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DISCUSSION PAPER

Medical Assistance in Dying (MAiD) for Persons Whose Sole Underlying Medical Condition is a Mental Disorder: Challenges and Considerations

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Introduction

Medical assistance in dying (MAiD) has stimulated extensive study and discussion among Canadian psychiatrists. There are many compelling legal, clinical, ethical, moral and philosophical questions that make this issue challenging. In 2020, the CPA released a position statement on MAiD that underscored the importance of protecting the rights and interests of patients with psychiatric conditions within the legislative context at that time.[1] The CPA has continued to engage members, through surveys,[2] a time-limited task force, symposia at annual conferences, and more recently in 2020 using an updated survey, member town halls, written comments from members,[3] and a working group to develop this discussion paper to support awareness and understanding

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of key issues relating to the evolving landscape of MAiD in Canada.

The intent of this paper is to provide Canadian psychiatrists with background and current information regarding key areas of discussion and debate to support their continued engagement and input regarding MAiD, particularly in light of recent legislative changes. The following issues are of particular relevance to psychiatrists and are the focus of this discussion paper:

- Overview of eligibility for MAiD in Canada.
- Irremediability and eligibility for MAiD, particularly where natural death is not reasonably foreseeable.
- Informed consent and capacity to consent to MAiD.
- Potential safeguards for MAiD where mental illness is the sole underlying condition.
- The role of the psychiatrist in MAiD.

Eligibility for MAiD in Canada

In 2016, Canada passed federal legislation, Bill C-14, to allow Canadian adults to request MAiD. This included amendments to the *Criminal Code of Canada* to exempt Canadian physicians and nurse practitioners from a charge of culpable homicide if involved in the provision of MAiD.[4]

To be eligible for MAiD under Bill C-14, a person had to be at least 18 years old, eligible for health services funded by the government, capable of making decisions with respect to their health, and have a grievous and irremediable medical condition. MAiD had to be voluntarily requested with no external pressure. Informed consent to receive MAiD had to be given after having been informed of the means available to relieve suffering, including palliative care.[5]

Under Bill C-14, a person had a grievous and irremediable medical condition only if they met all of the following criteria:

- They have a serious and incurable illness, disease or disability.
- They are in an advanced state of irreversible decline in capability.
- That illness, disease or disability or that state of decline causes enduring physical or psychological suffering that is intolerable to them and cannot be relieved under conditions that they consider acceptable.
- Their natural death has become reasonably foreseeable.[6]

Persons with mental disorders were not explicitly excluded from receiving MAiD under Bill C-14. However, many people with a mental disorder as their sole underlying medical condition would not meet eligibility criteria, particularly the criterion of natural death that is reasonably foreseeable.

In 2019, the Superior Court of Quebec found the MAiD eligibility criterion requiring "reasonable foreseeable natural death" to be unconstitutional.[7] Neither the Quebec nor the Canadian governments appealed the *Truchon* decision to the Supreme Court of Canada.

In March 2021, the federal government passed Bill C-7, which made changes to the eligibility criteria for MAiD in response to the *Truchon* decision. These changes included:

- Removal of the requirement for a person's natural death to be reasonably foreseeable.
- Introduction of a two-track approach to procedural safeguards, based on whether or not a person's natural death is reasonably foreseeable. This includes slight easing of safeguards where natural death is reasonably foreseeable, and the addition of new and strengthened safeguards where natural death is not reasonably foreseeable.
- Allow those whose natural death is reasonably foreseeable, and who have a set date to receive MAiD, to complete a waiver of final consent if they are at risk of losing capacity in the interim.
- Expand data collection through the federal monitoring regime to provide a more complete picture of MAiD in Canada.
- Temporarily exclude eligibility for those with mental disorder as the sole underlying condition for 24 months.

This temporary exclusion will provide additional time to study how MAiD for those with mental disorder as the sole underlying medical condition (MD-SUMC) can be provided safely with appropriate protections in place. Bill C-7 requires initiation of an expert review tasked with making recommendations on protocols, guidance and safeguards for MAiD for persons suffering from mental illness. This review must be completed, with recommendations available, within one year of initiation. Other outstanding issues, including eligibility of mature minors, advance requests and the protection of people living with disabilities will be considered through a parliamentary review process.[8]

Irremediability and Eligibility for MAiD

The eligibility criterion that a patient's disease be grievous and irremediable has been maintained in Bill C-7. Irremediability in the context of mental disorders is particularly challenging to determine, as outlined in a recent review by van Veen et al.[9] The Council of Canadian Academies Expert Working Group on Mental

