Constitutionality of Bill C-14 and Judicial Applications for Access to MAID

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Concerns regarding the constitutionality of Bill C-14 were expressed in expert testimony (and or written submission) before the Standing Senate Committee on Legal and Constitutional Affairs during their consideration of Bill C-14, including by Peter Hogg, Canada's pre-eminent legal expert and academic scholar on constitutional law. In his submission to the Standing Committee, Mr. Hogg submitted that:

In my opinion, the Bill is not consistent with the constitutional parameters set out in the *Carter* reasons", for the following reasons:

In two recently decided cases, courts have decided that the *Carter* right is not limited to end-of-life cases... [i.e., *Canada (Attorney General) v EF*, 2016 ABCA 155 and *IJ v Canada (Attorney General)*, 2016 ONSC 3380]

It is clear from these two decisions, that the class of persons entitled to the Charter right of physician-assisted death includes people whose suffering is not an end-of-life condition. But, if Bill C-14 were enacted in its present form, the class of entitled persons would no longer include people whose suffering is not an end-of-life condition...

If Bill C-14 is enacted in its present form, it can safely be predicted that a member of the newly excluded class – those who satisfy the *Carter* criteria and do not have an end-of-life condition – will bring a constitutional challenge to the new legislation. The challenge will come before a single judge and the challenger will show the judge three things: (1) the order made by the Supreme Court in *Carter*, (2) the two decisions confirming that *Carter* did not require any end-of-life conditions, and (3) sections 241.2(2)(b) and (d) of Bill C-14. What judge would not strike down the end-of-life provisions?

The case law referred to above by Mr. Hogg will be considered by the courts in any future legal challenges to Bill C-14 and its deviation from the criteria established in *Carter 2015*. Because of the extension period granted by the Supreme Court in *Carter 2016,* which also set out an interim judicial authorization process for those who met the criteria established in *Carter 2015* to obtain a court order for MAID, there is now a body of law regarding MAID that puts the common law in conflict with Bill C-14. This conflict will likely in the near future be

reconciled by the courts.

In the first such case in Canada, *Re HS,*[1] Justice Martin of the Court of Queen's Bench of Alberta strictly applied the criteria from *Carter 2015*, without regard to any other factors except for the judicial authorization process set out in *Carter 2016,* in granting MAID to the applicant, who was in the final stages of ALS. Moreover, Justice Martin stated that even if she was mistaken in her application of the facts to the criteria set out in *Carter 2015*, she would have granted the applicant a constitutional exemption from the *Criminal Code* prohibitions impugned in *Carter 2015*.[2]

In the first such case in Ontario, *AB v Canada (Attorney General),*[3] Justice Perell of the Ontario Superior Court of Justice also strictly applied the criteria from *Carter 2015*, in granting MAID to the applicant, who was in the advance stages of aggressive lymphoma. In doing so, Justice Perell restated the criteria as follows:

[22] I extract five criteria from para. 127 of *Carter*-2015; namely: (1) the person is a competent adult person; (2) the person has a grievous and irremediable medical condition including an illness, disease or disability; (3) the person's condition is causing him or her to endure intolerable suffering; (4) his or her suffering cannot be alleviated by any treatment available that he or she finds acceptable; and, (5) the person clearly consents to the termination of life.

Justice Perell then reviewed each of the criteria in order, establishing important principles that run contrary to Bill C-14 and which are likely to have persuasive value in any future litigation over eligibility for MAID. These include, (1) that "competent adult" is determined with reference to the common law definition of capacity in the context of making decisions about medical treatment (*i.e.*, the ability to understand the nature, the purpose, and the consequences of the proposed treatment)[4] and does not necessarily mean 18 years old or age of majority, (2) that a "grievous medical condition" means one that is in the range of "critical, life-threatening, or terminal" (Justice Perell in *IJ v. Canada (Attorney General)* reviewed in detail below, clarified that grievous medical condition need not be terminal),[5] (3) that "intolerable suffering" is determined based on a subjective-objective medical analysis,[6] (4) that "alleviation" is determined with reference to whether, objectively, there are treatments that will alleviate a person's pain and suffering (not their medical condition) that are also subjectively acceptable to the person,[7] and (5) that consent to treatment is determined, at least in Ontario, in accordance with the *Health Care Consent Act, 1996*[8] (the "HCCA"): (a) the consent must relate to the treatment; (b) the consent must be informed; (c) the consent must be given voluntarily; and (d) the consent must not be obtained through misrepresentation or fraud.[9]

Justice Perell also discusses the role of the court in considering whether the criteria in *Carter 2015* is met in a given case, including in particular that the court has no discretion – if the applicant satisfies the criteria (*i.e.*, as now set out in Bill C-14), they are entitled to receive MAID.

