



Canadian Association of MAiD
Assessors and Providers



Association canadienne des évaluateurs
et prestataires de l'AMM

The Interpretation and Role of “Reasonably Foreseeable” in MAiD Practice

Canadian Association of MAiD Assessors and Providers

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[A note on the terms “Prescriber”, “Provider”, and “Assessor” appears at Appendix A].

Recommendations by CAMAP on the interpretation and role of “reasonably foreseeable” in the practice of medical assistance in dying (MAiD)

1. Clinicians need not change the interpretation of “natural death has become reasonably foreseeable” from that used prior to the legislative amendments of March 2021 (the passing of Bill C7).
2. Clinicians may interpret “reasonably foreseeable” as meaning “reasonably predictable”. This may mean that there is sufficient temporal proximity to death (it is coming soon), and/or that the trajectory towards death is predictable from the person’s combination of known medical conditions and potential sequelae. In clinical circumstances this would include the consideration of a person’s individual circumstances such as age and frailty.
3. Clinicians need not employ or support rigid timeframes in their determination of whether a person has a reasonably foreseeable natural death (RFND). The law does not require a prognosis to be given as to the length of time the person has remaining. For greater clarity, “natural death has become reasonably foreseeable” does not mean that the person must be terminally ill or expected to die within a set period such as 6 or 12 months.
4. A person may meet the “reasonably foreseeable” criterion if they have demonstrated a clear and serious intent to take steps to make their natural death happen soon or to cause their death to be predictable. Examples might include stated declarations to refuse antibiotic treatment of current or future serious infection, to stop use of oxygen therapy, to refuse turning if they have quadriplegia, or to voluntarily cease eating and drinking.
5. If, after an assessment, a Provider is uncertain about the foreseeability of a person’s natural death, the Provider may consult with the other Assessor or seek the advice of another MAiD clinician with additional experience or expertise.
6. If the Provider deems a person eligible for MAiD but not to have a reasonably foreseeable natural death the person should be informed that legislation requires additional safeguards to be satisfied before MAiD can take place. These safeguards should be explained to the person.
7. It is the Provider who has the responsibility to assess RFND. The law does not require the Assessor to assess RFND although in most provinces the Assessor is required to give their opinion. The law does not require that the Provider and the Assessor agree on the issue of RFND. However, CAMAP’s recommendation is that if the Provider is of the opinion that the person has an RFND but the Assessor disagrees, the Provider should consider seeking a third opinion from another clinician.

8. If a person disagrees with the finding that their natural death is not reasonably foreseeable they should be told that they have the right to seek the opinion of an additional assessor or assessors.

9. If there are uncertainties regarding the application of legislation to a specific case, it is reasonable to seek medico-legal advice from the Canadian Medical Protective Association (CMPA) or the Canadian Nurses Protective Society (CNPS).

Introduction

Bill C-14, *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*, received royal assent on June 17, 2016. In June 2017 the Canadian Association of MAiD Assessors and Providers (CAMAP) published its clinical practice guideline (CPG) *The Clinical Interpretation of “Reasonably Foreseeable”*. It remains the only national practical guidance for Canadian clinicians regarding the meaning of the phrase “reasonably foreseeable”. The purpose of the CPG was to assist assessors and providers of medical assistance in dying (MAiD) in the clinical interpretation of “natural death has become reasonably foreseeable” in order to provide consistency in interpretation across the country.

Since the publication of the CPG, three events have taken place that have significantly impacted the interpretation and role of the words “reasonably foreseeable” in medical assistance in dying (MAiD) in Canada. The first was the A.B. case that went before the Ontario Superior Court of Justice in 2017. The second was the adjournment of the Lamb case in British Columbia, and the third was the passing of Bill C-7 in 2021. Bill C-7 removed the requirement that natural death be reasonably foreseeable as an eligibility requirement for MAiD. Bill C-7 also introduced additional safeguards for a person whose natural death is not reasonably foreseeable, therefore it is still important for clinicians to be confident in their interpretation of the term “reasonably foreseeable”. This paper includes explanations of the significance of these three events and why, while the role of RFND has changed, there need not be any change in the interpretation of “reasonably foreseeable” going forward.

