



Nova Scotia Health Ethics Network Presentation on Capacity

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Agenda

- ▶ Brief overview of the legal requirements surrounding capacity assessment in Nova Scotia (etc.).
- ▶ Capacity- the basics
 - ▶ when is an assessment necessary
 - ▶ who can do a capacity assessment
 - ▶ who can request an assessment
- ▶ The new legislation

Consent and Capacity - tied together

- ▶ Informed consent is required for treatment - to have a legally valid consent, informed consent must meet the following criteria:
 - ▶ **Capacity**
 - ▶ Disclosure - Adequate information/reasonable person test
 - ▶ Understanding - Retain, comprehend, access (language, culture)
 - ▶ Voluntary - no undue influence or duress
 - ▶ Choice - No fraud or misrepresentation

What is Capacity?

- ▶ Means the person is capable of understanding information (i.e. nature, material risks) and implications in relation to proposed treatment (i.e. consequences of undergoing/not undergoing proposed treatment)
- ▶ "capacity" means the ability to understand information that is relevant to the making of a personal-care decision and the ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision (PDA)
- ▶ Capacity refers to cognitive ability to understand - it is not the same as a lack of understanding due to language, cultural differences, external factors or lack of information
- ▶ Decisions don't have to be "reasonable"
 - ▶ →merely capable of understanding information and weighing factors

Age and Capacity

- ▶ Presumption at law that anyone over age of majority has capacity
 - ▶ Hospitals Act - presumption of capacity
 - ▶ Age of Majority Act - 19
- ▶ Nova Scotia does not have age of consent to treatment legislation

When is an assessment necessary/required

- ▶ Required under several statutes - however, none specifically states how it is to be determined that an assessment is required
- ▶ Hospitals Act
- ▶ Personal Directives Act
- ▶ Involuntary Psychiatric Treatment Act

When is an assessment necessary/ required: Hospitals Act

- ▶ In relation to treatment decisions or managing estate
 - ▶ person in a hospital or a psychiatric facility may be found, after examination by a psychiatrist, not to be capable of consenting to treatment or competent to administer the person's estate.

When is an assessment necessary/ required: Personal Directive Act

- ▶ Determining if the person has capacity to make a personal directive
 - ▶ A person with capacity may make a personal directive
- ▶ Determining when the delegate can act under the personal directive or when the SSDM can make decisions
 - ▶ A personal directive is in effect whenever the maker lacks capacity to make a personal-care decision
- ▶ When there is a request for an assessment as permitted under the PDA
 - ▶ 10(2) A delegate, statutory decision-maker, nearest relative, health care provider, person in charge of a home-care services provider or person in charge of a continuing-care home in which a maker or person represented resides may request an assessment of capacity of a maker or person represented.
 - ▶ (3) A maker or person represented may request a reassessment of capacity.
- ▶ When there is an application to court by the maker, person represented, or any other interested person (s. 29)

When is an assessment necessary/ required: Personal Directive Act

- ▶ In relation to leaving the province:
 - ▶ Where a person has made a personal directive and there is a reasonable basis to believe that the maker lacks capacity to make the decision to leave the Province, a police officer may use force that is necessary and reasonable in the circumstances to prevent the maker from leaving the Province until an assessment of capacity can be completed. (section 11)
- ▶ In relation to the delegate's authority
 - ▶ A delegate's authority under a personal directive ceases (a) when the delegate resigns, dies or lacks capacity to make personal-care decisions on behalf of the maker. (section 13)

When is an assessment necessary/ required: Involuntary Psychiatric Treatment Act(IPTA)

- ▶ For involuntary admission
 - ▶ To be involuntary admitted, there must be a determination that the individual does not have capacity
 - ▶ as a result of the mental disorder, the person does not have the capacity to make admission and treatment decisions
- ▶ For placement on a Community Treatment Order
 - ▶ To be placed on a Community Treatment Order, there must be a capacity determination
 - ▶ as a result of the mental disorder, the person does not have the full capacity to make treatment decisions

