MAID

Medical Assistance in Dying and Advance Consent

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Disclaimer

These slides contain legal information BUT are NOT legal advice.

If you need legal advice, please consult your own lawyer.

Overview

What is MAID – Medical Assistance in Dying

- Eligibility
- Process
- Availability and limitations

What is Advance Consent or Advance Requests to MAID

- What is an advance request or consent
- Pros and Cons
- Things to think about

Background to MAID - *Carter et al v. A.G. et al.*

Decision of the Supreme Court February 6, 2015,

Struck down the ban under the *Criminal Code* on assisted suicide in context of physician-assisted death

Supreme Court said Quebec law enacted December 2015 could stand (note that Quebec has slightly different legal model – Civil Code instead of Common Law

What did *Carter* do?

Voided s. 241(b) of the *Criminal Code* prohibiting assisted suicide;

and s. 14 (cannot consent to death and that's not a defence for person who causes death)
– not void entirely, just for MAID

Created path to federal legislation, Bill C-14, which amended the CRIMINAL CODE and became law in Canada as of June 17, 2016.

IMPORTANT

Now need to comply with the Criminal Code as amended by Bill C-14 and anything Ontario specific

Legislation does NOT directly follow the *Carter* decision although does permit MAID

Issues Studied at Federal Level

Reports were done on:

- A) requests by mature minors for MAID
- B) advance requests for MAID
- C) requests where mental illness is the sole underlying medical condition

But these three are NOT in the MAID law at this time

- **Reports are available on the internet and well worth reading to get a better undersynding of the complexity of these three issues**

Proposed Changes to MAID

October 5, 2020 – Federal Government reintroduced a bill, which proposes changes to the *Criminal Code's* provisions on medical assistance in dying (MAID).

The reintroduced changes are the same as those previously proposed by Bill C-7 in the previous parliamentary session.

This Bill would amend the *Criminal Code* to allow MAID for eligible persons who wish to pursue a medically assisted death, whether their natural death is reasonably foreseeable or not. This is in response to the Truchon case in Quebec.

Summary of changes later

https://www.justice.gc.ca/eng/csj-sjc/pl/ad-am/index.html

What is MAID?
Criminal Code s. 241.1

medical assistance in dying (MAID) means

(a) the administering by a **medical practitioner** or **nurse practitioner** of a **substance** to a person, **at their request**, that causes their death; or

(b) the **prescribing or providing** by a medical practitioner or nurse practitioner **of a substance** to a person, at their request, so that they may **self-administer** the substance and in doing so cause their own death.

Medical Assistance in Dying is death of a person at their OWN request, with heir informed consent, albeit with permitted assistance of a health practitioner

Its not called suicide to avoid problems with insurance and other reasons

What is still a Crime and not Permitted

Criminal offences of aiding and abetting suicide, culpable homicide, and administering a noxious substance **still exist** in the Criminal Code of Canada

MAID is an **exception** to these offences

All criteria in the law must be followed if it is to be MAID which is permitted and not a crime

Providing Information on MAID

Criminal Code specifically states
that no

social worker,
psychologist,
psychiatrist,
therapist,
medical practitioner,
nurse practitioner or
other health care professional

commits an offence if they provide information to a person on the lawful provision of MAID

Eligibility – 6 Criteria

A person may receive medical assistance in dying only if they meet **ALL** six criteria in s. 241.2

1. ELIGIBILITY Canadian Public Health Insurance Coverage

Must be **eligible** — or, but for any applicable minimum period of residence or waiting period, would be eligible — **for health services funded by a government in Canada;**

OHIP coverage; Covered by provincial health insurance from another province

2. & 3. ELIGIBILITY
AGE and Mental Capacity

Must be at least 18 years of age and capable of making decisions with respect to their health;

This is different than the Ontario *Health Care Consent Act (HCCA)* which has no specified age to consent to health care

HCCA is the Ontario provincial law on health care decision making

What is Capacity to consent to MAID ?

