Preparing for Consent and Capacity Board Hearings

January 23, 2018

The Consent and Capacity Board ("CCB") is an independent administrative tribunal created by the Ontario government under the *Health Care Consent Act* ("HCCA"). The CCB conducts hearings under various pieces of provincial legislation. When a panel is convened to hear applications brought forward by patients or health-care providers, the panel is usually comprised of a psychiatrist, a member of the general public and a lawyer (who will act as the Chair and preside over the hearing). In some cases, the legislation allows for a single senior lawyer member of the CCB to sit alone to hear an application.

Tips for Preparing for CCB Hearings

In a health-care setting, the two most common acts under which a CCB hearing may be called are the HCCA and *Mental Health Act* ("MHA"). Many health-care facilities expect health-care providers to attend CCB hearings without legal representation. The following tips should not be considered legal advice, but rather general guidance for health-care practitioners and physicians in navigating the hearing process.

Step 1. Identify the Type of Hearing

- Identify what type of hearing it is and which legislation it is proceeding under.

- Examples of the types of hearings under the HCCA are applications to:
    - review findings of incapacity (Form A)
    - appoint a personal representative to make treatment decisions (Form B)
    - determine whether a substitute decision maker ("SDM") is acting in the best interests of an incapable patient (Form G)

- Examples of types of hearings under the MHA are applications to:
    - review whether criteria for involuntary admission are met (Form 16 or 17, the latter of which is a mandatory review required at certain intervals)
    - review a finding of incapacity to manage property (Form 18)
    - review whether criteria to issue a Community Treatment Order are met (Form 48)

- obtain certain orders available where a patient is admitted involuntarily under a certificate of continuation (Form 51)
- obtain an order for an involuntary patient's transfer to another psychiatric facility (Form 52)

The above is not a complete list of hearings under either the HCCA or the MHA. Hearings may also proceed under the *Substitute Decisions Act, Personal Health Information Protection Act,* and *Mandatory Blood Testing Act.*

Step 2. Preparing for the Hearing

- Consider whether the hearing can be handled by the physician, health-care provider or capacity assessor alone, or if the assistance of legal counsel is needed. Generally, many hearings may be conducted without legal counsel. However, where you have received notice that the patient's lawyer intends to raise preliminary issues of a legal nature or will assert that there has been a breach of either procedural fairness or a Charter right, or the hearing involves a contentious dispute about whether an SDM has acted in the best interests of an incapable patient, it may be prudent to consult legal counsel. If the issue arises without notice, the health-care provider may ask the Board for an adjournment in order to consult legal counsel.

- Regardless of whether a health-care provider consults legal counsel, it is generally the health-care provider who bears the burden of proving that his or her finding meets the legal criteria or test in question at the hearing. Always keep this in mind when preparing for the hearing: it is imperative to show how a determination was made, whether it was a finding of incapacity or that the patient met the criteria for involuntary admission. The health-care provider must be able to point the Board to the clinical evidence that lead to the determination.

- Practical considerations that may be addressed in advance of a hearing:
  - Review and explore the relevant clinical issues with the patient and his or her substitute decision maker.
  - Ensure any language or cultural barriers have been addressed.
  - Document the clinical evidence supporting any findings of incapacity, involuntary admission, or community treatment order, as the case may be, in the patient's chart, including, for example, details of what you explained to the patient, your observations of the patient's condition and any corroborating information provided to you by others.
  - Ensure forms have been completed in accordance with legislation and reviewed by the Officer in Charge within the correct timelines, as required by the legislation.
  - Consider who should testify and whether more than one witness is necessary.
  - Assess what clinical notes and records should be relied upon at the hearing. For example, if other health-care providers have documented observations about the patient that support the primary health-care provider's finding of incapacity or determination of involuntary status, consider making copies of those notes to enter as additional exhibits at the hearing.

- Prepare a clinical summary. The CCB recommends a clinical summary to help marshal the clinical evidence in support of the health-care provider's position. This can be very helpful as it can serve as a basis for oral evidence at the hearing, which can supplement and update the information contained in the clinical summary. Templates for clinical summaries addressing different issues (*e.g.*, capacity, involuntary admission, etc.) may be found on the CCB's website.
- Consider whether a pre-hearing conference would be of assistance if, for example, there are multiple statutory parties to the hearing that will make scheduling difficult (a Form B hearing) or you believe the hearing will run longer than two hours due to the complexity of the issues to be addressed. Requests for pre-hearing conferences may be made to the case coordinator who is arranging the scheduling of the hearing.

