

Duty for Notice When a TSDM is Selected for Major Health Care in BC

This fact sheet discusses a duty that a health care provider in BC has if they select someone to be your Temporary Substitute Decision Maker (TSDM) for a matter that is defined as major health care.

The duty does not apply if you have a court-appointed committee of person or a representative named in a Representation Agreement and your representative has authority for health care. It also does not apply if you have a stand-alone Advance Directive with an instruction that applies to the specific major health care being offered.

What is a notice for major health care?

Nidus is using the term 'notice' in this fact sheet to refer to a requirement in section 14(4) of the Health Care Consent and Care Facility Admission Act when a health care provider has to provide specific information — give notice — to specific people.

Health care providers have this duty when they select a Temporary Substitute Decision Maker (TSDM) to make a decision on your behalf for a major health care matter.

See box to the right for definition of major health care. See box on page 2 about who can be selected as a TSDM.

When does a health care provider select a TSDM for major health care?

The health care provider selects a TSDM when:

- No other legal authority is in place that covers this decision. See box on page 2 about other legal authorities; and
- The health care provider determines that you (the adult patient/client/resident) are incapable of making a decision about the major health care that is being proposed.

The health care provider selects someone to be your TSDM from a list in the law (see list in box on page 2).

A TSDM is a temporary role and is part of the default scheme for health care decision-making if no other authority is in place.

After a TSDM has decided to give or refuse consent on your behalf for major health care, the health care provider must inform specific people.

Who must be informed if a TSDM is selected for major health care?

The health care provider has a duty to inform:

- You (the adult patient/client/resident); and
- Any spouse, near relative, or close friend who accompanies you. See box on page 3 for definitions of these terms.

What is major health care?

Major health care is defined as:

- Major surgery.
- Any treatment involving a general anesthetic.
- Major diagnostic or investigative procedures.
- Radiation therapy.
- Intravenous chemotherapy.
- Kidney dialysis.
- Electro-convulsive therapy — a TSDM can only make this decision if it is recommended in writing by your treating physician and at least one other medical practitioner (physician) who has examined you.
- Laser surgery.
- Any other health care that may be designated by regulation as major health care in the future.

Who is considered a health care provider?

BC's Health Care Consent and Care Facility Admission Act defines a health care provider as someone who is licensed or registered to provide health care in BC. Those who are most likely to provide major health care include:

- Physicians and surgeons
- Nurses
- Dentists

For a fuller list of health care providers, read [Health Care Consent in BC: Your Rights & the Law](#)

What information must the health care provider give?

The health care provider must provide information about:

- Their finding that you are incapable of informed consent for the major health care that is offered; and
- The name of the person they selected as your TSDM; and
- The decision of the TSDM to give or to refuse consent on your behalf to the major health care that is offered.

EXAMPLE: Cathy was in a car accident and was admitted to hospital. Cathy has been confused and sleeping a lot. The doctor wants to do a major investigative procedure, but has determined that Cathy is not able to give informed consent. There is no committee of person or representative in place, so the doctor must select a TSDM. After finding out that Cathy has no spouse, the doctor selects Cathy's daughter, Audrey, as the TSDM. Audrey gives consent for the major investigative procedure. The doctor informs Cathy and John, Cathy's son, about Cathy's incapability, the selection of Audrey as TSDM and Audrey's decision to give consent for the procedure.

How is the notice or information given?

The Health Care Consent and Care Facility Admission Act previously required health care providers to use a mandatory form for giving notice. The form is still available in the Health Care Consent Regulation, but the requirement to use it was deleted from the Act as of March 2004. The form is useful as a model and you can see a copy after the last page of this fact sheet.

When the requirement to use a mandatory form was deleted, nothing was added in its place. This means the way to give notice — inform — is not specific. It could be done verbally or in writing. We expect that a health care provider will make a written notation, probably in the health record, that they fulfilled their duty to inform, who was informed, how it was done, and when.

When is the notice or information given?

The law is not clear about when the health care provider must inform you and others. It would be best practice for the health care provider to do this before the major health care begins.

However, the issue of when notice is given is likely addressed by another requirement.

The law says that when a TSDM is selected for any health care decision, not just for major health care, the health care provider must confirm in writing that you (the adult patient/client/resident) are still incapable and the selected TSDM has given consent for the health care to begin. This written confirmation must be done 21 days or less BEFORE the health care begins.

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What other legal authorities take priority over a TSDM?

The following have priority over a TSDM, in order:

1. A committee of person (personal guardian) appointed by a judge of the Supreme Court of BC. This procedure involves the judge declaring you mentally incompetent of making health and personal care decisions. The court order stays in place until you die or it is discharged by a judge. If no committee of person,
2. A representative named in your Representation Agreement (RA7 or RA9) who has authority for major health care; if none,
3. A stand-alone Advance Directive that covers the specific major health care decision, if a health care provider has determined you are incapable of informed consent for the decision.

Who can be selected as a TSDM?

