

Foreseeably Unclear: The meaning of the “reasonably foreseeable” criterion for access to medical assistance in dying in Canada

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Introduction

In April 2016, the federal government of Canada introduced draft legislation to regulate medical assistance in dying (MAiD).¹ There was a swift and fierce response to various aspects of the Bill with some of the fiercest criticisms aimed at one of the criteria for eligibility found in the proposed text for s. 241.2(2) of the *Criminal Code*:

(2) A person has a grievous and irremediable medical condition only if they meet all of the following criteria:

...

(d) their natural death has become reasonably foreseeable, taking into account all of their medical circumstances, without a prognosis necessarily having been made as to the specific length of time that they have remaining.²

Some criticized the provision for being inconsistent with the Canadian *Charter of Rights and Freedoms*³ (drawing especially but not exclusively on the decision of the Supreme Court of Canada in *Carter v. Canada*⁴). This criticism is now being litigated in the courts through *Lamb v. Attorney General* and *Jean Truchon and Nicole Gladu v. Attorney General (Canada) and Attorney General (Quebec)*⁵ and is **not** the focus of this paper.

Others criticized the provision for containing a phrase that is unfamiliar and unclear: “reasonably foreseeable.”⁶

¹ Bill C-14, *An Act to Amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*, SC 2016, c 3 [Bill C-14].

² *Criminal Code*, RSC 1985, c C-46, s 241.2(2).

³ See e.g. Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 42nd Parl, 1st Sess, Issue No 10 — Evidence (6 June 2016) (Peter Hogg); House of Commons, Standing Committee on Justice and Human Rights, 42nd Parl, 1st Sess, Evidence, No 13 (4 May 2016) at 2045 (Jocelyn Downie).

⁴ *Carter v Canada (Attorney General)* 2015 SCC 5 [Carter].

⁵ *Lamb v Canada (Attorney General)* (27 June 2016), Vancouver, SCBC, S-165851 (notice of civil claim). (Canada) filed 27 June 2016, online: <bccla.org/wp-content/uploads/2016/06/2016-06-27-Notice-of-Civil-Claim-1.pdf> [Lamb]; *Jean Truchon and Nicole Gladu v Attorney General (Canada) and Attorney General (Quebec)* (13 June 2017), Montreal, CQ (Civ Div) (notice of Application to Proceed for Declaratory Relief) filed 13 June 2017, online: <www.menardmartinavocats.com/documents/file/demande-introductive-da%C2%80%C2%99instance-en-jugement-d%C3%83%C2%89claratoire.pdf> [Truchon and Gladu].

⁶ Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 42nd Parl, 1st Sess, Issue No 9 — Evidence (10 May 2016) (Dr. Douglas Grant, Dr. Joel Kirsh); House of Commons, Standing Committee on Justice and Human Rights, 42nd Parl, 1st Sess, Evidence, No 13 (4 May 2016) at 1720 (Dr. Jeff Blackmer).

Despite attempts to remove s. 241.2(2) (at the hearings for both the House of Commons Standing Committee on Justice and Human Rights and the Standing Senate Committee of Legal and Constitutional Affairs, and in amendments passed by the Senate⁷ but rejected by the House of Commons⁸), the provision remained in the version of the legislation that came into force on June 17, 2016.⁹

Not surprisingly, twenty-four months on, there is confusion among health care providers, lawyers, and the public as to what the provision means. One court case tackled the issue head on but, for reasons discussed below, did not resolve all of the confusion.¹⁰ One College of Physicians and Surgeons recently revised its MAiD standard to include an interpretation of the reasonably foreseeable criterion.¹¹ Unfortunately, others have not (yet) followed suit. As a result of the ongoing confusion, there is reason to be concerned that under- or over-inclusive interpretations of this eligibility criterion are adversely affecting access to MAiD.¹² With critical interests at stake (e.g., access to MAiD and potential criminal liability), it is essential that the meaning of the provision be clarified.¹³

Furthermore, the meaning of “reasonably foreseeable” will no doubt be contested in the two *Charter* challenges to the federal MAiD legislation currently before the courts in British Columbia and Quebec.¹⁴ In order to determine whether s. 241.2(2) violates the *Charter*, the courts will have to first determine what it means because whether the limits on access to MAiD violate the *Charter* depends on the scope of the limits.

For these two reasons, and because MAiD providers and assessors and the public need guidance as they wait for an authoritative interpretation from the courts, it is worth

⁷ *Debates of the Senate*, 42nd Parl, 1st Sess, Vol 150, No 50 (15 June 2016) at 1900ff (Bill to Amend — Third Reading); Senate, *Journals of the Senate*, 42nd Parl, 1st Sess, No 74 (16 June 2016).

⁸ House of Commons, *Order Paper*, 42nd Parl, 1st Sess, No 74 (16 June 2016).

⁹ *Debates of the Senate*, 42nd Parl, 1st Sess, Vol 150, No 52 at 1520 at 1700 (George Furey).

¹⁰ *AB v Canada (Attorney General)*, 2017 ONSC 3759 [AB].

¹¹ College of Physicians and Surgeons of Nova Scotia, *Professional Standard Regarding Medical Assistance in Dying*, Halifax: CPSNS, 2018, 5, online: <cpsns.ns.ca/guideline/medical-assistance-in-dying/> [Professional Standard].

¹² Between January 1 and June 30, 2017, of the 832 reported cases of requests for MAiD, 73-80 were declined and the most frequently cited reasons for declining requests for MAiD were: “Loss of competency, Death not reasonably foreseeable, Other.” Health Canada, *The 2nd Interim Report on Medical Assistance in Dying in Canada* (Ottawa: October 2017), online: <www.canada.ca/en/health-canada/services/publications/health-system-services/medical-assistance-dying-interim-report-sep-2017.html>. Of course we do not know from these numbers whether this reflects under-inclusion.

¹³ See Meaghan Craig, “Medically Assisted Death Fails Saskatoon Family,” *Global News* (29 May 2018), online: <globalnews.ca/news/4236902/medically-assisted-death-fails-saskatoon-family/>; Keith Gerein, “‘An Iron Will’: For Some, Alberta’s Medical Aid in Dying Process is Still a Work in Progress,” *Edmonton Journal* (5 February 2018), online: <edmontonjournal.com/news/local-news/an-iron-will-for-some-albertas-medical-aid-in-dying-process-is-still-a-work-in-progress>; Kas Roussy, “Parkinson’s Patient Forced to Battle Bureaucracy around Assisted Death,” *CBC News* (14 December 2017), online: <www.cbc.ca/news/health/parkinson-s-assisted-death-canada-doctors-aid-1.4416392>. See also “B.C. woman who challenged right-to-die laws gets medically assisted death,” *Canadian Press* (18 September 2017), online: <www.cbc.ca/news/canada/british-columbia/assisted-dying-law-canada-moro-1.4294809>.

¹⁴ *Lamb*, *supra* note 5; *Truchon and Gladu*, *supra* note 5.

bringing the principles of statutory interpretation to bear on the phrase “reasonably foreseeable.”¹⁵

What does “reasonably foreseeable” mean?

1. Case law

As of June 1, 2018, there has been one court case interpreting the phrase “reasonably foreseeable” within s. 241.2(2)(d). In *AB v. Attorney General (Canada)*, one physician assessed AB and found that she met the reasonably foreseeable criterion. A second physician assessed her and found that she did not. A third assessed her and found that she did. That should have been sufficient. However, despite being of the belief that she met the eligibility criteria, neither the first nor third physician then felt comfortable proceeding given the disagreement and so neither was willing to provide MAiD. At that point, the case was taken to court. In his decision, Justice Perell of the Ontario Superior Court of Justice drew the following conclusions with respect to the meaning of s. 241.2(2)(d):

[N]atural death need not be imminent and that 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.¹⁶

[I]n 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.¹⁷

The language reveals that the natural death need not be connected to a particular terminal disease or condition and rather is connected to all of a particular person’s medical circumstances.¹⁸

[T]he language does not require that people be dying from a terminal illness, disease or disability.¹⁹

[T]he language of s. 241.2(2)(d) encompasses, on a case-by-case basis, a person who is on a trajectory toward death because he or she: (a) has a serious and incurable illness, disease or disability; (b) is in an advanced state of irreversible decline in capability; (c) is enduring physical or psychological suffering that is

¹⁵ It may, in the future, be possible to bring even more contextual factors to bear. For example, one might consider patients’ perspectives on the meaning of “reasonably foreseeable.” However, we have not engaged in this interpretive exercise here because there is not yet sufficient evidence to draw upon. We focus on legal and clinical contexts because those are the domains about which we have sufficient information.

¹⁶ *AB*, *supra* note 10.

¹⁷ *Ibid* at para 80.

¹⁸ *Ibid* at para 81.

¹⁹ *Ibid* at para 82.

intolerable and that cannot be relieved under conditions that they consider acceptable.²⁰

Key to Justice Perell's statutory interpretation is the rejection of any requirement of temporal proximity of death, the embrace of the need for the assessment of reasonable foreseeability to be "person-specific" and to take into account "all of a particular person's medical circumstances," and the limiting of "reasonably foreseeable" to a "trajectory toward death **because** he or she: [meets s. 241.2(2)(a)-(c)]." (emphasis added).

However, this case, while revealing, is not determinative. Indeed, despite Justice Perell explicitly finding that "AB's natural death is reasonably foreseeable",²¹ the original physician was still not willing to provide MAiD and so a fourth physician had to be found.²² More generally, the case's impact is limited to Ontario and it is not a binding precedent even in Ontario as it is a decision from the Ontario Superior Court of Justice. In addition, neither the Attorney General (Ontario) nor the Attorney General (Canada) took a position in the case on the issue of the meaning of s. 241.2(2)(d). Finally, even though it decided not to appeal the decision, the Crown did not concede that the decision's statutory interpretation is correct. Therefore, we must proceed with a full statutory interpretation.

