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Quebec court accepts constitutional challenge to MAID requirements

When the federal government chose to amend the *Criminal Code of Canada* to allow for medical assistance in dying (MAID) as a consequence of the Supreme Court of Canada's decision in *Carter vs. Canada*, an unexpected condition was attached to the enunciated test. The *Criminal Code* was amended to state that for a person to receive medically assisted dying, he or she must have a "grievous and irremediable medical condition" which was defined as follows:

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

- **(a)** they have a serious and incurable illness, disease or disability;
- **(b)** they are in an advanced state of irreversible decline in capability;
- **(c)** that illness, disease or disability or that state of decline causes them enduring physical or psychological suffering that is intolerable to them and that cannot be relieved under conditions that they consider acceptable; and
- **(d)** *their natural death has become reasonably foreseeable, taking into account all of their medical circumstances, without a prognosis necessarily having been made as to the specific length of time that they have remaining*. [emphasis added]

This latter requirement was not one expressed or adopted by the Supreme Court in the *Carter* decision. This additional condition was controversial and in the intervening years has caused significant uncertainty and difficulty for individuals seeking MAID and for caregivers seeking to assist those individuals.

The court was confident that Canadian doctors could successfully evaluate a patient's capacity and determine if a person is vulnerable or not. (Photo credit: pixabay.com)

Two residents of Quebec, Jean Truchon and Nicole Gladu, challenged the constitutionality of s. 241.2(2)(d) of the *Criminal Code*, plus s. 26 of Quebec's *Loi concernant les soins de fin de vie (An Act Respecting End-of-Life Care)*, which contained a similar, if somewhat more restrictive, requirement. In a recently issued decision, Truchon and Gladu prevailed.

The plaintiffs in this case were individuals who both had serious conditions with no foreseeable cure (cerebral palsy and post-polio syndrome, respectively). Both were suffering from unacceptable physical or psychological harm that was intolerable to each of them. However, the medical evidence was that each would arguably live several more years despite their conditions. Both were found to have capacity to make MAID decisions. Their view was that the "reasonably foreseeable death requirement" discriminated against people with disabilities and violated their rights under sections 7 and 15 of the *Charter*.

The Attorney General of Quebec argued that the reasonably foreseeable death requirement struck a suitable balance between personal autonomy and society's interest in protecting vulnerable people. Without this requirement, people with disabilities would feel greater pressure to use medically assisted dying because of social pressures and discrimination. In addition, there was an argument that striking this legislation would harm groups with higher suicide rates, including veterans and members of Indigenous communities.

Justice Baudouin of the Quebec Superior Court examined a wide variety of evidence, including testimony from doctors in Canada and doctors who worked in countries where medically assisted dying without the foreseeable death requirement was legal. She made the following key findings:

- Since legalization in Quebec, MAID had been administered to 1,632 people. The number was growing, which she accepted showed social acceptability;
- The process for receiving MAID contained strenuous safeguards; and
- The alternative for a plaintiff was to refuse food and water, which necessarily created a lengthy, painful process.

In the result, the court concluded that a person can be vulnerable because they are very sick, yet still retain the capacity to consent to MAID. She was confident that Canadian doctors could successfully evaluate a patient's capacity and determine if a person is vulnerable or not. It was her view that society should not, in the name of protecting the disabled, prohibit access to MAID if they otherwise met all the other eligibility requirements, except reasonably foreseeable death, simply because they were perceived as vulnerable.

She also determined the following:

- Suicide is different from medically assisted dying; and
- There was no evidence that removing the end-of-life requirement will harm vulnerable people.

In arriving at her conclusions, Justice Baudouin considered an earlier Alberta Court of Appeal decision in *Canada (Attorney General) vs. EF*. In that case, the Alberta court found the declaration of invalidity in *Carter* does not require the patient to be terminally ill, but rather referred to cases of serious illnesses with no cure. She felt that the plaintiffs

in the Quebec case meet this standard, although she accepted that the legislators could adopt additional requirements beyond those cited in the Supreme Court decision, subject to the risk that the constitutionality of that legislation could be challenged on it's own merits.

In the result, she found that the requirement in s. 241.2(2)(d) of the *Criminal Code* violated both the plaintiffs' right to life, liberty and security of the person as guaranteed in s. 7 of the *Charter of Rights and Freedoms*, as well as the plaintiffs' right to equality based on discrimination (s. 15 of the *Charter*).

Specifically, Justice Baudouin determined that the law engaged the plaintiffs' interests in life, liberty and security of the person as it clearly affected their physical integrity, caused physical and psychological distress, and prevented them from making fundamental choices about their personal integrity.

She found that the deprivation was not in accordance with the principles of fundamental justice. Although she acknowledged the law was not arbitrary, she felt that the law was overbroad because it restricted people like the plaintiffs (who met all the other conditions) from ending the suffering their serious and incurable conditions caused them. She also felt that the law was grossly disproportionate because of the grave, prejudicial effect it had on the plaintiffs' interests in life, liberty and security of the person.

Finally, she found that this law could not be saved under s. 1 of the *Charter* (which allows for laws to breach the *Charter* if they are found to be "…reasonable limits as prescribed by law as can be demonstrably justified in a free and democratic society.")

In short, the law infringed s. 7 of the *Charter* and could not be saved under s. 1.

In the context of her s. 15 (equality rights) analysis, Justice Baudouin felt the law created a distinction based on the enumerated ground of disability. She felt that the distinction was discriminatory, as people with disabilities suffer a disadvantage, in addition to prejudice and stereotyping. She felt there was a "flagrant contradiction" in the state ignoring disabled people's consent and suffering until death becomes reasonably foreseeable, at which point it would acknowledge their right to autonomy. Again, she did not feel this breach could be saved by s. 1 of the *Charter*.

Justice Baudouin therefore declared the relevant sections of the law invalid and inoperative, but suspended her declaration of invalidity for six months to allow the government time make necessary amendments. Following the precedent set in the *Carter* decision, she chose to grant a constitutional exemption to Mr. Truchon and Ms Gladu to allow them to seek immediate relief.

As indicated at the outset of this article, Justice Baudouin also considered the similar but more restrictive provisions in the Quebec provincial legislation and provided quite a detailed analysis of that. This article is not intended to explore the scope of those findings as they are not relevant to the discussion of this case in the Alberta context.

The Quebec Attorney General has announced that it will not appeal the decision, and the federal government has given a similar indication. As of the date of this article, the federal government is looking at amending the *Criminal Code* within the six-month suspension imposed by the court to accommodate the ruling. However, the government had until October 11 to make that determination. In the meantime, the decision is not

binding on courts across the country but may no doubt form the basis of further challenges.

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