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# INFORMATION GUIDE ON MEDICAL LAW AND MENTAL HEALTH

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This information guide gives legal information regarding consent to treatment, access to medical files and forced hospitalization for people representing a danger for themselves or for others.

It was prepared for Mental Health Estrie by students at the Faculty of Law at University of Sherbrooke in collaboration with Pro Bono Students Canada and under the supervision of Professor Robert P. Kouri.

Please note that Pro Bono Students Canada at the Faculty of Law at University of Sherbrooke cannot provide legal advice. This document only presents a general outline of certain legal issues. Therefore, please consult a lawyer for legal advice.

Masculine pronouns are used generically in this document.

## **Consent to treatment**

Having someone close to us with a mental-health disorder is a challenge for everyone because we want to ensure the best care possible for that person. Unfortunately, it doesn't mean that the person who we are trying to help will accept any care given to him. As a grand rule, the person has to give his consent when receiving medical care. On the other hand, some exceptions may apply.

Under the Civil Code of Quebec, *every person is inviolable and is entitled to the integrity of his person*<sup>1</sup>. *Except in cases provided for by law, no one may interfere with his person without his free and enlightened consent*. Every patient has the right to refuse or to accept medical care. Consequently, every medical professional has to make sure the patient accepts before undergoing any procedure<sup>2</sup> and they must verify the capacity of refusing or to consent every time a treatment is proposed. Subject to certain exceptions, only the person concerned can make decisions concerning his well-being and their decisions must be respected<sup>3</sup>. Different rules may apply in cases of emergencies and for children under the age of 14, children aged 14 to 17 and in the cases of adults who can't make their own medical decisions.

There is no specific definition of *care*. Care includes *examinations, specimen taking, the removal of tissue, treatment or any other act*<sup>4</sup>, whether psychological, psychosocial or physical. It can include feeding, placement in an institution, etc.<sup>5</sup>. For a valid consent to care, an oral consent is generally accepted even though it must be provided in writing some case. The patient must have agreed without any pressure or threats, which means of their free will and it must be informed: they must have all the information regarding the treatment before making a decision. No important facts can be excluded. After receiving all the information, they can decide whether to receive or refuse a treatment, even if refusing a treatment may lead to the patient's death<sup>6</sup>.

Consent to care is necessary, but it is possible to go beyond the consent of the patient when there is an emergency including the patient's life or physical integrity is in danger and when "it is impossible to get permission in time, either from the patient or from someone who is allowed to

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<sup>1</sup> *Civil Code of Quebec*, art. 3,10, *Charter of human rights and freedoms*

<sup>2</sup> *Id.*, art. 10.

<sup>3</sup> Notes de cours Louise Bernier, Droit, Université de Sherbrooke, Session automne 2017.

<sup>4</sup> *Civil Code of Quebec*, CQLR, c. CCQ-1991, art. 11.

<sup>5</sup> *Nancy B. c. Hôtel-Dieu de Québec*, 1992 CanLII 8511.

<sup>6</sup> *Id.*

give permission instead of the patient.<sup>7</sup>” Thus, only necessary medical aid can be provided in case of an emergency. Certain exceptions include “reasons of hygiene, confinement in an institution ordered by the Quebec Court following a psychiatric assessment to determine whether or not the person should be confined in an institution<sup>8</sup>”.

### **Who can give consent to care for a child under 14 years of age?**

A person exercising parental authority, or a tutor can give his consent to care for the minor and it must be in the best interest of the minor under 14 years of age<sup>9</sup>. Also, the treatment must be beneficial, appropriate and without disproportionate risk. The opinion of the minor can be taken into account.

If the person exercising parental authority refuses the treatment based for example on religious beliefs because of other reasons that aren't in the minor's best interests, authorization of the Superior Court may be necessary.

### **Who can give consent to care for a child 14 years of age or over?**

A minor may consent by himself to medical care that is necessary<sup>10</sup> except in the case of an emergency if his life is in danger or his integrity threatened or if his medical status requires that he remain in a health or social services establishment for over 12 hours (in which case the consent of the person having parental authority, or the tutor is required). If the minor refuses non-emergency treatment, an authorization from the Superior Court may be necessary.

