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COMMON-LAW TESTS OF CAPACITY PROJECT

Backgrounder

Introduction to the Rationalizing and Harmonization of BC Common-Law Tests of Capacity Project

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INTRODUCTION

The British Columbia Law Institute has just begun work on a two-year project to examine the legal tests that determine when a person has the mental capacity necessary to carry out a transaction or enter into a relationship. The Rationalizing and Harmonization of BC Common-Law Tests of Capacity Project focusses on tests of capacity that are embodied in court decisions. These 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. Demographic changes and scientific advances provide the impetus for a re-examination of rules that, in some instances, have seen little change since they were first articulated in the nineteenth century. The goal of the project is to frame proposed reforms in draft legislation, which will be contained in the project's final report. An all-volunteer committee made up of experts in the field is assisting the BCLI in deciding on its recommendations for reform.

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LEGAL BACKGROUND

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 illness, disability, 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 specific types of transactions or relationships. 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 transactions. For example, the *Power of Attorney Act*[1] was recently amended and now contains a legislative framework for the test of capacity to give an enduring power of attorney.[2] Health-care decisions are also subject to a legislative test of capacity.[3] And British Columbia has enacted (but not yet brought into force) comprehensive reforms to its adult-guardianship regime—that is, the system by which a representative is appointed to manage the day-to-day affairs of a person with diminished capacity.[4]

But many areas of the law continue to rely on older common-law tests of capacity. Common-law tests of capacity are prominent in wills-and-estates law, contract law, and family law. In order to find the relevant tests of capacity in these areas of the law, it is necessary to trace the rules through court decisions, until one arrives (frequently) at a definitive statement in a nineteenth-century English judgment. This project focusses, for the most part, on the tests of capacity that apply to making a will, entering into a contract, making a gift, and getting married. It also tackles a few additional areas of the law that are connected to these four.

1. RSBC 1996, c. 370.
2. *Ibid.*, s. 12.
3. *See Health Care (Consent) and Care Facilities (Admission) Act*, RSBC 1996, c. 181, ss. 4–9.
4. *See Adult Guardianship Act*, RSBC 1996, c. 6, ss. 4–39 (not in force).

Although the common-law tests of capacity that the committee plans to study in this project have their share of complex and subtle points, it is possible to give a basic summary of them by quoting key passages from leading judgments. This description of the tests forms the legal background, against which the committee will be carrying out the project.

The test for capacity to make a will probably enjoys the highest profile among the legal and notarial professions—and the general public—of any of the common-law tests of capacity. The law here is particularly well-settled. In order to have the mental capacity to make a valid will, a person must be able to grasp the task at hand, the nature and extent of his or her property, and the claims that family members and others would be expected to have on that property. As the court put it in the leading case of *Banks v. Goodfellow*,[5] to pass the test, a person must:

- "understand the nature of the act [of making a will] and its effects";
- "understand the extent of the property which he is disposing";
- "be able to comprehend and appreciate the claims to which he ought to give effect"; and
- have "no disorder of the mind [that] poison[ed] his affections . . . [or] no insane delusion [that] influence[d] his will in disposing of his property. . . ."[6]

Another area that sees capacity crop up as an issue almost as frequently as wills-and-estates law is contract law. To enter into a valid contract, a person must have the capacity to understand the contract and its effects on the person's interests. And the other contracting party's knowledge of the first contracting party's mental state is also significant. As set out in the leading Canadian case *Bank of Nova Scotia v. Kelly*,[7] the test of contractual capacity has the following elements:

- a contracting party must be able to "understand [the contract's] terms";
- this contracting party must also be able "[to form] a rational judgment of its effect upon his interests"; and
- the other contracting party must have "actual or constructive" knowledge of the first contracting party's "mental incompetency."[8]

A large swathe of the case law and commentary also recognizes a fourth element, holding that a contract with someone who lacks contractual capacity will not be set aside unless the

5. (1870), LR 5 QB 549.
6. *Ibid.* at 565, Cockburn CJ.
7. (1973), 41 DLR (3d) 273, 5 Nfld. & PEIR 1 (PEISC) [*Kelly* cited to DLR].
8. *Ibid.* at 275, Nicholson J.

