OANHSS

LTCHA Implementation
MEMBER SUPPORT PROJECT

CONSENT TO TREATMENT PACKAGE

Release Date: December 21, 2010

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TEMPLATE FORM - CONSENT TO TREATMENT: OVERVIEW

About the Template

Most, if not all, OANHSS members use written forms to record consent of a resident or a substitute decision maker (SDM) to treatment. The *Long-Term Care Home Act*, *2007* (LTCHA) and its regulation set out requirements relating to such forms. OANHSS is releasing this template consent form to assist members in meeting these requirements.

Any document that includes a consent or directive with respect to treatment is a "regulated document" under the LTCHA. These documents must comply with requirements in the regulation, and a lawyer must certify this compliance. OANHSS members may treat the template form as certified, provided they meet the conditions of certification. *These conditions are set out in paragraph L of the explanatory notes*. Otherwise, homes may use the template as a starting point to design their own forms, and make their own arrangements for certification. The template can also supplement a home's existing checklist relating to consent to treatment. Finally, homes may provide the form and explanatory notes to external, third-party practitioners providing treatment in the home, as part of the home's measures to ensure that the use of consent forms in the home complies with the LTCHA.

Review of Consent Principles

The template reflects the basic principles and rules that relate to obtaining consent. A brief review of these principles and rules is set out below.

Consent and Capacity

Obtaining consent to treatment is a process. Consent is not a signature on a form. Consent is a discussion between a health practitioner and a resident or SDM about a proposed treatment. Signed consent forms are merely evidence that this discussion took place on a given date. A form does not replace the consent process. A signed form does provide some protection, as it may help to establish that there was a discussion about consent, and help verify that the discussion met the rules for informed consent in the *Health Care Consent Act* (HCCA).

A resident or SDM may give verbal consent, or he or she may give consent in writing. A health practitioner can also imply consent of the resident or SDM from the circumstances. Written consent forms are not mandatory in long-term care homes. Other means of making a record of the consent process include handwritten or electronic notes, and the use of consent checklists.

Under the HCCA, health practitioners must obtain informed consent from the resident or his or her SDM before providing treatment to a resident. In the HCCA, "health practitioner" refers to a member of a health professions college.

The resident must have the capacity to consent to the treatment. Unless there are reasonable grounds to believe otherwise, a practitioner may assume that the resident has the capacity to make a decision about consent. The resident is capable if he or she is able to understand information that is relevant to making a decision about the treatment. The resident must also be able to appreciate the reasonably foreseeable consequences of a decision or lack of decision. A resident may be incapable with respect to some treatments, but capable for others. A resident may also be incapable with respect to a treatment at one time, but capable at a later time. The resident has the right to ask the Consent and Capacity Board (CCB) to review a finding that he or she is incapable to give consent.

If the resident is incapable, a SDM makes the decision about treatment. Section 20 of the HCCA sets out the hierarchy of SDMs. (Paragraph A of the explanatory notes sets out the list of SDMs in order of priority.)

Valid and Informed Consent

Consent must be informed and relate to the proposed treatment. The consent decision must be voluntary, without coercion or pressure. A health practitioner must not obtain consent through fraud or misrepresentation (he or she must provide accurate and unbiased information).

Consent is "informed" if the resident or SDM receives information about the treatment that a reasonable person in the same circumstances would need to make a decision. This information must include the following:

1. The nature of the treatment,
2. The expected benefits of the treatment,
3. The material risks and side effects of the treatment,
4. Alternative courses of action, and
5. The likely consequences of not having treatment.

The resident or SDM must also receive responses to any requests for more information about the treatment.

Definition of Treatment

The HCCA defines "treatment" broadly. Treatment includes anything done for a therapeutic, diagnostic, cosmetic or other health-related purpose. The HCCA excludes certain actions from the definition of treatment, and these include the taking of a person's health history, treatments that pose little or no risk of harm and personal assistance services (hygiene, grooming, etc.).

The definition of treatment includes a "course of treatment," which is a series of similar treatments over time for a particular health problem. It also includes a "plan of treatment," which deals with health problems that a person has, and may also deal with health problems the person is likely to have in the future given his or her current health condition. A plan of treatment provides for various treatments or courses of treatment, and may provide for the withholding of

treatment in light of the person's current health condition. A plan of treatment is not a plan of care under the LTCHA. A plan of treatment is part of the plan of care, which must contain other content specified in the LTCHA.

Note that a plan of treatment must relate to a current health condition. The plan must not be too broad. A resident cannot provide informed consent to a plan of treatment in a general or abstract sense. A resident cannot consent to a plan if the plan does not relate to his or her current health condition or to a treatment that a practitioner has not proposed to the resident.

