Decision No.: 2017-MHAB-001-OTHER

MANITOBA HEALTH APPEAL BOARD

IN THE MATTER OF: APPELLANT,

- and -

(name removed) REGIONAL HEALTH AUTHORITY, MAID PROGRAM,

Respondent.

AND IN THE MATTER OF: An appeal hearing held in Winnipeg, Manitoba, on Thursday, November 30, 2017

BOARD QUORUM:

G. Driedger, Chairperson
Dr. B. Cham, Member
E. Graham, Member
R. Kennett, Member
P. Shah, Member

R. Sample, Administrator

APPEARANCES:

For the Appellant

Appellant
Support Person

For the Respondent

DR, Legal Counsel
AD, Legal Counsel

DECISION

Overview

[1] The question to be determined is whether this Board has the jurisdiction to review a decision to deny access to medical assistance in dying ("MAiD" hereafter). The Respondent made a preliminary motion in which it argued that this Board had no such jurisdiction, and the appeal should be dismissed prior to a hearing on its merits. The Appellant said that the Manitoba Health Appeal Board (the Board) could adjudicate this matter.

[2] The Board decided that, by majority decision, it had jurisdiction to hear the appeal. For the reasons that follow, the Respondent's motion on jurisdiction was denied, and the appeal can proceed on its merits.

Legal History of Medical Assistance in Dying in Canada

[3] The matter before the Board has its roots in recent evolutions of the law in Canada as it pertains to the entire field of MAiD.

[4] The Supreme Court of Canada struck down the Criminal Code prohibition against assisted suicide in a decision titled *Carter v. Canada (Attorney General)*[1] ("*Carter*", hereafter), on the basis that the prohibition against MAiD was contrary to this country's *Charter of Rights and Freedoms* (the "*Charter*"). The striking down of the pertinent sections of the Criminal Code was suspended for a period of time, first twelve months and then later extended a further four months, to permit Parliament to enact corrective legislation.

[5] In due course, in response to the *Carter* decision, the federal government passed *An Act to Amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*[2] ("*An Act to Amend*" hereafter). That legislation revised the

[1] 2015 SCC 5
[2] SC 2016, c. 3

Criminal Code provisions regarding assisted dying, and set out a detailed scheme laying out the circumstances in which a physician may assist a person in dying, without fear of criminal prosecution. That legislation was assented to June 17, 2015 and effective December 2015.

[6] In between the time that *Carter* was issued and *An Act to Amend* was passed the law stood in a state of limbo. During that time applications were brought to the superior courts of provinces across the country in which individuals sought a sort of pre-approval to provide or to obtain medical assistance in dying. One such application was *Patient v. Attorney General of Canada*[3] ("*Patient*" hereafter), the sole decision published by Manitoba's Court of Queen's Bench on the subject of medical assistance in dying.

[7] In the *Patient* decision Chief Justice Joyal set out an overview on the topic 'physician assisted death', which is instructive to the hearing before this Board. At paragraphs 7 – 9 Joyal C.J. wrote:

> It should be clear to an informed citizen that this and like applications arising from Carter 2016 are not about the foundational and normative question surrounding the desirability of physician-assisted death. The principal question on this and similar applications made pursuant to Carter 2016 is confined to whether an applicant has met the required criteria so as to qualify for the constitutional exemption already granted by the Supreme Court in Carter 2016 which allows an applicant to receive a physician-assisted death. However strongly held the differing and opposing views have been and will continue to be respecting this subject generally and the Supreme Court's reasoning more specifically, Canada's high court has in Carter 2015 unanimously and authoritatively pronounced itself. The rule of law and the principle of stare decisis now require that the judgment in Carter 2015 and any subsequent legislative refinement be respectfully followed and applied.
>
> In Carter 2015, a unanimous Supreme Court decided that the provisions of the Criminal Code, R.S.C. 1985, c. C-46, which prohibit physician-assisted dying, violate an individual's s. 7 Charter rights to life, liberty and security of the person in a manner that does not accord with the principles of fundamental justice. As a result, the Supreme Court struck down those provisions of the Code prohibiting physician-assisted death. Given the complexity of the issue, the Supreme Court suspended the declaration of invalidity respecting the impugned provisions for 12 months ending February 6, 2016. In Carter 2015, the Supreme Court specifically decided to not create a mechanism for personal exemptions during the 12-month period in which the declaration of invalidity was suspended.

