Jurisprudence
Module 7 – Consent

In this module you will learn about

- *Health Care Consent Act* including
    - Elements of consent
    - Definitions including
        - Capable
        - Proposer
        - Treatment
        - Course and plan of treatment
    - Activities not considered to be treatment
    - Who is authorized to give consent (substitute decision makers)
    - Exceptions in emergency treatment
- Consent guidelines for registrants of CMRITO
- Steps to obtaining consent

Resources to include with Module 7

- *Health Care Consent Act*
  http://www.ontario.ca/laws/statute/96h02
- *What you must know about … consent*
  https://www.cmrito.org/pdfs/wymkas/consent.pdf

- CMRITO Standards of Practice
  www.cmrito.org/pdfs/standards/standards-of-practice.pdf

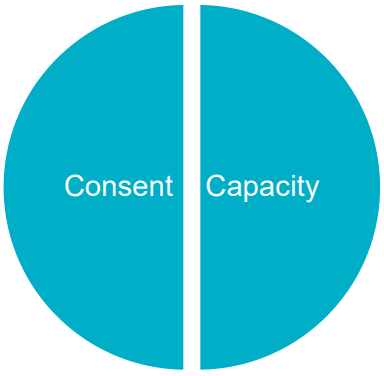
Jurisprudence
Module 7 – Consent

The *Health Care Consent Act* (HCCA) is the act governing patient consent to treatment in Ontario. As a registrant of the College, you are considered a health practitioner for the purposes of the HCCA and need to be familiar with its requirements.

As its central principle, the HCCA provides that a health practitioner who proposes a treatment to a person shall not administer the treatment and shall take reasonable steps to ensure that it is not administered unless they believe that the person is:

- capable with respect to the treatment, and has given consent; or
- incapable with respect to the treatment, and another person has given consent in accordance with the HCCA.

This means that any health practitioner who proposes a treatment to a person must not administer the treatment, and must take reasonable steps to ensure that the treatment is not done unless a valid consent has been given. Thus, in order for consent to be valid, an individual must be capable of consenting.



Explained here are a number of terms used in the HCCA, which have specific meaning in this legislative context. It is important that registrants understand these terms and concepts used in the legislation in order to comply with its requirements.

Capable:

A patient is capable of making a treatment decision if they are able to:

- understand the information that is relevant to making a decision about the proposed treatment, and
- appreciate the reasonably foreseeable consequences of accepting or refusing the treatment, or of making no decision

Consent:

In giving consent, the patient's consent must:

- relate to the treatment
- be informed
- be given voluntarily, and
- not have been obtained through misrepresentation or fraud.

Proposer:

Under the HCCA, the health practitioner who **proposes** the treatment is responsible to assess the capacity of the patient and to obtain the informed consent. The "proposer" is the health practitioner who is:

- responsible for deciding what treatment should be offered
- able to provide the information which a reasonable person in the same circumstances would need to give informed consent, and
- able to answer questions about the information

Treatment:

Treatment is defined as anything that is done for a therapeutic, preventative, palliative, diagnostic, cosmetic or other health-related purpose, and includes a course or plan of treatment.

Course of Treatment:

A course of treatment is defined as a series or sequence of similar treatments administered to a person over a period of time for a particular health problem.

Plan of Treatment:

A plan of treatment is defined as a plan that:

- is developed by one or more health practitioners
- deals with one or more of the health problems that a person has and may, in addition, deal with one or more of the health problems that the person is likely to have in the future given the person's current health condition, and
- provides for the administration to the person of various treatments or courses of treatment and may, in addition, provide for the withholding or withdrawal of treatment in light of the person's current health condition.

For the full text of the HCCA, please consult the Government of Ontario's website at: http://www.ontario.ca/laws/statute/96h02.

Guidelines for Registrants of CMRITO

Only a health practitioner who has the knowledge to obtain informed consent – including being able to answer the person's questions about the treatment – is able to obtain an informed consent to the treatment.