One or more health practitioners may develop a plan of treatment. A practitioner may propose the plan and obtain consent or refusal from a resident on behalf of all practitioners involved in the plan. Where it is reasonable to do so, a practitioner may presume that consent includes minor changes to a treatment or plan of treatment, as long as the nature, benefits, material risks and side effects of the changed treatment do not significantly differ from those of the original treatment.

Written Consent Forms and the LTCHA Requirements

Any document containing a consent or directive for "treatment" (as defined by the HCCA) is a regulated document under the LTCHA. The result is that consent forms must meet certain requirements in the regulations. A lawyer must certify this compliance.

The requirements for a consent form are in section 227 of the regulation. A consent form must:

1. Meet the requirements of the HCCA,
2. Not contain any content relating to resident charges,
3. Contain a statement that the resident or SDM may withdraw or revoke consent at any time, and
4. Set out the text of section 83 of the LTCHA, which requires homes to ensure that a person does not coerce a resident into signing a consent form by threat of discharge or refusal of admission.

These requirements will come into effect on January 1, 2011.

Note that section 80 of the LTCHA prohibits any person (not just the staff of the home) from presenting a consent form for signature to a resident or SDM, unless the form meets the requirements for regulated documents. This may create a challenge with respect to third parties who provide treatment to residents, but who are independent of the home. A home should take steps to ensure that these third parties are aware of and comply with the requirements for regulated documents, if they plan to ask the resident or SDM to sign a document that contains a consent with respect to treatment.

This Package is not OANHSS Legal or Professional Advice

As part of the LTCHA Implementation Member Support Project, OANHSS requested external legal counsel to prepare the overview, templates and notes in consultation with OANHSS members and

staff. Although homes may use the templates as a basis for their consent forms, this package is not legal or professional advice from OANHSS, and members should not construe it as such. Members seeking advice about the consent process should consult qualified legal counsel.

OANHSS Member Support Project

This template is part of a series of products that OANHSS is developing through its LTCHA Implementation Member Support Project. Members can find out more about the Project's delivery dates and scheduled teleconference meetings for members through the weekly OANHSS Executive Report. If members have questions or suggestions about the Project and the products in development, they can email Sue Lantz (slantz@oanhss.org) or Margaret Ringland (mringland@oanhss.org).

CONSENT TO TREATMENT TEMPLATE

Record of Consent to Treatment Discussion

Resident:

_____

If the resident is incapable,
Substitute Decision Maker (SDM):

_____

Health Practitioner recording consent:

_____

Date of consent discussion:

_____

* * *

This form is a summary record of a discussion between a health practitioner and a resident or SDM about consent to proposed treatment in a long-term care home. The health practitioner will fill out this form while he or she discusses the treatment with the resident or SDM, or immediately after. The resident or SDM must receive a copy of the completed consent form and will have the opportunity to ask questions during the consent process.

Consent must be informed and relate to the proposed treatment. The consent decision must be voluntary, without coercion or pressure. A health practitioner must not obtain consent through fraud or misrepresentation (he or she must provide accurate and unbiased information).

1. Name and Description of Treatment

[Insert a simple, general and succinct description of the proposed treatment, or provide space (e.g. lines or box) for the practitioner to make handwritten notes on the form to provide this description.]

2. Capacity with Respect to Treatment

The practitioner determined that the resident is able to understand the information that is relevant to making a decision about the treatment, and appreciates the consequences of a decision or lack of decision **OR** Yes ☐

The practitioner determined that the resident is not capable of giving consent to treatment Yes ☐

3. Informed Consent to Treatment

The practitioner provided the resident or SDM with the following information about the treatment:

Nature of the treatment	Yes ☐	Material side effects of the treatment	Yes ☐
Expected benefits of the treatment	Yes ☐	Alternative courses of action	Yes ☐
Material risks of the treatment	Yes ☐	Likely consequences of not having treatment	Yes ☐

[optional] Resident or SDM initials: _____

4. Additional Requirements for Consent

The resident or SDM understands that he or she may refuse to consent to the treatment	Yes ☐
The resident or SDM had an opportunity to ask questions and received satisfactory answers	Yes ☐
The resident or SDM had sufficient time to make an informed decision about consent	Yes ☐
The resident or SDM understands that he or she may revoke this consent at any time	Yes ☐

[optional] Resident or SDM initials: _____

5. Required Wording about Coercion

The Home must set out section 83 of the *Long-Term Care Homes Act, 2007* in any document containing a consent or directive with respect to treatment.

