ONTARIO PSYCHIATRIC ASSOCIATION

Mental Health Law Reform Proposals

Ontario Psychiatric Association, January 2024

The Ontario Psychiatric Association (OPA) proposes 3 reforms to Ontario mental health law:

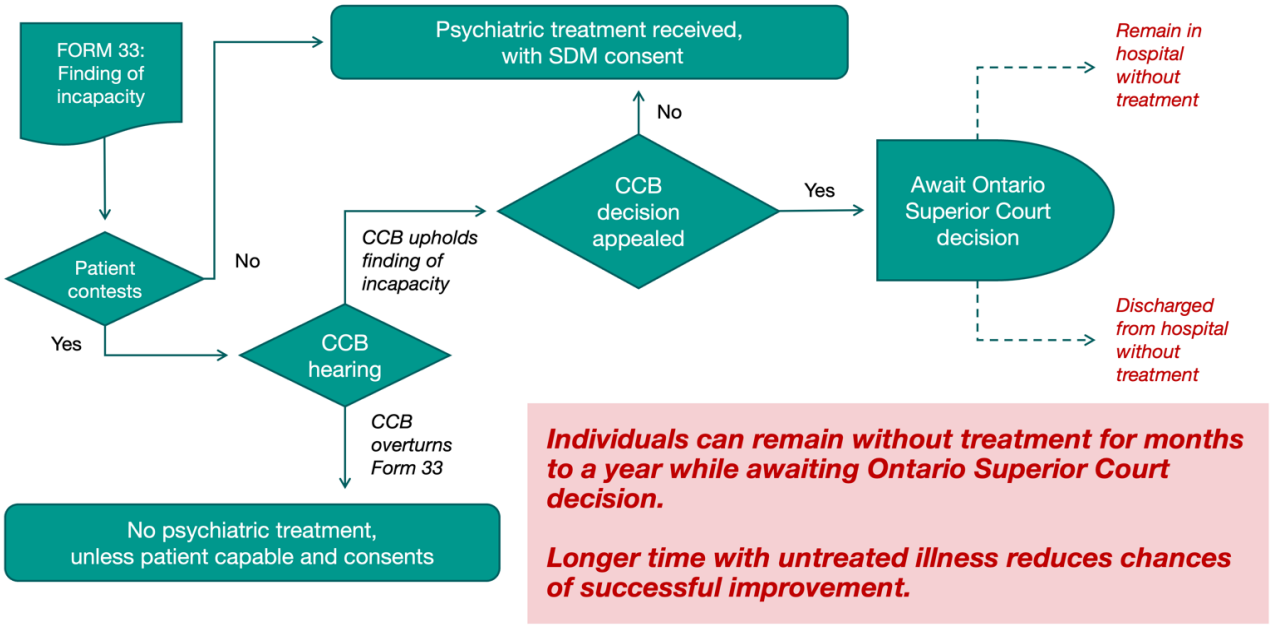
1. **Permit Treatment Pending Appeal under the Health Care Consent Act**
2. **Remove past response to treatment from Form 3 Box B Involuntary Admission Criteria, under the Mental Health Act**
3. **Extend a first involuntary admission to up to 30 days, under a Form 3**

These proposals arose from work of the OPA Mental Health Law Reform Task Force. Since its inception, the Mental Health Act has undergone various changes. Given this possibility for change, the OPA approved a task force focused on identifying specific ideas for mental health law reform. This task force brings together various stakeholders including resident and practicing psychiatrists, legal experts and patient/family advisors so discussions can draw upon different experiences and perspectives. The goal is to promote changes that will improve mental health care services available for patients, families, and mental health practitioners on both individual and system-wide levels.

1. Permit Treatment Pending Appeal under the Health Care Consent Act (HCCA)

Once an individual is admitted to hospital and a psychiatrist has found them incapable to consent to treatment with psychiatric medications, the individual may disagree and apply to the Ontario Consent and Capacity Board (CCB) to review the finding. The CCB determines whether the psychiatrist's incapacity finding will be upheld or not. Should the Board uphold the finding, individuals may still appeal receiving treatment, despite a legal Substitute Decision Maker's (SDM) informed consent for treatment. If the individual appeals the finding to the Ontario Superior Court of Justice, the Health Care Consent Act stipulates treatment shall not begin while awaiting court decision (**Figure 1**).

