



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

### 1. Purpose

1.1. This Policy Guideline outlines the principles behind and the procedure for ordering counsel where the subject of an application does not have legal representation.

### 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, affirmed by the Courts, to represent themselves if they wish, regardless of whether or not they are likely to represent themselves effectively. The deemed capacity of a person to retain and instruct counsel is not a rebuttable presumption; the person is capable. The deemed capacity includes the right to represent oneself and to terminate existing representation.

### 4. Process

4.1 The Board will use the following procedures:

4.2 On receipt of an application, the Registrar's Office will promptly issue an order to Legal Aid Ontario in respect of any subject of an application who does not have representation. The exception to this is where there is a clear indication that the person does not wish to be represented by counsel or will arrange for their own legal representation.

4.3 The Registrar's Office cannot 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.

4.4 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 asking whether the person wishes to have representation:

- a. When so inquiring, the panel shall advise the individual of the nature of the proceeding including the implications of the decision(s), the fact that the assistance of counsel may offer benefit, and that Legal Aid Ontario may provide counsel at no cost;
- b. If the person chooses to proceed without representation, no order for counsel will be made; and
- c. If the person chooses to consult or retain counsel, the panel shall consider all relevant factors in determining whether to permit an adjournment for this purpose and shall consider whether or not it should order Legal Aid Ontario to appoint counsel.

4.5 A panel cannot 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.

4.6 The Board has a duty to inquire into evidence relevant to the matter(s) before them. That duty creates an obligation on the panel to take a proactive role during the course of the hearing when dealing with an unrepresented party. In accordance with the Board's duty to inquire, the panel of the Board shall act in view of the following principles in any proceeding involving an unrepresented person (particularly the subject of the application):

- 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 asking questions.

- 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.
- g. Ask the unrepresented person if they have any questions and encourage questions throughout the hearing where it is fair and appropriate to do so.

**5. Withdrawal from representation**

5. 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).

**6. Effective Date**

6. This Policy Guideline is effective September 1, 2017.