**Health Care Consent, Pandemic-Style:**

**Key Aspects of Health Care Decision-making Law in BC**

Health care treatment decisions are some of the most difficult and deeply personal life decisions. They engage fundamental questions about how we want to live and die, and impact our bodily integrity.

As a result, the right to make our own health care decisions is protected by multiple levels of legislation. The Supreme Court of Canada has determined that the [*Canadian Charter of Rights and Freedoms*](http://canlii.ca/t/8q7l) protects the right to informed consent. This right is also codified in BC’s *Health Care (Consent) and Care Facility (Admission)* Act (the[*Health Care Consent Act*](https://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-181/latest/rsbc-1996-c-181.html)), and recognized in international laws, such as the United Nations [*Convention on the Rights of Persons with Disabilities*](https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html).

Health care providers—defined in BC legislation to include all health care professionals and social workers—have a corresponding duty to get informed consent before providing treatment, except in certain emergency situations. Put most simply, this means that physicians recommend treatment, but they don't make treatment decisions.

When a patient clearly understands treatment options and risks, and there is plenty of time for discussion and consultation with the health care team and family, meeting the informed consent requirements may be straightforward. But what about decision-making involving:

* Older people with dementia who do not seem to have capacity?
* Patients with disabilities that impact communication and understanding?
* Circumstances where family members disagree about health care treatment decisions?
* People who seem to have no family or close friends to support them or provide substitute consent?

Add to this mix the challenge of providing health care in the context of pandemic policies that limit visitors and patient accompaniment, and we can see that in practice getting informed consent can be challenging.

Health care workers are powerful gate-keepers of consent rights, and properly applying health care consent rights requires an understanding of the details of BC laws. In the rest of this article I will cover critical granular details of health care consent law, and provide links for additional learning.

1. **The Right to Assistance with Communication**

People with disabilities have a right to assistance with communication. In BC this right is supported by the [*Human Rights Code*](https://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-210/latest/rsbc-1996-c-210.html) and the *Health Care Consent Act*. The *Human Rights Code* prohibits discrimination against people with disabilities and requires accommodation of barriers linked to disability. This means not only building ramps and other mechanisms of physical accessibility but also providing assistance with communication. The 1997 Supreme Court of Canada decision in [*Eldridge* v *British Columbia (Attorney General)*](file:///C%3A%5CUsers%5Cmaryl%5CAppData%5CLocal%5CMicrosoft%5CWindows%5CINetCache%5CContent.Outlook%5CTFQW3LNI%5CBritish%20Columbia%20%28Attorney%20General%29%2C%20%5B1997%5D%203%20SCR%20624%2C%20at%2070%20and%2072), [1997] 3 SCR 624, which considered access to sign language interpretation, noted that physicians cannot meet their informed consent duties without “being able to communicate effectively with their patients”, concluding that “effective communication is an indispensable component of the delivery of medical services” (at 70 and 72).

BC’s *Health Care Consent Act* (s 8) also imposes an obligation on health care providers to communicate with people “in a manner appropriate to the adult’s skills and abilities”. This language means that health care professionals need to adapt their ways of communicating to suit the needs of a person with disabilities. Arguably, this provision will sometimes require including in the discussion someone who knows the person with a disability well and understands their unique communication methods. Certainly, sometimes skilled clinicians will be able to adapt their practice in order to communicate effectively with a person who has a disability. But this is not true for all people with disabilities and all health care professionals. Some people with disabilities communicate with subtle and non-verbal strategies, and it may take time to learn how they communicate. Even for people with hearing impairments, not everyone relies on American Sign Language.

1. **The Right to Support with Decision-making**

Many people with disabilities who cannot make decisions independently can make some or all of their own health care decisions if they have support with decision-making from a person they trust. Other people with disabilities may make better decisions for themselves when they have support. In BC, the [*Representation Agreement Act*](http://canlii.ca/t/84bw) allows people to appoint a supportive decision-maker for health care through a document called a representation agreement. (You can also appoint a substitute decision-maker for health care.) Supportive decision-makers “support” a person to:

* Understand the issues involved in a decision;
* Understand the consequences of a decision;
* Access the appropriate assistance or information to help them make a decision; or
* Express their views, acting as interpreter where required.

People with disabilities are entitled to communicate with their supporters when health care decision-making is required. The supportive decision-maker can help them to demonstrate capacity for decision-making, and assist with decision-making.

Further the *Health Care Consent Act* affirms that health care providers “may allow the adult’s spouse, or any near relatives or close friends, who accompany the adult to help the adult and offer their assistance to understand or demonstrate an understanding” of the information relevant to the proposed health care (s 8(b)). This language endorses supported decision-making for health care even where a person has not formally appointed a representative through a representation agreement.

1. **The Duty to Consult**

Certainly, some people cannot make their own decisions—even with support. In such instances health care staff must seek consent to treatment from a substitute decision-maker. In BC, a substitute health care decision-maker could be a guardian, a representative, or a temporary substitute decision-make chosen under the *Health Care Consent Act*.

Health care decision-makers cannot make substitute decisions in a vacuum; they have legal obligations to communicate with the person they represent. In BC, a temporary substitute decision-maker for health care is required to consult with the adult to the extent possible, consider their wishes, and comply with them if reasonable (s 19(1)). If a temporary substitute will not fulfil these duties, then the health care provider cannot accept substitute consent from them, and must choose the next person in the list under s 16 of the *Health Care Consent Act*.

Most of us consult with people we trust in order to make the best decisions we can for ourselves. We talk about our concerns with family and close friends. We seek additional expert opinions. However, for many people with disabilities, the support of trusted allies is not just helpful—it may be integral to exercising legally protected health care decision-making rights. Health care consent rights require health care providers to facilitate access to family, close friends, and other trusted caregivers.

So what does all this mean during this pandemic? At a minimum:

* Staff may need to consider how to engage substitute and supportive decision-makers through technology.
* Facilities may need to relax rules around physical distancing to support decisional autonomy.

More learning and reading:

* Additional legislation applies to [consent to chemical restraints in long-term care](https://www.bcli.org/consent-to-chemical-restraints-in-long-term-care).
* Read more about the role of the [Public Guardian and Trustee](https://www.trustee.bc.ca/Documents/adult-guardianship/Consent%20to%20Health%20Care.pdf) in health care decision making for people who cannot make a health care decision and have no family or friends to assist.

**Plain Language Resources**

This year the Canadian Centre for Elder Law published a series of [plain language resources](https://www.bcli.org/project/health-care-decision-making-legal-rights-of-people-living-with-dementia) on health care decision-making for people living with dementia and their families, working in collaboration with the Alzheimer Society of B.C. Although designed for people living with dementia, these videos and booklets provide an accurate summary of the law for anyone living in BC.