In summary

Person must be **able to understand and appreciate** the certainty of death upon receiving the MAID medication

Capacity at time of request and time administered

Person consenting to MAID must be capable BOTH

- **At the time of the request for MAID** and
- **At the time MAID is administered**

Waiting Period

- 10 clear days between the day on which the request for MAID was signed by or on behalf of the person and the day on which the medical assistance in dying is provided

Waiting Period may be shortened

- If the medical practitioner or nurse practitioner administering the MAID medication

  AND the medical practitioner or nurse practitioner that provided the second written opinion that the person is eligible for MAID

  are BOTH of the opinion that the person's death, or the loss of their capacity to provide informed consent, is **imminent** they can shorten the waiting period to a period that they think appropriate in the circumstances

Capacity

This requirement for capacity at the time of request and at the time of administration of MAID protects the person's **right to rescind the request** right up to the very last moment

This also protects the medical practitioner or nurse practitioner as it requires them to be certain that the person **is giving an informed consent at the time of the administration of MAID**

WHO assesses capacity for MAID

Medical practitioner or Nurse practitioner administering MAID AND the Medical practitioner or nurse practitioner that provides the second written opinion

MUST be at least TWO opinions that person is capable to consent

No Substitute Consent

For other health care, if a patient is not mentally capable to consent to treatment then their

SUBSTITUTE DECISION MAKER (SDM)
as defined in the *Health Care Consent Act* may give or refuse consent of their behalf

THIS does NOT apply to MAID

SDMs have no decision making role in MAID

SDMs play no role in MAID

SDMs who may give consent to other health care if a person is not mentally capable to provide consent are the following:

- Court ordered Guardian of the Person
- Attorney named in Power of Attorney for Personal Care
- Representative appointed by an Order of the Consent and Capacity Board
- Spouse or Partner
- Parent and Children
- Brothers and Sisters
- Any other Relative
- Public Guardian and Trustee
-

No Advance Consent / Advance Request

If a person is not mentally capable to consent to MAID at the time it is administered, it cannot be provided

When not yet eligible for MAID cannot ask that MAID be administered when individual reaches an advanced state of mental incapacity

When determined to have a health problem that is likely to become incapable and may meet other MAID conditions cannot ask for MAID to be provided if meet MAID conditions except for capacity in the future

When eligible for MAID, cannot give consent to MAID if become incapable before MAID is to be administered

4. ELIGIBILITY
Required Medical Condition

Must have a **grievous and irremediable medical condition**

Criminal Code
Grievous and Irremediable Medical Condition

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

(a) they have a **serious and incurable illness, disease or disability**;

(b) they are in **an advanced state of irreversible decline in capability**;

Grievous and Irremediable Medical Condition

(c) 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

Grievous and Irremediable Medical Condition

(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.

5. Voluntary Request

Patient must have made a **voluntary request** for medical assistance in dying that, in particular, was not made as a result of external pressure

Voluntary Request

Obligation on medical practitioner or nurse practitioner to determine the voluntariness

6. Eligibility - Informed Consent

- **Must give informed consent** to receive medical assistance in dying after having been informed of the means that are available to relieve their suffering, including palliative care.

Eligibility
Informed Consent

Person must **understand their health condition**

Person must **understand the options** for treatment of their condition

Person must be informed and understand the means that are available to relieve their suffering, including palliative care.

Person must be able to understand and appreciate the certainty of death upon receiving the MAID medication

Person's Options if found not eligible for MAID

- Get second opinion
- Ask for a referral
- Complain to health professional's College
- Options depend on grounds not found eligible

Oversight and Reporting

Physicians and nurse practitioners who provide MAID are required to notify the coroner of the death, and provide the coroner with the facts and circumstances of the death.

The coroner will determine whether it is appropriate to investigate the death.

If the coroner is of the opinion that the death ought to be investigated, and investigates the death, the coroner is required to complete and sign the medical certificate of death. However, if the coroner is of the opinion that the death does not require an investigation, then, in accordance with applicable law, the physician or nurse practitioner is required to complete and sign the medical certificate of death.

