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Legal rights of transgender youth seeking medical care

BC law regarding transgender youth consent to gender-affirming medical treatment is unambiguous: the youth has exclusive right—provided certain conditions are met by their health care provider.

ABSTRACT: Medical care providers have specific legal duties in relation to youth: to respect their human rights and to assess their capacity to consent to treatment. In *AB v CD* (2020), the BC Court of Appeal clarified the responsibilities of health care providers when their patient is under 19 years of age,¹ addressed how the Infants Act² and Family Law Act³ apply in situations where youth and parents disagree about medical treatment.⁴ The Court confirmed that under the law, health care providers, not parents, are responsible for two things: assessing the capacity of a minor patient to consent to a treatment and determining whether a treatment is in the best interest of that patient. Where a health care provider assesses a young person to be capable and concludes that the treatment is in their best interests, the young person alone has authority to consent to or refuse treatment. In providing health care to a youth, providers' responsibilities are subject to the scrutiny of their professional bodies and human rights tribunals.

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Who decides? Minors' consent to health care

AB v CD and EF (2019)⁵ is a case in which AB, a transgender youth, sought gender-affirming medical treatment at age 13. His gender clinic endocrinologist, Dr GH, recommended puberty-delaying hormone therapy; his father, CD, disagreed.⁶ Both AB and CD went to court: AB for a decision that he was entitled to consent to the recommended hormone therapy; CD to prevent that treatment.

The trial judge dismissed CD's application for an injunction preventing treatment, which enabled treatment to proceed. The trial judge held that CD's guardianship right to determine medical care for his child was limited by section 41(f) of the Family Law Act (2011), which specifies that a guardian's rights are subject to s 17 of the Infants Act (1996).⁷ Under s 17 of the Infants Act (1996),⁸ if a minor understands a proposed treatment and its consequences, and the minor's medical provider finds the minor

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1. The Age of Majority Act RSBC 1996 c 7 sets the age of majority in BC at 19.
 2. Infants Act RSBC 1996 c 223. Though it is called the "Infants Act," it applies to anyone under the age of majority.
 3. Family Law Act SBC 2011 c 25
 4. *AB v CD* 2020 BCCA 11. This case was an appeal from *AB v CD and EF* 2019 BCSC 254. In that case, the BC Supreme Court held that AB had the exclusive right to consent to treatment. The Court of Appeal confirmed the trial court's decision.
 5. The legal situation for transgender youth is outlined in *Houson* (2020) and *Day* (2008).
 6. Because the World Professional Association for Transgender Health (WPATH) recommends a psychological assessment for youth, AB had already had an assessment by a psychologist before he was referred to the Gender Clinic. WPATH Standards of Care: www.wpath.org/publications/soc.
 7. *AB v CD and EF* 2019 BCSC 254. There were also many other issues in the case before the initial Supreme Court order, after that order but before the hearing in the Court of Appeal, at the Court of Appeal, and after the decision in the Court of Appeal, which are not addressed in this case note.
 8. Infants Act RSBC 1996 c 223. Section 17 provides the following:
 - 17(1) In this section:
 - "health care" means anything that is done for a therapeutic, preventive, palliative, diagnostic, cosmetic or other health related purpose, and includes a course of health care;
 - "health care provider" includes a person licensed, certified or registered in British Columbia to provide health care.
 - (2) Subject to subsection (3), an infant may consent to health care whether or not that health care would, in the absence of consent, constitute a trespass to the infant's person, and if an infant provides that consent, the consent is effective and it is not necessary to obtain a consent to the health care from the infant's parent or guardian.
 - (3) A request for or consent, agreement or acquiescence to health care by an infant does not constitute consent to the health care for the purposes of subsection (2) unless the health care provider providing the health care
 - (a) has explained to the infant and has been satisfied that the infant understands the nature and consequences and the reasonably foreseeable benefits and risks of the health care, and
 - (b) has made reasonable efforts to determine and has concluded that the health care is in the infant's best interest.

competent and the treatment to be in the best interest of the minor, the minor has the exclusive right to consent to the treatment. So the court held that AB was exclusively entitled to consent; his father could not intervene. The BC Court of Appeal agreed.⁹

There have been two further cases in which a parent who does not support their child's gender identity has sought to have treatment for the child postponed. In *A.M. v Dr. F*,¹⁰ a parent obtained an order without advising the other parties they were seeking an order, restraining surgery. However, that order was set aside, the proceeding was dismissed, and an order was made that the dissenting parent could not start another proceeding about the same issues. And in *G.M.S v Dr. Z*,¹¹ a parent's request for an injunction was denied. So in BC, the law about consent to treatment by transgender youth is unambiguous.

