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BRITISH COLUMBIA
LAW INSTITUTE

COMMON-LAW TESTS OF CAPACITY PROJECT

Backgrounder

Consultation Paper on Common Law Tests of Capacity

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INTRODUCTION

The Rationalizing and Harmonization of BC Common-Law Tests of Capacity Project is a major law-reform project that is studying judge-made rules on mental capacity required to enter into certain transactions or relationships and considering whether British Columbia should enact legislation to reform those rules. The British Columbia Law Institute started work on the project in October 2011 and its final report is due in September 2013.

The *Consultation Paper on Common-Law Tests of Capacity* sets out tentative recommendations for reform. These tentative recommendations contain policy positions that may form the foundation for the recommendations in the project's final report. The BCLI invites public comment on these tentative recommendations, to help shape the final recommendations for the project. The consultation period is open until **15 June 2013**.

The Common-Law Tests of Capacity Project has been made possible by funding from the Law Foundation of British Columbia and the Notary Foundation of British Columbia.

SUMMARY AND FULL CONSULTATIONS

There are two versions of the consultation for this project: a summary consultation and a full consultation.

The summary consultation provides highlights from the full range of tentative recommendations in the consultation paper. It contains minimal background information and no citations of sources. If you wish to read and respond to the summary consultation, you may find it in appendix B to the full consultation paper. You can also download a freestanding copy of the summary consultation from www.bcli.org.

The full consultation contains all 31 of the tentative recommendations made over the course of the project for public comment. It also makes available all of the legal research

that was undertaken in the project. The rest of this backgrounder relates to the full consultation.

COMMON-LAW TESTS OF CAPACITY PROJECT COMMITTEE

The Common-Law Tests of Capacity Project is being carried out with the assistance of an all-volunteer project committee. The project committee was formed shortly after the commencement of the project, and it has met regularly since December 2011. The members of the committee are:

Andrew MacKay—chair
*(partner, Alexander Holburn
Beaudin & Lang LLP)*

R. C. (Tino) Di Bella
(partner, Jawl & Bundon)

Russell Getz
*(legal counsel, Ministry of Justice
for British Columbia)*

Kimberly Kuntz
(partner, Bull Housser & Tupper LLP)

Roger Lee
(partner, Davis LLP)

Barbara Lindsay
*(senior manager—advocacy and public
policy, Alzheimer Society of British
Columbia)*

Catherine Romanko
*(Public Guardian and Trustee for
British Columbia)*

Laurie Salvador
*(principal, Salvador Davis & Co.
Notaries Public)*

Jack Styan
*(managing director, RDSP Resource
Centre/vice president for strategic
initiatives, Community Living British
Columbia)*

Geoffrey White
*(principal, Geoffrey W. White
Law Corporation)*

Kevin Zakreski (staff lawyer, British Columbia Law Institute) is the project manager.

WHAT ARE COMMON-LAW TESTS OF CAPACITY?

It is basic law that mental disability, illness, or impairment does not, in and of itself, leave a person incapable under the law to carry out transactions, enter into relationships, or manage his or her affairs. The law's focus is on the degree of mental disability, illness, or impairment. If a person's mental disability, illness, or impairment exceeds in degree a legal threshold, then that person will be considered incapable in the eyes of the law. This legal threshold is commonly called a *test of capacity*.

There is no single, global test of capacity. Instead, the law has developed many different tests of capacity, each geared to a specific type of transaction or relationship. Over the past 20 years, British Columbian and Canadian law has seen significant development of legislation relating to mental capacity, which has yielded modern and sophisticated rules on when

a person is mentally competent to perform certain tasks or enter into certain relationships. But many other areas of the law continue to rely on tests of capacity that find their expression in court judgments. This consultation paper calls these tests of capacity *common-law tests of capacity*.

Common-law tests of capacity hold sway over many important areas of the law. They are engaged, for example, when a person whose capacity is in doubt makes a will, enters into a contract, or gets married.

THE STRUCTURE OF THE CONSULTATION PAPER

The consultation paper opens with an introductory chapter that explains the goals and organization of the Common-Law Tests of Capacity Project. This chapter is followed by a chapter that presents some general information on mental capacity and the law. This chapter discusses a diverse set of topics, ranging from the medical sources of cognitive decline and legal approaches to tests of capacity to characteristics of mental-capacity jurisprudence and reasons for taking on a project to reform common-law tests of capacity.

The bulk of the consultation paper is taken up with discussing the current law, issues for reform arising from the law, the options to address those issues, and the committee's tentative recommendations for reform. This discussion is organized into separate chapters for each of the common-law tests of capacity examined in this consultation paper. These common-law tests of capacity are the tests of capacity to:

- make a will;
- make an *inter vivos* gift;
- make a beneficiary designation;
- nominate a committee;
- enter into a contract;
- retain legal counsel;
- marry;
- form the intention to live separate and apart from a spouse; and
- enter into an unmarried spousal relationship.