[3] 2016 MBQB 63

> A definitive legislative response did not come by February 6, 2016 and such a response is still awaited from the Government of Canada. The challenge remains enormously complex, not only because of the moral and ethical grey zones, but also, for reasons of jurisdiction. The subject matter implicates both the criminal law (federal jurisdiction) and areas of health law (a matter of concurrent jurisdiction). As was noted by the Supreme Court of Canada in Carter 2015 at para. 53:
>
> > ... Health is an area of concurrent jurisdiction; both Parliament and the provinces may validly legislate on the topic ... This suggests that aspects of physician-assisted dying may be the subject of valid legislation by both levels of government, depending on the circumstances and focus of the legislation. ...

[8] In the wake of *Carter*, and shortly after *Patient* was published, *An Act to Amend* was eventually passed by our federal Parliament. After that, the Province of Manitoba's Department of Health created polices to address the MAiD issue. Those polices, which will be reviewed in greater depth later in this decision, direct the various Regional Health Authorities to implement systems to provide access to MAiD.

[9] The manner in which some of those policies have been administered gives rise to the events that form the foundation of this appeal.

Issue

[10] The first issue to be determined is whether or not this Board has the jurisdiction to review anything related to the MAiD program operated by the Respondent. At the request of the Respondent, that issue was considered on a preliminary basis, without evidence on or regard to the question of whether this Appellant met the MAiD criteria, or not. The Appellant has requested that the Board declare he was denied access to a MAiD *consultation*, as distinguished from actual assistance in dying. The sole question to be determined at this stage is whether this Board can hear matters such as this related to the MAiD process.

[11] The second issue to be determined is raised in the Respondent's question "Can a third party (for example, the Board) order a physician to provide MAiD"?

Facts

[12] There are two separate strands of facts relevant to the jurisdictional question. The first is the brief outline of the Appellant's circumstances, and experience with the MAiD process. The second is the history of the MAiD implementation process administered by the Respondent and the Province of Manitoba.

(a) The Appellant's Health and Personal Experience

[13] The Appellant suffers from a number of health issues, the most significant of which is (health condition). His (health condition) came on as an adult.

[14] He sought to be assessed for the MAiD process.

[15] The Appellant testified that he had inquired with both his family doctor as well as an (specialist) about exploring medical assistance and dying.

[16] The Appellant had a phone consultation with the MAiD physician on January 11, 2017. In the course of the call he was advised that he did not meet the criteria for MAiD. This decision was confirmed with the Appellant in a letter dated July 6, 2017, written by the Provincial MAiD Clinical Team.

[17] The Respondent did not challenge any aspect of the Appellant's evidence nor did it submit any evidence of its own. No witnesses testified nor attended on behalf of the Respondent. It limited its focus to the jurisdictional question.

(b) Implementation of MAiD by the Province of Manitoba and the Respondent

[18] Written evidence was submitted which demonstrated that at some point, the exact date of which is unclear, the provincial health department added two entries to its physician billing codes related to medical assistance in dying. The billing codes set out the process and rates for physicians to bill Manitoba Health for providing MAiD services to patients, including consultations with patients.

[19] Manitoba's Department of Health published its MAiD policy after June 17, 2016, when Bill C-14, the federal legislation on medical assistance in dying, had received royal assent. That policy directed each Regional Health Authority to implement MAiD related services and procedures, in accordance with the law on *Carter* and *An Act to Amend*.

Positions of the Parties

[20] The Appellant argued that the Board has jurisdiction to hear the appeal for the following several reasons. First, the Appellant said that the Board has jurisdiction under the Act to hear appeals made by a person who had been denied benefits. He argued that MAiD is an insured benefit. He noted that MAiD is not listed as an excluded service under the Regulations.

[21] He pointed to the fact that Manitoba Health has established a procedure for determining whether people meet the criteria. He referred to the Manitoba Physician's Manual which provides an extensive list of benefits available to persons for the purpose of setting physician's rates of remuneration and noted that MAiD is included in the list. He raised that fact that there are billing codes for doctors who consult and provide direction to patients. He argued that MAiD may be considered to be a hospital service because it is a service that has been provided in Winnipeg hospitals. Finally he argued that MAiD may be considered in the future to be medically necessary if a physician decided that the service is in the best interests of the patient and their care.

[22] Clearly, he argued, at a minimum a person is entitled to be assessed by the MAiD team, and he has been denied that benefit.

[23] The Respondent submitted that the Board has no basis to review or interfere with a physician's decision on this issue, nor indeed can it consider any matters related to MAiD.

