

# **A Comparative Analysis of Adult Guardianship Laws in BC, New Zealand and Ontario**

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## **Canadian Centre for Elder Law Studies**

The Canadian Centre for Elder Law Studies (CCELS) was created by the British Columbia Law Institute as a vehicle to carry forward the Institute's work in relation to legal issues affecting seniors and to enrich and to inform the lives of older people in their relationship with the law. It is a response to the need in Canada for a body that has a dedicated focus on this area to facilitate the development of Elder Law as a coherent body of knowledge.

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- (a) promote the clarification and simplification of the law and its adaptation to modern social needs,
- (b) promote improvement of the administration of justice and respect for the rule of law, and
- (c) promote and carry out scholarly legal research.

The Institute is the effective successor to the Law Reform Commission of British Columbia, which ceased operations in 1997.

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## **INTRODUCTORY NOTE**

The Canadian Centre for Elder Law Studies and the British Columbia Law Institute have the honour to present:

### **Study Paper on A Comparative Analysis of Adult Guardianship Laws in BC, New Zealand and Ontario**

The approach of the *Patients Property Act* (PPA) in British Columbia (BC) reflects a traditional protective paternalism toward vulnerable adults who lose their capacity to make decisions regarding their personal rights and their property. The sole focus is on protection of a vulnerable adult. In many other jurisdictions, adult guardianship legislation promotes the autonomy of the adult, and seeks to preserve the greatest degree of normalcy in the person's life, providing assistance only where necessary.

In late 2005, the BC government announced its intention to replace the outdated PPA. Bill 32, the *Adult Guardianship and Personal Planning Statutes Amendment Act*, was introduced into the BC Legislature prior to the publication of this comparative paper. It is hoped that this comparative analysis will assist in discussion regarding the proposed legislation and the extent to which it addresses or fails to address concerns regarding procedural fairness and constitutional rights for individuals, in particular older adults, whose liberty rights may be jeopardized by an order of guardianship.

This paper discusses the legislative and practical schemes in BC and other jurisdictions, notably New Zealand and Ontario. It also considers key issues that are essential to meaningful reform.

The paper has been prepared by the Canadian Centre for Elder Law Studies (CCELS), in connection with the Aging with Challenges project, funded by the Law Foundation of BC. One of the objectives of the CCELS is to meet the increasing need for education and research in relation to issues of particular significance for older adults. The Aging with Challenges project is aimed at considering the difficulties faced by adults aging with disease, physical or mental disabilities, addiction or substance abuse problems, identity or cultural differences, and those aging within the penal system.

Although capacity and guardianship issues may affect adults of any age, the focus of this paper is on the impact of guardianship legislation with respect to older adults.

Ann McLean  
Chair,  
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October 2006



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## **EXECUTIVE SUMMARY**

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, interaction 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).

As will be demonstrated in the proceeding discussion, British Columbia's guardianship laws are heavily rooted in 14<sup>th</sup> century English "lunacy" laws. Indeed, the province's *Patients Property Act* is a direct descendent of the *Imperial Lunacy Act* of 1890, and predominately 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. Among the targets of necessary legislative reform include: the lack of legislative guidance; the inherent regulatory paternalism; and, the infringement of procedural rights.

First, in British Columbia (as in all common law jurisdictions) adults are presumed to be legally capable and thus have the corresponding ability to make necessary decisions respecting their person and their property. However, the state is under the obligation to intervene when an adult is incapable of making these types of 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 which confuse the issue and obfuscate clear roles and rights for both the adult and her professional advisors. Ob-

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servably, 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, some 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. Indeed, 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.

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### **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.





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## I. INTRODUCTION

Issues of personal autonomy, decision-making and guardianship are of increasing importance both in British Columbia (BC) and around the world. Developments in the theory and law of guardianship have substantively changed the approaches that governments and the Courts take when considering issues of incapacity and decision-making. Generally, the shift in theory has been from a paternalistic model of complete, or global, committee-ship to a modern, individual rights-based model of gradual, nuanced intervention.

In few jurisdictions has the struggle to modernize guardianship laws been more protracted than in the province of BC, which has retained the historic global model, despite increasing pressures over the last two decades to develop a modern guardianship model. It is hoped that this paper will inform discussion and analysis surrounding impending guardianship reform in BC in general, and Bill 32 in particular.

Chapter II discusses the demographic context which has, in part, driven the development of new modern BC guardianship legislation.

Chapter III briefly discusses the history of English “lunacy” law, which is the root of the current guardianship system in BC. It also considers the impact of disability rights theory and elder rights theory on the local debate.

Chapter IV discusses the current state of guardianship law in BC. First, it considers the existing system under the *Patients Property Act* (PPA).<sup>1</sup> Next, problems within the system are identified, and issues pertaining to procedural fairness, professional responsibility and liberty rights are considered. The discussion then turns to the 2005 governmental policy announcement regarding proposed reforms, which culminated in Bill 32. The fate of this bill, which received first reading before it was removed from the agenda prior to the close of the spring legislative session, is uncertain at the time of writing.

Chapter V considers adult guardianship in New Zealand, the first of the comparative jurisdictions. First, the paper outlines the history leading up to the New Zealand *Protection of Personal and Property Rights Act* (PPPRA),<sup>2</sup> which governs issues of guardianship in that jurisdiction. Next, the Court-based New Zealand guardianship system under the current PPPRA legislation is reviewed. Key components of the system are then identified. Last, an update on the status of the PPPRA is provided.

Chapter VI considers adult guardianship in Ontario, the second of the comparative jurisdictions. First, it outlines the history leading to the creation of the *Substitute Decisions*

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1. R.S.B.C. 1996, c. 349 [PPA].

2. (N.Z.) 1988/04 [PPPRA].

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*Act* (SDA).<sup>3</sup> Next, the system under the current SDA legislation is reviewed. Again, key components of the system are identified. Last, an update on the status of the SDA is provided.

Chapter VII refocuses attention on BC. Parsing out key components of both the Ontario and New Zealand experiences, this section considers how the comparative experiences of these other jurisdictions might usefully inform modern guardianship laws for BC. Lastly, it summarizes the recommendations for the reform of BC's guardianship laws.

