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## Issue of MAID could end up back in the courts, but some advocates will first seek to block government's legislation in the Senate

With many key readiness criteria in place, advocates and opponents of expanding MAID say the latest developments point to a larger shift in the federal government's position on the issue.

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With the federal government making a significant shift in its approach to MAID following the recommendation of a joint parliamentary committee, some advocates on both sides of the issue are saying the matter could end up back in the courts—but some proponents of expanding MAID will first look to the Senate to stifle the government's legislation that would change the coming sunset clause.

On Feb. 1, Health Minister Mark Holland (Ajax, Ont.) introduced legislation in the House of Commons that would delay legalizing medical assistance in dying (MAID) for patients who have mental illness as their sole underlying cause until 2027.

The move comes in follow-up to a Jan. 29 report from the Special Joint Committee on Medical Assistance in Dying, which recommended that this form of MAID “should not be made available in Canada until the minister of health

and the minister of justice are satisfied, based on recommendations from their respective departments and in consultation with their provincial and territorial counterparts and with Indigenous Peoples, that it can be safely and adequately provided.”

Presently, a sunset clause is set to expire on March 17, which would change the Criminal Code to make this form of MAID legal in Canada. That means legislation must be passed both the House and Senate before that time in order to stop the change in law from coming into effect.

Advocates and opponents of expanding MAID broadly agree that Ottawa's plan to seek a delay of four years indicates a significant shift in the government's position, after several years of Canada moving towards an increasingly more permissive MAID regime.

In 2016, Bill C-14 legalized track one MAID—for patients whose death is reasonably foreseeable—in response to the

Health Minister Mark Holland, left, has introduced legislation to delay an expansion of MAID until 2027 in response to a report from a joint Parliamentary Committee. One Senator, in a dissenting opinion on the report, said Justice Minister Arif Virani, right, should seek a Supreme Court reference on the matter. The Hill Times photographs by Andrew Meade

Supreme Court's Carter decision. In 2021, Bill C-7 legalized track two MAID—for patients who are suffering from a serious illness, disease, or disability, but whose death is not reasonably foreseeable—in response to the Truchon decision from the Quebec Superior Court. Originally, Bill C-7 was set to exclude patients who had a mental illness as their sole underlying cause for this form of MAID, but an amendment introduced in the Upper Chamber by ISG Senator Stanley Kutcher (Nova Scotia) proposed adding irremediable mental illness as grounds to access track two MAID. The bill was returned to the House, and passed with a two-year sunset clause in place before that form of MAID would come into effect in March

2023.

As the previous sunset clause approached, the federal government announced it would introduce legislation to extend that deadline by one year, on the grounds that provinces, territories, and health care professionals needed more time to get ready to safely provide this form of MAID. At that time, many observers believed the government was still intent on ultimately moving ahead with the expansion.

However, given that three of the key readiness criteria identified by the government at that time—establishing national practice standards, a MAID curriculum, and a training program for MAID practitioners—appear to have largely been completed, according to experts in several provinces interviewed by The Hill Times who have been working on these components, many are interpreting the latest developments as a larger shift in the government's position.

Some of the key players have also changed. Prime Minister Justin Trudeau (Papineau, Que.) has appointed a new health minister and justice minister since the previous extension for MAID was sought, with Holland replacing former health minister Jean-Yves Duclos (Québec, Que.) and Arif Virani (Parkdale—High Park, Ont.) taking over the justice portfolio from outgoing Liberal MP David Lametti (LaSalle—Émard—Verdun, Que.)—who recently indicated he would still move ahead with the expansion were he in his old job.

There are also signs of hesitation at the provincial level that appear to cut across partisan lines. On Jan. 30, the health ministers for seven provinces and all

three territories—representing a mix of conservative, Liberal, and NDP governments—wrote to Holland asking for an indefinite pause to this expansion of MAID.

