

Note from Judith Wahl – September 2015

This list of cases was prepared in 2012 by ACE as a resource for a six part course on Consent and Capacity Law that ACE prepared for what was then called the Quality Services Office of Legal Aid Ontario. This course was put on DVDs and was available from LAO, although LAO only released three of the six parts as permission was not obtained from some of the participants in the two parts that were not released. The DVDs that were released included a detailed explanation of the SDA and HCCA and capacity assessment. I could not find reference on the LAO website as to whether these DVDs are still available. This case lists was not updated for this education session on Health Care Consent and Advance care planning in October 2015 except for the addition of the SCC 2013 decision in Rasouli. However this document is still a good starting point for your research on consent and capacity issues.

HISTORICAL CONTEXT OF MENTAL HEALTH LAW

R. v. Swain, [1991] 1 S.C.R. 933.

CONSENT AND CAPACITY BOARD: JURISDICTIONAL ISSUES

Status of the Board's Policy Guidelines: Susceptible to Challenge

D.H. (Re), 2005 CanLII 57789 (Ont. C.C.B.).

Simultaneous Proceedings before the Board and the Superior Court

Re. S. (unreported, August 29, 2005, Doc. No. TO-05-7036, Ont. C.C.B.), endorsement of senior lawyer Board member Michael Newman.

Jurisdiction of the Board to Consider the Constitutional Validity of Legislation and to Grant Relief under Subsection 24(1) of the *Charter*

Ontario (Attorney General) v. Jane Patient (2005), 250 D.L.R. (4th) 697 (Ont. Div. Ct.).

W.S. (Re), 2005 CanLII 57656 (Ont. C.C.B.).

R. v. Conway, [2010] 1 S.C.R. 765.

***Charter* Compliance and *Charter* Values**

R. v. Conway, [2010] 1 S.C.R. 765.

Disputes Respecting End-of-Life Decision-Making

Cheah et al. v. Sunnybrook Health Sciences Centre et al., (unreported, October 22, 2010, Doc. No. 03-102/10, Ont. Sup. Ct.), Conway J.

Rasouli v. Sunnybrook Health Sciences Centre et al., 2011 ONSC 1500.

Rasouli v. Sunnybrook Health Sciences Centre et al., 2011 ONCA 482.

Cuthbertson v. Rasouli, 2013 SCC 53, [2013] 3 S.C.R. 341

Detention in Psychiatric Facilities and the Availability of *Habeas Corpus*

Re Carnochan, [1941] S.C.R. 470.

Kowalski v. Penetanguishene Mental Health Centre, [1977] O.J. No. 530 (Div. Ct.) (QL).

Re H. (unreported, 22 July 2005, Doc. No. 05-CV-292622 PD3, Ont. Sup. Ct.), Gans J.

Capano v. Centre for Addiction and Mental Health, [2010] O.J. No. 1107 (Sup. Ct.), currently under appeal.

Mental Disorder Provisions of the *Criminal Code* and Treatment Incapacity before the Consent and Capacity Board: Community Treatment Orders as a Means to Ensure Public Safety

R. v. Lamanna, 2009 ONCA 612.

PROCEDURE BEFORE THE CONSENT AND CAPACITY BOARD: THE BOARD'S PROCESS

Rights Advice and the Effect of a Failure to Provide Prompt Rights Advice

M.C. (Re), 2004 CanLII 36175 (Ont. C.C.B.).

D.G. (Re) (unreported, August 15, 2008, Doc. No. HA-08-1525, Ont. C.C.B.).

G. (Re), 2009 CanLII 60753 (Ont. C.C.B.).

M.E.R. (Re), 2005 CanLII 12687 (Ont. C.C.B.).

A.P. (Re), 2004 CanLII 34872 (Ont. C.C.B.).

A, Re, 2002 CanLII 6475 (Ont. C.C.B.).

Mandatory and Deemed Applications

S.K. (Re), 2004 CanLII 10784 (Ont. C.C.B.).

Access to Records

McInerney v. MacDonald, [1992] 2 S.C.R. 138.

Statutorily Mandated Time-Frame for the Scheduling of Hearings: the Effect of Delay

Re S. M., 2002 CanLII 6954 (Ont. C.C.B.).

