

S E R V I N G C A N A D I A N S 

DEPARTMENT OF JUSTICE

Consent

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 Department of Justice Canada Ministère de la Justice Canada 

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The concept of consent

Defined as “the voluntary agreement to or acquiescence in what another person proposes or desires; agreement as to a course of action.” (Oxford dictionary)

Nurses have both ethical and legal obligations for obtaining consent. Today’s presentation focuses on the legal obligation to do so.

p. 3 of CNO Practice Guideline- Consent



Applicable legislation

Since nurses have professional and legal obligations for obtaining consent, knowing the relevant legislation is necessary:

- *Health Care Consent Act, 1996 (HCCA)*
- *Substitute Decisions Act, 1992 (SDA)*



Applicable legislation: *Health Care Consent Act (HCCA)*

1. Promotes individual authority and autonomy;
 2. Facilitates communication between health care practitioners and their clients; and
 3. Ensures a significant role for family members when the client is incapable of consenting.
- **Focus of the HCCA** is on the capacity to make decisions in relation to specific treatment, admission and personal assistance services.
 - HCCA deals with consent to the following separately:
 - a) **Treatment** (consent must relate to treatment proposed, informed, voluntary and not obtained through fraud),
 - b) **To a care facility** (consent required except in crisis situation)
 - c) **To personal assistance services** (does not specify consent in the Act but CNOrequires.that.it.be.obtained.either.from.client.or.substitute.decision-maker)....



Applicable legislation: *Substitute Decisions Act, 1992 (SDA)*

- The SDA deals with decision-making about personal care or property on behalf of incapable persons.
- SDA focuses on persons needing decision made on their behalf on a continuing basis.
- Involves the formal appointment of a decision-maker:
 - Power of attorney (for personal care or property or both) through either the Office of the Public Guardian and Trustee; or
 - A court appointment



Treatment

Anything done for a therapeutic, preventive, palliative, diagnostic, cosmetic or other health-related purpose. It includes a course of treatment, plan of treatment or community treatment plan.



Consent to treatment

Consent is required for any treatment except treatment provided in certain emergency situations.

The consent must:

- Relate to the treatment being proposed;
- Be informed;
- Be voluntary; and
- Not have been obtained through misrepresentation or fraud.

Emergency? Person is experiencing severe suffering or is at risk of sustaining serious bodily harm if the treatment is not administered promptly. Includes examination or diagnostic procedure if necessary to determine if there is an emergency.



Consent information must include the following:

- The nature of the treatment or care;
- The expected benefits;
- The material risks and side effects;
- Alternative courses of action; and
- Likely consequences of not receiving the treatment.



Informed consent

Consent is informed if, before giving it:

1. The person received the information about the treatment that a reasonable person in the same circumstances would require to make a decision; and
2. The person received responses to his/her requests for additional information about the treatment.



Consent forms – Documentation of consent

- Consent is about more than signing a form since the form itself is not the “consent”.
- The explanation, the dialogue about the treatment are crucial
- The form is evidentiary, written confirmation that the explanations were given and that the patient agree to what was proposed.
- The form however is of little value if the patient can convince the court that the explanations were inadequate or, worse, were not given at all.
- Documentation is key (i.e. charting questions or concerns to validate the consent process)



The information must include:

- The nature of the treatment;
- Expected benefits of the treatment;
- Material risks and side effects of the treatment;
- Alternative courses of action; and
- Likely consequences of not having the treatment.



Test your knowledge

Your client has a few questions about an upcoming procedure that a physician will perform. The nurse has been asked to obtain written consent.

Should the nurse obtain consent before the physician answers Kai's questions? Yes or no?



Obtaining informed consent and witnessing signatures

- CNO states that whoever requires the informed consent should also obtain the client's signature but employer practices may differ.
- The important part of the process is informing the client. The signature is meaningless if the client is not informed.
- Nurses are accountable to ensure that the client is informed and capable of giving consent which is done by asking if they understand and if they have any questions about the treatment.





Capacity

The client is presumed to be capable of making decisions about treatment and a health care practitioner is entitled to rely on this presumption of capacity unless she/he has reasonable grounds to believe otherwise. If the client is capable, then the client make the decision.