### **Consent to care for an adult who cannot give consent**

An adult is incapable of giving his consent for numerous reasons. For example, an illness like dementia could affect the patient's capacity to consent. In some cases, the patient's legal representative such as a mandatary, a tutor or a curator could provide his consent (substitute

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<sup>7</sup> EDUCALOI, *Emergency Medical Decisions*, Online:[<https://www.educaloi.qc.ca/en/capsules/emergency-medical-decisions>], (January 15, 2019).

<sup>8</sup> EDUCALOI, *Emergency Medical Decisions*, Online:[<https://www.educaloi.qc.ca/en/capsules/emergency-medical-decisions>], (January 15, 2019).

<sup>9</sup> *Civil Code of Quebec*, CQLR, c. CCQ-1991, art. 33.

<sup>10</sup> *Id.*, art. 14, 16.

consent) if there is a legal representative. Another kind of substitute consent include the patient's spouse, a close relative or friend. As in the case of a minor, the person giving consent must act in the best interest of the person incapable of giving his consent. The risks taken must not exceed the benefits of the proposed treatment

A person who is incapable of consent can categorically refuse treatment even if the substitute consent is provided. In this case, authorization from the court may be given and it would oblige the patient follow the treatment even if it's against his will.

## **Confinement in an institution**

## ***What is confinement in an institution?***

It is an exceptional measure used in order to protect a person who represents a danger to themselves or to others. This means that persons can be confined in an institution against their will, if authorized by the court, in order to ensure their safety or the safety of others. Therefore, because confinement deprives a person's right to freedom, the legal procedures regarding involuntary placement in an institution must be strictly followed.

The only cases in which confinement is deemed necessary are:

- ❖ When the person refuses or is incapable of giving consent to undergo into psychiatric assessment in order to establish the necessity of ordering confinement
- ❖ When the person refuses to be confined even though a psychiatric evaluation indicates the necessity of ordering confinement

Therefore, if a person consents to undergoing a psychiatric assessment or to being confined following the psychiatric assessment points to the necessity of confinement, the legal rules regarding mandatory confinement do not apply.

## ***What is the procedure regarding confinement in an institution?***

There are 3 types of confinement:

- 1. Preventive confinement**
- 2. Temporary confinement**
- 3. Authorized confinement**

### *1. What is a preventive confinement?*

- ❖ It is a legal measure allowing any physician to put a person representing a **serious and immediate danger** to oneself or others **temporarily** under preventive confinement in a health institution in the absence of consent or against one's will, without having to obtain prior authorization from the court and without having to have a psychiatric assessment performed.
- ❖ In such circumstances, the law permits the use of a peace officer. The latter is authorized to act only at the request of a crisis worker, the person having parental authority, the guardian of a minor or a mandatary, tutor or curator for people of full age incapable. If the person of full age is not so represented, consent is given by his or her married, civil union or de facto spouse or, if the person has no spouse or his or her spouse is prevented from giving consent, it is given by a close relative or a person who shows a special interest in the person of full age.

***What are the criteria for authorities to keep a person in confinement against the individual's will?***

- ❖ **Dangerousness** is the only criteria that authorizes to keep a person in confinement.
- ❖ A mental disorder diagnosis or a treatment refusal do not consist of a proof of dangerousness. Dangerousness needs to be shown, be serious and probable. In other words, it needs to be predictable of a high chance of danger in the short term.

***When does a person represent danger?***

- ❖ Whether or not a diagnosis has been made, danger to oneself or to others caused by a mental state is demonstrated when the person is susceptible to put his or her own health, security or of others in danger.

***What is the duration for this type of confinement?***

- ❖ This type of confinement cannot exceed **72 hours**. After this period, the person must be released, unless a **court** has ordered an **extension** of the confinement for psychiatric assessment. However, if the 72-hour period ends on a Saturday or on a holiday, if no judge having jurisdiction in the matter is able to act and if termination of confinement presents a danger, the confinement may be extended until the expiry of the next working day.

