Bill C-7: Addressing the Gaps in the Regulation of Medical Assistance in Dying (MAID)

Medical assistance in dying, or MAID, is a controversial topic that has generated much constitutional debate and litigation in Canada. For some people, providing legal access to MAID enhances the personal autonomy and dignity of people with serious illnesses, giving them "control over the manner of … [their] death."[1] For others, though, it's a dangerous medical advancement that "devalues the … lives" of already marginalized people and "renders them vulnerable to unwanted assistance in dying."[2] In 2016, the Canadian Parliament weighed in on this debate when it legalized MAID for people who meet certain eligibility requirements. In 2021, the government then enacted Bill C-7 to address what it regarded as holes in the 2016 legislation.[3]

The History of MAID in Canada

Helping a person to commit suicide was, and still is, illegal under section 241(1)(b) of the *Criminal Code*.[4] However, through a series of amendments to the *Criminal Code*, exemptions were made in 2016 for medical practitioners and healthcare providers who provide MAID in accordance with certain legislative guidelines.[5]

The story of these amendments began in 1993, when the Supreme Court of Canada ruled on a case called *Rodriguez v British Columbia (AG)*. In *Rodriguez*, the Court upheld the original *Criminal Code* provisions, which prohibited MAID under all circumstances.[6] By a 5-4 majority, the Court rejected the claim that the *Criminal Code* provisions unjustifiably infringed various *Charter* rights, including the rights contained in sections 7, 12, and 15 of the *Charter*. The Court held that even if section 15 — the equality rights section of the *Charter* — had been infringed, the blanket prohibition on assisted suicide was still legally justified because it protected vulnerable people who are at risk of being pressured into ending their lives prematurely.[7]

Just over two decades later, the Supreme Court unanimously overturned *Rodriguez* in *Carter v Canada (AG)*, recognizing that people who are "grievously and irremediably ill … may be condemned to a life of severe and intolerable suffering"[8] without medical assistance in dying. In arriving at this decision, the Court considered the public's evolving sentiments regarding MAID, as well as international precedents that had legalized MAID in other places since the *Rodriguez* ruling. In light of these factors, the Court held that the blanket prohibition of MAID unjustifiably violated section 7 of the *Charter*, which protects each individual's right not to be deprived of life, liberty, or security of the person in a way that breaches "the principles of fundamental justice."[9] Having dealt with the case under section 7, the Court found it unnecessary to consider whether the prohibition also violated

the equality rights section of the *Charter* (section 15).[10]

In a rare move, then, the Supreme Court of Canada had overturned its previous ruling in *Rodriguez*. Rather than striking down the blanket prohibition on MAID immediately though, the Court issued a suspended declaration of invalidity so that Parliament would have time to create its own regulatory framework.[11] This prompted Parliament to pass Bill C-14, which created exemptions to the blanket prohibition by allowing medical professionals to administer MAID in accordance with strict safeguards and eligibility requirements.[12] If these requirements were met, medical practitioners would not be held criminally responsible for providing MAID.[13]

Although Bill C-14 opened the door to MAID in Canada, its eligibility requirements and safeguards were still subject to challenges under the *Charter of Rights and Freedoms*. These challenges were at the heart of a 2019 Quebec Superior Court case, *Truchon c Procureur général du Canada*.[14]

Charter Challenges to Bill C-14

The *Truchon* case brought up two main *Charter* challenges under sections 7 and 15. These challenges were directed at the requirement that a person's natural death must be "reasonably foreseeable" before they will be eligible for MAID.

The Section 7 Challenge

In *Truchon,* the Superior Court found that the "reasonably foreseeable" requirement violated the liberty and personal security of people who are suffering from grievous and irremediable illnesses but are barred from accessing MAID because their natural deaths are not reasonably foreseeable.[15] More specifically, the requirement infringed on the liberty of such individuals because it prevented them from making important medical choices,[16] and it threatened their security of the person by potentially prolonging their suffering.[17] While such infringements are permissible under section 7 if they are found to be "in accordance with the principles of fundamental justice," the Court decided that this was not the case here, since the infringements were overbroad and grossly disproportionate to the law's intended purpose: namely, the goal of protecting vulnerable people from being taken advantage of.[18]

As with other *Charter* violations, a section 7 violation will be upheld by a court if it is shown to be "demonstrably justified in a free and democratic society"[19] (this possibility is laid out in section 1 of the *Charter*). To determine whether a violation is "demonstrably justified," courts use a two-step test known as the *Oakes* test, which requires that the violation serves a "pressing and substantial objective" and is "proportionate."[20] In *Truchon*, the Court concluded that the violation of section 7 could not be saved under the *Oakes* test. In the Court's view, the violation was not "proportionate" because it did not "minimally impair" the claimants' section 7 rights,[21] and because the law's potential benefits did not outweigh its deleterious effects on seriously ill people whose deaths are not reasonably foreseeable.[22]