Adjournments

Small and Williams v. Harding, (Unreported, July 21, 2000, Doc. No. 426/2000, Ont. Div. Ct.), Cummings J.

Thomson v. Sisters of St. Joseph, 2010 ONSC 2337 (CanLII).

Conway v. Darby, 2008 CanLII 54773 (Sup. Ct.).

PROCEEDURE BEFORE THE CONSENT AND CAPACITY BOARD: THE CONDUCT OF HEARINGS

Appointment of Counsel and the Role of Appointed Counsel

Patient Name, Re, 2001 CanLII 7708 (Ont. C.C.B.).

A.M. (Re), 2004 CanLII 6726 (Ont. C.C.B.).

B. (Re), 2009 CanLII 54132 (Ont. C.C.B.).

Banton v. Banton (1998), 164 D.L.R. (4th) 176 (Ont. Ct. Gen. Div.).

Righter v. Righter, (2008), unreported, Toronto court file 03-20/08.

Competence of Appointed Counsel

Gligorevic v. McMaster, 2012 ONCA 115.

The Appointment of *Amicus Curiae* and the Role of *Amicus Curiae*

S. (Re), 2008 CanLII 53952 (Ont. C.C.B.).

R. v. Starson (2004), 183 C.C.C. (3d) 538 (Ont. C.A.).

Bon Hillier v. Milojevic, 2010 ONSC 4514.

The Power to Compel Witnesses and the Right of the Subject of the Hearing to be Free from Compulsion

C.W. v. Manitoba (Mental Health Review Board), [1994] 95 Man. R. (2d) 152 (C.A.).

Starson v. Swayze, [2003] 1 S.C.R. 722.

Hughes v. Ontario (Ministry of Health), [1990] O.J. No. 2724 (Gen. Div.) (QL).

The Exclusion of Witnesses and of the Public

B. (Re), 2007 CanLII 35280 (Ont. C.C.B.).

L. C. v. Pinhas, 2002 CanLII 2843 (Ont. Sup. Ct.).

Preliminary Issues and Procedural Confusion

S.H.M. (Re), 2004 CanLII 6720 (Ont. C.C.B.).

RE (Re), 2003 CanLII 54989 (Ont. C.C.B.).

Presenting the Case: the Leading of Evidence by Parties and the Role of the Tribunal

Daugherty v. Stall, [2002] O.J. No. 4715 (Sup. Ct.).

Conway v. Darby, 2008 CanLII 54773 (Sup. Ct.).

Jacques v. Conway, 1998 CarswellOnt 3761 (Gen. Div.).

Re Grover, 2009 CanLII 16577 (Ont. Sup. Ct.).

Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), [1992] 1 S.C.R. 623.

DECISIONS OF THE CONSENT AND CAPACITY BOARD

Burden of Proof with respect to Establishing Incapacity, Standard of Proof, and the Quality of Evidence Required

Starson v. Swayze, [2003] 1 S.C.R. 722.

L. C. v. Pinhas, 2002 CanLII 2843 (Ont. Sup. Ct.).

Stetler v. Ontario Flue-Cured Tobacco Growers' Marketing Board (2005), 76 O.R. (4th) 321 (C.A.).

GUIDANCE WITH RESPECT TO SPECIFIC APPLICATIONS

Involuntary Status

Dayday v. MacEwan (1987), 62 O.R. (2d) 588 (Dist. Ct.).

Re X, 2003 CanLII 54102 (ON CCB).

Middel v. Adams, 1993 CarswellOnt 2788 (Gen. Div.).

Levinskas v. Hutson, 1989 CarswellOnt 3343 (Dist. Ct.).

Starnaman v. Penetanguishene Mental Health Centre (1995), 100 C.C.C. (3d) (C.A.).

Penetanguishene Mental Health Centre v. Stock (1994), 116 D.L.R. (4th) 550 (Ont. Gen. Div.).

Subotic v. Roopchand, 1989 CarswellOnt 2939 (Dist. Ct.).

T.S. v. O'Dea, 2004 CanLII 12720 (Ont. Sup. Ct.).