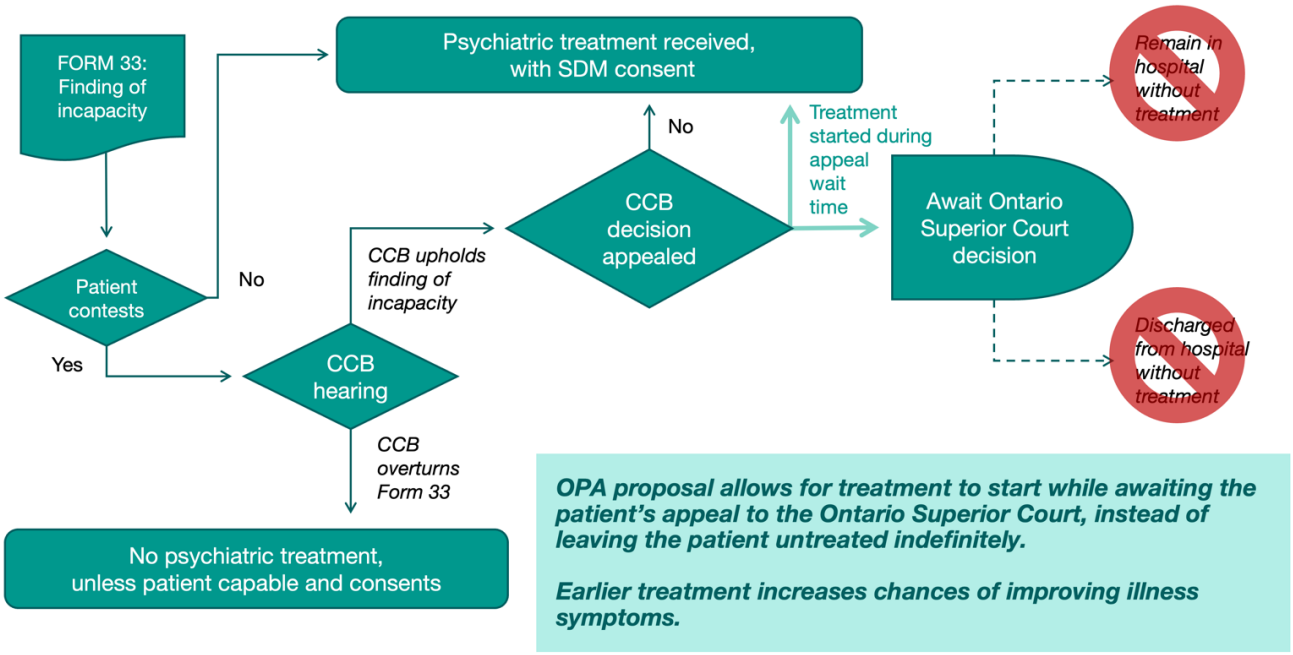
Figure 1: *Current HCCA: Treatment Pending Appeal Not Allowed*



The vast majority of decisions by the Superior Court still uphold the CCB's finding of incapacity, but this process takes months to a year to be decided. During this time, patients might remain in hospital or be discharged into the community – without the needed treatment in both scenarios – resulting in prolonged suffering, worse illness prognosis, and risks to quality of life and personal functioning.

The Ontario Psychiatric Association proposes to permit treatment during the appeal process, rather than waiting for the appeal process to be completed (**Figure 2**). The automatic right to appeal while remaining untreated in Ontario is inconsistent with the majority of Canadian provinces and territories. Ontario's laws should align with other provincial and territorial standards of care to allow treatment with medications *while* the patient engages in the appeal process. This reform promotes an individual's rights to freedom, treatment, wellness, and health by removing time-intensive legal processes that impede illness recovery and safe discharge from hospital.

Figure 2: *OPA Proposed HCCA Reform: Allow Treatment Pending Appeal*



For individuals who remain hospitalized while awaiting Court decision, the current lack of allowance for medication treatment means that safety risks warranting hospital admission remain unmitigated (e.g. harm to self, harm to others or physical impairment), causing detrimental, prolonged, and complicated admissions. In a 2002 study in the Canadian Journal of Psychiatry (Kelly et al.), the financial cost of untreated patients remaining hospitalized while awaiting legal review of their capacity was $3,867,000. With today's per diem rates for hospitalization, the expenditure would be estimated to be $8,646,000. This study examined data over 10 years and calculated that earlier treatment could have saved over 1 million dollars in expenditures, suggesting that current legislation aggravates costs to the health system.

