

Incapable to Make Treatment Decisions

A Rights Guide for Patients
in Ontario Psychiatric Facilities

Disclaimer

This guide is intended for use as general information and is prepared for purposes of convenience only. It is not to be relied upon as legal advice or legal authority. If you have inquiries as to legal proceedings, or if you would like more detailed information regarding legislation, you should consult a lawyer.

What is this guide about?

- This guide is about your rights when a health practitioner decides that you are incapable to make treatment decisions and that someone other than yourself should decide whether you receive treatment. A health practitioner is someone who is, for example, a doctor, a psychologist, an occupational therapist, or a nurse. For simplicity in this guide, we will refer to the health practitioner as doctor.
- The rights described in this guide apply to treatment decisions made by all health practitioners.

What does it mean to be found incapable to make treatment decisions?

- To be found “incapable” means that a doctor has examined you and decided that you are either:

- not able to understand information about a proposed treatment; or
 - not able to appreciate the consequences of making or not making decisions about the proposed treatment.
- If you are found incapable to make decisions about a treatment, you will not be allowed to say “yes” or “no” to the treatment. Someone else [called a Substitute Decision-Maker (SDM)] will say “yes” or “no” for you.
 - Your SDM must be at least 16 years of age, capable of consenting to treatment, available and willing to make a decision.

Who is capable?

- Everyone is presumed to be capable of consenting to treatment unless found by the doctor that he or she is not capable. This is true regardless of your age.

What kinds of treatments are covered?

Treatments can be for either your physical or mental health. Treatments can be medication or some other type of therapy. They may include:

- medication;
- a diagnostic procedure, such as, X-ray or taking blood or urine samples;
- psychotherapy;
- electro-convulsive therapy (ECT);

- a program to change your behaviour with rewards and punishment;
- a community treatment plan under a community treatment order (CTO)

How am I made incapable regarding treatment decisions?

- Every time your doctor proposes to give you a treatment, your doctor must assess you to decide whether you are capable to give consent (that is, to say "yes" or "no") to the proposed treatment. You may consent as long as you are **capable** to do so.
- During this assessment, the doctor will determine whether you are able to understand:
 - relevant information about the treatment, and;
 - the consequences of what will happen if you say yes or no to the treatment or make no decision at all
- If the doctor believes that you are not able to satisfy these two conditions, the doctor will find that you are not capable to make your own treatment decisions. The doctor will ask someone else to make these decisions for you.

Who will make treatment decisions for me?

- The person who will make treatment decisions for you is called your SDM.

- The *Health Care Consent Act* sets out who will be your SDM. In most cases it will be a family member, your spouse/partner or closest relation. Sometimes it can be a court-appointed guardian, an attorney for personal care, a government agency called the Public Guardian and Trustee, or a representative appointed by the Consent and Capacity Board.
- Your SDM will decide whether or not you should receive the treatment. The doctor cannot treat you unless he or she receives consent from your SDM. In an emergency the doctor does not require the consent of the SDM to provide life saving treatment.
- The Public Guardian and Trustee is an Ontario government agency that is required by law to assist people who are vulnerable and have no one to make treatment decisions for them when incapable.

When will the doctor decide whether I can make my own treatment decisions?

- Your doctor must assess you before offering you a treatment. Your doctor must also get your consent or that of your SDM before starting the treatment.

Can I have the capacity to say “yes” or “no” to some types of treatments, but not to others?

- Yes, you may have the capacity to say “yes” or “no” to one kind of treatment, but not another kind of treatment.

Can my ability to say “yes” or “no” to a treatment change over time?

- You may have the ability to make a decision about a treatment at one time, but not at another time.

How will my SDM know how to make decisions about my treatment?

- The doctor’s responsibility is to ensure that your SDM has the information necessary to make a decision about whether to say “yes” or “no” to the treatment. For more information about SDMs, please see PPAO’s InfoGuide titled “Substitute Decision-Makers”.

What information should the doctor tell me and/or my SDM before deciding about the treatment?

