Time to clarify Canada's medical assistance in dying law

D.A. (Gus) Grant LLB MD CCFP Jocelyn Downie CM FRSC FCAHS SJD

It has now been a full 2 years since Parliament passed legislation permitting medical assistance in dying (MAID). The medical and nursing professions have responded, with physicians and nurse practitioners across the country stepping forward to fulfil requests to end the lives and suffering of eligible patients. Unfortunately, the confusion that remains on certain questions of patient eligibility and procedural safeguards has given rise to variation in the interpretation of the law. Amidst the inconsistency, legally eligible patients are possibly being denied MAID or unnecessarily experiencing extended periods of intolerable suffering.

Clarifications

Here we focus on 3 aspects of the MAID legislation about which there appears to be confusion: MAID eligibility of those with mental illness as the sole underlying medical condition and the interpretations of *imminent loss of capacity* and *reasonable foreseeability of natural death*.[1] From our legal and regulatory perspective, these aspects can be clarified with confidence.

Mental illness as the sole underlying medical condition. There is a need to address whether individuals whose sole condition is a mental disorder are eligible for MAID. Some say that such patients are automatically excluded; others say that they are not. The latter are correct. The patient with refractory anorexia nervosa who lives with enduring, intolerable, and irremediable suffering, and who is in an advanced state of decline, is eligible. Sadly, in regions of this country, such patients would be denied access to MAID.

The source of the confusion is apparent. The legislation identifies 3 areas for further study: mental illness as a sole condition; the eligibility of mature minors; and the role, if any, for advanced requests.[1] However, the legislation does not treat these 3 areas equally; it specifically excludes eligibility for mature minors and any role for advanced requests. In contrast, no provisions in the legislation exclude patients whose sole underlying condition is mental illness.

To presume, as many have, that mental illness is implicitly excluded is both wrong in law and counter to the legislative intent. Comfort has come from the highest office; in response to a direct query on this issue, the federal Minister of Justice has confirmed in writing that it was not the government's intent to exclude from eligibility individuals whose sole underlying condition is a mental illness.[2] Although the cases might be few, a patient with mental illness who otherwise meets all the criteria set out in the legislation, such as the described patient with anorexia, is eligible for MAID.

Loss of capacity is imminent. The phrase *loss of capacity is imminent* needs to be clarified. There is a mandatory 10-day waiting period between the request for and receipt of MAID.[1] The legislation also requires that MAID be provided only to patients capable of giving an informed consent when making the request and immediately before the provision of MAID.

The unintended consequence, clearly counter to the intent of the legislation, is that the suffering of eligible patients might be being extended rather than relieved. Eligible patients might be refusing pain medication out of fear it will compromise their capacity to give the final consent to MAID. The result would be 10 days of untreated suffering. Other eligible patients might be being roused from a sedated and comfortable state to a state of suffering to give the final consent.

Both these scenarios are cruel and unnecessary. They are unnecessary because there is a provision permitting the waiver of the 10-day waiting period where "loss of capacity is imminent," and this provision can and should be interpreted as meaning that a patient's loss of capacity is imminent whether threatened by 1) the underlying condition alone or in concert with other natural conditions, or 2) medically appropriate treatment of the patient's medical condition and symptoms. Thus, if capacity-threatening kinds or levels of drugs (eg, deep sedation) are urgently required to adequately manage the patient's suffering, then the patient's loss of capacity can be considered imminent.

Reasonably foreseeable natural death. Finally, direction is needed on the troublesome provision that requires that a patient's "natural death has become reasonably foreseeable."[1] Far more precise language was available to the drafters of the legislation. They could have stipulated that the cause of death must be predictable or that the patient must be expected to die within a specific length of time. Over the objections of many voices,[3] the opaque phrase *reasonably foreseeable* remains in the legislation, giving rise to apprehension and inconsistency of interpretation.

This vague language has left space for a number of interpretations, with a real effect on patients. There is no consensus at work, and discussions about patient status (eg, patient must be at the end of life) and

appropriate length of prognosis (eg, 12 months or less, or 6 or 10 years) continue. The result is that from one province to another (or even one doctor to another), a patient with a particular constellation of medical circumstances will be declared eligible for MAID, while another in identical circumstances will not.

One common sticking point can be overcome. On the face of the legislation, temporal proximity (ie, that the patient is to die within a certain time frame) is not a necessary condition of "reasonably foreseeable." The "reasonably foreseeable" provision of the act contains the statement "without a prognosis necessarily having been made as to the specific length of time that they have remaining."[1] Even more tellingly, the French version of the provision reads "sans pour autant qu'un pronostic ait été établi quant à son espérance de vie."[1]

The only court decision we have on this issue (the 2017 Superior Court ruling on *A.B. v Canada*[4]) states the following:

> 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 [and] in formulating an opinion, the physician need not opine about the specific length of time that the person requesting medical assistance in dying has remaining in his or her lifetime.[5]

Based on a review of the legislation itself and the only court decision we have, it is reasonable to conclude that temporal proximity can be sufficient for concluding natural death is reasonably foreseeable, but it is not required. A predictable cause of natural death can also be sufficient for concluding natural death is reasonably foreseeable, but it is also not required. In other words, natural death will be reasonably foreseeable if a medical or nurse practitioner is of the opinion that a patient's natural death will be sufficiently soon *or* that the patient's cause of natural death has become predictable.

If you are interested in full justification of the interpretations we have provided in this article, please review Downie and Chandler's 2018 report.[5]

Conclusion

Regarding the aspects of the MAID legislation that we have discussed here—the question about eligibility of those with mental illness as the sole underlying medical condition and the meaning of the phrases *imminent loss of capacity* and *reasonable foreseeability*—the time for confusion has passed. It is time for all involved, including the federal government, regulatory authorities, health authorities, professional associations, and provinces and territories, to provide clear guidance to health care providers and their patients. It is in the public interest for them to do so.

Dr Grant is Registrar and CEO of the College of Physicians and Surgeons of Nova Scotia in Halifax. **Dr Downie** is University Research Professor in the Schulich School of Law and the Faculty of Medicine at Dalhousie University in Halifax.

Competing interests
None declared

Correspondence
Dr D.A. (Gus) Grant; e-mail **dagrant@cpsns.ns.ca**

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