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Bill C-7 Amends Medical Assistance in Dying Laws in Canada

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Legislation Commented On: Bill C-7, *An Act to amend the Criminal Code (medical assistance in dying)*, 2nd Sess, 43rd Parl, 2021 (assented to 17 March 2021)

On March 17, 2021, changes to Canada's *Criminal Code* provisions on Medical Assistance in Dying (MAiD) under [Bill C-7](#) received Royal Assent and are now in effect. These changes mark a significant milestone in Canada's MAiD laws, which have been under constant debate and criticism since the Supreme Court of Canada held in *Carter v Canada (Attorney General)*, [2015 SCC 5 \(CanLII\)](#), that in certain circumstances, 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](#) in a manner that was not demonstrably justified under section 1 of the *Charter*. This blog post reviews the judicial and legislative history of MAiD in Canada, outlines the major new changes, and discusses some ongoing concerns with the MAiD laws.

History of MAiD in Canada

Pre-*Carter*, a medical professional could not assist an individual in ending his or her life, for example by prescribing a quantity of medication that would hasten death, as doing so would violate section 241 of the *Criminal Code*. This provision prohibits counselling a person to commit suicide or aiding or abetting a person's suicide. In addition, medical professionals could not end a patient's life, for example by administering a lethal dose of a medication, as that was captured by the homicide provisions of the *Criminal Code*.

In 1993, Sue Rodriguez, a 42-year-old woman with ALS, a degenerative neurological condition affecting motor function, challenged the constitutionality of the prohibition on assisted suicide. In a landmark decision, *Rodriguez v British Columbia (Attorney General)*, [1993 CanLII 75 \(SCC\)](#), a 5–4 majority of the Supreme Court of Canada found that section 241(b) did not infringe sections 7 or 12 of the *Charter*. The majority also concluded that the issue of assisted suicide should not be resolved as an equality issue and did not engage in a full section 15 analysis, but determined that if there was any section 15 violation, it would be justified under section 1. Of the four dissenting opinions, while there was some divergence on which sections of the *Charter* were violated, all held that the violations were not saved under section 1 of the *Charter*.

Twenty-two years later, in *Carter*, the Supreme Court of Canada reversed its decision in *Rodriguez* following a lengthy legal battle led by the BC Civil Liberties Association in support of end-of-life rights. In *Carter*, the Court found that sections 241(b) and 14 (the prohibition on consenting to death) were unconstitutional insofar as they deprived a competent adult of medical assistance in dying where:

- 1) the person affected clearly consents to the termination of life; and
- 2) the person 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 (at para 4).

The Court added that “irremediable” did not require the patient to undertake treatments that are not acceptable to that individual (at para 127).

Following the decision in *Carter*, the federal government amended the *Criminal Code* to legalize MAiD under certain circumstances (sections 241.1 – 241.4). These provisions set out a scheme by which a medical or nurse practitioner can assist someone with hastening their death under certain circumstances. The new MAiD provisions were [criticized](#) as being inconsistent with the ruling in *Carter*. In particular, the condition that “natural death has become reasonably foreseeable” as a requirement for access to MAiD, the exclusion of mental illness as grounds for MAiD eligibility, and the prevention of mature minors from consenting to MAiD, were not distinctions made by the Court in *Carter*. The federal government tasked the Canadian Council of Academies with undertaking an independent review of these complex types of requests for MAiD. The resulting [2018 CCA Report](#) has substantially influenced subsequent amendments to the MAiD laws.

On September 11, 2019, the Superior Court of Québec ruled in *Truchon v Attorney General of Canada*, [2019 QCCS 3792 \(CanLII\)](#), that it was unconstitutional to limit access to MAiD for people nearing the end of life, finding that “the reasonably foreseeable natural death requirement deprives persons such as the applicants from exercising their autonomy and from their choice to end their life when and how they choose” (at para 632). The Court found that this requirement violated both section 7 and 15 of the *Charter* and could not be saved under section 1 on the grounds that this provision was not proportional to its objectives and was too restrictive. The Court allowed a six-month suspension of its declaration of invalidity to afford the federal and Québec governments time to amend the legislation, and granted a constitutional exemption to the plaintiffs during the suspension period.

