



Ordering Counsel Where the Subject of an Application Does Not Have Legal Representation

1. Purpose

1.1. This Policy Guideline outlines the procedure for determining whether the Board should issue an order to arrange for the legal representation of the subject of an application. The Policy Guideline also addresses the Board's duty to inquire and to elicit evidence when dealing with unrepresented subjects of an application.

2. Legislation

2.1 Section 81 (1) of the *Health Care Consent Act, 1996 (HCCA)* provides that if a person who is or may be incapable with respect to a treatment, managing property, admission to a care facility or a personal assistance service is a party to a proceeding before the Board, and does not have legal representation,

(a) the Board may direct Legal Aid Ontario to arrange for legal representation to be provided for the person; and

(b) the person shall be deemed to have capacity to retain and instruct counsel.

3. General Principles

3.1 Parties have a constitutional right to represent themselves if they wish,ⁱ regardless of whether or not they are likely to represent themselves effectively.ⁱⁱ

4. Process

The Board will use the following procedures in scheduling hearings:

Within 48 hours of receipt of an application, the Board will issue an order to Legal Aid Ontario in respect of any subject of an application who does not have representation. This policy also applies when the Board has no indication as to whether the subject of the application wants to be represented or not.

The Board will not issue an order under s. 81 of the *HCCA* prior to the hearing when it is notified that the subject of an application wants to represent himself or herself.

The Board will not issue an order under s. 81 of the *HCCA* in respect of any party to its proceedings who is not the subject of an application, for example, a substitute decision-maker.

The Board will strive to avoid adjournments as a general principle. When the subject of an application appears unrepresented, the panel of the Board hearing the application will decide whether or not to proceed without legal representation by conducting a preliminary mini-inquiry to establish:

- a. Whether the subject of the application refuses to obtain legal representation at the time of the hearing; and if so
- b. Whether the subject of the application has made an informed decision. The Board will not consider the objective wisdom of the choice once an informed choice has been made.ⁱⁱⁱ
- c. Whether the subject of the application does not want legal representation because he or she does not want to pay the fees for legal representation. The panel should clarify that the subject of the application has no obligation to retain the assigned counsel. If the lawyer arranged as a result of the Board's order cannot obtain a retainer from a subject of an application, Legal Aid Ontario will pay the legal fees for the lawyer. However, if the subject of an application's property is managed by the PGT, the PGT may agree to pay the fees of the appointed counsel out of the subject of the application's funds; and
- d. Whether the subject of the application has already been granted adjournment(s) to obtain counsel.

The Board has a duty to inquire. That duty gives the Board the authority to take a proactive role during the course of the hearing when dealing with the unrepresented subject of an application ("unrepresented person"). The panel of the Board

should act in accordance with the following principles in any proceeding involving an unrepresented person:

- a. Make the unrepresented person aware of the nature of the proceedings to the extent possible.
- b. Explain the format of the hearing, the process of presenting evidence, and the basic principles of cross-examination.
- c. Ask if the unrepresented person requires pen and paper for note taking.
- d. Explain the role of the panel to the unrepresented person.
- e. Instruct and assist the unrepresented person throughout the hearing while ensuring fairness to the other parties.
- f. Accommodate the unrepresented person's lack of familiarity with the process while respecting the rights of the other parties. The panel should err on the side of providing more, rather than less, assistance to the unrepresented person.
- g. Ask the unrepresented person if they have any questions and encourage questions throughout the hearing.
- h. Satisfy itself that the legal requirements (for involuntary detention, incapacity, etc.) were met by the health practitioner (if applicable).

4.7 Rule 2 of the Rules of Professional Conduct of the Law Society of Upper Canada require a lawyer not to withdraw from representation of a client except for good cause and upon notice to the client appropriate in the circumstances. A lawyer may not withdraw if serious prejudice to the client would result. In those cases, the Board may order counsel to remain for the hearing as *amicus curiae* (in this case, friend of the Board).

5. Effective Date

5.1 This Policy Guideline is effective September 1, 2007.

ⁱ *R. v. Swain*, 63 C.C.C. (3d) 481, 125 N.R. 1, 3 C.R.R. (2d) 1, 47 O.A.C. 81, [1991] 1 S.C.R. 933 (Supreme Court of Canada).

ⁱⁱ *R. v. Swain*, *ibid.*

ⁱⁱⁱ *R. v. Romanowicz* (1999), 45 O.R. (3d) 506 (Ont.C.A.).