

CANADIAN ASSOCIATION OF MAID ASSESSORS AND PROVIDERS
CLINICAL PRACTICE GUIDELINE

The Clinical Interpretation of “Reasonably Foreseeable”

Purpose of the Clinical Practice Guideline

To assist assessors and providers in the clinical interpretation of “natural death has become reasonably foreseeable” in Bill C14, in order to provide consistency in interpretation across the country.

Note on terms

Prior to the passing of Bill C-14, medical assistance in dying (MAID) was generally called “physician-assisted dying”. This was the term used by the Supreme Court of Canada in *Carter*. The Federal Government adopted the term MAID to reflect the decision to allow nurse practitioners as well as physicians to provide the service.

In this document, physicians and nurse practitioners will be jointly referred to as “clinicians” except where the text applies only to one group.

Canadian Association of MAID Assessors and Providers (CAMAP)

CAMAP is a unique association of professionals involved in the assessment and provision of MAID in Canada. Founded in 2016, our mission is to support MAID assessors and providers in their work, educate the public and the health care community about MAID and to provide leadership on determining the highest standards and guidelines of care in MAID provision. CAMAP members strive to achieve the highest level of care for our patients and to model this care for a national and international audience.

We aim to work with governments in Canada at all levels, provincial medical and nursing licensing bodies, national medical colleges, national professional medical groups, medical protective associations, and national advocacy groups.

Key Recommendations

- 1. Clinicians should be aware that Bill C-14 makes MAID an end-of-life option for individuals whose natural deaths are reasonably foreseeable.**
- 2. As an aid to clarity, clinicians can consider interpreting “reasonably foreseeable” as meaning “reasonably predictable” from the patient’s combination of known medical**

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conditions and potential sequelae, whilst taking other factors including age and frailty into account.

3. Clinicians should not employ or support rigid timeframes in their assessments of eligibility for MAID. Bill C-14 contains no requirement for a prognosis having been made as to the length of time the patient has remaining.

Process

This Clinical Practice Guideline (CPG) was drafted by the CAMAP Committee on Standards and Guidelines. Amendments were suggested by the provider members of CAMAP (as those most experienced in MAID assessments) through online discussion. The resultant draft was re-examined by the Committee on Standards and Guidelines and finalized for publication. At the time of publication over 1300 medically assisted deaths have taken place in Canada. A much greater number of patients have been assessed for eligibility. This CPG represents the combined experience of clinicians who have carried out thousands of assessments.

Background

Bill C-14, *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*, received assent on June 17, 2016.

The Act, which is still customarily referred to as Bill C-14, was the Federal Government's response to the decision of the Supreme Court of Canada (SCC) in *Carter v Canada (Attorney General)*. The nine Supreme Court justices decided unanimously that physician-assisted death should be permitted for a competent adult person who (1) clearly consents to the termination of life and (2) has 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. No further constraints were imposed by the SCC.

The Federal Government placed additional restrictions within Bill C-14. It sought to strike the most appropriate balance between the autonomy of persons who seek medical assistance in dying on one hand, and the interests of vulnerable persons in need of protection and those of society on the other. It argued that these were necessary to prevent errors and abuse in the provision of medical assistance in dying, to affirm the inherent and equal value of every person's life, to avoid encouraging negative perceptions of the quality of life of persons who are elderly, ill or disabled, and to avoid undermining efforts at suicide prevention. Bill C-14 also had the stated aim of bringing about a consistent approach to medical assistance in dying across Canada.

This CPG concerns one part of Bill C-14, which requires of the person that their "natural death has become reasonably foreseeable".

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This CPG does not debate the inclusion of this criterion within Bill C-14. It only examines its meaning, which has caused considerable difficulty to clinicians particularly those carrying out assessments of eligibility for medical assistance in dying (MAID).