The health practitioner giving an order for a treatment is the person responsible for ensuring that informed consent for the treatment is obtained. A health practitioner performing a treatment under the order (often the case for registrants of CMRITO) should be able to rely on the fact that the patient presents with a requisition as proof that informed consent has been obtained.

If a "plan of treatment" is to be proposed for a patient, one health practitioner may, on behalf of all the health practitioners involved in the plan of treatment:

- propose the plan of treatment
- determine the person's capacity with respect to the treatments referred to in the plan of treatment, and
- obtain consent or refusal of consent either from the patient, if they are capable of doing so, or the patient's substitute decision-maker if the patient is found incapable.

Registrants perform procedures on the basis of an order from a physician. Therefore, in most circumstances it is the responsibility of the physician to assess the capacity of the patient and to obtain informed consent. **Although the responsibility to obtain the patient's informed consent rests in most circumstances with the physician, as a registrant of CMRITO you still have certain obligations which include the following**:

- you should ensure that the physician obtained the patient's consent by determining whether consent is documented in the patient record, or there is other reasonable evidence that consent was obtained.

- before beginning the procedure or treatment, you should fully explain to the patient what you are going to do and why. This is particularly important when the procedure forms part of a plan or course of treatment.
- there may be indications that the patient has withdrawn consent to the procedure, or they may even resist. Assuming the patient is mentally capable, they can withdraw consent to a procedure at any time. If there are any indications consent has been withdrawn, you should not perform the procedure until the patient's consent is obtained.
- although a patient may have been capable of giving consent at the beginning of a course of treatment they may become incapable at some stage during the course of treatment. Especially in the context of radiation therapy, you must be aware of signals that the patient may no longer be capable of giving consent. You may be obliged to ensure that the physician assesses the patient's capacity during a course of treatment in order to ensure the patient's continuing consent to the course of treatment.
- if you are in doubt about whether the patient is capable of giving consent, or has given an informed consent, you should refer the patient back to the responsible physician.
- you should make certain that your hospital or facility has protocols in place which address the following:
    - who is the appropriate health care provider to inform the patient about the proposed treatment and to obtain the consent?
    - how will the patient's consent be documented so that other members of the health care team know the consent was obtained?
    - what steps should be taken if a health care professional has reason to believe that the patient's consent was not informed, that the patient has changed their mind, or that they are not, or were not capable of giving consent to the proposed treatment?

Review of the *Health Care Consent Act*

In order to fully appreciate these guidelines, it is important to understand in more depth some of the provisions of the HCCA as outlined here.

Activities not considered "treatment" under the HCCA

Certain activities that would otherwise be considered a treatment have been specifically excluded from the Act. Some of these specific exclusions are:

- the assessment or examination of a person to determine the general nature of the person's condition
- the taking of a person's health history
- the communication of an assessment or diagnosis
- the admission of a person to a hospital or other facility
- assistance with, or supervision of, hygiene, washing, dressing, grooming, eating, drinking, elimination, ambulating, positioning or any other routine activity of living
- a treatment that in the circumstances poses little or no risk of harm to the person.

Since the use of ionizing radiation, radiopharmaceuticals, electromagnetism and soundwaves is done either for a diagnostic or therapeutic purpose, and it is unlikely that any of the exceptions apply, it can be assumed the procedures performed by the registrants of CMRITO will be governed by the HCCA.

