

MILLER THOMSON LLP

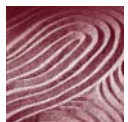
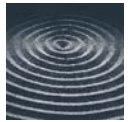
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Consent and Capacity Admission to Care Facility : Tips and Traps Kathryn Frelick



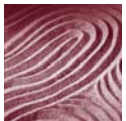
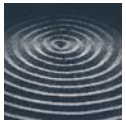
January 16, 2008

Overview



- Consent and Capacity principles
- Applications to the Consent and Capacity Board
- Tips and Traps

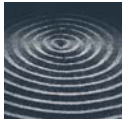
Example scenarios



- A patient has had a series of admissions to hospital and exhibits signs of neglect. Her elderly husband is anxious to take her home and will not consider placement to long term care. Although some of the patient's comments support suspicions of neglect or abuse, they are inconsistent.

Consent and Capacity

Sources of Law



- Legislation
 - Health Care Consent Act
 - Mental Health Act
 - Substitute Decisions Act
 - Personal Health Information Protection Act
 - Regulated Health Professions Act
- Common Law
 - Professional Standards and Guidelines



Consent Principles - Legislation

- HCCA applies to treatment, admission to care facilities and personal assistance services
- Care facility = nursing home, home for the aged, charitable home (when new legislation in force - long term care homes)



Admission to Care Facilities

- Decision made by capable person, or where an evaluator has made a finding of incapacity, the SDM, may consent or refuse admission to care facility
- the SDM is required to make decisions in accordance with principles under HCCA
- Includes ability to withdraw consent

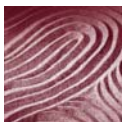
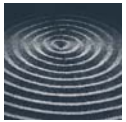
Crisis Admission

- Admission may be authorized without consent where:
 - Incapable individual requires immediate admission as a result of a crisis
 - It is not reasonably possible to obtain an immediate consent or refusal on incapable person's behalf

Capacity

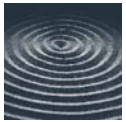
- A person is capable with respect to admission to a care facility if a person is:
 - **able** to understand the information that is relevant to admission decision, **and**
 - **able** to appreciate the reasonably foreseeable consequences of a decision or lack of decision

Capacity



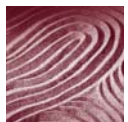
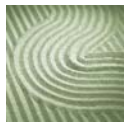
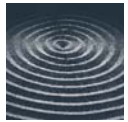
- Capacity is presumed
- A person may rely on presumption of capacity unless reasonable grounds to believe that the person is incapable with respect to the admission

Capacity



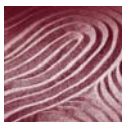
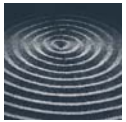
- Specific health professionals are “evaluators” and determine capacity with respect to admission
- Evaluators include SLPs, nurses, OTs, MDs, PTs, psychologists
- No specific requirements re: capacity assessments

Capacity



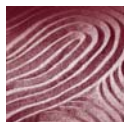
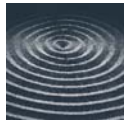
- Individual must be notified of finding of incapacity and consequences (informal rights advice)
- Individual may challenge a finding of incapacity to the Consent and Capacity Board (CCB)

Capacity



- test for capacity under HCCA (*Starson v. Swayze*)
 - Practitioner’s idea of “best interests” not relevant
 - Failure to make decision is not the same as inability to make decision
- *Re Koch* (role of evaluator)

Capacity



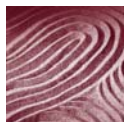
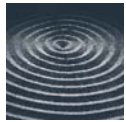
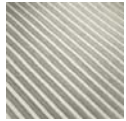
- HCCA does not require an actual appreciation of the consequences
- Person is entitled to disregard the clinical advice and/or to make an unwise decision



Substitute Decision Making

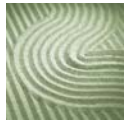
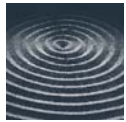
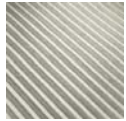
- guardian of the person
- power of attorney for personal care
- representative appointed by the CCB
- spouse or partner
- child, parent, CAS or other person lawfully entitled to provide consent
- access parent
- brother or sister
- any other relative
- Public Guardian and Trustee (PGT)

Powers of Attorney



- POA(PC) must confer requisite authority (cannot be for property)
- POA is a legal document which must meet certain statutory requirements in order to be valid (i.e. in writing; witnessed; capacity)
- ‘advance directive’ or ‘living will’ may qualify as a valid POA, but only if it meets legal requirements under SDA
- a non-relative may be appointed SDM only by way of court or CCB order or POA

Determining the SDM



- SDM must be capable
- > 16 years unless parent
- not prohibited by court order/separation agreement from having access
- is available (i.e. able to communicate within reasonable time)
- is willing to act as SDM
- PGT is SDM of last resort

Principles for giving or refusing consent

- SDM is entitled to have all of the information that person would have in order to make decision
- Evaluator must inform the SDM of his or her obligations in giving or refusing consent to admission under the HCCA (*A.M. v. Benes*)

Principles for giving or refusing consent

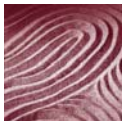
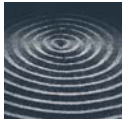
- SDM must act in accordance with the person's:
 - prior capable wishes, if known, or
 - best interests
 - Values and beliefs
 - Quality of life (i.e. improvement or prevent deterioration)
 - Balance risk and benefits
 - Less restrictive alternatives



