

# MAiD in Canada – State of Play

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# Today's Focus

- Scope: Who should be able to access MAiD?
  - Disability
  - Mental Illness
- Is there a slippery slope that Canada is sliding down on?
  - Social Determinants of Health
- Advance Directives

# Carter v Canada February 2015

- In 2011, the Royal Society of Canada published a report on end-of-life decision-making and recommended that the [Criminal Code](#) be modified to permit assistance in dying in some circumstances.
- Kay was diagnosed in 2008 with spinal stenosis, a condition that results in the progressive compression of the spinal cord. By mid-2009, her physical condition had deteriorated to the point that she required assistance with virtually all of her daily activities. She had extremely limited mobility and suffered from chronic pain. As her illness progressed, Kay informed her family that she did not wish to live out her life as an “ironing board”, lying flat in bed.

## SCC 2015

- Section 241 (b) and s. 14 of the Criminal Code unjustifiably infringe s. 7 of the Charter and are of no force or effect to the extent that they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition.

## BILL C-14 2016

- A person has a grievous and irremediable medical condition only if they meet all of the following criteria:
- They have a serious and incurable illness, disease or disability;
- They are in an advanced state of irreversible decline in capability;
- That illness, disease or disability or that state of decline causes them enduring physical or psychological suffering that is intolerable to them and that cannot be relieved under conditions that they consider acceptable; and
- 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.

# Truchon v Canada 2019

- Two individuals with severe disabilities argued that the eligibility criterion 'natural death has become reasonably foreseeable' violated their section 7 right to life, liberty, and security of the person and their section 15 Charter right to equality before and under law and equal protection and benefit of law.
- Truchon had cerebral palsy. Three of his four limbs were not functional at birth, and he subsequently lost the use of the fourth, but he could have continued to live for many more years.

# Columnists hunting for attention

OPINION

## Euthanasia for babies? Canada finds itself sliding down a slippery slope on MAID



ROBYN URBACK >

PUBLISHED OCTOBER 15, 2022

CONTRIBUTORS

OPINION

## Canada is going too far with medical assistance in dying. The danger of abuse is becoming ever more apparent

Death by doctor is no longer rare, as we head toward a system that kills people because they're desperate or disposable or too costly to keep alive.



By **Andrew Phillips** Star Columnist  
Fri., Oct. 14, 2022 | 3 min. read

# Slippery slopes

- Conceptual
    - Criteria are sufficiently fuzzy as to open the door to abuse.
  - Causal
    - Once we step on the slippery slope of decriminalization bad, unwanted things will inevitably follow.
- 
- None of this applies to Canada's MAiD case.
  - Why is that?

# Canada's courts on slippery slopes

- Justice Smith had carefully considered the expert evidence re: slippery slopes in permissive jurisdictions. She concluded “[t]his evidence serves to allay fears of the practical slippery slope. The evidence does not support the conclusion that, since the legalization of physician-assisted death, there has been a disproportionate impact, in either Oregon or the Netherlands, on socially vulnerable groups such as the elderly or persons with disabilities.” (Carter)
- Supreme Court of Canada subsequently noted: “The trial judge, after an exhaustive review of the evidence, rejected the argument that adoption of a regulatory regime would initiate a descent down a slippery slope into homicide. (Carter)
- “Neither the national data in Canada or Quebec nor the foreign data indicate any abuse, slippery slope or even heightened risks for vulnerable people when imminent end of life is not an eligibility criterion for medical assistance in dying.” (Truchon)




# Social Determinants of Health

- 'Not Dead Yet'
- 'disability' should be seen as a variety of human existence, a mere difference that is unproblematic in its own right.
- It is never the disability itself that could render a person with disability's life not worth living, but rather it is the social determinants of health.

**NOT DEAD YET**  
*The Resistance*

is a national, grassroots disability rights group that opposes legalization of assisted suicide and euthanasia as deadly forms of discrimination.

