



PRINCE EDWARD ISLAND
ÎLE-DU-PRINCE-ÉDOUARD

CONSENT TO TREATMENT

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This document is *not* the official version of the Act. The Act and the amendments as printed under the authority of the Queen's Printer for the province should be consulted to determine the authoritative statement of the law.

For more information concerning the history of this Act, please see the *Table of Public Acts* on the Prince Edward Island Government web site (www.princeedwardisland.ca).

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CONSENT TO TREATMENT
CHAPTER C-17.2
AND HEALTH CARE DIRECTIVES ACT

PART I — INTERPRETATION

1. Definitions

In this Act

- (a) “**associate**” means a person whom the patient has recognized as a trusted adviser;
- (b) “**capable**” means mentally capable, in accordance with section 7, of making a decision, and “**capacity**” is used as the corresponding noun indicating the state of being capable;
- (c) “**court**” means the Family Section of the Supreme Court;
- (d) “**decision**” means a consent, refusal to consent or revocation of consent to any treatment;
- (e) “**directive**” means a document made in accordance with this Act before or after the coming into force of this Act, in which the maker sets out decisions or wishes or instructions respecting treatment, or appoints a proxy, or both;
- (f) “**guardian**” includes a guardian appointed under the *Mental Health Act* R.S.P.E.I. 1988, Cap. M-6.1 or any other enactment;
- (g) “**health practitioner**” means a person who is registered or licensed to provide treatment pursuant to an Act but does not include a person who is registered under the *Social Work Act* R.S.P.E.I. 1988, Cap. S-5;
- (h) “**maker**” means a person who makes a directive;
- (i) “**Minister**” means the Minister of Health and Wellness;
- (j) “**patient**” means a person in respect of whom treatment is proposed;
- (k) “**prescribed**” means prescribed by the regulations made under section 36;
- (l) “**proxy**” means the person or persons appointed by the maker of a directive to make decisions on his or her behalf, and includes an alternate in the event that the person or persons appointed is unable to act;
- (m) “**personal assistance service**” means assistance with or supervision of a routine activity of living, including one that relates to a person’s health care, nutrition, shelter, clothing, grooming, hygiene or safety but does not include anything prescribed by the regulations as not constituting a personal assistance service;
- (n) “**spouse**” does not include a person living separate and apart within the meaning of the *Divorce Act* R.S.C. 1988, Chap. D-34;

- (o) “**substitute decision-maker**” means a person who is authorized to make a decision on behalf of a person who is incapable with respect to treatment;
- (p) “**treatment**” means a procedure or set of procedures that is done for a therapeutic, preventive, palliative, diagnostic, cosmetic or other health-related purpose, and includes a course of treatment or group of associated treatments, but does not include
 - (i) an examination or assessment conducted in accordance with this Act, the *Adult Protection Act* R.S.P.E.I. 1988, Cap. A-5, the *Mental Health Act*, the *Public Health Act* R.S.P.E.I. 1988, Cap. P-30, the *Public Trustee Act* R.S.P.E.I. 1988, Cap. P-32.2 or any Act respecting capacity or guardianship of the person,
 - (ii) the assessment or examination of a person to determine the general nature of the person’s condition,
 - (iii) the taking of a person’s health history,
 - (iv) the communication of an assessment or diagnosis,
 - (v) the admission of a person to a hospital or other facility except as provided in section 15,
 - (vi) a personal assistance service,
 - (vii) a treatment that in the circumstances poses little or no risk of harm to the person,
 - (viii) counselling that is primarily in the nature of advice, education or motivation,
 - (ix) anything prescribed by the regulations as not constituting treatment.
1996,c.10,s.1; 2005,c.40,s.5; 2008,c.8,s.5(2); 2010,c.31,s.3.

2. Subject to other Acts

- (1) This Act is subject to the *Mental Health Act* and the *Public Health Act* R.S.P.E.I. 1988 Cap.P-30 and where there is conflict between this Act and any provision of any of those Acts, the provision of that other Act prevails.