Who can do a capacity assessment

▶ Hospitals Act

- ▶ Psychiatrist/Physician
- ▶ For the purpose of this Act, any reference to a psychiatrist carrying out a capacity or competency assessment means
 - ▶ (a) for the purpose of a person in a psychiatric facility, a psychiatrist as defined in clause (r) of Section 2; and
 - ▶ (b) for the purpose of a person in a hospital, the attending physician or other suitable health professional determined by the hospital.
- ▶ A psychiatrist, after having examined a person in a hospital or a psychiatric facility to determine his capacity to consent to treatment, shall complete a declaration of capacity in respect of that person.
- ▶ The declaration of capacity shall state whether or not in the opinion of the examining psychiatrist the person examined is capable of consenting to treatment or not.

Who can do a capacity assessment

- ▶ **Personal Directives Act**
- ▶ **Assessment of capacity under Section 10, 11 or 13 of the Act**
- ▶ **Only a physician may conduct the following assessments of capacity:**
 - (a) an assessment or reassessment of capacity of a maker or person represented for the purposes of Section 10 of the Act;
 - (b) an assessment of capacity of a maker for the purposes of Section 11 of the Act after the maker has been prevented from leaving the Province
 - (c) an assessment of capacity of a delegate to make personal-care decisions on behalf of a maker for the purposes of clause 13(a) of the Act.
- ▶ **A personal directive may name a person, by name, title or position, with whom the person making an assessment of the capacity of the maker is to consult in making the assessment.**

Who can do a capacity assessment

- ▶ Personal Directives Act - the court can make a capacity determination and order a capacity assessment
 - ▶ The court may, on hearing an application under Section 29, do any one or more of the following:
 - ▶ make a determination of capacity of the maker or person represented or a delegate or statutory decision-maker after considering a report made under subsection (2)(b);
 - ▶ To assist the court, the court may
 - ▶ order that a report on the capacity of a maker or person represented or a delegate or statutory decision-maker be prepared

Who can do a capacity assessment

- ▶ Involuntary Psychiatric Treatment Act (IPTA)
- ▶ Psychiatrist



How to do a capacity assessment: CPSNS

- ▶ A physician should determine a patient's capacity to give consent. A physician conducting an assessment of a patient's mental capacity should:
 - a) attempt to obtain the patient's agreement to participate;
 - b) assess the patient's capacity to understand information relevant to the topic at hand
 - c) assess the patient's capacity to understand the decisions to be made;
 - d) Assess the patient's capacity to understand the risks and benefits of actions that may be undertaken;
 - e) assess the patient's ability to understand his or her choices; and
 - f) use accepted capacity assessment procedures to determine mental capacity.

Legal requirements of capacity assessment: Hospitals Act

- ▶ In determining a patient's capacity to make a treatment decision, the psychiatrist shall also consider whether the patient's mental disorder affects the patient's ability to appreciate the consequences of making the treatment decision.
- ▶ In determining whether or not a person is competent to administer his estate, the psychiatrist examining the person shall consider
 - ▶ (a) the nature and degree of the person's condition;
 - ▶ (b) the complexity of the estate;
 - ▶ (c) the effect of the condition of the person upon his conduct in administering his estate; and
 - ▶ (d) any other circumstances the psychiatrist considers relevant to the estate and the person and his condition.

Legal requirements of capacity assessment (IPTA)

- ▶ In determining whether or not a person in a hospital or a psychiatric facility is capable of consenting to treatment, the examining psychiatrist shall consider whether the person understands and appreciates
 - ▶ (a) the condition for which the specific treatment is proposed;
 - ▶ (b) the nature and purpose of the specific treatment;
 - ▶ (c) the risks and benefits involved in undergoing the specific treatment; and
 - ▶ (d) the risks and benefits involved in not undergoing the specific treatment.

Who can consent on behalf of an incapable adult or child?