Duties of care providers in providing medical care to minors¹²

Health care providers have two statutory duties under the Infants Act (1996) in relation to youth seeking care. They must assess the youth to be capable of making an informed decision about their health care, and they must determine that the proposed treatment is in the youth's best interests.

In the absence of the Infants Act, a youth's parents would have the right and responsibility

to determine their child's best interests and decide their child's medical care. But the Family Law Act, which specifies what rights and responsibilities parents have in relation to their children, specifies that parents' right to consent to medical care for their child ends when their child is mature enough to make their own decisions under the Infants Act.¹³ The same rules apply to a child in care: the child decides, if they are determined capable by their doctor.¹⁴

Once a youth's care provider concludes that the minor is able to understand a proposed treatment and its potential risks and benefits, and that the treatment is in the minor's best interests, then the minor has the exclusive right to consent to treatment. The parents (or the ministry, if the youth is in care) are not entitled to decide what is in the child's best interests. They can neither consent nor refuse consent to the treatment. Note that there is no specific age cutoff in BC: a minor may be competent to decide about a particular medical treatment¹⁵ at a young age, depending on the nature of the treatment and the minor's maturity.

Assessing youth capacity

If a patient is a under 19 years of age, the first question is always, who is entitled to consent to or refuse a medical treatment¹⁶—the youth, or the youth's parents? That question depends on whether the youth has capacity to consent.

To assess a minor's capacity, the care provider must explain and be satisfied that the youth understands the nature of a proposed treatment, including the reasons for the treatment, the alternatives, and the reasonably foreseeable risks and benefits.¹⁷ No special assessment form or process is required. It need not be done in writing.

If the care provider concludes that a youth is capable, the care provider also has a duty under the Infants Act (1996) to make reasonable efforts to determine whether the proposed treatment is in the best interest of the minor, and to conclude what is in the minor's best interests. The law does not specify what "reasonable efforts to determine" entails.

Finally, if a minor is capable and the care provider believes a treatment to be in the best interests of the minor, the care provider will elicit the youth's consent, or refusal to consent, to the treatment.¹⁸ The care provider is not permitted to seek consent from a child's parent.

While the Court of Appeal encourages parental involvement, where possible, in the consideration of medical decisions a minor might make, where a minor has capacity, the health care provider must respect the confidentiality of the patient's information and must seek the minor's consent to include their parents in discussions about treatment.¹⁹ One of the risk factors for transgender youth, in particular, is a lack of parental support, which could be caused or exacerbated by inappropriate disclosures by a

9. 2020 BCCA 11. Names of the parties and medical witnesses were anonymized by the court, which also issued a publication ban on information that might lead to the identification of parties or treating professionals, in light of the risk to AB of being outed and the experience of health professionals with online abuse when their names were known.

10. *A.M. v Dr. F* 2021 BCSC 32. www.canlii.org/en/bc/bcsc/doc/2021/2021bcsc32/2021bcsc32.html?searchUrlHash=AAAAAQAddHJhbnNnZW5kZXIgc3VyZ2VyeSB2ZXhhdGlvdXMAAAAAAQ&resultIndex=2.

11. *G.M.S. v Dr. Z* 2021 BCSC 1915

12. Though some health authorities or other agencies have policies or guidelines for assessing capability and consent, they do not necessarily address the situation of patients who are minors. See, for example, Vancouver Coastal Health's "Capability and Consent Tool": <https://vch.eduhealth.ca/PDFs/IB/IB.100.C33.pdf>; the Canadian Mental Health Association's *Information Sharing in the Context of Mental Health and Substance Use in British Columbia*: <https://www2.gov.bc.ca/assets/gov/health/managing-your-health/mental-health-substance-use/information-sharing/information-sharing-adult-2016-final.pdf>; and HealthLink BC's "The Infants Act, Mature Minor Consent and Immunization": www.healthlinkbc.ca/healthlinkbc-files/infants-act-mature-minor-consent-and-immunization. There is an excellent handout by BC Children's Hospital and BC Women's Hospital and Health Centre—"Consent to Health Care: A Guide for Young People": www.bcchildrens.ca/transition-to-adult-care/Documents/ConsentforHealthcareAGuideforYouth.pdf.

13. Family Law Act SBC 2011 c 25

14. Child, Family and Community Service Act, RSBC 1996 c 46 s 25, 32, 47

15. The Court of Appeal was clear that a minor who is capable of consenting to a treatment (for example, to sew up a cut) may not be capable of consenting to all medical treatments (for example, a much more complex physical issue or treatment plan); that assessment is up to the care provider.