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**Blog**

[Lisa Blumberg: Getting Beyond Advance Medical Directives](#)  
September 16, 2022 - 3:15 pm  
For years, advance medical directives, popularly known as living wills, have been promoted as giving people control over what happens to them at "end of life", i.e., when they are in dire medical straits. (1) It is hard to disagree with the ... [Continue reading...](#)

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[Response: "Neurologic Diseases and MAiD" in The American Journal of Bioethics](#)  
August 30, 2022 - 10:36 am  
Jules Good writes in response to "Neurologic Diseases and MAiD: Aid-In-Dying Laws Create an Underclass of Patients Based on Disability" by Lonny Shavelson, Thaddeus M. Pope, Margaret Pabst Battin, Alicia Oulette & Benzi Kluger, published in The American Journal of Bioethics 16 ... [Continue reading...](#)

# Social Determinants of Health

REAL News

**'I can't live that way': Montreal man seeking medically assisted death due to home care conditions**



REAL News

**Woman with disabilities nears medically assisted death after futile bid for affordable housing**



# Social Determinants of Health

- Empirical evidence supports the view that both disability as well as mental illness can reduce people's social determinants of health, resulting in a lower quality of life than would have otherwise been the case.
  - There can be no question about the fact of suboptimal services, and one should not equivocate about it, neither should one equivocate about the obvious solution: significant increases of available healthcare and social services resources to assist such individuals.
- 
- Should such patients should not be eligible for assisted dying until these resource shortcomings are fully remedied?

# Truchon - Protecting the 'vulnerable'

- The Court cannot accept the concept of collective vulnerability suggested by the Attorney General because the broad protection that results therefrom is too general an application of a precautionary principle. Vulnerability (tied to various external factors including the social determinants of health) should not be understood or assessed on the basis of a person's belonging to a defined group, but rather on a case-by-case basis, at least for the purposes of an analysis under section 7 of the Charter. In other words, it is not the person's identification with a group characterized as vulnerable—such as persons with disabilities, Indigenous persons or veterans—that should bring about the need to protect a person who requests medical assistance in dying but, rather, that person's individual capacity to understand and consent in a free and informed manner to such a procedure, based on his or her specific characteristics.
- In the Court's view, however, we cannot, in the name of the principle of protecting certain persons from themselves or of socially affirming the inherent value of life, deny medical assistance in dying to an entire community of persons with disabilities precisely because of their disability. That is what the legislator is doing indirectly by providing wide-ranging protection of certain groups instead of implementing strict structural conditions to ensure that such persons are well protected, should it deem it appropriate. Again, collective vulnerability cannot be conceptually used as a basis to refuse medical assistance in dying.

# Truchon

- Mr. Truchon and Ms. Gladu, who belong to this category of persons, want to be given the choice to decide for themselves. The Court agrees with this. To do otherwise could lead to discrimination against persons with disabilities on the sole basis of their disability. These people are full citizens and consequently have the same rights as all other citizens, especially those that involve making decisions of utmost importance to their bodily integrity and dignity as human beings. Respect for their individual freedom that is expressed thoughtfully, freely and clearly also contributes to the affirmation of the inherent value of their lives.

# One ethical response

- Proponents of restrictive access regimes contribute to the continuing stigmatisation of disability. They essentially advocate to remove such patients' agency, because they disapprove of the end-of-life choice that some of these patients would predictably make.
- These arguments also fail to respect the lived experience of some people with disabilities or severe mental illness who insist that their suffering is caused by their condition, not by social determinants of health.
- The argument re: social determinants of health fails for the same reason the argument re: palliative care failed. As Justice Smith observed in Carter: "the argument that legalization should not be contemplated until palliative care is fully supported rests, as Dr. van Delden observed, on a form of hostage-taking. In other words, this argument suggests, the suffering of grievously-ill individuals who wish to die will serve as leverage for improving the provision of adequate palliative care."

# One ethical response

- Consequentialists might ask this:  
How would Truchon have been better off for having his ability to choose MAiD removed from the end-of-life options available to him?

