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Assisted dying law poses thorny issues for lawyers

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Thorny questions around clients giving advance directions for euthanasia are among the novel issues estates practitioners, health law specialists and other lawyers could face when Canada throws open its doors to physician assisted dying three months from now.

The train is hurtling down Parliament's legislative track, on schedule, with a Supreme Court imposed arrival time of June 6, when the *Criminal Code's* blanket prohibition of assisted suicide struck down by the *Carter v. Canada* [2015] SCC 5 decision last year is expected to be replaced by amendments exempting medically assisted dying from criminal liability.

So far lawyers have done less preparatory groundwork than some other professionals who will be affected, such as physicians, who have been busy for months trying to map out how they will navigate their new reality.

"I don't think that most practising lawyers have turned their minds to their professional involvement in this issue," said Dalhousie Schulich School of Law legal ethics professor Jocelyn Downie, a proponent. "Law schools and continuing legal education programs are going to need to develop and deliver modules on the topic," she said. Michael Waite of Calgary's Carbert Waite LLP, who chairs the Canadian Bar Association's national health law section, told *The Lawyers Weekly* "I can't speak for the whole profession, obviously, but I expect that lawyers are going to have a lot of getting-up-to-speed time when we see the legislation, and the regulation, because at this stage it's not crystal clear which way the government is going to go on a few of the main issues."

Parliament gave its first sign of what new legislation (expected to be introduced in May) might look like when the Liberal dominated joint Senate Commons committee on physician assisted dying made 21 recommendations for reform Feb. 25, after hearing from 61 witnesses and receiving 100 written submissions along the spectrum of opinions.

The majority Liberal and NDP committee members unanimously recommended that the government take an expansive approach to medical assistance in dying (a term they preferred over physician assisted dying) — including: leaving it as a matter to be decided between patients and two independent doctors (i.e. no prior review by a judge or other legal decision-maker); permitting advance directives, for example by people diagnosed with dementia or other grievous and irremediable conditions; permitting it for competent people with mental illnesses; as well as allowing it for "mature minors" — albeit with up to a three-year delay after the law is proclaimed, to enable further study of that explosive issue.

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> **Lisa Corrente**
> Torkin Manes LLP

Along with these controversial recommendations, the dissenting Conservative MPs denounced the Liberal/NDP position that doctors with conscientious objections should nevertheless be required to give patients who want assistance in dying "effective" referrals to non-objecting physicians — a measure the Conservatives called a global first.

Lisa Corrente, a health law practitioner with Toronto's Torkin Manes LLP, said the advent of national and provincial/territorial rules for the procedure (currently available only by individual court order) will generate considerable legal work.

"The *Carter* decision is relevant to lawyers from a range of practice areas, including...those representing health professionals and health facilities, mental health lawyers and medical negligence lawyers, [as well as] estates lawyers and human rights lawyers," she said. "If we take health law lawyers alone, you have those...who represent regulated health professionals like physicians, so you can probably expect that their clients are going to be going to them for advice in terms of how to comply with their professional obligations, and also turning to them when something allegedly goes wrong and [clients] may face some type of issue."

By way of example, Corrente cited a doctor who doesn't implement physician assisted dying within the context of the legal framework. "Then there may be implications on their licensing, in terms of are there going to be complaints made to their regulatory bodies? Are they going to face discipline in that regard? So the lawyers that represent health professionals are going to have to be up to speed on this new law."

Criminal lawyers could also be involved in such circumstances.

In addition, lawyers such as Corrente who advise hospitals, long-term care facilities and retirement homes where physician-assisted dying is likely to be provided, "are going to want to make sure that their professional staff is operating within the proper legal framework," she said.

Human rights lawyers and litigators are also likely to be involved. For example, many hospices are refusing to offer assistance in dying. Ottawa's largest palliative care hospital, the Catholic-run Bruyere Continuing Care, says it won't provide it to eligible patients nor allow it on its premises. Covenant Health, a Catholic organization which runs hospitals and long-term care homes in Alberta, has said the same, as have (mostly privately run) palliative care facilities in Quebec. However the parliamentary committee's majority report recommends that, in order to ensure effective and equal public access, governments should require all publicly funded health care facilities to provide it to eligible patients.

One of the most salient recommendations the majority Liberals and NDP members of the committee made was that people should be able to make a valid request in advance for assisted death, so long as they are capable and can give informed consent at the time of their request —which must be after they have been diagnosed with the grievous and irremediable condition for which they seek medical assistance in their death. To illustrate, a mentally competent person newly diagnosed with dementia could at that time make a valid advance directive seeking to be euthanized when certain conditions are met, for example, when she is no longer competent, no longer recognizes loved ones and is suffering intolerably because she

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can no longer talk, feed, walk nor toilet herself.

Speaking for himself, and not the Canadian Bar Association, Waite said advance directives — if Parliament opts to allow them — are "probably going to be one of the most difficult pieces of this to strike the right balance.

"One of my recommendations for wills and estates lawyers in their planning discussions — assuming that advance directives are going to be part of this — is to give some very clear thought, and have specific discussions with clients, about what are the triggers" to implement a request for euthanasia. "What is the point at which the person wants assistance in dying, so that a request is then made" on their behalf, he said. "In the directive, there needs to be some clear language to set the parameters as to when the request is going to be made. And that's going to be different for every patient and every condition."

Boiler-plate won't do, he stressed. "It's not a cookie-cutter approach…You need to be specific about at what point the patient believes their life will be 'intolerable' under the language of *Carter*."