16. The Court of Appeal was clear that a youth's competence must be assessed with respect to any treatment. For example, a finding by a doctor that the youth is capable to consent to treatment of a broken leg would not automatically mean the youth is capable to consent to hormone treatments.

17. Clark BA, Virani A, Saewyc EM. "The edge of harm and help": Ethical considerations in the care of transgender youth with complex family situations. *Ethics & Behavior* 2019;30:161-180.

18. If the care provider concluded that a youth was not capable of making the health care decision, the youth's parents would make the decision.

19. BC Freedom of Information and Privacy Association. Health information privacy in British Columbia: children and teenagers. n.d. www.healthinfoprivacybc.ca/confidentiality/children-and-teenagers.

health care provider.²⁰ Though no case has decided the issue directly, it is likely that a minor would have to consent to the release of their records to their parents, because creating records is part of health care.²¹

Old law; new application

The Court of Appeal decision is not new law. Section 17 of the Infants Act has been part of the laws of BC since 1996. So this case is old law applied to a new situation—hormone therapy for transgender youth.²²

While it is technically possible for a parent to challenge²³ the decision of a health care provider to treat a minor without parental consent,²⁴ the Court of Appeal has clarified that the challenge will be successful only if a parent can show that the care provider has not followed the Infants Act: that the youth does not have legal capacity to consent to the health care, or that the health care provider has failed to explain the treatment and its risks and benefits, or that the health care provider has failed to make efforts to determine and conclude that the health care is in the youth's best interests. A challenge will never be successful if the challenging parent just has a different opinion than the health care provider about the child's best interests in relation to the care.

Professional complaint

Care providers who provide gender-affirming care may have a complaint made against them to their professional body by an objecting parent. Such a complaint can threaten the privacy of

the care provider, the patient, and other people adjacent to the main players.

In a recent complaint about the medical care of a transgender youth, the Health Professions Review Board decided that the College of Psychologists be allowed to redact the names of people who had written unsolicited letters of support for the registrant (medical professional).²⁵

In a separate decision, the same board held that a letter against a medical professional whom the complainant could not identify because the registrant was the subject of a court-issued sealing order with respect to their identity was a “complaint,” notwithstanding that the registrant was not identifiable by the complainant. The board held that the College of Physicians and Surgeons had incorrectly failed to investigate the complaint because the registrant's identity was shielded by a sealing order. The College had to take reasonable steps to identify the registrant apart from the materials prohibited from being disclosed by the court's orders.²⁶

Human rights of young transgender patients

In addition to having the right to consent to medical care as soon as they are capable, transgender youth have the right to have their human rights respected in the receipt of medical care. Research has shown that transgender people avoid seeking medical care because they are not confident that they will be treated respectfully.²⁷

Both federal and provincial human rights

laws protect transgender people from discrimination in the provision of services, including medical care, on the basis of gender identity or gender expression. That is, legal recognition that gender identity (one's internal sense of gender), trumps one's sex (the gender one is assigned at birth). Transgender people in BC can have their birth certificates legally changed so that the gender marker matches their gender identity; currently, they can request a birth certificate and other identity documents showing M, F, or X.²⁸

The biggest challenge to accommodating transgender people is to understand that the law recognizes a difference between an individual's sex and their gender identity, and that the law says that transgender people have the right to the recognition of their gender identity (through the use of appropriate names, pronouns, and so on) rather than being processed on the basis of their gender assigned at birth.

To ensure that the right of transgender patients to have their gender identity respected, health care providers may be required to make some modifications to their practice. In particular, health care providers should review their intake forms to ensure that patients are addressed by their preferred name and pronouns, provide training for staff so that they do not misgender waiting patients, and ensure that washrooms are transgender-inclusive.

Best practice is never to rely on the MSP-supplied gender marker that is associated with an individual's health card because that gender marker reflects a patient's birth-assigned sex, not their gender identity.

20. Researchers of transgender teen health found that 1 in 3 youth did not have an adult in their family that they could talk to about problems, and 7 in 10 felt their family did not understand them. When they felt cared about and supported by family, they reported better health. Veale J, Saewyc E, Frohard-Dourlent H, Dobson S, Clark B, and the Canadian Trans Youth Health Survey Research Group. Being safe, being me: Results of the Canadian Trans Youth Health Survey. Vancouver, BC: Stigma and Resilience among Vulnerable Youth Centre, School of Nursing, University of British Columbia. 2015. www.saravyc.ubc.ca/2018/05/06/trans-youth-health-survey/.