Other important cases arising under the judicial authorization process set out in *Carter 2016* generally stand for the proposition that the criteria for MAID established in *Carter 2015* is not limited to (a) advance stage physical conditions, and/or (b) terminal illnesses.

In *EF*, discussed above, the Alberta Court of Appeal dismissed an appeal by the Attorneys General of Canada and British Columbia of the motions judge's finding that EF met the criteria for MAID established in *Carter 2015*. EF was a 58 year old woman who endured

chronic and intolerable suffering as a result of a medical condition diagnosed as "severe conversion disorder", classified as a psychogenic movement disorder. While her condition was diagnosed as a psychiatric one, her capacity and her cognitive ability to make informed decisions, including providing consent to terminating her life, were unimpaired.

The Attorneys General raised concerns regarding the sufficiency of the psychiatric evidence and Canada, in particular, took the position that the criteria set out in *Carter 2015* were not met for two reasons: (1) the applicant's illness, however severe, was not regarded as terminal; and (2) the applicant's illness had at its root a psychiatric condition. The Court of Appeal rejected the argument regarding terminal illness and Canada's interpretation of *Carter 2015*:

[33] As Canada fairly conceded, the language of the declaration itself is broad and rights based. Nowhere in the descriptive language is the right to physician assisted death expressly limited only to those who are terminally ill or near the end of life. Canada accepts that a dictionary definition of "grievous and irremediable" medical condition could include conditions that are not life-threatening or terminal.

The Court of Appeal also rejected Canada's second argument regarding psychiatric illnesses for the same reasons above – nowhere is such a limitation contained in *Carter 2015* nor can one be read-in or inferred. With respect to Canada's argument that allowing MAID for psychiatric illnesses could result in a "slippery slope" of persons seeking MAID for "minor medical conditions", the Court of Appeal was satisfied that the requirements in *Carter 2015* that a person (a) be competent (*i.e.*, have capacity despite psychiatric condition or mental illness), and (b) clearly consent to MAID (*i.e.*, in accordance with provincial consent to treatment legislation), provided the necessary safeguards with respect to the vulnerability issues which may arise for persons with psychiatric disorders (in the same way that requiring the individual be an adult safeguards minors):

[53] It is important to note that this issue was very much a focus of debate in *Carter 2015*, as is obvious from a review of the decision and the evidentiary record. As has been discussed, the court in *Carter 2015* was tasked with striking a balance between the autonomy and dignity of a competent adult who seeks death as a response to a grievous and irremediable medical condition, and the sanctity of life and the need to protect the vulnerable. The court's decision was premised on competent individuals being entitled to make decisions for themselves in certain circumstances. The court recognized that there was a need to protect the vulnerable from abuse or error, but determined that a properly administered regime is capable of providing that protection.

In *IJ v Canada (Attorney General)*,[10] Justice Perell cited *EF* above for the proposition that the constitutional exemption granted in *Carter 2016* did not require the applicant's medical condition to be terminal. In *IJ*, although the 90 year old applicant's medical conditions were not "imminently terminal or life threatening", they were described by Justice Perell as "horrific":

[5] I.J. has: spinal stenosis; discogenic disease; neurogenic claudication; lumbosacral facet osetoarthropathy; spondylolisthesis; rotoscoliosis; major kyphosis; and sacroiliac joint complex pain disorder. He is deformed to the point where he cannot stand erect or sit comfortably. His chin rests on his chest, and he feels like he is being strangled. He has difficulty breathing, swallowing, and speaking. He has pain in all his limbs, his buttocks, his back, his hip, his neck. His skin itches. The condition of his bone and joint pain are worsening, and he is beginning to lose the ability to hold a pen and eating utensils. He can walk with a walker albeit just barely and painfully. His digestive, bowel, and urinary systems are dysfunctional. He is in constant excruciating pain, and the pain is increasing. He has no energy because it is taken up fighting the pain. He has sleep apnea from the pain and the

itchiness. Pain medications aggravate his severe constipation and digestive issues. He is exhausted and stressed but he does not want for mental acuity and capacity. He describes the mental anguish that comes from being trapped in a pain-wracked, constipated, effectively immobile body as an intolerable state of being. He says his life is unbearable. He says that he will starve himself to death if the assisted death application is refused. He says he cannot take this suffering or existence anymore.

In granting the application for MAID, Justice Perell noted squarely, as in *EF*, that there was no requirement in *Carter 2015* or *Carter 2016* that a medical condition be imminently terminal or life-threatening, but that the eventuality or inevitability of death from such medical conditions was a relevant consideration to whether they were "grievous and irremediable":

[21] However, whether or not a person's illness, disease, or disability will end in death remains relevant to determining whether it is a grievous illness, disease, or disability. The imminence of death may not be determinative, but it is something to consider in determining whether a person has a grievous and irremediable medical condition including an illness, disease or disability.