In order to discuss the meaning of “reasonably foreseeable” it is necessary to state all the criteria required for a person to be deemed to have a grievous and irremediable condition. Bill C-14 states (emphasis added):

A person has a grievous and irremediable medical condition only if they meet all of the following criteria:

- (a) they have a serious and incurable illness, disease or disability;
- (b) they are in an advanced state of irreversible decline in capability;
- (c) that illness, disease or disability or that state of decline causes them enduring physical or psychological suffering that is intolerable to them and that cannot be relieved under conditions that they consider acceptable; and
- (d) their 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.**

The term “reasonably foreseeable” is not one used in clinical medical practice. It is a legal term used mainly in civil law (although also found in the criminal law), and there it relates to risk, harm and the law of negligence. It has been defined in the following way:

A consequence is “reasonably foreseeable” if it could have been anticipated by an ordinary person of average intelligence as naturally flowing from his actions

The fact that clinicians have not previously had to consider the meaning of “reasonably foreseeable” in their clinical practice - except in the rather rarified context of wondering whether a court might find a previous action, allegedly negligent and the subject of a legal case, to have been reasonably foreseeable in terms of harm caused - means that it has proved very difficult for them to know how to approach this criterion. Clinicians have discussed this issue amongst themselves and have sought the advice of lawyers engaged by the Canadian Medical Protective Association (CMPA), and have also sought further clarification from the Government. The interpretation of “reasonably foreseeable” as it pertains to MAID has been examined by many different authorities - governmental, legal, and medical.

The intention of the law

The Government published a number of documents to help explain the wording of Bill

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C-14. The Legislative Background document was published prior to the passing of the Bill, in order to inform parliamentarians and the public as to the Government's intentions in the wording of the Bill. Regarding reasonable foreseeability it stated (emphasis added):

The criterion of reasonable foreseeability of death is intended to require a temporal but flexible connection between the person's overall medical circumstances and their anticipated death. As some medical conditions may cause individuals to irreversibly decline and suffer for a long period of time before dying, **the proposed eligibility criteria would not impose any specific requirements in terms of prognosis or proximity to death** (e.g. a six month prognosis as some U.S. states' medical assistance in dying laws require). **The medical condition that is causing the intolerable suffering would not need to be the cause of the reasonably foreseeable death.** In other words, eligibility would not be limited to those who are dying from a fatal disease. Eligibility would be assessed on a case-by case basis, with flexibility to reflect the uniqueness of each person's circumstances, but with limits that require a natural death to be foreseeable in **a period of time that is not too remote.**

A Glossary was also published. The wording is subtly different from that of the Legislative Background and should therefore be studied for further insights and nuances regarding the intentions of the Government. It states (emphasis added):

"Natural death has become reasonably foreseeable" means that there is a real **possibility** of the patient's death within a period of time that is not too remote. In other words, the patient would need to experience a change in the state of their medical condition so that it has become **fairly clear** that they are on an irreversible path toward death, even if there is no clear or specific prognosis. Each person's circumstances are unique, and life expectancy depends on a number of factors, such as the nature of the illness, and the impacts of other medical conditions or health-related factors such as age or frailty. **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.** While medical professionals do not need to be able to clearly predict exactly how or when a person will die, the person's death would need to be foreseeable in the **not too distant future.**

The Government also indicated that Kay Carter (of *Carter v. Canada*) would have qualified for MAID under the legislation – despite the fact that she did not have a terminal illness and, on

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actuarial tables, had years to live – and that others whose factual circumstances are similar to Ms. Carter’s should similarly qualify, clearly indicating that “not too distant future” could include a number of years.

Statements made by Jody Wilson-Raybould, the Minister of Justice, during the debates on Bill C-14 are helpful. In the meeting of the Senate on June 1, 2016 she was asked whether Kay Carter, whose daughter Lee was a plaintiff in the SCC case, would have been eligible under the terms of the Bill. Kay Carter’s grievous and irremediable condition was spinal stenosis, a condition which is not itself terminal. The Minister said:

Unlike some U.S. states that require specific prognosis and fatal disease, Bill C-14 **does not require a strict temporal or causal relationship between any single medical condition and the foreseeability of death.** This purposeful flexibility recognizes circumstances such as those of Kay Carter, who was in the final stages of her natural life even though she did not suffer from any single condition that was causing her death.