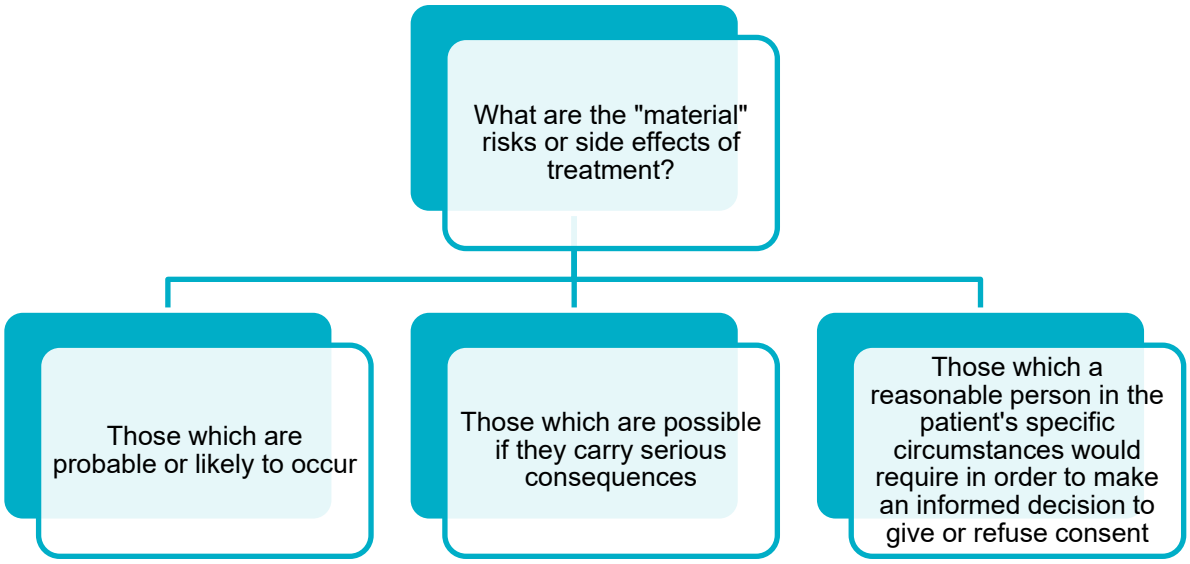
Consent must be specific and informed

Under the HCCA, consent must be specific and informed. In order for the consent to be informed, the person who is to give consent must first receive information that a reasonable person in the same circumstances would require in order to make a decision. This includes information about:

- the nature of the treatment
- expected benefits of the treatment
- material risks of the treatment
- material side effects of the treatment
- alternative courses of action
- the likely consequences of not having the treatment.

In addition, the health practitioner must also respond to the person's requests for other information about these aspects of the treatment.

Although the HCCA does not define the meaning of "material risk of treatment" or "material side effects of the treatment", it is likely that they include:



