

THE CONSENT AND CAPACITY BOARD:
CONSENT, CAPACITY AND SUBSTITUTE DECISION MAKING

PRESENTATION FOR
ADVANCE CARE PLANNING EDUCATION PROGRAM
WATERLOO WELLINGTON
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These slides were part of a presentation, are not intended as legal advice nor should they be taken as legal advice, but information only.

KEY GOALS TODAY

- Identify Consent and Capacity Board
- What when and how to access the Consent and Capacity Board
- Identify the legal test for capacity and substitute decision making
- Identify various types of Board applications
- Identify means of obtaining more information to assist you

WHAT IS THE CONSENT AND CAPACITY BOARD?

We are a provincial administrative tribunal with jurisdiction to hear matters under multiple pieces of Ontario legislation including the *Health Care Consent Act*, *Mental Health Act* and *Substitute Decisions Act*.

The Board's mission is the fair and accessible adjudication of consent and capacity issues, balancing the rights of vulnerable individuals with the safety of the public.

These are the principles Board members keep in mind when adjudicating.



WHO IS THE CCB?

- Approximately 140 Members province-wide
- One third lawyers, one third psychiatrists, one third public members
- Usually sit in panels of 3
(sometimes 1, sometimes 5)
- Staff of 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
- Staff are Ontario public servants

- Board is independent; operates at arm's length from the Ministry of Health and Long Term Care
- 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)*

CASELOAD IN 2014/2015

- 6845 Applications received
- CCB convened approx. 3500 hearings
- Projected increase in hearings of over 10% over next year

ARE THERE LAWYERS AT CCB HEARINGS?

- Every party to a CCB hearing is entitled to be represented by counsel if s/he wishes
- Board can direct Legal Aid Ontario to arrange for counsel for a patient or incapable person involved in a CCB hearing
- Persons have the right to self represent
- Physicians (and other health practitioners) almost always represent themselves

LAWYER FOR PATIENT REVIEWS THE CHART

- A lawyer representing a patient at a CCB hearing (and/or the patient) must be given full access to the patient's medical record to prepare for the hearing (*HCCA* s.76)
- No consent or other documentation is necessary; just the lawyer's word that s/he is counsel
- This access will often be requested on short notice, and must be immediately accommodated so as not to result in delay of the hearing

WHAT IS THE ROLE OF HEALTH CARE PROVIDERS BEFORE THE CCB?

- In almost every hearing, the physician or other health care practitioner is named as a party and bears the burden of proof
- This is so even though s/he is usually not the Applicant (eg involuntary status reviews, reviews of a finding of incapacity to consent to treatment)
- Important to bring evidence (i.e. information) to satisfy the legal test
- Can be intimidating!

THE HEARING: WHEN, WHERE AND HOW?

- The Board is required by law to schedule the hearing to begin within 7 days of receiving the Application, unless the parties agree to a postponement.
- The hearing will usually take place at the facility where the Applicant is located, or at the CCB office.
- Sometimes, the Board will hold the hearing by videoconference or teleconference. Perhaps there is a need for a prehearing to determine and resolve some of the issues.

WHEN AN APPLICATION IS MADE TO THE CCB FOR A REVIEW

- If, before the treatment is started, the health practitioner learns that the incapable person has or intends to apply to the CCB for a review of the incapacity finding, the treatment may not begin until the Board has dealt with the application and the appeal period has expired, or an appeal has been disposed of (HCCA, s.18), except in case of emergency.

CONSENT AND CAPACITY BOARD RULES OF PRACTICE

- These rules set out many of the procedures followed by the Board before and at hearings. They are a very useful resource for people appearing at hearings.
- A link to the CCB Rules can be found on the CCB website.

HOW DOES A HEARING UNFOLD?

- The Board presiding member usually explains the hearing process at the beginning of the hearing. If not ask how the hearing will proceed.
- Sometimes lawyers for the client/patient will bring preliminary issues/motions. For that matter you may have preliminary issues as well. "I am not ready to proceed, one of my witnesses is sick". Remember to ask the Board about compelling the attendance of witnesses through a summons. See the Board's Rules.
- You or the party opposite will be given an opportunity to respond. If you need time to consider the issue, ask for time. Maybe you will need to call the office or a colleague.

