

Bill C-14: Medical Assistance in Dying

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The Federal Government recently tabled Bill C-14 (Medical Assistance in Dying) in response to the Supreme Court's 2015 decision in *Carter v Canada*, which declared the *Criminal Code* prohibitions on assisted suicide invalid to the extent they deprive an eligible person from accessing physician-assisted death or, as Bill C-14 defines it, "medical assistance in dying" (MAID).

In *Carter*, the Supreme Court held that, under the *Charter*, 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, is eligible for MAID.

Bill C-14, however, departs from *Carter* by placing additional restrictive criteria that may not withstand the legislative process or judicial scrutiny. Bill C-14 also creates ambiguity by requiring that natural death be "reasonably foreseeable", *even in the absence of a prognosis*.

Absent clarification of what "reasonably foreseeable" means, practitioners may be unable to determine patient eligibility for MAID, and may face indeterminate liability for opinions rendered regarding MAID. Although Bill C-14 provides that the exemptions for MAID apply even if a person has a "reasonable but mistaken belief about any fact that is an element of the exemption", this may not apply to matters of opinion.

Hospitals will therefore need to develop policies to deal with this and any other ambiguities remaining in the final version of Bill C-14, so that there is consistency at the institutional level.

Bill C-14 replaces section 241 (Counselling or Aiding Suicide) of the *Criminal Code* with a new section providing that a person may receive MAID *only* if, among other criteria, they have a *grievous and irremediable medical condition*. While this is indeed the phrase as used in *Carter*, Bill C-14 goes on to provide that a person has a "grievous and irremediable medical condition" if:

- 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.

This definition clearly departs from the Supreme Court's less restrictive definition in *Carter*

and essentially requires (i) that the medical condition be terminal, and (ii) that natural death be either imminent or at least likely to occur in the near to mid-term, depending on the interpretation given.

Because Bill C-14 also requires that two practitioners be “of the opinion” that the criteria for MAID are met, it is difficult to imagine how such an opinion can be formed without a prognosis. A “prognosis” at common law is “a doctor’s representations about real and substantial future possibilities to the particular patient, which are factually based on a patient’s existing condition” (*Kelly v Lundgard*, 2001 ABCA 185). Similarly, what is “reasonably foreseeable” at common law generally refers to “the ability to consider a reasonable range of possible outcomes, including those that are unfavourable” (*Willmot v Benton*, 2010 ONSC 5610).

Because “death comes to us all in the end”, the *time frame* during which natural death is likely to occur is critical to determining whether the death is “reasonably foreseeable” in the circumstances. Yet Bill C-14 provides no guidance on this point and does not require a prognosis. This is inconsistent with other permissive jurisdictions where likelihood of natural death is a pre-condition to MAID, such as the US states that require a prognosis that it be likely to occur within 6 months (CA, OR, VT and WA).

Providing MAID where there is disagreement over whether the patient’s natural death was “reasonably foreseeable” (in the absence of a prognosis that natural death be likely to occur within a particular time frame), could result in (A) a civil claim for wrongful death brought by the patient’s estate, or (B) criminal charges for aiding suicide under section 241 of the *Criminal Code*.

Although section 13 of the *Public Hospitals Act* protects hospital staff and others from acts done in good faith, the protection does not apply to criminal charges because the federal *Criminal Code* is paramount to provincial law. It could also be argued that a criminal act, by definition, cannot be done in good faith, and therefore civil claims may also be able to overcome this protection.

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