

CANADIAN TRENDS:
GUARDIANSHIP IN BRITISH COLUMBIA
AND OTHER PROVINCES



**PUBLIC GUARDIAN
AND TRUSTEE OF
BRITISH COLUMBIA**

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INTRODUCTION AND BACKGROUND

There is a presumption in Canadian law that adults are mentally capable and have the legal capacity to make independent decisions in all matters respecting their person and property. This legal presumption remains intact until the contrary is demonstrated. A variety of conditions can interfere with one's capacity to make independent decisions and adults may be found to be incapable either for a specific transaction or more generally. When an individual loses capacity it may become necessary for someone else to make decisions on the incapable person's behalf.

One of the most fundamental issues in the area of guardianship and substitute decision-making involves two central and competing interests: the promotion of individual autonomy and self-determination balanced against the best interests of the individual sometimes as determined by the state through the exercise of its *parens patriae* role.¹ The state also has an interest in achieving administrative simplicity, efficacy and efficiency in the care of its citizens.² Developments in guardianship law in Canada over the past 40 years have reflected the tension between these competing values.

Canada is undergoing a major period of reform in the area of adult guardianship. A central underlying principle in law reform efforts has been that the wishes of individuals must be respected to the extent of their capacity to make decisions. As a result, recent legislative initiatives in British Columbia and elsewhere in Canada reflect a more sophisticated approach to capacity determinations. It is now understood and accepted that individuals may possess varying degrees of capacity, that is, they may be capable of making some decisions but not others. Legal tools have been created which provide for limited forms of intervention into the lives of individuals, leaving full guardianship as an option of last resort.

This paper will approach the topic in three parts. First, an overview of the societal influences that have impacted the development of modern Canadian guardianship law will be undertaken. Second, examples primarily related to British Columbia but from across Canada, of how guardianship law has developed in each of its major components will be outlined. Lastly, the development and influence of Public Guardian and Trustees in Canada on adult guardianship law reform will be described.

PART 1: MAJOR TRENDS AND POLICY IMPERATIVES

Adult guardianship, standing as it does at the intersection point of families, social services and law is subject to a number of societal influences. All of the following factors have been present, to a greater or lesser extent, in virtually every jurisdiction in Canada that has modernized its guardianship law.

(a) The Development of Rights Consciousness Including the *Charter of Rights*

Canadian society has changed significantly in the past few decades as individuals, courts and legislatures have all become significantly more rights conscious. This awareness has taken various forms – an increase in procedural fairness, the structuring and narrowing of

¹ Chalke, Hayes and Howitt, *Substitute Decision-Making for Incapable People: Trends in Law and Policy*, Law Society of Upper Canada, Special Lectures 1996, page 387.

² D. N. Weisstub, *Inquiry on Mental Competency* (1990) Final Report (Queen's Printer for Ontario), page 48.

administrative discretion, a move towards minimum interference with liberty and increased opportunities for reviews and appeals. While there were some cases that predated the advent of the *Charter of Rights*³ the major change followed the introduction of the *Charter of Rights* in Canada in 1982, and the equality provisions which came into force in 1985. Cases such as *Re Eve*⁴, *Malette v. Shulman*⁵ and *Fleming v. Reid*⁶ represent examples in three different areas (non-therapeutic sterilization; right to refuse treatment even if death may ensue; right of a psychiatric in-patient to give advance binding instructions to refuse consent) where the courts supported a trend away from a culture of paternalism and towards a recognition of rights, self determination and minimum interference. These cases in turn, impacted legislatures when modernizing guardianship law.

(b) The Desire for Greater Autonomy and Self Determination

There has been a recognition in Canada of personal autonomy and self determination. The trend throughout Canada and indeed throughout North America has been one that has recognized and valued individual liberty even where, by an objective standard, lifestyle choices would not be shared by others⁷. For example, in *Koch*⁸ the court stated: "...it must be remembered the appellant has the right to spend her money foolishly if she desires. The right to be foolish is an incident of living in a free and democratic society."

This trend towards greater autonomy is not limited to financial matters and indeed the greatest change has probably occurred with respect to personal care and living circumstances. Great value is placed in Canadian society on the "dignity to live at risk" provided that others are not put in danger and, as we shall see later, provided that the individual is capable of making these choices.

(c) The Deinstitutionalization of Persons Living with Mental Illness and Developmental Disability

Over the past 30 years Canada has seen a marked decrease in the institutionalization of people living with mental illness or developmental disability. Decades ago, long-term institutionalization and global declarations of incapacity meant that relatively simple and absolute guardianship laws were broadly applicable. However today, a largely community-based clientele means that guardianship laws must accommodate individual circumstances to a much greater degree than in the past. Furthermore, the pressure on guardianship services themselves, particularly public guardianship, to deliver individualized service has increased as well.

³ Until 1982 fundamental constitutional rights and freedoms in Canada were founded in common law cases only. In 1982 Canada adopted written constitutional rights.

⁴ (1986), 31 D.L.R. (4th) 1 (S.C.C.)

⁵ (1990), 72 O.R. (2d) 417 (C.A.)

⁶ (1991), 4 O.R. (3d) 74 (C.A.)

⁷ Allan, J. "A View from the Bench" Canadian Centre for Elder Law Studies National Conference, Vancouver 2005

⁸ (1997) 33 O.R. (3d) 485 (Ont. Ct. Gen. Div.)

