

Community Alert – Covid-19 Vaccines

Information on Consent to Health Care Legislation in BC

As the Covid-19 vaccines are being dispensed, there are questions about BC law on consent to health care.

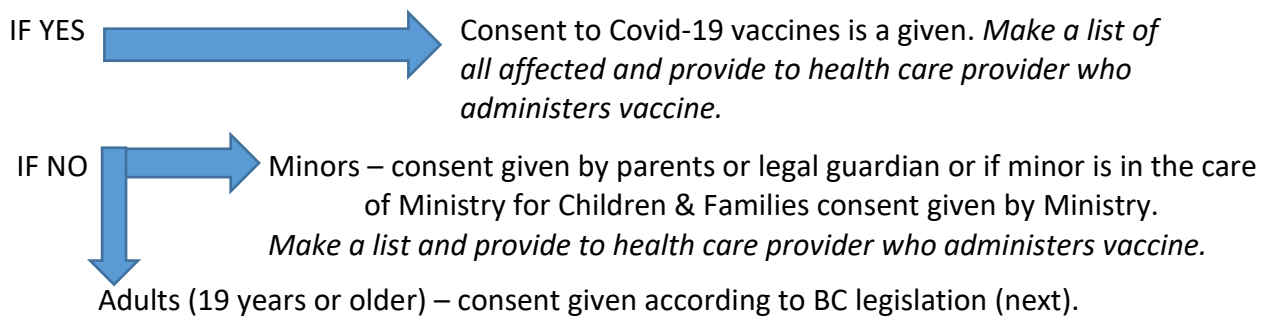
This communication is not about the risks and benefits of Covid-19 vaccines. Please click the following link to learn more about this - <https://immunizebc.ca/covid-19>

BC has legislation about how health care providers obtain informed consent for health care.

Non-profit and for-profit organizations, such as those providing services in the community living sector, have an important role with respect to education, communication and record keeping but should NOT be producing consent forms for health care, including for Covid-19 vaccines.

FLOW CHART TO SUMMARIZE STEPS – Details on following pages.

? Is COVID-19 vaccination required for residents/participants and employees of licensed facilities/programs?



? What is BC legislation on health care consent for adults? Who consents?

1. Committee of person (appointed by court order).
2. Representative SUPPORTS adult to decide (representative is named in the adult's Representation Agreement). Representative can also act on behalf of the adult.

If no committee of person or no Representation Agreement in effect, the health care provider must determine if adult is capable/incapable of informed consent. If yes, adult decides. If no, representative decides or, if no Agreement, check for Advance Directive, if none, health care provider selects TSDM.

Is there also a Plan for Minor Health Care? Can only be signed by committee of person, rep, or TSDM. Might be useful as advance consent for Covid-19. Can last for up to one year, must be drawn up by health care provider. *Contact HSCL nurse to draw up – check with PGT for example?*

3. Advance Directive (instruction written by adult capable of understanding).
4. Temporary Substitute Decision Maker (TSDM) – selected by health care provider.

Gather copies of documents (court order or Representation Agreement) for health care provider. If no legal authority is in place, only a health care provider can select someone to be a TSDM (you can help by providing a list of the adult's next-of-kin, close friends, and in-laws by marriage). If there is no one, staff at the Public Guardian and Trustee can be TSDM.

CHECK LICENSING REQUIREMENTS

An initial step might be to check legislation concerning licensed facilities/programs and requirements related to immunizations like Covid-19 vaccines.

Legislative References:

Community care facility is defined in the BC Community Care and Assisted Living Act as a premises or part of a premises

- (a) in which a person provides care to 3 or more persons who are not related by blood or marriage to the person and includes any other premises or part of a premises that, in the opinion of the medical health officer, is used in conjunction with the community care facility for the purpose of providing care, or
- (b) designated by the Lieutenant Governor in Council to be a community care facility;

Care is defined in the BC Community Care and Assisted Living Act as supervision that is provided to:

- (a) a child through a prescribed program,
- (b) a child or youth through a prescribed residential program, or
- (c) an adult who is
 - (i) vulnerable because of family circumstances, age, disability, illness or frailty, and
 - (ii) dependent on caregivers for continuing assistance or direction;

The Residential Care Regulation of the BC Community Care and Assisted Living Act states:

In section 49, (1) A licensee must require all persons admitted to a community care facility to comply with the Province's immunization and tuberculosis control programs.

In section 86, A licensee must keep the following records in respect of each employee:

- (a) criminal record check results;
- (b) character references;
- (c) compliance with the Province's immunization and tuberculosis control programs;
- (d) a record of any performance reviews made under section 40 [continuing monitoring of employees] and any attendance at continuing education programs.

Questions:

Does the "Province's immunization and tuberculosis control programs" as referenced in the Regulation for the Community Care and Assisted Living Act include the Covid-19 vaccination?