If no other authority is in place and you are incapable of informed consent, a health care provider must select someone to be TSDM from a list in the law and in this order:

1. Your spouse;
2. An adult child;
3. A parent;
4. A sibling;
5. A grandparent;
6. A grandchild;
7. Other relative;
8. A close friend;
9. A person who is immediately related by marriage (in-law).

The health care provider must also make sure the person is qualified to be a TSDM.

The Public Guardian and Trustee staff (a government office) are the last resort if no one else is available.

For details, read [Role and Scope of Authority of a TSDM](#).

EXAMPLE: After the major health care investigative procedure, Cathy's doctor determines that Cathy needs dental surgery (with a general anesthetic) to repair some of the damage from the car accident. The doctor believes Cathy is incapable of informed consent and selects Cathy's son, John, as the TSDM for the dental surgery decision. John gives consent for the surgery, which is scheduled to take place in four weeks. Cathy's surgeon informs Cathy that the surgeon finds her incapable of informed consent and that John has been selected as the TSDM and John has given consent for the dental surgery. The surgeon also informs Audrey, who is a near relative and accompanying Cathy.

Two weeks before the dental surgery, the surgeon re-assesses Cathy and re-confirms that she is still incapable of consent. The surgeon also double-checks with John to re-confirm that he is consenting to the dental surgery on Cathy's behalf. The surgeon puts the confirmations in writing in Cathy's health record.

What if a complaint or concern?

If you or someone accompanying you has a concern about the information provided by the health care provider, you can ask them to review it. Perhaps you do not agree with their finding that you are incapable of informed consent or there is disagreement with the decision of the TSDM.

The legislation for health care consent used to provide for a Review Board made up of a health care provider, a lawyer (member of the Law Society of BC), and someone who is not a health care provider or a lawyer. However, the Review Board was deleted from the legislation in 2004. Health authorities have ethics committees and we understand that you can ask them to review concerns.

More Information from Nidus

For other fact sheets, go to www.nidus.ca > Information (top menu bar) > [Health Care Consent](#)

- How Health Care Decisions are Made in BC if You are Incapable of Informed Consent
- Health Care Consent in BC: Your Rights & the Law
- Role and Scope of Authority of a TSDM for Health Care in BC
- Giving Consent to a Plan for Minor Health Care in BC
- Representation Agreements in BC for Health Care
- Advance Directives in BC
- Adult Guardianship/Committeeship in BC

To view legislation and regulation

Go to www.bclaws.ca > Laws of BC > Public Statutes and Regulations > H > Health Care Consent and Care Facility Admission Act (see link for Regulations, click for Health Care Consent Regulation).

Some Definitions in BC Legislation

- In British Columbia, the age of **adulthood** (age of majority) is 19 years of age or older.
- A **spouse** refers to the person the you (adult/patient/client/resident) is legally married to or lives with in a marriage-like relationship (common law). There is no time period a couple has to be together to be recognized as spouses in a marriage-like (common law) relationship.
- A **near relative** refers to a person who is 19 years or older and is the adult's (the patient/client/resident) child, parent, grandparent, sibling, or any other person who is related by birth or adoption, or a spouse of any of these.
- A **close friend** is defined as a person who is 19 years or older and who has a long-term, close personal relationship involving frequent personal contact with you, but who does not receive compensation for providing personal care or health care to you.

What cannot be used for consent?

Health authorities and professional associations often create their own paperwork. As we know, every industry has its own terminology and jargon.

You always need to check with the law, as legislation overrides policies and practices.

For example, like living wills, the DNR and MOST forms promoted by health authorities, are not part of BC law and cannot be used as an advance or substitute consent for health care.

FORM 1 – NOTICE OF INCAPABILITY AND SUBSTITUTE CONSENT (MAJOR HEALTH CARE)

[en. B.C. Reg. 40/2002; am. B.C. Reg. 431/2004.]

Health Care (Consent) and Care Facility (Admission) Act, Section 14 (4) (b) of the Act

(The wording of section 14(4)(b) was changed (amended). It used to say the health care provider must use this form when a TSDM is selected for a major health care decision. The Act is now silent on how notice or information is given — this form might serve as a model.)

To _____
[name of adult for whom substitute consent has been given (please print)]

I, _____ am your physician/other health care provider and I
[name of health care provider (please print)]
have proposed the following health care for you:

I have determined, using the legal test of incapability stated in section 7 of the Health Care (Consent) and Care Facility (Admission) Act, that you are incapable of giving or refusing consent to the health care described above.

To the best of my knowledge, you do not have a committee, or representative, who is authorized to make a decision for you about the health care described above.

Therefore, I have chosen _____ as temporary
[name and phone number of Temporary Substitute Decision Maker (please print)]
substitute decision maker for you and he/she has given refused [CHECK ONE BOX ONLY]
substitute consent to the health care described above.

If you disagree with the decision of your temporary substitute decision maker, you may ask your attending physician or one of the nurses caring for you how to have the decision reviewed.

The decision to give refuse [CHECK ONE BOX ONLY] substitute consent to the health care described above was made on _____ at _____ AM/PM.
[dd/mm/yyyy] [time]

[signature of health care provider] _____ position/title _____ [dd/mm/yyyy] _____ AM/PM
[time]