



LAW SOCIETY OF ONTARIO

THE SIX-MINUTE ESTATES LAWYER 2021

May 13, 2021

**MEDICAL ASSISTANCE IN DYING:
WHAT YOU NEED TO KNOW ABOUT THE NEW MAiD REGIME
By Kimberly A. Whaley**

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INTRODUCTION TO MAiD

Medical assistance in dying (MAiD) has had a contentious history before Canadian courts and legislatures. This history notably started in 1993 when the issue of MAiD was first decided by the Supreme Court of Canada in the case of, *Rodriguez v. British Columbia (Attorney General)*¹ (“*Rodriguez*”). In that decision, the Supreme Court determined that the *Criminal Code*² provisions denying Canadians’ access to MAiD did not in fact violate their constitutional rights.

Twenty-two years later, in 2015, the Supreme Court reversed this decision in the case of, *Carter v. Canada*³ (“*Carter*”) by decriminalizing assisted suicide under certain conditions. Amendments to the *Criminal Code* following *Carter* provided access to MAiD for Canadians, yet restricted MAiD to instances where natural death was reasonably foreseeable. The passing of federal Bill C-7 in March 2021, has been the latest iteration to MAiD developments in Canada.

¹ [1993] 3 S.C.R. 519 (S.C.C.).

² R.S.C. 1985, c. C-46 [*Criminal Code*].

³ 2015 SCC 5, [2015] 1 S.C.R. 331 [*Carter*].

Bill C-7 amended the *Criminal Code*, extending access to MAiD to individuals experiencing enduring and intolerable suffering, but whose natural death is not reasonably foreseeable. In extending MAiD eligibility to this group, the new provisions also introduce procedural safeguards. Too, safeguards applicable to people who are near death were somewhat relaxed. These legislative developments seek to bring the *Criminal Code* provisions on MAiD into conformity with the Supreme Court's ruling in *Carter* and permit individuals under disability, decision-making autonomy reflective of their value and dignity.

HISTORY OF MAiD

Prior to 2015, provisions at subsection 241(b) of the *Criminal Code* rendered aiding or abetting a person to end their life, a criminal offence, thus preventing individuals from seeking a physician-assisted death. This section previously stated as follows: "Everyone who... (b) aids or abets a person to commit suicide, whether suicide ensues or not, is guilty of an indictable offence and is liable to imprisonment for a term not exceeding fourteen years".

Additionally, section 14 of the *Criminal Code* stated that, "No person is entitled to consent to have death inflicted on him, and such consent does not affect the criminal responsibility of any person by whom death may be inflicted on the person by whom consent is given."⁴ Together, these provisions effectively banned MAiD in Canada.

⁴ *Criminal Code*, *supra* at s. 14 (current), "No person is entitled to consent to have death inflicted on them, and such consent does not affect the criminal responsibility of any person who inflicts death on the person who gave consent."

Subsection 241(b) of the *Criminal Code* was challenged in the *Rodriguez* case, the first Supreme Court of Canada decision on the issue. Sue Rodriguez suffered from and was dying of amyotrophic lateral sclerosis (ALS). She wanted the right to seek a physician's assistance in dying when her suffering became intolerable. She challenged s. 241(b) of the *Criminal Code* as unconstitutional in that it violated her rights under sections 7, 12 and 15(1) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") to seek such assistance.

In 1993, a slim majority of the Supreme Court upheld the prohibition on MAiD created by this section. The Court's analysis centered on the violation of section 7 rights to life, liberty and security of the person under the *Charter*. The Court determined that, while the appellant's *Charter* rights had been engaged by the provision since she was deprived of her autonomy over her person and caused physical pain and psychological distress, the provision however, did not violate the principles of fundamental justice enshrined at section 7 or her other *Charter* rights. The liberty and security interests sought to be protected by section 7 could not be divorced from the sanctity of life provisions, likewise, protected by this section.

The provision was challenged yet again 22 years later in the *Carter* case. This time, however, the Supreme Court of Canada unanimously held that this provision, along with section 14 of the *Criminal Code*, violated section 7 of the *Charter* and this violation was not justified under section 1 of the *Charter*. In *Carter*, the Court observed that people who are grievously and irremediably ill, cannot seek a physician's assistance in dying and

may be condemned to a life of severe and intolerable suffering. They are forced into the cruel choice of either taking their own life prematurely, often by violent or dangerous means, or experiencing prolonged suffering until they die from natural causes.⁵ The Court left it to Parliament, and the provincial legislatures to respond by enacting legislation consistent with their reasons in *Carter*.