Does the requirement only apply at the time of admission/hiring or at any time while receiving care or being employed? For example, what about yearly flu shots?

Is there some kind of wording that allows the Province's programs to be automatically updated as new vaccines are developed for new conditions or for previous conditions?

Does compliance rely on other legislation to make certain immunizations mandatory?

Community Living BC and the Public Guardian and Trustee likely have better access to official sources who can answer these questions – or CLBC/PGT may have the answers!

BC'S LEGISLATION FOR HEALTH CARE CONSENT – ROLE OF HEALTH CARE PROVIDER

Note: this legislation is provincial and applies to all adults – 19 years and older, except:

For those who must comply with the “Province's immunization and tuberculosis control programs” as noted for licensed facilities/programs. (Covid-19 vaccines and yearly flu shots may NOT be included in the Province’s programs – need to check.)

If an adult is involuntarily committed under the Mental Health Act – in this case, the adult is ‘deemed to consent’ to treatment and placement related to the mental disorder.

See Nidus fact sheet – http://www.nidus.ca/PDFs/Nidus_HealthCareConsent_YourRights-BC.pdf

Before getting informed consent, the health care provider must provide information including the risks and benefits of treatment offered. Community organizations might help to communicate this information.

A health care provider needs to obtain informed consent to health care from the following, in ranked order, and does not proceed if find the ranked legal authority is in place:

1. Committee of Person (type of adult guardianship)

This is someone, usually a spouse or family member of the adult, who is appointed by a judge of the Supreme Court of BC and given authority to act on the adult’s behalf for health and personal care matters. The judge first has to rule that the adult is incapable of making decisions about their health and personal care. The judge’s finding of incapability means consent is not sought from the adult. (If there seems to be a disagreement about a decision of the committee of person and what the adult might decide, the adult would have to go to court to have the committee of person removed.)

This type of legal authority is difficult to reverse. Committee of person is rare and even more so since the Representation Agreement Act and the default scheme for health care (TSDM) came into effect. A judge has discretion to allow an existing Representation Agreement to continue instead of appointing a committee.

See - http://www.nidus.ca/PDFs/Nidus_AdultGuardianship_Committeeship-BC.pdf

The health care provider will want to see copy of the court order for a committee of person as evidence of legal authority.

2. (If no committee of person), Representative AND Adult

There is a common misperception that a representative is only involved when an adult is determined incapable by a health care provider. Unless such wording is stated in the Representation Agreement, the Agreement is in effect immediately (when executed) and the representative must be contacted and included – if not by the adult, then other parties involved.

The adult does not have to be labelled incapable to get help from their representative. A representative is an adult named in a Representation Agreement (RA7 or RA9). The representative's first duty is to support the adult to make their own decision (this might include helping with communication) or, if the adult cannot give or refuse informed consent, the representative can act on behalf of the adult. Sometimes adults want their representative to make the decision for them because they trust the representative and it is less intimidating and confusing.

For the purpose of Covid-19 vaccination, check that the Agreement includes authority for health care.

It is vital that a representative be involved and informed in order to maintain continuity of care – it is a safeguard for the adult. Also, for example, it may be critical if acting on behalf of the adult that a representative has direct knowledge of any health care an adult has received.

If there seems to be a disagreement between the representative and the adult about the decision, they should discuss it – it would be good to include the monitor. If unresolved, the adult may want to revoke the Agreement; a representative may want to resign.

See - http://www.nidus.ca/PDFs/Nidus_RepresentationAgreements&HealthCare-BC.pdf

The health care provider will want to see copy of a Representation Agreement as evidence of legal authority.

Is there also a Plan for Minor Health Care?

A Plan for Minor Health Care is optional and must be signed by a legal authority according to the order of ranking (see next).

A committee of person, a representative or a TSDM (see page 5) can give consent to a Plan for Minor Health Care.

A Plan for Minor Health Care can be handy for adults who do not reside with the representative. It **must be prepared by a health care provider** – and ethically, this should be a health care provider who knows the adult. The Plan must apply to the adult's current health condition and current and expected health care needs. The Plan can last for up to one year. It is a way to give consent in advance, for one or more relevant minor health care matters.

See - http://www.nidus.ca/PDFs/Nidus_PlanForMinorHealthCare-BC.pdf

The health care provider will want to see a copy of The Plan for Minor Health Care as evidence of legal authority.

Note: A Plan for Minor Health Care could be specific to give consent to the Covid-19 vaccine. It does not have to cover all minor health care matters – this could be risky for an adult with complex and changing health care needs. There could be more than one Plan for Minor Health Care, depending on when made. For example, there might be a Plan for Minor Health Care that only covers the Covid-19 vaccination and a different Plan for other relevant minor health care matters.