contract is unfair. But the majority view appears to be that fairness is a separate basis for reviewing contracts, one that should not be imported into the test for contractual capacity.[9]

The mental capacity required of a person who wishes to make a gift of property while that person is still living[10] ranges between the capacity to enter into a contract and the capacity to make a will. In the leading case *Royal Trust Co. v. Diamant*[11] the test was described as follows: "[t]he degree of mental incapacity which must be established in order to render a transaction *inter vivos* invalid is such a degree of incapacity as would interfere with the capacity to understand substantially the nature and effect of the transaction."[12] But some cases have said the test for determining capacity to make an *inter vivos* gift is the same as the test of capacity to make a will.[13] This would appear to import a higher test than the one set out in *Diamant*, as it would require the person to understand the nature of the transaction, the effect of it on his or her interests, *and* the effect of the transaction on the interests of others (such as family members) who may ultimately have a claim on the property that is the subject of the gift. Some commentators have pointed out that the test varies with the size of the gift. If the gift is "significant in value, in relation to the donor's estate," then the testamentary-capacity standard should apply.[14]

Capacity does not loom as large in family law as it does in wills-and-estates and contract law, but there is a growing body of cases on the test of capacity to marry. The starting place for understanding this test is to note that, at a basic level, marriage is a form of contract. So, the test bears some similarities to the test of contractual capacity. But most courts and commentators view marriage as a special type of contract, and accordingly distinguish capacity to marry from contractual capacity. An often-cited, nineteenth-century English case describes the test as "a capacity to understand the nature of the contract [of marriage], and the duties and responsibilities which it creates."[15] Meeting this test requires something more than "a mere comprehension of the words of the promises exchanged . . .,"[16] but "if the parties are capable of understanding that the relationship is legally monogamous, inde-

9. *See ibid.* at 276 ("it is my view that fairness of the transaction is material not in a case such as this where the defence is that there is mental incompetence amounting to incapacity to contract known to the other party, but only in cases where there is a lesser degree of mental incompetence (not amounting to incapacity to contract) of which the other party has taken advantage").

10. That is, by means other than a will (which takes effect on death). In legal language, such gifts are called gifts *inter vivos* (= "between the living; from one living person to another").

11. [1953] 3 DLR 102 (BCSC).

12. *Ibid.* at 111, Whittaker J.

13. *See*, *e.g.*, *York v. York*, 2011 BCCA 316, [2011] BCJ No. 1308 at para. 37 (QL), Garson JA.

14. Kimberly Whaley, "Comparing the Various Tests of Capacity" (November 2010), online: Whaley Estate Litigation <www.whaleyestatelitigation.com> at 18.

15. *Durham v. Durham* (1885), 10 PD 80 at 82, Sir James Hannen P.

16. *Ibid.*

terminable except by death or divorce, and involves mutual support and cohabitation, capacity is present."[17]

The test of capacity to marry is viewed as setting a low threshold to clear, one that is less stringent than the tests for making a will or a gift, or for entering into a contract.[18] But there is also a line of "English authorities that have been cited with approval in our courts" which adds an additional requirement: "[t]he principle that a lack of ability to manage oneself and one's property will negative capacity to marry. . . ."[19] This additional requirement would have the effect of raising the level of capacity needed to enter into a marriage. But its status in Canadian law is unclear.

These are the major areas of the law to be taken up in the project. The project committee also plans to consider some transactions or relationships that are connected with wills, contracts, gifts, or marriage. In these areas, the test of capacity is often obscure or spelled out by reference to the test in one of the four major areas. So, the capacity to form the intention to live separate and apart from a spouse (as a prelude to division of family property and divorce) is often discussed in terms of capacity to marry,[20] capacity to nominate a committee is understood as being similar to testamentary capacity,[21] and capacity to make a (retirement-plan or insurance) beneficiary designation is governed by the same test as capacity to make a will.[22] Finally, the project will examine two areas that are often overlooked: capacity to form an unmarried spousal relationship and capacity to instruct legal counsel.