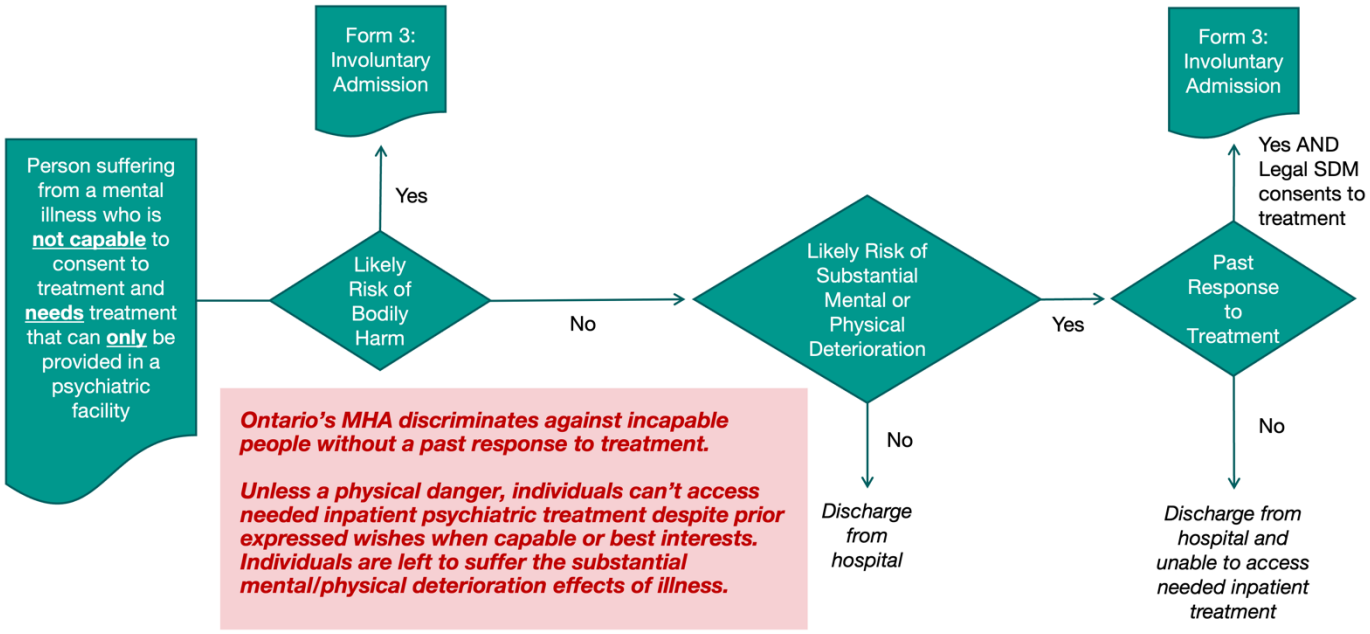
See **Appendix A** for supportive CCB data and comparisons with other Canadian jurisdictions.

2. Remove past response to treatment from Mental Health Act Form 3 Box B Involuntary Admission Criteria

Under the Mental Health Act, the Form 3 Box B criteria serve to prevent likely mental or physical deterioration, and require a person to have previously received treatment and shown clinical improvement from it, as part of the eligibility for involuntary admission. This legislative restriction discriminates against Ontarians, often young adults, experiencing

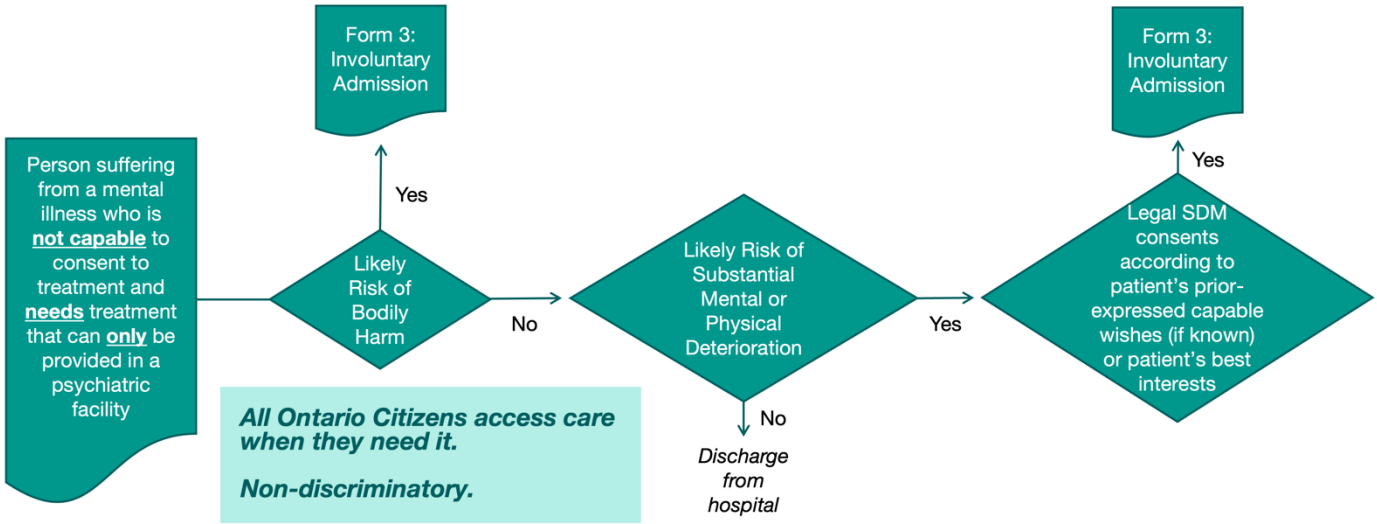
a first onset of severe mental illness, who are incapable for treatment decisions, but will not be eligible for involuntary hospitalization to address mental deterioration because of never having accessed medication treatment (**Figure 3**).

