



# **Consent and Capacity in Ontario: How Far Have We Come?**

---

***Canadian Conference on Elder Law 2010***  
**October 30, 2010**

***Mary Jane Dykeman, Partner***  
***Dykeman Dewhirst O'Brien LLP***





# Historical backdrop

---

- Older adults
  - Originally had tremendous status as society's revered elders
  - That status has been significantly eroded
  - Families tend to be more widely dispersed and may provide less ongoing support
  - Some will take advantage (at best) or abuse (at worst)

# Intervening v. not

- A sad prevalence of elder abuse (neglect, and/or physical, financial, sexual and emotional abuse) has reinforced the need to ensure that
  - Criminal activity is recognized as such
  - Robust rights protection framework is actually working and strikes the appropriate balance between needed protections and respect for the autonomy of older adults – subject of ongoing debate
  - Access to good legal information and legal advice is available, as necessary, without barriers



# Three steps forward.....

---

- The *Substitute Decisions Act* (SDA) was enacted on April 3, 1995, replacing the more archaic *Mental Incompetency Act* to create Ontario's new guardianship regime
- The *Consent to Treatment Act* was enacted at the same time and was based on Ontario's *Mental Health Act*
  - Created a scheme to govern consent, capacity and substitute decision-making
- The *Advocacy Act* was enacted to enshrine advocacy and rights advice services

# At least one step back.....

---

- Despite the hard work of the Fram Commission in the mid-'80s that culminated in this trilogy of legislative reform, a subsequent government immediately took steps to repeal the *Advocacy Act*
  - Patient advocates still limited today to serving clients of the 10 former government-run psychiatric hospitals
  - Rights advice is provided by trained rights advisers only upon certain changes of legal status, while in other circumstances rights information is provided

# But a step forward as well?

---

- *Substitute Decisions Act* left intact, with strong presence of Office of the Public Guardian and Trustee
- Government also repealed the *Consent to Treatment Act* but replaced it with the *Health Care Consent Act* (HCCA)
  - HCCA expanded what was in CTA to cover admission to a care facility (i.e., long-term care home)



# Long-Term Care Homes Act

---

- As discussed already in other settings, even the most ambitious law reform initiative may not immediately counter entrenched practices
- LTC homes, families and residents may have some common needs and concerns, but each is subject to other pressures

# Competing perspectives remain on the road to law reform

---

- ❑ First available bed policies
- ❑ Advanced planning directives
- ❑ Conflicts in end of life decision-making (e.g., recent case reported in the media of SDM and clinical team in conflict)
- ❑ Long-term care homes remain concerned about legal requirement to keep residents safe (sometimes at expense of the resident's rightful assumption of risk)
- ❑ LTCHA creates new rules with respect to resident's admission to a locked unit



---

# Questions?

Mary Jane Dykeman

Tel: (416) 967-7100, ext. 225

[mjd@ddohealthlaw.com](mailto:mjd@ddohealthlaw.com)