When the patient lacks capacity, can still treat if can obtain consent from delegate/substitute decision maker. Need to determine the legally valid substitute decision maker (SDM). Is there:

An appointed Delegate/SDM (*Personal Directives Act, old Medical Consent Act, Powers of Attorney Act may incorporate PDA/MCA*); or

A Court appointed guardian

If no, need to look to legislation to see who may act as a substitute decision maker. Most jurisdictions have a hierarchy of ranking:

Spouse (common-law, same-sex partners)

Other family members (children, parents, siblings)

Public Trustee

Issues

- ▶ Documentation
 - ▶ Declaration of capacity not completed
 - ▶ Statement from SDM not completed
- ▶ SSDM/Delegate must have capacity to make decision
 - ▶ Challenge when there is concern that SDM does not have capacity
 - ▶ Where a substitute decision-maker approves or refuses treatment on behalf of a patient pursuant to subsection (2) of Section 54, the Supreme Court of Nova Scotia (Family Division) or the Family Court where there is no Supreme Court (Family Division) may review the provision or refusal of consent when requested to do so by the psychiatrist or the patient to determine whether the substitute decision-maker has rendered a capable informed consent.
 - ▶ Similar provisions under IPTA
 - ▶ What to do when SDM does not appear to be acting in the “best interests” of the patient

Adult Capacity and Decision-Making Act: effective date - December 28, 2017

- ▶ Replaces the Incompetent Persons Act - provides for a court-ordered representative with respect to some or all types of decisions.
- ▶ Personal Directives Act and Hospitals Act still apply to personal care and/or health care decisions in the absence of a court ordered representative for such decisions.
- ▶ "capacity" means the ability, with or without support, to
 - ▶ (i) understand information relevant to making a decision,
 - ▶ (ii) appreciate the reasonably foreseeable consequences of making or not making a decision including, for greater certainty, the reasonably foreseeable consequences of the decision to be made;
- ▶ "capacity assessment" means an assessment, conducted by an assessor, of the capacity of an individual

Adult Capacity and Decision-Making Act

- ▶ "assessor" means
 - ▶ (i) a medical practitioner as defined in the Medical Act,
 - ▶ (ii) an occupational therapist as defined in the Occupational Therapists Act,
 - ▶ (iii) a registered psychologist as defined in the Psychologists Act,
 - ▶ (iv) a registered nurse as defined in the Registered Nurses Act including, for greater certainty, a nurse practitioner as defined in that Act,
 - ▶ (v) a social worker as defined in the Social Workers Act, and
 - ▶ (vi) a licensed, practising member of any other health profession prescribed by the regulations,
 - ▶ who is designated by or under the regulations as an assessor

Adult Capacity and Decision-Making Act

- ▶ Who will make capacity determinations for court applications?
 - ▶ Some preliminary questions:
 - ▶ Will all listed health professionals be expected/permitted to assess capacity regarding all types of decisions or will their profession-specific skills be utilized to assess specific types of decisions?
 - ▶ What training will be provided or required - will training be intended to address gaps in a professional's skills so that any listed professional with training can assess capacity with respect to all types of decisions?
 - ▶ Will any listed professionals be exempted from the requirement of training? Some Physicians and psychologists may feel very challenged to assess capacity with respect to financial matters or personal care decisions such as living arrangements, activities, legal proceedings.
 - ▶ Who will be responsible to enforce/confirm that health professionals have the requisite training - will this be a matter for regulatory bodies to enforce, or will it be up to the employer?