Restraint, confinement

- (2) This Act does not affect any authority at common law to restrain or confine a person or take other remedial action when immediate action is necessary to prevent serious bodily harm to the person or to others. *1996, c.10,s.2.*

3. Presumption of capacity

- (1) Every person is presumed to be capable of
 - (a) giving or refusing consent to treatment; and
 - (b) making a health care directive,until the contrary is demonstrated.

Revocation

- (2) Authority to give consent includes authority to refuse consent or revoke a consent previously given. *1996,c.10,s.3.*



PART II — CONSENT TO TREATMENT**4. Consent rights**

Every patient who is capable of giving or refusing consent to treatment has the right

- (a) to give consent or to refuse consent on any grounds, including moral or religious grounds, even if the refusal will result in death;
- (b) to select a particular form of treatment from among those proposed by a health practitioner on any grounds, including moral or religious grounds;
- (c) to be assisted by an associate; and
- (d) to be involved to the greatest degree practicable in case planning and decision making. *1996, c.10, s.4.*

5. No treatment without consent

A health practitioner shall not administer a treatment and shall take reasonable steps to ensure that it is not administered unless he or she is of the opinion that

- (a) the patient, while capable with respect to the treatment, has given consent; or
- (b) the patient is incapable with respect to the treatment, and another person has given consent in accordance with this Act. *1996, c.10, s.5.*

6. Elements of consent

(1) The following are the elements required for a valid consent to treatment:

- (a) the consent must relate to the particular treatment;
- (b) the consent must be informed;
- (c) the consent must be given voluntarily;
- (d) the consent must not have been obtained through misrepresentation or fraud.

Informed consent

(2) A consent is informed if, before giving it, the patient received the information that a reasonable person would require to understand the proposed treatment and to make a decision, including information about

- (a) the condition for which the treatment is proposed;
- (b) the nature of the proposed treatment;
- (c) reasonable alternative treatments;
- (d) the material risks, expected benefits, likely effects and side-effects of the proposed treatment and of alternative treatments, including no treatment, that a reasonable person would expect to be told about, and the patient has an opportunity to ask questions and receive answers about the proposed treatment.

Waiver

(3) Notwithstanding clause (1)(b), a patient may by a release in writing waive the right to receive the information required by subsection (2).

Manner of communication

(4) Information under subsection (2) shall be communicated, to the extent practicable, in a manner appropriate to the skills and abilities of the patient.

Express or implied

- (5) Consent to treatment and refusal of consent may be expressed orally or in writing or may be inferred from conduct.

Additional or alternative treatment

- (6) A health practitioner may provide additional or alternative treatment to a patient if
- (a) the treatment that was consented to is in progress;
 - (b) the patient is unconscious or semi-conscious or it is otherwise not reasonably possible to obtain an informed consent; and
 - (c) it is medically necessary to provide the additional or alternative treatment to deal with conditions not foreseen when consent was given.

Included consent

- (7) Unless it is not reasonable to do so in the circumstances, a health practitioner is entitled to presume that consent to a treatment includes
- (a) consent to variations or adjustments in the treatment, if the nature, expected benefits, material risks and likely effects and side-effects of the changed treatment are not significantly different from the nature, expected benefits, material risks and likely effects and side-effects of the original treatment; and
 - (b) consent to the continuation of the same treatment in a different setting, if there is not significant change in the expected benefits, material risks and likely effects and side-effects of the treatment as a result of the change in the setting in which it is administered. *1996, c.10, s.6.*

CAPACITY

7. Capacity with respect to treatment

- (1) Subject to the criteria prescribed pursuant to section 10, a patient is capable with respect to treatment if the patient is, in the health practitioner's opinion, able
- (a) to understand the information that is relevant to making a decision concerning the treatment;
 - (b) to understand that the information applies to his or her particular situation;
 - (c) to understand that the patient has the right to make a decision; and
 - (d) to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.

Assistance in determining capacity

- (2) In determining a patient's capacity, a health practitioner shall, where he or she considers it necessary, inform the patient of the right to assistance and take into account such assistance as may be provided by an associate.

Capacity depends on treatment

- (3) A person may be incapable with respect to some treatments and capable with respect to others.

