

CRAFTING NEW LEGISLATION TO MEET THE CHALLENGE OF THE SUPREME COURT DECISION



Family Matters

by

John Syrtash

B. A. (Hon.), LL.B.
Counsel

Garfin Zeidenberg LLP
Family Lawyer & Mediator
for 33 years

Recently the Supreme Court of Canada ruled that the criminal law in Canada forbidding assisted suicide was unconstitutional and gave the Federal government one year to develop a new law to replace it. By contrast, Jewish law traditionally forbids assisted suicide and calls it murder, although there is one halachic authority in commentaries to the *Shulchan Aruch* (Code of Jewish Law) for not *hindering* death. We will not debate the merits of this ruling. Irrespective of such differences and the merits of the ruling, Mr. Harper now has a big problem. His Government will now be obliged to worry about many of the same considerations that family and estate lawyers often consider when assessing a client's mental capacity when interviewing him concerning his instructions before signing a legal document, such as a Will or Release. So here are a few questions Mr. Harper needs to consider:

1. When a patient makes such a request, just who will be qualified to assess his consent, what are the qualifications of such a person beyond having a medical degree, and what are the conditions by which that consent is to be judged? Even if it's to be two doctors should at least one be a psychiatrist with training in capacity assessments? In Ontario, if I have any doubt about someone's mental capacity, I turn to a specified list of licensed "capacity assessors"; some are psychologists, some are psychiatrists -- others social workers. But the key fact

here is that they are all licensed by the Ontario government and trained for such a role.

2. Will the people who are potentially influencing the patient be considered when such a request is made by a disabled person who may be partially medicated or in a weaker state of mind by reason of the pain they are experiencing? I have had people come to me for assistance who have been badly abused or in distress but my efforts are sometimes frustrated by friends or relatives with their own agendas and not always for monetary gain, such as a future inheritance. So some clients will resist my advice because of such outside influences. Family law lawyers call these people 'cheerleaders' who give advice without knowing all the facts or the law, often subtly or sometimes forcefully. They may be well-meaning or distracted by misplaced empathy or they cannot tolerate the pain in which a friend or relative suffers. Such people will often want the client to take disastrous "shortcuts." By analogy, how will the new Legislation deal with such cheerleaders and protect the weak from making an irreversible decision?

3. Just who will be doing the killing? Which doctors or nurses will be qualified? And how will such a professional be properly insured and be legally protected if some relative or spouse later claims that his or her loved one never gave proper consent because they were not in their right mind or were improperly influenced? And who will legally protect the "killer" from accusations that he or she didn't apply the "correct" legislative or regulatory standards?

I think we should all pray for Mr. Harper as the new law will need a great deal of very careful thought. Someone's innocent life depends on it.