Thereafter, in 2016, Parliament passed Bill C-14. The Bill permitted eligible Canadians to request MAiD and provided exemptions from criminal liability under the *Criminal Code* for several individuals, including medical practitioners (MPs) and nurse practitioners (NPs) who provide MAiD as well as persons who assist them, such as pharmacists. They also exempted individuals who assist an individual approved for MAiD, to self-administer.

Bill C-14 set the requirements for MAiD eligibility at section 241.2 of the *Criminal Code*. This section defined having a “grievous and irremediable medical condition” as being met by all the following criteria:

1. a serious and incurable illness, disease or disability;
2. an advanced state of irreversible decline in capability;
3. the illness, disease or disability or 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
4. 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.⁶ [Emphasis added]

⁵ *Ibid* at para. 1.

⁶ *Criminal Code*, *supra* at s. 241.2(2).

These provisions therefore required that natural death be reasonably foreseeable for a person to be eligible for MAiD. However, in setting this eligibility requirement, Parliament was more restrictive than the Supreme Court had been in its holding in *Carter*. In *Carter*, the Supreme Court had given mentally competent Canadian adults with a grievous and irremediable condition that causes enduring and intolerable suffering and who clearly consent to the termination of life, the right to MAiD.⁷ As a result, Parliament's choice to restrict MAiD to Canadians whose natural death has become reasonably foreseeable was again challenged in a Superior Court of Quebec case decided in 2019.

TRUCHON AND BILL C-7

*Truchon c. Procureur général du Canada*⁸ (“*Truchon*”) was a Superior Court of Quebec case brought by Jean Truchon and Nicole Gladu. Jean Truchon had cerebral palsy and was diagnosed with severe spinal stenosis and myelomalacia. Nicole Gladu was diagnosed with post-polio syndrome. Neither of them had a psychiatric illness that could be related to their request for MAiD. As a result of their conditions, Truchon and Gladu challenged both the *Criminal Code* requirement that their natural deaths be “reasonably foreseeable” in order to receive MAiD. Similarly, they challenged the Quebec assisted dying law requirement that they be, “at the end of life.”⁹ Both had made a request for MAiD and had been found to meet all other eligibility criteria.

⁷ *Carter*, *supra* at para. 4.

⁸ 2019 QCCS 3792 [*Truchon*].

⁹ *Ibid* at paras. 3-4.

The Quebec court considered the “reasonable foreseeability of natural death” eligibility criterion at section 241.2(2) of the *Criminal Code*, and s. 26 of the Quebec legislation, and found that the requirement infringed section 7 of the *Charter*.¹⁰ Moreover, the requirement also infringed section 15 of the *Charter* and as such, was not justified under section 1.¹¹

The court noted that Parliament’s choice to include this limitation on MAiD was overly broad and disproportionate in its aim to protect vulnerable persons and, as such, was not in accordance with the principles of fundamental justice. It also stated that, if the Supreme Court in *Carter* had wanted to impose this eligibility requirement, it would have stated so explicitly in its decision.¹² Parliament’s choice, however, led individuals like Truchon or Gladu, who otherwise met all other criteria for MAiD, to the “cruel choice” observed by the Supreme Court of either putting an end to their lives through less dignified means, or persisting in intolerable suffering.

The court considered with the assistance of expert witness testimony, the impact of extending MAiD eligibility to persons with disabilities whose natural deaths are not foreseeable. It indicated that, in the context of MAiD, a vulnerable person would be “akin to someone who does not have the capacity to express his or her needs and wishes, who cannot decide for himself or herself, or who is likely to be subjected to external pressure.”¹³ The Court observed that, given the other safeguards in the *Criminal Code*,

¹⁰ *Ibid* at para. 535.

¹¹ *Ibid* at paras. 683 and 690.

¹² *Ibid* at para. 495.

¹³ *Ibid* at para. 247.

prohibiting those whose deaths are not foreseeable from accessing MAiD would not protect vulnerable persons. It rather would prevent eligible persons, such as Gladu and Truchon, from choosing this path to put an end to their suffering,¹⁴ forcing them to either endure prolonged pain, or to resort to death through other, typically violent, means. As such, collective vulnerability could not be conceptually used as a basis to refuse medical assistance in dying.¹⁵

The court declared the *Criminal Code* provisions invalid but suspended the declaration of invalidity to permit the federal government time to amend the *Criminal Code*. Neither, the Attorney General of Canada, nor, the Quebec government appealed the ruling. Bill C-7, which was introduced at Parliament in February 2020, to broaden the MAiD eligibility requirements, received Royal Assent on March 17, 2021. Truchon incidentally, received MAiD in April 2020, whereas, Gladu remains alive.