Capacity depends on time

- (4) A person may be incapable with respect to a treatment at one time and capable at another. *1996, c.10, s.7.*



8. Return of capacity

When

- (a) a patient becomes capable in the health practitioner's opinion with respect to treatment, consent to which has already been given or refused by another person in accordance with this Act; or
- (b) the health practitioner has been acting in an emergency without consent pursuant to section 16 or 17 and, in the health practitioner's opinion, the patient is or becomes capable and the circumstances now permit an informed decision,

the patient's own decision with respect to treatment governs. *1996,c.10,s.8.*

9. Request for opinion of psychiatrist

(1) Where a health practitioner is of the opinion that

- (a) pursuant to section 7, a patient is not capable; or
- (b) pursuant to section 8, a patient has not become capable,

with respect to treatment, the patient may request that a reassessment of his or her capacity be conducted by a psychiatrist or such other practitioner as may be prescribed, and the health practitioner shall inform the patient of the right to make such request.

Confirmation

(2) Where the psychiatrist or other health practitioner does not confirm the opinion of the health practitioner, a decision made on behalf of the patient pursuant to section 11 is void. *1996,c.10,s.9.*

10. Determination of capacity

In determining a patient's capacity with respect to treatment, a health practitioner shall apply such criteria and follow such standards and procedures as may be prescribed. *1996,c.10,s.10.*

CONSENT ON INCAPABLE PATIENT'S BEHALF

11. Consent on incapable patient's behalf

(1) If a health practitioner proposes to administer treatment to a patient who is, in his or her opinion, incapable with respect to the treatment, a decision may be made on the patient's behalf by another person who is referred to in one of the following clauses, in descending order of priority:

- (a) the proxy;
- (b) the guardian if having the authority to give or refuse consent to treatment;
- (c) the spouse;
- (d) the son or daughter, or the parent, or a person who has assumed parental authority and who is lawfully entitled to give or refuse consent to treatment on the patient's behalf;
- (e) the brother or sister;
- (f) a person whom the health practitioner considers to be the patient's trusted friend with close knowledge of the wishes;
- (g) any other relative,

of the patient.

Inquiry

- (2) The health practitioner shall make reasonable inquiry as to the existence of persons referred to in subsection (1) and shall determine, in accordance with this section, who is entitled to make a decision.

Qualifications of consenter

- (3) Only a person who
- (a) is at least sixteen years of age;
 - (b) is himself or herself capable with respect to the treatment; and
 - (c) has knowledge of the incapable patient's circumstances and has been in recent contact with the patient,
- may make a decision.

Parent under sixteen

- (4) A person, though not sixteen years of age or more, may make a decision on behalf of his or her child if the person is capable with respect to the treatment.

Ranking

- (5) If a person described in one of the clauses of subsection (1) is available, a person described in a later clause may make a decision only if the one described in the earlier clause is not willing to assume the responsibility for making a decision or is himself or herself incapable with respect to the treatment.

Decision-maker of last resort

- (6) If no person described in any of the clauses of subsection (1) is available, capable with respect to the treatment, and willing to assume the responsibility for making a decision, or if there is disagreement among persons of the same class, such public official as may be empowered with the duty of public guardianship or as may be designated by the Minister may make a decision.

Meaning of "available"

- (7) For the purpose of subsections (5) and (6), a person is available if it is possible for the health practitioner, within a time that is reasonable in the circumstances, to communicate with him or her and obtain a decision. *1996,c.10,s.11.*

12. Excluded matters

Nothing in this Part authorizes a person to make a decision on an incapable patient's behalf with respect to any of the following:

- (a) subject to any express authority given in a directive, a procedure the primary purpose of which is research except where the research is likely to be beneficial to the well-being of the patient;
- (b) sterilization that is not medically necessary for the protection of the patient's health;
- (c) an abortion except where the continuation of the pregnancy would be likely immediately to endanger her life or health.
- (d) the use of electric shock as aversive conditioning;
- (e) not proclaimed;
- (f) any other treatment prescribed in the regulations. *1996,c.10,s.12.*



13. Principles

- (1) A substitute decision-maker shall act in accordance with the following principles:
- (a) if the person knows that the patient has made a directive that contains instructions applicable to the circumstances, they must be followed, subject to clause (c);
 - (b) if the person does not know of any such instructions, he or she shall act in accordance with any wishes applicable to the circumstances that he or she knows the patient expressed, orally or in writing, when capable, and believes the patient would still act on if capable;
 - (c) if the person knows of, and there is evidence satisfactory to the person and the health practitioner of, wishes applicable to the circumstances that the patient expressed, orally or in writing, when capable, and believes the patient would still act on them if capable, and if the wishes are demonstrably more recent than the instructions contained in a directive, the wishes must be followed;
 - (d) if the person does not know of any such instructions or wishes or if it is impossible to comply with such instructions or wishes, he or she shall act in the patient's best interests;
 - (e) so far as is practicable, the person shall attempt to involve the patient in consideration of the decision.