# BILL C-7 2021 Track 2

## Procedural Safeguards – Requests where your natural death is not reasonably foreseeable:

- If the practitioners assessing your request for MAID determine that your death is not reasonably foreseeable, there are added safeguards that **must** be met to be eligible to receive MAID:
- One of the two practitioners who provides an assessment must have expertise in the medical condition that is causing your unbearable suffering.
  - If neither of these practitioners have this expertise, another practitioner with expertise in your medical condition that is causing your suffering **must** be consulted in the assessment process.
- You must be informed of available and appropriate means to relieve your suffering, including counselling services, mental health and disability support services, community services, and palliative care, and you must be offered consultations with professionals who provide those services.
- You and your practitioners must have discussed reasonable and available means to relieve your suffering, and **all** agree that you have seriously considered those means.
- Your eligibility assessment must take a minimum of 90 days, unless the assessments have been completed sooner and you are at immediate risk of losing your capacity to consent.
- Immediately before MAID is provided, the practitioner must give you an opportunity to withdraw your request and ensure that you give express consent to receive MAID.



Slippery  
Slope? –  
Not quite.

Bill C7 moved us closer to where  
our MAiD journey began, in  
terms of the SCC access criteria.

# Advance Directives

- Big no ... but
- On March 17, 2021, changes to the legislation on medical assistance in dying allow you to waive the requirement for giving final consent just before MAID is provided, **only if**:
- your [natural death is reasonably foreseeable](#)
- AND
- while you had decision-making capacity:
  - you were assessed and approved to receive MAID
  - your practitioner advised that you are at risk of losing capacity to provide final consent
  - you made a written arrangement with your practitioner in which you consent in advance to receive MAID on your chosen date if you no longer have capacity to consent on that date
- Any arrangement for the waiver of final consent will be considered **invalid** if, at the time that MAID is to be provided, you no longer have capacity **and** you demonstrate refusal or resistance to the administration of MAID by words, sounds or gestures.
- For further clarity, reflexes and other types of involuntary movements, such as response to touch or the insertion of a needle, **would not constitute refusal or resistance.**

# Advance Directives

- There are at least 3 problems
- Conceptual: Kicks in when it shouldn't (result of our obsession with autonomy).
- Procedural: It's difficult to cover all relevant eventualities (there's always room for interpretation).
- Ethical: Why enact it when a demented patient is content?

## Who is eligible today?

- Persons with disabilities that do not make their natural death reasonably foreseeable are now eligible for MAiD.

## Who is eligible from March 2023

- Canadians whose only medical condition is a mental illness, and who otherwise meet all eligibility criteria.

# More sliding



News / Canada



## FIRST READING: Canada's very quick slide to approving euthanasia for the mentally ill

*Pierre Poilievre's strange habit of expounding on policy while smoking a water pipe*

Tristin Hopper

Apr 05, 2022 • April 5, 2022 • 5 minute read • 133 Comments



NP Comment



## Killing off the sad and the poor with MAID: Full Comment with Anthony Furey

*People who are poor, lonely or battling mental illnesses, who's lives might get better with help, are being offered a lethal injection instead*

Postmedia News

May 24, 2022 • May 24, 2022 • 1 minute read • 70 Comments



# Mental illness

- What's your take on mental illness?
  - For instance, refractory depression?
- 
- Standard therapies deployed to treat patients suffering from depression fail a substantial portion of patients who have been trying these treatments over extended periods of time.
  - The suffering mental illness can cause equals or surpasses some of the worst suffering caused by other illnesses.

# The problem

- Irremediableness
- Who should be the judge as to when enough is enough?

# Anti-choice activism latest

- Don't mention MAiD...
- OTOH, maybe it's not a good idea to bring up MAiD to a patient in the context of lamenting that their hospital care costs 1500\$ per day, as has happened in this province...



Anyway... comes  
Germany's  
Constitutional  
Court

Suicide is legal in that country.

Decisionally capable people have a right to commit suicide.