and later:

I am 100 per cent confident that Kay Carter would be eligible under Bill C-14 to access medical assistance in dying. The eligibility criteria and definition around "grievous and irremediable" are meant to be read in their totality, given all of the circumstances of a particular individual. In recognition of Kay Carter: She was 89 years of age, suffering intolerably from spinal stenosis and in a state of irreversible decline. Her death had become reasonably foreseeable by virtue of her age and frailty. The flexibility that we sought to inject in the eligibility criteria was to provide medical practitioners the ability to assess their patients' circumstances and to provide for that patient to be able to be eligible for medical assistance in dying. Kay Carter would have fulfilled that criteria.

At the time that the case commenced in the SCC Kay Carter was 87 years old. An average 87 year old Canadian female has a life expectancy greater than 6 years (<http://www.statcan.gc.ca/pub/84-537-x/2013005/tbl/tb11b-eng.htm>). Even at the age of 89, (her age when Kay Carter died in Switzerland which was referenced by the Minister), average female life expectancy is greater than 5 years. Whilst Kay Carter was frail, and thus could be expected to have had a life expectancy lower than the average for her age, it is certainly clear that the criterion of "reasonably foreseeable" does not mean 6 months, a year, or any other specified shorter period, which has at times been the interpretation suggested by some legal and medical authorities.

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In July 2016, after Bill C-14 had received assent, an Addendum to the Legislative Background document was posted on the Ministry of Justice website. It tackled the issue of the inclusion of criteria in the Bill that did not appear in the *Carter* decision, the constitutionality of these criteria, and in particular the issue of reasonable foreseeability. The content of the Addendum led to the CMPA in particular cautioning against confirming eligibility for MAID for people with prognoses longer than 6 to 12 months. This caution is, in the opinion of CAMAP, unwarranted. The wording of the Addendum needs to be examined carefully.

The Addendum noted that there are two categories of legislative regime for assisted dying around the world. The first category restricts MAID to individuals whose natural death is approaching, and most of these regimes limit eligibility to people with terminal diagnoses with a prognosis of 6 months or less. This category of regime exists in the six US jurisdictions that have passed laws permitting MAID (California, Colorado, District of Columbia, Oregon, Vermont and Washington). The second category disregards life expectancy as an issue and is aimed only at relieving unbearable suffering. This category of regime exists in Belgium, the Netherlands, and Luxembourg (the Benelux countries). The key part of the Addendum as far as practicing clinicians are concerned is the following (emphasis added):

The approach taken in Bill C-14 reflects the Government's assessment, based on the available evidence including international experience and informed opinion, that a broad eligibility model such as that in the Benelux countries would frustrate the Government's objectives, including in relation to the protection and promotion of the rights of vulnerable groups. It equally reflects the Government's assessment that, in view of the nature and seriousness of the risks, a prudent approach is warranted. This means adopting an approach that is closer to existing end-of-life models than to the Benelux approach – a model that restricts eligibility to individuals who are declining toward death, allowing them to choose a peaceful death as opposed to a prolonged, painful or difficult one. **At the same time, the flexible "reasonably foreseeable death" standard, and the absence of a specific "time remaining before death" requirement, make Bill C-14 broader than existing end-of-life regimes.**

Some CMPA lawyers' interpretation

Some lawyers retained for physicians by the CMPA have been advising physicians to adopt a very conservative stance. These lawyers have taken the position that even though the Addendum was published after Bill C-14 was passed, and was thus not available to members of Parliament when they voted, nonetheless it has power as a statement of the Government's intentions in the

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drafting of Bill C-14 and would be considered in a court of law. Some physicians are advised by counsel that the further a patient's prognosis extends beyond 6 months, the greater the risk to the physician in any subsequent court case where the physician's decision that death was "reasonably foreseeable" is challenged. The role of the CMPA is to be risk averse on behalf of physicians, not to provide guidance on best practice. The role of CAMAP is to advise on best practice. In MAID provision, best practice includes not denying MAID to a person who is eligible due to excessive caution on the part of the clinician.