Coercion prohibited

83. (1) Every licensee of a long-term care home shall ensure that no person is told or led to believe that a prospective resident will be refused admission or that a resident will be discharged from the home because,

(a) a document has not been signed;
(b) an agreement has been voided; or
(c) a consent or directive with respect to treatment or care has been given, not given, withdrawn or revoked. 2007, c. 8, s. 83 (1).

6. Consent to Treatment

The resident ☐	Consents to the treatment	Yes ☐	
SDM ☐		No ☐	

[optional] Resident or SDM initials: _____

7. Resident or SDM Acknowledgement

I (the resident or SDM) participated in the consent discussion summarized on this form, on the date set out on the top of the form.

_____ Signature of resident or SDM

_____ Witness signature

_____ Print name of witness

Important: the resident or SDM must receive a copy of this form

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EXPLANATORY NOTES TO TEMPLATE

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Explanatory Notes to Template

A. **"If the resident is incapable":** If the resident is incapable, discuss consent with the highest-ranked, willing and available SDM from the list of SDMs in section 20 of the HCCA. An abbreviated version of this list is as follows:

1. Guardian of the person
2. Attorney for personal care
3. Representative appointed by the CCB
4. Spouse or partner (defined in HCCA)
5. Child, 16 years or older
6. Custodial parent
7. Children's aid society
8. Parent with only a right of access
9. Brother or sister
10. Other relative
11. PGT is SDM of last resort or if two SDMs of equal rank cannot agree

Homes may want to review and make excerpts of sections 20 and 21 of the HCCA to assist them in determining who the SDM is and how they to make their decisions. A practitioner is responsible for making the SDM aware of the requirements of section 21 in the context of the SDM's decision to give or refuse consent. For guidance in this context, practitioners should refer to the policies and standards of their colleges relating to consent to treatment.

B. **"…record of discussion between…."** The template is a record or acknowledgement of a discussion between a practitioner and resident or SDM with respect to proposed treatment. It is not something that the practitioner hands to a resident or SDM and simply asks for his or her signature. The form facilitates and records an exchange of information between the practitioner and the resident or SDM. The practitioner fills out the form during or at the end of the discussion, and the resident or SDM then signs the acknowledgement at the bottom of the form. It is not necessary for the practitioner to follow the order of the form during the consent discussion.

C. **"…proposed treatment *in the home*"**: Practitioners on staff at the home may use this form. The home can also provide this template for the use of any external practitioners who propose treatment to a resident or SDM and request them to sign a consent form. Homes should notify external practitioners that the home is responsible for ensuring that consent forms relating to treatment in the home comply with the requirements of the LTCHA.

If there are questions about whether an action or activity is "treatment", the home should refer to the definition of *treatment*, *plan of treatment*, and *course of treatment* in subsection 2(1) of the HCCA.

D. **"Consent must be informed and relate to the proposed treatment …."**: This paragraph sets out the elements required under the HCCA for consent to treatment. Note that consent for one treatment does not necessarily imply consent for another.

E. "**Name and Description of Treatment**": Insert a description of the treatment or treatment plan. The description should be a general (no need for precise details or minutiae), succinct (short but clear), and simple (plain language wherever possible) description of the treatment, course of treatment, or plan of treatment. **Important note:** The practitioner is seeking consent on the basis of his or her discussion of the proposed treatment, not the description on the form. The discussion of treatment must reflect:

1. The nature of the treatment,
2. The expected benefits of the treatment,
3. The material risks and side effects of the treatment,
4. Alternative courses of action, and
5. The likely consequences of not having treatment.

Important note: The practitioner's explanation of the treatment and the dialogue between the practitioner and the resident or SDM is the all important factor of the consent process. Do not seek consent on the basis of the written description, which is simply to identify the proposed treatment which the practitioner more fully explained during the consent discussion.

Practitioners may propose a single treatment, or they may propose a course of treatment, in which case they will seek informed consent for a series of similar treatments that relate to the resident's particular health problem. Homes may also seek a single informed consent for a plan of treatment, relating to the administration of various treatments or courses of treatments, or the withdrawal of treatment in light of the resident's current health condition. **Important note:** consent to a plan or course of treatment does not remove any of the legal requirements for informed consent to treatment. Residents or SDMs require all the information necessary for informed consent with respect to each treatment in a plan or course of treatment.

F. **"Capacity with Respect to Treatment":** The first prompt sets out the test under section 4 of the HCCA. Note that a resident must be able to appreciate the "reasonably foreseeable" consequences of a decision or lack of decision. **Important note:** A practitioner must inform the resident about the finding of incapacity and about his or her right to apply to the CCB to review the finding. For guidance in this context, practitioners should refer to the policies and standards of their colleges relating to consent to treatment. Note that a practitioner who is proposing treatment may rely on a determination of capacity by a qualified member of the care team.

