The *Carter* Decision and Physician-Assisted Dying

Ministry of Health and Long-Term Care and Ministry of the Attorney General
April 6, 2016

Ontario

Presentation Overview

- In response to the Supreme Court of Canada's (SCC) decision on physician-assisted dying (PAD) in *Carter v. Canada,* the Government of Ontario is working to develop and assess options for a provincial approach to PAD.

- This approach will be informed by advice received by the provincial-territorial (P/T) Expert Advisory Group (EAG) on PAD as well as online public consultations and discussions with key stakeholders.

- In the context of Ontario's approach to PAD, the purpose of this presentation is to:

    1. Provide a briefing on:

        A. Background and Context for Action

        B. Ontario's Approach to PAD and Updates on Activities

        C. Outstanding PAD Policy Questions and Issues

        D. Next Steps for PAD

Supreme Court of Canada Ruling in *Carter v. Canada*

- In February 2015, the Supreme Court of Canada (SCC) unanimously struck down the *Criminal Code* prohibition against physician-assisted dying (PAD).

- The ruling serves as a "carve-out" of PAD from the general prohibitions in the *Criminal Code* against aiding and abetting a person to commit suicide or consenting to having death inflicted upon them.

- The Court suspended the declaration of invalidity for 12 months, which means that the SCC's ruling will take effect on February 6, 2016.

In order for PAD to fall within the SCC "carve-out", the following requirements must be met:

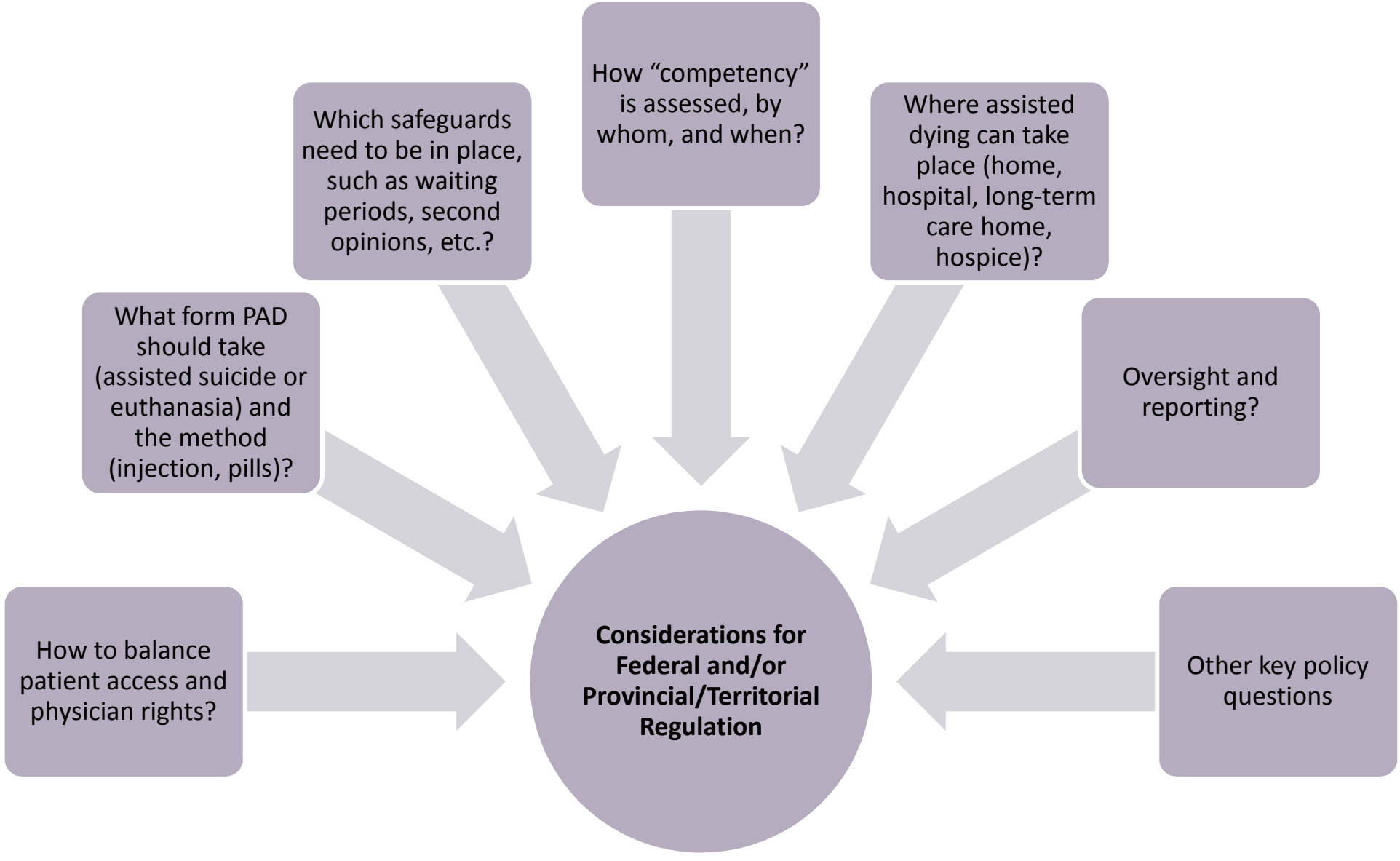
1. PAD is "physician-assisted";
2. PAD is provided to a competent adult person;
3. The competent adult person clearly consents to the termination of life;
4. The competent adult person has a grievous and irremediable medical condition (including an illness, disease or disability); and
5. The medical condition causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition.