The goal of this study paper is neither to suggest specific legislative drafting changes, nor to promote complete legislative transplants from other jurisdictions. Rather, its purpose is to consider two different common law jurisdictions, in order to examine the usefulness of their divergent systems, and to learn from their successes. Identifying the key components of both the New Zealand and the Ontario guardianship models may helpfully inform the discussion regarding the important components that should be incorporated in modern guardianship laws in BC.

### **II. DEMOGRAPHICS: WHY AN AGING POPULATION MAY BE DRIVING GUARDIANSHIP REFORM IN BC**

Since the beginning of this century, “seniors”<sup>4</sup> have constituted the most rapidly growing age group in Canada. In 2001, 3.92 million Canadians, or one Canadian in eight, were 65 years of age or older.<sup>5</sup> By 2026, the proportion of Canadians 65 or over is expected to rise to one in five. As this tsunami of “baby boomers” – those born between 1946 and 1965 – swells, seniors will constitute about 6.7 million Canadians by 2021 and an estimated 9.2 million Canadians by 2041, or nearly one in four Canadians.<sup>6</sup>

Declining birthrates and increasing life expectancies have also augmented the “top-heaviness” of the demographic map. In Canada in the mid-1940s through the mid-1960s, fertility rates were three children or more per woman. They have dropped to 1.5 children per woman since that time. Meanwhile, the life expectancy for women will increase from 81.4 years in 1997 to an estimated 86 years in 2041. Similarly, the life expectancy for men will increase from 75.8 to 81 years over the same period.

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3. S.O. 1992, c. 30 [SDA].

4. For the purpose of this paper, the following definitions are used: seniors are 65 years of age and older; seniors aged 85 years and older are often referred to as the “older old.”

5. By contrast, eighty-five years ago, in 1921, only one in twenty Canadians was 65 or over.

6. In 2001, seniors 85 years and over comprised more than 430,000 Canadians, more than twice as many than in 1981 and more than 20 times as many as in 1921. Statistics Canada expects that the number of Canadians aged 85 or more will grow to 1.6 million by 2041, or 4% of the population.

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Governments are becoming aware of the impending need for legal and societal infrastructures to adequately respond to this burgeoning segment of the population.

This aging demographic has a notably gendered feature as well. In 2001, women comprised 56% of Canadians over 65, 60% of those between 75 and 84, and 70% of those over 85. It is obvious that there will be progressively more older women than older men.<sup>7</sup>

Population migration has also influenced the demographic landscape. Because British Columbia is the “retirement capital” of Canada, seniors will constitute a quarter of this province’s population as early as 2030, rather than by 2041 for Canada as a whole.<sup>8</sup>

However, older adults are not a homogenous group. Factors such as gender, culture and poverty, must inform any proposal to modernize BC’s guardianship regime. Consequently, government should take a nuanced and layered approach, one that carefully balances an individual’s autonomy and procedural fairness rights against the state’s duty to provide gradual and context-sensitive support for adults with diminished or diminishing capacity.

### III. BC’S EXPERIENCE PAST AND PRESENT: FROM LUNACY TO DISABILITY TO SENIORS’ RIGHTS THEORY

#### A. History of Lunacy Laws

BC’s present legislation has remained virtually unchanged since the inception of the old lunacy laws.<sup>9</sup>

The state’s duty to protect the estates and the persons of those under legal disabilities is derived from Prerogativa Regis. That 14th century document is considered the source of the crown’s *parens patriae* jurisdiction over the estates of idiots (those who had never been and would never be capable) and lunatics (those who had once been capable, and might, however faint the hope, regain their senses).<sup>10</sup>

Notably, the extent of the jurisdiction differed with respect to the two categories of incapability. In the case of an idiot, “the King was given custody of his land, including the profits, with the limitation that he would not commit waste or destruction,” and “upon the

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7. Statistics Canada, “CANSIM Table” (3 March 2006), online: Statistics Canada <<http://www40.statcan.ca/101/cst01/demo10a.htm>>.

8. Statistics Canada, “Population Projections 2005 to 2031” *The Daily* (15 December 2005), online: Statistics Canada <<http://www.statcan.ca/Daily/English/051215/d051215b.htm>>.

9. See in particular the *Imperial Lunacy Act 1890*, c. 5.

10. Louise Harmon, “Falling off the Vine: Legal Fictions and the Doctrine of Substituted Judgment” (October 1990) 100:1 *The Yale L.J.* 1 at 16 [Harmon].

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idiot's death, the King was to render the estate to his heirs."<sup>11</sup> In the case of a lunatic, who might "regain his sanity," or at least experience periods of lucidity, the King was not given custody of the lunatic's land; nor was he permitted to take any profit for his own use. Instead, the King had the duty to provide that the land of the lunatic was safely kept without waste and destruction, and that the profits were used solely for the lunatic's support and maintenance.<sup>12</sup>

In short, the King's jurisdiction over the lunatic amounted to a "power of administration" only.<sup>13</sup> It resided in the person of the King, and, by Sign Manual, the personal signature of the monarch, it was delegated to the Chancellor personally. It did not reside in the Court of Chancery itself, which had no equitable jurisdiction over the guardianship of lunatics, as it did over the wardship of children, although in practice the jurisdiction came to amount to the same thing.<sup>14</sup> Over time, the distinction between idiots and lunatics was lost, and references were made more generally to "those of unsound mind."

Under this authority, the Lord Chancellor and, later, the Lord Justices of Appeal in Chancery, held "inquisitions," supervised the activities of committees<sup>15</sup> and, under the pretence of "tenderness toward the lunatic himself," made orders respecting distribution of the lunatic's income to members of his or her family.<sup>16</sup>

The *Imperial Lunacy Act 1890* consolidated and amended the existing legislation in an effort to make proceedings "less costly and cumbersome."<sup>17</sup> A special category of incapable people, the mentally infirm, was introduced; procedures for appointing an agent to manage the estate of an infirm person were simplified; and the use of medical evidence of incompetence as an alternative to a full judicial inquiry was introduced.<sup>18</sup>

BC's PPA is a direct descendant of this 1890 Act. While some changes were introduced in the 1962 *Patients' Estates Act*,<sup>19</sup> they have been described as largely "semantic."<sup>20</sup> The

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11. Harmon, *supra* note 10 at 16-17.

12. *Ibid.* at 17-18.

13. *Ibid.* at 19.