If suicide isn't criminal, assisting someone in committing suicide can't be criminal either.

Ergo: Anyone can assist a decisionally capable person to commit suicide, whatever their reasons.



Intermission

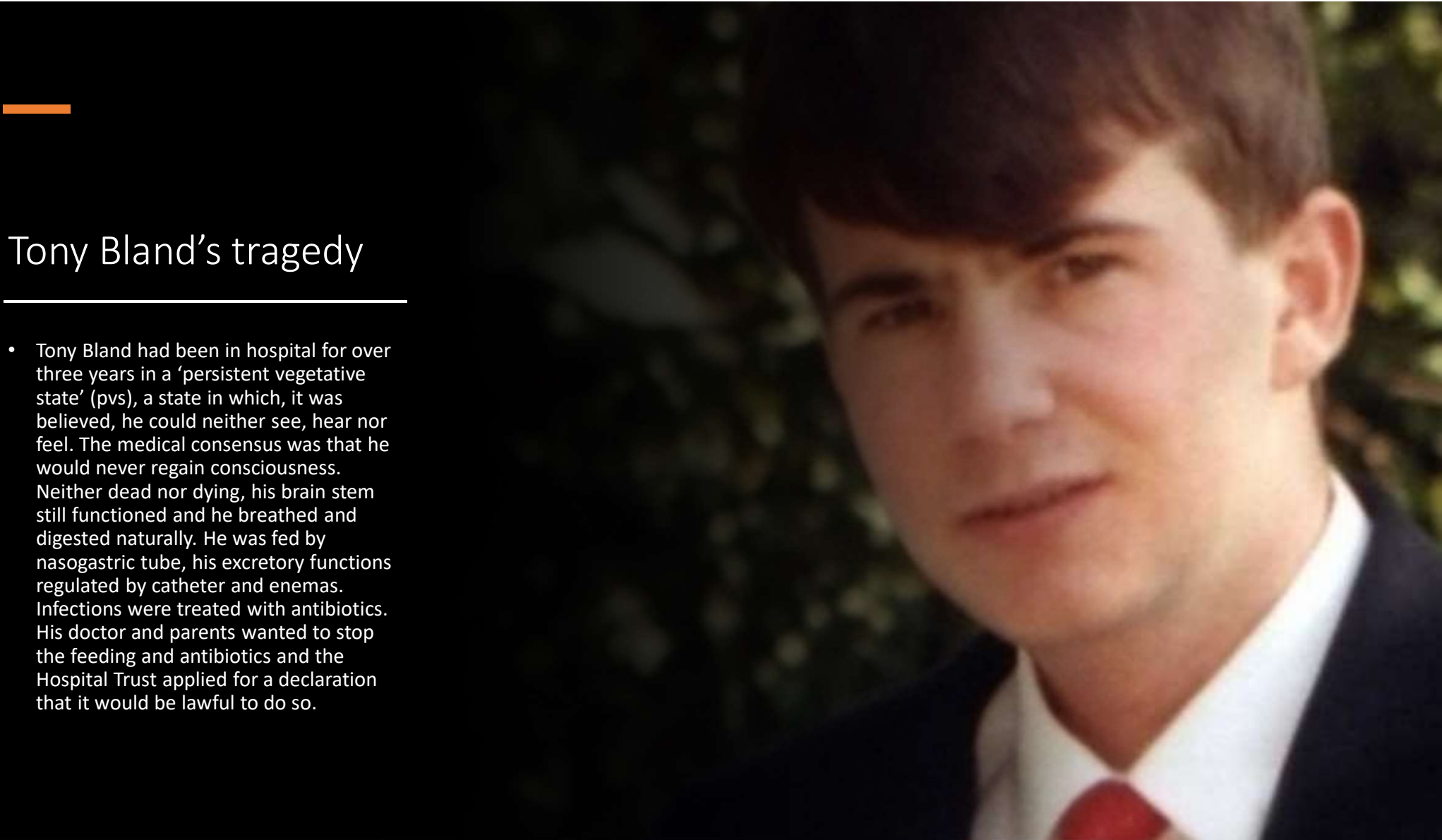
# What about people who have never been autonomous, and never will be?