[24] First, it argued that this Board does not have jurisdiction because, to the extent that MAiD related matters have been legislated, that legislation has come from the federal

government. The Respondent argued that appeals related to MAiD issues must be within federal jurisdiction, and could not be delegated to a provincially created administrative tribunal.

[25] Second, the Respondent submitted that this Board has no jurisdiction to review any decisions that are within the realm of the physicians' responsibility as set out in the amendments to the Criminal Code, referred to above.

[26] Finally, the Respondent argued that MAiD can never be a "benefit" under *The Health Services Insurance Act* because it is not an insurable service because it is not ever a medically necessary procedure.

Analysis and Decision

[27] Having considered the evidence and submissions of all parties at the hearing, it is the decision of a majority of the Board that the appeal is allowed to be heard, and that the Board does have jurisdiction to hear this matter, for the reasons that follow.

(a) General Parameters of the Jurisdiction of the Board

[28] This Board is an administrative tribunal, created by a statute passed by the Province of Manitoba. That statute is *The Health Insurance Services Act* ("the Act"). This Board has no "inherent jurisdiction". It can do only what that Act specifically says it has the power to do. The question that has to be answered is whether the issue in this case falls within the power that the provincial government has given this Board.

[29] The starting point is section 10(1) of the Act, which states:

> **Right of appeal**
>
> 10(1) An appeal may be made to the board by a person
>
> (a) who has been refused registration as an insured person under this Act or the regulations;
>
> (b) who has been denied entitlement to a benefit under this Act or the regulations;

(c) who has been refused an approval to operate a laboratory or a specimen collection centre, on whose approval conditions have been imposed, or whose approval has been revoked under subsection 127(1);

(d) who has been refused a licence to operate a personal care home under section 118.2 or whose licence to operate a personal care home has been suspended, cancelled or not renewed under that section; or

(e) prescribed by the regulations as being entitled to appeal to the board.

[30] This particular question of the Board's jurisdiction to hear appeals on MAiD has not been previously ruled upon in Manitoba. In fact, there is no record of any decisions of the Manitoba Court of Queen's Bench on any jurisdictional question involving this Board. Prior panels of this Board have considered jurisdictional issues in the past, on a variety of different points, but none on this issue.

[31] Furthermore, on the topic of MAiD, it does not appear that any judicial or quasi-judicial body in the Province of Manitoba has given consideration to MAiD related appeals since the time that the federal legislation was passed in June of 2016. As noted above, there is the *Patient* decision from 2016, which preceded *An Act to Amend* and the policy implementations which followed it.

[32] It is not clear on the face of any legislation or policy where an appeal of this nature ought to go, as borne out by the Appellant's experience in this case. The MAiD policies do not provide any guidance as to an appeal process. The matter arrived before this Board largely, it seems, because no person contacted by the Appellant had an answer as to how to appeal. At first instance there is uncertainty as to how any appeal such as that sought by the Appellant should be dealt with. It may be a matter for the provincial legislature to consider whether there ought to be clarification in mapping how MAiD related decisions may be reviewed.

(b) Legislation and Decisions from Other Provinces

[33] With one exception, no judicial or quasi-judicial decisions relevant to the appeal were brought to the attention of the Board at the hearing. No decisions were discovered

in research done by Board members on their own initiative. This area of the law has changed drastically in the past two years, and no doubt will continue to evolve rapidly in the near future.[4]

[34] The one exception is the decision raised by the Appellant *A.B. v. Canada*[5] from the Ontario Superior Court of Justice. That decision is of limited assistance. First, it does not address jurisdictional issues of any administrative tribunal at all, let alone of this particular Board. Second, the application judge very clearly was dissatisfied with the entire proceeding. At paragraph 4, Perell J. stated:

> AB's heartbreaking application is misconceived. Ontario's and Canada's response to it is as unhelpful as it is technically correct.

[35] Further, at paragraph 52:

> I begin the discussion by explaining why this application is misconceived, and then I shall go on to explain why Ontario's and Canada's response to it is unhelpful.

[36] Those comments make unequivocally clear that the *A.B.* decision should not be regarded as a template for review, whether judicial or quasi-judicial, of MAiD related matters.

[37] Though well short of a template on how to proceed on MAiD related matters, the *A.B.* decision did provide some commentary as to how the MAiD criteria created in *An Act to Amend* may be interpreted. It also confirmed, at paragraph 88, that the assessment of the foreseeability of death was the doctor's task to evaluate, not the courts. Finally, the case demonstrates that in Ontario there is also a lack of clarity as to how a person should proceed to question MAiD related issues.