14. *Ibid.*

15. Robert M. Gordon and Simon N. Verdun-Jones, *Adult Guardianship Law in Canada* (Ontario: Carswell, 1992) at 1-17 [Gordon].

16. Harmon, *supra* note 10 at 21.

17. Gordon, *supra* note 15 at 1-17.

18. *Ibid.* at 1-17 and 1-18.

19. S.B.C. 1962, c. 44.

20. Gordon, *supra* note 15 at 1-18.

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current legislation remains archaic. The PPA's values are grounded in nineteenth-century liberalism and property rights,<sup>21</sup> and the Act concentrates on the administration of estates rather than on the guardianship of persons. It fails to account for the myriad advancements in medical science, which make the administration of personal decisions as to medical treatment (i.e. informed consent) of great importance in the modern context. It fails to account for evolving social attitudes, which have led to the constitutional entrenchment of such values as equality, dignity and autonomy of the person. And it fails to account for either modern demographic realities, or modern discourse and advocacy in the emerging areas of disability theory, aging theory and elder law.

The faults of the present system are well known, and BC has been considering reforms for more than a dozen years. However, agreement on the implementation of useful changes in this area of the law has remained elusive.

In 1993, a major law reform study in BC resulted in the development of four statutes relating to substitute decision-making and guardianship.<sup>22</sup> Because of practical and financial concerns, these statutes were not proclaimed in force until February 28, 2000. And at that time, while the other three statutes were largely brought into force, Part 2 of the *Adult Guardianship Act* (AGA), which was intended to replace the PPA with a modern, graduated adult guardianship scheme, was not proclaimed. Part 1, which was proclaimed, embraces the philosophy of adult guardianship reform only briefly and contains guiding principles and a statutory presumption of capability.

After a delay of some 13 years, it became clear that the unproclaimed Part 2 legislation drafted in 1993 would not be enacted. The perceived difficulties with the proposed legislation remained, and modern guardianship theory continued to evolve beyond its provisions. The government decided to reconsider and redraft the legislation.

### **B. Guardianship Law Reform and the Personal Planning Debate: A Clash Between Underlying Theories?**

In a contentious legislative area, it is useful to look beneath the surface to discover the root of the apparent disagreement, especially when many of the values that are engaged, such as dignity, autonomy, individual rights and civil liberties, are not in themselves contentious. Although very little analysis has addressed this issue, the struggle to modernize guardianship law in BC may, in part, reflect a clash between disability rights theory and the emerging field of elder rights theory.

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21. Harmon, *supra* note 10 at 20.

22. The *Representation Agreement Act*, the *Adult Guardianship Act*, the *Health Care (Consent) and Care Facility (Admission) Act* and the *Public Guardian and Trustee Act*.

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The adult guardianship reform movement may be understood as branching into two limbs: first, the disability rights movement, informed by the field of disability rights theory; and second, the seniors' rights movement, informed by the more recent field of seniors' rights theory and the emerging discipline of elder law. This chapter examines the divergence of disability theory and seniors' rights theory as they relate to guardianship. Efforts to modernize guardianship law in BC, and to replace the global committee model, have become stalled in the impassioned discourse regarding appropriate personal planning documents. Despite their common desire to avoid committee, a disagreement between the two branches has resulted in many disability rights advocates favouring a substitute decision-maker, or proxy, approach, and some seniors' rights advocates favouring advance directives, which reflect a living will approach.

### C. The Disability Rights Movement and Underlying Theories

Disability rights theory and guardianship issues have long been linked, and until recently, disability advocates had the strongest voice in calling for adult guardianship reform.

The disability movement developed to improve the conditions and opportunities for those labeled as disabled, whether mentally or physically. The initial struggle often centred on humanizing treatment and improving accessibility to programs and services.

Out of this desire to de-“Bedlamize” the historically abysmal treatment of persons with mental or physical challenges developed a movement dedicated to understanding concepts of disability and the extent to which these concepts are socially constructed. Since the 1950s, the goals of the disability rights movement have been threefold: 1) to ameliorate services to and for persons with challenges; 2) to engage in rights advocacy for persons with challenges; and, 3) to critically explore concepts of disability.

Rights advocacy is essential to the first goal of ameliorating services. However, without the evolving concept of rights theory to underpin those efforts, the disability movement lacked a functional matrix. Social research on disability theory developed in the 1950s, and was critically challenged by scholars in the 1960s. This discourse culminated, in the 1970s, in the social model of disability theory.<sup>23</sup> The social model rejected old definitions of impairment, handicap and disability, replacing them with new definitions, which were either created or endorsed by persons with challenges.<sup>24</sup> This social model, generated by disability scholars and activists, resulted in a new acceptance that a variety of social factors contributed to perceptions of what it means to be handicapped.

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23. Colin Barnes and Geof Mercer, “Breaking the Mould? An introduction to doing disability research” in Colin Barnes, ed. *Doing Disability Research* (Leeds: The Disability Press, 1996) 1 at 1 [Barnes].

24. See for instance, the work of the British Council of Organizations of Disabled People (BCODP) and the Disabled Peoples' International (DPI).

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These social factors also underlay what had previously been an exclusively medical model of disability theory. In the 1980s, some scholars began advancing theories of experiential disablement, which “explore how socially constructed barriers...have ‘disabled’ people with a perceived impairment.”<sup>25</sup> The deconstructionist and social justice movements of the late 1980s and 1990s further impacted disability theory.<sup>26</sup>

The resultant scholarship is rich and engaged. Theory and activism have combined, as one might expect of any vibrant movement such as feminism, race theory and the like. Meanwhile, disability activists have worked tirelessly to avoid guardianship through the use of personal planning tools. In BC, the work in this area culminated in the *Representation Agreement Act*.<sup>27</sup>

There is no question that BC’s disability advocates were pivotal in the campaign for the development of proxy-style Representation Agreements in the 1990s. The disability community sought an empowering, normalizing tool that would enable adults with challenges to make their own decisions to the greatest extent possible. Accordingly, advocates pressed for an extremely low threshold of capacity necessary to make section 7 Representation Agreements, sometimes referred to as “standard” or “limited” agreements. However, the legal and health care communities were reluctant to rely on a planning document with such a low, undefined and nebulous capacity threshold. As a result, certain higher-level decisions<sup>28</sup> were placed in a separate class of section 9 Representation Agreement provisions, sometimes referred to as “enhanced” or “general” agreements. These section 9 Representation Agreement provisions require a higher, although still undefined and nebulous, level of capacity. They also require the assistance of a lawyer.

