



Consent and
Capacity Board

The Consent and Capacity Board: Consent, Capacity and Substitute Decision Making

*Michael D. Newman B. Comm., LL.B., LL.M. (Health Law)
Vice Chair and Senior Lawyer Member
Consent and Capacity Board of Ontario*

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For Providence Care Community

WHAT IS THE CONSENT AND CAPACITY BOARD?

We are a provincial administrative tribunal with jurisdiction to hear matters under multiple pieces of Ontario legislation.

We are not a Court. We are a quasi-judicial body.

Who Is the CCB?

- Approximately 130 Members province-wide
- One third lawyers, one third medical members, one third public members
- Usually sit in panels of 3
(sometimes 1, sometimes 5)
- Staff of approximately 14, 7 of whom schedule hearings

Who Is the CCB? (cont.)

- Members are appointed by Order in Council for a fixed term (1, 2, 3 or 5 years, eligible for re-appointment)
- All are part time appointees, except the Chair and two full-time Vice Chairs
- Staff are Ontario public servants
- Board is independent; operates at arm's length from the Ministry of Health
- Has only the powers given to it by law
- Decisions can be appealed to Ont. Superior Court

What Does the CCB Do?

- Holds hearings in response to Applications under:
 - *Mental Health Act (MHA)*
 - *Health Care Consent Act (HCCA)*
 - *Substitute Decisions Act (SDA)*
 - *Personal Health Information Protection Act (PHIPA)*
 - *Mandatory Blood Testing Act (MBTA)*
 - *Child Youth and Family Services Act (CYFSA)*

Caseload

- Approx 8000 Applications received in 2018/19
- CCB convened approx. 5000 hearings
- At centralization in 2002/03 the current staffing structure and numbers were put in place
- Annually hearings were held in over 250 locations province wide, until Covid-19
- Board did not suspend operations with Covid-19
- Continued hearings by teleconference. Pilot project currently to some video conference hearings
- Projected increase in hearings of over 10% over next year

Health Practitioner/Evaluator Role In the Legal Context...

- Legally they are the person empowered by the state to change the legal status of individuals and curtail their rights to LIBERTY and SECURITY of the PERSON
 - These are rights protected by the *Charter of Rights and Freedoms* and subject to strong protections
 - Integral part of patient care

How Matters Get Before the CCB

- ⦿ There are a number of different types of Applications.

Assessment for Capacity wrt Management of Property

- Mental Health Act
- Substitute Decisions Act

The *Health Care Consent Act* (*HCCA*)

- Deals with issues of capacity and consent in the context of medical treatment, admission to long term care and personal assistance services
- Represents society's shift from a paternalistic approach to a more collaborative one, respecting individual autonomy in decision making

Purposes

- To provide rules re: consent to treatment that apply consistently in all settings;
- To facilitate treatment, admission to long term care and personal assistance services for those lacking capacity to make decisions about such matters;
- To enhance autonomy of persons for whom treatment, admission to long term care or personal assistance services are proposed, by:

Ways the *HCCA* Enhances Autonomy

- 1) Allowing persons found incapable re: such decisions to apply to a tribunal for a review of the finding;
- 2) Allowing incapable persons to request that a representative of their choice be appointed by the tribunal to make decisions on their behalf; and
- 3) Requiring that prior capable wishes with respect to these issues be adhered to.

Purposes (cont.)

- To promote communication and understanding between health practitioners and their patients or clients;
- To ensure a significant role for supportive family members of someone who lacks capacity to make a decision of this sort; and
- To permit intervention by the PGT only as a last resort in decisions of this type.

Capacity to Consent (or refuse consent) to Treatment

Capacity with respect to Admission to a Care Facility

Capacity to Consent (or refuse consent) to Personal Assistance Services

- Need to be recipient (s 2 HCCA)- Need to be in Long Term Care or place prescribed by regulations etc

Who completes the assessment?

The Test for Capacity

- The *HCCA* tells us that *a person is capable* to make his or her own decision re treatment, admission to long term care or personal assistance services as long as s/he is both:
 - *a) able to understand the information relevant to making the decision; and*
 - *b) able to appreciate the reasonably foreseeable consequence of the decision.*

Note that it is:



The ability

- to understand the information
- and appreciate the consequences

Not simply

- whether or not the patient actually understands
- and appreciates.

ABLE to Understand Relevant Information

- Requires cognitive ability to process, retain and understand the relevant information.
- Ability can be affected by psychosis, delusions, extreme anxiety, dementia, etc
- Courts have said there needs to be a determination of why or how an individual is incapable, not just a finding that they are incapable ie REASONING

Ability To Understand/ Appreciate

- Often mixed up or used interchangeably

A Finding of Incapacity

- A finding of incapacity concerning a decision is a finding that a person is, at the time of the finding, unable to do one or both of those things. Legal Consequences

Capacity and Completing POA-PC (S47 SDA)

- Test for capacity to give a POA for Personal Care different than for treatment or admission etc
- ability to understand whether proposed attorney has a genuine concern for the person's welfare AND
- Appreciates that the person may need to have the proposed attorney make decisions for the person

Key Issue with an Incapable Person is the introduction of an SDM

- 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. Section 20 applies with necessary modification to admission or PAS decisions
- 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?

Default

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, and their claims rank ahead of all others, 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 42 for Admission to LTC)

- Section 21 of the *HCCA* tells SDMs how to make a treatment decision for an incapable person. It must be followed for each decision. See Section 42 re SDM and admission decision

Section 21 (s. 42 etc) 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?

- Considers values and beliefs and wishes and ultimately best interests for that person.
- Best interests different for each person-defined term of factors to consider

Whose Job is it to Educate the SDM?

- Depends on the issue, health practitioner/evaluator
- Once an SDM has been identified and has agreed to make the decision on the incapable person's behalf, the treatment team (or person responsible for authorizing admission to the care facility) must ensure that s/he understands two things:

1) His or her responsibilities under s.21 (or 42 for admissions) 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

- Health Practitioners are 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 (or where person responsible for authorizing admissions...).

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 or person responsible for authorizing admissions... 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) or 42, 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 s42 re 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 (or LHIN with an admission case) 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 (or in an admission case the LHIN) is of the opinion that the SDM did not comply with s.21 (or s 42 in an admission case) in reaching that decision, the health practitioner or LHIN (in admission case) 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 (or s 42 in admission case) 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 (or s 42 in admission case) 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. Yes, there can be competing applications.
- 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 or LHIN in admission case 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 or s 42 in admission case).

- “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....”

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 it 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.” there is similar provision in admission cases- s 53 HCCA

- 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 LHIN can apply to the CCB for an 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.

Factors that may Influence Capacity

- Memory
- age, medical state, mental state
- Psychosis-ie delusions, hallucinations
- Paranoia
- Thought process deficits
- Insight
- Rational Beliefs
- safety
- There are a number of Others
- Best interests is **not** a factor in determining capacity; in law it actually is irrelevant

- Finding a solution through open, respectful and full discussion will always be better than having one imposed by the CCB or a Court.
- Stay safe and THANK-YOU.

www.ccboard.on.ca