



## What you must know about...

(On March 29, 1996 the Health Care Consent Act (HCCA) replaced the Consent to Treatment Act when the Advocacy, Consent and Substitute Decisions Statute Law Amendment Act was brought into force. At the same time, the Advocacy Act was repealed and the Substitute Decisions Act was amended. The legislation now governing consent to treatment is the HCCA, not the Consent to Treatment Act. This publication replaces the November 1995 'What you must know about . . .' on the Consent to Treatment Act.)

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### *Introduction*

As a medical radiation technologist (MRT) you are considered a health practitioner for the purposes of the HCCA and need to be familiar with its requirements. This Act applies to most treatments wherever they are provided and to most of the regulated health professions.

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 he or she believes 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.

Explained here are a number of terms used in the HCCA, and in this outline, which have a specific meaning.

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## **Definitions**

### **Capable**

A patient is mentally capable of making a treatment decision if he or she is 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, preventive, 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

### **Guidelines for the MRT**

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 that treatment is obtained. A health practitioner performing a treatment under the order (often the case for MRTs) should be able to rely on the informed consent having been obtained if it is reasonable to do so.

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 a consent or refusal of consent from either the patient, if capable, or the patient's substitute decision-maker if the patient is found to be incapable

MRTs 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 an MRT you still have certain obligations which include the following:

- You should ensure that the physician obtained the patient's consent by determining whether the 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.
- If the patient gives any sign of not knowing or understanding the procedure, then you should not perform it, even if the patient's record indicates that consent has been given. You should refer the patient back to the physician to ensure informed consent is obtained.
- There may be indications that the patient has withdrawn consent to the procedure, or he or she may even resist. Assuming the patient is mentally capable, he or she 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, he or she 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 procedures or 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 his or her mind, or that he or she is not, or was not, capable of giving consent to the proposed treatment

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## **Review of the HCCA**

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 is done for either a diagnostic or therapeutic purpose, and it is unlikely that any of the exceptions apply, it can be assumed the procedures performed by the MRT 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, that is 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 risks of the treatment” or “material side effects of the treatment”, it is likely that they include:

- Those which are probable or likely to occur
- Those which are possible if they carry serious consequences
- Those which a reasonable person in the patient’s specific circumstances would require in order to make a decision to give or refuse consent

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.

The HCCA permits a health practitioner to presume that a consent to treatment also includes consent for variations or adjustments in the treatment, or the continuation of the treatment in a different setting, if 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 his or her 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’)

#### ***Who is authorized to give consent to a 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 describes who can be a substitute decision-maker with respect to the proposed treatment.

#### ***Exception in emergency treatment***

The HCCA provides an exception to the requirement 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.

The exception for emergency treatment applies if:

- The patient is mentally incapable of making the treatment decision
- The delay required to obtain consent will prolong the suffering or put the person at risk of sustaining serious bodily harm

The exception for emergency treatment also applies if:

- The patient is apparently capable, but communication cannot occur because of a language barrier or a disability
- Reasonable steps have been taken to find a practical means of communicating with the patient but such steps have been unsuccessful, and
- The delay required to find a practical means to communicate will prolong the suffering or put the person at risk of sustaining serious bodily harm

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.

A person who is mentally capable has a right to refuse treatment even if it is an emergency. 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. Mental capacity is specific to the treatment being performed. Mental capacity 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 mentally capable of consenting to treatment.

The HCCA states that a person is presumed to be capable with respect 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 the 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 a 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

***Providing consent when the patient is incapable***

The HCCA provides the following hierarchy of substitute decision-makers (in order of authority):

- A guardian of the person who has been appointed by the court under the Substitute Decisions Act 1992 if the guardian has authority to give or refuse consent to the treatment
- An attorney for personal care under a power of attorney that confers the authority to give or refuse consent to the treatment
- A representative appointed by the Consent and Capacity Board (the "Board")
- A spouse or partner of the patient
- A child (at least 16 years of age) of the patient, parent of the patient, or a Children's Aid Society or some other person who is entitled to give or refuse consent to the treatment instead of the parent. (Parents who only have a right of access are not included in this level of the hierarchy. Parents are also not included in this level of hierarchy where a Children's Aid Society or other person



is lawfully entitled to give or refuse consent to treatment instead of the parents)

- A parent of the patient who only has a right of access
- A brother or sister of the patient
- Any other relative of the patient or
- The Public Guardian and Trustee

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.