Adult Capacity and Decision-Making Act

- ▶ Regulations made be made respecting
- ▶ Capacity assessments and assessors, including, without limiting the generality of the foregoing,
 - ▶ (i) respecting how capacity assessments are to be conducted,
 - ▶ (ii) respecting the content of capacity assessment reports,
 - ▶ (iii) prescribing health professions for the purpose of the definition of "assessor", designating eligible persons as assessors and authorizing the Minister to designate eligible persons as assessors,
 - ▶ (iv) authorizing the Minister to establish mandatory and non-mandatory guidelines and standards for capacity assessments and requiring assessors to comply with mandatory guidelines and standards,
 - ▶ (v) requiring assessors to undergo such training and possess such qualifications as the Minister may prescribe,
 - ▶ (vi) authorizing the Minister to establish or approve training courses and continuing-competency programs for assessors,
 - ▶ (vii) respecting the circumstances under which a capacity assessment may be conducted in the absence of the adult who is to be assessed and the conduct of such a capacity assessment,
 - ▶ (viii) authorizing the Court to order an adult who is the subject of a representation order or an application under this Act to undergo a capacity assessment and prescribing the circumstances under which such an order may be made,
 - ▶ (ix) prescribing fees that may be charged for capacity assessments,
 - ▶ (x) prescribing the circumstances in which fees for capacity assessments are to be paid by the Crown, and
 - ▶ (xi) respecting the authority of an assessor to collect, use and disclose information, as defined in subsection 32(1), in relation to an adult who is the subject of a capacity assessment;

Adult Capacity and Decision-Making Act

- ▶ Section 9: Subject to Sections 10 and 15, an assessor may conduct a capacity assessment only if the adult has not refused to undergo or continue with the capacity assessment and, in the assessor's opinion,
 - ▶ (a) where the adult appears to be capable of consenting to the capacity assessment, the adult
 - ▶ (i) understands the purpose of the capacity assessment and that the adult has the right to refuse to undergo or continue with the capacity assessment, and
 - ▶ (ii) has consented to the capacity assessment; or
 - ▶ (b) where the adult does not appear to be capable of consenting to the capacity assessment, there are reasonable grounds to believe the adult is incapable of making decisions about any matter to be assessed.
- ▶ Section 10 (1) The Court may order a capacity assessment of an adult if
 - ▶ (a) the adult's capacity to make decisions is at issue in a proceeding under the Act; and
 - ▶ (b) there are reasonable grounds to believe that the adult is incapable of making decisions about any matter.
- ▶ (2) An order under subsection (1) may direct an adult whose capacity is at issue to undergo the capacity assessment and to
 - ▶ (a) permit an assessor and any person assisting the assessor to enter the adult's place of residence to conduct the capacity assessment; or
 - ▶ (b) attend at another place at any time specified in the order to undergo the capacity assessment.

Adult Capacity and Decision-Making Act

- ▶ Section 11 - Before conducting a capacity assessment of an adult, an assessor must determine whether the adult requires a medical examination before the capacity assessment to identify any medical condition, including any temporary or reversible condition, that may affect the adult's capacity in respect of any matter to be assessed.
- ▶ Section 12(1) Before conducting a capacity assessment, an assessor must ensure that the assessor has been advised of the reasons for which the capacity assessment was requested and be provided with a description of any circumstances or events that gave rise to the request.
- ▶ (2) An assessor may assess an adult's capacity in respect of a matter only if the assessor is satisfied that a capacity assessment in respect of the matter is necessary.
- ▶ Section 13 When conducting a capacity assessment, an assessor shall determine whether the adult being assessed is capable of making decisions in respect of any matter being assessed and shall take into account observational information and collateral information gathered from other sources.

NSHA Policies

- ▶ Do Not Resuscitate (DNR) policies
- ▶ Personal Directive Policy
- ▶ Consent to Treatment policies
 - ▶ CBDHA HLW-6-290 Informed Consent _Pulmonary
 - ▶ CBDHA A-3-190.1 Research Protocol Amendment Review, Consent Form Revision Review
 - ▶ CBDHA A-3-41 Consent to Treatment
 - ▶ CBDHA HLW-6-160 Informed Consent _Cardiac
 - ▶ CDHA CH 30-045 Consent to Treatment
 - ▶ CEHHA 101-003 Consent to Treatment
 - ▶ CHA Consent
 - ▶ SWH Consent
 - ▶ PCHA Consent to Treatment
 - ▶ GASHA Consent to Treatment
 - ▶ GASHA - DI Informed Consent
 - ▶ AVH 280.001 Consent to Treatment, Procedure or Operations
 - ▶ SSH-AD-110-206 Consent to Treatment
 - ▶ SSH-NU-400-738 Surgical Consent
- ▶ OP3 Nova Scotia

Comments/Questions