(d) Recognizing Cultural and Ethnic Diversity

Canada, and particularly British Columbia, is home to an increasingly diverse population. In just 10 years the Vancouver region's visible minority population will reach 53%. This has created a policy tension to accommodate cultural differences within guardianship laws while still protecting fundamental values (such as those in the *Charter of Rights*). Examples of this tension include cultural norms that identify property as family owned rather than individually owned and different decision-making hierarchies within families than are found within most substitute decision-making laws.

Recent immigration of seniors presents particular challenges. Approximately 35% of recent immigrants to British Columbia in the family class are parents or grandparents being sponsored by family members. Under sponsorship, the family member undertakes to provide for their basic needs and to be financially responsible for the immigrant for 10 years. Sponsored seniors have the benefit of involved families, however they could also be isolated and unaware of services available in Canada, increasing potential for abuse and neglect.

(e) An Aging Population

The proportion and number of seniors continues to increase as people live longer due to advances in public health, medical technology and nutrition. Seniors, particularly those over age 85, are the fastest growing segment of British Columbia's population. A recent national study has predicted that nearly 14,000 new cases of dementia will be diagnosed each year in British Columbia. The North American post World War II baby boom is approaching the age of 60, resulting in far greater interest in seniors' issues including incapacity planning and guardianship than existed even 10 years ago. Stakeholder organizations representing seniors have, in the United States⁹, considerable influence in public policy matters and their influence in Canada will continue to grow¹⁰.

(f) A Mobile Population and the Trend Toward Distant Families

The population in Canada, and in particular British Columbia, is highly mobile, with the result that families are widely dispersed and local family supports, particularly for the elderly, may not be available. This has increased the pressure on public agencies to be in a position to support individuals who do not have family living nearby. The other major impact has been a growing interest in the inter-provincial and indeed the international recognition of incapacity planning instruments and guardianship orders from other jurisdictions¹¹.

⁹ For example, the American Association of Retired Persons.

¹⁰ Recently, the Premier of British Columbia appointed a Premier's Council on Aging and Senior Issues with a mandate to report on how to meet the needs of the growing seniors population by 2020.

¹¹ This has resulted in a growing interest in formally recognizing of guardianship and incapacity planning documents between provinces and, through the 1999 *Hague Convention* in the International Protection of Adults internationally.

(g) The Widespread Interest in Planning for Future Incapacity

Interest among individuals to actively plan for their possible future incapacity has become widespread throughout North America as people become more aware of the personal and financial advantages of undertaking the responsibility to plan for their future. The movement towards planning for future incapacity started with enduring powers of attorney which were introduced in British Columbia in 1978 and across Canada before and after that date. In the early 1990s, various provinces across Canada expanded the ability to plan to include personal decision-making.¹² This interest was recently heightened by the intense public interest in the Terry Schiavo case in the United States.

(h) Concern Over Global Declarations of Incapacity

It has long been recognized in Canada that the test for incapacity is a legal, not a medical, test for the court to consider.¹³ However, it is safe to say that, in the past the quality of assessments was highly variable. The issue continues to present those who conduct capacity assessments as well as courts, with difficulty.

There is consensus that capacity is decision specific. In most jurisdictions in Canada there are at least two aspects to decision-making, financial and personal decision-making. However, in modern guardianship statutes this has been further subdivided, particularly, with regard to personal care decisions. Typical are categories such as health care, shelter, participation and personal safety. In some jurisdictions these are further subdivided. This movement towards decision specific incapacity has been accelerated through the use of transactional temporary substitute decision-making schemes in various jurisdictions for health care decisions and, to a lesser extent, admission to a care facility. In such schemes the test for incapacity is specific to the particular decision in question.

(i) Changes in Treatment of Mental Illness

The progress in the development of medications over the past 40 years has radically changed the treatment of mental illness. This has resulted in the move away from long-term institutionalization of the mentally ill (see above) to a largely community-based system of mental health supports. However, difficulties remain particularly when individuals in the community refuse or fail to take medications resulting in episodic acute mental illness accompanied by short-term hospitalization, stabilization and release. In mental health terms, this is known as the “revolving door syndrome”. It has been accompanied by a lesser known counterpart of multiple short-term guardianships.

¹² In Canada, the expansion to personal decision-making has included the ability of the person appointed to make substitute health care decisions (unlike in Ireland).

¹³ *Supra*, note 7. *Re Bulger* (1911) 1 W.W.R. 248 (Man.K.B.) Even in that case almost a century ago, the court stated “the affidavits of the medical men must not be confined to stating their opinion of the lunacy, but they must show all the facts evidencing the lunacy from which the court may judge for itself if the person is or not of unsound mind.”

(j) The Development and Use of Technology at the End of Life

Issues arising from the use of technology at the end of life have increased greatly in the past two decades. Twenty years ago, it was generally true that brain, heart and lung functions all ceased almost simultaneously. Through recent advances in medical technology, it is possible to sustain breathing and cardiac function in individuals with virtually no brain function and who, until recently, would have died. Unfortunately, the advent of this technology has not been accompanied by a social consensus on when it should be used. The American cases of Nancy Cruzan and Terry Schiavo and the Australian case of Maria Korp have all dramatically heightened awareness regarding the need to develop appropriate laws applicable to the use of such technology as well as improved methods for resolving health care treatment disputes among physicians, substitutes and family members.