Bill C-7 is the Government of Canada’s legislative response to the *Truchon* decision. It is important to note that the Court’s decision in *Truchon* is [limited](#) to persons with the kind of physical disability experienced by the plaintiffs in the case, that is, an ever increasing decline and very limited capacity to function independently and even with assistance. Bill C-7 responds to the ruling in *Truchon* but also addresses some other issues that have been raised since the *Criminal Code* provisions on MAiD were first introduced in 2016.

New MAiD Laws under Bill C-7

Prior to Bill C-7 the eligibility criteria required that the individual requesting MAiD must:

- be 18 years of age or older and have decision making capacity;
- be eligible for publicly funded health services;
- make a voluntary request that is not the result of external pressure;
- give informed consent to receive MAiD; and

- have a grievous and irremediable medical condition, defined in subsection 241.2(2) as being:
 - a serious and incurable illness, disease, or disability;
 - in an advanced state of irreversible decline in capability;
 - experiencing enduring and intolerable suffering that cannot be relieved under conditions acceptable to them; and
 - whose natural death has become reasonably foreseeable.

Under the new law, the eligibility criteria relating to age, capacity, residency, voluntariness, and informed consent remain unchanged. However, the nature of the underlying grievous and irremediable condition required to access MAiD has changed. Specifically, an individual must:

- have a serious and incurable illness, disease, or disability (excluding a mental illness until March 17, 2023);
- be in an advanced state of irreversible decline in capability; and
- have enduring and intolerable physical or psychological suffering that cannot be alleviated under conditions the person considers acceptable (ss 241.2(1), (2)).

Notably, the new law removes the requirement that natural death has become reasonably foreseeable. However, it continues to differentiate between those whose death is reasonably foreseeable and those whose death is not by creating two different sets of safeguards. For individuals whose natural death is reasonably foreseeable, the existing safeguards continue to apply, and in some cases are eased with the removal of the requirement for two witness signatures on the written request for MAiD and the elimination of the mandatory 10 day reflection period (ss 241.2(3)(c), (g)).

For individuals whose natural death is not reasonably foreseeable, the new section 241(3.1) sets out the following additional safeguards:

- a minimum 90 day assessment period of the individual’s eligibility for MAiD, which can only be shorted if the person’s loss of capacity is imminent;
- a mandatory eligibility assessment carried out by a medical or nurse practitioner with expertise in the condition that is causing the person’s suffering;
- the individual be informed of and offered available counselling services, mental health, and disability support services, community services, and palliative care; and
- the individual and practitioners must agree that reasonable and available means of alleviating the person’s suffering had been discussed and seriously considered before MAiD can be provided.

While the new law undoubtedly makes it easier to access assisted death in Canada, and it recognizes and facilitates individual choice as a fundamental element, Bill C-7 neglects to resolve a number of key issues respecting access to MAiD.

Outstanding Access Issues with Canada’s MAiD Laws

Eligibility for persons suffering from mental illness remains limited under Bill C-7. Canadians whose only medical condition is a mental illness and who otherwise meet all eligibility criteria remain ineligible for MAiD until at least [March 17, 2023](#) in order to implement adequate safeguards to protect those persons. Although some [argue](#) that expanding access to this group is a win from an equality perspective, extending MAiD availability to persons suffering from mental illness does elicit some concern. In particular, several expert groups argue that there is no reliable standard for determining when mental illness is “irremediable” (see e.g. [here](#) and [here](#)). In addition, there is concern that for those suffering from intolerable mental illness, MAiD may even be easier to access than treatment or supports, which can be expensive or otherwise inaccessible due to social and economic factors, or subject to lengthy wait times. In fact, even those who support expanded access to MAiD [argue](#) that we must make mental health services more accessible. Further, individuals with mental illness are often vulnerable to poverty, isolation, risky behaviours, violence, and substandard living, leading to [fears](#) that MAiD will become normalized within this demographic as a solution to socially inflicted suffering.

Similar concerns arise for other vulnerable groups whose deaths are not reasonably foreseeable, such as the elderly, individuals with disabilities, or those receiving palliative care. One author [argues](#) that the new law perhaps “opens a normative space in which various social actors, including medical experts and the state itself, can discuss the topic of ‘lives not worth living.’” This quality of life question extends MAiD into the realms of assisted suicide, rather the original objective of allowing individuals the right to determine the modality of their own death in situations where there was no reasonable hope of recovery and suffering was certain.

