



## Upcoming Changes to MEDICAL ASSISTANCE IN DYING

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### WHAT SASKATCHEWAN PHYSICIANS CAN EXPECT

*This message is being distributed to Saskatchewan physicians to describe the perspective of the College of Physicians and Surgeons on access to Medical Assistance in Dying (MAID) after June 6.*

#### Summary

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- 1) There is currently no legislation which governs Medical Assistance in Dying (MAID) (formerly called Physician-Assisted Dying)
  - 2) It is not clear when legislation will come into effect or whether the legislation passed by the House of Commons will be the final form of the legislation, which currently is before the Senate.
  - 3) The College policy document *Physician-Assisted Dying* provides guidance to and expectations of physicians until there is legislation;
  - 4) For some physicians, participating in MAID may be a change in the scope of their practice. College bylaws require physicians who are considering changing the scope of their practice to advise the Registrar and receive approval from the Registrar before changing the scope of their practice.
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#### Introduction and Proposed Legislation Related to MAID

It is unclear when Canadian legislation will be in effect relating to MAID. It is also unclear whether there will be any changes to the legislation which was passed by the House of Commons and is currently before the Senate.

Until June 6, a patient who sought MAID was required to obtain a court order confirming that the patient met the criteria for MAID. Until June 6, the *Criminal Code* stated that a person who assisted another individual to commit suicide was guilty of a criminal offence, unless the patient had obtained a court order that authorized MAID.

The legislation passed by the House of Commons contained a number of requirements for patients to access MAID. The most important provisions in that proposed legislation are:

- 1) Either two physicians, two Nurse Practitioners or one physician and one Nurse Practitioner can authorize providing MAID to a patient;
- 2) A physician, nurse practitioner, other health care worker who participates in MAID is protected from criminal prosecution if they reasonably and in good faith think that the patient meets the criteria for MAID;
- 3) Any individual who assists a patient, at the patient's request, to self-administer medications to cause MAID is protected from criminal prosecution;
- 4) In order to be eligible for MAID a patient must:
  - a) Be eligible for Canadian Health Services or will be eligible after a waiting period;
  - b) Be 18;
  - c) Be capable of making decisions about their health;
  - d) Have a grievous and irremediable medical condition;
  - e) Have requested MAID which is not as a result of external pressure; and,
  - f) Have given informed consent to MAID.
- 5) What is "grievous and irremediable" is defined in the legislation as follows:
  - a) The patient must have a serious and incurable illness, disease or disability;
  - b) The patient must be in an advanced state of irreversible decline in capability;
  - c) The patient must be enduring physical or psychological suffering that is intolerable to the patient caused by the illness, disease, disability or state of decline;
  - d) The patient's suffering cannot be relieved under conditions that they consider acceptable; and
  - e) The patient's natural death must have become reasonably foreseeable without a prognosis necessarily having been made as to the specific length of time that they have remaining.
- 6) The legislation also imposes specific procedural requirements for a physician or Nurse Practitioner to provide MAID to a patient:
  - a) The patient must sign a request before two independent witnesses;
  - b) Two physicians, two nurse practitioners or one of each, who are independent of each other, must confirm their opinion that the patient meets MAID criteria;

- c) There must be a 10 day waiting period after the initial request before MAID is provided, unless the patient's death or loss of capacity is imminent;
- d) The pharmacist who dispenses medication for the purpose of MAID must be informed the medication will be used for MAID.

### The Registrar's Perspective on MAID requirements until there is Canadian legislation

The legislation described in the previous heading is similar to the principles established by the Supreme Court of Canada in decision *Carter v. Canada*, 2015 SCC 5 <http://www.canlii.org/en/ca/scc/doc/2015/2015scc5/2015scc5.html?resultIndex=2>. It is also similar to what is contained in the College Policy *Physician Assisted Dying*, available at the College's website, <https://www.cps.sk.ca/imis/Documents/Legislation/Policies/POLICY%20-%20Physician-Assisted%20Dying.pdf>. When Canadian legislation comes into effect, it will establish the requirements for physicians to provide MAID. If there are amendments to the legislation passed by the House of Commons, what is set out above may change.

Until there is legislation, physicians who provide MAID should follow the principles established in College policy and the Supreme Court decision *Carter v. Canada*.