Disorders as a Sole Underlying Condition was unable to reach consensus regarding MAiD in this circumstance.[10] Others have stated some specific cases of mental illness can meet the eligibility threshold of enduring, irremediable suffering and advanced and irreversible decline.[11] Furthermore, it has been suggested that there are two types of irremediability: that of the illness itself, and that of the patient's ability to adapt to the illness.[12] Patients may live in difficult psychosocial circumstances which affect their illness experience and quality of life, and these factors can impact the level of suffering experienced by a patient in addition to suffering caused directly by symptoms of illness. Suffering can be severe, unbearable, and devastating in both physical and mental illness.[10,13,14,15]

The issue of irremediability becomes more complex with the removal of the requirement that natural death must be reasonably foreseeable, and makes assessment of whether an illness has become grievous and irremediable more challenging. If death does not have to be reasonably foreseeable to be eligible for MAiD, the question of a future intervention that might relieve suffering always remains a possibility. This potential uncertainty must be balanced with the patient's own experience of suffering and right to self-determination. Addressing this will require the contribution of evidence-based guidance and clinical expertise to evolve normative standards and principles regarding MAiD in Canada.[16] The importance of necessary safeguards in this context is underscored and highlights that decision-making regarding eligibility for MAiD requires both clinical and ethical considerations.[17] Recommendations to address this will be the task of the upcoming expert committee on MAiD for persons suffering from mental illness.

Informed Consent and Capacity Assessment

Informed consent and capacity are defined in various ways in law, and then assessed and interpreted by health care providers in practice. Informed consent requires that the individual considering a specific treatment understands the underlying illness and the treatment proposed, alternative options to the treatment proposed, and the implications of accepting or declining the proposed treatment. To be informed, consent must occur free of coercion and be voluntary. Consent to a treatment should allow for open and informed discussion of treatment options with consent or refusal for a specific treatment provided by a capable patient. Informed consent for MAiD is a process that should include a discussion of the nature and purpose of MAiD and treatment alternatives, as with other treatments. Special attention to the voluntariness of the decision is necessary to ensure that there is not undue external pressure influencing the person's choice.[18]

Capacity refers to the ability of an individual to decide about a specific question or issue. The legal standard for capacity in Canada was set by the 2003 Supreme Court *Starson* decision which formalized the two criteria of a need to "understand" and "appreciate."[19] To be capable of making a specific decision, individuals must be able to understand the problem at hand and appreciate how it affects them, and they must be able to understand the consequences of making, or not making, a specific decision. This is not a best-interests approach to capacity and "the crux of the *Starson* decision is that capable people are allowed to make unreasonable, wrong, and even foolish decisions to the point of risking their own health and well-being, as long as they appropriately understand the risks of not undergoing treatment."[20]

It is important to note that the determination of capacity is treatment specific. Most agree that a higher or more stringent threshold for capacity is required when decisions are more complex or are accompanied by significant risk.[21,22] A decision to proceed with MAiD may warrant a higher or more stringent threshold for capacity.[21,23] If a mental disorder is part of the clinical picture, an even higher threshold has been proposed for MAiD as a potential safeguard.[24] This could include a requirement for evaluation of capacity by a psychiatrist or repeated assessments to confirm a finding of capacity. Others have suggested that holding patients with a mental disorder who are requesting MAiD to a higher threshold of capacity compared to other patients is discriminatory and perpetuates the stigma of mental disorder.[10]

A mental disorder does not in and of itself imply incapacity in any domain of decision-making, but when active, various forms of mental illness can impair decision-making capacity. It is noted that "all patients, including those with psychiatric illnesses, are presumed capable of deciding or rejecting treatment until deemed otherwise – the presumption of capacity can be displaced only with evidence to the contrary."[20] Psychiatry has long experience in working with patients in various stages of illness who are capable in some areas but incapable in others. A person's capacity for specific decision-making may fluctuate over time and may need to be reassessed over time. Psychiatrists have specialized training and practical experience assessing capacity in people with mental disorders. A British study found a high level of agreement between psychiatrists for capacity judgements of 55 patients.[25] This specialized knowledge of psychiatric illness and specific experience in assessing decision-making capacity in patients with psychiatric illness is acquired over the course of formal psychiatric training and practice.

Currently, two independent assessors are required to determine eligibility for MAiD including determining capacity. A psychiatrist can provide additional expertise in capacity assessments in the context of mental disorders via a comprehensive assessment, situating the specific MAiD assessment in the context of the patient's life course.