It should be noted that whilst the Legislative Background document and the Addendum make clear that MAID in Canada is an end-of-life issue, the only points at which the period of 6 months is mentioned are to categorize the two types of existing MAID regime (in the Addendum), and to distinguish Bill C-14 from regimes employing rigid time frames by making clear that the law does not impose any specific requirements regarding prognosis. In fact, the only actual declarations regarding prognosis is that it should be "a period of time that is not too remote" and "in the not too distant future".

Medical health authorities and institutions

Some medical health authorities, particularly those which regulate the provision of MAID within facilities, have adopted time limits to prognosis. For example, some provincial and regional organisations automatically rule ineligible any patient with a prognosis of more than one year.

Clinical interpretation of "reasonably foreseeable"

"Reasonably foreseeable" is a term that can and should be subjected to clinical interpretation in a manner similar to that which occurs in any other clinical assessment. The term "reasonably foreseeable" rarely occurs in medical literature. Its inclusion within the criteria for MAID has therefore perplexed many clinicians and created anxiety given the possible severe consequences of applying an interpretation that a court of law might find erroneous.

However, most clinicians, in particular family physicians, palliative care physicians and others working with patients with terminal illnesses or with the elderly, do in fact already have an understanding of when a natural death is reasonably *predictable*. If the question "is the patient's natural death reasonably foreseeable?" is framed in a way that would be asked in other clinical situations, the meaning becomes clearer.

Thus, if asked whether a patient's death is "reasonably predictable" from the patient's combination of co-morbidities and age then clinicians would answer more readily. Once the patient's death and its manner has become reasonably predictable (as far as the factors leading to it are concerned) then it can be said to be reasonably foreseeable. Reasonably predictable does not mean that the clinician is confident that death will definitely ensue in this way, only that

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predicting that it will do so is reasonable.

The explanation within the Glossary (see page 3) is helpful here. It stated that *“Natural death has become reasonably foreseeable” means that there is a real possibility of the patient’s death within a period of time that is not too remote*” and *“it has become fairly clear that they are on an irreversible path toward death, even if there is no clear or specific prognosis”*. The use of “possibility” rather than “probability” and the term “fairly clear” shows that the law does not require certainty on the part of the clinician.

Clinicians use their clinical experience to interpret data every day. When uncertain, they turn to other clinicians expert in the relevant field. Although risk is involved in all such decisions, including the risk of making a decision that is later alleged to be negligent, clinicians do not turn to lawyers to help them understand the information on which they make the decision, they turn to other clinicians. Although a new service there is a growing number of clinicians who have become expert in the provision of MAID. The determination of reasonable foreseeability is now firmly within the clinical sphere and actual practice is determining what this term means.

It is clear that it was the intention of the Government to make the issue of whether death is “reasonably foreseeable” a clinical decision when Bill C-14 was drafted. As noted previously the Glossary stated that *“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”*. Clinicians can use their ordinary clinical experience to determine the meaning of “reasonably foreseeable”, by asking themselves if the natural death of the patient is reasonably *predictable* because they are on a trajectory toward death.

For example, faced with a 60 year old male with a new diagnosis of multiple sclerosis who has relatively minor symptoms and no significant co-morbidities but who is seeking MAID now on the basis of this diagnosis alone, the average life expectancy of 20 years for a man of his age and the obvious lack of any information regarding his future medical conditions would lead to the conclusion that his natural death is not reasonably predictable whether or not the patient feels that his clinically fairly minor symptoms are intolerable. He would also fail to qualify by not being in an advanced state of irreversible decline.

Conversely, a 95 year old female with pain from osteoarthritis which she finds intolerable, resistant to all medications that do not produce unacceptable side effects, who wishes MAID, should not be found ineligible just because the average life expectancy of a 95 year old Canadian female is over 3 years. It is not likely that the average clinician would regard such a patient’s death as “remote” or as being in the “too distant future”, the terms used in the Government’s explanatory publications. Her death is reasonably predictable.

