Toronto Law Journal

Estate and Insurance Planning Implications of Medical Assistance in Dying

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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

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[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

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[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.

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Court of Appeal affirms the importance of the "appropriate means" test under s. 5(1)(a)(iv)

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In *Presley v. Van Dusen*,[1] the Court of Appeal for Ontario affirmed the importance of the appropriate means test under s. 5(1)(a)(iv) of the *Limitations Act, 2002*, and confirmed that superior knowledge and expertise sufficient to delay the commencement of proceedings is not restricted to "strictly professional relationships;" rather, plaintiffs are entitled to rely on the expertise of persons who are members of non-traditional professions or not professions at all in order to demonstrate that it was reasonable to rely on such expertise to delay commencing a claim.

The appellants, Janice Presley and Robert Frederick, brought a claim against Jack Van Dusen, and others, for the negligent design, installation, approval and inspection of their septic system. Over several years, Van Dusen attempted to fix the problem with the appellants' septic system. Five years following the first problem with the septic system, a claim was commenced against him and the other defendants. Both the Small Claims Court and Divisional Court agreed that the claim was brought outside the limitation period. On appeal, the appellants argued that both lower courts failed to conduct a sufficient discoverability analysis as they did not consider when the appellants knew or ought to have known that a proceeding would be an appropriate means to remedy their claim under s. 5(1)(a)(iv) of the *Limitations Act, 2002*.

The Court of Appeal agreed with the appellants' argument and affirmed that a determination under s. 5(1)(b) as to the date on which a reasonable person would have discovered the claim requires the consideration of all four elements enumerated under s. 5(1)(a). The Court of Appeal held that the lower courts erroneously found that once the date of discovery is determined, there is no requirement to make an express determination with respect when the appellants knew or ought to have known that litigation was appropriate pursuant to s. 5(1)(a)(iv). Sharpe J.A. concluded that the Courts below also conducted an insufficient analysis as to whether the presumption under s. 5(2) was rebutted as a result of their failure to make a determination under s. 5(1)(a)(iv). The Court reiterated the proposition that a plaintiff's reasonable reliance on the expertise of a professional may delay the date on which he or she knew or ought to have known litigation was an appropriate means to remedy their injury or loss. In this case, the Court of Appeal clarified that this reliance on expertise is not restricted to strictly professional relationships but also extends to members of "non-traditional professions" or individuals "who are not professionals at all".

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* You can read more of Christina's work on limitation periods at www.limitationslaw.com.

[1] 2019 ONCA 66.

Van Dusen's continuous assurances and scheduled attempts to have the septic system defects rectified were sufficient to give the appellants a reasonable belief that litigation was inappropriate in these circumstances. The Court distinguished this case from other decisions in which ongoing communications and negotiations took place when it was already known that legal proceedings were appropriate and the issue being considered was whether the claim can be settled. By contrast, in this case, the conversations between the appellants and the respondent were aimed at determining whether an issue even existed. While the appellants might be criticized for not being more insistent that Van Dusen fulfill this assurance more promptly, the evidence established that they were engaged in ongoing discussions with him and took actions to enable him to access the property. Therefore, the appellants reasonably relied on Van Dusen's assurances. These assurances led the appellants to the reasonable belief that the problem could and would be remediated without cost and without any need to have recourse to the courts. Accordingly, the claim was commenced in time.

The goal of s. 5(1)(a)(iv) is to deter needless litigation.[2] *Presley* follows a series of decisions of the Court of Appeal that have emphasized the application of the appropriate means test under s. 5(1)(a)(iv).[3] These decisions confirm that a claim is not properly discovered until "a proceeding would be an appropriate means" to remedy it. In those cases where the Court of Appeal did make a finding that it was reasonable for the plaintiff to rely on the defendant's superior knowledge and expertise, the defendants belonged to traditional expert professions, such as a physician,[4] a dentist,[5] and an accountant.[6] The Court's decision in *Presley* acknowledges that plaintiffs are also entitled to rely on the expertise of persons who may not be "professionals" in the traditional sense, but assist the plaintiff in attempting to remedy the problem so as to make a claim and litigation unnecessary.

[2] *407 ETR Concession Co. v. Day*, 2016 ONCA 709 at para. 48, leave to appeal refused, [2016] S.C.C.A. No. 509.

[3] See for example, *407 ETR ibid.* and *Presidential MSH Corp. v. Marr, Foster & Co. LLP*, 2017 ONCA 325.

[4] *Brown v. Baum*, 2016 ONCA 325.

[5] *Chelli-Greco v. Rizk*, 2016 ONCA 489.

[6] *Presidential MSH Corp., supra* note 3.

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Court rejects deal price as indicator of fair value in dissent decision[1]

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Introduction

In an extraordinary decision, the Supreme Court of Yukon (the Court) in *Carlock v. ExxonMobil Canada Holdings ULC (ExxonMobil)*, awarded dissenting shareholders a 43% premium to the negotiated deal price in ExxonMobil's 2017 acquisition of InterOil. The Court's US$71.46 per share award is particularly surprising given ExxonMobil's price of US$45 plus a contingent resource payment valued at just under US$5.00 per share was itself a topping bid to a prior board-supported transaction with Oil Search, and the fact that the transaction was approved by a significant majority of shareholders not once but twice due to disclosure-related litigation.