---

[4] *An Act to Amend* has been criticized as being too narrow an application of *Carter*, and Charter challenges of that legislation followed promptly in the wake of its passage, see *Lamb v. Canada* (2017 BCSC 1802) for one such example.

[5] 2017 ONSC 3759

[38] In terms of comparing legislation, a brief review from other jurisdictions around the country yields limited assistance. Each province has particular nuances in the legislation governing boards similar to this one.

[39] Ultimately, the statutory and judicial authority from other provinces sheds little light on the authority of this Board. Its jurisdiction must be grounded in the legislation enacted by this province.

(c) MAiD as Exclusively Within Federal Jurisdiction

[40] One further preliminary issue must be considered. The Respondent argued that appeals related to MAiD issues must be within federal jurisdiction, and could not be delegated to a provincially created administrative tribunal.

[41] This argument was not persuasive. As was confirmed in *Carter* (paragraph 53) and also in *Patient* (paragraph 9), the matters at issue are the subject of concurrent jurisdiction between the provinces and the federal government. In the preamble to *An Act to Amend* it expressly referred to MAiD being provided in accordance with the principles of the *Canada Health Act*. The *Canada Health Act*, at section 3,[6] states:

> 3. It is hereby declared that the primary objective of Canadian health care policy is to protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers.

[42] Those principles and objectives when put into practice in Canada's federation delegate the delivery of health care to the provinces. In Manitoba the provincial government responded by enacting a policy directed at all of the Regional Health Authorities, including the Respondent, who in turn developed procedures to carry out the policy, such as the creation of the MAiD team.

[43] The fact that the federal government passed *An Act to Amend* does not prohibit the province from becoming involved in the delivery of the service. This Board is not

[6] R.S.C. 1985, c. C-6

dealing with any kind of an assessment related to charges under the Criminal Code, which would obviously be beyond its power. The Board is being asked to consider whether MAiD related services are an insured benefit under the Act, and whether the Appellant was denied a service that the Province of Manitoba has provided on an insured basis to some of its residents.

[44] That question is not a federal matter. The Province of Manitoba made clear policy decisions in the MAiD subject area, and directed the Regional Health Authorities to implement teams such as the one the Appellant sought to access. Surely, if the province has the authority to implement all of the mechanisms to access MAiD it also has the authority to address appeal questions.

[45] This Board therefore concludes, firstly, that it would be within the power of the Province of Manitoba to address matters related to MAiD, including any potential appeal issues.

[46] That does not answer whether the province has actually given this Board that power. That next question will be addressed in the balance of this decision.

(d) Overview of Section 10(1) of *The Health Insurance Services Act*

[47] The foundation in assessing the authority of this Board is section 10(1) of the Act.

[48] Most of this section addresses issues that are unrelated to the matter on appeal. These unrelated subsections are 10(a) registration as an insured person under the Act, 10(c) approval to operate a laboratory or specimen collection centre, 10(d) licensing for operation of a personal care home and certain issues related to home care, and 10(e), which refers to any powers prescribed in regulations passed under the Act. In the regulations, only one, the *Manitoba Health Appeal Board Regulation*[7], refers to appeal powers granted to this Board and this concerns home care services, clearly not related to the matters at issue in this appeal.

[7] H35 – M.R. (175/2008)

[49] The sole possible source of jurisdiction lays within section 10(1)(b) which is discussed in detail below.

[50] As further background to powers provided in the Act and its regulations, there are at least two additional areas where the Board has, or at least appears to have, jurisdiction. Though not referenced anywhere in this Board's foundational Act, another statute, *The Emergency Medical Response and Stretcher Transportation Act*[8], provides a further ground at section 12. That section specifically names this Board as the body to hear appeals related to license issues regarding certain forms of emergency medical transportation. In this instance, the Board's jurisdiction is clearly stated.

[51] However, in a second area, the Board appears to have authority regarding decisions on compensation issues in Manitoba's Hepatitis C compensation program without being specifically named in any regulation enacted on that subject. However, since the inception of that program in about 2002 the province has directed all appeals from that program to this Board. Even without a proper legislative foundation for this jurisdiction the province and the individuals who have sought compensation have accepted it as the authority to determine issues regarding Hepatitis C compensation.

[52] Neither the emergency medical transportation licenses nor the Hepatitis C program described above are remotely related to the MAiD program. However, the variance in the nature of the Board's authority in hearing their appeals is offered as background in interpreting the remaining section, section 10 (1) (b), which is the sole possible source of jurisdiction.