[22] In determining whether a person satisfies the criteria for a physician-assisted, death, the proximity or remoteness of death and the duration of suffering are relevant factors that must be considered in the unique and special circumstances of any applicant for a physician-assisted death...

Given the case law above and Peter Hogg's related senate submission, it is difficult to imagine how the courts would refuse similar applications for MAID in the future, which will now need to be advanced in any case that does not meet the more restricted criteria under Bill C-14. In the authors' view, in difficult and compassionate cases such as that of *IJ* above, the courts are more likely than not to either (a) declare the more restricted criteria under Bill C-14 unconstitutional, or (b) grant individual constitutional exemptions from it. In *Re HS*, Justice Martin considered granting such an individual exemption in the alternative:

[118] Based on the foregoing analysis, I find that Ms. S. meets the criteria set forth at para 127 of *Carter 2015* and is therefore entitled to the constitutional exemption granted by the Supreme Court of Canada in *Carter 2016*. Like Ms. Taylor, she is not a vulnerable person who requires the protection of those sections of the *Criminal Code* impugned in *Carter 2015*.

[119] If, however, I am wrong in my reading of *Carter 2016* and the application to which the Supreme Court of Canada referred is an application to this Court for a constitutional exemption, then I would grant the exemption. Like the majority of the Court in *Carter 2016* at para 6, I do not "see any need to unfairly prolong the suffering of those who meet the clear criteria ... set out in [*Carter 2015*]." It is clear that Ms. S. is such a person.

In response to the *Charter* section 1 concerns regarding the balancing of individual *Charter* section 7 rights versus society's desire to protect the vulnerable (*Charter* section 1), the Bill provides "safeguards" for the provision of MAID, which health facilities and regulated health professionals must now comply with:

Safeguards

241.2(3) Before a medical practitioner or nurse practitioner provides a person with medical assistance in dying, the medical practitioner or nurse practitioner must

(a) be of the opinion that the person meets all of the criteria set out in subsection (1);

(b) ensure that the person's request for medical assistance in dying was

(i) made in writing and signed and dated by the person or by another person under subsection (4), and

(ii) signed and dated after the person was informed by a medical practitioner or nurse practitioner that the person has a grievous and irremediable medical condition;

(c) be satisfied that the request was signed and dated by the person – or by another person under subsection (4) - before two independent witnesses who then also signed and dated the request;

(d) ensure that the person has been informed that they may, at any time and in any manner, withdraw their request;

(e) ensure that another medical practitioner or nurse practitioner has provided a written opinion confirming that the person meets all of the criteria set out in subsection (1);

(f) be satisfied that they and the other medical practitioner or nurse practitioner referred to in paragraph (e) are independent;

(g) ensure that there are at least 10 clear days between the day on which the request was signed by or on behalf of the person and the day on which the medical assistance in dying is provided or – if they and the other medical practitioner or nurse practitioner referred to in paragraph (e) are both of the opinion that the person's death, or the loss of their capacity to provide informed consent, is imminent – any shorter period that the first medical practitioner or nurse practitioner considers appropriate in the circumstances;

(h) immediately before providing the medical assistance in dying, give the person an opportunity to withdraw their request and ensure that the person gives express consent to receive medical assistance in dying; and

(i) if the person has difficulty communicating, take all necessary measures to provide a reliable means by which the person may understand the information that is provided to them and communicate their decision.

Although not as controversial as the issue of "reasonably foreseeable death", these safeguards may also be open to attack in court on the basis that they encroach on provincial constitutional jurisdiction over healthcare and are therefore *ultra vires* the federal government, particularly if their level of detail goes beyond what is required to prevent "aiding or abetting suicide" or "consenting to death" under the *Criminal Code* into what is in pith and substance a health law (*e.g.*, consent and capacity laws, etc.).

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[1] 2016 ABQB 121 (CanLII), http://canlii.ca/t/gnj3q.

[2] *Ibid* at ¶118-119.

[3] 2016 ONSC 1912 (CanLII), http://canlii.ca/t/gnr79 [*AB*].

[4] *Ibid* at ¶24.

[5] *Ibid* at ¶25.

[6] *Ibid* at ¶26.

[7] *Ibid* at ¶27.

[8] SO 1996, c 2, Sch A, http://canlii.ca/t/52kkp.

[9] *AB*, *supra* note 22 at ¶28.

[10] 2016 ONSC 3380 (CanLII), http://canlii.ca/t/grt98.

Next chapter: "Health Regulatory College Policies on MAID and Medico-Legal Liability"

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