SUMMARY OF THE COMMITTEE'S TENTATIVE RECOMMENDATIONS

Introduction

The committee's focus through much of this consultation paper is on the elements that make up these nine common-law tests of capacity. In assessing its options for substantive reform of these elements, the committee considered whether the common law was deficient. If so, then it asked if legislation could bring about a significant improvement in the law. It found that this rigorous standard could only be met in a few cases.

The committee also considered a number of areas collateral to the common-law tests of capacity considered in this consultation paper. It proposed several fine-tuning reforms in these areas.

Capacity to Make a Will

The committee is not proposing any reforms to the well-known test of capacity to make a will. This test of capacity has two components: (1) a general component, focussed on the capacity to understand the nature of the will, and how it affects a person's own interests, the person's property, and the person's family (and others who might have a moral claim on the person's property); (2) a component aimed at delusions that directly affect the will.

The committee is proposing a legislative presumption of capacity to make a will, which would be harmonized with the presumptions of capacity to make other important personal-planning documents, such as enduring powers of attorney and representation agreements.

Wills for Individuals Who Lack Testamentary Capacity

One of the implications of having a test of capacity to make a will is that certain people will not be able to meet this test. Their estate-planning options will accordingly be limited, and this may cause hardship for them and their families.

The committee addresses this concern by tentatively recommending that British Columbia enact legislation creating a court-based procedure to allow people with diminished capacity to make a will. The procedure would be modeled on existing statutory-will procedures in the United Kingdom and Australia.

Certification of Testamentary Capacity Before the Death of the Testator

Another consequence of having a test of capacity to make a will is that the test may spawn estate litigation. The committee examined an American procedure that is often advanced by commentators as a means to reducing estate litigation. The procedure essentially involves an application to court, on notice to interested parties, for a declaratory order that a person has the mental capacity to make a will at the time when the will is executed.

In the committee's view, this procedure would be of limited utility. It has not proved to be significantly effective in stemming estate litigation in the handful of American states that have adopted it.

Capacity to Make a Gift

The common-law test of capacity to make an *inter vivos* gift has become confused and uncertain. The committee tentatively recommends to clarify the law by adopting a test of capacity to make an *inter vivos* gift that is analogous to the test of capacity to make a will. This

tentative recommendation is in accordance with recent trends in the case law and with the protective purpose of the test of capacity.

Capacity to Make a Beneficiary Designation

The committee is proposing no changes to the common-law test of capacity to make a beneficiary designation. The test of capacity does not appear to be causing any problems in practice. Its elements are similar to the elements of the test of capacity to make a will. This usefully harmonizes the approach to mental capacity for two important aspects of estate planning.

Capacity to Nominate a Committee

A useful, but often overlooked, personal-planning device is the nomination of a committee under the *Patients Property Act*. The common-law test of capacity to nominate a committee is obscure. The committee proposes clarifying the law by adopting the better-known legislative test of capacity to make a representation agreement with non-standard provisions. In the committee's view, this proposal should help to make these planning documents more accessible and more widely used.

Capacity to Enter into a Contract

The committee is not proposing substantive changes to the common-law test of capacity to enter into a contract. It is proposing a clarification of one of the collateral rules to this test. Under this rule, anyone who provides necessities to a person with diminished capacity is entitled to reasonable compensation for the necessities. This rule currently has two aspects: a rule for necessary goods (found in the *Sale of Goods Act*) and a rule for necessary services (found in the common law). The committee is tentatively recommending the enactment of a harmonized rule, in a more appropriate location in the statute book than the *Sale of Goods Act*.

Capacity to Retain Legal Counsel

The committee is not proposing substantive changes to the common-law test to retain legal counsel. It is proposing two reforms that should help to improve access to legal services in two specific situations. The first situation involves proceedings in which a person's mental capacity is at issue. The second involves the creation of a representation agreement. In both situations, uncertainty over a person's mental capacity to retain legal counsel can serve as a barrier to needed legal services. The committee's proposals would remove that barrier by clarifying the law.

Capacity to Marry

Possibly the most challenging subject addressed in this consultation paper is the common-law test of capacity to marry. The committee is sympathetic to criticisms of the test's low threshold of mental capacity. But it was not convinced that a general legislative rule was

the best means to address concerns about the common-law test of capacity to marry. The committee is not proposing substantive changes to the test of capacity to marry.

Capacity to Form the Intention to Live Separate and Apart from a Spouse

The committee is not tentatively recommending any changes to the common-law test of capacity to form the intention to live separate and apart from a spouse. This test of capacity has traditionally been linked to the test of capacity to marry. In the committee's view, it is important that the law maintain this link.

Capacity to Enter into an Unmarried Spousal Relationship

The committee is not proposing substantive changes to the common-law test of capacity to enter into an unmarried spousal relationship. This is an emerging area of the law. The courts have only just begun to define the applicable test of capacity. In the committee's view, the time is not ripe for legislative intervention on this subject.

CONCLUSION AND CALL FOR RESPONSES

The committee is interested in receiving the public's views on its tentative recommendations. These comments will be considered in preparing the final report for the Common-Law Tests of Capacity Project.