(k) Growing Awareness of Abuse, Neglect and Self -Neglect

While still developing, there is a growing awareness of problems related to abuse, neglect and self-neglect of adults who are incapable or otherwise unable to withdraw from an abusive situation by reason of disability. Furthermore, there is a growing recognition that the liberalization of planning opportunities through mechanisms such as enduring powers of attorney has been accompanied by financial abuse in some cases. While such cases are, no doubt, in the minority, it is generally accepted in North America to be a significant minority and one that demands response.¹⁴ This growing awareness has resulted in the need to clarify who, in a multi-disciplinary service environment of public, social, health and justice services should be responsible for responding to concerns of abuse, neglect and self-neglect. This represents a challenge in many jurisdictions in North America in which such services are fragmented along service or regional lines.

(l) Profile and Funding of Public Trustee and Guardianship Services

Public trustee and guardian services in Canada historically had a low public profile. They were poorly funded, often were forced to resort to illogical internal cross subsidization and plagued by huge caseloads. Public concern over the quality of public guardian and trustee services resulted in various policy pressure points, including a desire for greater alternatives to guardianship including short-term interventions rather than long-term guardianship, a desire to improve services by public guardians and trustees and demands for increased transparency and accountability.

PART 2: MODERN GUARDIANSHIP LAWS: SOME EXAMPLES FROM BRITISH COLUMBIA AND ACROSS CANADA

The policy imperatives listed in Part 1 have resulted in law reform in most jurisdictions in Canada.

Canada is a federal state and the constitutional responsibility for enacting laws related to adult guardianship rests with the 13 provinces and territories. While significant distinctions exist

¹⁴ The British Columbia Coalition to Eliminate Abuse of Seniors estimates that 1 in 12 seniors in the province will be abused during their lifetime.

between the laws passed in the various jurisdictions within Canada, there are some common themes that have developed in modern guardianship law including:

- A new emphasis on procedural fairness, rights protection and self-determination;
- Modernization of incapacity planning documents;
- New and refined assessment procedures;
- Statutory articulation of duties for guardians;
- Statutory schemes for responding to allegations of abuse, neglect and self-neglect of vulnerable or incapable adults;
- Codification of the common law rules with respect to health care consent;
- A broadening of persons who can give a legally authorized health care consent to include non court appointed substitutes;
- Limited requirements for providing rights advice, in certain circumstances; and
- Modernization of the legal structure for the Public Guardian and Trustee.

While the laws relating to the above items are not uniform most jurisdictions that have adopted modern guardianship laws have addressed most or all of these issues.

However, despite the similarities listed above there have been a number of areas where the provinces and territories have differed in their approaches. Generally, these differences are fairly minor but often they relate to matters that are fairly contentious in policy terms and it is perhaps not surprising that jurisdictions have arrived at different resolutions of these potential contentious issues. Some of these include:

- Holistic versus separate planning documents for property and personal care;
- The applicability of statutory health care consent laws to children and adolescents;
- Tests for capacity to create incapacity planning documents;
- The organizations identified to investigate allegations of abuse, neglect and self-neglect; and
- The degree of accountability and transparency of the Public Guardian and Trustee.

(a) Planning for Incapacity

The interest in incapacity planning among individuals in North America is substantial. The public debate and interest surrounding incapacity planning has largely overshadowed the debate on post incapacity issues.¹⁵

(i) Capacity

Most jurisdictions have adopted, either at common law or by statute, an incapacity test relatively similar to that as set out in the English case of *In Re K*¹⁶. Ontario has a somewhat higher test grounded in *Re Godelie*¹⁷ and that subsequently was codified.¹⁸ British Columbia has (in addition to powers of attorney)

¹⁵ This can be seen in the public discussion regarding the recent Terry Schiavo case in the United States where much of the resulting discussion involved incapacity planning, when in fact the case dealt with questions of post incapacity guardianship.

¹⁶ [1988], Ch. 310 (House of Lords)

¹⁷ 8 R.F.L. (2d) 97, 21 O.R. (2d) 748, 92 D.L.R. (3d) 287

¹⁸ *Substitute Decisions Act*, 1992 S.O. 1992, Ch. 30, s. 8

representation agreements which permit an adult to appoint a representative to engage in “routine management” of financial affairs. Given that routine management encompasses most non-real property transactions, there has been considerable controversy over the liberal definition of capacity to enter into such an agreement.

The liberal test of capacity for representation agreements has been considerably less controversial as it applies to the appointment of a personal or health care substitute decision-maker. The threshold of being able to discern who one should trust, which has been adopted in Ontario and (somewhat less clearly) in British Columbia, appears to be satisfactory for personal care decisions possibly due to the involvement of a health care or other service provider which creates a check and balance over the authority of the proxy decision-maker.

(ii) Scope of Authority

As indicated above, enduring powers of attorney for property have existed for almost 30 years in most jurisdictions in Canada. The major change in recent years to the scope of authority of incapacity planning documents has been to extend the ability to plan to cover personal care decisions including health care. This included the ability to appoint a proxy or substitute decision-maker by naming that person as well as to permit the giving of instructions when capable that are binding on the substitute decision-maker when the grantor is no longer capable.