Best interests

- (2) In deciding what a patient's best interests are, the substitute decision-maker shall take into consideration
- (a) the values and beliefs that the person knows the patient held when capable and believes he or she would still act on if capable;
 - (b) the patient's current wishes, if they can be ascertained; and
 - (c) the following factors:
 - (i) whether the treatment is likely to
 - (A) improve the incapable person's condition or well-being,
 - (B) prevent the incapable person's condition or well-being from deteriorating, or
 - (C) reduce the extent to which, or the rate at which, the incapable person's condition or well-being is likely to deteriorate,
 - (ii) whether the patient's condition or well-being is likely to improve, remain the same or deteriorate without the treatment,
 - (iii) whether the benefit the patient is expected to obtain from the treatment outweighs the risk of harm to him or her,
 - (iv) whether a less restrictive or less intrusive treatment would be as beneficial as the treatment that is proposed. *1996, c.10, s.13.*

14. Information

Notwithstanding any restriction relating to the disclosure of confidential medical information, a substitute decision-maker and an associate are entitled to receive all the information required for an informed consent as described in subsection 6(2). *1996, c.10, s.14.*

15. Admission to hospital, etc.

Authority to give or refuse consent to treatment on an incapable patient's behalf includes authority to consent to the patient's admission to a hospital or to a psychiatric or other treatment facility for the purpose of the treatment. *1996,c.10,s.15.*

GENERAL PROVISIONS

EMERGENCY TREATMENT

16. Emergency treatment despite refusal

If consent to a treatment is refused on an incapable person's behalf by his or her substitute decision-maker, the treatment may be administered despite the refusal if, in the opinion of the health practitioner proposing the treatment,

- (a) there is an emergency; and
- (b) the substitute decision-maker did not comply with section 13. *1996,c.10,s.16.*

17. Emergency treatment without consent

(1) Notwithstanding section 5, a health practitioner may administer treatment to a patient without consent if, in his or her opinion,

- (a) the patient is experiencing severe suffering or is at risk, if the treatment is not administered promptly, of suffering serious bodily harm; and
- (b) it is not reasonably possible to obtain a decision from the patient or on the patient's behalf, or the delay required to do so will prolong the suffering that the patient is experiencing or will put the patient at risk of suffering serious bodily harm.

Apparently valid refusal

(2) If the health practitioner has reasonable grounds to believe that the patient, when capable expressed a wish to refuse consent to treatment of the kind that is proposed, he or she shall not administer that treatment. *1996,c.10,s.17.*

PROTECTION FROM LIABILITY

18. Apparently valid consent

(1) A health practitioner who administers treatment to a patient pursuant to section 16 or based on a consent which the health practitioner believes, on reasonable grounds and in good faith, to be sufficient for the purposes of this Part is not liable for administering it without consent.

Apparently valid refusal

(2) A health practitioner who refrains from administering treatment to a patient because of a refusal or revocation of consent which the health practitioner believes, on reasonable grounds and in good faith, to be sufficient for the purposes of this Part is not liable for failure to administer the treatment.



Emergency treatment

- (3) A health practitioner who administers treatment to a patient or refrains from doing so in accordance with section 17 is not liable for administering the treatment without consent or for failure to administer the treatment, as the case may be. *1996, c.10, s.18.*

19. Substitute or associate

A substitute decision-maker or an associate, acting in good faith and in accordance with this Part, is not liable for making a decision. *1996, c.10, s.19.*

PART III — HEALTH CARE DIRECTIVES**20. Capacity of maker**

- (1) Every person over the age of sixteen years who is capable may execute a directive.