2. Ordinary meaning

According to the *Canadian Oxford Dictionary*, "reasonably" is the adverbial form of "reasonable." "Reasonable" is defined as:

1. having sound judgement; moderate; ready to listen to reason.
2. In accordance with reason; not absurd.
- 3a. within the limits of reason; fair, moderate (a reasonable request)
- b. inexpensive; not extortionate.
- c. fairly good, average.²³

"Foreseeable" is the adjective form of "foresee," which the *Canadian Oxford Dictionary* defines as "see or be aware of before hand."²⁴

The ordinary meaning of "reasonably foreseeable," applied to the MAiD context, is that it is in accordance with reason/not absurd to be aware beforehand **that** someone will die a natural death. Clearly, it is not reasonable to interpret the legislation as meaning "that it is in accordance with reason/not absurd that health care providers are aware **that** someone will die a natural death" — natural death is over 90 percent certain for all of us from the moment of our birth as fewer than 10 percent of deaths are a result of suicide, homicide,

²⁰ *Ibid* at para 83.

²¹ *Ibid* at para 6.

²² Email from Shanaaz Gookol to Jocelyn Downie (29 May 2018), personal correspondence with the author.

²³ *Canadian Oxford Dictionary*, 2nd ed, *sub veto* "reasonable."

²⁴ *Ibid*, *sub veto* "foreseeable."

or accident.²⁵ Therefore, the ordinary meaning of this phrase, read alone or in isolation, cannot provide a definition for this provision in the Act because doing so would violate the absurdity principle of statutory interpretation²⁶ and the rule against “mere surplusage” (meaninglessness).²⁷ We must therefore look beyond the ordinary meaning for additional interpretive direction.

3. Technical (clinical) meaning

When testifying about Bill C-14 before the Senate, the Minister of Health indicated that the use of the phrase “reasonably foreseeable” had support from the Canadian Medical Association (CMA): “This language has not been something which has presented a challenge to the group that studied doctors’ opinions on this to the largest extent of any organization in this country.”²⁸

However, the Canadian Medical Association had not conducted any valid research regarding doctors’ opinions on “reasonably foreseeable.”²⁹ Furthermore, Jeff Blackmer, the CMA’s Vice President, Medical Professionalism, acknowledged the lack of consistent support for the phrase among physicians when he testified before the House of Commons Standing Committee on Justice and Human Rights:

What the wording in Bill C-14 does is it allows us to understand how grievous this condition has to be. So we would say while it may not be perfect from a physician standpoint — and I've heard colleagues who have said it provides clear guidance, and I've heard colleagues who say I'm not quite sure how to interpret that — it's certainly much improved.

If the committee felt there was additional language that could be added to further improve that, to further clarify that for physicians, we would welcome that.³⁰

²⁵ Statistics Canada, “Mortality: Overview, 2010 and 2011”, by Laurent Martel, in *Report on the Demographic Situation in Canada*, Catalogue No 91-209-X (Ottawa: Statistics Canada, 30 November 2015).

²⁶ *Ontario v Canadian Pacific Ltd*, [1995] 2 SCR 1031, 1995 CanLII 112 (SCC).

²⁷ See *Medovarski v Canada (Minister of Citizenship and Immigration)*, [2003] 4 FCR 227 at para 41: “Lastly, Parliament intended that its words have some meaning. Words of a statute are not to be ignored. Thus, a legislative provision should not be interpreted so as to render it ‘mere surplusage’” (*R v Proulx*, [2001] 1 SCR 61, at paragraph 28), meaningless, pointless or redundant (*Winters v Legal Services Society*, 1999 CanLII 656 (SCC), [1999] 3 SCR 160; *Morguard Properties Ltd et al v City of Winnipeg*, 1983 CanLII 33 (SCC), [1983] 2 SCR 493). ”

²⁸ *Debates of the Senate*, 42nd Parl, 1st Sess, Vol 150, Issue 41 (1 June 2016) at 1740 (Jane Philpott).

²⁹ The CMA did issue a press release right at the peak of debate about Bill C-14 with “results” of a survey of physicians. However, the closing date for the survey had not yet passed, and only 2,500 physicians had responded (which is approximately 3 percent of the CMA’s member physicians). Such a response rate renders the results totally invalid. Furthermore, the survey did not ask about “reasonably foreseeable.” See Canadian Medical Association, News Release, “Nine in 10 doctors agree federal legislation needed on Medical Assistance in Dying” (16 June 2016), online: CMA <www.cma.ca/En/Pages/nine-in-10-doctors-agree-federal-legislation-needed-on-medical-assistance-in-dying.aspx>.

³⁰ House of Commons, Standing Committee on Justice and Human Rights, 42nd Parl, 1st Sess, Evidence, No 13 (4 May 2016) at 1720 (Dr. Jeff Blackmer).

He also testified that: “given the type of association we are, it's very difficult for Dr. Forbes [then President of the CMA] and me to pretend to represent 80,000 members when we haven't had that discussion internally.”³¹ Not surprisingly, the CMA has subsequently indicated that “reasonably foreseeable” is posing difficulties for providers.³²

Further evidence in support of the claim that “reasonably foreseeable” does not have an established technical (clinical) meaning is the fact that when Bill C-14 was being considered by Parliament, the president of the Federation of Medical Regulatory Authorities of Canada (FMRAC) testified to the Standing Committee on Legal and Constitutional Affairs that “reasonably foreseeable” “is legal, not medical, language.”³³ Similarly, Monica Branigan, chair of the Canadian Society of Palliative Care Physicians, testified that “[a]mong my colleagues, not only my palliative care colleagues, ‘reasonably foreseeable’ does not have a medical meaning because it is reasonably foreseeable that we will all die.”³⁴ Catherine Ferrier, President of the Physicians’ Alliance Against Euthanasia, said “[t]he requirement that natural death be reasonably foreseeable means nothing to us as physicians.”³⁵

Soon after the passage of the legislation, the press quoted Fleur-Ange Lefebvre, executive director and CEO of FMRAC, as saying that the vagueness of the term “reasonably foreseeable death” is a “significant concern,” and that “[t]he federation does not know how to define the term.”³⁶ Similarly, Senator Joyal stated in the Senate debates on C-14 that “[r]easonably foreseeable” is a *Criminal Code* concept. It is not a medical concept.”³⁷

One year after the passage of the legislation, the Canadian Association of MAiD Assessors and Providers (CAMAP) released a clinical practice guideline (CPG), but even it noted that “[t]he term ‘reasonably foreseeable’ is not one used in clinical medical practice. It is a legal term used mainly in civil law (although also found in the criminal law), and there it relates to risk, harm and the law of negligence.”³⁸

³¹ *Ibid.*

³² See Shannon Proudfoot, “Why Canada’s Assisted-Dying Law is Confusing Doctors — and Patients,” *Maclean’s* (18 November 2016), online: <www.macleans.ca/news/canada/why-canadas-assisted-dying-law-is-confusing-doctors-and-patients/>. In this article, Dr. Jeff Blackmer says, “There is very clearly uncertainty in the medical community — there’s no question.”

³³ Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 42nd Parl, 1st Sess, Issue No 9 — Evidence (10 May 2016) (Dr. Douglas Grant).

³⁴ House of Commons, Standing Committee on Justice and Human Rights, 42nd Parl, 1st Sess, Evidence, No 11 (3 May 2016) at 1027 (Dr. Monica Branigan). Note, the transcript reads: “not only palliative my colleagues”; we assume this was a transcription error and for ease of reading have edited the quote rather than quoting the transcript and using [*sic*].

³⁵ House of Commons, Standing Committee on Justice and Human Rights, 42nd Parl, 1st Sess, Evidence, No 13 (4 May 2016) at 1700 (Dr. Catherine Ferrier).

³⁶ Barbara Sibbald, “Doctors Left to Define Foreseeable Death in New Law” (27 June 2016) 188:11 CMAJ, E243, online: <www.cmaj.ca/content/188/11/E243.full>.

³⁷ *Debates of the Senate*, 42nd Parl, 1st Sess, Vol 150, Issue 42 (2 June 2016) at 1700 (Serge Joyal).

³⁸ CAMAP, “The Clinical Interpretation of ‘Reasonably Foreseeable’” in *Clinical Practice Guideline* (2017) at 3, online: <www.camapcanada.ca/cpg1.pdf> [“Clinical Interpretation”].

Almost two years after the passage the legislation, the College of Physicians and Surgeons of Nova Scotia amended their MAiD standard to include the following:

The only court decision to date addressing “reasonably foreseeable” states that:

natural death need not be imminent and that 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.

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. (*AB v. Canada* 2017 ONSC 3759, para 79-80)

Therefore, 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.³⁹

No others have provided their members with interpretive guidance.

It can therefore be concluded that “reasonably foreseeable” did not (and still does not⁴⁰) have an established technical (clinical) meaning derived from specialized use by physicians or nurse practitioners in a clinical context (of course, with the implementation of the MAiD legislation, a technical (clinical) meaning may develop in time). We must therefore next look to see whether there is an established legal meaning of the phrase.

4. Legal meaning

“Reasonably foreseeable” is a term found elsewhere in law. Indeed, the Minister of Justice explicitly stated in the House that, “[r]easonable foreseeability is something that has been used quite regularly in the *Criminal Code*.”⁴¹ The official Legislative Background: Medical Assistance in Dying (Bill C-14) that accompanied the introduction

³⁹ CPSNS, *Professional Standard*, *supra* note 11 at 5.

⁴⁰ CAMAP, “Clinical Interpretation,” *supra* note 38 at 1-2. The CAMAP guideline suggests interpreting “reasonably foreseeable” as meaning: “‘reasonably predictable’ from the patient’s combination of known medical conditions and potential sequelae, whilst taking other factors including age and frailty into account.” However, the guideline is not without controversy (see, e.g. Dr. Jeff Blackmer’s comments in Kelly Grant, “Group of Assisted-Death Providers Publish Clinical-Practice Guideline”, *Globe and Mail* (2 June 2017), online: <www.theglobeandmail.com/news/national/group-of-assisted-death-providers-publish-clinical-practice-guideline/article35192103/>). The CAMAP’s CPG also has an element of inconsistency with some of the reasoning in what follows in this paper, particularly with respect to “end of life,” which, we will argue below, is inconsistent with legislative intent and should not be read into the definition of “reasonably foreseeable.”