Bill C-7 also addresses advanced consent in the specific context of failed self-administration which results not in death, but in loss of capacity. In such a circumstance, consent to MAiD is understood as having been given under the following circumstances:

1. Before the person lost the capacity to consent to MAiD, the person entered into an agreement in writing with the physician or nurse practitioner providing MAiD that:
 - a. requires the physician or nurse practitioner to be present at the time of the self administration; and
 - b. allows the physician or nurse practitioner to administer a second substance to cause the person’s death if the person lost capacity to consent and did not die within a specified period after self administration.
2. The person self-administered the first substance but did not die within the specified period and has lost capacity to consent.
3. The second substance is administered to the person in accordance with the terms of the arrangement (s 241.2(3.5)).

This provision applies to both situations where the individual’s natural death is reasonably foreseeable and where it is not.

Apart from addressing the specific situation of failed self-administration, the amendments do not substantively address the issue of accessing MAiD through an advance directive. On the one hand, some argue that individuals should be able to autonomously plan for their future medical needs,

including those that arise should they lose decision-making capacity, which includes other end-of-life care and should thus also include MAiD. Others raise concerns about the uncertainty inherent in making advance medical decisions. For example, one expert [report](#) raises three dimensions of uncertainty: status of the patient (e.g. the alignment between their current medical condition and statements regarding MAiD and the description of their advance request for MAiD), clarity (e.g. how well the patient described the circumstances under which they would want to receive MAiD in their advance request), and strength of relationships (e.g. whether doctors and/or loved ones are aware of the history of the patient’s MAiD wish and is familiar with their situation).

The amendments also do not address whether mature minors may consent to MAiD. These are individuals who, while under the age of majority, meet the legal test for capacity. Outside of the MAiD context, these individuals are generally able to consent to medical decisions on their own behalf. However, they are excluded from the existing MAiD regime, which is only accessible to those over age 18. Experts [argue](#) that while expanding access would require close scrutiny of the patient’s decision-making capacity, uptake would likely be very small. For example, in the Netherlands and Belgium, which are the only two countries that allow access for minors, there have been only 16 reported cases of MAiD since 2002. Because of this limited international experience, some are [concerned](#) with the lack of evidence on the impact of MAiD on minors and their families, their unique vulnerabilities and susceptibility to external influence, and whether access to MAiD could normalize suicide among young people.

The federal government has committed to launching a joint [parliamentary committee](#) within 30 days of the new laws coming into force to review access to MAiD for mature minors, advance requests, mental illness, the state of palliative care in Canada and the protection of Canadians with disabilities. The recommendations arising from this review are expected by spring 2022.

Conclusion

The evolution of Canada’s MAiD laws has often focused on where the line should be drawn in terms of who has access and who is excluded from accessing MAiD. For example, prior to *Carter*, the law distinguished between individuals who were physically able to end their own lives and those who were not, the latter of whom were “restricted to self-imposed starvation and dehydration in order to take their own lives” (at para 29). This raised a concern that individuals may “take their own lives sooner than they would were they able to obtain a physician’s assistance in dying”, lest they lose the ability to do so (at para 90). While the post-*Carter* amendments to the *Criminal Code* expanded access for some groups, others remained unable to access MAiD. This prompted cases like *Truchon*, which questioned the exclusion of individuals whose natural death was not reasonably foreseeable. If the focus is on intolerable suffering, these individuals may be in a worse position than those able to access MAiD, given that the law required them to experience that suffering until death became sufficiently foreseeable to access MAiD, at which point they may not meet other requirements such as capacity.

Bill C-7, which recently came into effect, expands access to MAiD for individuals whose natural death is not reasonably foreseeable. It also introduces future access to MAiD for individuals whose sole underlying condition is a mental illness. While these legislative amendments expand access, there are still groups who are excluded from accessing MAiD, such as mature minors and those

requesting MAiD via advance directive. As with the other groups who have gained access to MAiD, these individuals may point to their intolerable suffering as being comparable to those who are able to access MAiD and to the inequity of excluding them from access. The government will have to continue to grapple with these arguments in determining whether these and other future groups should be permitted to access MAiD and what the appropriate safeguards ought to be.

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