Content of directive

- (2) A directive may
- (a) stipulate treatment, procedures, or medication that the maker authorizes or refuses to consent to, or directs to be discontinued, in the circumstances set out in the directive;
 - (b) stipulate circumstances in which the maker shall be permitted to die a natural death, receiving only palliative care intended to reduce pain and suffering;
 - (c) appoint a proxy;
 - (d) specify an event or condition upon which the directive becomes effective;
 - (e) make any other direction concerning the health care or treatment of the maker. *1996, c.10, s.20.*

21. Writing required

- (1) A directive shall be in writing and dated.

Execution

- (2) A directive shall be signed
- (a) by the maker; or
 - (b) by some other person in the presence and by the direction of the maker, in which case
 - (i) the person signing shall not be the proxy or the spouse of the proxy,
 - (ii) the maker shall acknowledge the signature in the presence of a witness, who shall not be the proxy or the spouse of the proxy, and
 - (iii) the witness shall sign the directive as witness in the presence of the maker.

Form of directive

- (3) If a form of directive is prescribed, the use of the prescribed form is not mandatory.

Agreement of proxy

- (4) The appointment of a proxy is valid only if the proxy, or another person at the direction of the proxy, agrees to the appointment in writing prior to the maker's incapacity. *1996, c.10, s.21.*

22. Coming into effect of directive

A directive and the authority of a proxy become effective

- (a) when the maker ceases to be capable of making or communicating decisions; or
- (b) upon the occurrence of such other event or condition as may be specified in the directive,

and continue to be effective for the duration of the maker's incapacity or inability to communicate. *1996, c.10, s.22.*

23. Inquiry

A health practitioner shall make reasonable inquiry as to the existence of a directive. *1996, c.10, s.23.*

24. Effect of decision by maker

- (1) A decision contained in a directive shall be as effective as if made by the maker when the maker had capacity to make the decision.

Effect of decision by proxy

- (2) Subject to any express limitations in the directive and to section 13, a decision made by a proxy on behalf of a maker shall be as effective as if made by the maker when the maker had capacity to make the decision. *1996, c.10, s.24.*

25. Revocation

- (1) So long as the maker has the capacity to make decisions, a directive may be revoked by
 - (a) a later directive;
 - (b) a later writing declaring an intention to revoke the directive by the maker and made in accordance with subsection 21(2); or
 - (c) the destruction, with intent to revoke, of all original executed copies of the directive either by the maker or by some other person in the presence and at the direction of the maker.

Effect of ceasing to be a spouse

- (2) Unless the directive expressly provides otherwise, the appointment of a spouse as proxy in a directive is revoked if the person ceases to be a spouse after executing the directive. *1996, c.10, s.25; 2008, c.8, s.5(3).*

26. No delegation

- (1) A proxy may not delegate the authority to make decisions.

More than one proxy

- (2) Where more than one proxy is named in a directive and the directive does not indicate whether they are to act jointly or successively, they shall be deemed to be appointed to act successively, in the order named in the directive.

Joint proxies

- (3) Unless the directive provides otherwise, where more than one proxy is named in a directive to act jointly rather than successively,



- (a) the decision of the majority shall be deemed to be the decision of all; and
- (b) if one or more of them has died or is unwilling or, after reasonable inquiries, unavailable to make a decision, the remainder of them may make the decision and the decision of the majority of the remainder shall be deemed to be the decision of all. 1996, c.10, s.26.

27. Review of misconduct

- (1) Any interested person who considers that a proxy is not acting in good faith may file a complaint with such public official as may be empowered with the duty of public guardianship or as may be designated by the Minister.

Investigation

- (2) Upon receipt of a complaint the person referred to in subsection (1) shall conduct an investigation and endeavour to resolve the matter.

Application to court

- (3) Failing resolution, the person referred to in subsection (1) may apply to the court and the court may by order
 - (a) suspend or terminate the appointment of the proxy and rescind a decision made by the proxy; and
 - (b) if the directive does not appoint another proxy who can continue to act, substitute its own decision in place of the rescinded decision. 1996, c.10, s.27.

