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Coffee Talk
Health Industry Seminar Series

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Institutional Obligations to Mental Health Patients and Staff

Kathryn Frelick
kfrelick@millerthomson.com
416.595.2979

Lauren Parrish
lparrish@millerthomson.com
416.595.2638

Overview

1. Sources of Mental Health Law
2. Common Challenges
3. Special Challenges for Schedule 1 Designated Psychiatric Facilities
4. Special Challenges for Non-Schedule 1 Facilities
5. Overview of Strategies to Manage Legal Obligations

1. Sources of Mental Health Law

- *Mental Health Act*
- *Canadian Charter of Rights and Freedoms*
- Part XX.1 of the *Criminal Code*
- Human Rights Code
- *Occupational Health and Safety Act*
- *Public Hospitals Act*
- *Health Care Consent Act*
- *Substitute Decisions Act*
- *Personal Health Information Protection Act*
- *Patient Restraints Minimization Act*
- Common Law (case law, inquests, etc.)

Also, interaction with:

- *Local Health System Integration Act*
- *Ambulance Act*
- *Police Services Act*
- *FIPPA*
- *MFIPPA*

Know the authority under which the individual is being treated.

The rights and responsibilities flow from this.

1a. The *Mental Health Act*

- Applies to every psychiatric facility
  - facility for the observation, care and treatment of persons suffering from mental disorder and designated as such by the Minister
- Designated Schedule 1 psychiatric facilities must provide the following essential services (unless exempted):
  - Inpatient, outpatient, day care, emergency and consultative and educational services

1a. The *Mental Health Act*

- Governs "patients" being treated in a designated psychiatric facility (Schedule 1 Facility)
- "Mental disorder" is defined broadly to include "any disease or disability of the mind"
- Statutory obligations/roles set out for "officer in charge" and "attending physician"

1a. The *Mental Health Act*

- Extensive and complex legislation that governs things like:
  - Involuntary detention
  - Use of restraints
  - Searching Patients
- Remedial in nature and should serve as a vehicle for the protection, rehabilitation and emancipation of mentally ill persons

Assessment and Admission to Hospital under MHA

- May be voluntary, informal, or involuntary
- May occur by police apprehension
- May occur by Court order
- Status may change during course of admission

1b. The *Charter of Rights and Freedoms*

Does the *Charter* apply?

- *Charter* applies to government and government agencies
- *Charter* MAY apply to private entities where carrying out a statutory authority or government program/policy.

→ ie. *Mental Health Act* and involuntary detention

Relevant Charter Provisions in Mental Health Context

Section 2(b) – freedom of expression

Section 7 – the right to life, liberty, and security of the person

Section 8 – protection against unreasonable search and seizure

Section 9 – protection against arbitrary detainment

Section 10 – rights upon detention

Section 15(1) – equality under the law

Reasonable Limits to Charter Rights

Section 1 of the *Charter* expressly recognizes that, in a free and democratic society there may be circumstances when the government or institution is justified in violating individual rights.

In order to be justified under section 1, the limit on the right or freedom must be:

Step 1: “prescribed by law”; and

Step 2: If prescribed by law, the limit must be demonstrably justified in a democratic society

1c. The *Criminal Code*

Part XX.1 of the *Criminal Code* governs the assessment, detention and release of persons who have been found unfit to stand trial or not criminally responsible by reason of a mental disorder (NCR). → Referred to as the “Forensic System” or “Forensic Mental Health System”

Individual can be detained in a designated hospital:

1. Where the accused is found unfit to stand trial; or
2. Where the accused is found not criminally responsible by way of mental disorder.

1d. Human Rights Code

Section 1 of the Ontario *Human Rights Code* outlines the right to be free from discrimination

1 Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, martial status, family status or **disability**.

Ontario Human Rights Commission has a comprehensive policy on preventing discrimination based on mental health disabilities and addictions – area of focus

Duty to Accommodate Mental Health Disability

The duty to accommodate arises from a finding of prima facie discrimination.

Prima facie discrimination has taken place when there is:

1. Differential treatment;
2. Based on an enumerated ground.

When has the duty to accommodate been met?

The person responsible for accommodation must show that the standard, factor, requirement, or rule causing discrimination:

1. Was adopted for a purpose or goal rationally connected to the function being performed;
2. Was adopted in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and
3. Is reasonably necessary to accomplish its purpose or goal, in the sense that it is impossible to accommodate the claimant without undue hardship.

UNLESS, accommodation would result in **undue hardship** to the institution based on:

1. Cost;
2. Outside sources of funding, if any; and
3. Health and safety requirements, if any.

1e. The *Occupational Health and Safety Act*

Imposes a number of duties on employers to ensure the safety of their employees.

- Employer **must** “take every precaution reasonable in the circumstances for the protection of a worker”.
- Employer **must** prepare written policies with respect to workplace violence and harassment and must review the policies annually
- Employer **must** develop and maintain a program to implement the policies on violence and harassment
- Employer **must** assess the risks of workplace violence that “may arise from the nature of the workplace, the type of work or the conditions of work”

2. Common Challenges for all Facilities

- Need to balance:
  - Obligations to patients
  - Obligations to staff
  - Obligations to public
- There may be conflicting obligations under different law
- **Risk analysis** → Weigh competing factors before arriving at a decision
- **Document** → Document the analysis so that you can demonstrate that exercised your due diligence

Ensuring Staff Safety

- ***Ontario (Ministry of Labour) v. Royal Ottawa Health Care Group***, 2016 ONCJ 456
- Structure of the workplace violence program and Code White Policy is crucial
- In this case, nursing staff were assaulted by a psychiatric patient.
- Court has held that Hospital had discharged its duty under OHSA to ensure staff safety

> "The Court finds that the Royal Ottawa had developed and maintained a workplace violence program and it did include a measure or procedure for summonsing help and, as such, that count will be dismissed."