RATIONALES FOR REFORM

The project committee is considering reforms to common-law tests of capacity for four reasons. These reasons relate both to issues that have arisen within the law and to broad societal changes and intellectual developments.

First, many of the common-law tests of capacity have their roots firmly established in nineteenth-century jurisprudence, which was heavily influenced by nineteenth-century scientific and medical knowledge on the mind. Neuroscience has developed in ways that could not have been foreseen in the nineteenth century, but the law has been much slower to discard old insights and theories. For example, the test of capacity to make a will includes an

17. Gerald B. Robertson, *Mental Disability and the Law in Canada*, 2d ed. (Toronto: Carswell, 1994) at 254.

18. *See*, *e.g.*, *Durham*, *supra* note 15 at 82 ("the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend").

19. *Banton v. Banton* (1998), 164 DLR (4th) 176 at 226, 66 OTC 161 (Gen. Div.), Cullity J., *aff'd* (*sub nom. Banton v. CIBC Trust Corp.*) (2001), 53 OR (3d) 567, 197 DLR (4th) 212 (CA).

20. *See Wolfman-Stotland v. Stotland*, 2011 BCCA 175, 16 BCLR (5th) 290 at para. 27.

21. *See Fraser v. Fraser*, 2008 BCSC 1733, 45 ETR (3d) 285 at para. 20.

22. *See Re Rogers* (1963), 39 DLR (2d) 141 at 148, 42 WWR 200 (BCCA), Wilson JA (Davey JA, concurring) ("I think that, since here the donee of the power was concerned with the interests of others rather than with his own interest, the testamentary test is the right one to apply.").

element that invalidates a will if it is the product of a fixed "insane delusion." This element embodies the concept of monomania, an older psychological notion that is considered outmoded today. Its presence in the test of capacity to make a will has attracted some criticism.[23] Other critics have said that modern neuroscience poses a challenge not just to specific elements of the test, but also to the general assumptions that form the foundation of the test as a whole. They have called for "[m]ore attention . . . to be given to the subtler aspects of capacity. . . ."[24] The project committee will explore whether the law can accommodate advanced insights about these subtler aspects and not grow so complex as to lose its utility for assisting people in important practical tasks, such as making a will or entering into a contract.

Second, the composition of society is changing, as the population is getting older on average. Other social and economic trends, such as the increasing complexity of family structures and the concentration of wealth in senior citizens (and the resulting transfer of that wealth in anticipation of or upon death) are also becoming more and more pronounced. These factors will serve to highlight the importance of the legal tests of capacity in the upcoming years.[25] Already, they are starting to have an impact by fueling calls to reform long-neglected areas of the law. The test of capacity to marry is an example of this dynamic. Exploitation of older, wealthier adults by younger caregivers was once seen as anomalous. More recently, this type of fraud has acquired the label "predatory marriage"[26] and has begun to crop up with greater frequency in court cases.[27] This has led some critics to conclude that the time is ripe to consider changes to the well-settled test for capacity to marry, to bring the law "into line with modern realities."[28] The project committee will consider the desirability of—and the implications flowing from—proposed reforms to tests of capacity to respond to social changes.

Third, some aspects of the law itself are in a state of confusion. The summary of the leading common-law tests of capacity that appeared in the previous section of this backgrounder had to contain a number of hedges and qualifications. It is not possible to state the tests of

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23. *See* Bradley E. S. Fogel, "The Completely Insane Law of Partial Insanity: The Impact of Monomania on Testamentary Capacity" (2007) 42 Real Prop. Prob. & Tr. J. 67.

24. Kenneth I. Shulman, Ian M. Hull & Carole A. Cohen, "Testamentary Capacity and Suicide: An Overview of Legal and Psychiatric Issues" (2005) 24 ETPJ 288 at 302.

25. *See ibid.* at 288 ("A number of psychological and demographic factors are conspiring to produce an increasing frequency of challenges to wills in the coming decades. Foremost is the demographic imperative of an aging society whose very old are increasing at the most rapid rate and possess a disproportionate amount of the economic wealth. The high prevalence of mental disorders in old age and the increasing complexity of family structures will add to the tendency towards more challenges based on lack of testamentary capacity.").