Failure to comply will be an indictable criminal offence with a penalty of imprisonment of not more than two years or an offence punishable on summary conviction.

Safeguards in Criminal Code

Before a medical practitioner or nurse practitioner provides a person with MAID they must ensure compliance with Safeguards as set out in s. 241.2(3) of the Criminal Code

Safeguards:
Determine Eligibility *

The medical practitioner or nurse practitioner must be of the opinion that the person seeking MAID meets ALL of the eligibility criteria

Safeguards:

Request in Writing *

The medical practitioner or nurse practitioner must ensure that the person's request for MAID was

(i) **made in writing and signed and dated by the person** or by another person in the person's presence, on the person's behalf and under the person's express direction.

AND

(ii) **signed and dated after the person was informed** by a medical practitioner or nurse practitioner **that the person has a grievous and irremediable medical condition**

Also requires two independent witnesses to sign the request

Safeguards:

Person Informed that may withdraw request *

The medical practitioner or nurse practitioner must ensure that the person was informed that:

- ❑ they may withdraw their request for MAID
- ❑ at any time

and

- ❑ in any manner (e.g. orally, in writing, by any other means)

Safeguards:

Written Opinion by another INDEPENDENT MP or NP*

The medical practitioner or nurse practitioner must ensure that:

- another **independent** medical practitioner or nurse practitioner has provided **a written opinion** confirming that the person meets all of the eligibility criteria for MAID

Safeguards:

Opportunity to withdraw request and confirm express consent *

The medical practitioner or nurse practitioner must ensure that:

- ❑ immediately before providing MAID
- ❑ Must give the person an opportunity to withdraw their request
  and
- ❑ Ensure that the person gives express consent to receive MAID

Safeguards:

Particular attention to Communication

The medical practitioner or nurse practitioner must ensure that:

- ❑ if the person has difficulty communicating,
- ❑ the MP or NP must take all necessary measures **to provide a reliable means** by which the person may understand the information that is provided to them and communicate their decision

Feb 2020 Proposed Amendments

This Bill would retain all existing eligibility criteria, but would remove the requirement for "reasonable foreseeability of natural death".

It would also expressly exclude persons suffering solely from mental illness. This exclusion is already in the law but was not specifically written into the Criminal Code sections on MAID. The amendments makes it explicit.

Eligibility
Informed Consent - HCCA s.11

Person must receive information about:

1. The nature of the treatment.
2. The expected benefits of the treatment.
3. The material risks of the treatment.
4. The material side effects of the treatment.
5. Alternative courses of action
6. The likely consequences of not having the treatment.

And get answers to any of their questions

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This Bill would amend the *Criminal Code* to allow MAID for eligible persons who wish to pursue a medically assisted death, whether their natural death is reasonably foreseeable or not. This is in response to the Truchon case in Quebec.

September 11, 2019, the Superior Court of Québec found the "reasonable foreseeability of natural death" eligibility criterion in the *Criminal Code*, as well as the "end-of-life" criterion from Quebec's *Act respecting end-of-life care*, to be unconstitutional (*Truchon v. Attorney General of Canada*…

https://www.justice.gc.ca/eng/csj-sjc/pl/ad-am/index.html

Proposed changes to MAID

This Bill would retain all existing eligibility criteria, but would remove the requirement for "reasonable foreseeability of natural death". It would also expressly exclude persons suffering solely from mental illness.

- proposes a two-track approach to procedural safeguards based on whether or not a person’s natural death is reasonably foreseeable. Existing safeguards will be maintained and eased for persons whose death is reasonably foreseeable. New and strengthened safeguards would be applied to eligible persons whose death is not reasonably foreseeable.