Notably, the SCC:

- Did not limit the ruling to those unable to take their own life, to cases of terminal illness, or to people near dying.
- Confirmed that, for a condition to be considered "irremediable," a patient is not required to undertake treatments that are not acceptable to the individual (para 127).
- Expressly left open the question of how to reconcile the rights of patients to physician-assisted dying with any religious or conscientious objections of physicians to participate in it (para 132).

The *Carter* Decision: What Is Left Open

- Several key factors were left open in the SCC ruling for federal and provincial/territorial (P/T) governments (and associated regulatory bodies such as professional colleges) to determine:



The *Carter* Decision – Timing

- In the federal Minister of Justice/Attorney General of Canada's Mandate Letter on November 13, 2015, the Prime Minister named the following as one of the Minister's top priorities:
  - To "lead a process, supported by the Minister of Health, to work with provinces and territories to respond to the Supreme Court of Canada decision regarding physician-assisted death."

- On December 3, 2015, the federal government requested a six-month extension from the SCC in order to have more time to engage and consult with Canadians and provinces/territories on this complex and personal issue.
  - The federal government also requested that Quebec's *Act Respecting End-Of-Life Care* be exempt from suspension during the extension period, if granted.

- On January 15, 2016, the SCC provided the following ruling in response to the federal government's extension request:
  - The federal government's request for an extension was granted but for a period of 4 months only (to June 6, 2016);
  - Quebec's Act is exempt for the granted extension period; and,
  - Individuals who meet the *Carter* criteria are granted the right to apply to a superior court of justice in their respective jurisdictions for an individual exemption (during the extension period).

Federal Policy Development

- In January 2016, the federal government struck an all-party Special Joint Committee to study the issue of PAD and to provide policy recommendations to inform the federal government's response.

- On February 26, 2016, the Committee issued its final report to Parliament, which recommended a generally permissive approach to PAD.
  - The Committee's report was divided into a Majority and Minority (Dissenting) view.
  - The Majority view supports patient access to PAD, such as who can access assistance in dying (age 18+ initially but eventually include mature minors; persons with mental health conditions permitted; advance directives permitted), who can provide assistance in dying (physicians, nurse practitioners, and nurses under the direction of a physician), and requirements for physicians to make an effective referral and for all publicly funded institutions to provide assistance in dying.

- Overall, it is still unclear how the federal government will proceed.
  - How comprehensive will the federal legislation will be?
  - What will the federal government leave for provinces and territories to address?
  - Will the federal government will provide further clarity on key issues, such as the role of other healthcare providers/professionals, access to self-administered drugs, the role of advanced directives, etc.

Ontario's Strategy Consists of Three Streams of Work

1 P/T Expert Advisory Group	2 Ontario Public Engagement	3 Internal Policy Work
• Engagement with pan-Canadian stakeholders • See Appendix A for background on Expert Advisory Group	• Online public survey • Public e-mail account • In-person consultations	• Research and legal analysis • Intraministerial and interministerial collaboration • Engagement with key stakeholders • Approvals and decision-making

Three Streams of Work: Update

1 P/T Expert Advisory Group	2 Ontario Public Engagement	3 Internal Policy Work
• The EAG met with stakeholders in person and also solicited written submissions from stakeholders across Canada. o High-response topics included eligibility, procedural safeguards, and conscientious refusal.	Online public survey/public e-mail account: • Public participation in Ontario's online survey has been very active, with a total of over 13,000 responses to date. In-person public consultation sessions (11 total) were held in mid-January 2016. Public e-mail account remains open.	• Ontario's policy and program development is being informed in part by: o Federal response/ direction; o Existing legislation and research; o Expert advice, public and stakeholder viewpoints; o Web portal, online survey, and stakeholder meetings; and o The final report of the P/T EAG. • Internal policy work will inform possible legislative, regulatory, or policy changes, depending on the path forward.