Figure 3: *Current MHA Form 3 Involuntary Admission Criteria*



The OPA proposes removing criteria that require a past response to treatment from Form 3 Box B so that a person suffering from a mental illness needing treatment that can only be provided in a psychiatric facility can be involuntarily hospitalized, after their legal SDM provides informed consent, when that person is at likely risk of substantial mental or physical deterioration, and is incapable with respect to treatment (**Figure 4**). The legal SDM must make treatment decisions that align with the patient's previously expressed capable wishes or, if unknown, what is in the patient's best interest.

Figure 4: *OPA Proposed MHA Form 3 Reform: Involuntary Admission Criteria*



Canada's Health Act asserts that all insured citizens should have reasonable access to health services. The OPA maintains that individuals suffering from mental illnesses that prevent them from knowing they are ill and having capacity for treatment decisions must not be excluded from accessing treatment. Ontario needs to align with the majority of Canadian jurisdictions which permit involuntary admission to prevent likely substantial mental and physical deterioration when other criteria are met, regardless of access to past treatment.

Modifying Form 3 Box B criteria is a legislative strategy to facilitate earlier access to treatment, which is especially crucial for when longer duration of untreated illness portends worse prognosis. **Table 1** compares the current and proposed modifications to involuntary admission criteria.

See **Appendix B** for considerations of Charter rights and supportive legislative procedures of other Canadian jurisdictions.

Table 1: Comparison of MHA Form 3 Involuntary Admission Criteria

Current Form 3 Box B Criteria	OPA Proposed Form 3 Box B Criteria
• *Patient has been found incapable of consenting to treatment in a psychiatric facility and SDM consent has been obtained.* • *Patient has previously received treatment for a mental disorder of an ongoing or recurring nature that when not treated, will likely result in serious bodily harm to self or another person, substantial mental or physical deterioration, or serious physical impairment.* • *Patient has shown clinical improvement as a result of the treatment.* • *The patient is suffering from the same or a similar mental disorder as the one for which treatment was previously received.* • *Given the person's history of mental disorder and current mental or physical condition, the patient is likely to cause serious bodily harm to self or another person, suffer substantial mental or physical deterioration, or suffer serious physical impairment.*	• *Patient has been found incapable of consenting to treatment in a psychiatric facility and SDM consent has been obtained.* • *Patient is suffering from a mental disorder as a result of which the patient needs treatment that can only be provided in a psychiatric facility.* • *As a result of the mental disorder, the person is likely to cause serious bodily harm to self or another person, suffer substantial mental or physical deterioration or suffer serious physical impairment.*