Excerpt from Justice Website

Proposed legislative changes introduced on February 24, 2020

Maintained and eased safeguards for persons whose natural death is reasonably foreseeable:

- the request for MAID must be made in writing. This written request must be signed by one independent witness, and it must be made after the person is informed that they have a "grievous and irremediable medical condition". A paid professional personal or health care worker can be an independent witness.
- two independent doctors or nurse practitioners must provide an assessment and confirm that all of the eligibility requirements are met
- the person must be informed that they can withdraw their request at any time, in any manner
- the person must be given an opportunity to withdraw consent and must expressly confirm their consent immediately before receiving MAID (this "final consent" requirement can be waived in certain circumstances as described below)

Excerpt from Justice Website

New safeguards for persons whose natural death is not reasonably foreseeable:

- the request for MAID must be made in writing. This written request must be signed by one independent witness, and it must be made after the person is informed that they have a "grievous and irremediable medical condition". A paid professional personal or health care worker can be an independent witness.
- the person must be informed that they can withdraw their request at any time, in any manner
- two independent doctors or nurse practitioners must provide an assessment and confirm that all of the eligibility requirements are met
  - one of the two practitioners who provides an assessment of eligibility must have expertise in the medical condition that is causing the person's suffering

Excerpt from Justice Website

- the person must be informed of available and appropriate means to relieve their suffering, including counselling services, mental health and disability support services, community services, and palliative care, and must be offered consultations with professionals who provide those services
- the person and the practitioners must have discussed reasonable and available means to relieve the person's suffering, and agree that the person has seriously considered those means
- the eligibility assessments must take a minimum of 90 days, unless the assessments have been completed and loss of capacity is imminent
- immediately before MAID is provided, the practitioner must give the person an opportunity to withdraw their request and ensure that they give express consent

Excerpt from Justice Website

Waiver of final consent

This Bill would allow waiver of final consent only for persons:

- whose natural death is reasonably foreseeable
- who have been assessed and approved to receive MAID
- who made an arrangement with their practitioner for waiver of final consent because they were at risk losing decision-making capacity before their chosen date to receive MAID

The Bill would render this waiver of final consent invalid if the person, after having lost decision-making capacity, demonstrates refusal or resistance to the administration of MAID. Reflexes and other types of involuntary movements, such as response to touch or the insertion of a needle, would not constitute refusal or resistance.

Should MAID be permitted with Advance Consent ?

Ongoing debate - arguments for and against

Much more complicated Issue than usual pro arguments that are given

Refer to the State of Knowledge on Advance Requests for MAID – Report of The Expert Panel Working Group on Advance Requests for MAID, Council of Canadian Academies

https://cca-reports.ca/wp-content/uploads/2019/02/The-State-of-Knowledge-on-Advance-Requests-for-Medical-Assistance-in-Dying.pdf

What is Advance Consent / Advance Request for MAID

-

No present clinical or legal standing in Canada for this type of concept

Defined by the Working Group as a request for MAID created in advance of loss of decision making capacity intended to be acted upon under the circumstances outlined in the request after the person has lost decisional capacity

Can’t we give advance consent NOW to future treatment?

Not in Ontario
Not in other provinces across Canada although there is a variation in provincial law as how “advance care planning” for health care is done and is recognized and implemented

The law in Ontario specifies that a person **cannot** provide an “advance consent” to any health treatments.

Advance care planning in Ontario which includes expressing wishes about future health care does not constitute “advance consent” to any treatments.

Informed Consent

Misunderstandings by the public and the health system in Ontario about advance care planning and informed consent

Research study on Forms, policies and practices on health cae consent prepared for the Law Commission of Ontario showed that out of 100 sets of documents and forms reviewed , NONE were completely accurate in respect to informed consent

Long term care homes still use Levels of Care Forms, signed on admission that seem to be used as consents when not reflect the Health Carre Consent Act requirements for informed consent

My review of some forms being used for consent to COVID vaccinations show legal errors on who is the SDM if person being vaccinated is incapable

Also some consents are set up with patients confirming they read the material on the COVID vaccination and that they are informed and consent rather than reflect HCCA requirement of duty of health practitioner giving vaccination to get informed consent

What is Health Care Consent?