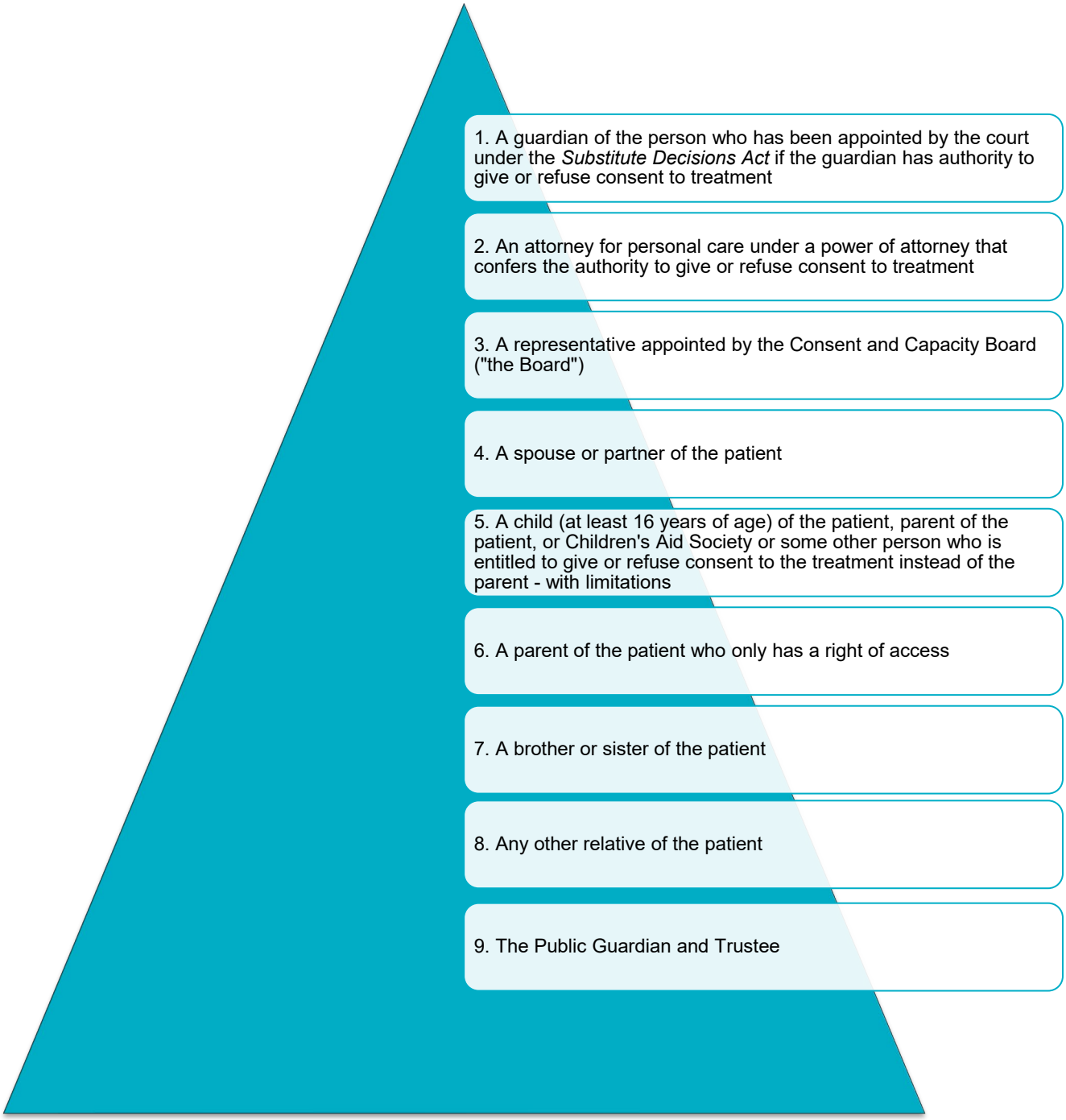
The consent may be in writing or it may be oral, but it must be obtained **before** the treatment begins. It is important to note that **consent may be withdrawn at any time**. If a patient withdraws their consent, the registrant must discontinue the treatment or procedure.

The HCCA permits a health practitioner to presume that consent to treatment also includes consent for variations or adjustments in the treatment, or the continuation of the treatment in a different setting, so long as the expected benefits, material risks or material side effects do not change significantly.

Language and culture may affect the giving of informed consent to treatment. The health practitioner should use – to the best of their ability – a means of communication which takes into account the person's education, age, language, culture and special needs. Where the health practitioner and the patient (or if the patient is incapable, the substitute decision-maker) cannot communicate because of language, an interpreter will be required. (See also, 'Exceptions in Emergency Treatment' below).

Who is authorized to give consent to treatment?