He noted there could be apparent clashes between the advance directions of the patient and what his or her substitute decision-maker wants — for example disagreement that an incompetent patient's suffering has become intolerable. "I think, practically speaking, what would happen is the physicians would have to decide whether they are going to participate [in assisted dying] in those circumstances," Waite said. "I would hope that the legislation or the regulations, or at the very least, some of the policies from the College of Physicians and Surgeons, or the Law Society, will address this issue where you have a potential conflict between the written advance directive of the patient and the desires of a substitute decision-maker because, in Alberta for example, the *Personal Directives Act* has language in it that says if there is a written advance directive contained in a personal directive, health providers must, underline must, follow it, and I think there are going to have to be some subsequent amendments to various other pieces of legislation to address some of the unintended consequences."

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> Carbert Waite LLP

Downie said by e-mail she sees the parliamentary committee's report as "a very solid foundation upon which the government can build a good bill."

At the same time, "there are still major grey areas where the federal, provincial and territorial governments need to work together, and about which we've been given very little indication of the direction they are going to take," she noted. "So for example, if the procedural safeguards put in place by the provinces/territories are too onerous, we may see *Charter* litigation. If a province or territory decides to not have any service provided, as with abortion in P.E.I., we may see *Charter* litigation or action by the federal government under the *Canada Health Act*. We may also see litigation on the issue of conscientious objection."

She said she hopes that instead "people come together now and focus on developing a robust regulatory framework, with as much co-operation as possible, in the design to minimize the need and desire to resolve differences through the corrosive and expensive process of litigation."

Assisted dying foes say 'vulnerable Canadians' not protected

On the central question of when people should be eligible for medical assistance to die, the majority report of Parliament's committee on physician assisted dying tracks the Supreme Court's decision in *Carter v. Canada* [2015] SCC 5 closely in stipulating that there must be a "grievous and irremediable medical condition, including an illness disease or disability" as well as enduring suffering that is intolerable to the individual in the circumstances of his or her condition, and informed consent.

However in recommending that advance directives be permitted, and that medically assisted dying be made available to "mature minors", the majority ventured beyond *Carter* — which dealt only with grievously and irremediably ill adults who are enduring intolerable suffering and are capable of giving informed consent, at the same time as they request medical help in ending their life.

In their minority report, the Conservatives accused the majority of failing to abide by *Carter* and failing to protect "vulnerable Canadians and the *Charter*-protected conscience rights of health professionals."

Echoing the Canadian Medical Association and others, the Conservatives warned that issues around advance directives "are extremely complicated" and that "significantly more time" is needed to explore the legal and policy implications.

The Liberals and NDP acknowledged these complexities. But the majority noted their deep concern "that by excluding individuals who want access to (assisted suicide) but have lost competence, such individuals will be left to suffer or end their lives prematurely. This situation was exactly what the *Carter* decision sought to avoid," they said.

— Cristin Schmitz

Sabourin: Lay persons on judicial council 'reasonable idea'

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cil are ready for that discussion…. Maybe for just enriching the debate around the council table, I think it certainly sounds like a reasonable and positive idea, and why not explore it?"

The CJC is also asking Ottawa to change the *Judges Act* so that, pursuant to the statute, the reasonable costs of complaints, investigations and formal inquiries into alleged judicial misconduct under the act (whether those expenses are large or small) are funded not from the council's tight operating budget, but directly by the government from the consolidated revenue fund — as they are, for example, in Quebec, Sabourin said.

In the current and past fiscal year the commissioner for Federal Judicial Affairs had to go to Parliament, on behalf of the CJC, to get an extra $3.6 million (not all spent yet) to defray unforeseen legal and investigation costs involved in pursuing discipline proceedings against federal judges, the government's supplementary estimates show.

Sabourin said this happened because judicial discipline costs are, by their nature, highly variable and unpredictable. "The council conducting the peer review of allegations of misconduct against judges shouldn't have to go cap in hand to the executive branch to say, 'Please fund us for this quasi-constitutional obligation.' "

He explained that unlike before, since fiscal year 2014-2015 Ottawa requires the council to fund discipline matters out of its $1.6 million operational budget "until it runs out of money — and this is a position that the council thinks is untenable."

The current situation requires the CJC to try to anticipate each year what it is going to spend on discipline matters. But it wasn't able to accurately forecast which judicial conduct complaints, investigations and proceedings would arise, and it also found itself defending multiple taxpayer-funded court challenges to its process launched by judges facing formal inquiries.

Sabourin pointed out that in some years the CJC has no formal inquiries. But in 2014 and 2015 there were two or three going on at the same time — with costs running into the millions. The CJC isn't the only one who consequently had to ask for more cash: in 2015-2016 the commissioner for federal judicial affairs asked for close to $1 million extra to help pay for the (non-capped) taxpayer-funded legal fees the judges expended in defending themselves.

"Which case is going to be litigious? We don't know," said Sabourin. "And in many jurisdictions, it's acknowledged that the requirement for peer review of judicial misconduct allegations is necessary and that funding for that process must come out of the consolidated revenue fund."

In previous years, the government used to fund judicial discipline statutorily, but decided this was not the correct interpretation of the act and required the CJC to fund those expenses out of its budget. "At the time, there was an understanding with the government that they would take steps for legislative amendments to allow for statutory funding of discipline matters," Sabourin said. "It hasn't happened. It's something that needs to happen and it needs to happen soon."

He emphasized, "The need to ensure that there is stable funding is not just a nice-to-have — the council has expressed the view that's a quasi-constitutional requirement. The past minister [of justice Peter MacKay] acknowledged that this was so. And we hope that the current government can move fairly quickly to solve that issue. It's an important issue."