Although the *Representation Agreement Act* came into force in 2000, it remains a contentious document, often criticized for its vague drafting. However, many disability rights activists view it as “normalizing” insofar as it neither singles out nor excludes the disabled as a group.<sup>29</sup> For many members of the disability rights community, part of the advantage of Representation Agreements is that they are not disability-specific, and they do not marginalize persons with challenges. They are broad documents that any adult can use in order to nominate a substitute decision-maker and to make their wishes known. An empowerment and normalization theory underlies Representation Agreements. Their use

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25. Barnes, *supra* note 24 at 1.

26. See examples such as: Mike Oliver *et. al.*, *Walking into Darkness* (London: McMillian Press, 1988); Jenny Morris, *Able Lives* (London: The Women’s Press, 1989); Colin Barnes, *Cabbage Syndrome: The Social Construction of Dependence* (London: Falmer Press, 1990).

27. R.S.B.C. 1996, c. 405 [RAA].

28. Such as the use of physical restraints, end of life decisions, radiation therapy, electroconvulsive therapy, care of minor children, etc.

29. Our thanks to Dr. Robert Gordon for his assistance in the development of these ideas.

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avoids external, global committees, which strip subject adults of their right to make their own decisions. Representation Agreements provide a method for almost all adults to make choices for themselves in advance of incapacity.

Much disability advocacy concerns adults with physical disabilities. However, organizations advocating on behalf of adults with mental capacity issues (i.e., those with Alzheimer's, acquired brain injuries, etc.) also found purchase in the Representation Agreement movement. Some capacity-interested groups have age-related constituents and others do not. For example, Alzheimer's is more likely found with increased age, as is stroke, but these conditions are not specifically age-dependent. Indeed, acquired brain injury can occur at any age. Accordingly, the central focus was on incapacity as a disability or challenge, rather than on incapacity as a seniors' rights issue.

### D. The Seniors' Rights Movement and Underlying Theories

Seniors' rights have been strongly espoused in the United States for many years. They were highlighted on the national agenda during the development of the American "Great Society." This led to the proclamation of the *Older Americans Act* of 1965 (OAA).<sup>30</sup> The OAA, and its subsequent amendments, still provides a national framework of rights, guarantees and institutions for older Americans.<sup>31</sup>

In Canada, the rise of seniors' rights has been less obvious, and there has been no specific legislation to entrench older adult-specific rights, guarantees and institutions. Rather, due to a variety of structural factors, including Canada's federal nature, parliamentary system and national health care program,<sup>32</sup> the Canadian seniors' rights movement is more diffuse and muted than its American counterpart.

In the 1990s, however, local interest in BC seniors' rights began to surface. Engaged older adults formed coalitions, and reinvigorated seniors' centres. Organizations such as the BC Coalition to Eliminate the Abuse of Seniors became vigorous and active. In addition, increased attention was focused on aging scholarship in BC. The Simon Fraser University Departments of Gerontology and Criminology and the Gerontology Research Centre, as well as the University of Victoria Centre on Aging, were leaders in this field. Other scholarly organizations, such as the UBC Centre for Personhood in Dementia, addressed issues of capacity, often within gerontological frameworks.<sup>33</sup> As well, the newly

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30. *Older Americans Act of 1965* 42 U.S.C. § 3001.

31. Laura Watts and Leah Sandhu, "The 51st State—The 'State of Denial': A Comparative Exploration of Penal Statutory Responses to 'Criminal' Elder Abuse in Canada and the United States" (2006) 14:1 *Elder L.J.* 207 at 234 [Watts].

32. Watts, *supra* note 32 at 235-236.

33. Established in July 2004, the Centre for Personhood in Dementia is a transdisciplinary research centre situated within the School of Social Work and Family Studies at the University of British Columbia



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merged Office of the Public Guardian and Trustee focused attention on issues affecting older adults. In the late 1990s, the British Columbia Law Institute developed an older adults project to address seniors' legal issues in a targeted fashion.<sup>34</sup> Increased advocacy and scholarship resulted in international gerontological conferences being held in BC.

Seniors' issues also gained prominence on a broader stage. The Canadian Institute of Health Research, which replaced the older federal health funding body, now includes an Institute of Aging. The visibility of larger organizations, such as the Canadian Network for the Prevention of Elder Abuse and the International Network for the Prevention of Elder Abuse, has increased. Notably, 1999 was declared the International Year of the Older Person. Suddenly, seniors' rights were on the move.

However, while advocacy and scholarship on issues affecting older adults mounted, the legal and sociological theory underpinning this area was not well developed. A review of the literature in gerontology, sociology, history, philosophy and law reveals a marked paucity of theoretical understandings. A few articles skirt the issue of disability theory, aging and the law.<sup>35</sup> Others simply call for the need to develop scholarly theoretical bases for elder law, or, as some have called it, "gerontological jurisprudence" or "jurisprudential gerontology."<sup>36</sup> For simplicity, this paper will refer to this neglected area of scholarly work as seniors' rights theory.

Without a theoretical underpinning, the seniors' rights movement, like the disability movement in the 1950s, lacks a functional matrix. As a result, seniors' rights advocates were divided during the development of BC's 1993 personal planning and proposed adult guardianship legislation. Some seniors groups were aligned with the disability rights movement, espousing the *Representation Agreement Act* model of substitute decision-making by proxy-appointment. Others pushed for a living will, or Advance Directive (AD) model. This group expressed their desire to simply "write it all down," and many were shocked to discover that their colloquial understanding of a living will had no force in law.

The other prime proponents of the AD model were, not surprisingly, government policy-makers, health authorities, and medical professionals. They wished to streamline the approach to informed consent in the context of incapability. Rather than speaking to a sub-

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(UBC), and encompasses expertise that capture biomedical, social sciences, and humanities perspectives at both academic and clinical levels.

34. The precursor to the CCELS.

35. See for instance, J. Kennedy and M. Minkler, "Disability Theory and Public Policy: Implications for Critical Gerontology" (1998) 28:4 *International Journal of Health Services* 757 for an interesting article skirting the issue.