⁴¹ *House of Commons Debates*, 42nd Parl, 1st Sess, No 74 (16 June 2016) at 1103 (Jody Wilson-Raybould).

of Bill C-14 described “reasonably foreseeable” as “a more familiar legal concept [than ‘end of life’].”⁴²

The legal meaning of the phrase is important because the Supreme Court of Canada has been very clear in its position that the court should assume that Parliament intends the legal meaning of legal terms:

When Parliament uses a term with a legal meaning, it intends the term to be given that meaning. Words that have a well-understood legal meaning when used in a statute should be given that meaning unless Parliament clearly indicates otherwise. This principle has been applied in a number of cases such as *Will-Kare Paving & Contracting Ltd v Canada*, 2000 SCC 36, [2000] 1 SCR 915, at paras 29-30; *Townsend v Kroppmanns*, 2004 SCC 10, [2004] 1 SCR 315, at para 9; *AYSA Amateur Youth Soccer Association v Canada (Revenue Agency)*, 2007 SCC 42, [2007] 3 SCR 217, at paras 8-23 and 48-49. Most recently in *R v Summers*, 2014 SCC 26, [2014] 1 SCR 575, the Court noted that “Parliament is presumed to know the legal context in which it legislates” and that it is “inconceivable” that Parliament would intend to disturb well-settled law without “explicit language” or by “relying on inferences that could possibly be drawn from the order of certain provisions in the *Criminal Code*”: paras 55-56.⁴³

4.1 Criminal law context

As noted above, the Minister of Justice stated in the House that “[r]easonable foreseeability is something that has been used quite regularly in the *Criminal Code*.”⁴⁴ However, apart from in the MAiD provision, “reasonably foreseeable” and its linguistic cognates actually appear **only once** in the *Criminal Code of Canada* — in s. 753(1)(a)(ii) respecting the test for whether someone shall be found to be a dangerous offender (“reasonably foreseeable consequences to other persons of his or her behaviour”⁴⁵). This phrase has not been judicially considered in the context of s. 753(1)(a)(ii).

⁴² Department of Justice, *Legislative Background: Medical Assistance in Dying (Bill C-14, as Assented to on June 17, 2016)* (Ottawa: Government of Canada, 2016) at 20, online: <www.justice.gc.ca/eng/rp-pr/other-autre/adra-amst/index.html> [Legislative Background].

⁴³ *R v DLW*, 2016 SCC 22 at para 20, [2016] 1 SCR 402.

⁴⁴ *House of Commons Debates*, 42nd Parl, 1st Sess, No 74 (16 June 2016) at 1103 (Jody Wilson-Raybould).

⁴⁵ *Criminal Code*, *supra* note 2, s 753(1): On application made under this Part after an assessment report is filed under subsection 752.1(2), the court shall find the offender to be a dangerous offender if it is satisfied

- (a) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (a) of the definition of that expression in section 752 and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing
- [...]
- (ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behavior [...]

Moving to the broader criminal law context (i.e., not limited to the text of the *Criminal Code*), the Supreme Court of Canada considered the meaning of “reasonably foreseeable” in *R v. Nur*.⁴⁶ The Supreme Court discussed the constitutionality of mandatory minimum sentences and whether or not it is reasonably foreseeable that mandatory minimum sentences would impose grossly disproportionate sentences. The Supreme Court said that in reviewing mandatory minimum sentences, “the court may look not only at the offender’s situation, but at other reasonably foreseeable situations where the impugned law may apply.”⁴⁷ Further, the Supreme Court asserted:

Not only is looking at the law’s impact on persons whom it is reasonably foreseeable the law may catch workable — it is essential to effective constitutional review. Refusing to consider reasonably foreseeable impacts of an impugned law would dramatically curtail the reach of the *Charter* and the ability of the courts to discharge their duty to scrutinize the constitutionality of legislation and maintain the integrity of the constitutional order.⁴⁸

Later, the Supreme Court gave more details about the reasonable foreseeability test, saying the test:

is not confined to situations that are likely to arise in the general day-to-day application of the law. Rather, it asks what situations may reasonably arise. It targets circumstances that are foreseeably captured by the minimum conduct caught by the offence. Only situations that are ‘remote’ or ‘far-fetched’ are excluded.⁴⁹

The Supreme Court did not draw the defining line for reasonable foreseeability at likelihood, explicitly drawing it instead at remoteness (understood as “far-fetched”).

*R v. Maybin*⁵⁰ is another leading criminal case that discusses reasonably foreseeable, here with respect to intervening acts (i.e., was the intervening act and its resultant harm reasonably foreseeable). The Supreme Court stated:

[I]t is the general nature of the intervening acts and the accompanying risk of harm that needs to be reasonably foreseeable. Legal causation does not require that the accused must objectively foresee the precise future consequences of their conduct. Nor does it assist in addressing moral culpability to require merely that the risk of some non-trivial bodily harm is reasonably foreseeable. Rather, the intervening acts and the ensuing non-trivial harm must be reasonably foreseeable in the sense that the acts and the harm that actually transpired flowed reasonably from the conduct of the appellants.⁵¹

⁴⁶ 2015 SCC 15, [2015] 1 SCR 773.

⁴⁷ *Ibid* at para 58.

⁴⁸ *Ibid* at para 63.

⁴⁹ *Ibid* at para 68.

⁵⁰ 2012 SCC 24, [2012] 2 SCR 30.

⁵¹ *Ibid* at para 38.

This is, of course, not terribly helpful as it is about causation rather than prediction.

Because it will become relevant in the later discussion of legislative intent, it must be noted here that one cannot draw any temporal proximity limit for “reasonably foreseeable” in C-14 from the criminal law context; it says nothing explicitly and does not invite inferences about temporal proximity.

From these cases, the most that can be drawn re: the meaning of “reasonably foreseeable” for s. 241.2(2)(d) is “prediction of natural death is ‘not far-fetched.’” Given the 90 percent likelihood of a natural death for every one of us, this interpretation of “reasonably foreseeable” alone and only of this phrase in isolation, again, falls afoul of the rules against absurdity and mere surplusage. We must look beyond the criminal law context for additional interpretive direction to perform the necessary narrowing function.

4.2 Civil law context

The Alberta Court of Appeal provided a succinct definition of “reasonably foreseeable” in the context of negligence: “an event will be found reasonably foreseeable as a ‘real risk’ when it is ‘one which would occur to the mind of a reasonable man in the position of the defendant [...] and which he could not brush aside as far-fetched.’”⁵²

Because it will become relevant in the later discussion of legislative intent, it must be noted here that, inasmuch as the concept of proximity plays a part in the legal meaning of “reasonably foreseeable” in the civil context, it is only in relation to the determination of whether there is a duty of care between the plaintiff and the defendant,⁵³ which is not relevant to the interpretation of C-14. One cannot draw any temporal proximity limit for “reasonably foreseeable” in C-14 from the civil context as C-14 has nothing to do with a duty of care between individuals.

Therefore, the most that can be drawn re: the meaning of “reasonably foreseeable” for s. 241.2(2)(d) is again “prediction of natural death is ‘not far-fetched.’” Reliance on the civil legal meaning of “reasonably foreseeable” alone and only of this phrase in isolation

⁵² *Phillip v Bablitz*, 2011, ABCA 383 at para 29, 2011 Carswell Alta 2168 (Alta CA). Reasonable foreseeability is also discussed in *Becham v Hughes*, [1988] 6 WWR 33, [1988] BCWLD 2167 at para 30, where the B.C. Court of Appeal quotes *McLoughlin v Obrien*, [1983] 1 AC 410, 2 WLR 982 at pp 432-33: “Foreseeability, in any given set of circumstances, is ultimately a question of fact.” See also *Donoghue v Stevenson* [1932] All ER Rep 1, [1932] AC 562 (HL); *Hall v Hebert*, [1993] 2 SCR 159, 1993 CarswellBC 1260; *Cooper v Hobart*, 2001 SCC 79, [2001] 3 SCR 357; *Mustapha v Culligan of Canada Ltd*, [2006] OJ No 4964, 218 OAC 271 (CA); *Odhavji Estate v Woodhouse*, 2003 SCC 69, [2003] SCR 263.

⁵³ See, e.g. *Hall v Hebert*, [1993] 2 SCR 159 at para 114, 1993 CarswellBC 1260: “The notion of legal proximity has been traditionally formulated in terms of whether the risk of harm ought to have been reasonably foreseeable to the defendant” and para 115: “This Court has approved the two stage test for considering foreseeability, proximity and duty of care. It is: (i) is there a sufficiently close relationship between the parties so that, in the reasonable contemplation of a party, carelessness on its part might cause damage to another person; if so, (ii) are there any considerations which should negate or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise.”

would lead to a violation of the rules against absurdity and mere surplusage. Once more, we must look beyond the civil context for additional interpretive direction.

5. *The Act itself*

5.1 *Section 241.2(2)(d)*

The phrase “reasonably foreseeable” must be read in the context of the specific provision,⁵⁴ the section,⁵⁵ and the entirety of the Act⁵⁶ within which it is found.

The specific provision of the Act within which “reasonably foreseeable” appears also includes the phrases “has become” and “taking into account all of their medical circumstances, without a prognosis necessarily having been made as to the specific length of time that they have remaining.”

“Has become” narrows the ordinary and legal meaning of “reasonably foreseeable.”⁵⁷ In other words, it implies that our deaths are not already reasonably foreseeable from birth (even though, for all of us, there is a 90 percent chance of dying a natural death). For X to be able to become Y, it cannot have already been Y. Something must change sometime after birth to indicate that our natural death “has become” reasonably foreseeable. What that something is, though, is not revealed by the phrase “has become.” Therefore, the inclusion of “has become” in the provision indicates that s. 241.2(2)(d) should not be interpreted as simply meaning that it is not far-fetched to predict that a person will die a natural death (i.e., the ordinary and legal meaning). What then should it be taken to mean?

The phrase “taking into account all of their medical circumstances, without a prognosis necessarily having been made as to the specific length of time that they have remaining” may signal how we are supposed to narrow the ordinary and legal meaning of “reasonably foreseeable” to respond to the inclusion of “has become” in the provision.

According to the *Oxford Concise Medical Dictionary*, “prognosis” means “an assessment of **the future course and outcome of a patient’s disease**, based on knowledge of the

⁵⁴ Using the maxim of statutory interpretation *noscitur a sociis* (“know a thing by its associates”).