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- Preliminary issues may include whether a party wants or requires counsel or accommodation, as Board must be very alert to whether process is accessible and understood: fairness may require adjournment.
 - Then, health professional asked to present evidence (eg to support incapacity finding). Evidence can be oral testimony of a witness (him/herself and/or others) or relevant documents (eg summaries, nursing notes, etc)
 - All witnesses can be questioned by opposing party or their lawyer(where there is one) and by the Board members.

HOW DOES A HEARING UNFOLD? (CONT.)

- Once all of the health professional's evidence has been submitted, the panel will call a short break in the proceedings, then will ask the Applicant if s/he wishes to present any evidence (oral testimony, from him/herself and/or others, and/or documents)
- Again, witnesses will be questioned by the other party and by the Board members

AFTER THE EVIDENCE

- Each party (or their lawyer) will be invited to make brief oral “submissions”, which is a summary of what they say the Board should find, and why.
- The hearing will then close, and the Board members will remain to deliberate privately.
- The parties will receive the Decision by the end of the next day after conclusion of the hearing, and may request Reasons for Decision.
- If Reasons requested within 30 days of the hearing to be produced in 4 business days.
- An appeal, if any, must be started within 7 days of the Decision.

TIPS FOR ENSURING A SMOOTH HEARING

- Don't forget the legislatively-imposed scheduling demand: hearing must begin within 7 days of application (absent consent of all parties)
- Remember that the health care provider always has the onus to prove that the legal test has been satisfied, so know what the legal test is!

EXAMPLE: REVIEW OF A FINDING OF INCAPACITY TO CONSENT TO TREATMENT

- In order to have the CCB uphold the incapacity finding, the health professional must prove with evidence at the hearing that the incapable person is:
 - a) unable to understand the information relevant to making the decision; and/or
 - b) unable to appreciate the reasonably foreseeable consequences of a decision.

(Section 4, HCCA)

THE CCB SUMMARY

- This is the best tool for preparing for and presenting at a CCB Hearing
- It is a template which breaks down the legal test
- Found on CCB website: www.ccboard.on.ca
- Physician/health practitioner can save it electronically and complete it, then print out and copy, or print it out and fill it out manually
- Give a copy to patient's lawyer, and have one for each member of the CCB panel (bring 6 to be safe)
- CCB Summaries exist for most common hearing types

THE CCB SUMMARY (CONT.)

- Using the CCB Summary results in hearings which are more focused and shorter, and minimizes the risk of the hearing adversely affecting the therapeutic alliance
- Also, it enhances the health practitioner's confidence in approaching the hearing, by outlining what type of information is required

REMEMBER THE ROLES AND RESPONSIBILITIES AT A CCB HEARING

- The CCB's role is to apply the relevant legal test to the evidence (i.e. information) presented to it
- The health care practitioner's role is to assemble and present that evidence (via CCB Summary, assessments, admission/discharge summaries, nursing notes and other documents, any oral evidence and/or witnesses if necessary) and to answer questions from the patient's lawyer and the Board members
- The patient may testify or not; up to him/her
- The patient's lawyer's role is to advocate for what his/her client wants (not needs), if known. This may require rigorous questioning of the health care practitioner. Don't take it personally!

HELP FAMILY MEMBERS UNDERSTAND

- Whether or not they will be giving evidence at the hearing, a patient's family members want and need to understand what is going on
- Ensure that they understand the purpose of the hearing, why it is being held, what could result from it, and the various roles set out on the previous slide

NOT A WIN/LOSE PROPOSITION

- The role of the health care practitioner is to present evidence to satisfy a legal test, on a balance of probabilities.
- In some cases, the Board will find that s/he has done so, and in some cases, not.
- When the latter occurs, s/he should resist any temptation to view it as having “lost” the case.
- Always request Reasons for Decision to help you understand, for future cases.

THE BEST RESULT

- Ideally, parties are able to resolve these issues without the need for a hearing and the assistance of the Board (this does occur).
- The hearing process is designed to resolve conflict when resolution cannot occur, despite your best efforts.

UNIQUE TO THE CCB

- Unlike most other tribunals, we attempt to arrange hearings around party schedules
- Scheduling CCB hearings within these strict requirements is very challenging
- Note: hearings open to the public except in rare cases where CCB orders otherwise

OUTREACH AND EDUCATION

- The CCB values its relationships with its stakeholders, and welcomes input on its processes
- We will gladly provide a speaker to attend at your facility to present on any aspect of CCB process, presenting effectively at hearings, the *Mental Health Act*, the law of capacity etc.