- The doctor must explain to you:
 - the purpose of the treatment and likely benefits
 - any and all side-effects and likely risks
 - alternatives
 - what will happen if you don’t take the treatment
- The doctor must answer any questions you may have
- The purpose of explaining all of this is so that you (and/or your SDM) can give informed consent. For more information about informed consent, please see PPAO’s Rights Guide called "Making an Informed Decision about Your Treatment."

- You and/or your SDM have the right to make the decision free of coercion or pressure. When you (and/or your SDM) say “yes” or “no” to a treatment it must be voluntary.

What if I’ve said something in the past about whether or not I want the treatment?

- If you were capable to say “yes” or “no” to a proposed treatment in the past and you expressed a wish about that treatment, your SDM must honour that wish now. This is called a prior capable wish.
- Your SDM should also consider your values and beliefs as well as any wishes regarding treatment, which you expressed.
- If the SDM does not know of any such wish, he or she must make the decision which would be in your best interests based on all the information provided by the doctor and based on your values and beliefs.
- In limited circumstances, the SDM or physician proposing treatment may ask the Consent and Capacity Board to clarify your prior wish, or may ask for permission for the SDM to depart from your wish.

How will I be notified of the doctor's decision that I am not capable to consent to a treatment for a mental disorder?

- If the doctor wants to give you treatment for a mental disorder but not allow you to say "yes" or "no", by law the doctor must:
 - advise you of this fact
 - if you are 14 years old or older and in a psychiatric facility the doctor must also give you a signed **Form 33** (Notice to the Patient) which notifies you that the doctor has found you to be incapable of making your own treatment decisions.
 - Notify the Rights Adviser

Will the doctor always advise me that I have been found incapable to make treatment decisions regarding a mental disorder?

- You will **NOT** get this notice or a Rights Adviser visit in three situations:
 - (1) if your doctor wants to treat you in an emergency situation;
 - (2) if you have a guardian for personal care with authority to make treatment decisions for you; or,
 - (3) if you have given someone a special kind of power of attorney for personal care (a power of attorney that specifically waives your right to apply for a hearing).

Who will explain what it means to be incapable of making treatment decisions regarding a mental disorder?

- A Rights Adviser will meet with you to explain your rights, your options and will help you to exercise them, if you wish.
- A Rights Adviser is independent of your treatment team and will meet with you privately and keep your discussions private.
- The Rights Adviser is knowledgeable of your rights under the *Mental Health Act*, the *Health Care Consent Act* and the *Substitute Decisions Act*.
- If you want to speak to the Rights Adviser, ask ward staff to contact one for you. By law, the doctor must promptly notify the Rights Adviser of your change of status to meet with you.

How will I be notified if the doctor's decision involves treatment for a physical health issue?

- If a doctor thinks that you are not capable to say **"yes" or "no"** to a treatment that is *not* a treatment for a mental disorder, and you are not in a psychiatric facility or you are not 14 or older your doctor **does not** have to give you a notice form.
- Your doctor should tell you that you have been found incapable and someone else will make treatment decisions for you.

- If you disagree with that decision the doctor should tell you about your right to a hearing (discussed below).
- The Rights Adviser will not be notified to visit you. However, *you have the same rights* (which are discussed below) in this situation, as you would if a doctor found you **not capable to say “yes” or “no”** (incapable to consent) to a treatment for a mental disorder.

What can I do if I disagree with the doctor’s decision?

- You have the right to speak to the doctor about not being allowed to make your own treatment decisions. You have a right to agree or disagree with the doctor’s decision that someone else should make treatment decisions for you.
- If you disagree with the doctor and believe that you are capable to make your own treatment decisions, you have two options:
 - (1) Discuss this with the doctor. He or she has the legal authority to reassess and change this status.
 - (2) You have the right to have a hearing before the **Consent and Capacity Board**. The Board is independent of the hospital and doctor. It can decide whether to agree with the doctor’s decision or not.

How do I apply for Consent & Capacity Board hearing?