(e) Section 10(1)(b) and the Meaning of "Benefit"

[53] As set out above, section 10(1)(b) provides for appeals from a person who "…*has been denied entitlement to a benefit under this Act or the regulations*".

[8] C.C.S.M. c. E83

Are MAiD related services a "benefit" as defined in the Act?

[54] The Respondent argues that they are not, that MAiD is not "medically necessary", and, by definition, would not ever be medically necessary. It argues that benefits in the Act are limited to treatments which are medically necessary.

[55] The term "medically necessary" or "medical necessity" are not defined in the Act, nor in any of the regulations. It is a pre-condition for a health care service to be insurable that it be medically necessary. Two regulations under the Act, the ***Excluded Services Regulation 46/93*** and the ***Medical Services Insurance Regulation 49/93***, both make clear that medical necessity has to be considered on issues of funding.

[56] The Respondent may, or may not, be correct in arguing that MAiD would not be medically necessary. That, however, does not assist it on the question of jurisdiction. This Board regularly considers whether a procedure is medically necessary, when it comes to a wide variety of applications particularly with regard to those two regulations named above. Assessment of medical necessity is squarely within this Board's jurisdiction. The Respondent did not provide evidence that MAiD would never be medically necessary.

[57] A further, related, argument advanced by the Respondent was that the Board does not have the authority to overturn a physician's decision, whether related to MAiD or any other matter. The Respondent submitted that section 10(1)(b) only gives the Board jurisdiction to address matters of finance, whether payments ought to be made to a person.

[58] The distinction to be drawn is whether the complaint pertains to the denial of a service, or whether the complaint is confined to how a service has been provided. This Board has recently ruled[9] that it does not have jurisdiction to intervene as to how a health

[9] CanLII - *2017-001-PCHP*

care organization delivers a particular service, for example as to which facility a particular service ought to be provided in.

[59] The question here is whether there was a complete denial of an insured benefit, rather than a disagreement as to whether the provincial protocols for administering the service were adhered to.

[60] This comes back to the question of whether MAiD related services are a “benefit” within section 10(1)(b) of the Act. The question to be considered is whether the Board has the jurisdiction to deal with only cost and reimbursement related issues, or whether it can venture into the area of whether medical services have been provided.

[61] On the plain wording of the Act there is no limitation that restricts the jurisdiction of this Board to cost and financial issues only. In fact if one considers the different types of decisions the Board is specifically empowered to make it includes a number of areas that go well beyond mere matters of finance. The Board is specifically authorized to assess whether Home Care services should be provided, or expanded upon, even in cases where the decision of the Board may overrule decisions made by healthcare professionals. Likewise, the Board is authorized to review and overturn licensing decisions for laboratories, emergency vehicle services, and the certification of personal care homes. Even the decisions that are predominantly confined to financial matters, regarding reimbursement for costs of medical services provided in another jurisdiction or the Hepatitis C compensation cases, involve an evaluation of medical evidence, often with competing medical opinions.

[62] The legislation contemplates a broad scope of authority. The overall realm of this Board’s authority, while still relatively narrow, does clearly extend beyond reimbursement decisions.

[63] The term “benefits” is defined at the outset of the Act as “*the benefits that are designated in the regulations as benefits to which an insured person is entitled under this*

Act". Turning to the regulations, in the *Hospital Services Insurance and Administration Regulation*, it states:

> **Entitlement to hospital services**
>
> 2 An insured person who has been admitted to a hospital in Manitoba as an in-patient or an out-patient on the order of
>
> (a) a physician, nurse practitioner or midwife; or
> (b) subject to section 3, a licensed dentist;
>
> ***is entitled to receive in-patient services or out-patient services as a benefit under the Act*** without paying any charge to the hospital other than the authorized charges referred to in sections 7, 8 and 9.
>
> (Emphasis added.)

[64] That same regulation goes on at Schedule A to define a list of hospital in-patient services.

> The following services are hospital in-patient services:
>
> 1 Accommodation and meals that are supplied to standard ward patients.
> 2 ***Necessary nursing services***.
> 4 ***Drugs***, biologicals, ***and related preparations***.
> 5 Use of an operating room, case room, and anaesthetic facilities, including necessary equipment and supplies.
> 6 Routine medical and surgical supplies.
> 9 ***Services provided by persons who receive remuneration for those services from the hospital***.
> 10 ***Other services that are approved by the minister***.
>
> (Excerpts edited, and emphasis added)

[65] The Respondent argues that MAiD is not specifically referenced in any regulation, and therefore cannot be a benefit provided in the Act. However, many particular medical

procedures are not listed in the regulations; the regulations are not a catalogue of all services provided. Furthermore, MAiD is not specifically stated as an excluded service.