⁵⁵ See e.g. *Debates of the House of Commons*, 42nd Parl, 1st Sess, Vol 148, No 45 (22 April 2016) at 1028 (Jody Wilson-Raybould): “In terms of the legislation, reasonable foreseeability and the elements of eligibility in terms of being able to seek medical assistance in dying, all must be read together. We purposefully provided flexibility to medical practitioners to use their expertise, to take into account all of the circumstances of a person’s medical condition and what they deem most appropriate or define as reasonably foreseeable.”

⁵⁶ This is a principle of statutory interpretation (e.g. the Preamble is an “intrinsic aid”). See e.g. Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law, 2016).

⁵⁷ This point was signaled at one point in the debates in the House by Sean Casey, Parliamentary Secretary to the Minister of Justice and Attorney General of Canada, as he placed great weight on the inclusion of the words “has become”: “I would ask the member to read the two words in front of those two words, which are ‘has become.’ Therefore, the reasonable foreseeability in the bill is only in the context of a change in someone’s conditions.” See *Debates of the House of Commons*, 42nd Parl, 1st Sess, Vol 148, No 60 at 1243 (Sean Casey).

course of the disease in other patients together with the general health, age, and sex of the patient.”⁵⁸

A logical implication of the wording in the provision is that the following statements are consistent with the provision:

- 1) it is not necessary for **any prognosis** to have been made as to a **specific length of time** until death;
- 2) it is not necessary for **any prognosis** to have been made; and
- 3) it is necessary for a **prognosis (not necessarily as to a specific length of time)** to have been made.

The first statement is obviously true. Statement 1 is not only consistent with the provision, it is logically implied by it.

While logically consistent, one can argue that statement 2 makes no sense. If the government had meant statement 2, surely they would have said so directly (i.e., saying instead “without any prognosis necessarily having been made”). Reading the provision as meaning that no prognosis needs to have been made renders “as to the specific length of time that they have remaining” mere surplusage. Therefore, it is reasonable to conclude that the implication of the wording of this provision is that some prognosis is required, i.e. we should reject statement 2.

What, then, we must ask, is the meaning of “prognosis (not necessarily as to a specific length of time)” in the third statement? There are two possible interpretations of the implications of the additional phrase “not necessarily as to a specific length of time.” It could mean that a **specific or non-specific** length of time is required, or that **no length of time** is required.

The main problem with the first (“no specific or non-specific length of time required”) interpretation is that, in the context of prognoses, the concept of a “non-specific length of time” is at best unclear and at worst nonsensical. In clinical terms, survival predictions always involve both a probability and a temporal range (e.g., 95 percent chance of death in less than six months, 90 percent chance of death in two to five years, 10 percent chance of death from the condition within ten years). What could make one range specific and another not specific? What would be a specific range as opposed to a vague one?

On the other hand, the second (“no length of time required”) interpretation has its own large problem: why does the legislation include the word “specific” if the provision was intended to completely remove time (specific or non-specific) from the requirement for a prognosis? Why not simply say “without a prognosis necessarily having been made as to the length of time that they have remaining”? The “no length of time” interpretation seems to render “specific” mere surplusage.

⁵⁸ *Oxford Concise Medical Dictionary*, 9th ed, *sub veto* “prognosis” (emphasis added).

We could try to stop here and conclude that statement 3 above is true: s. 241.2(2)(d) requires only **that a medical or nurse practitioner has concluded that it is not far-fetched to provide an assessment of the future course of a patient's disease to natural death**, based on knowledge of the course of the disease in other patients together with the general health, age, and sex of the patient (which could either include a specific or non-specific length of time the patient has remaining, or not include any prediction of the length of time remaining).

However, this leaves open which interpretation of statement 3 is true: does the necessary prognosis require a prediction of a specific or non-specific length of time the patient has remaining, or does the necessary prognosis not require any prediction of the length of time remaining?

In addition, some might argue that “reasonably foreseeable” is narrower than we have suggested, that is, they might argue for there being additional requirements to be met. These people would argue that “has become reasonably foreseeable” requires that the 90 percent chance of natural death that we all face from birth has changed in some way, in addition to it now being not far-fetched to provide a prognosis related to natural death (not necessarily as to a specific length of time).

Again, we must look further for additional interpretive direction.

5.2 Section 241.2(2)

In the House and the Senate, the Government rightly indicated that s. 241.2(2)(d) must be read in light of **all** of the eligibility criteria.

In particular, reading the provision in light of the entire section means that one can rule out certain potential features to meet the “has become” element of s. 241.2(2)(d) if those features are already covered in s. 241.2 and s. 241.2(2)(a) through (c). That is, without (a) through (c), possible interpretations of “has become reasonably foreseeable” could be that the person has developed an incurable condition, is now in an advanced state of irreversible decline in capability, or is now experiencing enduring and intolerable suffering. However, these are already found as distinct criteria in the section. Subsection (d) must therefore mean something in addition to the characteristics covered in (a) through (c).⁵⁹

⁵⁹ It must be noted here that Justice Perell’s decision might, at first glance, appear to fall into the trap of suggesting this interpretation of the provision. He does link “reasonably foreseeable” to the other eligibility criteria in s. 241.2(2). However, reading carefully, it can be seen that he uses subsections (a) through (c) as the criteria for the trajectory toward death having shifted (presumably from the 90 percent certainty we all experience to something else). It is logically possible to be on a trajectory toward death for reasons other than (a)-(c) and it is logically possible to have (a)-(c) and not be on a trajectory toward death. Therefore, because Perell says at para 83 “on a trajectory toward death **because** he or she: [(a) through (c)],” Perell’s statement is not the logical equivalent of “reasonably foreseeable” being interpreted as simply a person having (a)-(c) (emphasis added).

Section 241.2(2)(d) must operate to divide the category of competent adults making voluntary decisions (because of s. 241.2(1)) and who have an incurable condition, are in an advanced state of decline, and are experiencing enduring and intolerable suffering (ss. 241.2(2)(a)-(c)) into two sub-categories — one of which will be eligible and one of which will not. The dividing line could centre on at least one or more of the following characteristics: early vs. late stage fatal conditions; non-fatal degenerative conditions with vs. without other sufficiently life-limiting medical circumstances; physical disability with vs. without other sufficiently life-limiting medical circumstances; and mental illness with vs. without other sufficiently life-limiting medical circumstances.

Looking at s. 241.2(2)(d) in context thus tells us that “has become reasonably foreseeable” does **not** mean an incurable condition, in an advanced state of irreversible decline in capability, or experiencing enduring and intolerable suffering. However, it does not tell us what it **does** mean. In other words, it does not help us to describe the critical dividing line.

5.3 The Preamble

It is tempting to turn to the Preamble to the Act for insight into the meaning of the expression “has become reasonably foreseeable”:

Whereas, in light of the above considerations, permitting access to medical assistance in dying for competent adults whose deaths are reasonably foreseeable strikes the most appropriate balance between the autonomy of persons who seek medical assistance in dying, on one hand, and the interests of vulnerable persons in need of protection and those of society, on the other;⁶⁰

However, this text doesn’t provide much direction. It exposes the purpose of restricting access to MAiD to individuals whose death “has become reasonably foreseeable,” but it doesn’t expose the meaning of “has become reasonably foreseeable.”

The “above considerations” referenced in the section of the Preamble quoted previously are the following:

Whereas robust safeguards, reflecting the irrevocable nature of ending a life, are essential to prevent errors and abuse in the provision of medical assistance in dying;

Whereas vulnerable persons must be protected from being induced, in moments of weakness, to end their lives;

Whereas it is important to affirm the inherent and equal value of every person’s life and to avoid encouraging negative perceptions of the quality of life of persons

⁶⁰ Bill C-14, *supra* note 1, preambular para 6.

who are elderly, ill or disabled;

Whereas suicide is a significant public health issue that can have lasting and harmful effects on individuals, families and communities;⁶¹

The first two of these are at least in part dealt with in the consent requirements (voluntariness) and the procedural safeguards (e.g., two independent assessments and waiting period) elsewhere in the Act.⁶² The last two, less so. Section 241.2(2)(d) seems primarily aimed at the last two objectives in the preamble, but could also be aimed at addressing the first two (if supplementing the other provisions in the Act).

Open questions remain to which the Preamble provides no answers: “what measures promote these objectives?” and “what definition ‘strikes the most appropriate balance’ [between them and the other objectives of the Act (most notably respect for autonomy)]?”

Intermediate conclusions

We can draw three intermediate conclusions from the preceding analysis. First, the legal meaning of natural death being “reasonably foreseeable” implies “prediction of natural death is not far-fetched.” Second, the inclusion of the phrase “has become” adds that there must have been some change in medical circumstances from being in a state of a 90 percent chance of natural death to being in some other state in relation to one’s natural death. Third, the inclusion of the phrase “taking into account all of their medical circumstances, without a prognosis necessarily having been made as to the specific length of time that they have remaining” adds the requirement of an assessment of the future course of a patient’s disease to natural death, based on knowledge of the course of the disease in other patients together with the general health, age, and sex of the patient (either with a requirement of a prediction of a non-specific or specific length of time the patient has remaining, or without any prediction as to length of time the patient has remaining) having been made.

However, we must proceed with further analysis for several reasons. First, we must determine whether there are any arguments that overwhelm the presumption that the phrase “reasonably foreseeable” should not be taken to have its ordinary legal meaning as modified as required by the text around it in s. 241.2(2)(d) (i.e., did the legislature signal that it intended to deviate from this meaning beyond the deviations required by “has become” and “taking into account all of their medical circumstances, without a prognosis necessarily having been made as to the specific length of time that they have remaining”). Second, we must determine whether there is anything else that can be drawn from legislative intent that shapes the interpretation of s. 241.2(2)(d) and answers some of the open questions identified earlier.

⁶¹ *Ibid*, preambular paras 2-5.

⁶² *Criminal Code*, *supra* note 2, s 241.2(3).

Given that there is ambiguity in the phrase “natural death has become reasonably foreseeable,” we must keep the ordinary and legal meanings, and the insights from a close reading of the provision, the section, and the Act in mind, but also look to legislative intent for additional interpretive direction. We therefore turn now to a legislative intent analysis.

6. Legislative intent

To assess legislative intent, we must look to statements made directly on the point of the meaning of the legislation, statements made about individuals or groups who would be eligible or not under the provision, actions taken in response to attempts to amend the legislation, as well as statements made about the purpose of the legislation. From each of these, we can attempt to infer the intended meaning.