- Contact the Rights Adviser in your hospital.
- The Rights Adviser will help you fill out the proper application (Form A) for a hearing and send it to the Board immediately.
- The Rights Adviser can also help to get you a lawyer and apply for Legal Aid to pay for the lawyer, if you qualify, and if you instruct him or her to do so.

When can I apply to the Board for a hearing?

- When a doctor has signed a Form 33 (Notice of Incapacity to make Treatment Decisions).
- When a doctor has decided that you are incapable to make treatment decisions for a physical disorder (Remember that you will not receive a written notice and the Rights Adviser will not be notified in this case and may not be in contact with you).
- You may only apply once every six months. There is one exception to this rule. If there is a material change affecting your treatment or your capacity to make treatment decisions, the Board may allow you to apply again. You may want to discuss this with a lawyer.

When and where does the hearing take place?

- The hearing will be held within **seven** days of the Board receiving your application.

- The hearing will take place at the hospital.
- You will receive a notice from the Board with the time and place of the hearing.

Will I receive treatment before the hearing?

- Unless treatment is not of an emergency nature and has not already begun when you decide to apply for a hearing, you should not receive treatment until the Board has made its decision.

What will happen at the Board hearing?

- The doctor will tell the Board why he or she thinks you are incapable to make treatment decisions.
- You or your lawyer can ask the doctor questions and tell the Board why you do not need an SDM to make treatment decisions for you.
- Your lawyer, the doctor or the Board members may ask you questions.
- The doctor, you or your lawyer may call witnesses to give evidence.

What happens after the Board hearing?

- The Board will meet in private to make a decision. It will issue a decision to you and the hospital within **one** day.

- If you would like written reasons of this decision, you may request it at the hearing or within 30 days.
- You, or the hospital, have the right to appeal the Board's decision to the superior court. This must be filed within **seven** days from receiving the Board's decision. Appeals are complicated and usually require a lawyer. If you did not have a lawyer for your hearing before the Board you may want to request one for an appeal.

The Board's decision:

- If the Board decides that you are **capable** to make your own treatment decisions, it will notify you and the doctor. You then will be in charge of making your own treatment decisions, unless there is an appeal.
- If the Board confirms that you are **incapable** to make your own treatment decisions, it will notify you and the doctor. Your SDM will then be responsible for making treatment decisions for you.

Can someone other than the person named under the *Health Care Consent Act* be my SDM?

- You have the right to apply to the Consent and Capacity Board to make someone else your legal substitute if you do not want the SDM appointed under the *Health Care Consent Act*.

- Remember, in most cases by law your SDM will be a spouse/partner, close relative, or person who you appointed or a court appointed to be your representative for personal care decisions. For some people their SDM is the Public Guardian and Trustee.
- You may be able to appoint someone to be your SDM using a Power of Attorney form. Power of Attorney kits are available from the Public Guardian and Trustee.

Your doctor/treatment team's responsibility:

- Your doctor's responsibility is to examine and assess you and decide if you are capable to say "yes" or "no" to the treatment he or she is proposing.
- If you are incapable to consent to a treatment, it is your doctor's responsibility to ensure that your legal substitute makes the decision as to whether you will have the treatment.
- Your doctor's responsibility is to ensure that you are safe while in the hospital. In some cases, you may be given medication without your consent, when the purpose of the medication is to restrain you. In this case the medication is not considered to be a treatment. For more information about restraints, please see PPAO's Rights Guide on "Restraints".

- You could also be given treatment without your consent in an emergency. This could be done if a doctor thought it was necessary to protect you from severe suffering or serious bodily harm.

Learning more about your rights:

This guide provides some general information about your rights. It is not a substitute for reading the law itself, or talking to a lawyer. If you are in a current or former provincial psychiatric hospital, there is a Patient Advocate who can help you. The Patient Advocate is independent of the hospital and can help you exercise your rights. The Patient Advocate can bring your concerns to the attention of the doctor or contact a lawyer for you. Staff must contact the Patient Advocate on your request. If you are in another psychiatric facility, there is a Rights Adviser, a patient representative, or a patient relations officer who can help you.

For help or further information, contact:

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