(iii) Coming Into Force

Most jurisdictions in Canada permit a property incapacity planning document such as an enduring power of attorney to be either “enduring” (commencing immediately and lasting beyond subsequent mental incapacity) or “springing” (coming into force on the occurrence of a prescribed event, typically some defined finding of incapacity). Springing powers are popular in theory because of concerns, particularly among seniors, that the granting of a power of attorney may result in the grantor being bypassed in favour of the named attorney even while the grantor retains capacity. However, this delayed effectiveness can be complex in practice because of the need to prove that the triggering event has occurred and that the document is now in effect.

The province of Quebec, which has a civil law rather than a common law legal tradition for matters under provincial jurisdiction, has dealt with this issue in a unique way. The creation of what is known in Quebec as a “mandate” involves the appointment of a substitute. However the substitute does not have authority until a court finds that the adult is incapable and the mandate is brought into effect and the authority of the person named as substitute is confirmed. This court process is known as “homologation”.

(iv) Registry of Incapacity Planning Documents

There is considerable interest in registries of incapacity planning documents but to date little has actually occurred in Canada. Ontario law contemplates the existence of a registry for powers of attorney for property and personal care but no such registry has been established. In various provinces there are unofficial voluntary registries that have been established but use of them does not yet appear to be wide-spread.¹⁹ The primary difficulty with voluntary registries appears to be the reluctance on the part of service providers, either financial (e.g. banks, investment dealers) or health care providers (e.g. nursing homes, hospitals) to commit to checking the registry on a systemic basis.²⁰

Again, the singular exception in Canada appears to be in Quebec where a mandate that is created with the assistance of a notary must be registered through a registry established by the society of notaries. Again however, the mandate does not have legal effect until certified through the homologation process and thus may be viewed as somewhat more akin to a guardianship order.

(v) Safeguards in Incapacity Planning Documents

The growth of incapacity planning documents has increasingly raised concerns regarding the potential for intentional or inadvertent misconduct on the part of attorneys or representatives. However, this growing concern has not stemmed the tide towards incapacity planning in Canada. Rather, the response has been to supplement simple incapacity planning documents with an increasing number of optional or mandatory safeguards either related to the creation of the document or subsequent use.

A. Formalities of Execution

A number of jurisdictions have struggled with the question of what formalities should accompany the execution of an incapacity planning document. Most jurisdictions still require one witness although some have required two²¹ or some combination of one or two witnesses depending on the document.²² British Columbia requires two witnesses for a limited representation agreement and one for a standard representation agreement signed with full legal capacity and for an enduring power of attorney.

Furthermore, some jurisdictions have attempted to ensure that a document is validly created by requiring that certain documents be signed in the presence of a lawyer or notary public.²³

¹⁹ In Ontario, some individual law firms advertise in their communities that they maintain a registry. In British Columbia, a partnership between the Representation Agreement Resource Centre and Juricert, the technology subsidiary of The Law Society, has established an on-line voluntary registry at www.nidus.ca.

²⁰ Part of this reluctance appears to be a concern on the part of third parties that once a decision is made to engage in systemic checking of a registry then failure in a particular case to do so could result in liability.

²¹ Ontario *Substitute Decisions Act*, s. 10.

²² British Columbia *Representation Agreement Act*, s. 13.

²³ For example, powers of attorney or representation agreements in British Columbia must be signed in the presence of a lawyer or notary public if the document is to be used for the purpose of a transaction involving land.

Various Canadian jurisdictions require witnesses to complete an acknowledgment that contains certain statements.²⁴

B. Private Monitors Selected by the Grantor

The use of privately selected monitors to invigilate the conduct of attorneys and representatives has not been wide-spread in Canada although it has been implemented in British Columbia. Monitors are mandatory for limited representation agreements made by persons with diminished capacity and are optional for general agreements. The role of a monitor is to make reasonable efforts to ensure the representative is carrying out their duties and if not, to report the matter to the Public Guardian and Trustee. Concern however, has been expressed by the bar that this duty on monitors is too vague and that monitors are potentially liable for failing to sufficiently superintend the conduct of the representative. For that reason, an alternative was included in the law to provide that a monitor could be avoided by appointing two representatives who are required to act jointly, since the duties on representatives are better understood.

C. Legal Advice

British Columbia has experimented with a requirement that individuals obtain legal advice when creating a general representation agreement. In addition, as mentioned earlier, where a power of attorney is created for the purpose of a land transaction it must be executed in the presence of a notary public or lawyer. These legal advice requirements have not been overly contentious with respect to property matters, however, it has been quite unpopular as a condition precedent to the appointment of a personal care representative. The requirement to obtain legal advice is seen as overly paternalistic, expensive and of limited value added for personal and health proxy appointments.

D. Notice of Duties

Canadian law has attempted to ensure that persons appointed under incapacity planning documents are aware of their duties in two major ways. First, in some jurisdictions, such as British Columbia, a representative must sign a statement certifying that they have “read and understand the duties and responsibilities of a representative...and...have agreed to accept these duties and responsibilities.”²⁵ The second manner in which notice of duties has been attempted is through codification. The common law duties for attorneys acting under powers of attorney are not widely known. Codification has been attempted in a number of jurisdictions so as to ensure that attorneys and representatives are well aware of their obligations. Particularly in the context of personal and health care

²⁴ For example, British Columbia’s Representation Agreement Regulation, BC Reg. 199/2001, Form 5 requires witnesses to certify that “I have no reason to object to the making of this representation agreement.” The form includes a notice to the witness that there are specified legislative grounds for making an objection and an instruction where a potential witness does have grounds to make an objection, they are not to witness the agreement and that they should report their objection to the Public Guardian and Trustee.