Re J.A., 2008 CanLII 3949 (Ont. C.C.B.).

Re H.B., 2003 CanLII 54924 (Ont. C.C.B.).

Re A.C., 2005 CanLII 7115 (Ont. C.C.B.).

S.T. (Re), 2003 CanLII 16135 (Ont. C.C.B.).

R. v. Webers (1994), 95 C.C.C. (3d) 334 (Ont. Ct. (Gen. Div.)).

S.C. (Re), 2005 CanLII 7113 (Ont. C.C.B.).

R. (Re), 2005 CanLII 30844 (Ont. C.C.B.).

Re P., 2002 CanLII 23601 (Ont. C.C.B.).

M.C. (Re), 2004 CanLII 36175 (Ont. C.C.B.).

Chandrasena v. McDougald, [1989] O.J. No. 1743 (Dist. Ct.) (QL).

B.C. (Re), 2006 CanLII 44258 (Ont. C.C.B.).

Chokan v. Cameron (1992), 3 Admin. L.R. (2d) 223 (Ont. Ct. (Gen. Div.)).

E. R. (Re), 2003 CanLII 8865 (Ont. C.C.B.).

H.(Re), 2005 CanLII 26824 (Ont. C.C.B.).

Lavallie v. Kingston Psychiatric Hospital, 2000 CanLII 16896 (Ont. C.A.).

L.H. (Re), 2007 CanLII 57084 (Ont. Sup. Ct.).

Voluntary (or Informal) Patient Must be Aware of Status

Daugherty v. Stall, [2002] O.J. No. 4715 (Sup. Ct.).

Treatment Capacity and the Test for Treatment Capacity

In the Matter of Scott (Professor) Starson (unreported, June 27, 2011, Doc. No. TO-11-0988/TO-11-0989, Ont. C.C.B.).

Starson v. Swayze, [2003] 1 S.C.R. 722.

Re Koch (1997), 33 O.R. (3d) 485 (Gen. Div.).

L.E. v. Desai, 2006 CanLII 28738 (Ont. Sup. Ct.).

Isber v. Zebrowski, 2009 CanLII 58980 (Ont. Sup. Ct.).

Neto v. Klukach (2004), 12 Admin. L.R. (4th) 101 (Ont. Sup. Ct.).

Fleming v. Reid (1991), 4 O.R. (3d) 74 (C.A.).

In re NB, CCB, January 16, 1992.

In re AF, HA-05-4585, January 26, 2005.

In re SC, OT-05-4952/53, March 11, 2005.

Broad definition of treatment

T. (S.M.) v. Abouelnasr, [2008] O.J. No. 1298 (Sup. Ct.).

In re D.W., TO-04-3842, December 6, 2004.

Requirement of consent

Reibl v. Hughes, [1980] S.C.J. No. 105.

Hopp v. Lepp, [1980] S.C.J. No. 57.

Wells (Public Trustee of) v. Paramsothy, [2000] O.J. No. 2390 (Sup. Ct.).

A.C. v. Manitoba (Director of Child and Family Services), 2009 SCC 30, cited in Ontario in *Isber v. Zebrowski* 2009 CanLII 58980 (Sup. Ct.).

Capacity to Manage Property and the Test for Capacity to Manage Property

Khan v. St. Thomas Psychiatric Hospital (1992), 7 O.R. (3d) 303 (C.A.).

Daugherty v. Stall, [2002] O.J. No. 4715 (Sup. Ct.).

L.E. v. Desai, 2006 CanLII 28738 (Ont. Sup. Ct.).

Giecewicz v. Hastings, 2007 ONCA 890.

Re Koch (1997), 33 O.R. (3d) 485 (Gen. Div.).

Roy v. Furst, 1999 CarswellOnt 1363 (Sup. Ct.).

W. (Re), 2008 CanLII 73639 (ON CCB).

Carvalho v. Sullivan, 2010 ONSC 223.

Form of request for an assessment of capacity

Re A.B. TO 03 1296, November 3, 2003.

The right to refuse assessment and the significance of procedural safeguards under the *Substitute Decisions Act*

Re Koch (1997), 33 O.R. (3d) 485 (Gen. Div.).