THE NEW LAW ON MAiD: BILL C-7

In order to implement the court's decision in *Truchon*, the new MAiD provisions of the *Criminal Code* extend eligibility to both individuals who suffer from a grievous and irremediable medical condition whose natural death has become reasonably foreseeable, as well as, to those whose natural death has not become reasonably foreseeable. Some of the safeguards are the same for both groups of eligible candidates. However, for those whose natural death is reasonably foreseeable, the new law eases some of the

¹⁴ *Ibid* at para. 248.

¹⁵ *Ibid* at para. 309.

procedural safeguards. For those whose natural death has not become reasonably foreseeable, the law introduces a separate and more stringent set of safeguards.

Under the new law, the following safeguards apply to both groups eligible for MAID:

- The MP or NP is of the opinion that the person meets all the eligibility criteria set out in subsection 241.2(1) of the *Criminal Code*;
- The request for MAID is made in writing and signed and dated by the person after they were informed that they have a grievous or irremediable medical condition;
- The person is informed that they may, at any time and in any manner, withdraw their request;
- If the person requesting MAiD has difficulty communicating, reasonable measures must be taken to provide a reliable means by which the person may understand the information that is provided to them and communicate their decision; and,
- In both situations, only one independent witness is required to witness the signing of a request for MAiD, instead of the two witnesses currently required.

There are, however, significant differences in the MAiD regimes for those facing a reasonably foreseeable natural death from those who are not. They are set out below.

Approval for MAiD

Where death has not become reasonably foreseeable, additional confirmation of eligibility is necessary. Another MP or NP must provide a written opinion confirming that the person meets the criteria. The second physician or NP, must be independent from the

first.¹⁶ Additionally, one of the physicians, or NPs assessing eligibility is now required to have expertise in the condition that is causing the person's suffering.¹⁷

Additionally, the bill requires that the person be informed of other means available to relieve suffering including counselling services, mental health and disability support services, community services and palliative care. The patient must also be offered consultation with professionals who provide those services.¹⁸ The physicians or NPs must also discuss reasonable and available means to relieve the person's suffering with the person and agree that the person has given serious consideration to those means.¹⁹

Waiting Period

Where natural death has become reasonably foreseeable, the new bill eliminates the 10-day reflection period currently required between the signing of a request for MAiD, and the day that MAiD is provided. The elimination of the waiting period followed public consultations that revealed that individuals who make a written request for MAiD, have already given the procedure a lot of consideration and thus the 10-day reflection period unnecessarily prolongs their suffering.

On the other hand, where natural death is not reasonably foreseeable, the bill introduces a 90-day waiting period between the time when the first assessment is made, and the provision of MAiD, unless both physicians, or NPs are of the opinion that the

¹⁶ *Criminal Code*, *supra* at s. 241.2 (6).

¹⁷ *Ibid* at ss. 241.2(3.1)(e)-241.2(3.1)(e.1).

¹⁸ *Ibid* at s. 241.2(3.1)(g).

¹⁹ *Ibid* at s. 241.2(3.1)(h).

person's loss of capacity is imminent. If loss of capacity is imminent, the MP or NP who will provide MAiD can determine the waiting period.²⁰

Consent Prior to the Provision of MAiD

Consent must be verified in all cases immediately prior to MAiD being provided and the physician or NP must ensure that the person is giving their express consent. In both instances, the person should be given the opportunity to withdraw their request for MAiD. Additionally, in both instances the verification of final consent to MAiD can also be waived if certain criteria are met.²¹ This addresses circumstances where the illness causing the suffering may impact the eligible person's ability to provide consent by the time that MAiD is to be administered.²²

Assistance with the Self-Administration of MAiD

The previous law created a gap in instances where the self-administration of MAiD had not resulted in death, but rather in the person losing capacity to consent to MAiD. In such instances, it was illegal for a physician or NP to administer a substance that would cause the person's death given that advance consent is not legal in Canada.

The new subsection 241.2(3.5) clarifies that physicians, or NPs, can administer a substance when a person has self-administered and lost the capacity to consent, but has not died, subject to certain conditions. Arrangements must be made in writing providing

²⁰ *Ibid* at s. 241.2(3.1)(i).

²¹ *Ibid* at ss. 241.2(3.2)-241.2(3.5).