Alexandra McPherson, an Alberta-based psychiatrist who has been involved in readiness activities, including work on developing and teaching the MAID curriculum, told The Hill Times that, in her view, all of the key pieces identified by the federal government were ready in her province.

“I think that by those readiness metrics that we're ready,” said McPherson. She added it is not clear what additional metrics the federal or Alberta government might be looking for, leaving her to conclude the decision points to a shift in political direction on the issue.

“They don't really mention what it is exactly entirely that we need to do in order to be ready,” said McPherson. “I think the idea of an indefinite pause is not justifiable. I think it's probably unconstitutional. And it will be challenged probably.”

Derryck Smith, a British Columbia-based psychiatrist who had been offering feedback on readiness materials to the provincial government in his province, offered similar observations when it comes to readiness, and said returning to the courts may be “the only way to go.”

“I think we could wait for 10 years and the governments wouldn't be ready,” said Smith.

“In fact, the court is the only venue in which we've gotten any MAID laws in Canada,” he added, in reference to the Carter and Truchon decisions leading to

the federal government making past changes to the laws. “If we waited for the politicians, we'd have zero MAID laws in Canada right now. So going to court is a great idea.”

Helen Long, CEO of Dying with Dignity Canada, told The Hill Times that while her organization is not yet planning to seek legal action, it will listen to expert advice for the best way to move forward.

“I think the first point is let's see what the bill [to delay the end of the sunset period] says,” said Long. “But if at some point, this looks like a viable road, I'm certainly not saying we wouldn't consider pursuing it ... If the experts feel like this is the most expedient way to go. We're certainly not opposed to that.”

Committee recommendation the result of ‘a democratic process,’ says disability advocate In light of the committee's recommendation to delay, advocates of expanding MAID—including members of the committee who wrote dissenting reports—have criticized the committee for straying too far from its mandate to look at readiness. A dissenting report from Kutcher, ISG Senator Marie-Françoise Mégie (Quebec), and CSG Senator Pamela Wallin (Saskatchewan) said the committee had “failed to address its mandate.”

However, Liberal MP Francis Scarpaleggia (Lac-Saint-Louis, Que.), another member of the committee—and one of several Liberal members on the committee to have been changed since its last report—told The Hill Times he believed this broader approach was warranted.

“The way I see it is, we did look at the readiness, but we looked at it in more broad terms than maybe those who dis-

agreed with the majority thought the focus should be,” said Scarpaleggia. “They were focusing on whether the specific protocols are in place, but the way I look at it is it’s not just about whether we have protocols, it’s whether the protocols take into account these broader issues.”

Krista Carr, executive vice-president of Inclusion Canada, a national federation for people with intellectual disabilities, said she feels the committee did properly assess the readiness issue, while also responding to a broader message that was delivered.

“A democratic process was set up where people were to be heard,” said Carr.

“When you hear overwhelming evidence from overwhelming numbers of people, and receive overwhelming numbers of briefs saying the same thing in a democracy I don’t think they’re out of scope,” she added, pointing to an analysis by the British Columbia Aboriginal Network on Disability Society which found that of 175 submissions to the committee, 155 of them were opposed to expanding MAID.

PSG Senator Pierre Dalphond (De Lorimier, Que.), another member of the committee, and a former judge, wrote a separate dissenting report in which he focused on a series of legal arguments for moving ahead with MAID expansion. He is calling for a Supreme Court of Canada reference as to whether further delays are constitutional.

Dalphond said he believes moving to the courts is necessary because the committee has set out a process that would take years, and is “designed to prolong” and “quite frankly, just to make sure that the issue is on the backburner until after the

next election, minimum.”

Instead, he believes the issue can be dealt with best in the courts.

“The political forum is not necessarily a forum where logic is driving the process all the way,” said Dalphond. “But a court of justice is one where we look at evidence, and we are thought to appreciate evidence, and where everybody has the opportunity to present and cross examine for days instead, instead of an hour panel.”

