



## INFOGUIDE

February 2005

### SUBSTITUTE DECISION-MAKERS

#### What is an SDM?

***Disclaimer: This INFOGUIDE 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.***

***A healthcare practitioner under the Health Care Consent Act may include a doctor, a dentist, a chiropractor, a psychologist, a nurse, an occupational therapist and others. For simplicity, in this guide we will use the term "doctor" in place of healthcare practitioner.***

#### ***How does someone become my Substitute Decision-Maker (SDM)?***

- If a doctor finds you incapable of making your own decisions about any form of medical treatment, the doctor will ask another person to make decisions for you. This other person is called a "substitute decision-maker" (SDM). The SDM has to follow particular rules when making treatment decisions for you.
- The doctor, relying on a list of people in the *Health Care Consent Act*, determines who is the appropriate SDM. The doctor then asks the SDM to make treatment decisions for you.
- The person named SDM could be one of: your guardian of the person, your attorney for personal care, a family member, or, if there is no one else willing to act, the Public Guardian and Trustee (PGT). If there is more than one person named SDM (for example, there are 2 brothers) both must agree on the treatment decisions.

***What legislation defines the role of the SDM?***

- The *Health Care Consent Act* lists the rules that apply to substitute decision-making. The *Health Care Consent Act* also outlines various reviews that are available to an independent tribunal, the CCB (the "CCB"). These reviews are discussed in more detail below.

***What does it mean to be "incapable"?***

- If a person is unable to understand the information relevant to informed consent or appreciate the consequences of making or not making a decision, the person will be "incapable" for the purposes of that treatment.
- A person is assumed to be capable unless there is a reason to believe otherwise. A person may be capable of some treatments and incapable of others. One's capacity also may fluctuate with time.

***What information does my SDM receive before they make a decision?***

- Before any medical treatment begins (except in specific cases of emergency) either the person or the SDM must give "informed consent" to the treatment. An SDM is entitled to all of the information that the person would be entitled to before making a decision about treatment.
- "Informed consent" means that the doctor has an obligation to provide information that a "reasonable person" would need to make a decision about treatment regarding:
  - The nature of the treatment;
  - The expected benefits of the treatment;
  - The material risks of the treatment;
  - The material side effects of the treatment;
  - Alternative courses of action; and
  - The likely consequences of not having the treatment.

***How will the SDM make treatment decisions?***

- An SDM must comply with the rules in the *Health Care Consent Act*. The Act says that if an SDM knows the person has, when capable, indicated a wish with regard to the treatment, then that wish must be followed.
- If no wish is known, then the SDM must make decisions in the person's "best interests". Determining a person's "best interests" involves considering:

- The person's values and beliefs;
  - Wishes expressed by the person, while incapable;
  - Whether the treatment is likely to improve the person's condition, prevent the condition from deteriorating or reduce the extent to which the condition is likely to deteriorate;
  - Whether, with treatment, the person's condition is likely to improve, remain the same or deteriorate without the treatment;
  - Whether the benefit to the person is expected to outweigh the risk of harm; and
  - Whether a less restrictive or intrusive treatment would be as beneficial.
- If the doctor thinks the SDM is not following the rules set out in the *Health Care Consent Act*, the doctor may apply to the CCB for a ruling that the SDM comply with the rules. If an SDM or a doctor is uncertain as to a "prior capable wish" or if the SDM or doctor wishes to depart from a "prior capable wish" the SDM or doctor may apply to the CCB for directions.

### ***What are "prior capable wishes"?***

- A prior capable wish is a direction or instruction a person has given relating to the treatment while they are capable and at least 16 years old. The wish may be written in a power of attorney or another document or it may have been expressed verbally. When there is a "prior capable wish" the SDM must consent to treatment according to the wish unless they have an order from the CCB allowing them to depart from the wish.

### ***What if my SDM isn't sure whether I've made a wish or what my wish means? What if he or she doesn't agree with my wish?***

- An SDM may apply to the CCB to ask for "directions" about your wish. For example, if your SDM isn't sure whether or not you were capable of making a decision when you made your wish or whether or not your wish applies to your current circumstances, he or she can ask the CCB to give them instructions. Once the CCB makes a decision, the SDM must follow the directions given.
- Your doctor may also make these applications to the CCB for directions. You or your lawyer could also speak to the CCB to give them further information. For information about the process of CCB hearings, please look at our rights guide called "Psychiatric Patients' Rights under Ontario Health Law".

***What if I don't agree with my SDM's decisions about my treatment?***

- If you do not believe that your SDM is making decisions appropriately, there are a number of things you may do. The best action to take depends on your particular circumstances. Below are some different options.
- You may apply to the CCB to review your doctor's decision that you are incapable of making treatment decisions. If the CCB believes that you are capable then you will once again make decisions about your own treatment. You may apply to the CCB with a "Form A", which you may obtain from the CCB directly or from your Patient Advocate or Rights Adviser.
- You may apply to the CCB to appoint a representative who will make treatment decisions for you. You may ask the CCB to appoint a person other than your current SDM. (Form B)
- If you are capable of making a power of attorney for personal care, you may do so and name a different person to be your "attorney". An attorney takes priority as SDM over all other persons except a guardian of the person. You may also specify your wishes about your treatment in the power of attorney; however, if you are not capable with respect to a particular treatment, a wish regarding that treatment will not be a "prior capable wish".

***Questions?***

If you have questions contact your local Patient Advocate or Rights Adviser or call the central office of the Psychiatric Patient Advocate Office at 1-800-578-2343. Please also check out our website at: [www.ppao.gov.on.ca](http://www.ppao.gov.on.ca).