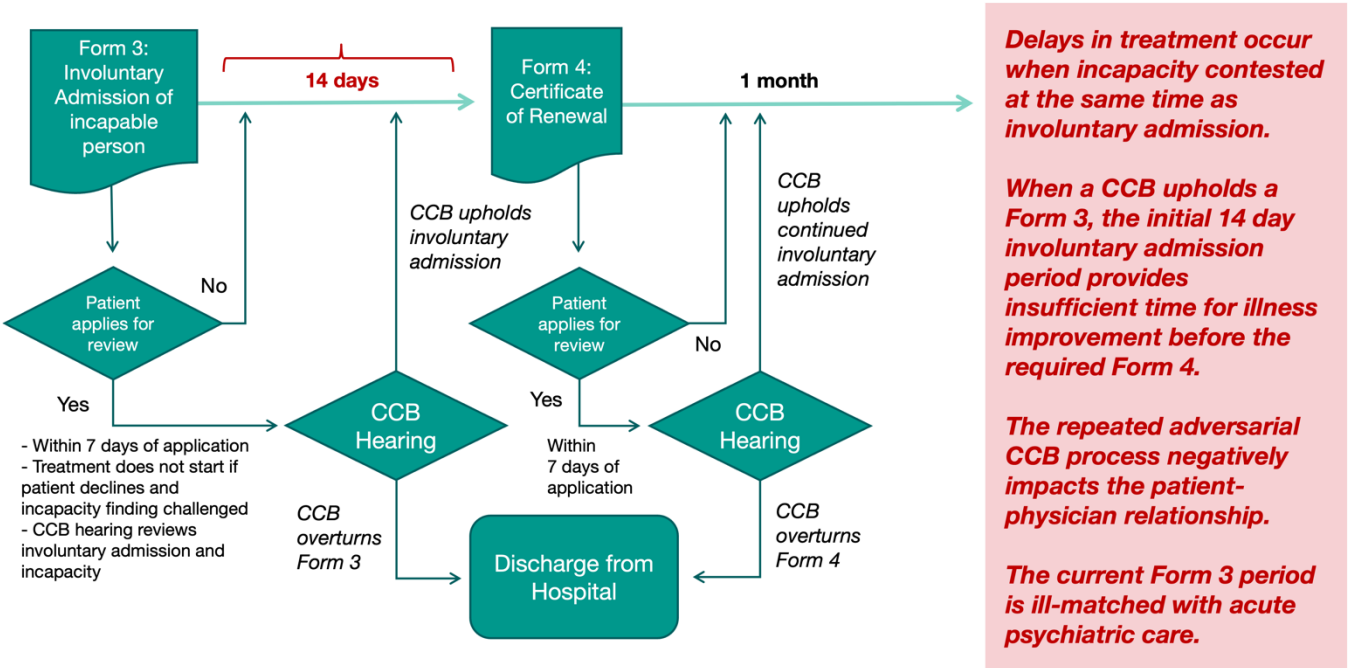
3. Extend a first involuntary admission to up to 30 days, under a Form 3

In Ontario, once involuntarily admitted on a Form 3, an individual can contest the involuntary admission status by applying to the Consent and Capacity Board for a review. When an individual declines treatment and contests involuntary admission, medication initiation is delayed until after the CCB hearing. The Board may confirm the certification – whereby the individual remains involuntarily admitted, up to the duration of the 14-day Form 3 period— or rescind the involuntary admission, meaning the person cannot be involuntarily hospitalized.

Clinically, an individual involuntarily admitted to hospital for psychosis or mania often needs more than 14 days of medication treatment for symptoms to improve sufficiently to allow a change from involuntary to voluntary status, or to

allow safe discharge from hospital. More often, patients hospitalized on Form 3s require subsequent certification on a Form 4 (up to an additional 30 days) for a longer involuntary hospitalization to facilitate ongoing medication treatment. Although a CCB hearing is supposed to occur within 7 days of receiving the individual's application, factors out of the physician and patient's control often result in CCBs getting scheduled at the end of the 14-day Form 3 period. Thus, many CCBs often do not get scheduled until the end of the 14-day Form 3. Sometimes the 14-day period has already expired by the time the CCB hearing is scheduled, and a Form 4 has already been issued. The Form 4 may then be contested by the patient, leading to another CCB hearing (**Figure 5**). Repeatedly certifying patients negatively impacts the doctor-patient relationship, strains family relationships and this adversarial process impedes treatment success.