The Council developed the document *Physician Assisted Dying* to provide guidance to and expectations of Saskatchewan physicians if there is no MAID legislation. The document was developed to be consistent with the *Carter* decision. If MAID is to occur in a facility operated by a Regional Health Authority, the RHA may establish additional expectations for physicians. Physicians who are discussing MAID with patients, or who are considering providing MAID to a patient, should be familiar with both the College policy document and any requirements that exist in RHAs. The Senior Medical Officers in the Regional Health Authorities have also been involved in discussions related to MAID. Physicians who are considering becoming involved in providing MAID should consider discussing their involvement with their local SMO.

### Providing MAID as a change in a physician's scope of practice

College bylaws require that a physician considering a change in scope of practice contact the Registrar and obtain the Registrar's approval before instituting the change.

College regulatory bylaw 4.1

<https://www.cps.sk.ca/imis/Documents/Legislation/Legislation/Regulatory%20Bylaws%20-%20November%202015.pdf> defines a change in scope of practice as follows:

*A significant change in a physician's scope of practice is one in which the nature of the patient population cared for by the physician, the treatments provided by the physician or the environment in which the physician sees patients has changed in a significant way. A significant change in a physician's scope of*

*practice is also where a physician begins to practise outside of what would be considered the usual scope of practice for the physician's discipline, training and experience.*

Providing MAID may be a change in scope of practice for some physicians. Physicians who are considering providing MAID and who are unsure whether that would constitute a change in scope of practice should discuss the matter with the Registrar, Dr. Karen Shaw.

The Registrar is particularly concerned about a physician's change in scope of practice if MAID is to be provided outside a RHA facility. If MAID is provided in a RHA facility, subject to RHA approval, it is less likely to be of concern to the College.

### Current MAID activities in Saskatchewan

Most of the work related to MAID has been based upon the legislation passed by the House of Commons. That has included:

- 1) Developing a process map to guide practitioners who are involved in discussing MAID with a patient, assessing a patient to determine if the patient meets the MAID criteria or in providing MAID to patients who qualify. Therefore, while much of what has been done is relevant to providing MAID without legislation, some of the process described may not be accurate in dealing with MAID requests where there is no legislation;
- 2) Developing scripts to assist health care providers to discuss MAID with patients, and assist health care providers to identify what issues should be discussed;
- 3) Developing descriptions of roles and responsibilities of physicians and nurse practitioners who are involved in MAID;
- 4) Developing forms to be used by physicians and nurse practitioners and forms to be signed by patients, related to MAID;
- 5) Developing consistent communications in Saskatchewan related to MAID.

### The College's perspective on MAID in the absence of Canadian legislation

The College has reviewed the situation with others to try to understand the implications for MAID during the period that there is no legislation from the Government of Canada.

There may be developments, such as court decisions, which clarify the situation, but we assess the situation as follows:

1. There will be no “good faith” protection for individuals who participate in MAID if the patient does not objectively meet the criteria established in *Carter*;
2. A physician will not commit a criminal offence by providing MAID to a patient who meets the *Carter* criteria. While we think that exemption will also probably apply to individuals such as RNs, RN(NP)s and pharmacists who assist the physician to provide MAID, that is not absolutely clear;
3. Only physicians, not nurse practitioners, will be able to provide MAID;
4. The prohibition against counselling someone to commit suicide will remain in effect. “Counselling” in the *Criminal Code* means more than simply discussing the option of MAID with the patient;
5. The criteria that a patient must meet under the *Carter* decision are somewhat different than what a patient must meet under the legislation approved by the House of Commons. In particular, the *Carter* decision does not require that a patient’s death be “reasonably foreseeable” which is a requirement under the legislation;
6. The only requirement for a second physician to confirm the *Carter* criteria are met will be in the College policy;
7. The only requirement for a cooling off period before MAID is provided will be in the College policy.
7. The possible options for patients seeking MAID after June 6:
  - a) Ask physicians, pharmacists and others involved to provide MAID without a court order;
  - b) Seek a constitutional exemption as it existed prior to June 6 (courts may not be willing to consider such applications as the February, 2016 decision of the Supreme Court only allowed such applications to be made until June 6); or
  - c) Seek a declaration from the Court of Queen’s Bench that they meet the MAID criteria and that anyone who assists them in participating in MAID is not subject to the Criminal Code provisions prohibiting assisting suicide (it is unclear whether courts will consider such applications as courts do not normally pre-judge matters or give advance rulings. Additionally, it is not clear that whether courts will consider the simplified procedure for patients to seek a constitutional exemption that was available until June 6).

### Additional sources of guidance

We encourage physicians who have additional questions about MAID to contact Bryan Salte or Dr. Karen Shaw at the College (telephone 306-244-7355), or the Canadian Medical Protective Association at 1-800-267-6522.