The evolution of the meaning of “reasonably foreseeable”

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 in 2015 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 (3) causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition and that cannot be relieved by means acceptable to the person.

Bill C-14 required the additional criterion, amongst others, that a person’s natural death be reasonably foreseeable for them to be eligible for MAiD. The SCC had not included this criterion. This additional restriction caused considerable difficulty for clinicians, particularly those carrying out assessments of eligibility for MAiD, as they were not sure what it meant and therefore when its condition was met. The term “reasonably foreseeable” is not a clinical term but a legal term used mainly in civil law. It relates to risk, harm and the law of negligence. In those contexts, 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 [sic] actions.

This definition was obviously not relevant in the context of MAiD.

The fact that clinicians had not previously had to consider the meaning of “reasonably foreseeable” in their clinical practice meant that it proved very difficult for them to know how to approach this criterion. In the months after the passing of Bill C-14, clinicians discussed the issue amongst themselves and sought the advice of lawyers engaged by the Canadian Medical Protective Association (CMPA) and the Canadian Nurses Protective Society (CNPA). Clarification was also sought from the Federal Government, provincial colleges of physicians and surgeons, and the courts.

Sources of Guidance

1. CAMAP Guidelines (2017)

The Clinical Interpretation of “Reasonably Foreseeable”, CAMAP’s guideline of 2017, provides the following 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. Once a 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 predicting that it will do so is reasonable.

CAMAP recommended that clinicians should define “reasonably foreseeable” as meaning “reasonably predictable” from the person’s combination of known illnesses and physical frailties (age-related and otherwise). The guideline advised that 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, CAMAP’s view was that the criterion of a reasonably foreseeable natural death had been satisfied.

2. A.B. v. Canada

The patient (A.B.) was a 77-year-old who did not have a terminal diagnosis but rather was in an advanced state of incurable, irreversible, worsening illness (degenerative osteoarthritis) with excruciating pain and no quality of life.

Justice Perell offered a declaration of statutory interpretation. His language confirmed that natural death **need not be imminent** and what is a reasonably foreseeable death is a person-specific medical question to be made without necessarily making (but not necessarily precluding) a prognosis of the remaining lifespan. In doing so, he firmly placed the

determination of whether or not a person's natural death is reasonably foreseeable in the field of medical rather than legal practice.

Justice Perell cited a speech made by the Attorney General of Canada conceding that the language of C-14 does not require that people be dying from a terminal illness, disease or disability but rather is connected to all of a particular person's medical circumstances.

As a matter of statutory interpretation, Justice Perell said that "a person in circumstances like those in which A.B. finds herself, is a person in circumstances that fall within the meaning of s.241.2(2)(d) of the Criminal Code."

The federal and Ontario governments were both respondents in the A.B. case; neither appealed the ruling.

3. Lamb v. Attorney General (Canada)

In 2019, a court challenge by Julia Lamb, a woman suffering from spinal muscular atrophy, was adjourned when a federal government expert stated the following in her expert report submitted to the court:

If Ms. Lamb were to be assessed now, and she indicated a clear intent to stop BiPaP [bilevel positive airway pressure] and refuse treatment when she next developed pneumonia, it is likely that she would be found to meet the threshold for having a reasonably foreseeable natural death... She would not be required to develop an episode of pneumonia before being approved for MAiD. Most [MAiD assessors] would consider it sufficient that she expresses certain intent to refuse treatment when this occurs, as she will inevitably develop a chest infection in the near future.

In a letter to the court, the Attorney General of Canada conceded the expert's interpretation, stating "There is no conflict in the evidence about whether the plaintiff, Julia Lamb, may qualify for MAiD in her present condition". Thus, expressing a clear intent to stop a life-sustaining intervention is sufficient: stopping it would not be necessary.