THE HEALTH CARE CONSENT ACT (HCCA)

- Governing statute that establishes the Consent and Capacity Board
- 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
- HCCA aims to provide a complete codification of common law requirements for obtaining informed consent
- It also codifies principles of assessing capacity

HCCA

- Provisions of HCCA apply to treatment decisions wherever and whenever a treatment is proposed for an individual ie within or outside of hospitals or psychiatric facilities

HCCA

HCCA also establishes statutory regime for substitute decision making on behalf of incapable individuals AND

Sets out hierarchy of SDM's and prescribed rules for SDM's consenting to or refusing treatment/ placement/ personal assistance services on behalf of incapable persons

WHAT IS CAPACITY?

A STATUTORY OVERVIEW

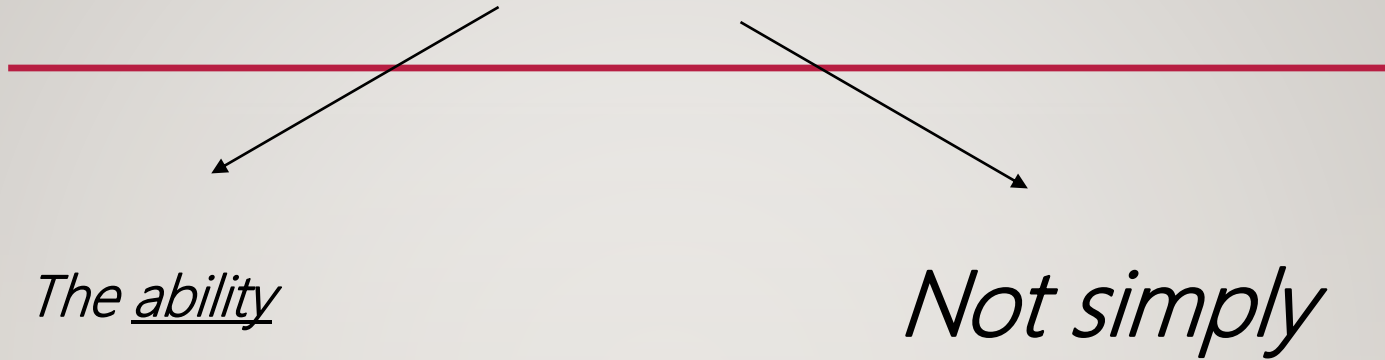
CAPACITY TO CONSENT (OR REFUSE CONSENT) TO TREATMENT

- Assessed under the Health Care Consent Act (the “HCCA”)
- Assessment is done by a “health practitioner” proposing a treatment (or plan of treatment)
- This assessment can occur in any setting
- A finding of incapacity triggers the identification of a substitute decision maker (“SDM”).

DEFINITION OF CAPACITY

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- A person is capable with respect to a treatment if the person is:
 - able to understand the information that is relevant to making a decision about the treatment, AND
 - able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

NOTE THAT IT IS:



➤ to understand the information

➤ and appreciate the consequences

➤ whether or not the patient actually understands

➤ and appreciates.

THE "WHAT" TEST

- Is the person able to understand what the proposed treatment (or admission, etc) is, and why it is being proposed for him or her?
- Note: The person does not need to agree with the diagnosis. (so in a mental health context they do not need to actually acknowledge mental illness)

THE “WHAT IF” TEST APPRECIATION OF CONSEQUENCES

- This means that at the level of a lay person, the person must be able to appreciate:
 - 1) what the options are; and
 - 2) what is likely to occur with each option, good and bad.
- What will happen if I take the treatment?
- What will happen if I don't take the treatment?

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- If the so called incapable person's decision to accept or decline a treatment plan is reasoned (based on an ability to both understand relevant information and appreciate reasonably foreseeable consequences), even if it may not be a "reasonable" decision from a medical standpoint, he or she is legally capable to make the decision

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- This resolution between legal and medical considerations, prescribed by Ontario law is sometimes difficult for health practitioners and families to understand and accept

CAPACITY IS TIME AND DECISION
SPECIFIC



DECISION SPECIFIC

- Section 15(1) of the HCCA provides:
- *A person may be incapable with respect to some treatments and capable with respect to others.*
- Every capacity assessment must concern a specific decision, e.g. whether or not to consent to treatment : to amputate a leg or to be treated with mood stabilizing medication. "Treatment" may include a plan of treatment (see definition in HCCA, s.2).