26. *See* Kimberly Whaley, "Predatory Marriages: Legal Capacity to Marry and the Estate Plan" (April 2011), online: Whaley Estate Litigation <www.whaleyestatelitigation.com>

27. *See Feng v. Sung Estate* (2003), 1 ETR (3d) 296, 37 RFL (5th) 441 (Ont. SCJ), *aff'd* (2004), 11 ETR (3d) 169, 9 RFL (6th) 229 (Ont. CA); *Barrett Estate v. Dexter*, 2000 ABQB 530, 34 ETR (2d) 1.

28. Albert H. Oosterhoff, "Consequences of a January/December Marriage: A Cautionary Tale" (1999) 18 ETPJ 261 at 284.

capacity to marry or to enter into a contract with a high degree of precision because there are still disputes over the elements that make up the test. These uncertainties have even caused some frustration for judges deciding cases involving the test of contractual capacity.[29] The project committee will examine how to cure these uncertainties in the law.

Fourth, and finally, there is a major assumption underlying the common law's approach to capacity that is due for re-examination. The common law has, at least since the nineteenth century, taken a transaction-specific approach to issues of mental capacity. Different tests have evolved for different transactions, so that (for example) the test for making a will is different than the test for entering into a contract. The rationale for this approach appears to be a desire to move away from a primitive position that mental incapacity is a global condition that completely disqualifies a person from participating in any transaction or relationship. In this way, the common law helps to support the values of individual freedom and autonomy. Defending these values is of great importance: the law should not be a vehicle for stigmatizing people who suffer from mental illnesses or disability. And the transaction-specific approach does have some benefits: for example, it provides the law with a high degree of flexibility, which should allow the courts to respond quickly to changing circumstances. But the transaction-specific approach also makes the law more complex and can lead to some anomalous results. The uncertainties generated by this approach can be particularly damaging because many of the areas of the law that have a common-law test of capacity are concerned with planning for future events. Such planning needs a certain, predictable legal framework. The project committee will explore harmonization of the common-law tests of capacity, considering whether it is a possible route to such a legal framework.

GOALS OF THE PROJECT

The project's primary goal is the publication of a final report, which will include recommendations in the form of draft legislation and commentary on that draft legislation. In support of this primarily goal, the project committee will pursue the following subsidiary goals:

- to carry out legal research into the current state of the law and law-reform proposals regarding tests of capacity;
- to raise awareness in the legal and notarial professions and among the general public about the current state of the law;
- to publish the results of the project's legal research, creating a resource for legal researchers and practising lawyers and notaries public; and
- to conduct a wide-ranging public consultation aimed at eliciting comment on specific law-reform proposals.

29. *See Kelly*, *supra* note 7 at 288–89 ("The law relating to the contracts of mentally incompetent persons is not now, and so far as I can tell, never was in a satisfactory state.").

NEXT STEPS IN THE PROJECT

The project will contain the following three distinct phases:

- a research-and-deliberation phase, which will run through from winter 2012 to early autumn 2012, during which the project committee will meet regularly to consider the common-law tests of capacity in the areas it has chosen to study and the options for reform of the law;
- a consultation phase, beginning with the publication of the project committee's consultation paper that will survey the current law, discuss options for reform, and present the project committee's tentative recommendations (expected in late autumn 2012), and running through to spring 2013, during which time the public will have the opportunity to comment on the project committee's tentative recommendations;
- a drafting phase, running from summer 2013 to autumn 2013, during which the project committee will be engaged in considering the responses to its consultation paper and drafting the recommendations for its final report (which is planned for publication in September 2013).

ABOUT THE BRITISH COLUMBIA LAW INSTITUTE

The British Columbia Law Institute was incorporated in 1997 under the British Columbia *Society Act*. Its mission is to be a leader in law reform by carrying out the best in scholarly law-reform research and writing and the best in outreach relating to law reform.

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