²² See Dying with Dignity Canada, "Audrey Parker's last message to Canadians" (6 February 2019), *YouTube*, online: <<https://www.youtube.com/watch?v=XwRRKq29tsw>>.

that the MP or NP will be present at the time of the self-administration and administer a second substance to cause death if death has not resulted from self-administration.²³ This option is available to all persons who chose to self-administer MAiD regardless of their prognosis.

Increased Monitoring

The government intends to increase its monitoring of the MAiD regime. Currently, information about cases is collected by Health Canada only if a written request for MAiD is submitted. Subsection 241.31(1) of the *Criminal Code* expands the cases requiring filing of information to include any case in which an assessment takes place as well as when a written request has been submitted to the physician or NP. This permits the government to collect data on who is requesting and receiving MAiD, so as to better determine if there is any inequality, individual or systemic, or any sort of disadvantage in the context of or delivery of MAiD.²⁴

MAiD Regime Elements for Further Study

There are several issues regarding Canada's MAiD regime that the federal government will continue to review and render decision on in the coming years. The first, is the widely reported issue in the media of allowing individuals with mental illness as their sole underlying condition to access MAiD. Bill C-7 amends the eligibility criteria by establishing that mental illness is not an illness, disease or disability for the purpose of

²³ *Criminal Code*, *supra* at s. 241.2(3.5).

²⁴ Government of Canada, Department of Justice, "Canada's new medical assistance in dying (MAiD) law" (19 March 2021), online: <<https://www.justice.gc.ca/eng/cj-jp/ad-am/bk-di.html>> [DOJ on MAiD].

determining eligibility for MAiD.²⁵ Mental illness includes conditions that are primarily within the domain of psychiatry (e.g., depression, personality disorders) and does not include neurocognitive and neurodevelopmental disorders, or other conditions that may affect cognitive abilities.²⁶

This means that, under the current MAiD regime, mental illness alone is not enough to qualify for MAiD even if the other criteria are satisfied. The government has stated that requests for MAiD due to mental illness were too complex to address given the *Truchon* court-imposed time limit. Bill C-7 incorporated a “sunset clause” of two years expiring March 17, 2023, to address the issue of whether individuals suffering from a mental illness should be given rights to access MAiD. In the interim, the federal government will initiate an expert review to consider protocols, guidance and safeguards for MAiD for persons suffering from mental illness, and they are required to make such recommendations by March 17, 2022.²⁷

The government will also review the issue of “mature minors”, in reference to children being able to access MAiD. Other matters to be studied in the Parliamentary review of Canada’s assisted dying regime are questions related to advance requests, the state of palliative care in Canada and the protection of Canadians with disabilities. The committee responsible for the Parliamentary review process will be required to submit its report to Parliament a year after the start of the review.²⁸

²⁵ *Criminal Code*, *supra* at s. 241.2(2.1).

²⁶ *DOJ on MAiD*, *supra*.

²⁷ *Ibid.*

²⁸ *Ibid.*

IMPLICATIONS OF BILL C-7

Criticisms

There is deep division regarding the expansion of MAiD to persons whose natural death is not reasonably foreseeable. This division was present before the *Truchon* court as evinced by the testimony of expert witnesses before the court. Many of the experts as well as those in the disability community see the new access to MAiD resulting in increased scope of manipulation and abuse of people with disabilities, who are more likely to be low-income with a third living below the poverty line.²⁹

Persons living under disability cite negative societal attitudes towards disability and a chronic lack of supports. These factors may add pressure, directly or indirectly, having the effect of prematurely ending their lives by using the new access to MAiD.³⁰ MAiD is now made accessible to individuals under disability, on the basis of vague and subjective criteria, and the current safeguards do not require the physician to agree that all other medical options for relief of suffering have been exhausted.³¹

²⁹ Katherine Wall, “Low income among persons with a disability in Canada” (11 August 2017), *Statistics Canada*, online: <<https://www150.statcan.gc.ca/n1/pub/75-006-x/2017001/article/54854-eng.htm>>.

³⁰ *Truchon*, *supra* at para. 284.

³¹ Bernise Carolino, “Law prof criticizes Bill C-7 medical assistance in dying for impact to physicians’ standard of care” (23 February 2021), *Canadian Lawyer*, online: <<https://www.canadianlawyermag.com/practice-areas/medical-malpractice/law-prof-criticizes-bill-c-7-medical-assistance-in-dying-for-impact-to-physicians-standard-of-care/338065>>.