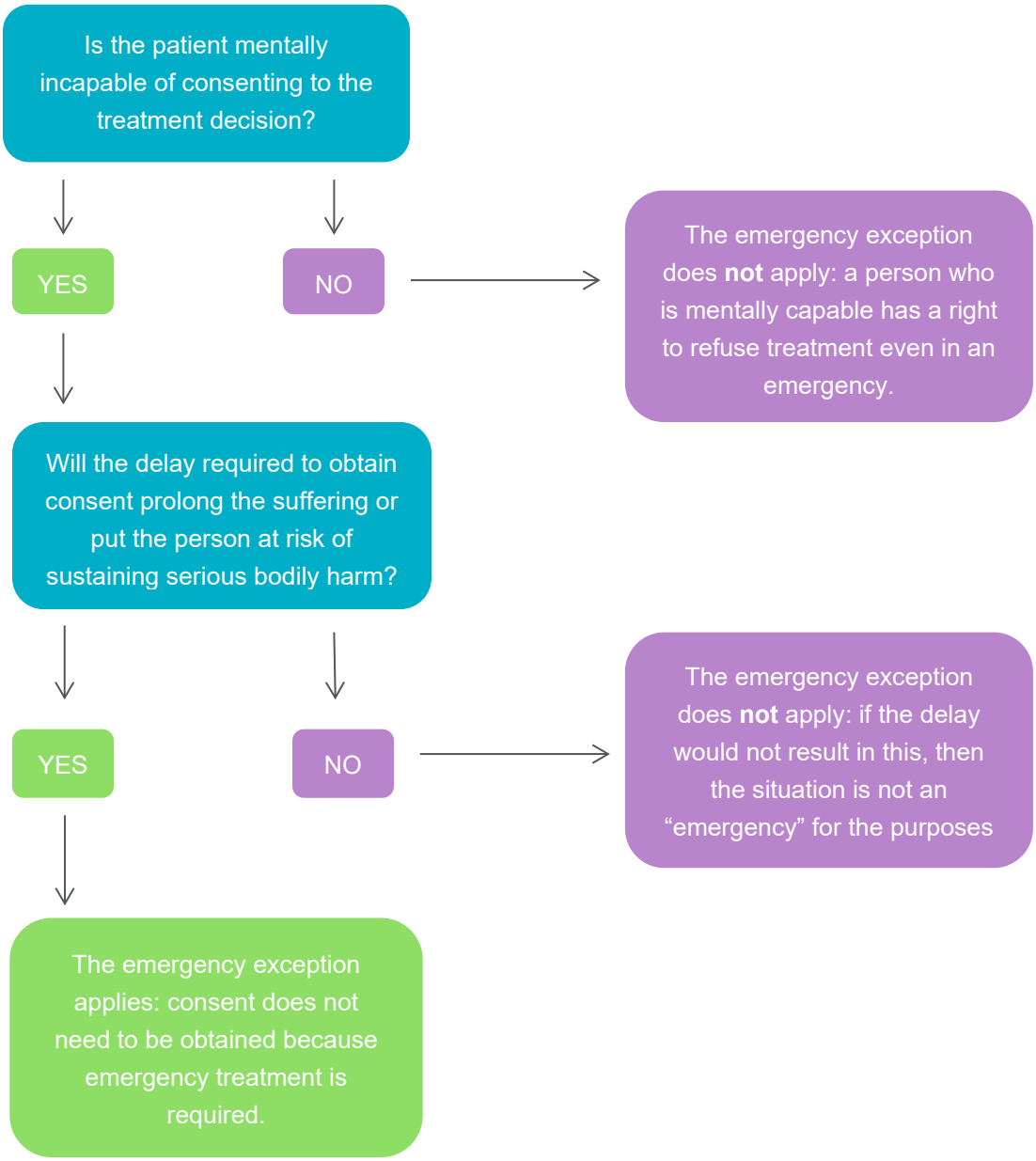
If the health practitioner proposing the treatment believes that the patient is capable with respect to the treatment, then the patient is the person from whom the consent should be obtained. However, if the health practitioner proposing the treatment believes the patient is incapable with respect to the treatment, then consent must be obtained from a substitute decision-maker. The HCCA provides the following hierarchy of substitute decision-makers, (in order of authority):