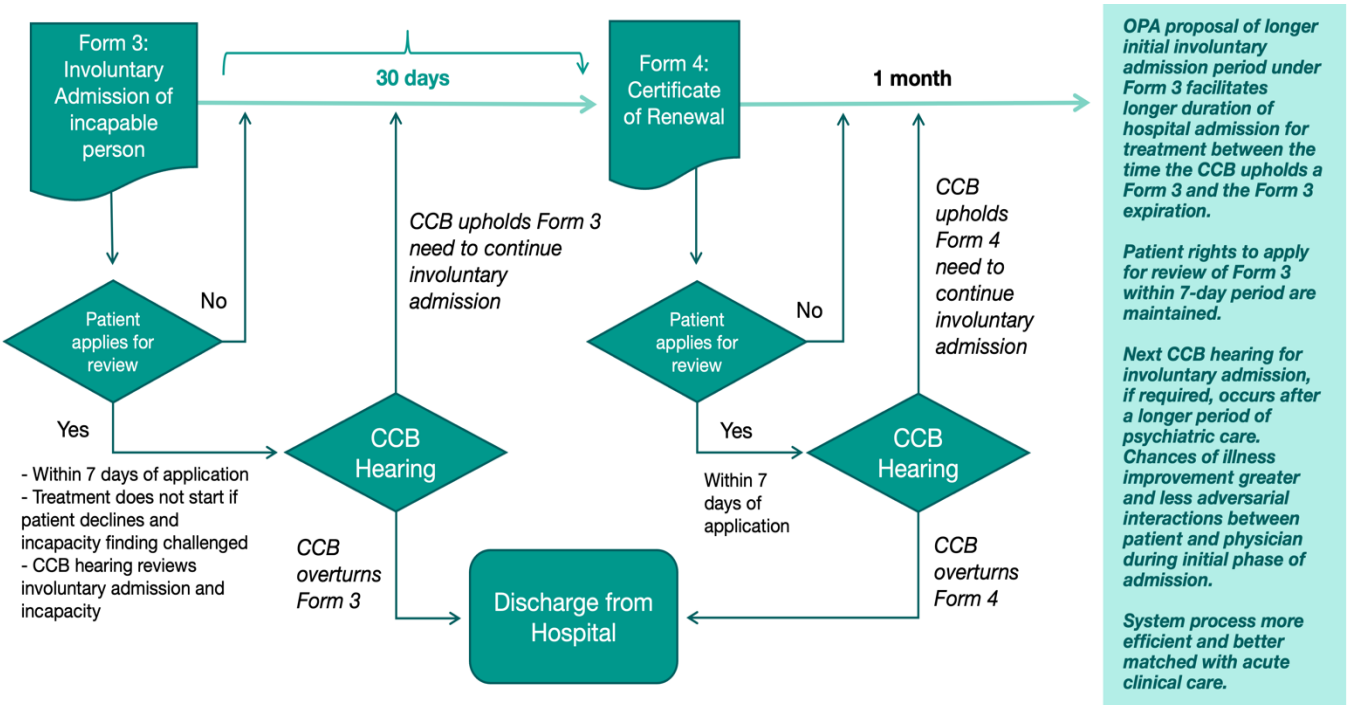
Figure 5: *Current MHA Form 3: Involuntary Admission UP TO 14 DAYS*



The OPA proposes extending the involuntary hospitalization period under a Form 3 to up to 30 days (**Figure 6**). This would maintain patients' rights to contest involuntary hospitalizations in a timely manner, while facilitating a realistic timeframe for successful clinical treatment, and lessening negative impacts on physician-patient and family-patient relationships.

Within Canada, Ontario is an outlier for having 14 days as its first involuntary hospitalization period. All other jurisdictions (except Nunavut) have an initial 21-day or 30-day involuntary admission period. Since the majority of CCB hearings in Ontario uphold involuntary admission status (Appendix C), lengthening the Form 3 initial involuntary hospitalization duration would reduce repeat involuntary hospitalization hearings before a patient's condition has substantially changed as a result of treatment. Changing the maximum duration of a Form 3 would not disturb the current ability for the Form 3 to be discontinued before the form expiry date if the patient no longer meets involuntary admission criteria.

Figure 6: *Proposed MHA Form 3 Reform: Involuntary Admission UP TO 30 DAYS*



The Ontario Psychiatric Association's proposed reforms would enrich the livelihood of Ontarians with severe mental illness who are unable to access timely evidence-based treatment for their condition due to current overly restrictive legislation. These reforms would expedite psychiatric treatment that patients deserve, and scaffold hope for families seeking appropriate psychiatric care for loved ones, while reducing system inefficiencies and health system costs.

All citizens have the right to timely and medically beneficial treatment to maximize the chances of remission and to reduce current and future suffering such as more severe mental illness, unemployment, scholastic attrition, isolation, and homelessness. Mental health care and resources throughout Ontario should align with Canadian Practice Guidelines for Pharmacotherapy, Psychosocial Treatment, and Comprehensive Community Treatment for Schizophrenia and Schizophrenia Spectrum Disorders. Ontario needs to stop the discriminatory barriers that incapable people with psychosis or mania regularly experience in the province.