6.1 Statements about the meaning of the legislation

A review of all of the speeches in the House and Senate as well as testimony before the House and Senate Committees, and background and other explanatory materials produced by the government reveal the legislative intent behind s. 241.2(2)(d).⁶³

Some conclusions can be confidently drawn about what s. 241.2(2)(d) was **not** intended to mean. “Natural death has become reasonably foreseeable”:

- need not be caused by the grievous and irremediable condition⁶⁴

⁶³ For transcripts of the above, see LegisInfo, “C-14,” online: <www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=8177165&View=0>. Senator George Baker foreshadowed that the statutory interpretation process would rely on legislative intent: “A court in the future will look at this bill and say, ‘What does the bill mean as far as expectation of life is concerned?’ They will go to this background document and they will say, ‘That’s what this means in this bill.’ Why? Because that’s what the Government of Canada says in their background document.” (See *Debates of the Senate*, 42nd Parl, 1st Sess, Vol 150, Issue 42 (2 June 2016) at 1530 (George Baker).) Of course, a court would not restrict itself to the background document. It should also be noted here that Anthony Housefather, Chair of House of Commons Standing Committee on Justice and Human Rights, said “what is also eminently reasonable and strongly follows the will of the House of Commons is the minister rejecting the amendment to remove the criteria of death being ‘reasonably foreseeable.’” He then went on to misdescribe the effect of the Act as: limited to those “near the end of his or her natural life,” not including “people who have purely psychological illness,” “help people who are suffering intolerably but have an illness that will extinguish their life at some future date,” and claimed that the Act excluded “someone who comes to them and who may have many years left to live, and who has an illness that we may find a cure for in four or five years” (See *Debates of the House of Commons*, 42nd Parl, 1st Sess, Vol 148, No 74 (16 June 2016) at 1329). Housefather’s statements were inconsistent with the statements made by Ministers Wilson-Raybould and Philpott, Parliamentary Secretary to the Minister of Justice and Attorney General of Canada Sean Casey, and official government documents; see examples discussed in Part 5.1.. We have therefore disregarded his comments in our analysis.

⁶⁴ E.g. Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 42nd Parl, 1st Sess, Issue No 8 — Evidence (4 May 2016) (Jody Wilson-Raybould): “However, in terms of the way that we’ve drafted our definition around ‘grievous and irremediable,’ all of those elements need to be read together in the totality of the circumstances.”

- is not limited to fatal conditions⁶⁵
- is not limited to being terminally ill⁶⁶
- is not limited to six months (U.S. model)⁶⁷
- is not limited to “at the end of life” (Quebec model)⁶⁸

None of these statements are inconsistent with the ordinary or legal meaning of the words used in s. 241.2(2)(d) and there is evidence that the legislature intended these conclusions. They should all be rejected as interpretations of “natural death has become reasonably foreseeable.”

But how is “reasonable foreseeability” limited if it is narrower than the intermediate conclusions provided earlier? A number of possibilities arise.

6.1.1 Definition by health professionals

In explaining its choice of the phrase “reasonably foreseeable,” the government made it clear that the use of “reasonably foreseeable” was intended to achieve maximum flexibility specifically with respect to the exercise of professional expertise. For example, Minister of Justice Jody Wilson-Raybould said the phrase was chosen to provide “maximum flexibility for medical assessment to health care providers, both in terms of the circumstances that led a person to be on a trajectory toward death and in terms of the time during which they can seek medically assisted death.”⁶⁹ She further explained, “we specifically did not put a time frame around reasonable foreseeability, as they have in other jurisdictions but left it to medical professionals to determine based on individual circumstances.”⁷⁰

⁶⁵ E.g. *Debates of the House of Commons*, 42nd Parl, 1st Sess, Vol 148, No 45 (22 April 2016) at 1010 (Jody Wilson-Raybould): “To be clear, the bill does not require that people be dying from a fatal illness or disease or be terminally ill.”

⁶⁶ E.g. *Debates of the House of Commons*, 42nd Parl, 1st Sess, Vol 148, No 46 (2 May 2016) at 1559 (Arif Virani): “Bill C-14 is actually more permissive than any assisted-dying legislation in North America. In Quebec, an applicant must have a terminal disease. Bill C-14 is more accessible. It would allow medical assistance in dying where death is reasonably foreseeable, looking at the totality of the medical circumstances.”

⁶⁷ E.g. House of Commons, Standing Committee on Justice and Human Rights, *Committee Evidence*, 42nd Parl, 1st Sess, No 10 (2 May 2016) at 1607 (Jody Wilson-Raybould): “eligibility does not depend on a person's having a given amount of time remaining, such as a certain number of weeks or months to live, as in the United States.”

⁶⁸ E.g. *Debates of the Senate*, 42nd Parl, 1st Sess, Vol 150, Issue 41 (1 June 2016) at 1700 (Jane Philpott): “‘end of life’ is very difficult to define. It is a term that is used in the Quebec legislation. There are jurisdictions that put real parameters around it that say the end of life must be anticipated within six months or a certain period of time. [...] The solution was to recognize that, while we could have used the term ‘end of life’ [...], we preferred instead to define ‘grievous and irremediable’ and to say that a natural death was ‘reasonably foreseeable,’ which is a term that is understood and accepted by doctors, as I said before.” It should also be noted here that the government took the exact phrase from the Quebec legislation re: “advanced state of irreversible decline in capability.” If it had intended to adopt the substance of the Quebec provision with respect to “end of life,” it is reasonable to presume it would have done the same thing with the provision “at the end of life” found in the Quebec legislation.

⁶⁹ House of Commons, Standing Committee on Justice and Human Rights, *Committee Evidence*, 42nd Parl, 1st Sess, No 10 (2 May 2016) at 1607 (Jody Wilson-Raybould).

⁷⁰ *Ibid* at 1653 (Jody Wilson-Raybould).

Minister of Health Jane Philpott affirmed: “the concept of reasonable foreseeability is a concept that respects the professional judgment of a health care provider.”⁷¹

It is not clear, however, whether that exercise was intended to be in relation to the application of the definition or in the actual definition.

We purposefully provided flexibility to medical practitioners to use their expertise, to take into account all of the circumstances of a person's medical condition and what they deem most appropriate or **define** as reasonably foreseeable.⁷²

While it is entirely appropriate for there to be flexibility to allow the exercise of professional expertise with respect to whether eligibility criteria in the legislation have been met, it would be inappropriate for the flexibility to allow individual health care providers to define terms in the legislation. First, the definition of a term in a piece of legislation should surely never be left to the very individual who is subject to criminal liability under that legislation. Flexibility is certainly left to those who will **administer** a legislative provision.⁷³ Flexibility is left with respect to the **application** of legislative provisions.⁷⁴ However, we have found no cases in which the individual subjects of the provision actually **define** the provision.

Second, professional judgement and clinical expertise relates to whether a patient has met a set of criteria, not to defining the criteria — e.g., it relates to **whether a person has less than five years to live** but not to **whether MAiD should be limited to persons who have less than five years to live**. It relates to the identification of the particular trajectory a patient will follow to natural death. It does not relate to the question of whether a patient should only have access to MAiD if she is on a particular kind of trajectory (e.g., fatal condition). The definition of the eligibility criteria is a social judgement (for legislatures) while the assessment of whether the criteria have been met is a clinical judgement (by health care professionals).

It might be argued, in response, that medicine and nursing are self-regulating professions and that the government has delegated considerable responsibility and authority to the colleges to regulate health professionals. Perhaps, it might be argued, the legislative intent was to leave the definition of “reasonably foreseeable” to the colleges. However, this argument should be rejected for several reasons. First, the delegation of authority to colleges comes from provincial/territorial governments (under their jurisdiction over the administration of health). The federal government plays no part in that delegation. In

⁷¹ *Ibid* at 1706 (Jane Philpott).

⁷² *Debates of the House of Commons*, 42nd Parl, 1st Sess, Vol 148, No 45 (22 April 2016) at 1028 (Jody Wilson-Raybould).

⁷³ See, e.g. *Oliveira v Ontario (Disability Support Program Director)*, 2008 ONCA 123.

⁷⁴ See e.g. *Tranchemontagne v Ontario (Director, Disability Support Program)*, [2006] 1 SCR 513, 2006 SCC 14. Provincial statutes such as the *Administrative Tribunals Act*, SBC 2004, ch 45, s 43(1) grant tribunals the jurisdiction “to determine all questions of fact, law or discretion that arise in any matter before it, including constitutional questions.”

order for the colleges to be a delegated authority, the federal government would have to have delegated authority with respect to an aspect of the *Criminal Code* to the provinces/territories, which would then delegate that authority to the colleges. Clearly, that has not happened. Second, physicians and nurse practitioners are both permitted to provide and assess eligibility for MAiD under the federal legislation. If the regulators are given the authority to define the meaning of “reasonably foreseeable,” the medical and nursing regulators could adopt different definitions, and so this interpretation could result in the actual definition of a *Criminal Code* provision being different for physicians and nurse practitioners even within the same province/territory.⁷⁵

It might be argued that medicine and nursing associations frequently establish clinical practice guidelines (CPGs) and that the government intended to delegate responsibility for defining “reasonably foreseeable” to professional associations. However, this argument too should be rejected for several reasons.

First, physicians from a wide range of specialties provide MAiD. Which professional association would be authoritative? For example, the Canadian Society of Palliative Care Physicians, the Canadian Association of Critical Care Physicians, or the Canadian Association of MAiD Assessors and Providers?⁷⁶ This interpretation could result in the **definition** of the law itself being different for different specialties. Second, both physicians and nurse practitioners are permitted to provide and assess eligibility for MAiD under the federal legislation. If their professional associations draft CPGs, this interpretation could result in the actual definition of a *Criminal Code* provision being different for physicians and nurse practitioners even within the same province/territory.

Finally, in response to both the colleges and associations arguments, the language used when discussing flexibility for health care providers suggests the speakers were referring to individual providers and not their regulatory bodies. As quoted above, the Minister of Justice said, “maximum flexibility for medical assessment to health care providers, both in terms of the circumstances that led **a person** to be on a trajectory toward death and in terms of the time during which **they** can seek medically assisted death.”⁷⁷ She earlier said, as quoted above, “We purposefully provided flexibility to medical practitioners to use their expertise, to take into account all of the circumstances of **a person's** medical condition and what they deem most appropriate or **define** as reasonably foreseeable.”⁷⁸ This is reiterated by the Minister of Health, who said, “[h]owever, the concept of reasonable foreseeability is a concept that respects the professional judgment of **a** health care provider.”⁷⁹

⁷⁵ Inconsistency in how the term may be interpreted has been flagged as a concern by CAMAP. See e.g. Kelly Grant, “Group of Assisted-Death Providers Publish Clinical-Practice Guideline”, *supra* note 40.

