

# DEMYSTIFYING THE FEDERAL GOVERNMENT'S ASSISTED DYING LEGISLATION AND THE NEW LAWSUIT CHALLENGING ITS CONSTITUTIONAL VALIDITY

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## Introduction

You are likely aware of the Federal Government's controversial Bill C-14 and the legislation enacted pertaining to Medical Assistance in Dying ("MAID"), which was passed into law on June 17, 2016 (the "Legislation"). You may also have heard that a new lawsuit was recently commenced, challenging the constitutionality of the new Legislation.

This bulletin will explain what you need to know about the new Legislation, how it works, and why there are concerns about its constitutionality.

## The Supreme Court of Canada's decision in *Carter v. Canada*

### Overview

The essence of the SCC's ruling in *Carter* can be summarized as follows: the provisions of the Criminal Code which make it illegal to assist a person from committing suicide and thus prohibit a person from accessing MAID, are a violation of Section 7 of the Charter of Rights and Freedoms. Section 7 protects a person's right to "life, liberty and security of the person". The SCC's decision stressed the importance of personal autonomy and human dignity in the context of a Section 7 analysis; the Court also emphasized the connection between the concepts of autonomy and dignity and an individual's right to decide how and when they will die.

The Court found that the fundamental purpose of the absolute prohibition in the Criminal Code was to protect vulnerable persons from being taken advantage of. The Court went on to hold that the impugned provisions were overbroad (and hence unconstitutional) because they prevented competent adults from taking their own lives in certain circumstances where vulnerability was not a concern.

### Key Findings

The BC Supreme Court found, and the Supreme Court of Canada agreed that:

- Competent adults who suffer from
  - a grievous and irremediable medical condition / illness / disability;
  - which causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition

are entitled to access MAID.

- The “irremediable” requirement does not require the individual to undertake treatments that are not acceptable to him/her.
- Individuals who are denied MAID in these circumstances may be condemned to a life of severe and intolerable suffering, and be forced to make a cruel decision between: (1) taking their own life prematurely, or (2) suffering until they eventually die from natural causes.

It is important to note that the evidence before the court came from a number of individuals, some of whom suffered from terminal conditions, and others who suffered from non-terminal conditions. Kay Carter, one of the lead plaintiffs in the case, suffered from spinal stenosis. Carter could have had a surgery to alleviate her condition, but she elected not to given the risks involved and the downside of the surgery itself.

### **The New Legislation – How it Works**

The Legislation, more specifically known as *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*, became law in Canada on June 17, 2016. In practice, the Legislation does four key things:

- amends the Criminal Code to create an exemption from the crimes of culpable homicide, aiding suicide and of administering a noxious thing, in order to permit medical doctors and nurse practitioners to provide MAID;
- sets out eligibility criteria and safeguards that must be met before MAID may be administered;
- sets information disclosure standards for medical practitioners administering MAID; and
- creates new offences under the Code for failing to comply with the new MAID provisions.

### Eligibility Criteria for MAID under the Legislation

As per the Preamble to the Legislation, in an effort to "strike the most appropriate balance" between the autonomy of persons who seek MAID, and the interests of vulnerable persons in need of protection, the Legislation limits the availability of MAID to those who are mentally competent and at least 18 years of age who are suffering from a grievous and irremediable medical condition. A “grievous and irremediable” condition is defined more specifically as:

- a serious and incurable illness;
- where the individual is in an advanced state of irreversible decline in capability; and
- where the individual's natural death has become reasonably foreseeable, taking into account all of their medical circumstances.

### "Reasonable Foreseeability" of Death

The long-awaited Legislation has drawn widespread criticism for implementing eligibility criteria that is overly narrow, restrictive, and inconsistent with the Supreme Court of Canada's ruling in *Carter*. Notably, there was no "reasonable foreseeability" requirement built into the criteria articulated by the Supreme Court of Canada in *Carter*. Indeed, the Court considered evidence from people for whom a natural death was not reasonably foreseeable.