[66] The policy directive published by the province demonstrates that MAiD services have been approved by the Minister. It is undisputed that MAiD services are performed at a hospital. The billing codes published by the province make plain that physicians receive remuneration for providing those MAiD services. The provision of nursing services and the use of drugs would be part of the MAiD process. A number of the other items listed would also play a role in the provision of MAiD services.

[67] Using a plain language and purposive approach to interpreting the Act and its regulations, the *Hospital Services Insurance and Administration Regulation* expressly states that an insured person is entitled to receive hospital services as "a benefit under the Act". The benefit is not merely the provision of funds for the service. The benefit is also the provision of the service which is done "on the order of a physician, nurse practitioner, midwife ...".

[68] In so far as decisions for the provision of services quite properly rest with physicians and other medical staff, the Act does provide a mechanism for the Board to hear an appeal, while not considering overturning the decision of a medical practitioner. Section 10(5) permits the Board to send back a decision for reconsideration by the properly authorized individual.

[69] Therefore, in a situation such as this, if the Board determined that a step in the administration of the MAiD protocol may not have been followed, the Board could refer the matter back to the Respondent and its MAiD team for review.

(f) Does this Board Have the Authority to Direct a Physician to Administer Medical Assistance in Dying?

[70] As noted above, the Board concluded that it did have the authority to assess whether or not an insured individual had been denied a benefit, and it concluded that

MAiD was a benefit within the meaning of *The Health Services Insurance Act*. From there, its authority would include the ability to refer a matter back to the appropriate decision maker for further consideration. Nothing in that authority includes the power to direct any individual to provide medical assistance in dying.

[71] Section 90(2) of the Act expressly relieves all medical practitioners from any obligation to render medical services to any insured person.

> **Right of medical practitioner to refuse service**
> 90(2) Nothing in this Act or the regulations imposes any obligations upon any medical practitioner to render medical services to any insured person.

[72] Both *An Act to Amend* and the *A.B*. decision from Ontario make clear that the onus is upon each individual physician to form their own opinion as to whether an individual meets the criteria to receive MAiD. Guidelines passed by Manitoba's College of Physicians and Surgeons also speak to this.

[73] There is also the matter of those health care professionals who have moral objections to providing MAiD related services. Every piece of legislation and policy referred to in this decision has mechanisms which permit conscientious objectors to opt out of MAiD related services. Legislation has been introduced, though not yet passed, in the Province of Manitoba also to that effect.

[74] This Board agrees with the Respondent that it does not have jurisdiction to order any individual physician to provide MAiD to any person. Nothing in the earlier part of the decision as to jurisdiction should be interpreted in that way.

[75] The distinction may be fine, but it is important. The difference is to consider whether a person has been denied a benefit, a service under the Act, as opposed to dictating how a service should be provided. The Appellant argues that he was denied the opportunity to even be assessed by the MAiD team.

Conclusion

[76] The motion made by the Respondent to have the appeal dismissed on a jurisdictional basis, is denied by a majority decision. Having considered the evidence and submissions of all parties at the hearing, it is the decision of a majority of the Board that the appeal is allowed to be heard, and that the Board does have jurisdiction to hear this matter.

[77] It should be noted that on the facts before the Board it was not clear whether or not a proper assessment had been done. No evidence was provided from the physician the Appellant spoke to as to whether that doctor believed the Appellant had been assessed. That argument is for another day. The limited question to be answered at this hearing was whether the Board had jurisdiction to make that determination. The majority of the Board concluded that it does.

[78] The Board also concluded, unanimously, that it does not have jurisdiction to order any individual physician to provide MAiD services.

DATED at Winnipeg, Manitoba, this 1st day of March, 2018.

Richard Kennett, Member
Priti Shah, Member
Elaine Graham, Member
Manitoba Health Appeal Board

Dissent opinion of appeal panel chairperson Grant Driedger

[79] I find that I must, with the greatest respect, disagree with the conclusion reached by the majority of this panel of the Board.