Safeguards

Under Bill C-7, persons whose sole underlying medical condition is a mental disorder are temporarily excluded from eligibility for MAiD, to allow an expert task force to review and make recommendations on protocols, evidence-based guidance and safeguards.

Conceptually, profound differences of opinion exist regarding what safeguards should be invoked in this case, with some opining that any additional criteria for persons with a mental disorder are discriminatory and others stating that the nature of mental disorders justifies the need for added protections.[10]

Additional safeguards that should be considered when determining eligibility for MAiD for persons whose sole underlying medical condition is a mental disorder include:

- Comprehensive assessment of mental disorder.
- Durability of the request.
- Voluntariness of the request.
- Robust eligibility assessment process.
- Oversight process.

Comprehensive Assessment of Mental Disorder

There is consensus in the literature that a person with a mental disorder should have a comprehensive assessment of their underlying mental disorder before being considered for a medically assisted death.[24,26,11] Such an assessment should occur over time and encompass a holistic and life course perspective. Bill C-7 requires that a person with expertise in the condition that is causing the person's suffering be consulted (either as one of the eligibility assessors or in addition to the eligibility assessment).

The patient should be assessed by one or more clinicians who have expertise in treating the patient's specific mental disorder. Some jurisdictions require at least two psychiatrists to be involved in each case and that there is agreement on diagnosis.[27] Others have advocated for a two-track model where one psychiatrist conducts the MAiD eligibility assessment, while a second continues to offer ongoing treatment.[10,28] The primary benefit of including one or more psychiatrists is because of their expertise in assessing and treating patients with mental disorder. The primary challenge with implementing this safeguard, particularly if more than one psychiatrist is required to be involved in the assessment, is the impact this will have on a relatively limited resource. One possible mitigation strategy is increased use of virtual consultation, particularly in areas where there is significant geographic distance between the patient and psychiatrist.

The assessment should validate whether the patient has had access to evidence-based mental health assessment, treatment and supports for a period of time based on generally accepted standards of care.[29,11,30,31,10,32] As there are areas within Canada with limited access to mental health resources, implementation of this safeguard may require additional resources or redistribution of current resources, and psychiatrists will be important advocates of equitable access to care for patients in these locations.

Documentation should demonstrate that standard treatments, including pharmacological, psychotherapeutic and other non-pharmacological therapies for the specific mental disorder, have been offered, attempted and failed over a sufficient period of time and that there are no other accessible reasonable alternatives.[33,15,10,34,9] It is important to acknowledge that, as with any medical condition, there may be patients for whom an effective, acceptable treatment for their mental disorder cannot be identified. In the context of mental disorders there is no generally agreed upon definition of incurability; within the field of psychiatry, there are some who do not accept that any mental disorder is incurable and will argue that there is always another treatment that can be attempted.[10,9] Given that incurability is one of the eligibility criteria to receive MAiD in Canada, there is the potential that patients may be found eligible by one psychiatrist and not another, based on the latter's determination that the patient's mental disorder can be cured or that associated suffering can be relieved. Resolution of this issue requires a pragmatic approach that balances clinical expertise and assessment of incurability with the patient's perspective and experience of their illness.

The patient's suffering must be comprehensively explored and documented, including what supports have been offered, and determined to be intractable.[24,29,33,35,36,37,38,10,39,40]

Both acute and chronic suicidal ideation must be considered and evaluated. Careful and expert review of a patient's past and current symptoms and response to treatment should be undertaken, in order to make a best determination if the patient's wish to end their suffering represents a realistic appraisal of their situation rather than a potentially treatable symptom of their mental illness.[41,30,42,43,44,45,10,32,46]

There is an acknowledgement in the literature that comprehensive assessments such as these can be complex and challenging.[14,10] Regardless, all patients with mental disorders deserve and require a thorough

comprehensive assessment if they request MAiD. Notably, in countries where MAiD is allowed for persons with mental disorders, many are not found to be eligible.[10] It is important that patients who are found ineligible for MAiD are provided with ongoing care and treatment. One of the benefits of comprehensive MAiD assessments in this circumstance is that they may help inform next steps in treatment planning.

In terms of process, there should be ongoing discussions with the patient, their current and past psychiatrists/clinicians, multidisciplinary team members, and the patient's family and/or friends to gather multiple perspectives on the patient's illness and course of treatment.[47,10] Some advocate that family and/or other important third parties must be mandated to be included in the process to be confident that the patient's illness journey is fully understood.[10] This involvement must be balanced against any potential harm of including input where there may be long-standing unhealthy family dynamics or estrangement; additionally, involving family without the consent of the patient raises a confidentiality issue.