3. Special Challenges for Psychiatric Facilities

- Have the power to **lawfully detain** persons who have been found by a physician to meet certain prescribed criteria

- Challenge → demonstrate compliance with statutory process and timeframes

- Requires appropriate policies and processes, delegation, checks & balances

Procedural / Statutory Compliance - MHA

Process to be followed for involuntary detention:

- Form 1 → Physician Application for psychiatric assessment (MHA, s. 15)
- Form 2 → JP Order for Psychiatric Admission (MHA, s. 16)
- Police Apprehension (MHA, s. 17)
- Form 3 → “A Certificate of Involuntary Admission” (additional 2 weeks)
- Form 4 → “Certificate of Renewal” (1 additional month)
  - Form 4 #2 → (2 additional months)
  - Form 4 #3 → (3 additional months)

Involuntary Patient Rights

Upon completion of a Form 3 or Form 4, the Patient must promptly be provided with a written notice containing:

(a) the reasons for the detention;

(b) the fact that the patient is entitled to a hearing before the Consent and Capacity Board (CCB);

(c) the fact that the patient has the right to retain and instruct counsel without delay; and

(d) For long-term detainees, the fact that the patient has the right to request that the CCB make one or more orders. (MHA, s. 41.1)

Additional Involuntary Patient Rights

- “Prompt” access to rights advisor
- Right to challenge initial detention, and any subsequent renewal, before the CCB (s. 39(1))
- Deemed application for CCB review after every fourth certificate of renewal (s. 39(4))

→ What happens if requirements are not complied with?

Involuntary Detention under the Criminal Code

Court or ORB can order:

- Assessment Order (s. 672.11)
  - Patient consent required for treatment
- Detention Order (s. 672.64)
  - Patient consent required for treatment
- Treatment Order (s. 672.58)
  - Treatment cannot exceed 60 days – no patient consent needed
  - Treatment cannot include psychosurgery or ECT
  - Must seek consent of person in charge of treating facility

Delegated Authority – Criminal Code

- Where ORB orders involuntary detention, it may delegate authority to increase and decrease restrictions on liberty to the person in charge of the Hospital

- Any person who increases restriction on patient liberty “**significantly**” must make a record and must provide notice to the ORB “as soon as practicable” and no later than 7 days after restrictions come into effect

- When ORB receives notice, a hearing must be held “as soon as practicable” and no later than 30 days after receiving notice

When is Notice to ORB required?

- *Campbell (Re),* 2018 ONCA 140
- Not all increases in restriction on liberty require notice to ORB, only **significant** increases
- What amounts to "significant" increase in restriction on patient liberty, triggering notice to ORB?
  - Depends on the facts of the case → "liberty norm" test
  - Balance is required between liberty interest of vulnerable people and unnecessary hearings that interfere with fundamental work of institutions.
- If Hospital fails to give notice, it may expose itself to a Charter challenge

Lack of Available Beds

- *CAMH v Ontario*, 2014 SCC 60
- Where a treatment order is made, Hospital can refuse to consent to accept patient if there is not an available bed
- In exceedingly rare circumstances, refusing consent and delaying admission of a patient may violate s. 7 Charter rights of the patient

Monitoring Patient Internet Access

- *Re Everingham*, 2014 ONCA 743
- Monitoring internet access is reasonable in some circumstances – fact specific
- If there are concerns about a patient accessing the internet, they should be diligently charted in order to defend the decision to monitor internet access

4. Special Challenges for Non-Schedule 1 Facilities

- No authority to detain persons under MHA
- However, may need to admit and/or treat the individual, pending transfer to Schedule 1 facility

Use of Restraints

- Non-Schedule 1 Facilities have no authority to detain
- Must balance duty to ensure safety of all clients with respect for individual rights
- *Patient Restraint Minimization Act* (PRMA) permits use of restraint with consent where part of a plan of treatment
- HCCA and PRMA uphold common law in relation to use of restraint without consent
- Can confine, restrain where, “immediate action is necessary to prevent serious bodily harm to the person or others”
- Determination requires clinical judgment

Searching Patients

- Cannot search patient's body or things without consent, however, obligation to ensure safety
- Options:
  - Ask patient to turn items over
  - Get consent for search
  - Refuse admission / discharge (if feasible)
  - Call police

Transfer to a Psychiatric Facility

- MHA requires that person subject to a Form 1 be apprehended and taken to psychiatric facility “forthwith”
- Forthwith = as soon as reasonably possible
- However, can’t always transfer patient “forthwith”
- Physician who completed the Form 1 should make a clinical assessment as to how the individual can be safely transferred given his or her physical and mental condition.
- If there is a delay in transporting the patient, a further clinical assessment may be appropriate prior to transfer

7. How Can Your Institution Comply With its Legislative Obligations?

1. Know the authority under which the individual is being treated – rights and responsibilities flow from this
2. Consider what legislation might be applicable and undertake a risk analysis
3. Identify where there are conflicting or competing obligations
4. Document your risk analysis/rationale
5. Create a policy or process to support this process

→ **Often there is no one right course of action. The key is to have a documented process to show that institution was aware of and considered all of its obligations, and to explain *why* a specific action was taken.**

Questions?

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kfrelick@millerthomson.com

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lparrish@millerthomson.com

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