TIME SPECIFIC

- Capacity can change over time.
- In the words of the HCCA, s. 15(2):
- *A person may be incapable with respect to a treatment at one time and capable at another.*
- Every capacity assessment must assess a person's capacity to make a specified decision at that time.

↳ It does not matter whether the individual will in fact consent to the treatment, or whatever is at issue.

↳ Acquiescence does not mean capacity. Refusal does not mean a lack of capacity.

BEST INTERESTS ARE IRRELEVANT TO DETERMINING CAPACITY

- A person is presumed to be capable to consent to a treatment(or whatever the issue is) unless it is established either that s/he lacks the ability to understand information relevant to making a decision about that treatment, or that s/he lacks the ability to appreciate the reasonably foreseeable consequences of such decision or lack thereof.
- THAT'S IT!
- There is no place in capacity assessments for consideration of a patient's best interests, or the "wisdom of a proposed decision."

WHO MAKES THE FINDING?

- Note that under the HCCA, the “health practitioner who proposes a treatment for a person” is the one legally charged with forming an opinion as to the person’s capacity to consent to that treatment.

Where surgery is at issue, the surgeon, not a psychiatrist, must make the finding. Consultations can of course be obtained.

👉 If the treatment proposed **is medical**, not psychiatric, a psychiatrist did not make the finding of incapacity, **the proposing practitioner did.**


HCCA ASSESSMENTS

- A “patient” in a psychiatric facility found incapable to consent to treatment is entitled to written notice of the finding, and rights advice, including information about applying to the Board for a review.

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- For all other HCCA assessments, the health practitioner or evaluator must comply with the guidelines of his or her professional College in terms of notifying the person of the finding and of his or her right to apply to the Board for a review

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- the proposing practitioner has to either advise the patient of the finding by law or in accordance with their ethical obligation (set out in rules of professional conduct) to help the patient challenge the finding if he or she is so inclined.

 **Medical patients don't have the benefit of Rights Advisers.**



OBTAINING CONSENT

- Once capacity or incapacity has been determined as of a specified time regarding a specified decision, consent must be obtained.
- If the person is capable, he or she gives or withholds consent.
- If the person is incapable, his or her substitute decision maker does so.

👉 The HCCA contains rules re:

👉 1) who will be the substitute decision maker, where applicable; and

👉 2) what is required in the obtaining of consent.

WHY CONSENT IS IMPORTANT

- HCCA S.10.(1) A health practitioner who proposes a treatment for a person shall not administer the treatment, and shall take reasonable steps to ensure that it is not administered, unless,

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- (a) he or she is of the opinion that the person is capable with respect to the treatment, and the person has given consent; or

(b) he or she is of the opinion that the person is incapable with respect to the treatment, and the person's substitute decision-maker has given consent on the person's behalf in accordance with this Act.



IDENTIFYING THE SDM

- The HCCA (s.20) dictates who will be the substitute decision maker. The health practitioner identifies that person, but does not choose him or her.

Note: The identity of the SDM is *irrelevant* to a review of capacity. That review simply determines whether a person will make his or her own decision, or whether someone else will.

STATUTORY LIST OF SDM'S

1. guardian of the person
2. attorney for personal care
3. representative appointed by the CCB at request of the person who is ill or by another person.
4. spouse or partner
5. child or parent
6. parent of the incapable person who has only a right of access.
7. brother or sister
8. other relative

POWER OF ATTORNEY FOR PERSONAL CARE

- See Sections 46-53 and 65-68, Substitute Decisions Act
- Document is called a power of attorney
- Person giving authority to someone else to make decisions is the grantor,
- Presumption person 16 years of age or more is capable of giving or refusing consent in connection to his/her personal care(vs. no minimum age for treatment as in HCCA)
- Person receiving authority is called the attorney
- There can be more than one attorney
- By executing(signing) the document, people can attempt to avoid adult guardianship

POWER OF ATTORNEY FOR PERSONAL CARE

- A person's Attorney for Personal Care is number two on the list and comes before spouse and child/children.
- Person(if at least 16 yrs old) can name an Attorney for Personal Care in a written document called Power of Attorney for Personal Care.
- The person you choose becomes your substitute decision maker for treatment decisions and/or admission to a care facility.

WITHOUT POWER OF ATTORNEY

- Example: If you do not want your spouse or a specific child or any of your children to make your treatment decisions, then a Power of Attorney allows you to make your own choice.
- If you do not name an Attorney for Personal Care your SDM becomes the person highest on the hierarchy who meets the requirements.