²⁵ B.C. Regulation 199/2001, Form 1.

documents, new duties of consultation with the adult and family members have been added to the scheme for decision-making.

E. PGT Investigation

Some jurisdictions in Canada, although not all, have created statutory frameworks for the Public Guardian and Trustee to investigate allegations that a person acting under an incapacity planning document has not properly carried out their role.²⁶ The investigatory role is fraught with practical complexities but is generally supported and seen as an important safeguard. However, it is essential that such statutory obligations be accompanied by adequate resourcing so that the role is not simply a hollow promise. This role does raise, in some quarters, the concern of public interference in what is viewed by some people as a private family matter. However, recognition of abuse of incapacity planning documents is generally sufficiently wide-spread that this concern is diminishing.

(b) Court and Statutory Guardianship

(i) Typical Concerns with Historic Guardianship Laws

Over the years, many concerns were expressed regarding historic court and statutory guardianship laws in Canada which were largely based on the English *Lunacy Act* of 1890. The concerns expressed frequently included:

- lack of statutory process regarding the issuance of certificates of incapability and the triggering of statutory guardianship without court order;
- lack of standards for conducting assessments of incapability;
- general absence of statutory duties for guardians;
- inadequate termination provisions that have the effect of unnecessarily prolonging the duration of guardianship;
- inaccurate and stereotypical terminology such as referring to adults as “patients”;
- the imposition of court costs that pose a barrier to families acting as guardian (particularly for people of modest means);
- the inadequate manner in which the law applies to personal care decision-making; and
- lack of sufficient statutory direction regarding the fees that may be charged by private guardians.

(ii) Reform Across Canada

The first modern adult guardianship was passed in Alberta in the mid 1970s.²⁷ This statute, *The Dependent Adults Act*, contained many innovative and

²⁶ For example, see British Columbia’s *Representation Agreement Act*, s. 30. This can be contrasted with the law in, for example, Alberta which does not require that province’s public trustee to investigate such allegations.

²⁷ This section is adapted from *Court and Statutory Guardianship: Patients Property Act and the Adult Guardianship Act (Part 2) A Discussion Paper On Modernizing the Legal Framework*, February 2004, Public Guardian and Trustee of British Columbia.

progressive features that later appeared in the early 1990's amendments to Quebec's *Civil Code and the Code the Civil Procedures Act*, Ontario's *Substitute Decisions Act* and Manitoba's *Vulnerable Persons Living With A Disability Act*. The *Dependent Adults Act* also influenced British Columbia's 1993 statute though the *Adult Guardianship Act* moved British Columbia to the leading edge of reform efforts. These statutes in turn influenced law reform in Saskatchewan, the Northwest Territories (and now the new Territory of Nunavut), Prince Edward Island and most recently, the Yukon Territory.

Alberta is currently carrying out public consultations on the *Dependent Adults Act* with a view to further modernizing the law in that province. Manitoba is currently undertaking a review of that province's scheme of statutory guardianship.

Adult guardianship law reform is yet to occur in Nova Scotia, New Brunswick and Newfoundland where existing legislation continues to reflect aspects of the English *Lunacy Act* of 1890. This has been a matter of concern for the Nova Scotia Law Reform Commission and reforms have been recommended for that province. New Brunswick is currently implementing new legislation to establish a Public Trustee.

(iii) General Canadian Approach

While significant distinctions certainly exist between the laws passed across Canada there are some common themes. A typical court and statutory modernization approach in Canada involves the following areas:

- improving procedural fairness in court and statutory guardianship appointments;
- modernizing the powers and duties of property guardians;
- modernizing the role, powers and duties of personal guardians;
- clarifying information and privacy issues relating to guardians, third party holders of information and adults under guardianship;
- improving protection in urgent cases;
- recognizing the mobility of adults under guardianship;
- modernizing the structure for fees charged by guardians;
- clarifying the supervision of private guardians by the Public Guardian and Trustee and the court; and
- modernizing the law relating to legal proceedings of persons under guardianship.

(c) Substitute Consent to Health Care

In Canada, the doctrine of informed consent to health care was, until recently, a matter of common law in all provinces. However, codification of the law of informed consent has occurred in a number of Canadian jurisdictions. This codification as it applies to capable patients has been generally unremarkable in that it largely articulated the existing common law rather than made new law. However, it unquestionably has increased the

awareness of health care providers and patients alike of the components that together comprise a legally valid informed consent.

More significant have been the new schemes for consent to health care to be provided on behalf of incapable adults. Ontario and British Columbia have been leaders in these new statutory substitute consent regimes.