Neill v. Pellolio, [2001] O.J. No. 4639 (C.A.).

Mesesnel (Attorney of) v. Kumer, [2000] O.J. No. 1897 (Sup. Ct.).

Community Treatment Orders

D.C. (Re), 2008 CanLII 40572 (Ont. C.C.B.).

Singh v. De Souza, 2009 CanLII 44122 (Ont. Sup. Ct.).

Haugan v. Whelan, 2003 CanLII 37206 (Ont. Sup. Ct.).

Admission to Long-Term Care

Starson v. Swayze, [2003] 1 S.C.R. 722.

Re Koch (1997), 33 O.R. (3d) 485 (Gen. Div.).

Bartoszek v. Ontario (Consent and Capacity Board), 2002 CarswellOnt 3265 (Sup. Ct.).

Re A.B. [2004] O.C.C.B.C. No. 233, TO 04-1257, 1260, May 5, 2004.

In Re L.M., O.C.C.B.C., TO-05-7935, 7936, November 25, 2005.

In Re G.B., O.C.C.B.C., KI-06-1556, May 29, 2006.

Appointment of a Representative

L.M. (Re), 2005 CanLII 48162 (Ont. C.C.B.).

Compliance of Substitute Decision-Makers with the Criteria for Decision-Making Mandated by the *Health Care Consent Act, 1996*

I.T. v. L.L. (1999), 46 O.R. (3d) 284 (C.A.).

A.M. v. Benes (1999), 46 O.R. (3d) 271 (C.A.).

Conway v. Jacques (2002), 59 O.R. (3d) 737 (C.A.).

Scardoni v. Hawryluck, [2004] 69 O.R. (3d) 700 (Sup. Ct.).

Marsden v. Taylor, 2006 CanLII 34214 (Ont. Sup. Ct.).

Prior capable wishes

Malette v. Shulman, [1990] O.J. No. 450 (C.A.).

Fleming v. Reid (1991), 4 O.R. (3d) 74 (C.A.).

REVIEW OF DECISIONS OF THE CONSENT AND CAPACITY BOARD

Judicial Review

Ontario (Attorney General) v. Jane Patient (2005), 250 D.L.R. (4th) 697 (Ont. Div. Ct.).

Appeal to the Superior Court of Justice

Relief pending appeal: continuation of involuntary status

Darby v. Magennis [2001] O.J. No. 3999 (Sup. Ct.) (QL).

B.C. (Re), 2006 CanLII 44258 (Ont. C.C.B.).

Relief pending appeal: treatment

S.R. v. Hutchinson, [2009] O.J. No. 516 (Sup. Ct.).

Starson v. Pearce, 2009 CanLII 46 (Ont. Sup. Ct.).

D'Almeida v. Barron, 2008 CanLII 37208 (Ont. Sup. Ct.).

Ability of the court to appoint *amicus curiae*

Bon Hillier v. Milojevic, 2010 ONSC 435.

The availability of *Charter*-based arguments

Ontario (Attorney General) v. Patient (2005), D.L.R. (4th) 697 (Ont. Div. Ct.).

S.M.T. v. Abouelnasr, 2008 CanLII 14550 (Ont. Sup.Ct.).

Principles of natural justice: apprehension of bias

Heuberger v. Stenn, [2002] O.J. No. 1285 (Sup. Ct.).

Discretion to admit new evidence on appeal

Palmer v. R., [1980] 1 S.C.R. 759.

Jacques v. Conway, 1998 CarswellOnt 3761 (Gen. Div.).

Re Koch (1997), 33 O.R. (3d) 485 (Gen. Div.).

Starson v. Swayze, [2003] 1 S.C.R. 722.

Marsden v. Taylor, 2006 CanLII 34214 (Ont. Sup.Ct.).

Mootness and the discretion of the court to hear a moot appeal

Borowski v. Canada (Attorney General), [1989] 1 S.C.R. 342.

Neto v. Klukach (2004), 12 Admin. L.R. (4th) 101 (Ont. Sup. Ct.).

Public interest standing

Thompson v. Attorney General of Ontario, 2011 ONSC 2023 (CanLII).