28. Proxy decision supersedes that of court and guardian

Unless a directive provides otherwise, a decision made by a proxy on behalf of a maker shall, subject to section 27, have priority over a decision made by a court or by any other person, including a guardian. 1996, c.10, s.28.

29. Medication for pain

Notwithstanding any instructions provided in a directive, the physician in attendance may prescribe medication to reduce pain and suffering. 1996, c.10, s.29.

30. Protection from liability *re* treatment

- (1) No action lies against a person who administers or refrains from administering treatment to another person by reason only that the person
 - (a) has acted in good faith in accordance with the decisions, wishes or instructions expressed in a directive or in accordance with a decision made by a proxy; or
 - (b) has acted contrary to the decisions, wishes or instructions expressed in a directive if
 - (i) the person did not know of the existence of the directive or its contents, or
 - (ii) compliance with the directive would not be realistically possible or would be contrary to the ethical standards of his or her profession.

Presumption of validity

- (2) A directive that has been acted upon and
 - (a) is not executed in accordance with this Act;
 - (b) has been revoked; or

(c) was made by a person who was not competent to execute it,
is deemed to be valid for the purposes of this Act if the person who acted upon it had no reason to believe that the directive was not in fact executed in accordance with this Act, was revoked or was made by a person who was not competent to execute it.

Protection from liability for proxy

- (3) No action lies against any proxy
- (a) by reason only of having acted, in good faith, in accordance with the authority conferred by the directive; or
 - (b) for failing to make decisions on behalf of the maker.1996,c.10, s.30.

31. Gift to witness, proxy, or person signing for maker

The entitlement of a person or his or her spouse to any of the following:

- (a) a beneficial devise, bequest, or other disposition or appointment of or affecting real or personal property under the will of the maker of a directive;
- (b) the proceeds of an insurance policy on the life of a maker; or
- (c) a share of a maker's estate under the laws governing intestate succession,

is not void by reason only that the person has signed a directive on the maker's behalf, has been a witness to the making of a directive or is, or has acted as, the maker's proxy.1996,c.10,s.31.

32. Registration

Not proclaimed. 1996,c.10,s.32.

33. No presumption

No inference or presumption shall arise by reason only that a person has not executed or has revoked a directive.1996,c.10,s.33.

PART IV — RECOGNITION OF EXTRA-PROVINCIAL DIRECTIVES

34. Effect of extra-provincial directives

- (1) A health care directive, whether it is made in Prince Edward Island or not, has the same effect as though it were made in accordance with Part III if
- (a) it meets the formal requirements of Part III; or
 - (b) it was made under and meets the formal requirements established by the legislation of
 - (i) the jurisdiction where the directive was made, or
 - (ii) the jurisdiction where the person who made the directive was habitually resident at the time the directive was made.

Formal requirements

- (2) For the purposes of subsection (1), the formal requirements are the requirements relating to the formalities of execution of health care directives.

Certification by lawyer

- (3) A person implementing a health care directive may rely on a certification by a person purporting to be a lawyer or notary public in a jurisdiction certifying that the directive meets the formal requirements of the jurisdiction.

Formal requirements not met

- (4) A health care directive that does not meet the formal requirements described in subsection (1) has the same effect as a health care directive that was made in Prince Edward Island but that does not meet the formal requirements of Part III.

Where impractical to determine if requirements met

- (5) In circumstances in which it is impractical to determine whether or not a health care directive meets the formal requirements described in subsection (1), the directive has the same effect as a health care directive that was made in Prince Edward Island but that did not meet the formal requirements of Part III. *1996, c.10, s.34.*

PART V — MISCELLANEOUS**35. Offence and penalty**

Any person who

- (a) wilfully conceals, falsifies or forges, or without the maker's consent alters, cancels, damages or obliterates a directive or a revocation of a directive; or
- (b) as proxy, other substitute decision-maker or otherwise, wilfully misrepresents a patient's wishes, wilfully contravenes section 13, or misrepresents himself or herself in a way which relates to the provisions of this Act,

is guilty of an offence and liable on summary conviction to a fine of not more than \$2,000 or to imprisonment for a term of not more than six months or to both. *1996, c.10, s.35.*

36. Regulations

The Lieutenant Governor in Council may make regulations. *1996, c.10, s.36.*