The statutory health care consent regimes in Canada typically have the following structure:

- A physician finding that a patient is incapable of giving or refusing informed consent;
- A requirement that some form of notice be given to the patient and, in some jurisdictions, notice of how such finding may be appealed;
- The physician must then obtain a treatment decision from the highest ranked substitute decision-maker established by a statutory list; for example, in British Columbia the list is as follows:
 - ◆ Court appointed guardians of person;
 - ◆ A representative appointed under a personal care in capacity planning document known as a representation agreement;
 - ◆ A nearest relative (this itself is its own ranked list including spouse, adult child, parent, sibling and other persons related by birth or adoption²⁸); and
 - ◆ The Public Guardian and Trustee who may make the decision or appoint another person (e.g. a friend of the patient) to make the decision.
- An established structure for decisions; decisions by substitutes may not be made according to their values but rather the statute provides for a strict application of a decision-making model. Instructions given when capable are typically binding on substitutes and if there are no such wishes then a best interest decision is made the criteria of which itself may be defined by statute;²⁹ and
- Exceptions are made to the scheme of substitute consent in the event of emergencies but even in such cases express treatment refusals are still binding.³⁰

These health care consent laws have been largely successful in increasing rights protection for incapable adults and ensuring independent review of proposed treatment for incapable patients. Physicians complying with the statute benefit from liability protection by obtaining a legally valid consent and patients benefit from increased scrutiny of health care that is proposed for them. Personal care guardianship does not need to be obtained in as many cases and thus long-term determinations of incapacity are avoided. Furthermore, needed health care can be delivered more quickly rather than waiting for court appointment of a guardian.

²⁸ British Columbia, but not Ontario, adds a qualitative test that the physician must apply to the relative to determine whether the relationship is sufficiently close to permit the relative to make a substitute health care decision. See British Columbia *Health Care (Consent) and Care Facility (Admission) Act*, s. 16.

²⁹ British Columbia's law also provides that before making a best interests decision a substitute must consider values and beliefs of the individual and whether those are determinative even in the absence of capable instructions.

³⁰ See for example, Ontario *Health Care Consent Act*, s. 26 and British Columbia, *Health Care (Consent) and Care (Facility) Admission Act*, s. 12.1.

However, these new health care consent laws have not been without their difficulties. Compliance is uncertain; most likely it is highest in hospital settings among physicians and somewhat lower among other health care providers and in community settings. Furthermore, the tension between efficiency and due process is evident around the question of finding of incapacity, rights advice and appeals. Both Ontario and British Columbia's laws were originally designed to balance physician findings of incapacity with independent third party rights advice to the patients. However, in neither province has a system of widespread rights advice survived. For practical and budgetary reasons it has not been possible to deploy, on a wide-spread basis, rights advice throughout all health care settings. Furthermore, the use of appeal structures has also been somewhat problematic.

However, in general, statutory health care consent schemes have been successful in Canada, as well as in the United States in circumstances where only short-term or transactional substitute decision-making is required and a long-term court appointed guardian is not necessary.

(d) Adult Protective Services

As mentioned above, historically the responsibility for investigating matters of financial or personal care abuse, neglect and self-neglect was unclear. Many agencies including those that provide health care, financial services regulation, policing and guardianship all had a role. However, responsibility and accountabilities were unclear.

Adult protection laws in Canada typically have assigned a lead role to a particular agency by requiring those agencies to investigate allegations of abuse, neglect or self-neglect. Some jurisdictions in Canada have implemented mandatory reporting of suspicions of adult abuse to such agencies but most have not.³¹ Agencies designated to investigate typically have investigatory powers and have certain statutory immunities. Identities of those who report abuse are typically protected and information tending to disclose the identity of an individual reporting abuse is typically exempted from freedom of information disclosure. Time limited court orders that remove the individual from the abuse situation or that are targeted specifically against the abuser are available in most jurisdictions. Police involvement is encouraged, or in some jurisdictions required, when the investigative agency believes a criminal offence has occurred.

British Columbia has engaged in an interesting experiment in community development to supplement the work of the investigating agencies. This community development originated in the guardianship law assigning to the Public Guardian and Trustee the role of organizing networks of public bodies and organizations to provide support and assistance to abused or neglected adults. The Public Guardian and Trustee has facilitated the development of some 70 locally-based community response networks across British Columbia.³² Typical community response networks have participation from health authorities, disability groups, police, seniors groups, social agencies and others. A

³¹ Mandatory reporting remains a controversial issue among those involved in assisting individuals who are suffering from abuse, neglect or self-neglect.

³² This facilitation was initiated through small annual grants from the Public Guardian and Trustee totalling approximately \$400,000 per year over five years.

provincial foundation has been established to solicit private and other funding on an ongoing basis³³.

PART 3: PUBLIC GUARDIAN AND TRUSTEESHIP IN CANADA

Public Guardians and Trustees occupy a unique position in the framework of Canadian justice, social and health institutions. The importance of their role is receiving greater public recognition. Services and reputations are improving even as public expectations also rise.

(a) History of Public Trusteeship and Public Guardianship in Canada³⁴

(i) Public Trustees

The first Public Trustee was established in New Zealand in 1873. The reason for the New Zealand Public Trustee was to provide for a public agency that would act as trustee for the general public. Subsequently, in 1912, its services were expanded specifically to address the management of estates for mentally incapable adults. England established a Public Trustee in 1906.