***2. What is a temporary confinement?***

- ❖ When confinement is ordered by **court** to force the person for a **psychiatric assessment**.
- ❖ Most often, a request for temporary confinement is presented in court either by the family, relatives, physicians or any other interested parties. The court must have serious reasons to believe that a person should undergo this kind of evaluation.
- ❖ The first examination must be carried out within **24 hours** after the person is taken in charge by the institution or after the court order.
- ❖ If the physician who carries out the examination concludes that confinement in an institution is necessary, a **second psychiatric** examination must be carried out by **another physician**.
- ❖ As soon as a physician reaches the conclusion that confinement is **not necessary**, the person must be released.
- ❖ If **two physicians** reach the conclusion that confinement is **necessary**, the person may be kept under confinement without his consent or the authorization of the court for **no longer than 48 hours**. In this case, authorization of court is necessary as the person refuses confinement. The report must be filed with the court within **seven days** of the court order.

- ❖ It is on the basis of this confidential report that the court will decide whether confinement is further necessary.

### ***What is a psychiatric assessment?***

A psychiatric assessment is a legal procedure in which the court authorizes the evaluation of one's mental state when that person refuses to be confined in a health institution. The goal of the psychiatric assessment is to determine whether or not that person should be so confined.

### ***What is the content of a psychiatric evaluation?***

The content of a psychiatric evaluation is mentioned in the Civil Code and the *Act respecting the protection of persons whose mental state presents a danger to themselves or to others*. It includes<sup>11</sup>:

- ❖ The necessity of confining the person in an institution if he is a danger to himself or to others because of his mental state
- ❖ The ability of the person who has undergone the examination to care
- ❖ The mention that the examining physician has himself examined the person
- ❖ The date of the examination
- ❖ The examining physician's diagnosis, even if only provisional, concerning the mental state of the person
- ❖ The examining physician's opinion as to the gravity and probable consequences of the person's mental state
- ❖ The reasons and facts upon which the examining physician's opinion and diagnosis are based and among the facts mentioned, those which the examining physician has observed as well as those which have been communicated to him by others

According to the Civil Code, the report must be filed with the court within seven days of the court order. It may not be disclosed, except to the parties, without the authorization of the court<sup>12</sup>.

### ***Who is in charge of conducting the psychiatric evaluation?***

According to the *Act respecting the protection of persons whose mental state presents a danger to themselves or to others*, the person who carries out the examination is<sup>13</sup>:

- ❖ A psychiatrist
- ❖ Any other physician if it is not possible to obtain the services of a psychiatrist in due time

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<sup>11</sup> *Act respecting the protection of persons whose mental state presents a danger to themselves or to others*, CQLR, c. P-38.001, art. 8. ; *Civil Code of Quebec*, CQLR, c. CCQ-1991, art. 3.

<sup>12</sup> *Civil Code of Quebec*, CQLR, c. CCQ-1991, art. 29.

<sup>13</sup> *Act respecting the protection of persons whose mental state presents a danger to themselves or to others*, CQLR, c. P-38.001, art. 8. ; *Civil Code of Quebec*, CQLR, c. CCQ-1991, art. 2.

The person in charge of conducting the psychiatric examination cannot be<sup>14</sup>:

- ❖ The spouse
- ❖ A close relative
- ❖ A relative by marriage or a civil union
- ❖ The representative of the person undergoing the examination or of the person who requested the examination

***What are the elements retained by the administrative court to review the situation of people who have been admitted to confinement?***

- ❖ The absence of self-criticism, combined with the presence of psychotic elements and aggressive behavior, suicidal ideation, regressive behavior, or the inability to control one's impulses.

***3. What is an authorized confinement?***

- ❖ It is a confinement in an institution for a **set period of time** when it is ordered by court after **two psychiatric assessments**. The judge must state his reasons both for the **danger** and the **need for confinement**.
- ❖ The court is not bound by the expertise. The **judge** must ensure based on his or her opinion of the existence and the nature of the dangerousness notwithstanding the two conclusive reports by the health professionals.

***What is the duration and process after an authorized confinement has been ordered by court?***

- ❖ Where the court has set a duration of confinement **exceeding 21 days**, the person under confinement must be examined periodically to ascertain whether **continued confinement** is necessary, and reports of such examinations must be produced at the following times:
  - (1) **21 days** from the date of the decision made by the court
  - (2) every **3 months** thereafter.