The standard of review on appeal

I.T. v. L.L. (1999), 46 O.R. (3d) 284 (C.A.).

Starson v. Swayze, [2003] 1 S.C.R. 722.

H.L. v. Canada (Attorney General), [2005] 1 S.C.R. 401.

Conway v. Jacques (2005), 250 D.L.R. 4th 178 (Ont. Sup Ct.).

Costs

Conway v. Jacques (2002), 59 O.R. (3d) 737 (C.A.).

Saunders v. Bridgepoint, 2005 CanLII 47735 (Ont. Sup. Ct.).

Re Koch (1997), 35 O.R. (3d) 71 (Gen. Div.).

CAPACITY TO RETAIN COUNSEL

Capacity to Retain Counsel Directly

Wolfman-Stotland v. Stotland, 2011 CarswellBC 803.

Calvert (Litigation Guardian of) v. Calvert (1997), 32 O.R. (3d) 281 (Gen. Div), Aff'd (1998), 37 O.R. (3d) 221 (C.A.).

Capacity to Retain and Instruct Counsel in the Criminal Context

Re O'Neill 2011 CarswellOnt. 13772

POWERS OF ATTORNEY

Capacity Threshold

Penny v. Bolen, 2008 CanLII 48145 (ON S.C.).

What an Attorney for Property Can and Cannot Do

Banton v. Banton (1998), 164 D.L.R. (4th) 176 (Ont. Ct. Gen. Div.).

COURT APPOINTED GUARDIANSHIP

Requirements for the Appointment of a Guardian

Deschamps v. Deschamps, [1997] O.J. No. 4894 (Gen. Div.).

Court Ordered Capacity Assessments

Abrams v. Abrams , 2008 CanLII 67884 (Ont. Sup. Ct.).

Neill v. Pellolio, 2001 CanLII 6452 (Ont. C.A.).

Impact of Capacity Assessment on Guardianship Application

Re R.(G.), 2011 CarswellOnt 10389 (C.C.B.).

Parker v. Fockler, 2010 ONSC 6872 (CanLII).

Procedural Requirements in Guardianship Applications

Donohue v. Crozier, [2003] O.J. No. 3298 (C.A.).

Boyd v. Thomson, [2006] O.J. No. 4796 (Sup Ct.).

Obligations of a Guardian of Property

Woolner v. D'Abreau, [2009] O.J. No. 538 (Sup. Ct.).

Teffer v. Schaefers, [2008] O.J. No. 3618 (Sup Ct.).

Westfall v. Kovacec, [2001] O.J. No. 3942 (Sup. Ct.).

Gryszczuk v. Gryszczuk (Litigation Guardian of) [2002], Toronto 32520 & Y30179/99 (Ont. Sup Ct.).

Fareed v. Wood, [2005] O.J. No. 2610.

Jacobs Estate v. Hershorn, [2006] O.J. No. 1333 (Sup. Ct.).

Consent and Capacity: Other Materials and Resources

D'Arcy Hiltz and Anita Szigeti, *A Guide to Consent & Capacity Law in Ontario* (2015 Edition), Published by LexisNexis Canada.

Marshall Swadron, "Representing the Alleged Incapable Client before the Consent and Capacity Board" which can be accessed online through the website of Swadron Associates:

<<http://www.swadron.com/images/Representing%20the%20Alleged%20Incapable%20Client%20final.doc>>.

Jeffrey Cole and Noreen Dawe, *Assessing Capacity for Admission to Long-Term Care Homes – A Training Manual for Evaluators*, which can be accessed online through the Central CCAC website:

<<http://www.ccac-ont.ca/Upload/central/General/ConsentandCapacityTrainingManual.pdf>>.

Susan Fraser, Fraser Advocacy:

<<http://fraseradvocacy.blogspot.ca>>.

Legal Aid Ontario:

<http://www.legalaid.on.ca/en/info/panel_standards_consent.asp>.

The Office of the Public Guardian and Trustee:

<http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/brochures_and_forms.asp>.

Community Legal Education Ontario:

<<http://www.cleo.on.ca/english/pub/onpub/subject/health.htm>>.

Advocacy Centre for the Elderly:

<http://www.ancelaw.ca/ace_library.php>.