21. Health care is defined in s 17(1) of the Infants Act as follows: “health care” means anything that is done for a therapeutic, preventive, palliative, diagnostic, cosmetic or other health related purpose, and includes a course of health care.” That definition likely includes medical records. And nonconsensual release of a transgender person's records may also constitute discrimination under the Human Rights Code.

22. It has been applied, for example, in an Alberta case concerning the right of a teenager to consent to an abortion (*J.S.C. v Wren*, 1986 ABCA 249 (CanLII)), and in a BC case outlining a surgeon's responsibility to explain a procedure to a 12-year-old patient, and holding that explaining the choices to the patient's parents was inadequate.

23. Anyone can sue anyone at any time for any reason: the question is whether they will win.

24. “Health care provider” includes a person licensed, certified, or registered to provide health care in BC: Infants Act s 17(1).

25. *Complainant v College of Psychologists of British Columbia* (No. 1) 2021 BCHPRB 51

26. *Complainant v College of Physicians and Surgeons of British Columbia* (No. 1), 2021 BCHPRB 85

27. Winter S, Diamond, M, Green J, et al. Transgender people: Health at the margins of society. *Lancet* 2016;388:390-400.; Trans PULSE Canada Team. Health and health care access for trans and non-binary people in Canada: National, provincial, and territorial results. 2020. <https://transpulsecanada.ca/results/report-1/>.

28. For a description of the process to change gender designation on a birth certificate, see BC Vital Statistics Agency: www2.gov.bc.ca/gov/content/life-events/birth-adoption/births/birth-certificates/change-of-gender-designation-on-birth-certificates. Currently, the American Medical Association is advocating that there be no gender markers on public-facing birth certificates, a result already adopted in some Canadian provinces: www.webmd.com/a-to-z-guides/news/20210616/remove-sex-from-public-birth-certificates-ama-says. Retrieved 3 February 2022.

Practitioners also need to be careful about when and how they request information about a patient's reproductive organs. Do not ask unless the information is necessary; then, ask in a way that makes no assumptions based on the patient's name, MSP gender marker, appearance, voice, and so on.

Even if a health care provider disagrees with a proposed treatment for a transgender youth, the health care provider is required to respect the human rights of the patient. Even if a health care provider offers the names of other care providers who will offer care to a transgender person, the health care provider may not escape liability for a human rights violation. In *Korn v Potter* (1996),²⁹ a physician whose name had been disseminated in litigation between former lesbian patients decided he would no longer offer insemination to lesbians. He referred a lesbian couple to other physicians. The physician was found to have discriminated against the couple on the basis of their sexual orientation. The BC Supreme Court refused an appeal from a human rights finding of discrimination, even though the College of Physicians and Surgeons had dismissed a complaint against the doctor. So, if a health care provider does not want to provide medical care to a transgender person for their own reasons, they should seek legal advice about how to fulfill their professional and legal obligations to that patient.³⁰

Practice points

Consider the following:

- What are your procedures for determining whether a youth is capable of consent under s 17 of the Infants Act?
 - How do you determine if a youth is capable of understanding the treatment and, therefore, is entitled exclusively to consent to treatment?
 - How do you decide if the treatment is in the youth's best interest?
- Do you document your determination on your file?

- Do you explain your decision to the youth so that they are aware that they are the decision-maker?
- Once you have determined that your patient is a mature minor, do you seek their consent before disclosing information to their parents?
 - Do you make sure that your staff are aware not to communicate with the minor's parents without consent?
- Do you, with the youth's consent, explain to their parents that the youth is exclusively entitled to consent to care?
- If you have a consent form, does the form contain either parental consent or the consent of the mature minor, but not both?
- Have you reviewed your intake and all other office forms and databases to ensure that your patients' gender is recorded only when required, and where recorded, matches their gender identity?
- Can a nonbinary transgender person use the washroom in your office? Is the washroom explicitly transgender-welcoming? ■

Competing interests

None declared.