36. Israel Doron and Asaf Hoffman, "Time for Law: Legal Literacy and Gerontological Education" (2005) 31 *Educational Gerontology* 627 at 629.

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stitute decision-maker, many health care providers preferred the apparent simplicity of taking instructions from a signed form. They wished to simply follow whatever directions were “in the chart.”

Both the proxy model of substitute decision-makers, or proxies, and the AD model of living wills have advantages and disadvantages. Why is the debate between the proponents of each model so impassioned?

Some of the tension may reside in the perceived lack of value attached by society to persons affected by issues of capacity. Such persons include both those in the more general disability community and older adults affected by dementia. Medical staff or community workers already unfamiliar with the law of consent, and working within an ablest society, commonly made decisions on behalf of adults, even those who are legally capable of making those decisions themselves. Often, appointed decision-makers are not consulted. Responsibility over issues of advance care planning documents has recently devolved from the Ministry of Health to health authorities. The latter are ill-prepared to address legal issues generally, and perceive “doing law” as contrary to “doing health.”

Disability advocates fear that a seniors’ rights theory that espouses an AD model supports the health system’s depersonalized approach, leaving both adults with challenges and older adults worse off. There is a fear that “given the opportunity not to care, the health system and society at large won’t.” This fear fuelled the push for an enhanced proxy-model, in which health-care providers are mandated to consult the proxy decision maker of the disabled adult’s choice in order to obtain informed consent.

While there may be a valid basis for these fears, focusing on the issue of personal planning may be blocking a different voice – the voice of older adults who seek the ability to write down their wishes in a living will, or AD. Neither disability advocates nor seniors’ rights advocates want a system in which their wishes are ignored, whether they are expressed to a proxy decision maker or on paper. In order to address these fears, some useful underlying questions might be:

- How does one address the reality of discrimination against, and devaluation of, both adults with disabilities and older adults?
  
- How does one identify the systems in place that either strip the disabled or older adult of their civil rights, or that support their individual freedoms?

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- If rights advocates were assured that every adult, regardless of challenge, disability or age would be treated with dignity, respect and full-worth, would the divide between a proxy-model and a directive model even exist?

For these reasons, the *Representation Agreement Act* has been received with mixed reviews. Meanwhile, there is a renewed interest in introducing the reforms that underlie the (unproclaimed) Part 2 of the 1993 AGA.

The Ministry of Attorney General commissioned a review of Representation Agreements and Enduring Powers of Attorney (the McClean report), the results of which were published early in 2002. A new government proposal<sup>37</sup> for adult guardianship reform, announced on December 22, 2005, was fast-tracked, with a brief 30-day consultation process as compared to the lengthy consultation process of the 1990s. Notably, suggested changes to the *Representation Agreement Act* once again sparked a maelstrom of anxiety and activity from disability rights groups. In contrast, proposed changes to the guardianship aspects of the legislative package were met with relative silence.

Arguably, the failure to implement legislation relating to guardianship in the 1990s resulted, at least in part, from a clash between established disability rights theory and emergent seniors' rights theory. Issues raised by disability activists, often advocating on behalf of younger adults with challenges, may overlap with issues affecting older adults, but they are not identical.

Indeed, persons living with challenges would be properly offended if their experiences of handicap, disability or oppression in an ablest society were described as the same as the lived experiences of an older adult with no functional, physiological, developmental or challenges resulting in diminishing or diminished capacity. The experiences of the older adult are not the same as the experiences of persons with challenges, although they share an interest in similar issues, and a cogent theory elucidating the similarities and differences may emerge.

### **E. “Aging with Challenges” – Where the Branches May Yet Meet**

If, as we have seen, disability theory informs one aspect of the personal planning and guardianship debate, and seniors' rights theory informs another (if somewhat overlapping) aspect, what then of those citizens who are “aging with challenges”?

Almost no work has been done specifically to address what it means to “age with a challenge,” be it a physical, psychological, psychiatric, developmental or other challenge.

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37. British Columbia, Ministry of Attorney General, “Adult Guardianship and Personal Planning Instruments Legislative Review” (22 December 2005) [no longer in circulation, archived at the CCELS].

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Now is the time to critically engage in this area, and to inquire whether aging with challenges should be grafted on the old lunacy law trunk.

Regardless of one's position on personal planning, the issues raised by both disability groups and seniors' rights groups are relevant to persons aging with challenges. Perhaps more in this branch than any other, a nuanced, individual and modern system of guardianship, emphasizing civil rights and procedural fairness, is required.

### IV. THE CURRENT LAW IN BC

#### A. Confusion over the Meaning of Incapability

In British Columbia, as in all common law jurisdictions, adults are presumed to have capacity and, as such, to be capable of making necessary decisions with respect to their persons and their property. The *Charter of Rights and Freedoms* (the *Charter*),<sup>38</sup> of course, guarantees fundamental rights to autonomy and self-determination.<sup>39</sup> However, as we have seen, there is also a duty on the state to intervene when an adult is incapable of making decisions. At common law, this duty is exercised under the *parens patriae* jurisdiction, which is protective in nature. The state acts in the adult's "best interests," making necessary decisions the adult is incapable of making. The central concern of guardianship law is to strike a balance between the individual's rights to autonomy and self-determination against the state's duty to protect its citizens. This balance cannot be achieved within a global committee model, and the recognition of this fact underlies the move toward a modern graduated, or nuanced, intervention.

Central questions include:

- What does incapability mean?
- Who decides when an adult is incapable?
- What are the consequences of that decision?

Currently in BC, there is confusion among legal and medical professionals as to the meaning and consequences of incapability, and the definition of incapability appears to differ in different contexts. Under the PPA, incapability is a legal determination. An adult deemed legally incapable under the PPA is under a legal disability, similar to that of a minor by virtue of age, and is deemed incapable of making decisions with respect to their

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38. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11.

39. In particular, ss. 2, 7 and 15(1).

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person, their property, or both. However, under the *Representation Agreement Act*, the BC Supreme Court Rules of Court (Rules of Court), and the BC Law Society Professional Conduct Handbook (the Handbook), incapability appears to have a different meaning and different consequences.

