



Consent and
Capacity Board

The Consent and Capacity Board: Substitute Decision Making and Types of Applications within Board's Jurisdiction

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Key Issues with an Incapable Person

- **What is an SDM?**
- **How is an SDM “selected”?**
- **What are the SDM’s duties and whose job is it to educate him or her?**
- **What if a problem arises?**

What Is An SDM?

SDM stands for SUBSTITUTE DECISION MAKER.

This is someone who is legally entitled under the *HCCA* to make a decision re: treatment or admission to long term care for a person who has been found incapable to make that decision.

How is an SDM “Selected”?

- **Health practitioners do not have discretion in who will be an incapable person’s SDM.**
- **Section 20 of the *HCCA* tells you who will be the SDM.**
- **It is not a matter of selection, but of identifying the appropriate person.**

Section 20: Identifying the SDM

Section 20(1) of the *HCCA* provides a list. The first job of the health care team in identifying the SDM is to go down the list, and identify the highest ranking person on that list who is available.

The s.20(1) list, simplified, is:

- 1. Guardian of the Person (appointed by a Court)**
- 2. Attorney for Personal Care with authority covering this decision**
- 3. Representative appointed by the CCB**
- 4. Spouse or Partner**
- 5. Child or parent (with more than a right of access)**
- 6. Parent with only a right of access**
- 7. Sibling**
- 8. Any other relative**

Definitions and Further Requirements

Spouse

Partner


Relative

Available

These are all defined terms in the *HCCA*. There are also some further requirements for SDMs set out.

No SDM?

What if there is no-one fitting any of the descriptions in s. 20 to make the decision?



If there is no person who both fits one of the descriptions in s.20(1) and meets the requirements of s.20(2), the Office of the Public Guardian and Trustee (PGT) becomes the decision maker.

Conflict

What if two or more people with equal rank on the list disagree about whether or not to give consent?

SDMs Must
Work it Out,
or...

If two or more people who are equally entitled to be SDM are unable to agree on whether to give or refuse consent, the PGT will make the decision.

What Are the SDM's Duties and Whose Job is it to Explain Those?

- Remember that *capable* people can make whatever decision they wish for themselves, for whatever reason they wish. The decision need not be “reasonable”.
- By contrast, SDMs, who are making a decision for someone else, are guided by law re: how they make the decision.

HCCA Section 21


- **Section 21 of the *HCCA* tells SDMs how to make a decision for an incapable person. It must be followed for each decision.**

Section 21 Paraphrased

- **An SDM must follow these two principles in giving or refusing consent on an incapable person's behalf:**

1. If the SDM knows of a wish applicable to the circumstances that was expressed by the person when s/he was capable (and 16 years old or more), that wish must be followed.

This is called a “*prior capable wish*”.




2. If the SDM does not know of such a wish or if it is impossible to comply with such wish, the SDM must make the decision in the incapable person's *Best Interests*.

What Are Best Interests?

- **Section 21 defines *Best Interests*.**

The SDM must consider:

- a) the values and beliefs that the incapable person held when capable that the SDM believes s/he would still act on if capable;**
- b) any wishes that the incapable person expressed re: the circumstances that don't qualify as prior capable wishes; and**

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- c) 1. Whether the treatment (or admission) is likely to:**
 - i. improve the incapable person's condition or well-being,**
 - ii. prevent that person's condition or well-being from deteriorating;**
 - or**
 - iii. reduce the extent to which, or the rate at which, that person's condition or well-being is likely to deteriorate.**

and

2. Whether the incapable person's condition or well-being is likely to improve without the treatment (or admission).

and

3. Whether the benefit the incapable person is expected to obtain from the treatment (or admission) outweighs the risk of harm to him or her.

and

4. Whether a less restrictive or intrusive treatment (or alternative to admission) would be as beneficial as the one proposed.

Whose Job is it to Educate the SDM?

- **If you are the health practitioner or evaluator in a word, Yours!**
- **Once an SDM has been identified and has agreed to make the decision on the incapable person's behalf, the treatment team must ensure that s/he understands two things:**



1) His or her responsibilities under s.21 of the *HCCA*, and the principles by which s/he must make the decision; and

2) All relevant information about the incapable person's current situation and the treatment (or admission) being proposed.

