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Background

CCEL Report no. 4/ BCLI Report no. 46—Study Paper on A Comparative Analysis of Adult Guardianship Laws in BC, New Zealand and Ontario

Date: October 2006

This study paper has been prepared by the Canadian Centre for Elder Law Studies, and has been published as a part of the Aging with Challenges project. The Aging with Challenges project is a two-year Law Foundation-funded endeavour to examine frequently unexplored issues facing older adults. In particular, the project explores the difficulties faced by adults aging with addiction, identity issues, interactions with the criminal justice system, and physical and mental disabilities. This study paper addresses one such difficulty: mental incapacity.

The evolution of guardianship law has significantly affected the way in which governments contemplate issues of incapacity and individual decision-making. The significant shift from a paternalist-based model to an individual rights-based regime is apparent across many jurisdictions in Canada and around the world, and yet it is observably absent in British Columbia. Unlike many jurisdictions, British Columbia has hesitated in its move to modernize guardianship law in the province, despite a growing challenge to the present legal framework. This study paper is intended to inform the discussion and debate surrounding this present legal challenge and prospective legislative change, most notably Bill 32 (2006).

As will be demonstrated in the proceeding discussion, British Columbia's guardianship laws are heavily rooted in 14th century English "lunacy" laws. Indeed, the province's *Patients Property Act* is a direct descendent of the *Imperial Lunacy Act* of 1890, and predominantly parallels its predecessor's archaic method of estates administration. Most notably, the *Patients Property Act* fails to account for modern medical advancements, evolving social attitudes, recent demographic realities, disability rights theory, and elder law.

While each of these legislative flaws has been well recognized in British Columbia, any proposed legislative reforms have been reluctantly implemented in the province. The targets of necessary legislative reform include: the lack of legislative guidance, the inherent regulatory paternalism, and the infringement of procedural rights.

In all common law jurisdictions including British Columbia adults are presumed to be legally capable, and thus have the corresponding ability to make necessary decisions respecting their person and property. Despite this fact the state is under the obligation to intervene in situations when an adult becomes incapable of making these decisions and has not appointed a substitute decision-maker, or no default decision-maker legislation exists. While British Columbia's *Patients Property Act* construes incapability as a legal determination, the province's *Representation Agreement Act*, Supreme Court Rules, and Law Society Professional Conduct Handbook may have rules and guidelines that confuse the issue and obfuscate clear roles and rights for both the adult and her professional advisors. Observably, none of these professional regulations provide lawyers with the requisite clear legislative guidance or guidelines to render a determination of incapability. This area of conflict has created considerable confusion for legal professionals attempting to reconcile their regulatory responsibilities, and significant problems for health care providers attempting to render their own informal assessments.

Second, British Columbia's *Patients Property Act* has been criticized for its outmoded and paternalistic view of necessary state intervention. Specifically, the legislation's "all or nothing" approach to incapability fails to recognize that adults may retain the capability to make certain types of decisions, even though they may be incapable of making others.

Finally, this binary and protectionist model appears to breach procedural fairness standards, threaten *Charter* rights and freedoms, and lack crucial out-of-court review processes—criticisms that are directly indicative of the legislation's archaic and inadequate guardianship framework.

In December 2005, British Columbia's Ministry of Attorney General recognized the need to reform the province's archaic legislative framework. The government's announcement was later followed by the introduction of Bill 32 in the spring legislative session of 2006. Bill 32, the *Adult Guardianship and Personal Planning Statutes Amendment Act*, promised to modernize British Columbia's statutory and Court-ordered guardianship frameworks, and pledged to repeal the outdated *Patients Property Act*. Indeed, the new legislation was drafted to reflect individual autonomy, dignity, greater procedural fairness, and the use of the least restrictive and least intrusive approach tailored to an individual's needs and circumstances. Although the proposed legislation arguably fell short in several significant aspects, any opportunities for debate on this Bill, as drafted, were quashed when it did not pass first reading. And while the fate of this potential legislative reform remains uncertain at the time of this writing, its proposals merit continued study and scrutiny for future and much needed legislative reform.

In anticipating such future legislative reform, it is useful to study other attempts at modern guardianship law. This study paper explores two such jurisdictions: New Zealand and Ontario. Although legislative regimes cannot be perfectly transplanted from one jurisdiction to another, Ontario's *Substitute Decisions Act* and New Zealand's *Protection of Personal and Property Rights Act 1988* provide valuable contextual, pragmatic, and rights-based approaches to developing our own modern guardianship framework in British Columbia. In-

deed, both Ontario and New Zealand have experienced notable successes with their adult guardianship reforms despite their differing systems, and these successes naturally inform subsequent recommendations for legislative change in British Columbia.

There is no question that British Columbia's guardianship laws demand significant and immediate legislative reform. This study paper presents several key recommendations.

Key Recommendations:

1. The meaning and consequences of incapacity, as the term is used in a variety of different contexts, should be clarified.
2. Uniform guidelines should be established for all capability assessments. Legal and medical professionals need clear direction in order to best serve their clients, the community and the Courts, especially in delicate areas such as incapacity issues.
3. Best practices with respect to capability assessments should be established.
4. Modern guardianship legislation should:
 - a. reflect the principle of minimal interference with an adult's autonomy;
 - b. incorporate the principle of individual referencing, mandating that an adult's behaviour be viewed in the context of his or her unique, individual characteristics;
 - c. give the adult rights advice when served with notice of an application regarding the procedure for guardianship applications, the possible consequences if the application is successful, and the right to oppose the application, etc.;
 - d. incorporate a system of accessible legal representation for adults facing incapacity proceedings;
 - e. incorporate preliminary hearings and/or a capacity assessment review board; and
 - f. specifically provide that adults deemed to be incapable can nevertheless instruct counsel for the purposes of appealing that determination. This recommendation entails consequential amendments to the Supreme Court Rules of Court, and changes to the Law Society's Professional Conduct Handbook.

Ultimately, while this study paper is not intended to propose specific legislative drafting changes, or promote legislative transplants from other jurisdictions, its investigation is intended to inform discussions surrounding British Columbia's impending guardianship law reform. To date, British Columbia continues to fall significantly behind many jurisdictions with respect to guardianship legislation. The time is ripe for reform.