

Applying for a Review of a Determination of Incapacity Regarding the Collection, Use or Disclosure of Personal Health Information

***Personal Health Information and Protection Act (“PHIPA”)* Form P-1**

A health information custodian may make a determination that a person is incapable of consenting to the collection, use or disclosure of his or her personal health information. The legal test for capacity to consent to the collection, use or disclosure of personal health information requires that a person be able to understand the information that is relevant to making a decision about the collection, use or disclosure of the personal health information, and be able to appreciate the reasonably foreseeable consequences of giving, not giving, withdrawing or withholding the consent. If a person is determined to be incapable to consent to the collection, use or disclosure of personal health information, they may apply to the Consent and Capacity Board for a review of the determination of incapacity.

Who makes decisions about the collection, use or disclosure of personal health information?

If a person is capable, they make their own decisions or authorize another person to make decisions for them. If a health information custodian has made a determination that a person is incapable, the decision will be made by another person according to the law. If a person has a substitute decision-maker under the *Health Care Consent Act* (“HCCA”) (in relation to decisions about treatment, admission to a care facility, or personal assistance services) that person is deemed to be the substitute decision-maker in respect of the collection, use or disclosure of personal health information. If the person does not have a substitute decision-maker under the HCCA, a Guardian of the Person or a Power of Attorney with the required authority, a representative appointed by the Board, or a family member of the person may make the decisions. If no one who is authorized to make the decision is available, the Public Guardian and Trustee will be asked to make it.

How to apply to the Board

Fill out an application form (Form P-1) and send it to the Board. The application can be found on the Board's website. It should be submitted by email or fax if possible but can also be submitted by regular mail. There is a restriction on repeated applications such that a person may not apply again if the Board has already determined the issue in the last six months, unless there has been a material change in circumstances.

When and where will the hearing be?

The Board will send a notice with the time and place of the hearing. The Board will attempt to schedule the hearing at a location that is convenient to the parties. The hearing will usually be held within one week after the Board receives the application.

Who are the parties to the hearing?

The parties to the hearing are the individual who has applied for the review of the determination, the health information custodian who made the determination of incapacity, and any other persons the Board specifies.

Legal representation at the hearing

It may be a good idea to have a lawyer at the hearing but parties are not required to have one. The Lawyer Referral Service at the Law Society of Ontario may be contacted for assistance. Information on this service is available on the Law Society's website. Some people may be eligible for a Legal Aid lawyer free of charge.

What will happen at the hearing?

The Presiding Member will introduce everyone and explain how the hearing will work, who the official parties are and the order in which people will speak. Each party may attend the hearing and invite anyone they want to come. Each party may have a lawyer, call witnesses and bring documents. Ideally the documents will have been exchanged between the parties and provided to the Board in advance of the hearing.

The health information custodian is required to present information about the reasons for the determination of incapacity. The Board will consider the test for capacity in the *PHIPA*. The person who has been determined to be incapable may also present evidence but is not required to. Each party as well as the Board members may ask questions of each witness. At the end of the hearing each party will be invited to summarize and the Presiding Member will end the hearing.

What happens after the hearing?

The Board will meet in private to make its decision. It will issue the decision within one day. Written reasons for the decision will be issued within four business days if any of the parties request them within thirty days of the hearing. The Board will either confirm the determination made by the health information custodian that the person is incapable or will find that the person is capable of making decisions about the collection, use or disclosure of their personal health information. If the Board finds that the person is capable, the person will make their own decisions about the collection, use or disclosure of their personal health information. If the Board confirms the determination of incapacity, someone else will make the decisions for the person.

Can the Board's decision be appealed?

A decision of the Board may be appealed by any party to the Ontario Superior Court of Justice.

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