The comprehensive assessment should adhere to any available consensus statements and/or guidance documents as they evolve in this area. Exploration of suffering, assessment of suicidality, determination of intractability and evaluation of capacity[48,49,50] are areas of particular interest, and there is a need for further development of guidance documents to reduce variability in practice. Such documents need to be generated and/or endorsed by professional bodies to ensure compliance.

Durability of the Request

A request for MAiD should be considered and sustained and not the result of a transient or impulsive wish.[35,11,10,34] This is particularly important for persons with non-terminal conditions such as a mental disorder, where the illness may be more episodic in nature. The length of time may in part need to be dependent on the nature of the patient's mental disorder and their illness path. Have they been unwell for many years or is their diagnosis more recent? Has MAiD been something that the patient has been considering for some time or is this something that the patient has only recently thought about?

Some jurisdictions have enacted or proposed the requirement for a set period between when a patient is found eligible or makes a request for MAiD and when MAiD can be received. For example, in Belgium a 30-day period is required,[10] and in Canada, a 90-day period is required for persons whose natural death is not reasonably foreseeable, which may apply to most persons whose sole underlying medical condition is a mental disorder. An extended time frame between the written request and the provision of MAiD for patients with a mental disorder (or indeed for all patients with a non-fatal condition) must consider the balance between ensuring durability of the request against unnecessary extension of intolerable suffering.

Voluntariness of the Request

For patients with a mental disorder, it has been noted that it is particularly important, and potentially challenging, to determine that a patient's wish for a medically assisted death is voluntary.[10] Experiences and perceptions of stigma, vulnerability, and of being a burden to society have the potential to influence a person's decision and should be carefully explored.[14,10] People with mental disorders may be more susceptible to the influence of others because of the nature of their illness.[10] Expertise and experience in understanding these influences should be included as part of the overall assessment for MAiD.

Robust Eligibility Assessment Process

Canadian legislation currently requires that two assessors who are medical or nurse practitioners, and who are independent of one another,[51] complete an eligibility assessment for each patient who requests MAiD. To decrease the possibility of bias or influence, it is recommended that assessors conduct their initial eligibility assessments separate of one another.[10]

For patients with a mental disorder who are requesting MAiD, some propose that at a minimum, one of the eligibility assessors has expertise in the assessment and treatment of psychiatric disorders.[11,10] Others have indicated explicitly that one or both assessors should be a psychiatrist or medical or nurse practitioner who has experience and expertise in the care of patients with the specific mental disorder(s) of the requesting patient.[10] The Dutch Psychiatric Association recommends a final evaluative process that includes the patient and three doctors (the doctor performing the assisted death and two consultants).[10] Most jurisdictions, including Canada, require that at least two independent assessors agree that the patient is eligible.[10] Bill C-7 requires that for patients whose natural death is not reasonably foreseeable, if neither of the two practitioners who assesses the patient's eligibility for MAiD has expertise in the condition that is causing the person's suffering, one of the practitioners must consult with a practitioner who has such expertise and share the results of that consultation with the other practitioner. For persons who are requesting MAiD because of a mental disorder, psychiatrists would have such expertise.

If there is a disagreement between assessors, there are various mechanisms that could be implemented. These include seeking a third opinion as a tie breaker, submitting to a committee of experts for review, or a judicial process.

As the number of practitioners required in the assessment process increases, the longer and more resource intensive it may become.

Oversight Process

In Canada, current oversight processes for MAiD vary between provinces. In most countries where medically assisted death is available for persons with a mental disorder as their sole underlying condition, there is either a prospective or retrospective mechanism in place for oversight (e.g., review committees, roundtable, ethics committee, legal investigation, coroner review).[52,53,54,10,27,55] The structure and composition of committees providing oversight varies significantly across jurisdictions. For retrospective reviews, this may include review of documentation, examination of the body, and/or interviews with the MAiD provider and family members.[52,53] For prospective reviews, the patient can also be interviewed. Public reporting on an annual or biannual basis has also been implemented in some jurisdictions.[10]

Some have suggested that a prospective oversight process be put in place for complex cases; this could include persons whose sole underlying condition is a mental disorder.[11] The primary advantage of a prospective review is that there is an opportunity to intervene and prevent MAiD from occurring if a problem in the process is identified. However, a prospective review may be more labour intensive, costly and result in significant delays.