This is essential for the SDM to perform his/her legal obligation to consider the incapable person's prior capable wishes, if any, as well as their Best Interests, as defined by the *Act*.

Importance of
these
Discussions
Can't be Over-
Emphasized

- **very busy professionals.**
- **These discussions take time.**
- **They can also be difficult and stressful, certainly for the decision maker but also for the health care professionals.**
- **But hearings and especially lawsuits take much more time, and are infinitely more difficult and stressful.**

What If a Problem Arises?

Two general types of problem may arise:

One is conflict between or among people legally qualified to act as SDM.

The other is the situation where it is not clear what decision the law requires, or where the treatment team does not believe the SDM is following the principles of s.21.

Form C: For Conflict Among Potential SDMs

- **If two or more people are equally qualified by law to act as SDM but can't agree, one or more may apply to the CCB to become "Representative" of the incapable person. The incapable person may also initiate this application if s/he wants a particular person to make the decision.**

Problems re: What Decision

- The *HCCA* provides for several types of applications to the CCB to help determine what decision the SDM should make.

Form D: Application for Directions

The SDM or health practitioner may apply to the CCB for directions if there is a previous wish but it is not clear whether or not it meets the criteria of s.21(1), i.e.

- 1)whether it is applicable to the circumstances,***
- 2)whether it was expressed while the person was capable and 16 or older, or***
- 3)when the wish itself is not clear.***

Form E: Application to Depart From Wishes

- **If an SDM is required by s.21 to refuse consent to a treatment (or admission) because of a prior capable wish (applicable to the circumstances etc.)**
 - a) s/he may apply to the CCB for permission to consent despite the wish; or**
 - b) the health practitioner may apply for permission for the SDM to consent despite the wish.**

Form G: Application to Determine Compliance with S.21

- **If an SDM gives or refuses consent on an incapable person's behalf, and the health practitioner is of the opinion that the SDM did not comply with s.21 in reaching that decision, the health practitioner may apply to the CCB for a determination as to whether the SDM complied with s.21.**

- **If, on hearing such an application, the CCB determines that the SDM did not follow s.21 in making the decision, it may direct that s/he do so within a certain time, failing which s/he will fail to qualify to act as SDM for that decision.**

Notes re:
Forms C, D, E
and G

- **Every application for Appointment of a Representative, Directions, Permission to Depart from Wishes or to Determine Compliance with S.21 is deemed to include an application to review the finding that the person is incapable to make the decision in question himself or herself, unless the CCB has dealt with that issue within the past six months.**

- The *HCCA* tells the CCB what to consider and what powers it has re: each of these types of applications.
- If you are involved with one, carefully read the relevant sections . Get legal advice or call the CCB for information.

Case Scenarios for Discussion

- **The incapable person has no family but there is a neighbour who is concerned, responsible and willing to give consent.**

Can the neighbour act as SDM?

Form C Application

- **The neighbour can bring an Application to be appointed Representative for the incapable person.**
- **If there is no family, OPGT becomes the decision-maker of last resort (and also makes a decision where SDMs cannot agree).**



A patient is admitted to hospital with instructions that they are to be “DNR”. Family later indicate that the patient should be “full code”. It is unclear how this change occurred and what to do next.

Form G Application

- **Was the SDM advised of his/ her/ their responsibilities as an SDM to make decisions in accordance with the HCCA?**
- **Possible Form G application: The health practitioner can apply to the CCB for an determination of whether the SDM is fulfilling his legal obligations to act in accordance with a prior capable wish applicable to the circumstances or in patient's best interests (s.21).**

Form E Application

On a Form E Application (to depart from wishes), the CCB can give the SDM permission to depart from a wish if is satisfied that:

s.36(3) “...the incapable person, if capable, would probably give consent because the likely result of the treatment is significantly better than would have been anticipated in the comparable circumstances at the time the wish was expressed.”

- **“We swore to Dad we’d never send him to a nursing home, but if he were alert today, he would want to go instead of putting Mum in the situation of having to care for him at home....”**

- **Mrs. Lee needs to go to a nursing home. Mr. Lee, her SDM, won't consent to this because if he loses her pension, he will lose his house....**

Form G Application

- **The health practitioner can apply to the CCB for a determination of whether the SDM (Mr. Lee) is fulfilling his legal obligations to act (in the absence of a prior capable wish applicable to the circumstances) in Mrs. Lee's best interests.**