Health practitioners need to obtain INFORMED consent or refusal of consent to a treatment from the patient, if capable, before treating, except in an emergency

If the patient is not capable, the consent is given by the patient's SDM

Health care consent is an informed and contextualized DECISION. (in contrast to ACP which are WISHES)

This is the same whether its treatment about end of life care or treatment under any other circumstances

What is Informed Consent?

- HCCA s. 11(2)

The patient must receive information on the:

- Nature of the treatment
- Expected benefits of the treatment
- Material risks of the treatment
- Material side effects
- Alternative course of action
- Likely consequences of not having the treatment

Consent

Consent is not just a “decision”

It must be INFORMED therefore it’s a PROCESS

It’s a discussion of the persons illness and the risks, benefits , side effects of treatment options, the alternatives to the treatment options, and what could happen if the person refuses the treatment options. It’s a discussion with the patient/ SDM of any questions that the patient/ SDM may have about the patients condition and the treatment options.

It’s NOT just a YES or NO

Duties of Health Practitioners when getting Consent to Treatment

Determine who is health decision maker by assessing capacity of patient

* Capable Patient
or
* Incapable Patient's SDM

Provide Information about:

- Illness
- Treatments options offered

(Includes: risks, benefits, side effects, alternatives, what may happen if treatment is refused)

Discuss Goals of Care

IF talking to SDM – explain requirement to make decisions following wishes/best interests of patient

Get Decision
(informed consent or refusal)

From Patient

or

Incapable Patient's SDM

Aren’t Goals of Care consents?

NO

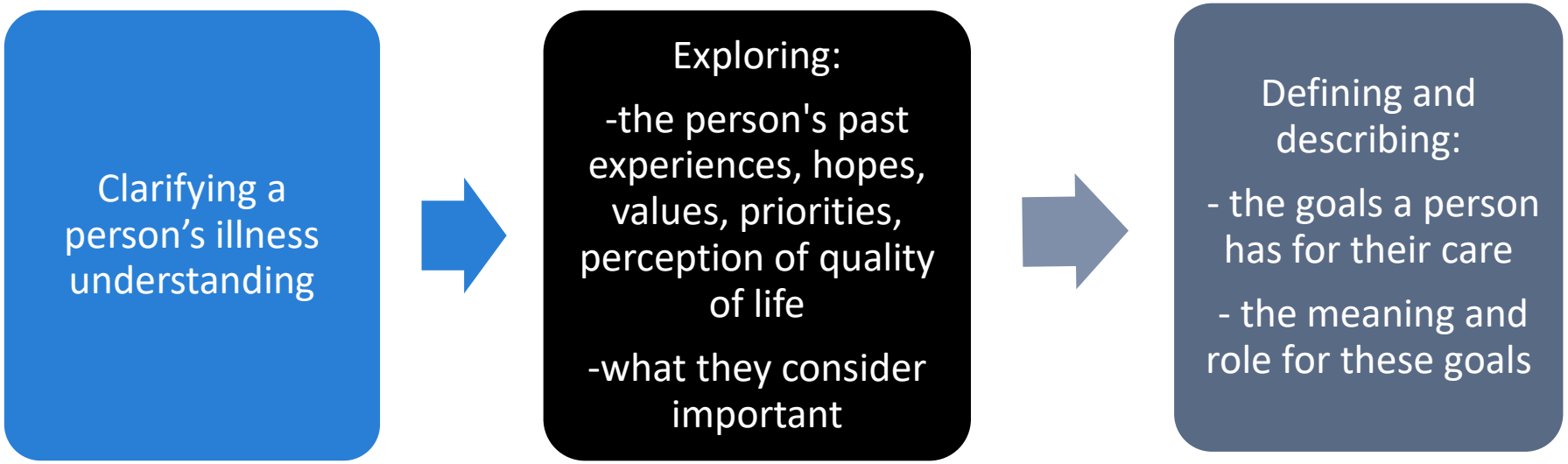
Goals of Care term observed being used as a replacement term for a consent to No resuscitation

