# Health Regulatory College Policies on MAID and Medico-Legal Liability

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This chapter is part of "Medical assistance in dying: Complying with Bill C-14 in healthcare policy and practice"

Many of the provincial health regulatory colleges have developed policies for MAID which predate Bill C-14 and which will now therefore need to be reconciled with it, including the College of Physicians and Surgeons of Ontario (CPSO). In the introduction to its Policy Statement #4-16 on Physician-Assisted Death[1] (the "PAD Policy"), the CPSO acknowledges that it is only responding to *Carter 2015,* and that its policies will be subject to any future legislation regarding MAID:

The SCC suspended its decision for 12 months (until February 6, 2016) to allow the federal and/or provincial governments to design, if they so choose, a framework to govern the provision of physician-assisted death. This deadline was later extended to June 6, 2016.

This means that following June 6, 2016, physician-assisted death will be legal in Canada. At that time, subject to any prohibitions or restrictions that are imposed in this policy or future legislation, physicians will be legally permitted to assist competent adults who are suffering intolerably from grievous and irremediable medical conditions to end their lives.

Subject to anticipated and pending future revisions to the PAD Policy, then, the CPSO currently aligns its criteria for MAID strictly with *Carter 2015*:

**Criteria for Physician-Assisted Death**

In accordance with the SCC's decision in *Carter v. Canada*, for an individual to access physician-assisted death, he/she must:

1. Be a competent adult;

2. Clearly consent to the termination of life;

3. Have a grievous and irremediable medical condition (including an illness, disease or disability); and

4. Experience enduring suffering that is intolerable to the individual in the circumstances of his or her condition.

Physicians must use their professional judgment to assess an individual's suitability for physician-assisted death, against the above criteria.

The College advises that physicians should only provide physician-assisted death to eligible patients within Canada who qualify for Canadian publicly-funded health services.

It is important to note in this regard that the CPSO recognizes MAID as a *Charter*-protected right in its PAD Policy, and that the policy (and any other MAID policy) should be interpreted accordingly. The CPSO then breaks down each of the above criteria in its PAD Policy to provide guidance to physicians who may be called upon to provide MAID, including for those who conscientiously object to it. As a general approach, the CPSO treats MAID, despite its novelty and gravity, the same or at least similar as any other medical treatment a physician may provide, in respect of which existing CPSO policies already apply. This guidance includes the following:

- That the Supreme Court did not define "adult" in *Carter 2015* (meaning but for Bill C-14, a "mature minor" might qualify in certain circumstances as a "competent adult").
- That competence is determined with reference to the HCCA and the CPSO's Consent to Treatment policy. In the context of PAD, the patient must be able to understand and appreciate the certainty of death upon self-administering or having the physician administer the fatal dose of medication.
- That consent is also determined with reference to the HCCA and the Consent to Treatment policy.[2] With respect to PAD specifically, the treatment options discussed with the patient must include all reasonable and available palliative care interventions. The CPSO's Planning for and Providing Quality End-of-Life Care policy[3] sets out the CPSO's expectations of physicians regarding planning for and providing quality care at the end of life. Importantly, requests for PAD must be made by the patient, and not through an advance directive, or the patient's substitute decision maker.
- That to determine whether the patient has a "grievous and irremediable medical condition," the physician must assess the patient and render a diagnosis and prognosis of the patient's condition, where: (a) "grievous" is a legal term that applies to serious, non-trivial conditions that have a significant impact on the patient's well-being, and (b) "irremediable" is a broad term capturing both terminal and non-terminal conditions. (Importantly, physicians should now consider the definition of "grievous and irremediable medical condition".)
- That "enduring suffering that is intolerable" is subjective, meaning it is assessed from the individual's perspective. When a physician is determining whether a patient satisfies this element of the criteria, the physician must be satisfied that the patient's condition causes them enduring physical and/or psychological suffering that is intolerable to the patient.
- That the activities involved in both assessing whether a patient meets the criteria for PAD, and providing PAD, are currently insured services. These activities may include, for instance, counselling and prescribing. Accordingly, physicians must not charge patients directly for PAD, or associated activities.

On the issue of conscientious objection, the CPSO refers to its existing policy on Professional Obligations and Human Rights,[4] which essentially entails a "duty to provide information and

refer":

- Where a physician declines to provide PAD for reasons of conscience or religion, the physician must do so in a manner that respects patient dignity. Physicians must not impede access to PAD, even if it conflicts with their conscience or religious beliefs.
- The physician must communicate his/her objection to PAD to the patient directly and with sensitivity. The physician must inform the patient that the objection is due to personal and not clinical reasons. In the course of communicating an objection, physicians must not express personal moral judgments.
- In order to uphold patient autonomy and facilitate the decision-making process, physicians must provide the patient with information about all options for care that may be available or appropriate to meet the patient's clinical needs, concerns and/or wishes. Physicians must not withhold information about the existence of any procedure or treatment because it conflicts with their conscience or religious beliefs.
- Where a physician declines to provide PAD for reasons of conscience or religion, the physician must not abandon the patient. An effective referral must be provided. An effective referral means a referral made in good faith, to a non-objecting, available, and accessible physician or agency. The referral must be made in a timely manner to allow the patient to access PAD. Patients must not be exposed to adverse clinical outcomes due to delayed referrals.