The OPA defends prioritization of patient autonomy, Charter rights, and advocates judicious provincial legislative amendments to facilitate earlier access to treatment for the most vulnerable in our mental health system. Access to needed treatment should not exclude those who do not realize they are ill.

A 2022 survey of psychiatrists conducted by the OPA, in collaboration with the Coalition of Ontario Psychiatrists and the Ontario Medical Association, found the majority of respondents agreed or strongly agreed with these proposals.

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APPENDIX A

Permit Treatment Pending Appeal

When patients disagree with the decision of a Consent Capacity Board (CCB) about upholding a finding of incapacity, they can appeal this decision to the Ontario Superior Court of Justice. In the Health Care Consent Act there is an automatic right of appeal and treatment cannot commence until after the final disposition of the appeal. The automatic right to appeal is differentiated from the right to review, in which patients would still have the right to appeal the CCB's decision, but it would be possible for the incapacity finding to stand, and for treatment to commence, should a legal Substitute Decision Maker provide informed consent. The legal Substitute Decision Maker is to make informed decisions that align with the previously expressed capable wishes of the patient or, if unknown, what is in the best interest of the patient.

There are jurisdictional differences in how treatment pending appeal is managed. In Ontario, Manitoba, Nunavut, the Yukon, and Quebec, treatment cannot commence until the matter is completed in court. In Ontario, under a special permission from the court, treatment can start in response to a motion for treatment pending appeal. However, in Alberta, New Brunswick, Nova Scotia, the Northwest Territories, and Prince Edward Island, patients can be treated while they await their appeal and they still are granted the right to appeal the decision. In Saskatchewan, Newfoundland and Labrador, and British Columbia, treatment is addressed through meeting the requirements for involuntary hospitalization.

There are potential harms that arise from an automatic right of appeal. While there is a protection of individual rights for self-determination and bodily integrity, there is a lack of prioritization of protecting the best interests of vulnerable populations.

In reviewing the data publicly available from the CCB, from 2003 to 2015 an average of 56 CCB decisions were appealed per year. From 2016 to 2020 there was an increase to an average of 91 appeals per year. While appeals can be for various incapacity findings, the majority are for treatment incapacity. Of the notifications of appeals received by the CCB, the majority were withdrawn, abandoned or dismissed. From 2010 to 2020, an average of less than 3% of appeals were allowed to proceed, with the maximum of 6% allowed to proceed.

There are significant consequences for patients when not permitting treatment while awaiting appeal including: detention in hospital without treatment, patients' loss of liberty, prolonged suffering with symptoms, worsening illness progression, poorer response to treatment, economic disruption for patients, and more complicated hospitalizations for patients because of ongoing risks that require ongoing involuntary hospitalization, which are typically harm to self, harm to others, or physical impairment.

APPENDIX B

Remove past response to treatment from Form 3 Box B Involuntary Admission Criteria

Currently under Ontario's Mental Health Act, involuntary admission to a psychiatric facility can be facilitated when a person with a mental illness is a danger to self or others, or at risk for physical impairment. This is known as Box A Criteria of the Form 3 – Certificate of Involuntary Admission. Additionally, involuntary admission can be facilitated when all of the following criteria are met: the person is incapable to consent to treatment, has a history of past response to treatment for a similar illness, has a legal Substitute Decision Maker consenting to treatment, and is at likely risk for harm to self/others, substantial mental or physical deterioration, or physical impairment if untreated. This is known as Form 3 Box B Criteria. In times of incapacity, a legal Substitute Decision Maker has an integral responsibility to make informed decisions that align with the previously expressed capable wishes of the patient or, if unknown, what is in the best interest of the patient.

Form 3 Box B criteria discriminate against and harm Ontarians with mental illness who have no prior history of response to treatment. This includes adolescents and young adults experiencing a first episode of illness or people who have been chronically unwell, and never accessed treatment, but now have decompensated to the point of mental or physical deterioration. People with serious psychiatric symptoms such as psychosis or mania are often unable to understand or appreciate their symptoms, the consequences of untreated illness, and how treatment can benefit them. This makes them incapable of deciding on psychiatric treatment. Even when symptoms are extremely severe and pose an element of risk, they often decline needed psychiatric medication and the only way for them to receive psychiatric care is through an involuntary admission.