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<sup>14</sup> Act respecting the protection of persons whose mental state presents a danger to themselves or to others, CQLR, c. P-38.001, art. 8. ; Civil Code of Quebec, CQLR, c. CCQ-1991, art. 2.

## ***What are the rights of a person placed under confinement?***

### **Right to information:**

When the peace officer, who acts in accordance with a court order, takes a person to an institution for confinement or psychiatric evaluation, he must inform the person on<sup>15</sup>:

- ❖ Where the person is being taken
- ❖ The person's right to contact his close relatives and an attorney immediately
- ❖ If the person has to be placed under temporary confinement, that the person must undergo a psychiatric assessment

As soon as the institution takes charge of the person or as soon as the person seems to understand the information, the institution must inform the person on<sup>16</sup>:

- ❖ Where the person is being confined
- ❖ The reasons for the confinement
- ❖ The person's right to immediately contact his close relatives and an attorney

According to the Civil Code, any person who is confined or receiving care in a social services or health establishment has the right to be informed by the establishment about<sup>17</sup>:

- ❖ The program of care prepared for him
- ❖ Any important change in the program or in his living conditions

In the case where the person is under 14 years old or is incapable of giving his consent, *the information is given to the person who is qualified to give consent to care on his behalf.*

According to the *Act respecting the protection of persons whose mental state presents a danger to themselves or to others*, the institution must immediately inform the person under confinement as soon as the confinement ends.

### **Right to communication:**

The person under confinement may communicate confidentially, orally or in writing, with any person of his choice.

The attending physician can however temporarily prohibit the person from communicating with certain persons or impose restrictions on the person's communications as long as the physician's decision is given to the person in writing and explains the reasons on which the decision is based. The restriction or prohibition must be in the person's interest.

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<sup>15</sup> *Act respecting the protection of persons whose mental state presents a danger to themselves or to others*, CQLR, c. P-38.001, art. 14.

<sup>16</sup> *Act respecting the protection of persons whose mental state presents a danger to themselves or to others*, CQLR, c. P-38.001, art. 15.

<sup>17</sup> *Civil Code of Quebec*, CQLR, c. CCQ-1991, art. 31.

Moreover, the physician cannot prevent the person under confinement from communicating with<sup>18</sup>:

- ❖ His representative
- ❖ The person authorized to give consent to the person's care
- ❖ An attorney
- ❖ The Public Curator
- ❖ The Administrative Tribunal of Québec

**Right to transfer:**

Transfer demanded by the person under confinement<sup>19</sup>:

- A person under confinement can demand to be transferred to another establishment if the organization and resources of that institution enable such a transfer
- The attending physician must attest, through a certificate containing reasons, that the transfer won't cause any serious nor immediate risks for the person or for others

Transfer demanded by the attending physician:

- The attending physician can order a transfer to another institution if he considers that the other institution will be a better suited to the person's needs
- The person under confinement must give his consent, unless the transfer is necessary to ensure the person's safety or the safety of others
- The transfer can only be done if the organization and resources of the new institution enable such a transfer

When the transfer is effected, confinement continues in the new institution and a copy of the record of the person under confinement is given to the new institution.

**Other rights:**

- ❖ In the case where it is so required by law or by a court decision, a person must submit to the psychiatric examinations. However, that person may categorically refuse any other examination, care or treatment
- ❖ If a person under confinement disagrees with a decision made to continue the confinement, or with any other decision made regarding that person, he can appeal his case to the Administrative Tribunal of Quebec<sup>20</sup>

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<sup>18</sup> *Act respecting the protection of persons whose mental state presents a danger to themselves or to others*, CQLR, c. P-38.001, art. 17.

<sup>19</sup> *Act respecting the protection of persons whose mental state presents a danger to themselves or to others*, CQLR, c. P-38.001, art. 11.

<sup>20</sup> *Act respecting the protection of persons whose mental state presents a danger to themselves or to others*, CQLR, c. P-38.001, art. 21.