This "duty to refer", to the extent it applies to MAID, is already under legal challenge in the Ontario courts and may or may not be ultimately upheld.[5] In the authors view, however, and regardless of the outcome of that litigation, there is, at minimum, a separate "duty to provide information" regarding MAID (and all other aspects of end of life care) under the CPSO's separate Consent to Treatment policy in order to ensure informed consent is obtained to any related treatment options:

Prior to obtaining consent, physicians must provide information about the nature of the treatment, its expected benefits, its material risks and material side effects, alternative courses of action and the likely consequences of not having the treatment.[6]

Finally, the PAD Policy confirms that the CPSO's existing policy on Medical Records[7] applies to physician-patient encounters concerning PAD. Where a patient has requested PAD, the physician must document each element of the patient's assessment in accordance with the criteria outlined above. Further, all oral and written requests for PAD, as well as the dates of these requests, must be documented in the medical record. A copy of the patient's written request must also be included. The CPSO also expresses its support in the PAD Policy for the establishment of a "formal oversight and reporting mechanism" that would collect data on PAD, and advocates that a data collection mechanism form part of any government framework.

Similar policies and guidance from the College of Nurses of Ontario[8] and the Ontario College of Pharmacists[9] (and their equivalents in other provinces) which previously focused only on the criteria established in *Carter 2015*, will also now need to be reconciled with Bill C-14.

In addition to the health regulatory colleges, the Canadian Medical Protective Association (CMPA) has issued a guidance document on End-of-life care: Medical-legal issues[10] (the

"CMPA Guidance") that is specifically focused on PAD and which will also now need to be reconciled with Bill C-14. Some of the issues and advice summarized and set out in the CMPA includes the following:

- Doctors want a robust process to correctly identify patients who may qualify for PAD and who are clearly capable of meeting the legal consent requirements. (Whether constitutional, Bill C-14, together with college policies, now provides for such a robust process.)
- While the Supreme Court ruling is clear that doctors cannot be compelled to end a patient's life, the Court acknowledged legislators and the Colleges must find a way to reconcile the rights of both patients and physicians. (In Ontario at least, this issue is addressed under existing college policies on conscientious objection.)
- From the CMPA's perspective, allegations of inadequate consent and the failure to adequately document the consent discussion are recurring themes in medical-legal cases. Doctors should therefore be familiar with relevant legislation and policies, and document consent discussions and decisions in the medical record (*i.e.*, including regarding capacity). (This documentation will be critical to defending any criminal charges under Bill C-14 or civil claim for wrongful death by the estate of an individual who has received MAID.)

Bill C-14 does not reconcile the competing *Charter* rights of access to MAID by patients and conscientious objection by practitioners (except to state that nothing in Bill C-14 compels an individual to provide or assist in providing MAID) – this reconciliation will be left up to health regulatory colleges, health facilities, and the common law (*i.e.*, CPSO's policy on Professional Obligations and Human Rights). In those provinces that do not currently recognize a "duty to refer" for conscientiously objecting practitioners, Bill C-14 will present medico-legal (informed consent), "duty to warn" and/or medico-ethical challenges.

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[1] Online: http://www.cpso.on.ca/Policies-Publications/Policy/Physician-Assisted-Death.

[2] Online: http://www.cpso.on.ca/Policies-Publications/Policy/Consent-to-Treatment [CTT Policy].

[3] Online: http://www.cpso.on.ca/Policies-Publications/Policy/Planning-for-Providing-Quality-End-of-Life-Care.

[4] Online: http://www.cpso.on.ca/Policies-Publications/Policy/Professional-Obligations-and-Human-Rights.

[5] Sean Fine, "Christian doctors challenge Ontario's assisted-death referral requirement", *The Globe and Mail* (22 June 2016) online: *theglobeandmail.com* http://www.theglobeandmail.com/news/national/christian-doctors-challenge-ontarios-assisted-death-referral-policy/article30552327/.

[6] CTT Policy, supra note 31 at p 8.

[7] Online: http://www.cpso.on.ca/Policies-Publications/Policy/Medical-Records.

[8] "Medical Assistance in Dying – Update June 20," *College of Nurses of Ontario* (20 June 2016), online: *cno.org* http://www.cno.org/en/news/2016/06/medical-assistance-in-dying–update/.

[9] "Physician Assisted Death: Updates Coming Soon" *Ontario College of Pharmacists* (20 June 2016), online: *ocpinfo.com* http://www.ocpinfo.com/library/news/pad-guidance/.

[10] Online: https://www.cmpa-acpm.ca/documents/10179/301963649/com_15_end-of-life_care-e.pdf.

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Next chapter: "Hospitals' and Health Facilities' Policies on MAID and Conscientious Objection"

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