#### ***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, he or she should determine whether the provisions respecting the emergency treatment of an incapable person without consent applies.
- If the patient is incapable and the emergency treatment provisions do not apply, the health practitioner must comply with his or her College's guidelines on the information to be provided to patients who are found incapable of making treatment decisions (See, for example, the CMRTO's guidelines below.)
- If, before treatment begins, the health practitioner is informed that the patient either intends to, or has, applied to the Board:
  - For a review of the finding of incapacity, or
  - For the appointment of a representative to give or refuse consent on his or her behalf,

or that another person intends to, 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, he or she is 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 Medical Radiation Technology Act for an MRT to do anything to a patient for a therapeutic, preventative, palliative, diagnostic, cosmetic or other health-related purpose in a situation in which a consent is required by law, without such a consent.

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#### ***For MRTs who propose a treatment - special guidelines with respect to patients found incapable of making treatment decisions***

Some MRTs - 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. If that is the case, there are a special set of guidelines that apply with respect to patients found incapable of making treatment decisions. The HCCA provides certain rights to these patients.

These rights include an entitlement to:

- Apply to the Board for a review of the finding of incapacity
- Request that the Board appoint a representative to give or refuse consent on his or her behalf

The HCCA does not, however, have any specific requirements for advising incapable persons that:

- They have been found incapable
- They have the option of applying to the Board for a review of the finding of incapacity, or
- They may request a representative be appointed to make decisions on their behalf.

It does require that a health practitioner shall, in the circumstances and manner specified in guidelines established by his or her College, provide information to the person found incapable about the consequences of the findings. The CMRTO's guidelines are set out below.

#### ***Special Guidelines for MRTs Who Propose a Treatment***

These guidelines have been developed to assist MRTs with discussions with patients found by you to be incapable. The guidelines apply unless the emergency provisions of the Act are applicable.

1. If the MRT proposing a treatment determines that the patient is incapable of making the decision and the MRT believes that the patient is able to understand the information, the MRT informs the patient that a substitute decision-maker will be asked to make the final decision. This is communicated in a way that takes into account the particular circumstances of the patient's condition and the MRT-patient relationship.
2. If there is an indication that the patient disagrees with this information, and, if it relates to the finding of incapacity or to the choice of substitute decision-maker, the MRT informs the patient of his or her options to apply to the Consent and Capacity Board for a review of the finding of incapacity, and/or for the appointment of a representative of the patient's choice.
3. If the patient expresses a desire to exercise these options, the MRT is expected to provide assistance.
4. If there is an indication that the patient disagrees with the finding of incapacity when the finding was made by another health care practitioner, the MRT explores and clarifies the nature of the patient's disagreement. If it relates to the finding of incapacity or to the choice of substitute decision-maker, the MRT informs the health care practitioner who made the finding of incapacity and discusses appropriate follow-up with such health care practitioner.

5. The MRT uses professional judgment to determine whether the patient is able to understand the information. For example, a young child or a patient suffering advanced dementia is not likely to understand the information. It would not be reasonable in these circumstances for the MRT to inform the patient that a substitute decision maker is going to be asked to make a decision on his or her behalf.
6. The MRT uses professional judgment to determine the scope of assistance to provide to the patient in exercising his or her options. The MRT documents her or his actions, according to departmental policy.

***Important Note***

This publication is not intended to be a comprehensive review of the Health Care Consent Act. It is also not intended to provide legal advice. The HCCA may be amended in the future. You should not act on information in the publication without referring to the specific provisions of the HCCA in force at the time, and without seeking specific advice from an appropriate person on the particular matters which are of concern to you.



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