

News

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Assisted dying bill muddies top court's intent, critics say

Justice Department says people must be on 'irreversible trajectory toward death'

CRISTIN SCHMITZ
OTTAWA

The federal government's proposal to restrict medical aid in dying to those whose deaths are "reasonably foreseeable" is unclear and likely unconstitutional, some lawyers say.

Tabled April 14 by Justice Minister Jody Wilson-Raybould, Bill C-14 confines what the government calls "medical assistance in dying" to people "whose natural death has become reasonably foreseeable, taking into account all of their medical circumstances, without a prognosis necessarily having been made as to the specific length of time that they have remaining (s. 241.2(2)(d))."

Health law practitioner Lisa Corrente of Toronto's Torkin Manes notes that the Supreme Court did not impose foreseeability of death as a prerequisite to medical aid in dying last year when it unanimously struck down the *Criminal Code's* blanket ban on assisted suicide in *Carter v. Canada (Attorney General)* [2015] SCC 5.

"Bill C-14 is a very cautious approach to medical assistance in dying," Corrente says. "The criteria for eligibility...contained in the proposed legislation are much more restrictive than the criteria set by the Supreme Court."

The proposed legislation faces an uphill battle to pass free votes in both the House of Commons and Senate by the June 6 deadline imposed by the Supreme Court.

Bill C-14 could also be significantly amended in response to severe criticism from both opponents and proponents of medical aid in dying. Advocates slam the government for not



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Lisa Corrente
Torkin Manes

extending medical aid in dying to those who make advance directives, mature minors and those whose sole underlying medical condition is mental illness — three areas the government says it needs to study further. Opponents also complain that the bill doesn't require prior court authorization of assisted deaths and fails to protect the conscience rights of health care professionals who don't want to provide the service or refer patients to willing providers.

However, the most legally contentious point seems to be whether the bill is too restrictive to comply with the letter, and spirit, of *Carter* and hence is constitutionally defective.

In *Carter*, the top court ruled that (as of June 6) the law can no longer bar a physician-assisted death to competent adults who clearly consent to their lives' being ended and who have, as the court succinctly wrote, "a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition."



Paterson

Bill C-14 adds layers and verbiage in defining what amounts to a "grievous and irremediable medical condition" — including the reasonable foreseeability of death requirement.

The new requirement creates uncertainty about who is eligible — a potential impediment itself to the availability of medical assistance in dying, Corrente suggests. "How long of a time is 'reasonably foreseeable?' Does natural death have to ensue in a month? Six months? A year? Or is some longer period acceptable? Will this uncertainty result in some medical and nurse practitioners being reluctant to participate?" she queried by e-mail. "Uncertainty will open the door to legal action being commenced by individuals who disagree with the practitioner's assessment of 'reasonably foreseeable.'"

The Department of Justice responds that "reasonable foreseeability," in this context, "should be understood to require a real possibility of the patient's death within a period of time that is not too remote. In other words, the patient must experience a change in the state of their medical condition so that it has become fairly clear that they are on an irreversible trajectory toward death, even if there is no clear or specific prognosis."

"The test is flexible, because each person's circumstances are unique, and life expectancy depends on the nature of the illness and the impacts of other medical conditions or health-related factors, such as age or frailty," the DOJ writes in an e-mail responding to questions from *The Lawyers Weekly*. "Physicians and nurse practitioners

have the necessary expertise to evaluate each person's unique circumstances and can effectively judge when a person is on a trajectory toward death, even if they cannot predict precisely when a person will die."

Both Wilson-Raybould, and her department, state that the proposed legislation was carefully reviewed to ensure consistency with the *Charter* and *Carter*.

"Moreover, this legislation would ensure that individuals like those whose circumstances were before the courts in *Carter* could obtain access to medical assistance in dying," the DOJ asserts. "The Supreme Court was clear that its ruling was limited to the 'factual circumstances' of the case (para 127). Other aspects of their ruling suggest they were not contemplating medical assistance in dying for people suffering only from mental illness (para. 111), and that it was comparing medical assistance in dying to other 'end of life' decisions that are only available to dying patients (paras 66 and 115)."

Josh Paterson, executive director of the British Columbia Civil Liberties Association which launched the *Carter* case, argues the bill's requirement of a reasonably foreseeable natural death should be dropped as it could deny a medically assisted death to those like Kay Carter, a central figure in the *Carter* decision, who experienced intolerable suffering (from spinal stenosis) but whose death from that illness was not foreseeably imminent. "We believe that if the legislation excludes people who do not have terminal illnesses, then it will be unconstitutional because the [*Carter*] case was, in part, about people who didn't have terminal illnesses and it was judged that they should have the right to escape from that intolerable suffering," Paterson explains. "What this provision forgets is that our case was not only about helping people to a more dignified death, whose death is coming as a result of an illness. It was also about allowing people to escape from being trapped in a lifetime of intolerable suffering whose death was not imminent, whose death was not around the corner, and those are people like Kay Carter."

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