Issue could go back to court, but some MAID advocates are looking first to the Senate Daphne Gilbert, a criminal and constitutional law professor at the University of Ottawa, who supports this expansion of MAID, told The Hill Times that she believes the immediate best strategy for proponents of the expansion is to look to have the Senate defeat or filibuster any legislation from the House of Commons that would extend the sunset clause.

Because there is already a law on the books that says the sunset clause is to expire on March 17, if the House and Senate cannot agree on a bill and no further legislation is passed, the expansion of MAID will come into effect on March 17 despite the government’s wishes. Given the number of Senators who have been supportive of expanding MAID, Gilbert believes this approach may be plausible.

However, if that does not come to pass, and the matter does end up back in the courts, Gilbert said she would then view that approach as preferable to an “endless pause.”

She suggested that it would be best for any question to the Supreme Court to fo-

cus on whether such a delay is constitutional, because the Supreme Court may not have the expertise to deal with the particular details of readiness issues.

She said the government’s current position still appears to be that previous court rulings established that there is a Charter right to MAID for patients with mental illness as the sole underlying cause, despite its plans to delay.

However, opponents of the expansion argue that none of the previous court rulings have ever established that this form of MAID must be legalized on constitutional grounds.

Trudo Lemmens, a University of Toronto law professor who studies health law and policy, said the Truchon decision—which led to the government legalizing track two MAID—should not be given such weight because it is a lower court decision from only one jurisdiction. Usually, the federal government will only change the law based on a Supreme Court ruling, or several lower court rulings across multiple jurisdictions.

He said there a number of legal issues that remain from that case, which was never appealed to a higher court.

If a Supreme Court reference does move forward, Lemmens said some of the key points he would want to see addressed are the issue of whether a mental illness can be deemed irremediable, as well as what would be the broader impact on suicide prevention if this form of MAID is legalized.

“We have to look at the context and the particular nature of psychiatric illness—taking into consideration the historical discrimination and the historical

way in which persons with mental illness have been put at higher risk of inadequate treatment,” said Lemmens.

Carr added that disability advocates had wanted to see an appeal of Truchon, and had also called for a Supreme Court reference on track two MAID for persons with physical disabilities when that law was brought in, but this step was not taken at that time.

“We were saying, at least do this if you won’t listen to us that this is discriminatory, it’s going to be disastrous, ... it violates people with disabilities rights to life, liberty, and equality—all those things—then ask the court before you go forward, and nobody would even entertain it,” she said.

The Hill Times reached out to the offices of Holland and Virani for a comment on the status of the readiness metrics identified by the government last year, and asking whether they would consider seeking a Supreme Court reference on the matter going forward. They did not reply by deadline.

[icampbell@hilltimes.com](mailto:icampbell@hilltimes.com) The Hill Times On Jan. 29, the Special Joint Committee on Medical Assistance in Dying issued a report that recommended that MAID when mental illness is the sole underlying cause ‘should not be made available in Canada until the minister of health and the minister of justice are satisfied, based on recommendations from their respective departments and in consultation with their provincial and territorial counterparts and with Indigenous Peoples, that it can be safely and adequately provided.’

Helen Long, CEO of Dying With Dignity Canada, said her organization will wait to look at the extension legislation before finalizing its next steps. Photograph courtesy of Dying With Dignity Canada

Francis Scarpaleggia, pictured, said it was not only a matter of readiness, but whether those protocols take into account ‘broader issues.’ The Hill Times photograph by Andrew Meade The Hill Times photograph by Andrew Meade

Krista Carr, executive vice-president of Inclusion Canada, said the committee report reflected ‘a democratic process.’ Photography courtesy of Inclusion Canada

University of Ottawa law professor Daphne Gilbert said the next step for advocates of MAID expansion should be to try to block the extension bill in the Senate. Photograph courtesy of University of Ottawa

University of Toronto law professor Trudo Lemmens said there were legal issues involving the Truchon case that could be appealed to a higher court. Photograph courtesy of University of Toronto

**Figure:**