Also observed as if Goals of care are the consent from which a physician may change treatment as persons illness changes when in some cases there is a need for a new consent discussion

Still need to get an informed consent to plan of tretamnet after discussion goals of care

Goals of Care Discussions

Discussions between a provider and a capable patient that include:



Goals identified by the capable patient (or their SDM) are used to facilitate decision making and consent

- Decision-making can take time. **It is important to distinguish decisions from goals of care discussions**

Informed Consent

When seeking consent, **health practitioners** have a **duty to COMMUNICATE** with patients (or the incapable patient's substitute decision-maker) about the patient's present condition and the available treatment options

Information needed to be communicated includes info on the risks, benefits, side effects, alternatives to the treatment, and what happens if the treatment is refused

Consent ALWAYS comes from a person, not a piece of paper - not from a patient's written "advance care plan" nor from patient's wishes noted in medical records

ACP wishes and Goals of Care are NOT consents

How “Wishes” affect Treatment options

Even if a patient has provided some form of “Advance Care Plan” to the health providers and expressed “wishes” about future care, those wishes should not be used to determine / limit treatment options offered

Wishes may have been expressed out of context without knowledge of how the patients condition has changed/ developed and without knowledge or understanding of possible treatment option - PATIENTS may CHANGE THEIR MINDS after getting all the INFO to make an informed consent

Treatment taking place in the future is NOT necessarily an advance care plan

A patient can give an informed consent to a treatment that takes place or is withheld in the future if that treatment relates to the patient's
PRESENT HEALTH CONDITION

This is not Advance Care Planning, but is Consent

Patients at end of life can CONSENT to No CPR/DNR and this is NOT advance care planning because it's within context of their present health condition

DNR(c) Form is not a informed consent to No CPR

DNR Confirmation form was created to enable health practitioners to communicate with emergency responders (EMS, ambulance and fire firefighters) when patients/SDMs have provided an informed consent to No CPR to a health practitioner

Form (MOHLTC numbered form) may be relied upon by emergency responders to not resuscitate because it's a confirmation of consent to No CPR signed certain Health practitioners,

DNR(c) form is NOT a DNR order that may be relied upon by health practitioners in a hospital or other health facility. Person has gone to the hospital for care and the treatment of resuscitation should be revisited as the patients condition may have changed since the DNR(c) form was completed.

What about Emergencies?

- In an **EMERGENCY**, health care providers do not need consent in order to treat.

But, they must follow any known WISHES of the patient in respect to the proposed treatment.

If consent to a treatment is refused on an incapable person's behalf by his or her substitute decision-maker, the treatment may be administered despite the refusal if, in the opinion of the health practitioner proposing the treatment,

(a) there is an emergency; and

(b) the substitute decision-maker did not comply with section 21(requirement for SDM to make decisions following patient's wishes/ best interests) (HCCA s. 27)

Advance Care Planning

In Ontario, Advance Care Planning is a two step process that involves the *mentally capable* person:

Identifying their substitute decision maker(s) (SDM)

- The person(s) who would make health care decisions on behalf of someone who is mentally incapable

Discussing their wishes, values & beliefs with their SDM(s)

- Including preferences for how they would like to be cared for if they were not capable to give or refuse consent

ACP “Wishes”

Advance Care Planning does not need to be about specific treatments that a person would want to not want

It is very difficult to anticipate what treatments one would want for themselves as people don’t know how their health condition will progress or what the effect of particular treatments would be

ACP Wishes and explanations of a person’s values and beliefs may help the SDM make better decisions for the patient as these wishes help the SDM understand:

- who the patient is,
- how they make choices for themselves,
- what they think is important to themselves what influences their decision making

How does the SDM make decisions?