⁷⁶ CAMAP, “Clinical Interpretation”, *supra* note 38.

⁷⁷ House of Commons, Standing Committee on Justice and Human Rights, *Committee Evidence*, 42nd Parl, 1st Sess, No 10 (2 May 2016) at 1607 (Jody Wilson-Raybould) (emphasis added).

⁷⁸ *Debates of the House of Commons*, 42nd Parl, 1st Sess, Vol 148, No 45 (22 April 2016) at 1028 (Jody Wilson-Raybould) (emphasis added).

⁷⁹ House of Commons, Standing Committee on Justice and Human Rights, *Committee Evidence*, 42nd Parl, 1st Sess, No 10 (2 May 2016) at 1706 (Jane Philpott) (emphasis added).

The use of the singular (“a person,” “a provider”) and “individual circumstances” indicates application in specific cases rather than determination of a general rule (i.e., definition) by a group.

Despite some apparent legislative intent, this interpretation should therefore be rejected.

That said, once the definition is clear, it should be left to health care providers to determine, using their professional judgement, whether the patient has met the criterion of s. 241.2(2)(d).

It is worth noting here that these conclusions were also drawn by Justice Perell in *AB v. Canada*. In his decision, Justice Perell issued an “interpretative declaration” indicating that it is for the courts to interpret the legislation: “In my opinion, making this declaration of statutory interpretation would be useful and fall with this court’s jurisdiction to interpret and declare the civil law and it would not interfere with prosecutorial discretion by issuing declarations purporting to predetermine criminal liability.”⁸⁰ He also indicated that it is the responsibility of physicians to determine whether the eligibility criteria have been met:

I agree with Ontario and Canada that Bill C-14’s legislative history (and its language) demonstrates Parliament’s intention that the physicians and nurse practitioners who have been asked to provide medical assistance in dying are exclusively responsible for deciding whether the Code’s criteria are satisfied without any pre-authorization from the courts.⁸¹

6.1.2 Excluded set

Comments by the Minister of Justice and others indicate that the legislative intent was to exclude people like the following:

- “a soldier with post-traumatic stress disorder, a young person who suffered a spinal cord injury in an accident, or a survivor whose mind is haunted by memories of sexual abuse”⁸²;

⁸⁰ *AB*, *supra* note 10 at para 66.

⁸¹ *Ibid* at para 62.

⁸² *Debates of the House of Commons*, 42nd Parl, 1st Sess, Vol 148, No 62 (31 May 2016) at 1014 (Jody Wilson-Raybould). The minister previously stated “a person with a major physical disability who is otherwise in good health, or a person who solely suffers from mental illness, in the absence of additional medical circumstances, may not be associated with a reasonably foreseeable death.” (See *Debates of the House of Commons*, 42nd Parl, 1st Sess, Vol 148, No 45 (22 April 2016) at 1010 (Jody Wilson-Raybould)). But does this mean that these conditions may be associated with a reasonably foreseeable death? Or that they cannot? Does “may not” refer to possibility or permissibility? “May not” has rarely been the subject of statutory interpretation, but the Alberta Municipal Government Board has deliberated on its meaning twice. In one case, “may not” was determined to mean “shall not” (see *Re, Irwin*, 2004 CarswellAlta 2364) while in the other case, “may not” was determined to confer discretion (see *Winchell v. Clearwater County (Subdivision Authority)*, 2015 ABMGB 32, 2015 CarswellAlta).

- “someone who is exclusively suffering from a physical or mental disability, but who is otherwise in good health and whose natural death is still many years away”⁸³;
- “persons who have recently become disabled in a car accident and have become quadriplegics”⁸⁴;
- “someone who recently became a paraplegic, whose mental process, whose acceptance of their new circumstances, may be very different if they waited a year”⁸⁵;
- “For people who are suffering from schizophrenia, depression, anxiety, et cetera, natural death is not a reasonable [*sic*] foreseeable outcome”⁸⁶;
- “The matter of reasonable foreseeability of death would exclude people suffering from mental illness alone [if not a kind of mental illness that can cause death, e.g., anorexia].”⁸⁷

One could draw from such statements the intention to exclude individuals with physical disability or mental disability or illness who are “otherwise in good health.” This could be because their natural death is in the too distant future and/or because it is not possible to predict how the patient will die a natural death, based on knowledge of the course of the disease in other patients together with the general health, age, and sex of the patient (not necessarily including any prediction of the specific length of time the patient has remaining). In other words, that it is not reasonable to predict how or when the person will die a natural death.

We turn therefore to the further consideration of the possible limits within the definition of “reasonably foreseeable” as, arguably, they should not lead to the inclusion of any of those who fall within this excluded set.

6.1.3 Temporal proximity

It is thought by many that “reasonably foreseeable” means temporal proximity, that is, it can be predicted that a person’s natural death will happen within a window of time.

The Minister of Justice stated “we specifically did not put a time frame around reasonable foreseeability, as they have in other jurisdictions [. . .] but left it to medical professionals

⁸³ *Debates of the House of Commons*, 42nd Parl, 1st Sess, Vol 148, No 47 (3 May 2016) at 1042 (Vance Badawey).

⁸⁴ *Debates of the House of Commons*, 42nd Parl, 1st Sess, Vol 148, No 74 (16 June 2016) at 1102 (Jody Wilson-Raybould).

⁸⁵ *Ibid* at 1101 (Anthony Housefather).

⁸⁶ Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 42nd Parl, 1st Sess, Issue No 8 — Evidence (4 May 2016) (Jane Philpott).

⁸⁷ The legitimacy of the addition of the text in the square bracket is made evident through a letter from the Attorney General of Canada to Jocelyn Downie; see Addendum in Jocelyn Downie & Justine Dembo, “Medical Assistance in Dying and Mental Illness under the New Canadian Law,” (2016) (open volume) JEMH at 10, online: <www.jemh.ca/issues/v9/documents/JEMH_Open-Volume_Benchmark_Medical_Assistance_in_Dying_and_Mental_Illness_Under_the_New_Canadian_Law-Nov2016.pdf>.

to determine based on individual circumstances.”⁸⁸ This could be read as suggesting either a) there is no temporal proximity requirement (with medical professionals determining eligibility based on something other than temporal proximity) or b) there is a temporal proximity requirement (with medical professionals determining eligibility based on a temporal proximity standard determined by them).

The Minister of Health said “We could have said nothing about the proximity of death. We could have specified a specific amount of time — six months or 12 months. However, the concept of reasonable foreseeability is a concept that respects the professional judgment of a health care provider.”⁸⁹ This could be read as suggesting that it is up to health care providers to determine whether natural death is sufficiently proximate — with no parameters provided by the legislation (i.e., the setting of the parameters is left to health care providers (this interpretation being vulnerable to the arguments made above against the “definition by health professionals” interpretation)).

Official explanations of “reasonably foreseeable” also included reference to natural death being “not too remote,”⁹⁰ “within a period of time that is not too remote from circumstances that can be predicted within a range of reasonable possibilities,”⁹¹ and in the “not too distant future.”⁹² These phrases suggest an intention to require some temporal proximity.

In addition, the existence of a temporal proximity requirement might be inferred from the fact that, as will be discussed in detail below, various statements were made with respect to what the temporal proximity limit might be.

All of this goes to support one of the two positions re: the meaning of the prognosis clause in the text of s. 241.2(2)(d) discussed earlier. It is evidence that “taking into account all of their medical circumstances, without a prognosis necessarily having been made as to the specific length of time that they have remaining” implies “it is necessary for a **prognosis (including a non-specific or specific length of time)** to have been made.”

If it is decided that the legislative intent was to include a temporal proximity requirement, the next question that we would have to address is “**what is the minimum length of time required in order to meet the eligibility criterion?**”

In a speech during the Senate debates on C-14, Senator Murray Sinclair (a former judge) raised and relied upon the legal meaning of “reasonably foreseeable” in a civil law context and stated that: “I want to point out that reasonable foreseeability does not mean

⁸⁸ House of Commons, Standing Committee on Justice and Human Rights, *Committee Evidence*, 42nd Parl, 1st Sess, No 10 (2 May 2016) at 1653 (Jody Wilson-Raybould).

⁸⁹ *Ibid* at 1706 (Jane Philpott).

⁹⁰ E.g. Department of Justice, *Legislative Background*, *supra* note 42 at 20.

⁹¹ *Debates of the House of Commons*, 42nd Parl, 1st Sess, Vol 148, No 46 (2 May 2016) at 1643 (Sean Casey).

⁹² Government of Canada, Department of Justice, “Glossary” (2016), online: <www.justice.gc.ca/eng/cj-jp/ad-am/glos.html>.

‘imminent.’ It does not mean someone has to be dying within the next short period of time. Death can be far down the road.”⁹³

Indirect statements also indicate legislative intent regarding the length (or window) of time that would meet the temporal proximity requirement. For example, the Minister of Health stated that individuals would meet the reasonably foreseeable criterion from the moment of a diagnosis of ALS being made:

An example of a case [that would be in] would be the matter of amyotrophic lateral sclerosis. [...] **From the time that that diagnosis is made**, sadly, a person’s death is reasonably foreseeable. [...] On the matter of whether or not their **death is reasonably foreseeable on a diagnosis of ALS**, I think few doctors would disagree that it is reasonably foreseeable, **because it usually happens within a matter of months or years**. (emphasis added)⁹⁴

This seems to set the minimum limit for “not too remote” at “usually within a matter of months or years.” It is, of course, impossible to tell from this how many years the minimum predicted survival is to be classified as “too remote.” Statistics from the ALS society show some of the problems with this example:

Most people who develop ALS are between the ages of 40 and 70, with an average age of 55 at the time of diagnosis. However, cases of the disease do occur in persons in their twenties and thirties. [...] Half of all people affected with ALS live at least three or more years after diagnosis. Twenty percent live five years or more; up to ten percent will live more than ten years.⁹⁵

The average life-expectancy at diagnosis of ALS is two to five years; Stephen Hawking was diagnosed at 21 and died in 2018 at 76.