The first Public Trustee in Canada was established in Ontario in 1919. Other jurisdictions in Canada created similar offices³⁵:

- Quebec – Public Curator (1945)
- Alberta – Public Trustee (1949)
- British Columbia – Public Trustee (1963)
- Prince Edward Island – Official Trustee (now Public Trustee) (1968)
- Northwest Territories – Public Trustee (1969)
- Manitoba – Public Trustee (1973)
- Nova Scotia – Public Trustee (1973)
- Saskatchewan – Public Trustee (1984)
- Nunavut – Public Trustee (2000)
- Yukon – Public Administrator (now Public Guardian and Trustee, 2004)
- New Brunswick – Public Trustee (2005)

Although legislation was passed in Newfoundland almost forty years ago to establish a Public Trustee, the law has not yet been proclaimed and the responsibility for the estates of mentally incapable adults is vested with the Registrar of the Supreme Court (Estates Division).

The mandate of Canadian Public Trustees has been generally to provide for a system of public administration of the financial affairs of adults unable to

³³ More information regarding Community Response Networks and the provincial foundation is available at www.bccrns.ca.

³⁴ This section is adapted from Chalke, “Public Guardians and Trustees and Canada: History, Mandate, Role and Guardianship Law Reform and Advocacy”, presented at the Annual Conference of the National American Academy of Elder Law Attorneys, 2001.

³⁵ Gordon and Verdun-Jones, *Adult Guardianship Law in Canada*, Carswell, 1995, pp.5-6.

administer their own property or legal interests (or others unable to protect their own interests such as children). In other words, the primary purpose of the Public Trustee as established in New Zealand differed from that of the Canadian Public Trustee offices. In New Zealand, it was believed necessary to establish a Public Trust office due to the absence of suitable private trust enterprises in that country in the 19th century. It was only later, and has remained a smaller aspect of the line of service of the Public Trust of New Zealand, that the management of the financial affairs of mentally incapable adults was added to their responsibility.

In Canada, the situation is much different. Public Trustees have, from the date of their inception, been primarily directed to providing for the administration of the property and legal affairs of persons at a disability at law. Voluntary and general-purpose trust services have, to date, not been a significant feature of services delivered by most Canadian Public Trustees.³⁶

Prior to the creation of Public Trustees, there were other arrangements in many provinces to provide for some administration of the property of persons unable to manage their own affairs. Typically, these would involve the financial affairs of inpatients of institutions being managed by an official of that institution or some other government body.³⁷ In British Columbia, the public official responsible for the administration of estates of mentally incapable adults before 1963 was the Official Committee.³⁸

(ii) Public Guardians

While public trusteeship, focussed on financial and property management (and more recently the protection of civil causes of action) has been in existence for decades, the development of public bodies to provide substitute decision-making and other services in respect of personal care is more recent. The first office of a Public Guardian in Canada was established in 1978 in Alberta. The Alberta model remains, to this day, the only large jurisdiction in Canada that has established separate Public Trustee and Public Guardian offices. Although the Public Guardian of Alberta has now been largely decentralized, it remains as a service completely distinct from that of the Public Trustee of Alberta. Interestingly, some of the smallest jurisdictions in Canada, by population, have adopted the Alberta model.³⁹ This is somewhat counter-intuitive as one might expect that it is the large jurisdictions where economies of scale might make separate organizations more attractive.

³⁶ There are some discretionary services delivered by Public Trustees such as acting as attorney under a power of attorney, representative under a representation agreement or executor under a will. However, these tend to be related to issues of capability and/or on a last resort basis, rather than the provision of general trust services.

³⁷ Perhaps the first such example which predates confederation, was that established in 1853 in which the Bursar of the Toronto Lunatic Asylum became the automatic committee of the estate of any person who was admitted. Gordon and Verdun-Jones, *Adult Guardianship Law in Canada*, Carswell, 1995, pp.5-7 and Robertson, *Mental Disability and the Law in Canada* (second edition), 1994.

³⁸ Dennis Shepherd, *The Public Trustee in British Columbia* (1966) 2 *University of British Columbia Law Review* 422.

³⁹ For example, the Northwest Territories and Nunavut.

In the three largest provinces in Canada that have undertaken adult guardianship law reform – Quebec, Ontario and British Columbia – the substitute decision-making services that relate to personal care, specifically health care, were assigned to the existing Public Trustees (or in Quebec’s case, Public Curator). As a result, all services are delivered from one organization. In the case of Ontario and British Columbia, the combined offices changed their names from Public Trustee to Public Guardian and Trustee.

(b) Modern Accountability Framework

The Public Guardian and Trustee of British Columbia is accountable to the government and Legislature, the public, and directly to its clients. Accountability is exercised by means of the government’s review of Public Guardian and Trustee performance planning, annual public reporting on performance, annual audited financial statements and through judicial oversight of the Public Guardian and Trustee statutory and fiduciary obligations to individual clients.

(i) Prospective Performance Planning

Section 22 of the *Public Guardian and Trustee Act* requires that the Public Guardian and Trustee prepare an annual three-year service delivery plan and deliver it to the Attorney General not later than December 31st each year. If approved by the Attorney General, the plan must be submitted to the Province’s Treasury Board for approval.

The Act requires that the service delivery plan must specify for each program area, for the fiscal year about to begin and for each of the following two fiscal years:

- The objectives of the program area;
- The nature and scope of activities to be undertaken;
- The performance targets and other measures by which performance of the program area may be assessed;
- A forecast of revenues to be collected;
- An estimate of funding required to meet the objectives of the program area; and
- An estimate of the amount of surplus or deficit and the cash balance remaining in the operating account for each fiscal year.