References

- AB v CD and EF* (2019) 2019 BCSC 254 (trial decision).
AB v CD (2020) 2020 BCCA 11 (appeal decision).
 Age of Majority Act RSBC 1996 c 7.
A.M. v Dr. F (2021) 2021 BCSC 32.
 BC Children's Hospital and BC Women's Hospital and Health Centre. Consent to health care: a guide for young people. 2004. Accessed 7 September 2021. www.bcchildrens.ca/transition-to-adult-care/Documents/ConsentforHealthcareAGuideforYouth.pdf.
 BC Freedom of Information and Privacy Association. Health information privacy in British Columbia: Children and teenagers. n.d. Accessed 7 September 2021. www.healthinfoprivacybc.ca/confidentiality/children-and-teenagers.
 BC Vital Statistics Agency. n.d. Retrieved 2 February 2022 from www2.gov.bc.ca/gov/content/life-events/birth-adoption/births/birth-certificates/change-of-gender-designation-on-birth-certificates.
 Canadian Mental Health Association. Information sharing in the context of mental health and substance use in British Columbia. n.d. Accessed 7 September 2021.
 Child, Family and Community Service Act, RSBC 1996 c 46.
 Clark BC, Virani A, Saewyc EM. The edge of harm and help: Ethical considerations in the care of transgender youth with complex family situations. *Ethics & Behavior* 2020;30:161-180.
Complainant v College of Physicians and Surgeons of British Columbia (No. 1) 2021 BCHPRB 51.
Complainant v College of Physicians and Surgeons of British Columbia (No. 1) 2021 BCHPRB 85.
 Day, DC. The capable minor's healthcare: Who decides? 2008 86-3 *Canadian Bar Review* 379, 2008 CanLII Docs 134. Accessed 27 January 2022. <https://canlii.ca/t/29k9>.
 Deutsch MB, editor. Guidelines for the primary and gender affirming care of transgender and gender nonbinary people. 2nd ed. University of California, San Francisco Department of Family and Community Medicine Center of Excellence for Transgender Health. 2016. <https://transcare.ucsf.edu/sites/transcare.ucsf.edu/files/Transgender-PGACG-6-17-16.pdf>.
 Family Law Act SBC 2011 c 25.
G.M.S. v Dr. Z 2021 BCSC 1915.
 HealthLink BC. The Infants Act, mature minor consideration and immunization. 2021. Accessed 17 September 2021. www.healthlinkbc.ca/healthlinkbc/files/infants-act-mature-minor-consent-and-immunization.
 Houson, C. Respecting and protecting transgender and gender-nonconforming children in family courts. *Can J Fam L* 2020;33:103.
 Infants Act RSBC 1996 c 223.
J.S.C. v Wren (1986) 1986 ABCA 249.
Korn v Potter (1996) 1996 CanLII 1818 (BC SC).
Potter v Korn (1995) 1995 CanLII 18185 (BC HRT), 23 C.H.R.R. D/319 (B.C.H.R.C.).
 Trans Care BC. www.phsa.ca/transcarebc/health-professionals/education/trans-intro.
 Trans Pulse Canada Team. Health and health care access for trans and non-binary people in Canada: National, provincial, and territorial results. 2020. Accessed 7 September 2021. <https://transpulsecanada.ca/results/report-1/>.
 Vancouver Coastal Health. Capability and consent tool: B.C. edition. n.d. Accessed 7 September 2021. <https://vch.eduhealth.ca/PDFs/IB/IB.100.C33.pdf>.
Van Mol v Ashmore (1999) 1999 BCCA 6.
 Veale J, Saewyc E, Frohard-Dourlent H, Dobson S, Clark B, and the Canadian Trans Youth Health Survey Research Group. Being safe, being me: Results of the Canadian Trans Youth Health Survey. Vancouver, BC: Stigma and Resilience among Vulnerable Youth Centre, School of Nursing, University of British Columbia. 2015. Accessed 8 September 2021. http://apsc-saravyc.sites.olt.ubc.ca/files/2018/03/SARAVYC_Trans-Youth-Health-Report_EN_Final_Web2.pdf.
 Webmed.com. American Medical Association is advocating that there be no gender markers on public-facing birth certificates, a result already adopted in some Canadian provinces. 2021. Accessed 7 September 2021. www.webmd.com/a-to-z-guides/news/20210616/remove-sex-from-public-birth-certificates-ama-says.
 Winter S, Diamond, M, Green J, et al. Transgender people: Health at the margins of society. *Lancet* 2016; 388:390-400.
 World Professional Association for Transgender Health. Standards of care for the health of transsexual, transgender, and gender nonconforming people. 7th version. 2012. www.wpath.org/publications/soc

29. *Korn v Potter* 1996 CanLII 1818 (BC SC)

30. For a comprehensive overview of trans-affirming care, see Deutsch (2016). An excellent BC resource with respect to trans health care, including resources for care providers, is Trans Care BC: www.phsa.ca/transcarebc/health-professionals/education/trans-intro.