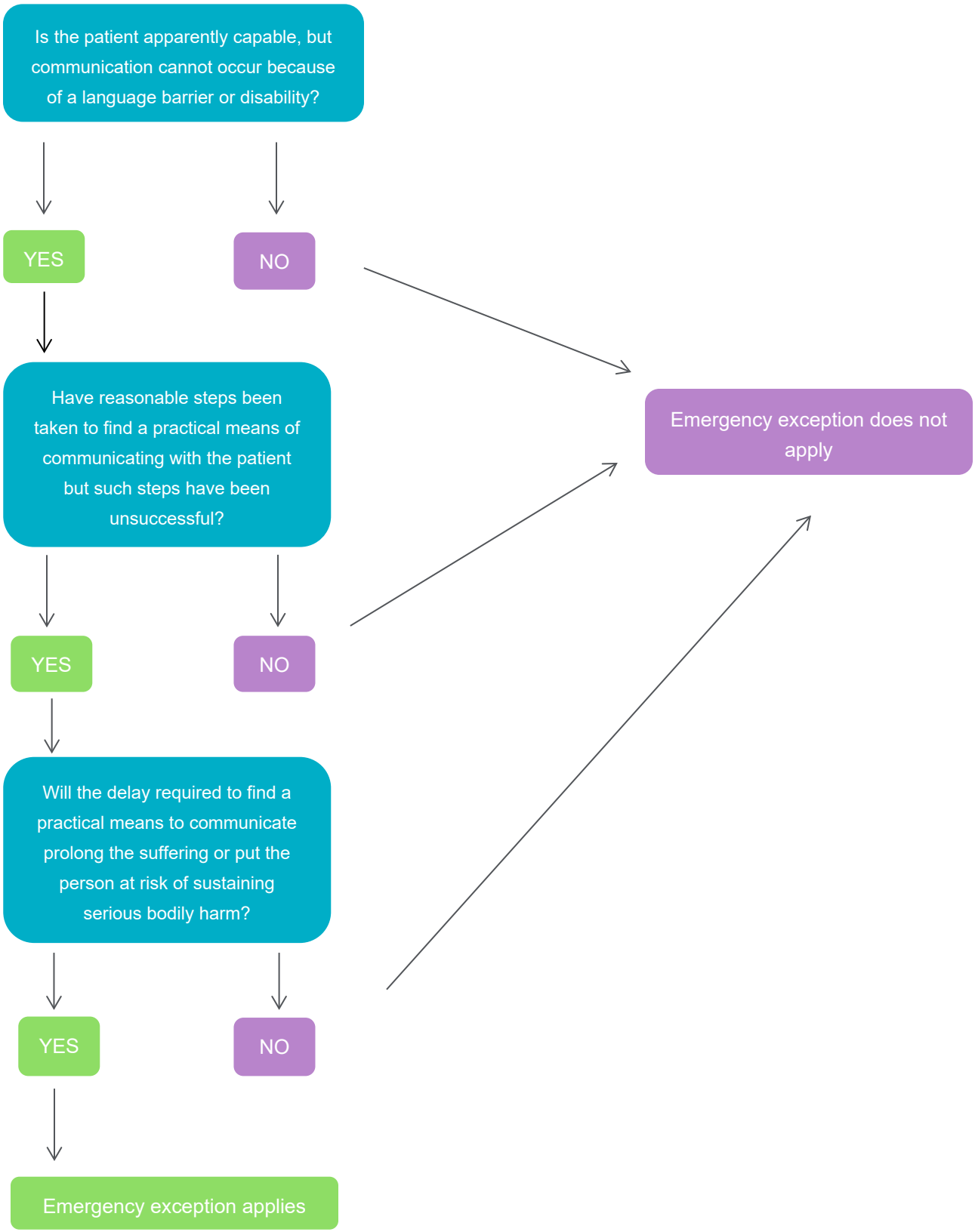
It is important to remember that the substitute decision-maker must be at least 16 years of age (unless a parent of a patient), capable with respect to consenting to the treatment, available, willing to assume the responsibility for giving or refusing consent, and is not prevented by court order or separation agreement from having access to the patient for giving or refusing consent on the patient's behalf.

Exception in emergency treatment

The HCCA provides an exception to obtain consent when emergency treatment is required. It is considered an emergency if a person is apparently experiencing severe suffering or is at risk of sustaining serious bodily harm. Below is an illustration of the application of the emergency exception:



The exception for emergency treatment also applies in the following circumstance:



In addition, a health practitioner who believes that a person is mentally incapable, or where communication cannot take place after reasonable steps have been taken, may conduct an examination or diagnostic procedure without consent, if the examination or diagnostic procedure is reasonably necessary to **determine whether there is an emergency**.