There is no statutory requirement for the service delivery plan to be published, but as a matter of practice, PGT makes its service delivery plans available on its website.

(ii) Retrospective Performance Reporting

Section 25 of the *Public Guardian and Trustee Act* requires the Public Guardian and Trustee to report to the Attorney General in each fiscal year on operations of the office for the preceding fiscal year.

This report must be provided to the Attorney General by September 30th of each year and thereafter tabled in the Legislative Assembly. It must contain:

- Audited financial statements on the stewardship of estates and trusts under administration;
- Audited financial statements on the operations of the Public Guardian and Trustee;
- A statement of the extent to which the Public Guardian and Trustee has met the performance targets and other objectives established in the Service Delivery Plan under section 22; and
- A report from the Auditor General or an independent auditor on the statement referred to in paragraph (c).

Section 26 of the *Public Guardian and Trustee Act* requires annual independent audits of both the PGT financial statements and the PGT performance report on its service delivery plan.

It should be noted that section 22, specifies that the Service Delivery Plan must include both “performance targets” and “other measures” by which performance of “each program area” may be assessed. This requirement for comprehensive performance planning is in contrast to more recent trends in public performance reporting which direct organizations to focus on their “few, critical, aspects of performance”. The reference to “other measures” also broadens the nature of PGT performance reporting from that associated with traditional performance measures.

The Auditor General’s audit of Public Guardian and Trustee performance reporting supports the credibility of the report by providing independent assurance. This heightened transparency is to ensure that services delivered to vulnerable British Columbians are of acceptable quality. This is necessary because most clients of the Public Guardian and Trustee are unable to obtain services elsewhere. As a result transparency acts as a surrogate for consumer choice.

(iii) Judicial Oversight

The majority of PGT services are mandated by statute and PGT can be held to account by a client. Many PGT functions are fiduciary in nature. Fiduciaries are legally accountable for their actions on behalf of others and judicial oversight mechanisms are highly developed.

(c) Reflections on the Role of Public Guardians and Trustees in Guardianship Law Reform

Public Guardian and Trustees have generally been intimately involved with the policy development and implementation of guardianship law reform in Canada. This involvement has exceeded that of a traditional stakeholder or interest group and frequently extended to the details of the legislative policy itself. For example, in Quebec, the Office of the Public Curator contributed “significantly to the law reform process”.⁴⁰ In Ontario, the Public Trustee was a member of the consultation committee in the late 1980’s that led to the new guardianship law.⁴¹ In British Columbia, the Public Trustee

⁴⁰ Gordon and Verdun-Jones, pp.5-27.

⁴¹ The Advisory Committee on Substitute Decision Making (also known as the Fram Committee).

was a member of the Joint Working Committee on Adult Guardianship that directly led to the new laws.

The direct involvement of Public Guardian and Trustees in the law reform that has occurred has had many benefits. These include:

- The unique perspective of the office sitting as it does at the convergence of many issues of fundamental civil rights;
- An understanding of the complex and specialized areas of law;
- A practical appreciation of the incidence and seriousness of abuse of the vulnerable;
- An understanding of the need for workable, practical solutions; and
- An appreciation of the broad variety of human experience encountered by its clients.

However, this intimate involvement in the development of guardianship law is not without its challenges. Given its special position, it is critical that Public Guardians and Trustees who are involved in the law reform movement maintain a broad and open perspective and do not overly focus on either operational pressures or the somewhat unrepresentative subset of cases with which the office has direct experience.

The latter concern, that of the potential for the Public Guardian and Trustee to have a distorted perception of reality, arises from the Public Guardian and Trustee's role in investigating private substitute decision-makers who are alleged to have acted improperly. The same balancing act that the office often sees on a case-specific level between interests of clients, autonomy and protection is played out at a macro policy level when considering the appropriate legislative structure. The Public Guardian and Trustee, because of its unique position, sees many cases of financial and personal care abuse. If not tempered by the appreciation that these represent a relatively small percentage of all cases where substitute decisions are being made on behalf of an adult, it could lead to a perspective that a highly protectionist policy is justified. While on some issues the objectives of protection and self-determination are not mutually exclusive, it is almost always true that a highly protectionist regime has some consequence for the public in terms of practicality, affordability, accessibility or interference with self-determination. The key is finding the balance.

If simply a stakeholder, the Public Guardian and Trustee could make the case that additional protections are required and let government assimilate these policy perspectives along with all others presented by stakeholders. However, in practice in Canada, Public Guardians and Trustees do not enjoy the luxury of simply being able to make their case arising from their offices' experiences. Usually, as the key public body involved in guardianship, they are asked by governments to apply their expertise and act in a policy development function in which they must assimilate, analyze and recommend a policy result taking into account a variety of interests. This requires Public Guardians and Trustees to keep the broadest possible societal focus, including considerations other than those directly experienced by the office.

CONCLUSION:

The Canadian experience can be instructive as Ireland faces this major area of complex law reform. Modernization of guardianship law in Canada has been the inevitable product of some powerful policy forces. However, in virtually every jurisdiction it has been more of an ongoing process than of an event. In most jurisdictions there has been more than one round of statutory change as adjustments need to be made to find the appropriate balance suitable for the particular jurisdiction. Common themes are developing in Canada that reflect Canadian priorities, values and approaches. The instability in guardianship law will continue for some time in Canada as statutes are refined but the major policy shifts are already underway.