

Estate and Insurance Planning Implications of Medical Assistance in Dying

Suzana Popovic-Montag and Nick Esterbauer, Hull & Hull LLP

Introduction of Physician-Assisted Death in Canada

A major turning point with respect to the legality of physician-assisted death (also known as medical assistance in dying, or "MAID" for short) came in 2015 with the Supreme Court of Canada's decision in *Carter v Canada (Attorney General)*.¹ Since that time, federal legislation has been updated and the option of physician assistance in dying has introduced several important considerations in respect of capacity, estate and insurance planning.

Historically, MAID was prohibited under the Canadian *Criminal Code*.² The SCC, however, found that the provisions prohibiting MAID infringed upon the right of Canadians to life, liberty and security of the person, in violation of the Canadian *Charter of Rights and Freedoms*.³ The SCC suspended the invalidity of the prohibition against MAID to allow the federal government the opportunity to update legislation to reflect this landmark decision.⁴ In 2016, *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*⁵ received royal assent. The resulting amendments decriminalized MAID and provided criteria for its authorized access by Canadians.

Life Insurance and Cause of Death

For many Canadians, whether the purpose is to fund payment of anticipated estate liabilities, equalize the distribution of an estate amongst multiple children, or to provide a direct benefit to one or more designated beneficiaries, life insurance policies represent an important component of an estate plan. If a policy cannot be honoured as a result of the cause of the insured's death, this may completely frustrate his or her testamentary wishes.

The terms of life insurance policies typically address the issue of whether a beneficiary will be entitled to the insurance proceeds if the insured commits suicide. Policy terms typically include a restriction as to the payout of the policy if the insured dies by his or her own hand within a certain number of years from the date on which the policy is taken out (most often two years).

The change in the law regarding MAID raised concerns in terms of whether it could be distinguished from suicide and should, accordingly, attract different treatment under the terms

¹ [2015] 1 SCR 331.

² RSC 1985, c C-46.

³ Enacted as Schedule B to the *Canada Act 1982*, 1982, c 11 (UK), which came into force on April 17, 1982.

⁴ *Supra* note 1; *Carter v Canada (Attorney General)*, [2016] 1 SCR 13.

⁵ SC 2016, c 3.

of a life insurance policy. Depending on the terms of the policy, the definition of suicide as it relates to voiding a life insurance policy may or may not encompass MAID.

Clarification of the Impact of MAID on Life Insurance

The preamble to the federal legislation with respect to MAID, however, refers to suicide as “a significant public health issue that can have lasting and harmful effects on individuals, families and communities”,⁶ while it refers to the objective of striking an “appropriate balance between the autonomy of persons who seek [MAID], on one hand, and the interests of vulnerable persons in need of protection and those of society, on the other”.⁷

In 2016, the Canadian Life and Health Insurance Association proposed the introduction of additional policy terms by individual life insurance providers to exclude MAID from the standard benefit exemptions resulting from suicide.⁸ Since then, the Ontario government has implemented legislation directed at honouring benefits to the families of individuals who have accessed MAID.

The *Medical Assistance in Dying Statute Law Amendment Act, 2017*⁹ came into force on May 10, 2017. This legislation provides protection and clarity for patients and their families. At the Second Reading of the *Act*, a representative for the Minister of Health and Long-Term Care suggested that medical assistance in dying should not impact a person’s right that otherwise exists under a contract or statute, including life insurance policies or other survivor benefits.¹⁰

The Medical Assistance in Dying Statute Amendment Act, 2017 effected amendments to various provincial legislation. As a result, a section now appearing within the *Excellent Care for All Act, 2010* reads as follows:

... the fact that a person received [MAID] may not be invoked as a reason to deny a right or refuse a benefit or any other sum which would otherwise be provided under a contract or statute ... unless an express contrary intention appears in the statute.¹¹

Conclusion

The amendments provided for within the new provincial legislation represent an important step in the recognition of MAID as a right that is distinguishable from the act of suicide. They also confirm the right of individuals who access medical assistance in dying to benefit their survivors

⁶ *Ibid.*

⁷ *Ibid.*

⁸ “Life insurance industry would treat assisted dying differently than suicide”, *CBC News* (10 April 2016), available at: <http://www.cbc.ca/news/canada/british-columbia/life-insurance-assisted-death-policies-1.3529244>.

⁹ SO 2017, c 7.

¹⁰ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 41st Parl, 2nd Sess, No 43 (21 February 2017) at 2305 (Mr. John Fraser).

¹¹ SO 2010, c 14, s 13.9.

with life insurance policies or other benefits without restrictions that may have otherwise been imposed.

In its first two years, a reported 3,714 Canadians have accessed MAID.¹² While the ability of Canadians to choose to obtain MAID remains a relatively recent introduction, the related estate and insurance planning implications may become increasingly relevant in the future. This is particularly so as the practice continues to distance itself from the stigma surrounding suicide, its increase in frequency, and as legislative guidance continues to develop.

¹² “The next frontier in the ‘right to die’: advance requests, minors and the mentally ill” *CBC News* (3 January 2019), available at: <https://www.cbc.ca/news/politics/maid-assisted-death-minors-mental-illness-1.4956388>.