- Liberal democracies base MAiD on respect for autonomous choice about one's own life.
- But what if one has never been, and will never be autonomous?
- Or, what if one has been autonomous, but lost autonomy irreversibly and hasn't left a valid Advance Directive?
- Newborn with heterotaxy syndrome
- Tony Bland
- Nancy Cruzan

## Tony Bland's tragedy

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- Tony Bland had been in hospital for over three years in a 'persistent vegetative state' (pvs), a state in which, it was believed, he could neither see, hear nor feel. The medical consensus was that he would never regain consciousness. Neither dead nor dying, his brain stem still functioned and he breathed and digested naturally. He was fed by nasogastric tube, his excretory functions regulated by catheter and enemas. Infections were treated with antibiotics. His doctor and parents wanted to stop the feeding and antibiotics and the Hospital Trust applied for a declaration that it would be lawful to do so.



# Nancy Cruzan's tragedy

- On January 11, 1983, then-25-year-old Nancy Cruzan (born July 20, 1957) lost control of her car while driving at nighttime near Carthage, Missouri. She was thrown from the vehicle and landed face-down in a water-filled ditch. Paramedics found her with no vital signs, but they resuscitated her. After three weeks in a coma, she was diagnosed as being in a persistent vegetative state (PVS). Surgeons inserted a feeding tube for her long-term care.
- In 1988, Cruzan's parents asked her doctors to remove her feeding tube. The hospital refused to do so without a court order, since removal of the tube would cause Cruzan's death.
- Nancy Beth Cruzan Most Loved Daughter-Sister-Aunt  
Born July 20, 1957, Departed Jan 11, 1983, At Peace Dec 26, 1990.



# Acts and omissions – Killing vs Letting Die

- Meilaender doesn't argue for extraordinary means of life support.
- 'No one should be subjected to useless treatment and that no one need suffer any and all possibly life-saving or life-prolonging treatments, however burdensome they may be.'
- 'Maximizing care will sometimes mean ceasing to struggle against death. Medical treatments may rightly be withdrawn if they are either useless or excessively burdensome.'
- He seems to encourage experimental procedures on the infant: 'if we never attempt any of those life choices, if we simply sweep such children off our doorstep every morning with euthanasia, medicine will never learn better ways to help them and others like them.'

# Acts and omissions

- The doctrine holds that there is a moral difference between acts and omissions with the same total consequences (ie death of infant, Blant, Cruzan).
- Is that plausible?
- Possible justifications:
  - Harmful by-products
  - Acts more certain to bring X about
    - Act ensures outcomes, omissions risks outcome
  - Agents more responsible for actions than omissions

# Acts and omissions

- Systematic comparison requires of us to compare like with like, both acts and omissions must
  - Have equally bad consequences;
  - Have equally certain consequences;
  - Be contract to some duty (beneficence?);
  - Be intentional.
- Consequentialists would argue that when these variables are held constant across the two cases, there can be no intrinsic moral difference between acts and omissions.



# Is there a difference between killing and letting die?

- Smith stands to gain a large inheritance if anything should happen to his six-year-old cousin. One evening while the child is taking his bath, Smith sneaks into the bathroom and drowns the child, and then arranges things so that it will look like an accident.
- Jones also stands to gain if anything should happen to his six-year-old cousin. Like Smith, Jones sneaks in planning to drown the child in his bath. However, just as he enters the bathroom Jones sees the child slip and hit his head, and fall face down in the water. Jones is delighted; he stands by, ready to push the child's head back under if it is necessary, but it is not necessary. With only a little thrashing about, the child drowns all by himself, "accidentally," as Jones watches and does nothing.

Still leaves us with this question:

- Who should decide whether killing *or* letting die are in a decisionally incapable patient's best interest?