So is that of a man diagnosed at age 30 with Huntington’s Disease, a relentlessly progressive

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disease (in a manner that multiple sclerosis often is not) leading to a severe movement disorder (chorea) and dementia, and death most commonly from pneumonia, heart disease or suicide. The prognosis at diagnosis is 10-20 years. There is no cure and frequently no effective treatment for the chorea. Once a patient with Huntington's Disease is suffering intolerably either physically or psychologically or both, and all treatments acceptable to the patient have failed, and they are in an advanced state of irreversible decline, and they request MAID, their reasonably predictable - in fact almost completely predictable - death from their condition should allow consideration of MAID regardless of prognosis. Furthermore, if this patient is suffering intolerably but has not yet lost capacity through cognitive decline then the almost complete predictability of dementia followed by death from his disease should allow for MAID before he loses eligibility due to a loss of capacity, whatever the estimated prognosis.

A clinician should decide:

1. Is it reasonable to predict that death will result from the patient's medical conditions and sequelae, taking into account age and other factors?
2. Is it likely that death will be "remote" or in the "too distant future" in the ordinary sense of these words?

If the answer to the first question is Yes, and the second question is No, then it is CAMAP's view that the criterion of a reasonably foreseeable natural death is satisfied.

Conclusion

Notwithstanding the fact that no case law regarding MAID in terms of Bill C-14 yet exists, and that little scientific evidence on the application of MAID in Canada has been published, CAMAP takes the view that the interpretation in this CPG of the criterion that "natural death has become reasonably foreseeable" will assist clinicians in determining whether or not a particular patient is eligible for MAID.

CAMAP notes:

1. The intention of Bill C-14 is to provide for an end-of-life MAID regime that balances the autonomy of persons who seek MAID and the interests of vulnerable persons and society.
2. Bill C-14 states clearly that there is no requirement for "a prognosis necessarily having been made as to the specific length of time [the patient] has remaining".
3. The only time requirement given by the Government in its explanatory publications (but not contained in Bill C-14 itself) is that the reasonably foreseeable natural death is "not too remote"

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and “in the not too distant future”

4. Each application is to be considered on a case-by-case basis.

Recommendations

1. Clinicians should be aware that Bill C-14 makes MAID an end-of-life regime for individuals whose natural deaths are reasonably foreseeable.

2. As an aid to clarity, clinicians can consider interpreting “reasonably foreseeable” as meaning “reasonably predictable” from the patient’s combination of known medical conditions and potential sequelae, whilst taking other factors including age and frailty into account.

3. Clinicians should not employ or support rigid timeframes in their assessments of eligibility for MAID. Bill C-14 contains no requirement for a prognosis having been made as to the length of time the patient has remaining.

4. If a patient’s eligibility remains uncertain, clinicians should seek the advice of a more experienced MAID provider. Access to such advice might be via personal contacts, local health authorities or their equivalent in the clinician’s province, organizations such as the provincial college of physicians and surgeons, or national organizations such as CAMAP. CAMAP has a members-only listserv for providers where advice can be sought.

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Resources

Bill C-14

[http://www.parl.gc.ca/HousePublications/Publication.aspx?
Language=E&Mode=1&DocId=8384014](http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=8384014)

Glossary

<http://www.justice.gc.ca/eng/cj-jp/ad-am/glos.html>

Legislative Background: Medical Assistance in Dying (Bill C-14)

http://www.justice.gc.ca/eng/rp-pr/other-autre/ad-am/p2.html#p2_2

Legislative Background: Medical Assistance in Dying (Bill C-14) - Addendum

<http://www.justice.gc.ca/eng/rp-pr/other-autre/addend/index.html>

Life expectancy table, Canada, females

<http://www.statcan.gc.ca/pub/84-537-x/2013005/tbl/tbl1b-eng.htm>

Life expectancy table, Canada, males

<http://www.statcan.gc.ca/pub/84-537-x/2013005/tbl/tbl1a-eng.htm>

Minister of Justice statements to the Senate, June 1, 2016

https://sencanada.ca/en/Content/Sen/chamber/421/debates/041db_2016-06-01-e