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Backgrounder

BCLI Report no. 21—Health Care Decisions and End-of-Life Issues: Terms of Reference for a Possible Project

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The British Columbia Law Institute entered into an arrangement with the Public Guardian and Trustee (PGT) for the development of terms of reference for a possible study on healthcare decisions and end-of-life issues. The proposed terms were developed pursuant to the PGT's request, and consider a number of issues relevant to the *Health Care (Consent) and Care Facility (Admission) Act* (the HCCF). The BCLI engaged Professor Stephan Salzberg of the University of British Columbia's Faculty of Law to produce this report, which was endorsed by the BCLI's Board of Directors and submitted to the PGT.

Implementation of new adult guardianship legislation, in particular the HCCF, gave rise to a number of issues resulting from a lack of common understanding of the provisions in the legislation. There was also confusion with respect to the PGT's role as a surrogate decision maker for health care decisions under the HCCF.

This report discusses those issues and also delves into implementation of two other statutes that also came into force as of 28 February 2000: the *Representation Agreement Act* and the *Adult Guardianship Act* (which at the time the report was written was largely unproclaimed). Both of those acts have provisions in relation to surrogate health care decision makers. Pending proclamation of the *Adult Guardianship Act*, the *Patients Property Act*, first enacted in 1962, was used as the basis for surrogate health care decision-making.

The scheme put in place under the HCCF Act, the *Representation Agreement Act*, and the *Adult Guardianship Act* aims to ensure that the adult's wishes are respected both through the method of designating surrogate decision makers, and the criteria to be applied in making surrogate decisions. The spirit of patient autonomy informs the HCCF, which purports to codify common law principles and developments. Adults are presumed to be capable of giving, refusing, or revoking consent to health care in the absence of a finding of incapability. An adult's way of communicating will not in itself be grounds for a finding of incapability.

The principle of autonomy is implicated in all the issues identified in this report, and reinforcing it the formulation and implementation of the act was a prime concern. Difficulties encountered during the period that the Act was in force was also an important factor in se-

lecting the issues presented. The issues addressed in the report are organized into six categories:

1. The criteria and process by which adults are found to be incapable of making health care decisions,
2. The scope of temporary substitute decision makers' authority,
3. The criteria applied by surrogate decision makers in making health care decisions, and their application in the context of end of life decision making,
4. The way in which decisions regarding general health care directives, such as "do not resuscitate orders" and "levels of care" instructions may or may not fit within the scheme of the Act,
5. Possible frameworks for decision making with respect to them, and
6. Mechanisms for the resolution of disputes under the Act, particularly the role and jurisdiction of the Health Care Review Board.

The Terms of Reference for the study address but not be limited to the following:

- Explore how health law issues related to the *Health Care (Consent) and Care Facility (Admission) Act* interact with particular attention to substitute health care decision making as it applies to end of life issues;
- Identify legal and ethical dilemmas within the substitute decision making provisions of the Act;
- Consider the concept of the "patient's best interests" in the context of the comatose patient;
- Consider the appropriate division of decision making between health care providers and other decision makers in the context of proposals to treat and proposals to withhold or withdraw treatment;
- Consider the role, jurisdiction, and functioning of mechanisms to resolve disputes;
- Consider the extent and nature of consultation to be undertaken for purposes of the study and the process that should be adopted.