Pro-life activists also oppose amendments to include mental illness alone as a ground of eligibility for MAiD, calling the act assisted suicide and stating that it undermines suicide prevention initiatives. The Centre for Addiction and Mental Health and other experts argue that there is no reliable standard for determining when mental illness is “irremediable.”³² Psychologists also appear divided on this issue. Some state that only a small minority of individuals would in fact be approved for MAiD on the basis of mental illness alone. These individuals would have endured many years, perhaps decades, of persistent and unbearable psychiatric suffering related to their mental illness without signs of improvement despite numerous interventions.³³

Sober Assessment of Ease of Access to MAiD

It is difficult to tell what the future of the MAiD regime will be in Canada and what the new access to MAiD will reveal. The court in *Truchon* gave serious consideration to the phenomenon of suicide and suicide contagion in connection with MAiD. It observed the frequent conflation of MAiD with suicide and noted that organizations such as the American Association of Suicidology expressly distinguished MAiD from suicide.³⁴

³² S. Sonu Gaind & Sephora Tang, “MAiD for mental illness opens dangerous doors” (16 February 2021), *The Hamilton Spectator*, online: <<https://www.thespec.com/opinion/contributors/2021/02/16/maid-for-mental-illness-opens-dangerous-doors.html>>.

³³ Jacques Gallant, “Psychiatrists are divided on assisted death for people with mental disorders” (9 March 2021), *Toronto Star*, online: <<https://www.thestar.com/politics/federal/2021/03/09/psychiatrists-are-divided-on-assisted-death-for-people-with-mental-disorders.html>>.

³⁴ *Truchon*, *supra* at para. 362.

Moreover, MAiD statutes typically screen out individuals who are driven to MAiD as a result of a mental illness that affects the rationality of their decision-making.³⁵ In jurisdictions where MAiD is legal (e.g., Europe) heightened scrutiny is required in cases of unbearable suffering resulting from intractable mental illness.³⁶ Additionally, even if a small number of euthanasia cases outside the traditional sphere have been observed in certain regimes, there is nothing to indicate that the same outcomes will be observed in Canada given the unique safeguards of its MAiD regime.³⁷

There is also insufficient evidence that increased access to MAiD will result in its abuse. Experts called before the court in *Truchon* were not aware of empirical data regarding persons under disability, who avail themselves of MAiD in Canada or elsewhere. Studies that were introduced before the court in *Truchon*, did not indicate that persons under disability or persons suffering from chronic illnesses in the Netherlands and Oregon were more likely to request and receive MAiD than the rest of the population.³⁸

CONCLUSIONS

At their very core, the new *Criminal Code* provisions setting out Canadians' rights to MAiD try to strike a careful balance between the competing interests and societal values of respect for the autonomy and dignity of individuals who are eligible for MAiD, and the protection of vulnerable persons, including redress of suicide as a public health

³⁵ *Ibid.*

³⁶ *Ibid* at para. 363.

³⁷ *Ibid* at para. 465.

³⁸ *Ibid* at para. 287.

issue. The new provisions attempt to improve conditions for those living with disability, while at the same time, providing those individuals the autonomy of choice in reducing their suffering.

Policy choices made by the federal government in its expansion of MAiD expectedly invites scrutiny and criticism. In *Carter*, the Supreme Court of Canada also observed the inherent tension in MAiD cases even within the groups who seek access to the procedure:

[10] ... Some people with disabilities oppose the legalization of assisted dying, arguing that it implicitly devalues their lives and renders them vulnerable to unwanted assistance in dying, as medical professionals assume that a disabled patient “leans towards death at a sharper angle than the acutely ill — but otherwise non-disabled — patient... Other people with disabilities take the opposite view, arguing that a regime which permits control over the manner of one’s death respects, rather than threatens, their autonomy and dignity, and that the legalization of physician-assisted suicide will protect them by establishing stronger safeguards and oversight for end-of-life medical care.

Any scrutiny or criticism of the Canadian MAiD regime is, however, arguably necessary to ensure that irreversible procedures such as MAiD are indeed striking the right balance between the competing interests sought to be advanced by MAiD legislation.

The expanded MAiD regime can be expected to result in an immediate uptick in the number of requests for MAiD from individuals under disability or persons suffering from chronic illnesses, considering their prior ineligibility. Whether that trend will hold for years to come, remains to be seen and will continue to be studied by the federal

government using its data from the increased monitoring of the MAiD regime. This data will aid in determining if the government's choice of safeguards to protect vulnerable members of these communities will be sufficient to prevent premature access to MAiD.

This paper is intended for the purposes of providing information only and is to be used only for the purposes of guidance. This paper is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.

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2021