There is limited evidence as to which oversight processes are most effective. Of note, one study examined the impact of forensic investigations on the patient's loved ones following assisted deaths in Switzerland. A correlation between those who experienced the forensic investigation as emotionally difficult and development of posttraumatic stress disorder was observed.[55]

Alongside an oversight process, it is important to establish a coinciding research agenda for evaluation purposes and to modify policies and practices in relation to safeguards as needed.

Role of the Psychiatrist

First and foremost, psychiatrists are required to act in ways that are consistent with key medical ethical principles including respect for autonomy, beneficence, non-maleficence and justice. It is the task of the psychiatrist to assess and treat mental disorders, suicidality and any other conditions which could affect decisional capacity surrounding MAiD. Additionally, psychiatrists can be involved in directing treatment options for those conditions determined to be remediable and instilling hope in the midst of suffering for the patient and their pertinent caregivers. Psychiatrists may also be involved in the MAiD process in a direct way: as a consultant for treatment related to a particular mental disorder, to determine if a mental disorder is impacting a person's request for MAiD or capacity to consent to MAiD, as an eligibility assessor, as a provider, or as a clinician who has expertise in the condition that is causing the patient's suffering. A recent survey of Canadian MAiD assessors and providers found that many described this work to be very important, professionally satisfying and meaningful.[56]

Psychiatrists have additional training in understanding issues relevant to specific populations that may be marginalized or vulnerable (for example, those who are homeless, transgendered individuals, youth and seniors). Psychiatrists with specialist training or expertise in specific populations can bring additional skills to ensure culturally appropriate assessment and treatment of contributory factors that might affect cognition, emotions, or judgement in regards to decisional capacity surrounding MAiD.

The role of the psychiatrist can be challenging particularly if the attending psychiatrist has strong views against MAiD. In these situations, psychiatrists should disclose their conscientious objection to MAiD and facilitate an effective transfer of care or referral to a psychiatrist with clinical equipoise in MAiD assessment.A psychiatrist may become an independent MAiD assessor or a capacity assessor or may become involved in their institutional or provincial MAiD oversight group to review contentious cases.[57,58,59] Specialized training and consultation supports for assessors and providers are recommended.[11,31,44,10] Groups such as the Canadian Association of MAiD Assessors and Providers (CAMAP) have developed guidance documents for assessors and providers.[60] There is the potential for these to be further developed through collaboration with other organizations such as the Canadian Psychiatric Association to include unique elements relevant to the assessment of persons with a mental disorder.

Education related to MAiD should be integrated into the curriculum for medical students and residents in psychiatry. This will ensure that trainees are well-informed of their obligations and processes to be undertaken if one of their patients requests MAiD, key ethical considerations, and how to proceed if they conscientiously object to MAiD.

Conclusion

MAiD is a complex legal and ethical issue that has generated diverse opinions and perspectives from Canadian psychiatrists. With the most recent changes to federal legislation, which include planning for future inclusion of mental disorder as the sole underlying condition, psychiatrists must inform themselves of the current debates and discussion regarding key topics

in this area. This paper has introduced key areas of discussion, and is intended to engage the profession in the upcoming work that must be done to ensure appropriate safeguards, processes and policies are established.

There are many complex issues to address. Balancing the commitment of health-care professionals to provide treatment, care and hope for recovery with a person's experience of suffering and right to enact personal choice in health-care decisions, including MAiD, is a fundamental challenge, particularly where natural death is not reasonably foreseeable.

This paper has highlighted the skills and attributes psychiatrists can offer to address challenges related to MAiD in the context of mental disorder, including ensuring accurate diagnosis and evidence-based treatment and support, assessment of capacity, assessment of suicide and provision of a comprehensive assessment with attention to the patient's history, unique values and circumstances. Psychiatrists also have the clinical expertise to contribute to work that is being done to evolve evidence for and standardize processes to address complex issues like determination of irremediability in mental disorders. Finally, psychiatrists are well-positioned to advocate for equitable access to clinical services for all patients, and to ensure that people do not request MAiD due to lack of available resources, supports or services.[61]

As legislation around MAiD continues to evolve and be enacted, Canadian psychiatrists must become knowledgeable about the key issues highlighted in this paper and continue to advocate for timely access to appropriate treatment. This will ensure that the rights of vulnerable Canadians are protected without stigmatizing and discriminating against people with mental disorders.

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