What temporal limit can one draw from these statistics for the minimum? Is it two or five years? Or three?

Also, while the Minister of Health said that someone at the time of a diagnosis of ALS meets the criterion, what about other conditions? In other words, does ALS represent a maximum survival time to qualify? Or does it simply fall under the maximum with that not being set by the survival time of persons at the time of diagnosis with ALS?

Further, does this expression of sufficient proximity in terms of two to five years or three years not violate the text of the provision itself by requiring a prognosis having been made as to the specific length of time? Is real specificity re: the maximum qualifying time (i.e., that it is not exceeded) required to meet this test? This problem cannot be

⁹³ *Debates of the Senate*, 42nd Parl, 1st Sess, Vol 150, No 52 (17 June 2016) at 1210 (Murray Sinclair).

⁹⁴ *Debates of the Senate*, 42nd Parl, 1st Sess, Vol 150, Issue 41 (1 June 2016) at 1700 (Jane Philpott).

⁹⁵ ALS Association, “Who Gets ALS?”, online:

<webma.alsa.org/site/PageServer/?pagename=MA_1_WhoGets.html>.

addressed by reverting to the non-specific expression “months or years” as that expression is hopelessly (and arguably impermissibly in light of *Charter* values) vague.

The Minister of Justice also addressed the issue of reasonable foreseeability in relation to a specific circumstance (this time a specific person rather than diagnosis). She stated: “I am 100 per cent confident that Kay Carter would be eligible under Bill C-14 to access medical assistance in dying.”⁹⁶ Understanding Kay Carter’s circumstances may therefore provide insight into the intended meaning of “reasonably foreseeable.” Kay Carter was not terminally ill and, indeed, had a life-expectancy of considerably more than six or 12 months. The life expectancy of an 89-year-old woman in British Columbia in 2009-2011 was six years.⁹⁷ Spinal stenosis itself does not significantly shorten life expectancy.⁹⁸ Based on the information available to the Minister (i.e., introduced into evidence in *Carter v. Canada*⁹⁹), the Minister’s comments are inconsistent with a temporal proximity window of anything less than six years. Again, though, we don’t know whether this set of medical circumstances sets the ceiling or simply falls somewhere under the ceiling. “Reasonable foreseeability” could be interpreted as “six years is the outside boundary for eligibility” or “six years is less than the outside boundary for eligibility.”

Thus it might be argued that the legislative intent was to have “reasonably foreseeable” establish a requirement for temporal proximity (with an outside limit of “not too remote,” two to five years, six years, or as determined by health care providers¹⁰⁰).

However, this interpretation faces numerous challenges. First, “not too remote” alone is arguably impermissible vague — how remote is too remote? If rendered less vague by attribution of a temporal window (e.g., less than five years), it may violate the prohibition on requiring a prognosis with a specific length of time. While there is a window (so it might be tempting to say it is not specific), in order to make a determination of whether the individual qualifies, the health care provider will have to make a determination of whether the individual has a prognosis of the specific number that represents the lower limit of the window, that is, a specific length of time. However, in response, one might argue that this is not specific as it is a range, e.g., “five to six” and the provider need not make a prognosis of five years. Also in response, one might argue that the further the probability falls away from a 100 percent chance of death within each particular timeframe, the less specific the prognosis is regarding the length of time the patient has remaining.

⁹⁶ *Debates of the Senate*, 42nd Parl, 1st Sess, Vol 150, No 41 (1 June 2016) at 1420 (Jody Wilson-Raybould).

⁹⁷ According to Statistics Canada, the life expectancy is 5.88 years for an 89-year-old woman in British Columbia: Statistics Canada, “Table 11b: Complete life table, females, British Columbia, 2009 to 2011” (2015), online: <www.statcan.gc.ca/pub/84-537-x/2013005/tbl/tbl11b-eng.htm>.

⁹⁸ Spinal stenosis might be estimated to likely reduce her life expectancy by approximately 0.6 years. BB Hatch et al, “Factors predictive of survival and estimated years of life lost in the decade following nontraumatic and traumatic spinal cord injury”, (2017) 55:6 *Spinal Cord* 540.

⁹⁹ *Carter v Canada*, 2012 BCSC 1587 (Evidence: Affidavit of Lee Carter, 24 August 2011, online: <bccla.org/wp-content/uploads/2012/06/20110824-Affidavit-Lee-Carter-Affidavit.pdf>).

¹⁰⁰ Assuming the arguments made above against leaving the definition (as opposed to application of the definition) to health care providers are rejected.

In the final analysis, there are three reasons to conclude that the legislative intent **was not** to include a temporal proximity requirement. First, there are statements that suggest a rejection of a temporal proximity limit. Second, some statements explicitly referenced the established legal meaning of “reasonably foreseeable” — which is non-temporal — when explaining the meaning of the statute.¹⁰¹ Third, this is the conclusion drawn in the only court decision we have on the issue.¹⁰²

On the other hand, there are two reasons to conclude that the legislative intent **was** to include a temporal proximity requirement. First, there are statements that suggest a temporal interpretation. Second, it appears that some of the actors appear to have believed, incorrectly, that the established legal meaning of “reasonably foreseeable” was temporal.

It can also be concluded that, if temporal proximity was intended to be a limit, there are very strong arguments in support of the interpretation that the temporal proximity window is **no less than** five years based on statements from the Minister of Justice’s statements regarding whether or not Kay Carter qualified¹⁰³ and statements from the Minister of Health’s regarding qualification from the moment of diagnosis of ALS.¹⁰⁴ But there is no clear answer available to the question **how many more** years can be added before long is too long, distant is too distant, and remote is too remote?

6.1.4 Prognosis (other than as to length of time)

Turning back to the suggestion made earlier that s. 241.2(2)(d) requires only that it is not far-fetched to provide an assessment of the future course of a patient’s disease to natural death, based on knowledge of the course of the disease in other patients together with the general health, age, and sex of the patient (not necessarily requiring any prediction of the length of time the patient has remaining), how well (or not) does this square with legislative intent?

The government offered an additional range of phrases when discussing “reasonably foreseeable” including “on a path toward death,”¹⁰⁵ “on a trajectory toward death,”¹⁰⁶ and “on a trajectory toward the end of their lives.”¹⁰⁷ These seem to resonate with this

¹⁰¹ See e.g. *Debates of the Senate*, 42nd Parl, 1st Sess, Vol 150, Issue 42 (2 June 2016) at 1500 (Serge Joyal): “‘Reasonably foreseeable’ is a *Criminal Code* concept based essentially on predictability. Predictability means something will happen, not proximity of time. Reasonably foreseeable is predictability, not proximity of time or death.”

¹⁰² *AB*, *supra* note 10.

¹⁰³ *Debates of the Senate*, 42nd Parl, 1st Sess, Vol 150, No 41 (1 June 2016) at 1420 (Jody Wilson-Raybould).

¹⁰⁴ *Ibid* at 1700 (Jane Philpott).

¹⁰⁵ E.g. *Debates of the House of Commons*, 42nd Parl, 1st Sess, Vol 150, No 46 (2 May 2016) 1643 (Sean Casey).

¹⁰⁶ E.g. *Debates of the House of Commons*, 42nd Parl, 1st Sess, Vol 150, No 61 (31 May 2016) at 1014 (Jody Wilson-Raybould).

¹⁰⁷ E.g. *Debates of the House of Commons*, 42nd Parl, 1st Sess, Vol 150, No 46 (2 May 2016) 1643 (Sean Casey).

interpretation of s. 241.2(2)(d). They do not import any requirement of temporal proximity (whether non-specific or specific).

The challenge this interpretation faces comes from the fact that, as described above, there is some evidence that it was the legislative intent to have a temporal proximity requirement for eligibility and this interpretation does not require temporal proximity. Also, as was also noted earlier, it could be argued that not requiring a length of time (as this doesn't) renders the term "specific" in the provision mere surplusage.

6.2 Statements about the purpose of the legislation

We might try to infer meaning for s. 241.2(2)(d) from statements made by the government about the purpose of the legislation. Specifically, the Preamble states the "reasonably foreseeable" provision was designed to protect vulnerable persons. The Minister of Justice spoke frequently about the objective of protecting the vulnerable.¹⁰⁸

It is possible that they were concerned about people being vulnerable to coercion. However, this cannot provide meaning for s. 241.2(2)(d) because that concern is already dealt with through the specific requirement of voluntary consent:

s. 241.2(1)(d) they have made a voluntary request for medical assistance in dying that, in particular, was not made as a result of external pressure;

It is possible that they were concerned about people lacking decision-making capacity (whether temporarily or consistently). However, this cannot provide meaning for s. 241.2(2)(d) because that concern is already dealt with through the specific requirement of capacity:

s. 241.2(1)(b) they are at least 18 years of age and capable of making decisions with respect to their health;

To read vulnerability re: voluntariness or capacity into "reasonably foreseeable" would

¹⁰⁸ See e.g. *Debates of the Senate*, 42nd Parl, 1st Sess, Vol 150, No 41 at 1430 (Jody Wilson-Raybould: "we sought to find the right balance in terms of the objectives of this bill and balancing and respecting personal autonomy, while recognizing that we need to do as much as we can to protect the vulnerable among us"; *Debates of the House of Commons*, 42nd Parl, 1st Sess, Vol 150, No 62 (31 May 2016) at 1014 (Jody Wilson-Raybould): "it would limit medical assistance in dying to persons in these types of circumstances in order to prevent the normalization of suicide, protect vulnerable persons who were disproportionately at risk of inducement to suicide, and affirm the equal value of every person's life"; *Debates of the House of Commons*, 42nd Parl, 1st Sess, Vol 150, No 47 (3 May 2016) at 1042 (Vance Badawey): "However, medical assistance in dying is not a solution to all forms of medical suffering. Such an approach would raise unacceptable risks, particularly for vulnerable people throughout our society. Take the example of someone who is exclusively suffering from a physical or mental disability, but who is otherwise in good health and whose natural death is still many years away. Making medical assistance in dying available to people in these circumstances risks reinforcing negative stereotypes of the lives lived by Canadians with disabilities, and could suggest that death is an acceptable alternative to any level of medical suffering or disability. This risks undermining our efforts to combat suicide, a pressing public health problem that affects not only those who die by suicide, but also their families, friends, and overall communities."

render these provisions or s. 241.2(2)(d) redundant and the new interpretation would violate the rule against mere surplusage.