### 1. INCAPABILITY UNDER THE *PATIENTS PROPERTY ACT*

Under s. 1 of the PPA, a “patient” is defined as

- a) a person who is described as one who is, because of mental infirmity arising
- b) from disease, age or otherwise, incapable of managing his or her affairs, in a certificate signed by the director of a Provincial mental health care facility or psychiatric unit as defined in the *Mental Health Act*, or
- c) a person who is declared under this Act by a judge to be
  - (i) incapable of managing his or her affairs,
  - (ii) incapable of managing himself or herself, or
  - (iii) incapable of managing himself or herself or his or her affairs.

When, upon application by the PGT, a near relative or other person,<sup>40</sup> an adult is declared incapable under section 1(b), the Court may appoint any person to become the committee or parent-like guardian of the adult’s property (committee of the estate), their person (committee of the person), or both.<sup>41</sup> Section 15 sets out the broad powers of the committee. The committee of the estate has all the rights, privileges and powers with regard to the estate of the patient as the patient would have if he or she were of full age and of sound and disposing mind.<sup>42</sup> The committee of the person has the custody of the person of the patient.<sup>43</sup> The committee of the estate and the person has all of those powers.<sup>44</sup>

Yet, with the possible exception of the wording in section 1(a),<sup>45</sup> which refers to “mental infirmity arising from disease, age or otherwise,” the term “incapable” is not defined in

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40. PPA, *supra* note 1 at s. 2.

41. *Ibid.* at s. 6 (1).

42. *Ibid.* at s. 15(1)(b)(i).

43. *Ibid.* at s. 15(1)(b)(ii).

44. *Ibid.* at s. 15(1)(b)(iii).

45. The Act distinguishes throughout between patients described as incapable under a certificate, and those declared incapable by a Judge. This paper is concerned only with those declared incapable by a Judge.

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the PPA. Nevertheless, in terms of an application to the Court, it is a legal determination, “based on the affidavits of 2 medical practitioners setting out their opinion that the person who is the subject of the application is” incapable of managing his or her affairs, his or her person, or both.<sup>46</sup> There are no regulations or guidelines as to the content of the medical affidavits, and many medical practitioners have expressed confusion as to the factors they should consider in making a determination of incapacity, and the legal consequences of making such a determination.

### 2. INCAPABILITY UNDER THE *REPRESENTATION AGREEMENT ACT*

The *Representation Agreement Act* is designed to allow capable adults “to arrange in advance how, when and by whom, decisions about their [person or property] will be made if they become incapable of making decisions independently, and to avoid the need for the court to appoint someone to help adults make decisions, or someone to make decisions for adults, when they are incapable of making decisions independently.”<sup>47</sup> Section 4 of the Act provides that “an adult may make a Representation Agreement unless he or she is incapable of doing so,” although, again, “incapable” is not a defined term. Section 8(1) of the Act provides that a person may make a Representation Agreement even though they may be under a legal disability for other purposes, such as making a contract or managing health care, personal care, legal matters, financial affairs, business or assets. Section 8(2) sets out the relevant factors “in deciding whether an adult is incapable of making a representation agreement” under section 7 of the Act. This section, which governs “standard” agreements respecting everyday decisions, establishes a low threshold for capability.

The relevant factors include:

- a) whether the adult communicates a desire to have a representative make, help make, or stop making decisions;
- b) whether the adult demonstrates choices and preferences and can express feelings of approval or disapproval of others;
- c) whether the adult is aware that making the representation agreement or changing or revoking any of the provisions means that the representative may make, or stop making, decisions or choices that affect the adult; and
- d) whether the adult has a relationship with the representative that is characterized by trust.

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46. PPA, *supra* note 1 at s. 3(1).

47. RAA, *supra* note 28 at s. 2.

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The Act does not specify who decides whether the adult is capable for the purposes of making a standard Representation Agreement under section 7. However, in order to make a Representation Agreement under section 9 of the Act, which governs agreements respecting extraordinary decisions involving important matters such as the use of physical restraints, end-of-life decisions, and the temporary care of the adult's minor children or other dependents,<sup>48</sup> the Act requires the adult to consult a member of the Law Society of British Columbia, and sets out a different, higher, threshold for capability. Section 10 states an "adult may authorize a representative to do any or all of the things referred to in section 9 unless the adult is incapable of understanding the nature of the authority and the effect of giving it to the representative." Presumably, it is the member of the Law Society, the lawyer, who decides whether the adult is incapable of this degree of understanding, although there are no regulations or guidelines as to how that determination is to be made. The resulting confusion is problematic for legal professionals attempting to reconcile their obligations and duties under the relevant provisions of the Handbook and the Rules of Court that govern legal proceedings involving persons under a legal disability.

### 3. INCAPABILITY AND PROFESSIONAL ETHICS

The Handbook prohibits a lawyer from taking instruction from an "incapable person."<sup>49</sup> Indeed, in a memo to the Law Society Benchers, the BC Law Society Ethics Committee affirmed that, "a lawyer who continues to follow instructions while aware that the client

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48. S. 9 (1) In a representation agreement, an adult may also authorize his or her representative to do any or all of the following:

- physically restrain, move or manage the adult, or have the adult physically restrained, moved or managed, when necessary and despite the objections of the adult;
- give consent, in the circumstances specified in the agreement, to specified kinds of health care, even though the adult is refusing to give consent at the time the health care is provided;
- refuse consent to specified kinds of health care, including life-supporting care or treatment;
- give consent to specified kinds of health care, including one or more of the kinds of health care prescribed under section 34 (2) (f) of the Health Care (Consent) and Care Facility (Admission) Act;
- accept a facility care proposal under the Health Care (Consent) and Care Facility (Admission) Act for the adult's admission to any kind of care facility;
- make arrangements for the temporary care, education and financial support of the adult's minor children, and any other persons who are cared for or supported by the adult;
- do, on the adult's behalf, any thing that can be done by an attorney acting under a power of attorney and that is not mentioned in paragraphs (a) to (f) or in section 7 (1).

49. Law Society of BC, "Client Capacity and Lawyer's Duty of Confidentiality" *Professional Conduct Handbook* (Vancouver: 2005) at Chapter 5 [Professional Conduct Handbook].

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has become incompetent may be held personally liable for the costs of a third party.”<sup>50</sup> This ethical determination has precedent in the common law. In the case of *Re Avery*,<sup>51</sup> the Ontario High Court held that a lawyer who had acted for a mentally incapable person risked personal liability for the other party’s costs.