If the decision is not successfully appealed, the award of such a significant premium to the negotiated purchase price puts market participants on notice that the process undertaken by transaction participants in negotiating a merger may come under scrutiny by courts in the context of a shareholder dissent. The decision also diverges from recent authority on the issue in Delaware, where deal price has been accorded deference as an indicator of fair value. If the decision stands, it may encourage increased levels of shareholder dissent.

Dissent Rights In Canada

There are several types of transactions and corporate changes in which shareholders have a right to dissent. Where shareholder approval is required for a corporation to effect a fundamental change, such as an arrangement, shareholders are entitled to formally dissent and to be paid the fair value of their shares. This ensures that a shareholder that opposes the transaction or corporate change is not required to accept the consequences of that change simply because other shareholders voted in favour. The dissenting shareholder and the corporation must follow a prescribed statutory process to attempt to agree on the fair value of the shares. If they do not, application may be made to the court to determine fair value.

There has been relatively limited Canadian jurisprudence regarding the exercise of dissent rights to date, particularly as compared to the United States. Canadian cases have typically focused on valuation issues as opposed to examining the governance and process that resulted in the outcome that triggered the dissent.

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[1] Originally published on Osler.com.

The Decision

The Court rejected ExxonMobil's expert's determination of the fair value of InterOil shares in favour of the fair value as determined by the dissenting shareholders' expert. The dissenting shareholders argued, based on an optimistic view of future market demand and pricing, that InterOil should be valued at US$71.46 per share under a discounted cash flow approach. ExxonMobil argued fair value should be viewed as US$49.98 per share based on a transaction price of US$45 per share and a contingent resource payment of US$4.98, supported by both asset-based and discounted cash flow valuations.

The Court noted that several factors supported the proposition that the transaction price represented fair value – for example, that InterOil was known to individual and institutional investors and traded on the NYSE; multiple sophisticated parties were interested in partial transactions; it was "no secret" that InterOil and its principal asset (a petroleum license in Papua New Guinea) were on the market; there was a bidding and negotiation process that led to the price of US$45 per share; and bidders included insiders (including ExxonMobil). However, in rejecting the transaction price as the indicator of fair value, the Court noted there was no planned sales process in which InterOil attempted to solicit the highest possible market price for a sale of the whole company, and that another bidder's decision to not match ExxonMobil's final bid (which was itself a topping "superior proposal" in respect of an agreed upon transaction) was not evidence of an auction. The Court also noted that, despite substantial changes to the state of the market since ExxonMobil's initial offer in June 2016, the transaction price of US$45 per share remained constant.

Most importantly, the Court observed that although InterOil made significant enhancements to its corporate governance process in response to the Yukon Court of Appeal's rejection of the original arrangement, the transaction price was still a result of the original, flawed process. As described in our earlier Osler update, the arrangement was initially blocked by the Yukon Court of Appeal on the basis that it was not fair and reasonable, in large part due to the lack of disclosure of the financial analysis underlying the original fairness opinion in support of the transaction, leading to a concern that the shareholder vote approving the arrangement was not fully informed. The arrangement was subsequently approved by the Court following corrective disclosure and a second shareholder vote where 91% of the votes cast were in favour of the transaction.

The Court further found that ExxonMobil failed to consider increases in the price of oil from March 2016 to February 2017 and failed to lead evidence regarding the country risk premium that informed its valuation. The Court accepted the valuation evidence of the dissenting shareholders and determined they are entitled to be paid US$71.46 for each share.

Delaware

The Court's judgment stands in contrast to the Delaware Supreme Court's decision in *Dell, Inc. v. Magnetar Global Event Drive Master Fund Ltd.* (December 14, 2017), which supports the "efficient market hypothesis" and the principle that only compelling evidence of market failure will justify departing from the deal price in situations with arm's-length mergers. The Delaware

Supreme Court unanimously questioned the reliability of valuations produced by an "expert witness who caters her valuation to the litigation imperatives of a well-heeled client."

Conclusion

In general, it would appear to be a sound rule that, absent manifest conflict or market failure, the results of a public sale process should be presumptive of fair value. A clear articulation of this in Canadian case law would provide helpful guidance to market participants. In the ExxonMobil decision, the Court was focused on process deficiencies and therefore did not defer to deal price as a proxy for fair value. This was a surprising conclusion: there was a board-supervised sale process with multiple bids and two credible bids; a definitive agreement was reached with Oil Search only to be subsequently topped by ExxonMobil; the ExxonMobil arrangement was initially approved by over 80% of votes cast at the first shareholders meeting; following corrective disclosure and a slight enhancement to the value of the contingent right payment, shareholders approved the transaction a second time, with 91% of votes cast in favour; and the entire process took close to a year.

It remains to be seen whether the decision will be appealed and what the impact of this decision will be. Regardless of the outcome, the decision serves as a reminder of the importance of a well-designed sale process that can withstand judicial scrutiny.