REQUIREMENTS TO BE SDM

- An SDM may give or refuse consent only if he or she is,
 - a) capable with respect to the treatment
 - b) at least 16 years old, unless he or she is the incapable person's parent
 - c) not prohibited by a court order
 - d) willing and available

IS SDM NEEDED?

Before an SDM is called upon to make treatment (or admission decisions in the case of admission), the person for whom he will act must be incapable of making his own treatment and/or admission decision.

as we saw earlier capacity is defined in the legislation. HCCA s.4; SDA s.6

REASONABLENESS OF DECISIONS

- A capable person is free to make his or her own decision based on anything (or nothing!) at all. The objective “wisdom” of the decision is not relevant. We all have the right to take risks and to be foolish.

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- However, a substitute decision maker must decide on the basis of principles set out in the HCCA (s.21).
 - Those principles include consideration of the incapable person's wishes, and of his or her best interests, as defined.

CAPACITY: KEY POINTS

- Everyone is legally presumed to be capable to make decisions about his or her own medical treatment
- (or with respect to admission if that is the issue,etc), unless found to be incapable.
- None of the following on its own can determine that a person is incapable:
age, medical state, mental state, safety

THE PRESUMPTION'S FIRST CONSEQUENCE

- Whenever there is any doubt about capacity, the benefit of that doubt goes to the person whose capacity is being assessed.

THE PRESUMPTION'S SECOND CONSEQUENCE

- At a CCB hearing, the person seeking to prove incapacity has the onus of proof.
- The person whose capacity is at issue does not need to prove anything.

CAPABLE PERSON MAKES OWN TREATMENT DECISION.

- A capable person is free to make what others might consider a foolish decision. A capable person is free to make mistakes.
- But if the person is not capable the SDM decides.

HOW DOES THE SDM MAKE DECISIONS?

- How does the SDM decide on treatment decisions?
- HCCA legislation tells you to consider:
 1. Prior capable *Wish* that is applicable in the circumstances.
 2. *Best Interest* of the incapable person.

PRIOR CAPABLE WISH

- Can be in multiple forms: included within the POA for personal care, in a “living will”, in a letter, in a conversation
- Must be capable and 16 years when wish made
- A prior capable wish that applies to the circumstances and is not impossible to follow is binding on the substitute decision-maker

MAKE WISHES KNOWN

- Wishes can be expressed in writing or orally.
- In Ontario make out a Power of Attorney for Personal Care.
- Choose a person who will reflect your values and is willing and available.
- Update your Power of Attorney as necessary.

BEST INTEREST

- To decide best interests, consider values and beliefs held by the person when capable and...
- Whether the proposed treatment(or admission) is likely to:
 - i. Improve his condition or well being.
 - ii. Prevent condition or well being from deteriorating.

BEST INTEREST CONT'D

- iii. Reduce the extent to which the condition or well being is likely to deteriorate.

ALSO CONSIDER

- Whether the benefit of treatment outweighs the risk of harm.
- Whether a less restrictive or intrusive treatment would be as beneficial.
- Any wishes not previously considered.

ACCESSING THE CCB: WHEN?

- Two primary situations in which the CCB becomes involved in Substitute Decision-Making issues
 - When there is uncertainty about who should be making treatment(or admission, etc) decisions
 - When there is disagreement between health care team and the SDM(s) about treatment

ACCESSING THE CCB: HOW?

- **Form G:** is the SDM complying with the HCCA?
- **Form B and C:** to appoint a “representative”
 - Also Form H: to amend conditions or terminate a representative
- **Form D:** application for directions
- **Form E:** application to depart from wishes

FORM B OR C – APPOINTING A REPRESENTATIVE (HCCA, S. 33)

- A person seeks to be named the SDM
 - Will not apply where there is a guardian or a POA
- Typical applications:
 - When SDMs cannot agree
 - When no family, or no one willing to take on role
- CCB determines if appointment in person's "best interests"
- HP party for capacity and for entirety of matter

FORM D – APPLICATION FOR DIRECTIONS (HCCA, S. 35)

- Application made by HP or SDM if there is a wish but:
 - Wish is not clear
 - Not clear if wish applicable
 - Not clear if wish expressed when capable
 - Not clear if wish expressed once person was 16
- Board may give directions

FORM D APPLICATION FOR DIRECTION

- If the SDM is not sure that the person's prior wish is capable, clear or applicable in the circumstances, he can apply to the CCB for Direction.
- A health practitioner and/ or person responsible for admission may also apply.