The Section 15 Challenge

The claimants in *Truchon* also asserted that the "reasonably foreseeable" requirement violated their section 15 equality rights. The claimants argued that the law discriminated against people based on the nature of their disability or illness. While a person with grievous and irremediable physical disabilities would be unable to legally obtain MAID if their natural death wasn't reasonably foreseeable, access *could* be legally provided to a person with comparably serious disabilities whose natural death *was* reasonably foreseeable. The Court agreed with the claimants that this constituted a violation of section 15 of the *Charter* and could not be saved under the *Oakes* test.[23]

Parliament's Response: Bill C-7

In 2021, in response to the *Truchon* ruling, the Canadian government introduced Bill C-7.[24] This Bill modified the eligibility requirements and safeguards for accessing MAID in an attempt to address the section 7 and section 15 *Charter* violations that were recognized in *Truchon*. To do this, Bill C-7 expanded legal MAID access by creating two sets of safeguards.[25]

On the one hand, for people whose deaths are reasonably foreseeable, Bill C-7 removed the final consent requirement and allowed them to give consent to MAID in advance (of course, they can still withdraw consent anytime).[26] This addressed concerns about people choosing to end their lives early due to fear of losing their capacity to consent.

On the other hand, for people whose deaths are not reasonably foreseeable, Bill C-7 applied slightly more stringent safeguards while now allowing them to legally access MAID. For example, Bill C-7 created a mandatory 90-day assessment period for people whose deaths are not reasonably foreseeable — a requirement that doesn't exist for people whose deaths *are* naturally foreseeable.

For many, these amendments mark important step in rectifying the section 7 and 15 infringements recognized in *Truchon*.[28] While the safeguards are different for people whose natural deaths are not immanent, many more people who are suffering from grievous and irremediable illnesses will now have legal access to MAID, regardless of the nature of their illness.[29]

Did Bill C-7 Solve the Issues With MAID in Canada?

Although Bill C-7 addressed some of the more prevalent *Charter* challenges to MAID laws, it is still possible for new *Charter* challenges to come up in the future. For example, MAID is currently unavailable to those who are suffering solely from mental illness, which could be framed as a violation of equality rights under section 15 of the *Charter* insofar as it entails another distinction based on the nature of a person's illness or disability. Whether MAID laws in Canada will be subject to further constitutional challenges will accordingly depend, in part, on whether new legislation opens up access to MAID for people suffering solely from mental illness (note: new legislation *is* expected by the end of March 2023).

[1] *Carter v Canada (AG)*, 2015 SCC 5 at para 10 [*Carter*].

[2] *Ibid* at para 10.

[3] *Bill C-7: An act to amend the Criminal Code (medical assistance in dying)* (September 2021), online: *Charter Statements* <https://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c7.html>.

[4] *Criminal Code*, RSC 1985, c C-46, s 241(1)(b).

[5] *Ibid* at s 241(2).

[6] *Rodriguez v British Columbia (AG)*, [1993] 3 SCR 519, 107 DLR (4th) 342.

[7] *Ibid.*

[8] *Carter*, *supra* note 1 at para 1.

[9] *Ibid.*

[10] *Ibid* at para 93.

[11] *Ibid* at para 128.

[12] Bill C-14, *An Act to amend the Criminal Code and to make amendments related to other Acts (medical assistance in dying)*, 1st Sess, 42nd Parl, 2016, (assented to 16 June 2016) SC 2016 c 3.

[13] *Ibid* at cl 1.

[14] *Truchon c Procureur général du Canada*, 2019 QCCS 3792 [*Truchon*].

[15] *Ibid* at para 522.

[16] *Ibid* at para 527.

[17] *Ibid* at para 528.

[18] *Ibid* at paras 536-544.

[19] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 1.

[20] *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.

[21] *Truchon*, *supra* note 14 at para 617.

[22] *Ibid* at para 637.

[23] *Ibid* at para 690.

[24] Bill C-7, *An Act to amend the Criminal Code (medical assistance in dying)*, 2nd Sess, 43rd Parl, 2021, (assented to 17 March 2021) SC 2021 c 2.

[25] Bill C-14, *supra* note 12 at cl 1(3.1).

[26] *Criminal Code, supra* note 4, s 241.2(3).

[27] *Ibid*, s 241.2(3.1).

[28] Dying With Dignity, "A Triumph of Compassion and Choice: Bill C-7 Receives Royal Assent" (March 17, 2021), online: *Dying With Dignity* <https://www.dyingwithdignity.ca/blog/bill_c7_royal_assent/>.

[29] However, it should be noted that there is still strong opposition to Bill C-7 and MAID laws in general, and some individuals and organizations believe that MAID inherently devalues the lives of people suffering from disabilities. See PRESS RELEASE: MAiD Bill violates equality rights of people with disabilities (February 2020), online: *Inclusion Canada* <https://inclusioncanada.ca/2020/02/28/medical-assistance-in-dying-bill-violates-equality-rights-of-people-with-disabilities-it-must-be-stopped/>.