Adult alone

An Adult with:

- No committee of person; or
- No representative; or
- A Representation Agreement that does not include authority for health care; or
- A Representation Agreement that says a representative only has authority if the adult is determined mentally incapable of informed consent to health care;

Must be determined capable/incapable of informed consent to the health care being offered **by the health care provider**.

Determination of capability/incapability for informed consent to health care is based on whether the adult can demonstrate two things:

1. Understanding of the information provided by the health care provider such as what kind of health care is being offered, its purpose, the benefits and risks; and
2. Understanding the health care applies to them (the adult).

If the adult is **determined capable** of informed consent **by the health care provider**, the adult gives or refuses consent to the health care being offered. An adult found capable can refuse consent even if this may result in their death.

If the ADULT is determined INCAPABLE of informed consent to health care, the health care provider obtains consent from:

A representative (see #2 above) can give or refuse consent on behalf of adult (unless the Agreement says authority is only to support or assist an adult to make decisions).

See - http://www.nidus.ca/PDFs/Nidus_HowHealthDecisionsMade_ifAdultIncapable-BC.pdf

3. Stand Alone Advance Directive

A stand-alone Advance Directive can be used as a substitute consent by a health care provider if they have determined the adult is incapable of informed consent to health care being offered and there is no committee of person or representative.

The health care provider must follow the written instructions in a stand-alone Advance Directive if the instructions are clear and apply to the specific circumstance at hand. The health care provider cannot ask paid staff, family or anyone else to interpret the adult's written instructions. The written instruction must speak for itself.

To be valid, an Advance Directive must be made by the adult when capable of understanding what it means and it has to include some specific conditions and be properly witnessed.

See - http://www.nidus.ca/PDFs/Nidus_AdvanceDirective-BC.pdf

4. Temporary Substitute Decision Maker (TSDM)

If an adult is determined incapable of informed consent to health care and there is no higher ranked authority, as listed above, the health care provider must select an adult, if qualified, from a list in the law to be the adult's TSDM.

To see the list of who can be selected as TSDM and the qualifications and limits on authority - http://www.nidus.ca/PDFs/Nidus_Role&ScopeAuthorityTSDM-BC.pdf

A TSDM is only selected when a health care decision needs to be made. A TSDM only has access to information related to the current health care decision. It is a 'temporary' role.

A TSDM can give consent to a Plan for Minor Health Care for the adult.

If the adult later makes a Representation Agreement that includes health care, the representative replaces any TSDM that may be selected.

A TSDM is not selected in an emergency situation if an adult is determined incapable but a committee of person or a representative is contacted and, if available, is asked for consent. (Emergency is defined in the law.)

ROLE OF ORGANIZATIONS/AGENCIES SUCH AS THOSE IN THE COMMUNITY LIVING SECTOR

- 1) Are you up-to-date on licensing requirements for "the Province's immunization and tuberculosis control programs" – what is and what is not included – and are you communicating these to those affected? Do you have a current list of people affected?
- 2) Are you connected to the health authority (HSCL services) who can help get things organized for vaccinations? HSCL nurses could help with a Plan for Minor Health Care and selecting TSDM if necessary. Maybe you have a qualified health care provider on staff?
- 3) Community living organizations/agencies have an important role in helping health care providers carry out their legal duties related to health care consent, by:
 - Helping to distribute information such as the risks and benefits of the Covid-19 vaccine to those who would be asked for informed consent.
 - Maintaining copies of existing legal authorities like court orders, Representation Agreements, Plans for Minor Health Care. Unfortunately, a lot of health care institutions, such as hospitals, still ask for an emergency contact but this is old practice, the law has changed. (Nidus operates an online registry service to help people keep track of legal authorities and related information and give easy access to health care providers who need to locate the most recent of these.)
 - Establishing regular and consistent communication with any committee of person or representative so you are aware of changes. For example, resignation or revocation that may affect a Representation Agreement; death of the committee of person.

- If no legal authority is in place, help by keeping an up-to-date list of the adult's next-of-kin and close friends and in-laws (by marriage). You can maintain the list but be careful about taking on liability and risk by going beyond your mandate. It is up to the health care provider to select the TSDM and to decide if they are qualified or not.
- Getting educated about BC legislation on health care consent and implementing best practices. Individuals you provide services to and their personal supporters need your assistance too, so they can learn about BC's legislation on informed consent to health care and what they can do BEFORE a health crisis.

ROLE OF PUBLIC GUARDIAN AND TRUSTEE IN HEALTH CARE CONSENT

The PGT has a 'Health Care Decisions Team.' Staff of the PGT can act as a TSDM if no one else on the list is available or qualified. They are the last resort. A health care provider may also contact the PGT if there is a dispute among potential TSDMs about who should be selected.

Note: living wills, the MOST form and the DNR form are **not** part of BC legislation for health care consent.