Client is capable if:

1. Understands the info that is relevant to making a decision concerning the treatment; and
2. Appreciates the reasonably possible consequences of a decision or lack of a decision.



Legal capacity and Age of consent in Ontario

Legal capacity: the ability to understand and appreciate the nature and consequences of decision making.

Age of consent: There is no minimum age for giving consent.

•You must use your professional judgment:

- Take into accounts the circumstances and the client's condition
- If the person is young, determine if the client has the capacity to understand and appreciate the information relevant to making the decision: does the physical, mental and emotional development allow for the full appreciation of the situation?
- If minor does not understand than the parent, guardian or substitute decision maker may be empowered to make the decision.



Case example: Consent

Facts:

- A 16-yr-old male saw his family physician for symptoms of severe depression.
- Doctor determined he was mature and understood the seriousness of the symptoms and need to address them.
- Doctor referred him to an adolescent treatment program.
- Diagnosed with major depression by psychiatrist.

Parental complaint to the College:

- Patient's mother filed a complaint with regulatory body alleging did not obtain consent for her son to attend the treatment program.



Case example: Consent (continued)

College's decision:

Both family physician and psychiatrist acted in accordance with the patient's instructions not to consult with his mother and acted in the best interest of the patient and according to College practices.



“Do what you think is best” = informed consent?

- You still have an obligation to discuss the risks and the benefits of the proposed treatment.
- The patient must be adequately advised of the risks to give informed consent.
- If the client has particular concerns than it warrants a detailed discussion of potential risks and benefits of each proposed treatment.

“When the subject matter requires expert knowledge in a specialized area, and qualified, respected specialists cannot themselves reasonably agree on the appropriate conduct, common sense dictates that the court should not decide that one body of opinion is more persuasive than other.” (*Pitman Estate v. Bain*).



Decision Tree for Obtaining Consent under the HCCA, 1996

Health care practitioner proposes treatment/admission to care facility/ personal assistance service. (Not mandatory to seek consent under the HCCA, but mandatory if consent from a substitute decision-maker is required.)



Test your knowledge

Under the *Health Care Consent Act*, one of the following is not included in the rules for when consent is required.

- a) Treatment
- b) Admission to a care facility
- c) Personal assistance services
- d) Property



Test your knowledge

Substitute decision-makers are identified in the *Health Care Consent Act* as those who can make treatment decisions for clients incapable of making their own decisions.

- a) True
- b) False

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Test your knowledge

Consent can be written, oral but not implied.

- a) True
- b) False

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Test your knowledge

The minimum age for consent under the *Health Care Consent Act* is 14.

- a) Yes
- b) No

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Test your knowledge

Edith is 89 years old and lives in a long-term care home. She is able to make decisions about her nutrition and other activities of living but unable to make decisions about her health care treatments. Unfortunately Edith cannot appoint someone to make decisions only about her health care treatments.

True or false?



Test your knowledge – which statement is correct?

- A nurse's recounting of her "usual practice" with respect to consent discussion is generally regarded by judges as having as much evidentiary weight as a contemporaneous note in the medical record.
- When a disagreement between the nurse and patient over what was said during a consent discussion, judges almost always favour the patient's account.
- A signed and witnessed consent form by itself does not constitute evidence that an adequate consent discussion took place.
- Judges generally have great sympathy for busy nurses who fail to maintain adequate medical records.



What are the legal implications of treatment without consent?

1. Professional sanctions by your regulatory body.
2. Civil liability claiming negligence and/or battery.
3. Criminal charges brought against you.



Basics of consent and nursing

1. Clients have the right to info about their care and treatment, and a right to refuse that treatment.
2. Even if consent is obtained, explain the treatment or procedure you are performing to the client.
3. Patient-specific circumstances may mandate a more thorough discussion of risks.
4. Do not provide treatment if you have any doubt about whether the client understands and is capable of consenting (unless the substitute-decision maker has consented).
5. Consent can be withdrawn at any time.
6. Advocate for your client's access to info about care and treatment if it is not forthcoming from other care providers.
7. Informed consent means oral, implied or written.

CNO Practice Guideline: Consent @ p. 7



Questions?

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"Is there a chance that you will die under the anaesthetic?"
Well, that is the killer question."