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Has Your Home Updated its MAiD Policy? Recent Legal Developments in Medical Assistance in Dying

By Lisa Corrente

In 2015, the Supreme Court of Canada ruled in the *Carter* decision that sections of the *Criminal Code* which made it illegal for anyone, including a physician, to cause the death of another person who consents to die or to assist a person to end their own life, were unconstitutional.

On June 17, 2016, in response to the *Carter* decision, amendments were made to the *Criminal Code* to decriminalize medical assistance in dying (“MAiD”). Specifically, Bill C-14 amended the *Criminal Code* to allow eligible individuals to receive MAiD from a medical practitioner (i.e. physician) or a nurse practitioner (i.e. Registered Nurse in the Extended Class). The amendments also define the criteria for who is eligible to receive MAiD, how assessments of eligibility are to be completed, and the roles of health practitioners and other healthcare professionals in managing a request for MAiD. Additionally, the amendments establish safeguards for individuals choosing MAiD and offer protection from criminal liability to health practitioners and other health care professionals who assist in the lawful provision of MAiD.

At the time that Bill C-14 was passed, many long-term care homes and retirements homes implemented internal policies to guide their interdisciplinary teams in dealing with requests for MAiD made by residents and the lawful provision of MAiD to them. As a result of further legislative amendments which came into effect earlier this year, long-term care homes and retirement homes now need to update their MAiD policies.

In particular, on March 17, 2021, a new set of amendments to the *Criminal Code* (i.e. Bill C-7) took effect. These new amendments introduce several key changes to Canada’s MAiD laws.

Firstly, it is no longer necessary for a person’s natural death to be reasonably foreseeable in order for them to be eligible for MAiD. However, MAiD will continue to be prohibited for individuals whose sole underlying medical condition is a mental illness until March 17, 2023.

Further, there are now two sets of procedural safeguards that must be respected before MAiD may be provided to an individual by a medical or nurse practitioner. The question of which set of safeguards applies to a MAiD request is determined by looking to whether or not the person's natural death is reasonably foreseeable.

In cases where the practitioners assessing an individual's request for MAiD determine that the individual's death is not reasonably foreseeable, there are added safeguards that must be met to be eligible to receive MAiD. Specifically,:

- One of the two practitioners who provides an assessment must have expertise in the medical condition that is causing the individual's unbearable suffering. If neither of these practitioners have this expertise, another practitioner with expertise in the individual's medical condition that is causing their suffering must be consulted in the assessment process;
- The individual must be informed of available and appropriate means to relieve their suffering, including counselling services, mental health and disability support services, community services, and palliative care, and they must be offered consultations with professionals who provide those services;
- The practitioners must have discussed with the individual any reasonable and available means to relieve their suffering, and must all agree that the individual has seriously considered those means;
- The individual's eligibility assessment must take a minimum of 90 days, unless the assessments have been completed sooner and the individual is at immediate risk of losing their capacity to consent; and
- Immediately before MAiD is provided, the practitioner must give the individual an opportunity to withdraw their request and ensure that they give express consent to receive MAiD.

Another important change resulting from the new legislative amendments is that eligible individuals whose natural death is reasonably foreseeable and who consent to MAiD but later lose capacity to consent will still be able to receive MAiD. However, the individual must have entered into a written arrangement with their medical or nurse practitioner in which they consent in advance to receive MAiD on their chosen date.

Finally, MAiD may now be provided to a person who has lost the capacity to consent to it as a result of the self-administration of a substance that was provided to them under the provisions governing MAiD in order to cause their own death.

In addition to the foregoing changes to eligibility and procedural safeguards, the new MAiD laws have also altered the framework for the federal government's data collection and reporting regime. Amendments will be made to the *Regulations for the Monitoring of MAiD* to align with the new legislation. Updating the Regulations will require extensive consultation and it is expected that it will take up to two years (i.e., by spring 2023) before reporting requirements are finalized and the regulations are in force. Until new regulations are in force, there are no new federal reporting requirements. However, health care professionals must continue to report on MAiD, subject to certain exceptions that are a result of the new law.

The College of Physicians and Surgeons of Ontario, the College of Nurse of Ontario and the Ontario College of Pharmacists have established updated guidelines for their members in respect of their roles, responsibilities and accountabilities regarding MAiD.

If you have any questions regarding MAiD or require assistance updating your organization's MAiD policy, please contact Lisa Corrente at lcorrente@torkinmanes.com or 416-643-8800.

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