4. Bill C-7

The judgement in *Truchon and Gladu v. Attorney General (Canada) and Attorney General (Quebec)* found that the inclusion of the requirement that a person's natural death be reasonably foreseeable (in Quebec, "at the end of life") was inconsistent with the Canadian Charter of Rights and Freedoms (sections 7 and 15) and struck it from the Criminal Code. The federal and Quebec governments chose not to appeal the decision. Instead, in response, the federal government introduced Bill C-7 which was passed in March 2021. In addition to other changes not covered in this paper (including the number of independent witnesses required when a request for MAiD is signed, the removal of the 10 day waiting period, and the introduction of a Waiver of Final Consent), Bill C-7 removed RFND as an eligibility criterion for MAiD in Canada but retained it as the deciding factor as to which procedural safeguards must

be satisfied to access MAiD. Whether or not a person's natural death is reasonably foreseeable, a set of procedural safeguards apply to all persons eligible for MAiD. If the person's natural death is not reasonably foreseeable, an additional set of procedural safeguards apply. These additional safeguards include:

- i. ensuring that if neither the Provider nor the Assessor have expertise in the condition causing the person's suffering, one of them consults with a medical practitioner or nurse practitioner who has that expertise and shares the results of the consultation between them;
- ii. ensuring that the person seeking MAiD "has been informed of the means available to relieve their suffering including, where appropriate, counselling services, mental health and disability support services, community services and palliative care and has been offered consultations with relevant professionals who provide those services or that care";
- iii. ensuring that both the Provider and the Assessor "have discussed with the person the reasonable and available means to relieve the person's suffering" and that they "agree with the person that the person has given serious consideration to those means"; and
- iv. ensuring that there are at least 90 clear days between the day on which the first assessment begins and the day on which MAiD is provided (unless loss of capacity is imminent in which case this can be shortened).

In view of the inclusion of the presence or absence of an RFND as determinative of which procedural safeguards apply, a clear understanding of the meaning of RFND remains important for MAiD practitioners.

Nothing in Bill C-7 modified the meaning of "reasonably foreseeable." Its role changed from an eligibility criterion to the determining factor for which procedural safeguards are applicable but its meaning did not. This was confirmed in an email on February 27, 2020, from the Ministry's press secretary to a journalist at *The Canadian Press*. It said:

The definition of reasonable foreseeability of natural death has not changed in the new legislation. Reasonable foreseeability of natural death is a familiar concept for providers after four years of providing the service. By retaining the same language in Bill C-7, practitioners will be using a standard that is already familiar to them as a means to determine which safeguards to apply.

Deciding whether a person has a reasonably foreseeable natural death

It is important to note that the *eligibility* requirements for MAiD are the same for individuals both with and without an RFND. However, new *safeguards* were introduced by Bill C-7 for a person who does not have an RFND.

It may not be clear at the outset of an assessment whether a person has an RFND. Clinicians should be aware of this and be prepared to modify or extend an assessment or require that further meetings take place with the person if there is uncertainty.

It is the Provider who has the responsibility to assess RFND. The law does not require the Assessor to assess RFND. However, the Assessor will in most cases come to an opinion as to whether the person has an RFND or not and in most provinces the Assessor is required to give their opinion.

The law does not require the Provider and the Assessor to agree on whether the person has an RFND. The Criminal Code [in subsection 241.2(3.1)(e)] states only that the Assessor must confirm eligibility for the person to be allowed to receive a medically-assisted death.

On its webpage “Medical assistance in dying: Implementing the framework”, the Government of Canada states:

Disagreement between MAiD assessors

The legislation does not expressly state that the two assessors must agree whether a patient's death is reasonably foreseeable. However, the assessors should discuss their respective views on this question. They can then appropriately determine which set of safeguards to apply in a given case.

The medical community may develop guidance for practitioners in this situation regarding how to reach an agreement, such as:

- seeking an opinion from a third assessor
- consulting with another practitioner familiar with the patient's condition

Thus the Provider may proceed with MAiD under the safeguards for a person with an RFND and without the additional safeguards required for a person who does not have an RFND even if the Assessor is of the opinion that the person's natural death is not reasonably foreseeable. However, CAMAP's recommendation is that if the Provider is of the opinion that the person has an RFND but the Assessor disagrees, the Provider should consider seeking a third opinion from another clinician.

Upon finding that a person does not have an RFND but meets the eligibility criteria, it should be explained to them that the clinician is of the opinion that they are eligible for MAiD but that additional procedural safeguards may have to be met. These should be described and discussed.

If the Provider is uncertain about the foreseeability of the person's natural death the person should be informed that this will be discussed with another clinician. If uncertainty remains, then the opinion of further clinicians experienced in MAiD assessments may be sought. Members of CAMAP may speak with a CAMAP MAiD Mentor or Consultant (details can be found on the CAMAP website).