G. **"Informed Consent to Treatment"**: This is the information that the HCCA requires the resident or SDM to receive to make an informed decision about treatment. Remember that consent is a process, the resident or SDM may already have certain information about the treatment, or may have very little or no understanding of it.

H. **"Additional Requirements for Consent"**: Under section 227 of the LTCHA regulations, the consent form must contain a statement that the resident or SDM may withdraw or revoke consent at any time. The other prompts reinforce the rules and principles of consent in the HCCA.

I. **Resident or SDM Initials:** Homes may choose not to have the resident or SDM initial the form in certain places. There is no requirement for initials. However, the benefit of asking for initials is that they may help verify the resident or SDM's participation in and understanding of the consent process.

J. **Resident or SDM Acknowledgement:** A signature is not consent. The reason for asking the resident or SDM to sign the form is for them to acknowledge the process, and to verify that the discussion took place and covered certain topics. It is prudent, but not mandatory, to have a witness. A staff member of the home may be a witness.

K. **Notes to Resident Record:** Legal actions in the consent context often relate to whether the person received adequate information to make a decision. Even if there is a signed consent form, a practitioner's note in the record or file may help to establish the validity of the consent process. Any notes should be contemporaneous with the consent discussion. Notes need not be long or take much time, but should be relevant to the consent discussion and mention any significant points of the discussion or process, such as any special concerns of the resident or SDM.

L. **Condition of Certification:** To use the template as certified, the home must not change it in any way, except as follows:

    1. Inserting name of resident or SDM, witness and practitioner(s),
    2. Adding description of treatment in accordance with paragraph E above,
    3. Use of optional content in accordance with paragraph I above,
    4. Changes to font and minor changes to format ("minor" refers to changes that do not affect the meaning of content), and
    5. Use of the home's address and logo.

Note that certification relates to the form meeting the requirements of the LTCHA. It does not relate to the process for obtaining consent, which homes and practitioners must ensure complies with the HCCA, LTCHA and any other applicable law, policy and standards.

IF THE HOME DOES NOT MEET THE REQUIREMENTS IN PARAGRAPH L, IT MUST NOT TREAT THE TEMPLATE AS CERTIFIED, AND THE HOME MUST HAVE A LAWYER CERTIFY THAT THE MODIFIED TEMPLATE COMPLIES WITH THE REGULATION.

M. **Internet Resources:**

CNO and CPSO policies on consent to treatment:
http://www.cno.org/Global/docs/policy/41020_consent.pdf
http://www.cpso.on.ca/uploadedFiles/policies/policies/policyitems/Consent.pdf

Advocacy Centre for the Elderly (ACE) publications and resources on consent and capacity:
http://www.advocacycentreelderly.org/consent_and_capacity_-_publications.php

St. Michael's Hospital Centre for Clinical Ethics, "Informed Consent to Treatment – a quick guide for healthcare consumers & healthcare providers":
http://www.stmichaelshospital.com/pdf/ethics/informed_consent.pdf

Consent and Capacity Board:
http://www.ccboard.on.ca/

Public Guardian and Trustee:
http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/default.asp

Health Care Consent Act, 1996:
http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_96h02_e.htm

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CONSENT TO TREATMENT CERTIFICATION LETTER

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December 20, 2010

Ms. Donna Rubin
Chief Executive Officer
Ontario Association of Non-Profit Homes and Services for Seniors
7050 Weston Road, Suite 700
Woodbridge, Ontario, L4L 8G7

Re: Certification of Consent to Treatment Form

Dear Ms. Rubin,

This letter relates to the template Consent to Treatment Form (the "Form") that I prepared for the LTCHA Implementation Member Support Project. The purpose of this letter is to provide evidence of legal certification for those OANHSS members who decide to use the Form subject to the conditions for certification.

The Form is part of a package OANHSS will release to members on December 21, 2010. The package also includes an overview and explanatory notes to the Form.

I certify that the Form (release date December 21, 2010) complies with Ontario Regulation 79/10 under the LTCHA. OANHSS members may consider the Form as certified, subject to their strict adherence to the instructions and conditions for certification set out in the explanatory notes accompanying the Form. These instructions and conditions are set out in paragraph L of the explanatory notes.

You have my permission to distribute this letter to OANHSS members. I expect member homes using the Form will want to keep a copy of this letter as evidence of certification.

Yours sincerely,

John Risk, LLB