However, Chapter 3 of the Handbook, under the heading “Client Capacity,” provides some exceptions. It reads as follows:

- 2.1 If a client cannot adequately instruct counsel for any reason, the lawyer must maintain a normal client-lawyer relationship with the client, to the extent reasonably possible.
  
- 2.2 A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only if the lawyer:
  - (a) reasonably believes that the client cannot adequately instruct counsel,
  - (b) reasonably believes the appointment or other protective action is necessary to protect the client’s interest, and
  - (c) does not take any action contrary to any instructions given to the lawyer by the client when the client was capable of giving such instructions.
  
- 2.3 A lawyer who reasonably believes that a client cannot adequately instruct counsel may, pending appointment of a representative of the client, continue to act for the client to the extent that instructions are implied or as otherwise permitted by law.

And under the heading “Lack of Capacity,” it reads:

- 2.4 A lawyer who is prevented from entering into a client-lawyer relationship with a person because of the person’s lack of capacity[\*note 4] may provide reasonable and necessary minimal assistance to the person and disclose confidential information provided the lawyer:
  - (a) is satisfied that the person cannot adequately instruct counsel generally or about possible protective action the lawyer might take,
  - (b) makes it clear to anyone who may be misled by the lawyer’s involvement that the lawyer does not represent the person,

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50. Continuing Legal Education Society of British Columbia, “Elder Law” (Vancouver: 2004) at 1.1.10 [CLE].

51. [1952] O.W.N. 475.



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- (c) discloses the minimum amount of information required, and
- (d) does not take action contrary to any direction given to the lawyer by the person.[\*note 5]

\*Note: 4. A lawyer may not form a client-lawyer relationship with a person who has never been the lawyer's client and who lacks the capacity to instruct the lawyer, except if the lawyer is appointed to act by a court or tribunal, by operation of statute or in a proceeding in which some aspect of the client's mental capacity is in issue. However, a lawyer may act for a person of marginal capacity who is capable of giving instructions on some matters but not others.)

\*Note: 5. For example, such assistance might consist of appearing at a scheduled court appearance to protect the person's interests or advising the Public Guardian and Trustee, family members or others of the person's need for assistance. Lawyers must act with great care in these situations since the disclosure of confidential information could open a lawyer to a claim and an accusation of acting unlawfully.

Although in BC lawyers are expected to assess the "capacity" of clients informally under these provisions, they have no training as "capacity assessors" and there remains confusion between mental capacity and legal capacity. The above rules, based upon the lawyer's "reasonable beliefs" as to a potential client's capacity or "marginal" capacity, offer scant protection from the serious consequences of taking instruction from an incapable client. As Note 5 indicates, "lawyers must act with great care in these situations since the disclosure of confidential information could open a lawyer to a claim and an accusation of acting unlawfully."

As noted above, Rule 2.4, Note 4 of the Handbook outlines three circumstances under which a lawyer may take instruction from a client whose capacity is in dispute. These are 1) where the lawyer is appointed to act by a court or tribunal, 2) by operation of a statute, and 3) in a proceeding in which some aspect of the client's mental capacity is in issue. Note 4 does not completely resolve the issue of whether a lawyer can take instruction from a client whose capability is in issue. For example, while the Court has the discretion to appoint a lawyer to represent an adult facing a committee application under the Rules of Court, it is not mandatory that such an adult be represented, or even be served with notice, and there are no provisions respecting the appointment of counsel for the alleged patient under the PPA. Hence, these exceptions, which are already effectively buried in the footnotes of the Handbook, neither provide an adequate definition of "capacity" or "marginal capacity" for the prudent lawyer, nor assist the allegedly incapable adult in securing counsel. Indeed, the third circumstance noted above does not distinguish between, and may in fact confuse, alleged incapacity with a legal determination of incapability under the PPA. Thus, the Handbook fails to recognize the common law and statutory presumption of capability. Further, it remains unclear whether a lawyer can take instruction from a person who has been designated a patient under the PPA when that Act

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itself explicitly states that no person other than the committee of the patient may bring an action on behalf of the patient.<sup>52</sup>

An adult who wishes to commence a proceeding challenging a determination of incapability must first convince a lawyer to accept the risks of liability, professional sanctions and the potential for a personal costs award against them associated with such a challenge. If that hurdle is overcome, how does the adult pay for legal services? Access to finances would almost certainly be beyond the adult's personal control, likely residing in the hands of an Attorney, a Representative, a Committee or perhaps a Guardian. As Gordon notes:

the right to procedural fairness includes the right to appeal courts' decisions...(yet)...the logistics of litigation may deter an adult from exercising this right, particularly, where the person no longer has control over his or her affairs and, consequently, has lost both the right to launch litigation and the ability to pay for legal assistance. There is no provision for subsequent, automatic reviews of the continuing need for guardianship, even though this could resolve the problems of standing before the court and payment.<sup>53</sup>

Consequently, the general confusion with respect to the meaning of incapability has been imported into the Handbook. The Handbook should be amended to clarify these exceptions, and any proposed legislation should contain an express section permitting a lawyer to take instruction from a client whose capacity is in issue.

In addition, ethics and responsibilities respecting issues of client confidentiality in potential incapability cases are unclear. Chapter 5, Rule 3 of the Handbook stipulates that

A lawyer shall not disclose the fact of having been consulted or retained by a person unless the nature of the matter requires such disclosure.<sup>54</sup>

Commenting on this section, the 2004 Continuing Legal Education materials note that under Chapter 5, Rule 3,

The lawyer's duty of confidentiality is triggered by the initial consultation regardless of whether he or she is ultimately retained. Consequently, *a lawyer consulted by a mentally incompetent person would have to turn that person away no matter how pressing the legal problem unless the prospective client agrees to involving a substitute decision-maker.*<sup>55</sup> [emphasis added]

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52. It remains unclear whether there is a different standard for instructions which may not involve bringing an action.