[80] The decision in this case is a difficult one, as can be seen by the divergent opinions set out in the multiple reasons for decision. The difficulty is part because neither Manitoba Health in its initial policy, nor the Respondent in the creation of the medical assistance in dying process, created any sort of an appeal process. That gap is further exasperated by the somewhat ambiguous language in *The Health Services Insurance Act* (the Act), the statute that gives this Board its jurisdiction. As noted in the majority decision, and elsewhere in decisions of this Board, this is not the only area in which there exists some confusion about the jurisdiction of this tribunal. For one other such example see the Hepatitis C hearings which this body hears not withstanding the fact that there does not appear to be any jurisdictional foundation to do so in any of the enabling legislation. There is opportunity for the legislature to assist in clarifying exactly what types of issues it intends this Board to handle.

[81] I agree with much of the reasoning in the majority, including that this topic is not a matter of exclusively federal jurisdiction, as well as in its decision that section 10(5) of the Act would permit it to review a decision of the Respondent and return it for reconsideration without infringing on the protections granted to physicians in the referenced legislation.

[82] I depart from the reasons of the majority when it comes to the interpretation of the word “benefits” in section 10(1)(b) of the Act. I agree with the majority that the only possible basis for this Board to have jurisdiction would be within section 10(1)(b). The question is, where the statute refers to benefits in that subsection, are those benefits simply the right to receive medical services without having to pay for them, or do benefits include access to the medical services themselves?

[83] In defining the word “benefits” the statue simply states that they are benefits as defined in the regulations. In my view, as the word is used in these regulations benefits

means the right to receive the medical services provided without having to pay for them. Under the *Hospital Services Insurance and Administration Regulation* it sets out hospital services that are benefits, and there is no doubt that the MAiD services would be included in those hospital services. At first glance that would support the majority view that the benefits include the actual MAiD services. However, as I read section 2 of that regulation, the hospital services only become benefits upon the direction of some sort of a qualified medical practitioner, be that a doctor, nurse, dentist or nurse practitioner. As I read that section authorization from a qualified medical professional is a precondition to those hospital services becoming benefits.

[84] I do not read any of the other regulations as providing for benefits other than the financial benefits.

[85] A review of the use of the word “benefit” or “benefits” in the text of the Act itself, in addition to the regulations, reveals somewhat inconsistent usage. The majority of the usage supports the interpretation that benefits are generally understood to be payments. Sections 29, 75.2(1), 86, 87, 89 and 95 all use the term specifically in the context of financial matters.

[86] Admittedly, that phrasing is not universal throughout. The way the word is used in section 77.1 (“…medical practitioner who rendered services to which the insured person is entitled to as a benefit under this Act…”), and to some degree sections 95.1(2) and 96, could potentially support a reading that benefits ought to include the medical services more broadly, rather than simply the right to receive those services without need of payment.

[87] The lack of clarity in section 10(1)(b) coupled with the different ways the term benefits is used throughout the Act and the regulations makes the question before this Board a difficult one to answer. On balance, it was my view that the intent of the Legislature in framing this Board’s jurisdiction was fairly narrow. I therefore would have concluded that the Board did not have the jurisdiction to determine whether the Appellant had been denied a benefit under the Act.

[88] Unlike the reasons for the dissent expressed by my fellow Board member Dr. Cham, I do not share the concern that this Board should not review the decisions of a doctor or other medical professionals. The enabling legislation clearly provides that this Board has the authority to review and overturn certain decisions made by health care professionals and specialists in various fields. It is not unusual for the Board to weigh competing medical opinions within its specified spheres of jurisdiction. As noted above, if the Board determined that this Appellant had been denied an assessment or consultation in regard to MAiD the remedy in section 10(5) would be to return the matter to the Respondent for reconsideration.

[89] I do not, however, agree that this particular case falls within one of the specified lanes of authority granted to this tribunal, and I therefore would have dismissed the appeal.

Dissent opinion of appeal panel member Dr. Bonnie Cham

[90] In my opinion the Manitoba Health Appeal Board (the Board) does not have jurisdiction to hear an appeal regarding the question of delivery of an assessment for MAiD to the Appellant by the (RHA).

[91] The Board exists arising from *The Health Services Insurance Act* (the Act) of Manitoba. Section 1(1) of the Act enacts the Manitoba Health Services Insurance Plan which is a plan administered for insurance in respect of the costs of hospital services, medical services and other health services. The Act establishes the Board as outlined in section 9 of the Act. Specifically the Board has jurisdiction to hear and determine appeals made under section 10 of the Act. The Act deals with the payment of benefits to Manitobans who require health care, and their eligibility for such, not with the organization or delivery of health care.