P/T Expert Advisory Group – Recommendations

- After several discussions, and with consideration given to what was heard from stakeholders, the EAG provided 43 recommendations, which are detailed in the EAG's final report
  - The report was submitted to participating PT Ministers of Justice/Attorneys General and Ministers of Health on November 30, 2015, and was publicly released on December 14, 2015.

- It was proposed that the EAG's final recommendations form the basis of Ontario's policy considerations. Recommendations related to the following policy topics:
  - Palliative Care
  - Access
  - Request and Documentation
  - Assessment of Eligibility
  - Review
  - Provision
  - Reporting
  - Duty to Inform
  - Duty to Care for the Patient
  - Duties of Institutions
  - Duties of Non Faith-based Institutions
  - Duties of Faith-based Institutions
  - Oversight
  - Research and Continuing Quality Improvement
  - Health professional Education and Training
  - Public Education and Engagement

Ontario's Stakeholder and Engagement Process

- Ontario has engaged with over 40 different stakeholder groups to discuss key issues, identify concerns, and help support the future implementation of PAD, including:
    - Key health stakeholders, such as the College of Physicians and Surgeons of Ontario, the Ontario Medical Association, the Canadian Medical Association, the College of Nurses of Ontario, the Ontario College of Pharmacists, and the Ontario Hospital Association, as well as Dying with Dignity Canada;
    - Key legal stakeholders, such as the Canadian Bar Association, the Canadian Civil Liberties Association, the Criminal Lawyers Association, and the Advocates' Society; and,
    - Officials in Washington, Vermont, and Oregon states, to discuss best practices and "lessons learned" from their experiences with PAD.

- The various groups' feedback and input is being incorporated into Ontario's policy position on PAD as the policy development process continues to evolve.

Next Steps for PAD

- The provincial/territorial governments, as well as the federal government, are working towards a full-system approach to PAD for when it becomes legal across Canada, on June 6, 2016.

- In addition to serving a “carve-out” of PAD from the general prohibitions in the *Criminal Code*, the federal government may pass legislation that additionally sets out procedural and operational details for PAD implementation.
    - Depending on how comprehensive or how narrow the federal legislative framework is, will determine which details are left to the provinces/territories and regulatory colleges to address for a wholesome approach to PAD.

Appendix A: P/T Expert Advisory Group (EAG)

Structure:

- A nine-member EAG was established to provide 11 participating P/Ts with non-binding advice on the implementation of physician-assisted dying. (See *Appendix B* for membership list.)
- Ontario provided secretariat support for the EAG.

Mandate:

- The EAG's mandate was to provide advice to P/T Ministers to assist them on the considerations regarding implementation of PAD within their jurisdictions.
- The EAG was guided by the Supreme Court of Canada's *Carter* decision, and (to the best of its abilities) provided recommendations that are consistent with the Criminal Code, the Canadian Charter of Rights and Freedoms and other applicable laws.
- With a health care-related focus, the EAG considered key policy questions related to eligibility, competency and consent, and provider participation. The EAG consulted by inviting deputations and written submissions from targeted experts and stakeholders.
- The EAG's advice is not binding on participating or non-participating jurisdictions. Each jurisdiction will maintain its authority to respond to the *Carter* decision as it deems appropriate.

Appendix B: P/T EAG Membership

Maureen Taylor (Co-Chair) *Ontario* Physician Assistant in Infectious Diseases and Medical Journalist
Dr. Jennifer Gibson (Co-Chair) *Ontario* Director of the University of Toronto Joint Centre for Bioethics
Dr. Trevor Theman *Alberta* Registrar of the College of Physicians and Surgeons of Alberta
Jocelyn Downie *Nova Scotia* Professor in the Faculties of Law and Medicine at Dalhousie University
Arthur Schafer *Manitoba* Director of the Centre for Professional and Applied Ethics at the University of Manitoba
Dr. Karima Velji *Ontario* President of the Canadian Nurses Association and Integrated Vice-President, Mental Health Services, for London Health Science Centre and St. Joseph's Health Care London
Dr. Doug Cochrane *British Columbia* Patient Safety and Quality Officer for BC and Chair of the BC Patient Safety and Quality Council
Ruth Goba *Ontario* Interim Chief Commissioner, Ontario Human Rights Commission
Dr. Nuala Kenny *Nova Scotia* Professor Emeritus of Bioethics at Dalhousie University and Former Ethics and Health Policy Advisor to the Catholic Health Alliance of Canada