However, unless people with symptoms such as psychosis or mania are dangerous or showing serious physical impairment, current Ontario mental health law only allows involuntary admission to manage mental or physical deterioration if they meet the criteria of having prior response to treatment. A significant portion of mentally ill patients lack a history of past response to treatment and thus will not be eligible for involuntary admission, and will never access evidence-based and effective inpatient psychiatric care that can remit their illnesses. When left untreated, individuals fail to engage effectively in employment, education, and relationships. This leaves them dependent on family or homeless, with risk of exposure to addictions and criminal activity.

The OPA proposes removing criteria that require a past response to treatment from Form 3 Box B so that regardless of lack of past response to treatment, a person suffering from a mental illness can be involuntarily hospitalized due to the likely risk of substantial mental or physical deterioration if they remain untreated, when they need treatment that can only be provided in a psychiatric facility, are incapable with respect to treatment, and their legal Substitute Decision Maker has provided informed consent. The legal Substitute Decision maker must make informed decisions that align with the previously expressed capable wishes of the patient or, if unknown, what is in the best interest of the patient.

The proposed Form 3 Box B criteria are Charter adherent and align with Justice Eidsvik's analysis of Alberta's mental health act in the Court of Appeal of 2019. In section 202 and 203 of her reasons for judgment, she explains several court decisions addressed involuntary admission criteria as it pertains to the likely risk of harm, such as when there is likely risk for mental or physical deterioration. She asserts coupling the harm risk with the need for treatment is Charter-adherent and this coupling has repeatedly withstood court challenges. This proposal couples an incapable person's risk of harm with the need for treatment, while also preserving a capable person's right to medical self-determination. Saskatchewan, Manitoba, Nova Scotia, and Newfoundland and Labrador mental health acts have involuntary admission criteria with a similar pairing. British Columbia, Alberta, the Northwest Territories, Yukon, and New Brunswick also permit involuntary admission to prevent substantial mental deterioration when other criteria are met. These jurisdictions do not require demonstration of a past response to treatment to be eligible for involuntary hospitalization.

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Ontario is the only jurisdiction that limits involuntary admission for incapable persons with a likely risk of substantial mental or physical deterioration to those with past response to treatment. It discriminates against those without that history.

The OPA's recommendations are also in keeping with Bill-63 regarding the right to timely mental health and addiction care for children and youth deemed to require such services. During the debates of February 2019, the debating parties unanimously supported the bill's intent and the importance of early access to treatment for our children and youth. Parliament unanimously voted in favor of the bill on first reading and it was moved to committee unanimously.

First episodes of psychosis and mania emerge most frequently among those under the age of 26, yet the current Mental Health Act makes timely access to inpatient treatment impossible for children and youth who are experiencing a first episode of illness and experiencing mental deterioration (but not presenting a safety risk), incapable for treatment decisions, and declining medication. This is because they have never received treatment and cannot demonstrate past response to treatment under current Form 3 Box B criteria.

Delays in the early treatment of psychosis is associated with a poorer response to treatment, lower functional recovery, and/or increased disability. Untreated, individuals suffer substantial mental deterioration and consequences such as isolation, scholastic attrition, unemployment, and homelessness.

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APPENDIX C

Extend a first involuntary admission to up to 30 days, under a Form 3

In Canada, Ontario is an outlier for having 14 days as its first involuntary hospitalization period on a Form 3. Apart from Nunavut and Ontario, all other jurisdictions have an initial 21-day or 30-day involuntary admission.

Over the past couple of years, there has been a steady increase in CCB hearings. In 2019/20 the CCB received 3719 applications to challenge involuntary admission status. 32% resulted in a board decision and involuntary admission was confirmed in 82% of cases. The applications that did not result in a hearing were resolved through other avenues, such as withdrawal of the application, dismissal, or the termination of the involuntary admission by the psychiatrists. In practicality, upholding the involuntary status occurs in the vast majority of cases. For the remaining applications that are overturned, modifying Form 3 duration to a 30-day involuntary hospitalization period would maintain patient rights to a CCB hearing within current timeframe standards. However, this change can correspond better to the realities of patient care by incorporating scientific knowledge of pharmacodynamics regarding treatment response and reflecting the length of time required to treat the complex psychiatric conditions seen in acute hospital settings.

The OPA proposes extending the involuntary hospitalization period under a Form 3 from 14 to 30 days. This would still maintain patients' rights to contest involuntary hospitalizations, within the same seven-day window, while facilitating success in clinical treatment, and lessening negative impacts on physician-patient relationships. This change would greatly ease system resource requirements in providing cost-efficient CCB hearings. Most involuntarily hospitalized patients across Canada already receive psychiatric care using this framework.

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