Conclusion

In 2017 *The Clinical Interpretation of “Reasonably Foreseeable”* assisted clinicians in the interpretation of the phrase “reasonably foreseeable” by recommending that the term should be understood as meaning “reasonably predictable”. It also recommended that clinicians need not employ rigid timeframes in their assessments of RFND as the Criminal Code contains no requirement for a prognosis as to the length of time the person has remaining. The experience gained by clinicians in the assessment of the tens of thousands of people who have requested MAiD since 2016 has confirmed this approach. The findings of the A.B. case have further validated this interpretation. The adjournment of the Lamb case has added to the understanding that “reasonably predictable” is a permissible interpretation of “reasonably foreseeable” and that expressing a clear intent to stop a life-sustaining intervention is sufficient to meet the qualification of reasonably foreseeable; stopping it is not required.

Nothing in Bill C-7 modified the meaning of “reasonably foreseeable.” The passing of Bill C-7, with the removal of RFND as an eligibility requirement and the introduction of additional safeguards for patients who do not have an RFND, does not require any change in the interpretation of “reasonably foreseeable”. It remains important for physicians to understand what “reasonably foreseeable” means and to determine whether a person has an RFND as this will determine whether additional procedural safeguards apply.

Appendix A

Terminology

The Criminal Code uses the term **Prescriber** for the practitioner who provides MAiD. In MAiD practice the Prescriber is almost always termed the **MAiD Provider** or **Provider**.

In the Criminal Code the second practitioner who determines eligibility is termed the **Assessor**.

Some confusion may result as both practitioners carry out an assessment and so when referred to together are often called “the assessors”.

In this document:

MAiD Provider or Provider: the practitioner who will carry out MAiD if the person is found eligible and chooses to have MAiD.

Assessor: the other practitioner who determines the eligibility of the person for MAiD.

Assessors: in almost all cases this means the Provider and the Assessor together. On occasion it may mean one or more practitioners who have assessed the person other than the Provider. The context will make it clear if this is the meaning.

Clinician: any physician or nurse practitioner. This term therefore includes a physician or nurse practitioner discussing MAiD with a person, whether or not the clinician will be one of the Assessors.

It should be noted that in some literature the Assessor is referred to as the “second assessor”. This term is not used here as there is no requirement in the law that the Assessor must assess the person only after the Provider has done so.

Resources

A.B. v. Canada (Attorney General), 2017 ONSC 3759
<http://eol.law.dal.ca/wp-content/uploads/2017/06/20170619152447518.pdf>

Bill C-14
<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=8384014>

Bill C-7
<https://www.parl.ca/DocumentViewer/en/43-2/bill/C-7/royal-assent>

Glossary to Bill C-14
<http://www.justice.gc.ca/eng/cj-jp/ad-am/glos.html>

Lamb and BCCLA v. AGC: adjournment
https://bccla.org/wp-content/uploads/2019/09/2019-09-06B-LT-Court_adjournment-of-trial.pdf

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>

Legislative Background: Bill C-7 - Government of Canada's Legislative Response to the Superior Court of Quebec Truchon Decision
<https://www.justice.gc.ca/eng/csj-sjc/pl/ad-am/c7/c7-eng.pdf>

Medical assistance in dying: Implementing the framework
<https://www.canada.ca/en/health-canada/services/medical-assistance-dying/guidance-reporting-summary/implementing-framework.html#a3>

Minister of Justice statements to the Senate, June 1, 2016
https://sencanada.ca/en/Content/Sen/chamber/421/debates/041db_2016-06-01-e

The Clinical Interpretation of "Reasonably Foreseeable" - CAMAP
<https://camapcanada.ca/wp-content/uploads/2019/01/cpg1-1.pdf>

Truchon and Gladu judgement (French)
<http://eol.law.dal.ca/wp-content/uploads/2019/09/500-17-099119-177.pdf>

<https://www.canlii.org/en/qc/qccs/doc/2019/2019qccs3792/2019qccs3792.html?searchUrlHas=AAAAAQANdHJ1Y2hvbiBnbGFkdQAAAAAB&resultIndex=1>