As noted above, a person who is mentally capable has a **right to refuse treatment** even if there is an emergency. Furthermore, if there is a language barrier, or the person has a disability which prevents communication, treatment cannot be performed without consent, where there is **reason to believe that the person does not want the treatment**.

Capacity and Incapacity under the HCCA

Capacity has been defined above. Capacity is specific to the treatment being performed and may also depend on timing: a person may be considered incapable with respect to treatment at one time and capable at another time. **Nor is there a fixed age at which a person becomes capable of consenting to treatment**.

The HCCA states that a person is **presumed to be capable with respect to consent to treatment**. A health practitioner is entitled to rely on this presumption, unless there are reasonable grounds to believe otherwise. Some of the observations which may give rise to a concern about a person's capacity include:

- the person shows evidence of confused or delusional thinking, or appears unable to make a settled choice about treatment
- the person is experiencing severe pain or acute fear or anxiety
- the person appears to be severely depressed
- the person appears to be impaired by alcohol or drugs.

The following factors on their own should **not** cause the health practitioner to presume that the person is incapable with respect to a treatment:

- the existence of a psychiatric or neurological diagnosis
- the existence of a disability, including speech or hearing impairment
- a refusal of a proposed treatment that is contrary to the advice of the health practitioner or of another person
- a request for an alternative treatment, or
- the person's age.

Steps to obtain consent to treatment

The following are the steps which the health practitioner who is proposing a treatment must follow in order to obtain consent:

- determine the patient's capacity to consent to the proposed treatment
- if the patient is capable of giving consent, the patient makes the decision

- if the health practitioner believes the patient is incapable, they should determine whether the provisions respecting the emergency treatment of an incapable person without consent apply
- if the patient is incapable and the emergency treatment provisions do not apply, the health practitioner must comply with their College's guidelines on the information to be provided to patients who are found incapable of making treatment decisions (See, for example, the CMRITO's guidelines below.)
- if, before treatment begins, the health practitioner is informed that the patient either intends to apply, or has applied to the Consent and Capacity Review Board (the Board)
    - for a review of the finding of incapacity, or
    - for the appointment of a representative to give or refuse consent on their behalf,

  or that another person intends to apply, or has applied to the Board to be appointed representative of the incapable person to give or refuse consent, the health practitioner must ensure that the treatment is not given until certain time periods have elapsed without an application being made to the Board (or until the Board has made a decision which has not been appealed)
- if the health practitioner is not informed that the steps referred to in the paragraph above have been or are intended to be taken before the treatment begins, the health practitioner must identify who the appropriate substitute decision-maker is in accordance with the provisions of the HCCA. The health practitioner then obtains consent to the proposed treatment from the substitute decision-maker.

Protection from liability

If treatment is administered to a person with a consent that a health practitioner believes – on reasonable grounds and in good faith – to be sufficient for the purposes of the HCCA, they are not liable for administering the treatment without consent.

The HCCA also provides protection if a practitioner withholds or withdraws treatment, provided the treatment is withheld or withdrawn in accordance with a plan of treatment for which a valid consent was obtained.

Offences

It is professional misconduct under the Professional Misconduct Regulation made under the MRIT Act for a registrant to do anything to a patient for a therapeutic, preventative, palliative, diagnostic, cosmetic or other health related purpose in a situation in which consent is required by law, without such consent.

For registrants of the CMRITO who propose a treatment – special guidelines with respect to patients found incapable of making treatment decisions

Some registrants of CMRITO – for example, those who operate an x-ray machine in breast screening programs – may **propose** a treatment, because mammograms do not have to be

done on the order of a physician when they are part of a breast screening program. In such cases, there is a special set of guidelines that apply with respect to patients found incapable of making treatment decisions. The HCCA provides certain rights to these individuals. Registrants who are working in the breast screening program should review the special guidelines provided in the CMRITO publication *What you must know about … consent*. This publication is available here.