The Ministers expressed concerns about the excluded set described above at various points during Bill C-14's passage (see section 1.6.1.2). If protecting all of the people in the excluded set requires excluding them from access to MAiD, then the most restrictive interpretation would be the intermediate conclusion with no requirement of a predicted length of time as none of these individuals have a condition for which one can offer a prediction of the future trajectory to natural death and, as soon as they have such circumstances, they fall outside the parameters of the set. Temporal proximity would allow access for the individuals in the set whose natural death is sufficiently close in time.

6.3 Actions taken during the legislative process

We might try to infer meaning for s. 241.2(2)(d) from actions taken by the legislature with respect to amendments suggested in Committee(s) and in the House and Senate. The majority of the House rejected proposed amendments (at the House Justice Committee hearings, by the Senate as a whole, and in the House debates) that would have removed s. 241.2(2). Had the amendments suggested revised wording for s. 241.2(2)(d), then it might be possible to infer meaning from the rejections by reasoning that one could at least be clear what the provision doesn't mean, i.e., the rejected amendment. However, the proposed amendments were to delete all of s. 241.2(2), most especially s. 241.2(2)(d), so all one can infer is that the government wanted the provision to remain. No inferences regarding meaning can be drawn.

Conclusion

No interpretation of s. 241.2(2)(d) can be shown to be consistent with all of the rules of statutory interpretation and all of the expressions of legislative intent. Three interpretations might be considered viable after reviewing the preceding lengthy analysis:

1. "In the professional opinion of the health care provider, it is not far-fetched to forecast **survival of something less than five years** given the totality of the person's medical circumstances (including age and frailty)."¹⁰⁹

¹⁰⁹ It is important to note here that the government repeatedly indicated that the entirety of a person's medical circumstances (including age and frailty) should be taken into account in assessing "reasonable foreseeability." We have therefore modified the interpretation grounded in the dictionary definition of prognosis as follows: change "disease" to "medical circumstances (including age and frailty)." In addition, the government's phrases "on a path to death" and "on a trajectory" are, in effect, no more limited than the ordinary and legal meaning of "reasonably foreseeable" (and thus do not meet the "has become" limit discussed earlier), so they need to be narrowed. "Future course of a patient's medical circumstances" can provide the necessary feature for "has become." A person has to have undergone a change in circumstances to move from the 90 percent chance of natural death that we all have from birth to a reasonably assessable course of medical circumstances to natural death. Therefore, requiring that a person have a reasonably assessable course of medical circumstances to natural death meets the "has become" requirement.

2. “In the professional opinion of the health care provider, it is not far-fetched to forecast an assessment of the future course of a patient’s medical circumstances (including age and frailty) to natural death, based on knowledge of the course of such medical circumstances in other patients together with the general health, age, and sex of the patient (**necessarily including a prediction of the specific or non-specific length of time the patient has remaining**).”
3. “In the professional opinion of the health care provider, it is not far-fetched to forecast an assessment of the future course of a patient’s medical circumstances (including age and frailty) to natural death, based on knowledge of the course of such medical circumstances in other patients together with the general health, age, and sex of the patient (**not necessarily including any prediction of the length of time the patient has remaining**).”

What remains constant between these three is:

- “In the professional opinion of the health care provider, it is not far-fetched to forecast”; and
- “given the totality of the person’s medical circumstances (including age and frailty).”

What varies is what needs to be forecast:

- survival of something less than five years; or
- the future course of a patient’s medical circumstances to natural death and within that, whether
 - necessarily including a requirement of a prediction of a specific or non-specific length of time; or
 - not requiring any prediction of any length of time.

While the three interpretations set out above might be considered viable, we believe that the second and third are more defensible than the first. They are consistent with the “without a prognosis necessarily having been made as to the specific length of time that they have remaining” clause. They deviate less than the temporal proximity interpretation because they require less narrowing of the ordinary and legal meaning. Both interpretations add a requirement of a prognosis having been made, but the temporal proximity interpretation requires the additional narrowing of a necessary rather than merely sufficient element of temporal proximity. It is therefore one step further away from the ordinary and legal meaning.

As between the second and third, we believe that the third is the most defensible. It is the most consistent with the rules and traditions of statutory interpretation (including the ordinary and legal meaning of “reasonably foreseeable,” basic logic, the language in the Act itself, and legislative intent, especially the excluded sets). And it is consistent with

the only court decision we have on the issue, which rejected a temporal proximity necessary condition.¹¹⁰

We would argue that medical and nurse practitioners assessing eligibility for MAiD should therefore ask themselves whether it is far-fetched to forecast an assessment of the future course of a patient's medical circumstances (including age and frailty) to natural death, based on knowledge of the course of such medical circumstances in other patients together with the general health, age, and sex of the patient (not necessarily including any prediction of the length of time the patient has remaining). If it is not far-fetched, they should consider the eligibility criterion in s. 241.2(2) to have been met.

It should be legally safe to operate under this interpretation — it is at least a plausible interpretation, and where there is more than one plausible interpretation of an ambiguous *Criminal Code* provision, any court should apply strict construction and accept the interpretation most favourable to the accused for the purposes of responding to charges in a particular case.¹¹¹ It is critically important for health care providers to know that this rule of statutory interpretation (i.e. strict construction) should protect them in the interim until we have an authoritative judicial determination of the meaning of the provision. Until a higher court provides a different interpretation than Justice Perell or until there is an amendment of s. 241.2(2)(d) to provide a definition of “their natural death has become reasonably foreseeable, taking into account all of their medical circumstances, without a prognosis necessarily having been made as to the specific length of time that they have remaining,” or the ambiguity re: the meaning of the provision is otherwise resolved, this interpretation should be able to be safely adopted.

We would also argue that all entities with the relevant authority and responsibility to provide guidance to medical and nurse practitioners should exercise their authority and capacity to provide interpretive guidance for, and education about, the practice of MAiD in Canada by adopting, endorsing, and disseminating this interpretation. Doing so will increase harmonization across the country with respect to access to MAiD and help us to realize the goal that access to MAiD does not vary because the legislation itself is being interpreted differently by different providers and their advisors. Doing this will also reduce the chill created by the uncertainty about the meaning of the “reasonably

¹¹⁰ *AB*, *supra* note 10 at paras 79-83.

¹¹¹ See *R v DLW*, *supra* note 43; *Bell ExpressVu Limited Partnership v Rex*, [2002] 2 SCR 559, 2002 SCC 42; *R v Hasselwander*, [1993] 2 SCR 398. See also *United Nurses of Alberta v Alberta (Attorney General)*, [1992] 1 SCR 901 at para 59-60: “In summary, I have concluded that on the basis of the ordinary rules of construction, s. 142(7) does not authorize the imposition of punishment for criminal contempt. At minimum, the equivocal or ambiguous nature of the words “enforceable as a judgment” leave a reasonable doubt with respect to this issue. The appellant is entitled to the benefit of this doubt. In *Maxwell on the Interpretation of Statutes* (12th ed. 1969), at p. 246, this rule of construction is expressed or follows:

The effect of the rule of strict construction might be summed up by saying that, where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself. If there is no ambiguity, and the act or omission in question falls clearly within the mischief of the statute, the construction of a penal statute differs little, if at all, from that of any other.

This is a rule that is applied by this Court and was applied recently in *R. v. Green*, 1992 CanLII 128 (SCC), [1992] 1 SCR 614, to resolve an ambiguity in the interpretation of s. 254 of the *Criminal Code*, R.S.C., 1985, c. C-46.”

foreseeable” criterion in C-14 and enhance end of life care for Canadians (as amply illustrated by the prevarication by the physician in *AB v. Canada*).

Finally, we would argue that now that the reasonably foreseeable confusion over the meaning of s. 241.2(2)(d) is evident in practice,¹¹² the Government should not leave health care providers vulnerable to an uncertain threat of criminal penalty and should not leave the onerous (and often insurmountable) burden of clarifying the legislation through the courts on the backs of patients and providers, but rather should amend the *Criminal Code* to make its meaning clear.

A very practical coda

Before closing, we offer a restatement of the interpretation argued for in this paper. Testing the interpretation with medical and nurse practitioners, we found that it was not expressed in language that was accessible to them. We therefore “translated” the interpretation drawn from the exercise of strict statutory interpretation to a statement that retains the meaning but is more accessible:

“Natural death has become reasonably foreseeable” **does not mean** that eligibility is limited to fatal conditions, being terminally ill, predicted survival of six or twelve months, or being “at the end of life” or “nearing the end of life.” There is no temporal proximity limit on eligibility for access to MAiD in Canada. Temporal proximity can be sufficient for concluding natural death is reasonably foreseeable but it is not necessary. It is not necessary to predict the length of time the patient has remaining.

“Natural death has become reasonably foreseeable” **means** that, in the professional opinion of the medical or nurse practitioner, taking into account all of the patient’s medical circumstances, how or when the patient’s natural death will occur is reasonably predictable.

We also offer some concrete illustrations of the implications of the interpretation, i.e., examples of individuals who would be eligible/ineligible if this interpretation were adopted:

Eligible (if s. 241.2(2)(a) through (c) met)

Patient with Amyotrophic Lateral Sclerosis, Parkinson’s, Huntington, Spinal Muscular Atrophy, or Alzheimer’s

Patient with intractable anorexia

Patient with locked-in syndrome who refuses artificial hydration and nutrition

¹¹² See Meaghan Craig, “Medically Assisted Death Fails Saskatoon Family,” Keith Gerein, ““An Iron Will””; Kas Roussy, “Parkinson’s Patient Forced to Battle Bureaucracy”; *supra* note 13.

Ineligible (even if s. 241.2(2) (a) through (c) met)

40-year-old patient with incurable cancer for which suffering can be controlled by means acceptable to the patient

25-year-old patient with paraplegia resulting from a car accident but no other health conditions

60-year-old patient with spinal stenosis but no other health conditions

45-year-old patient with chronic pain but no other health conditions

50-year-old patient with schizophrenia but no other health conditions