Types of CCB Applications

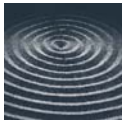
- Incapable persons may apply to CCB:
 - to review finding of incapacity
 - to appoint a representative
 - to review informal admission to facility
 - to review involuntary admission
- Any person may apply to CCB to be appointed as representative for an incapable person

Types of Applications to CCB



- Individual may bring application to:
 - Challenge evaluator’s finding of incapacity
 - Seek appointment of a representative to make decisions (unless POA or legal guardian in place)

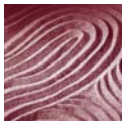
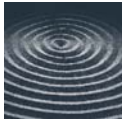
Applications to CCB



- SMD may apply to the CCB:
 - for directions (i.e. to clarify or depart from wishes)



Applications to the CCB (cont'd)

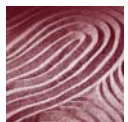
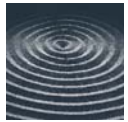


- The person responsible for authorizing admissions to a care facility may bring an application:
 - for directions (i.e. clarification of wishes or to depart from wishes)
 - to determine compliance with principles for substitute decision making

Applications to CCB

- Parties generally include:
 - evaluator/CCAC
 - patient
 - SDM
 - any other person whom the CCB specifies
 - increasingly, CCB is appointing legal counsel to patient/SDM, even if not represented
 - PGT

Applications to CCB



- Deemed application concerning capacity
- Onus upon party bringing the application to demonstrate that the individual is incapable with respect to the decision on a balance of probabilities (civil standard)



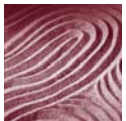
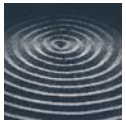
Admission must not begin

- Cannot authorize admission to LTC, if aware that individual intends to apply to CCB to review of finding of incapacity
- Limit on repeat applications (i.e. final disposition within 6 months)

No admission until:

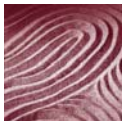
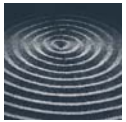
- 48 hours have elapsed with no application
- application to CCB has been withdrawn
- CCB has rendered a decision and none of the parties intend to appeal
- the period for commencing the appeal has lapsed or appeal disposed of

Exceptions



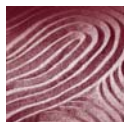
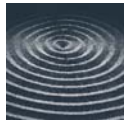
- Unless emergency or crisis, in which case, crisis admission is permitted
- Court order authorizing treatment pending appeal

Applications to CCB



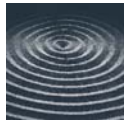
- Forms, guidelines and rules of practice can be found at www.ccboard.on.ca
- Select decisions can be found at www.canlii.org/on/cas/onccb/
- Hearings may be held with or without legal counsel, however, as a result of increasing complexity, the CCB has developed rules of practice

The Hearing



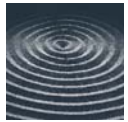
- Held within 7 days unless otherwise agreed
- Proceedings are recorded (will be transcribed in event of appeal)
- Generally occur where patient resides or is being treated

Hearings



- Facilitated by organization
- Generally open to the public
- Exclusion of witnesses?
- Private meeting space with lawyer/family/representatives
- Patient's lawyer entitled to review health record

Process During Hearing



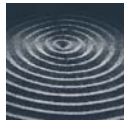
- Presiding Member makes introductions and explains format
- Evaluator/CCAC presents evidence (oral testimony, submission of documents and/or calling witnesses)
- Parties may be represented by counsel and given opportunity to present evidence and cross examine witnesses



Process During Hearing (Continued)

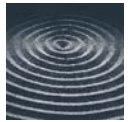
- After hearing, CCB will meet in private and make decision
 - Will issue decision within one day of hearing
 - If requested within 2 days, will provide written reasons for decision

Being the Applicant



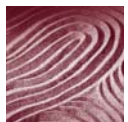
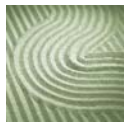
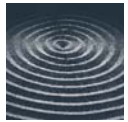
- Applicant must attend hearing
- CMPA/Hospital Counsel may assist the applicant in complex cases
- There are legal tests to be proven – if the Applicant cannot meet the tests, the patient/SDM will be successful in having the decision overturned

Being the Applicant



- Prepare thoroughly
 - Know the tests
 - Know the forms
 - Know the facts (create chronology, demonstrate that you made every effort to obtain relevant information from person)

Being the Applicant



- CCB very appreciative where Applicant prepares a summary report, to be admitted as an Exhibit
- Bring patient's chart and copies of key documents to be admitted into evidence (i.e. Forms, key reports and assessments)

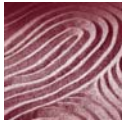
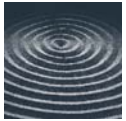


Facing Technical Issues

- If a technical issue is raised, don't panic
- If possible, try to determine if there will be any technical issues raised before the hearing
 - ask for an explanation
 - seek assistance from risk management, legal counsel
- If raised during hearing, object due to lack of notice or ask for an adjournment to consult legal counsel, if required

Appeal

- Party may appeal CCB's decision within 7 days of receiving decision



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Questions? Comments?

Thank you!