Alberta Doctors' Digest

Medical assistance in dying

On March 17, 2021, *Bill C-7* received Royal Assent. The bill amends the controversial legislation surrounding the administration of medical assistance in dying (MAID) in Canada. Although MAID has been legal in Canada since 2016, its availability was initially limited to individuals whose natural death was “reasonably foreseeable.” The impact of *Bill C-7* is to remove this requirement.

History

The history of MAID in Canada stems back to the Supreme Court of Canada’s 1993 decision *Rodriguez* v *British Columbia* (*AG)*, a case where a woman with an aggressive form of amyotrophic lateral sclerosis (ALS) requested that the Supreme Court find the general prohibition over physician-assisted death under section 241 of the *Criminal Code* invalid. The court denied Ms. Rodriguez’ request, concluding that the right to life was a fundamental value of society.

In 2015, the Supreme Court of Canada was handed a similar set of circumstances in *Carter* v *Canada,* which centered around two women suffering from spinal stenosis and ALS respectively. In its monumental decision, the Supreme Court revisited the decision in *Rodriguez* and declared that the *Criminal Code*’s ban on assisted death violated the individual’s *Charter* rights under section 7 (the right to life, liberty, and security of person) and section 15 (the right to equality). As such, section 241(b) was found invalid as it applied to physician-assisted death. The federal government was given one year to enact new legislation and enable regulatory bodies the opportunity to formulate policies concerning physician-assisted death.

In response, the federal government amended the assisted death provisions of the *Criminal Code* to allow for MAID. However, the new amendments led to uncertainty given that the definition of “grievous and irremediable medical condition” under section 241.2(2)(d) required an individual’s natural death to be “reasonably foreseeable,” without a prognosis necessarily having been made as to the specific length of time that they had remaining. As such, those suffering from agonizing and intolerable pain, but with no foreseeability of a natural death, were cut off from MAID.

This requirement did not form part of the decision of the Supreme Court in *Carter*, but for some reason unknown to these authors, was imposed by Parliament. In the intervening years it caused varying degrees of difficulty for physicians and other caregivers who were forced to wrestle with the notion of “reasonable foreseeability” in the face of divergent interpretations from across the country. As a result, many individuals who otherwise met the criteria expressed by the Supreme Court in *Carter* were likely denied access to MAID.

Eventually the issue was brought before the courts, this time in Quebec in Truchon v. Procureur Général du Canada. In that case, two individuals, one suffering from cerebral palsy and the other post-polio syndrome, argued that the “reasonably foreseeable death” requirement was unconstitutional given that, despite their immense suffering, the two

individuals had the potential for relatively long lives. Noting the strenuous procedural safeguards already imposed on the administration of MAID under the other provisions of section 241.1, as well as other medical evidence, the court concluded that it was unconstitutional to prevent a disabled person from seeking MAID because their death may not be reasonably foreseeable.

The court specifically noted that the Supreme Court in *Carter* had *not* established a temporal connection between the administration of MAID and the imminence of death. Instead, Justice Baudouin of the Quebec court clarified that the decision in *Carter* was based on the "respect for a person's wishes, the preservation of one's dignity, and the alleviation of a person's intolerable suffering associated with a grievous and irremediable illness." She struck down section 241.2(2)(d) but suspended the effect of her decision for six months to allow necessary amendments to the *Criminal Code* to be brought into force.

Neither the Attorney General for Quebec nor the federal Minister of Justice appealed the decision (although the federal government did obtain two further extensions of time to facilitate the passage of the legislation).

Legislative amendment

Ultimately, the federal government passed *Bill C-7* which, among other things, amended the *Criminal Code* by removing the requirement that death be reasonably foreseeable. However, rather than simply repealing section 241.2(2)(d) and removing the requirement of reasonable foreseeability, Parliament instead chose to divide MAID into two categories: MAID where natural death is reasonably foreseeable and MAID where it is not.

With respect to the administration of MAID where natural death is reasonably foreseeable, most of the safeguards remain unchanged. Some have been tempered, including the removal of the precondition that medical practitioners are required to wait 10 days after receiving a person's consent before providing MAID. The bill also reduced the need for two independent witnesses' signatures on the person's consent form to one.

Where natural death is not reasonably foreseeable, the new bill establishes that a medical practitioner may only administer MAID upon being satisfied that the person meets the requirements established under the legislation and provides proper written consent. As is the case where death is foreseeable, another medical practitioner is also required to provide a written opinion confirming that the person meets all of the criteria for MAID. Upon having discussed the reasonable and available means for relief of suffering with the patient and ensuring that at least 90 days have passed between the initial assessment and the administration of MAID (unless the risk of loss of capacity to provide consent is imminent), the medical practitioner may administer a substance that causes death or provide the person a substance that causes death so that they may self-administer.

Although not forming part of the Court's direction in *Truchon* v *Procureur Général du Canada*, the federal legislation also implements sections to assist medical practitioners when a person has lost capacity to consent to MAID, so long as the person had previously requested MAID in writing with a medical practitioner and the person had met all other requirements. This exception is available in very limited circumstances.

Finally, while the changes clarify that mental illness alone does not qualify a person for MAID, the bill specifies that the Minister of Justice and the Minister of Health will initiate a review with experts respecting recommended protocols, guidance and safeguards to apply to requests made for medical assistance in dying by persons who have a mental illness. So, for those patients whose mental illness alone is triggering the need for access to MAID, the door is not entirely shut.

Overall, the amendments to the *Criminal Code* under *Bill C-7* do provide individuals whose natural death may not be reasonably foreseeable with access to MAID in order to respect the person's dignity and relieve any intolerable suffering. While certain requirements have also been lifted, the amendments have implemented adequate safeguards to ensure that those who wish to be provided MAID are properly taken care of, while also removing hurdles which initially prevented access. However, since the legislation was only recently adopted, time will tell if the safeguards are, in fact, adequate.

Editor's note: The views, perspectives and opinions in this article are solely the author's and do not necessarily represent those of the AMA.

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