- ❖ If the person is not able to exercise the recourse himself, a family member, a person showing a special interest in him or a legal representative can exercise it on his behalf

### ***How to appeal to the Administrative Tribunal of Québec?***

1. The person directly concerned, a family member or his tutor must write to the Tribunal
2. The letter must explain the reasons why the person disagrees with the continuance of confinement or the decision regarding him
3. The letter constitutes the person's application to the Tribunal and must be sent within 60 days of the contested decision to one of the following addresses:

Québec area :

Secretariat

Tribunal administratif du Québec

575, rue Saint-Amable Québec (Québec) G1R 5R4

Telephone: 418 643-3418

Montréal area :

Secretariat

Tribunal administratif du Québec

500, boulevard René-Lévesque Ouest, 21e étage Montréal (Québec) H2Z 1W7

Telephone: 514 873-7154

Elsewhere in Québec :

Telephone (toll free): 1 800 567-0278

### ***When does confinement end?***

According to the *Act respecting the protection of persons whose mental state presents a danger to themselves or to others*, confinement ends in these cases<sup>21</sup>:

- ❖ As soon as the attending physician delivers a certificate attesting that confinement is no longer justified
- ❖ On the expiry of the time determined in the judgment ordering confinement
- ❖ Upon a decision to that effect by the Administrative Tribunal of Québec or a court of justice
- ❖ On the expiry of the 21-day delay for the production of the psychiatric examination report, after the court decision and at least once every three months thereafter

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<sup>21</sup> *Act respecting the protection of persons whose mental state presents a danger to themselves or to others*, CQLR, c. P-38.001, art. 12.

## **Access to medical files**

### *Who has access to medical files?*

- ❖ The record of a user is **confidential**, and no person may have access to it except with the consent of the **user** or the **person qualified** to give consent on his behalf. Information contained in a user's record may, however, be communicated without the user's consent in some cases, such as from an order of a court.
- ❖ According to the The Canadian Medical Association (CMA), medical records are regarded as confidential documents, owned by the physician, the institution or the clinic that compiled them. Patients have a right to information contained in their records but not to the physical documents themselves.
- ❖ When conveying information contained in a medical record to a patient, discretion and interpretation must be used by the health care professional. At all times, the physician must consider the patient's **well-being**.
- ❖ In the case of disclosures of information contained in medical records to **third parties**, for instance, physician-to-physician transfer, lawyer, insurance adjuster, a **written patient consent** or a **court order** is required.

### *At what age can a person have access to his or her own medical file?*

- ❖ **Every user 14 years of age or over** has right of access to his record. However, the institution may deny access to it temporarily if, on the advice of the attending physician or the physician designated by the executive director of the institution, communication of the record or any part thereof would likely be seriously prejudicial to the user's health. In that case, the institution, on the recommendation of the physician, shall determine the time at which the record or the part thereof to which access has been denied can be communicated to the user, and notify him thereof.
- ❖ The holder of **parental authority** is entitled to have access to the record of a user who is a **minor**.
- ❖ However, an institution shall **refuse** to give the holder of parental authority access to the record of a user **under 14 years** of age where the user has been the subject of an intervention within the meaning of section 2.3 of the Youth Protection Act (chapter P-34.1) or where a decision concerning the individual has been made under that Act, and the institution, after consulting the director of youth protection, determines that communication of the user's record to the holder of parental authority will or could be **prejudicial to the user's health**.
- ❖ An institution shall also refuse to give the holder of parental authority access to the record of a user who is **14 years of age or over** where, after being consulted by the institution, the user **refuses** to allow his record to be communicated to the holder of parental authority and the institution determines that communication of the user's record to the holder of parental authority will or could be **prejudicial to the user's health**.

*In what special circumstance would allow information to be communicated without a person's consent?*

- ❖ Information contained in the record of a user may be communicated, in order to **prevent** an act of **violence**, including a suicide, where there is reasonable cause to believe that there is a **serious risk of death or serious bodily injury** threatening the user, another person or an identifiable group of persons and where the nature of the threat generates a sense of urgency.
- ❖ The terms “serious bodily injury” mean any **physical or psychological** injury that is significantly detrimental to the physical integrity or the health or well-being of a person or an identifiable group of persons.
- ❖ The information may in such case be communicated to **any person exposed to the danger** or that **person's representative**, and to any person who can come to that **person's aid**. The information may only be communicated by a person or a person belonging to a class of persons **authorized** by the director of professional services or, failing such a director, by the executive director of the institution.