WISHES NOT CLEAR

- What if the incapable person expressed a treatment wish but,
 - a) it's not clear that the wish is applicable to the circumstances.
 - b) the wish is not clear.
 - c) it is an incapable wish.

FORM E – APPLICATION TO DEPART FROM WISHES (HCCA, S. 36)

- Application by SDM for permission to consent despite wish OR
- Application by HP for permission for the SDM to consent despite the wish
- Board may give permission if satisfied that the person would likely have consented because result is significantly better than would have been anticipated when wish expressed

FORM G – APPLICATION TO DETERMINE COMPLIANCE (HCCA, S. 37)

- Application made by HP to determine if SDM complying with section 21
 - Must determine if PCW, values & beliefs, wishes not PCWs and medical factors
- Determine how the decision is to be made and determine if SDM is complying or should be ordered to do so
 - If order made, time specified
 - If SDM does not comply, move to next SDM

TIPS FOR THE HEARING PROCESS

- Before applying on a Form G
 - Have open, frank discussions with the SDM, other involved family about the proposed plan of treatment and why it is being proposed
 - Ensure SDM is aware of his/ her obligations
 - Use the resources available to you to resolve impasse
 - Document all of this (and include in evidence) because positions change

TIPS... CON'T

- Consider retaining legal counsel
 - Can manage the process and reduce your time spent
- Complete a CCB summary! Found at:
<http://www.ccboard.on.ca/scripts/english/publications/ccbtemplates.asp>
 - Assists you to put your information into legal context
 - Tends to shorten hearings

TIPS... CON'T

- Be prepared to speak about your patient's capacity
- Ensure the proposed plan of treatment is clear
- When giving evidence, explain how you came to your conclusions

TIPS... CON'T

- Collect other key documents in advance (e.g. treatment plan, clinical notes, family meeting notes, letters to family, second opinions)-corroboration
- Be aware of the legal question that the CCB must answer at the conclusion of the hearing and consider your evidence in advance

WHY START A FORM G APPLICATION?

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- Because of your ethical and legal obligations to respect the patient's dignity and autonomy;
 - By ensuring deference to his/her previously expressed capable wishes.
 - By obtaining the best possible treatment based upon your proposal and even the patient's view of that(if available).
 - By avoiding a patient's unnecessary or prolonged suffering that does not offer a benefit to his condition.

WHY START A FORM G APPLICATION? (CONT'D)

- From a practical perspective,
 - Because you believe the SDMs are making the wrong decision, and all in-house attempts to resolve this conflict have failed.
 - The Board's Decisions are binding and enforceable, subject only to appeal to the Superior Court.

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- “The disagreement between the SDM and the health practitioner creates tension and the Act recognizes this by providing for a neutral expert Board to resolve the disagreement. Indeed, after hearing submissions from all parties, the Board is likely better placed than either the SDM or the health practitioner to decide what is in the incapable person’s best interests.”

***M., A. v. Benes*, 1999 CanLII 3807 (1999), 46 O.R. (3d) 271 (Ont. Court of Appeal)**

OUTCOME OF A FORM G APPLICATION

- The Board will:
 - Dismiss your application (i.e., SDMs were right).
- Or,
- Grant your application and direct the SDMs to give the consent you sought within a specified time, failing which they cease to be SDMs for the purpose of that decision and are replaced.

S.21: THE SDM'S OBLIGATIONS

1. Whether there are any Prior Capable Wishes that are applicable to the situation (i.e. were they made, were they made in contemplation of the person's current circumstances, sufficiently specific)

S.21: THE SDM'S OBLIGATIONS

2. "Best Interests"

- a. The persons "values and beliefs": what they said, how they lived their life, religion (own personal religious beliefs)
- b. Medical factors: likelihood of improvement/ quality of life, degree of pain, impact on dignity

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RESOURCES

- All CCB Reasons for Decision are published (all identifying information for patients removed) on www.canlii.org. You can search by application type, most recent decisions first, etc.
- The CCB website contains a wealth of valuable information and links, including all forms, legislation, a mock hearing video and the CCB Rules of Practice:

www.ccboard.on.ca

- Also, the CCB has full time legal counsel. She can not provide legal advice, but can help you to understand the process, the legislation, etc. Please do not hesitate to call.

QUESTIONS??

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