Step 3. Attending the Hearing

- *Logistical considerations for the hearing:*
- When can the hearing be scheduled?The legislation requires the CCB to schedule hearings *within seven days of receipt of the application*. Assume that the hearing will likely be scheduled on the seventh day, unless the parties to the hearing can agree on a brief adjournment, which is only possible where the patient is represented by legal counsel. If that is the case, reach out to the patient's lawyer to discuss the reasons for an adjournment. If an agreement on scheduling is reached, communicate this as soon as possible to the CCB case coordinator.
- How long will the hearing be?As part of a pilot project to streamline an increasing volume of hearings in the Greater Toronto Area, hearings are currently scheduled for no more than two hours. Consider whether additional time should be requested prior to the start of the hearing. If additional time is not requested and not concluded within the two hours allotted, the Board may adjourn the hearing to another day in order to accommodate other hearings waiting to be heard the same day.
- Where will the hearing be held?Are there security or safety considerations which need to be addressed?
- Can the parties agree in advance on the documents to be considered by the Board?If the parties cannot agree, that does not mean that one side will not be permitted to put the document before the Board. It simply means that there will likely be an objection to the document being relied on by the Board. Ultimately, it is for the Board to decide whether a document is relevant and admissible.

The parties may also agree in advance to a timetable for exchanging documents, particularly in cases where the hearing is being scheduled outside of the seven-day time limit.

- *Practical considerations at the hearing*
- In the interests of having the hearing proceed in a timely manner, the Board wants to receive documents at least fifteen minutes in advance of the hearing. The parties do not need to consent in order to deliver documents to the Board, according to a new direction by the Board. (See "Notice of pilot regarding hearing length and document delivery".) A party

may make an objection to certain documents as a preliminary issue once the hearing commences.
    - Consider how to present the evidence with particular attention to the legal test at issue so that you are able to demonstrate with the evidence that the test has been met.
    - Be prepared to answer any questions that the patient and/or Board may have about the matters at issue; if you do not understand a question, you may ask for the question to be repeated or clarified.
    - Consider in advance what you may want to say in conclusion, to summarize and support your position at the hearing.

With experience, CCB hearings become easier to navigate. However, even for the seasoned practitioner, challenges can arise when complex technical or legal arguments are advanced. In those circumstances, it is prudent to request an adjournment to seek legal advice.

A Note Regarding Recent Scheduling Developments at the CCB

The number of CCB applications and hearings are on the rise. There has been a 60 per cent increase in the total number of hearings over the last five years, and a 16 per cent increase in the last year alone. The CCB receives about 30 different applications for review each day, or about 150 applications each week.

Unless the affected patient is represented by counsel and an agreement is reached to adjourn the hearing, hearings will be scheduled within seven days of the receipt of the application, as required by the HCCA. Given that some hearings require a panel of three adjudicators and that both the physician and patient may be represented, each hearing may require consideration of the schedules of seven or more individuals.

In an effort to manage this increasing hearing load efficiently, the Board now expects each hearing to be completed within two hours, in part to facilitate the scheduling of up to four hearings per day for a panel. That means that a CCB panel may be presiding over multiple hearings at different locations on any given day.

This situation has created some challenges. Practitioners and health-care facilities may want to consider the following to help address scheduling difficulties:

- Encourage contact between the health-care provider or facility scheduler and the patient's counsel in order to reach an agreement on a date for the hearing outside the seven-day window, where the physician and patient's counsel are both available.
- Submit the physician's availability as soon as possible to the Board at ccb@ontario.ca.

Other Resources

For further information on preparing for CCB hearings, download "*A Practical Guide to Mental Health and the Law in Ontario*" (2016 edition), published by the Ontario Hospital Association and co-authored by BLG lawyers, Katharine Byrick and Barbara Walker-Renshaw.

By

Barbara_Walker-Renshaw, Meghan_Payne

Expertise

Health Law, Health Care & Life Sciences

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 800 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing unsubscribe@blg.com or manage your subscription preferences at blg.com/MyPreferences. If you feel you have received this message in error please contact communications@blg.com. BLG's privacy policy for publications may be found at blg.com/en/privacy.

© 2026 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.