The Department of Justice defines a "reasonably foreseeable death" as a circumstance in which there is a real possibility of the patient's death within a period of time that is "not too remote" and where it has been "fairly clear that they are on an irreversible path toward death, even if there is no clear or specific prognosis."<sup>[1]</sup> As of now, there is no objective criteria to determine whether an individual is on a trajectory toward death meeting the eligibility criteria for MAID, and this determination is in the hands of medical practitioners alone.

The Legislation, by implication, excludes individuals who are suffering intolerably from physical conditions that are not "terminal" or "advanced". Also excluded are all individuals who suffer from mental illnesses or psychiatric conditions, even where the condition may be serious and incurable and cause intolerable suffering. MAID has not been extended to "mature minors", nor will patients be able to provide advanced consent by leaving legal instructions for their assisted death in the event that they become incompetent.

Interestingly, while independent reviews by the Ministers of Justice and Health are pending with respect to the mental illness and mature minor omissions from the Legislation, there is no plan or requirement for the Government to review the controversial "reasonably foreseeable" element of the criteria.

### **The New Constitutional Challenge – *Lamb v. Canada***

Within days of Bill C-14 being passed into law, a new lawsuit was commenced by Julia Lamb and the British Columbia Civil Liberties Association ("BCCLA"). The BCCLA is a non-profit organization that was the institutional plaintiff in the *Carter* case and arguably the driving force behind that litigation.

#### Julia Lamb – a young plaintiff with a progressive degenerative disease

Julia Lamb is a 25 year old marketing assistant who lives in Chilliwack, BC. She suffers from spinal muscular atrophy ("SMA"), a progressive degenerative disease which affects the motor neurons in the spine and causes

her significant pain and mobility issues. Ms. Lamb currently lives independently from her parents, but requires 18 hours of care per day in order to do so. While her body is weakening and her respiratory and mobility issues are increasing in severity, SMA does not have any impact on Ms. Lamb's cognitive ability.

### Why the new Legislation is arguably faulty

The Lamb lawsuit alleges that the new Legislation is unconstitutional because it violates a person's:

- Section 7 rights to life, liberty and security of the person; and
- Section 15 right not to be discriminated against on the basis of age or physical disability.

The BCCLA's chief complaints with the new Legislation relate to the particular requirements a person must meet in order to qualify as having a "grievous and irremediable" condition, as noted above. Those elements of the test were not part of the SCC's articulation of the MAID criteria in the *Carter* case.

Ms. Lamb could survive with her condition for years, even decades. By importing the restrictive requirements discussed above into the Legislation, the Federal Government is arguably discriminating against younger people by preventing those who suffer from a grievous and irremediable condition - but whose death is not "reasonably foreseeable" - from accessing MAID. While an older adult with an identical condition would be able to access assisted dying, the younger person would not.

Similarly, if a person's condition is technically "curable", that person would not qualify for MAID - even if the only way to access the cure was to undertake treatments not acceptable to the individual. This runs counter to the SCC's strong statements in favour of individual autonomy and dignity and the Court's specific instruction that the "irremediable" requirement in "grievous and irremediable" does not require a person to undergo medical treatment that they subjectively do not wish to undergo.

### **Take Aways**

Physician-assisted suicide is now a reality in Canada. However, it is currently only a reality for individuals who meet the limited criteria prescribed by the Legislation. The recent constitutional challenge filed by Julia Lamb and the BCCLA highlights a glaring flaw in the new Legislation – under the new law, *only an individual who suffers from a terminal illness where his or her death is "reasonably foreseeable"* has access to MAID.

In addition to the inevitable practical challenges relating to the implementation of the MAID regime in Canada, we can also expect several years of litigation and uncertainty resulting from challenges to the new Legislation.

by Katherine A. Reilly

[1] Department of Justice website, Medical Assistance in Dying - Glossary page, accessed on October 26, 2016:

<http://www.justice.gc.ca/eng/cj-jp/ad-am/glos.html>[ps2id id='1' target='']

### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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