[92] Regarding *The Health Services Insurances Act*, Section 10(1) outlines the types of appeal that may be made by a person to the MHAB as follows:

> 10(1) An appeal may be made to the board by a person
>
> (a) who has been refused registration as an insured person under this Act or the regulations;
>
> (b) who has been denied entitlement to a benefit under this Act or the regulations;
>
> (c) who has been refused an approval to operate a laboratory or a specimen collection centre, on whose approval conditions have been imposed, or whose approval has been revoked under subsection 127(1);
>
> (d) who has been refused a licence to operate a personal care home under section 118.2 or whose licence to operate a personal care home has been suspended, cancelled or not renewed under that section; or
>
> (e) prescribed by the regulations as being entitled to appeal to the board.

[93] The Appellant argues that MAiD is considered a benefit under the Act and as such appeals concerning it are within the jurisdiction of the Board utilizing criteria 10(1) b.

[94] Has an entitlement to a benefit under the Act been denied to the Appellant? The Act as defined by section 1.1 deals with the plan for insurance in respect of costs of

hospital services, medical services and other health services. The denial of benefits that the Board therefore has jurisdiction in dealing with are benefits dealing with costs not with the provision of services. I believe that the provision of services and the quality of such services more properly fall under the jurisdiction of professional bodies such as the College of Physician and Surgeons, Regional Health Authorities, and ultimately the courts. Therefore in my opinion the Appellant has not been denied entitlement to a benefit under the Act and therefore the Board has no jurisdiction to hear this appeal.

[95] Further to the meaning of the word benefit in this Act, a definition of the word benefit appears in Regulation 49/93 of the Act. Here it states in Section 2 of the regulation "An insured person is entitled as a benefit under the Act to payment of insured medical services paid by the minister in accordance with this regulation." This in my opinion, restricts the Board's jurisdiction to considering benefits as payments, rather than the provision of a service that the patient requests but is denied.

[96] This brings us to the concern raised in the decision that if this Board does not have jurisdiction to hear an appeal regarding the denial of a requested service, then it may leave a person with no route to question, appeal or complain about such denial. I would argue that Regional Health Authorities have mechanisms to deal with such concerns. The (RHA) in specific, as that is the region invoked in this complaint, has a patient relations manager at (health facility), whose job it is to sort through patient concerns about problems and errors they have encountered in seeking care at the (health facility). Additionally there is a (name removed) Region Client Relations Coordinator who can be contacted to deal with concerns about care, or lack of care, encountered. A complaint of this sort could certainly be dealt with in that matter, by people involved in health care who have an understanding of how the system operates and background in the roles and responsibilities of health care providers.

[97] For this particular case, given that the Appellant seems concerned that a physician denied him an assessment for MAiD, a complaint could also be made to the College of Physicians and Surgeons of Manitoba, who would then have the capability of hearing

from all parties concerned and determining whether a service to which he was entitled was denied him by the (RHA) or the physician.

[98] While I understand that this lack of a specific appeal for access to MAiD may be motivating the panel to define “benefits” in this expanded way, I would argue that the appropriate place for these concerns to be addressed is at the level of the organizations and professional associations who provide service to Manitobans, not at a quasi-judicial tribunal which has been set up under *The Health Services Insurance Act* of Manitoba which deals with “costs of hospital services, medical services and other health services”. The decision invokes the argument that certain other authorized areas of jurisdiction do not involve costs and construe from this that “benefits” may be interpreted to have the broader meaning. However in the case of Home Care Appeals, the Board is specifically authorized to hear these appeals under Regulation 175-2008 entitled the *Manitoba Health Appeal Board Regulation* in which Section 2 states:

> For the purpose of clause 10(1)(e) of the Act, a person who is dissatisfied with a decision of a regional health authority relating to
>
> > (a) the person's eligibility to receive home care services; or
> > (b) the level or type of home care services to be provided to the person;
>
> is entitled to appeal the decision to the board.

[99] Similarly, appeals regarding refusal of licenses to operate laboratories, or personal care homes are specifically authorized in Section 10(1) of *The Health Services Insurance Act* and do not require an expanded definition of the word benefits beyond the definition referred to earlier in Regulation 49/93.

[100] While I agree with certain areas of the majority decision, I believe that the use of the word benefits in the Act that establishes the Board is intended to refer to costs and therefore cannot support the opinion that the Manitoba Health Appeal Board has jurisdiction to hear this appeal.