In making decisions on behalf of an incapable patient, SDMs have to:

- Follow any applicable wishes that were expressed by the patient when capable; or
- If no applicable wishes were expressed when the patient was capable, make decisions in the patient's best interest (including considering the patient's values, beliefs and any other wishes expressed by the patient)
- Duty of Health practitioner to inform SDMs of how they are required to make decisions (Benes case)

May SDM NOT follow a wish when deciding for the patient?

If wish was to refuse particular treatment / admission and SDM believes that patient, if capable now, would probably give consent because the likely result of the treatment/ admission is “significantly better than would have been anticipated in comparable circumstances at the time the wish was expressed”, SDM may go to Consent and Capacity Board asking that they will not follow that wish (HCCA s 36, s 53)

If SDM believes that a wish is impossible to follow then SDM does not need to follow it

Role of the SDM******

SDM is the “interpreter” of the patient's wishes, values and beliefs and must determine:

- whether the wishes of the patient were expressed when the patient was still capable (and were expressed voluntarily);
- whether the wishes are the last known capable wishes;
- what the patient meant in that wish;
- whether the wishes are applicable to the particular decision at hand;

and,

- If there are no applicable/capable wishes, how the patient’s values, beliefs, and incapable/inapplicable wishes would apply to the patient’s best interest.

Present problems with understanding of Informed consent and wishes

Difference between informed consent and Goals of Care

Forms used in health facilities including E records

How forms are explained before signature

Who takes directions from “advance directive” or ACP plan

Are wishes if “valid” at trime still current or the last known capable wishes

Difference between ACP and AR for MAID

Advance requests for MAID only in respect of death – Final decision

ACP outlines preferences of person –which may result in death (withholding or discontinuing of treatment) but SDM has opportunity to consider patients present condition and options and put speculative wishes in context

Different kind of decision for AR for MAID than for consideration and honouring of ACP wishes.

Could AR for MAID be protected with safeguards ?

What would have to be done to have advance consent to MAID

Need for changes in the law more than for MAID

Provincial law and common law covers informed consent and health care

Differences across the country

MAID involves Criminal Law – MAID is exemption to Federal Criminal Law

AR for MAID would require a regulatory framework that involves BOTH provincial /territorial regulation and federal law

Necessary elements for an AR for MAID

Capacity of person at the time created

Informed consent at the time created – knowledge of illness / condition would it lead to a state of grievous and irremediable medical condition decline causes them enduring physical or psychological suffering that is intolerable to them

Voluntary

Still in Effect at time that MAID being considered

Safeguards

Who would decide if AR for MAID is valid

Health care practitioner or SDM?

What info would HP need to have to be satisfied of validity ?

And of whether conditions are met to give authority to give MAID?

Should SDM be appropriate to judge validity ?

Bias; SDM understanding or misunderstanding of patients condition and suffering; own self interest; acting on own wishes not that of patient

How create the AR for MAID

How determine capacity ?

How determine influence at the time because person not yet suffering?

What information needed to determine if INFORMED consent?

Person may not yet have a condition that could cause them intolerable suffering so what info would be provided?

How determine voluntariness?

Safeguards – Pros and Cons

Lessen risk that [person will receive MAID against their wishes

Accessibility of care or availability of care

Stigma associated with certain health conditions

Fear of certain heallth conditions

Meetings with Physicians/ nurses/ Social workers before signature

Time limits on Validity of AR for MAID

Guidance to the SDM on interpreting AR for MAID

Ongoing discussion between HCP that will give MAID and the patient through decline of capacity

Resources

For more Information on MAID .

Best resources are on Justice Canada https://www.justice.gc.ca/eng/csj-sjc/pl/ad-am/index.html to see specific information on the legislation and a comparison of the present law and what will change if the Feb 2020 Bill is passed

And on

Government of Canada website on MAID

https://www.canada.ca/en/health-canada/services/medical-assistance-dying.html

For Info on Health Care Consent

Law Commission of Ontario two Projects on Capacity and Guardianship and on End of Life

See final report on Capacity and Guardianship and commissioned papers for both projectys

Thank You!

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