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Medical Assistance in Dying: An Overview for Estate Lawyers

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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 incapacity and estate planning.

Historically, MAID was prohibited under the Canadian *Criminal Code*.[2] The Supreme Court, 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 Court 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.

We take this opportunity to briefly review the continually-evolving state of the law involving MAID and its eligibility requirements, and to review a few possible implications for estate lawyers and related professionals.

Who Has Been Able to Access MAID?

Until recently, MAID was available only to individuals able to satisfy the following test:

a) they are eligible - or, but for any applicable minimum period of residence or waiting period, would be eligible - for health services funded by a government in Canada;

b) they are at least 18 years of age and capable of making decisions with respect to their health;

c) they have a grievous and irremediable medical condition;

d) they have made a voluntary request for medical assistance in dying that, in particular, was not made as a result of external pressure; and

[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.

e) they give informed consent to receive medical assistance in dying after having been informed of the means that are available to relieve their suffering, including palliative care.[6]

As it currently stands, an individual who qualifies for MAID must provide express consent to receive it immediately prior to the procedure and their natural death must be "reasonably foreseeable" as a result of their condition, amongst other requirements outlined in the *Criminal Code*.[7]

How Are Eligibility Rules For MAID Changing?

A number of individuals and groups, including Dying with Dignity Canada, have advocated for the amendment of MAID eligibility requirements to provide for the option of providing advanced requests for MAID. Country-wide surveys suggest that Canadians from across the country are both highly engaged and generally supportive of the enhancement of access to MAID.

In *Truchon c Procureur général du Canada,*[8] the Quebec Superior Court of Justice considered the constitutional validity of the requirement that the natural death of individuals accessing MAID be reasonably foreseeable. Ultimately, the Court found that this requirement infringed the applicants' fundamental rights under sections 7 and 15 of the *Charter* and declared these provisions of Quebec and Canadian MAID laws unconstitutional. Rather than appealing the *Truchon* decision, the federal government announced that it would propose legislative amendments to enhance access to MAID. Since then, legislators have been tasked with finding a better balance between the rights of those with grievous and irremediable medical conditions to die with dignity on one hand, and the protection of individuals who are vulnerable and whose capable wishes can no longer be confirmed on the other.

Proposed legislative amendments to enhance access to MAID further to the *Truchon* decision and in response to complaints regarding inaccessibility were ultimately introduced by way of Bill C-7 in 2020.[9] Most notably, Bill C-7 sought to repeal the provision requiring a person's natural death to be reasonably foreseeable, and to permit access to MAID by individuals who had previously consented to receive it but are no longer capable on the basis of their prior consent and agreement with the medical practitioner to receive MAID.

Bill C-7 recently received Royal Assent, significantly enhancing the class of individuals who are able to access MAID.

Can an Attorney or Guardian of Personal Care Consent to MAID?

As it currently stands, although the scope of authority of an attorney or guardian of personal care (or another substitute decision-maker authorized to act under the *Health Care Consent Act*) are broad, in order to access MAID, it is currently the patient him/herself who mush

[6] *Criminal Code*, *supra* note 2, s 241.2(1).
[7] *Ibid*, ss 241.2(2)(d), 241.2(3)(h).
[8] 2019 QCCS 3792.
[9] Bill C-7, *An Act to amend the Criminal Code (medical assistance in dying)*, 1st Sess, 43rd Parl, 2020.

consent to its administration. What is currently being contemplated is a change to the time at which consent must be provided, not the extension of such rights to substitute decision-makers.

What Impact Does MAID Have on Life Insurance?

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 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. Accordingly, early on, there was some concern that MAID could have a significant impact on the implementation of the estate plans of those who chose to access it. Since then, the Ontario government has implemented legislation that provides protection and clarity for patients who have accessed MAID and their families.[10] The legislation specifies that MAID does not impact a person's rights that otherwise exist under a contract or statute, including life insurance policies or other survivor benefits, unless an express contrary intention appears in the statute.[11]

What Impact Might MAID Have on Estate Litigation?

We are beginning to see estate disputes where the deceased accessed MAID. Some practitioners may be beginning to encounter the issue of whether MAID may impact a will challenge or other challenged disposition on the basis of the deceased's lack of mental capacity and, if so, how.

Capacity is task-, time- and situation-specific. Presumably, the standard of capacity applying to the decision to access MAID is that required to make other personal care decisions, such as receiving or refusing medical treatment. Section 45 of the *Substitute Decisions Act, 1992*,[12] defines incapacity for personal care as follows:

> A person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

The standard for testamentary capacity typically applied remains that set out in the old English authority of *Banks v Goodfellow*.[13] While, historically, standards of mental capacity were viewed as hierarchical, recent case law and commentary have strayed from this understanding, instead viewing the different standards of mental capacity as just that: different. Courts will

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[10] *Medical Assistance in Dying Statute Law Amendment Act, 2017*, SO 2017, c 7.
[11] *Excellent Care for All Act, 2010*, SO 2010, c 14, s 13.9.
[12] SO 1992, c 30.
[13] (1870) LR 5 QB 549.

consider whether an individual understood the nature of the decision being made and appreciated the reasonably foreseeable consequences of their decision.

While possessing the capacity to confirm consent to obtain MAID may not correspond to testamentary capacity, it may nevertheless become evidence suggestive of a degree of mental capacity that is valuable (in conjunction with other evidence) in establishing that a last will and testament executed shortly before death is valid. Similarly, the evidence of those administering MAID may be of considerable relevance.

Conclusion

Some clients may ask us during the incapacity and estate planning process about MAID and under what circumstances it may be available.

As with other end-of-life preferences, clients should be encouraged to communicate their wishes with their loved ones. A recent decision of the Nova Scotia Court of Appeal saw a scenario in which a wife of nearly 50 years petitioned to prevent her husband from receiving MAID after he had told her of his plan to access assisted death, highlighting the importance of having open discussions with family regarding this aspect of end-of-life care.[14]

[14] *Sorenson v Swinemar*, 2020 NSCA 62. The wife's application and appeal were unsuccessful, and the husband accessed MAID the day after the Court of Appeal's decision was released.