53. Gordon, *supra* note 15 at 1-26.

54. Professional Conduct Handbook, *supra* note 50 at Chapter 5, Rule 3.

55. CLE, *supra* note 51 at 1.1.10.

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Chapter 5, Rule 16 was established to enable a lawyer facing questions of capability to disclose confidential information in certain circumstances. Under the heading “Incapacity,” it states:

- 16** A lawyer may disclose a client’s confidential information for the purpose of securing the appointment of a guardian or in conjunction with other protective action taken on behalf of the client, provided:
- (a) the lawyer reasonably believes the client cannot adequately instruct counsel regarding the issue of disclosure,
  - (b) the lawyer reasonably believes the disclosure is necessary to protect the client’s interests,
  - (c) the disclosure is not contrary to any instructions concerning disclosure given to the lawyer by the client when the client was capable of giving such instructions, and
  - (d) the lawyer discloses the minimum amount of information required.<sup>56</sup>

Again, these Rules are based upon the lawyer’s reasonable belief as to the adult’s capacity. As such, they import the general confusion with respect to the meaning of incapacity into the Rules by conflating alleged incapacity with a legal determination of incapacity, thereby failing to recognize the common law and statutory presumption of capability. While Chapter 5, Rule 16, assists the lawyer facing a confidentiality issue with respect to a client they reasonably believe to lack capacity, it provides no assistance to the allegedly incapable adult wishing to dispute a formal or *de facto* finding of incapacity. Such an individual is unlikely to want a litigation guardian, given that the very issue they are trying to challenge is their need for any type of guardianship whatsoever. Further, if the adult falls into that grey area where they appear to be incapable to the prudent lawyer, but they are not a patient under the PPA, how is the presumption of capability to be interpreted?

Thus, an adult who wishes to challenge a determination of her own incapacity may have no standing in BC Courts because of the prior determination of his or her incapacity.

#### 4. INCAPABILITY AND THE BC SUPREME COURT RULES OF COURT

Rule 6 of the Rules of Court establishes the procedures for bringing applications to the Court on behalf of “Persons Under Disability.” Rule 6 (2) specifies that

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56. Professional Conduct Handbook, *supra* note 50 at Chapter 5, Rule 16.

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(2) A person under legal disability shall commence or defend a proceeding by his or her litigation guardian.<sup>57</sup>

The first question one might ask is how this Rule interacts with the Handbook's Rule 2.4, Note 4 respecting a proceeding in which some aspect of the client's mental capacity is in issue. The provisions of Rule 6 make it clear that persons under a "legal disability" do not have standing in Court, and may only be heard through a litigation guardian. However, the Rule does not define who is to be captured by the term "legal disability." Not surprisingly, Rule 6 (10.1) indicates that those under the age of majority are captured. But with respect to whether an adult's mental capacity, or lack of same, constitutes a legal disability, the only guidance comes in the form of oblique references to the PPA and the *Representation Agreement Act*.

For instance, Rule 6 (1) defines a committee as the committee of the estate of a patient appointed under the PPA. Clearly, a "patient" under the PPA is under a legal disability for the purposes of Rule 6. However, as we have already seen, while the PPA defines a "patient" as a person who is incapable of managing his or her affairs, his or her person, or both, to the Court's satisfaction upon the affidavit opinion evidence of two medical practitioners, it does not define the term "incapable," nor does it provide any guidelines respecting the contents of the medical affidavits. However, section 22 (1) of the PPA makes it clear that a person other than the committee of the patient *must not* bring an action on behalf of the patient.

Rule 6 (7) and (8.1) refer to the appointment of a litigation guardian under section 35 (1) of the *Representation Agreement Act*, which states that a representative authorized under the Act to instruct a lawyer on an "incapable" adult's behalf is the adult's litigation guardian unless the Court orders otherwise. However, the *Representation Agreement Act* only purports to define who is incapable for the purposes of making a Representation Agreement under its provisions.<sup>58</sup> With respect to when the adult becomes incapable, section 2 of the Act makes it clear that a Representation Agreement is a mechanism to allow adults to arrange in advance how, when and by whom decisions will be made if they become incapable of making decisions independently; section 3 makes it clear that until the contrary is demonstrated, every adult is presumed to be capable; and section 36, under the heading "Agreement does not deprive adult of power to act," states that an "adult who is capable may do anything that he or she has authorized a representative to do." Thus, although section 15 provides that the agreement comes into effect on the date it is executed, the adult is still presumed to be competent, and can specify that the agreement come into effect upon the occurrence of a specific event provided that they specify how and by whom the event is to be confirmed. Because section 7 agreements can be executed without the assis-

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57. British Columbia, *Supreme Court Rules of Court*, r. 6(2).

58. RAA, *supra* note 28 at ss. 8 and 10.

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tance of a lawyer, there are no doubt many instances in which it is unclear precisely when the subject adult becomes “incapable” under the agreement’s terms.

Consequently, the confusion with respect to the meaning of incapability under both the PPA and the *Representation Agreement Act* is also reflected in Rule 6 through the use of the broad term “legal disability.”

Further, it is unclear exactly how the Rules of Court interact with statutory provisions under the PPA and the *Representation Agreement Act*. The more recent case of *Finnegan (Guardian ad Litem of) v. Gronow*<sup>59</sup> confirms that Rule 6 is a “complete code” respecting the commencement and conduct of proceedings for persons under a disability. However, Rules of Court are subordinate to statutory enactments. The case of *Re Rosandik and Manning*<sup>60</sup> held that “Rules of Court are not substantive law,” and “that they are not a complete code and continue to be servants and not the masters of the proceedings they govern.” As a result, the Court held that provisions of the *Mental Health Act*<sup>61</sup> permitting a patient in a mental health institution to make an application for discharge on their own behalf trumped both Rule 6, and the then *Patients’ Estates Act* provisions, both of which, as now, prevented someone under a legal disability from bringing an action except through a committee or litigation guardian.<sup>62</sup> However, the case was interpreting Rule 6 in the light of a specific statutory provision granting standing to a patient under the *Mental Health Act*. No such provision exists in the PPA.

In *Beadle v. Beadle*,<sup>63</sup> the Court held that a person who has been declared incompetent to manage their affairs is not competent to instruct counsel or conduct litigation, and is thus under a legal disability pursuant to Rule 6. In *Grieg v. Stretch*,<sup>64</sup> the Court seemed to accept that the test for whether a person is under a disability for the purposes of Rule 6(2) is whether the person is capable of instructing counsel as a reasonable person would be expected to. The Court went on to hold that if it is found that a plaintiff was under a legal disability at the commencement of an action, this did not render the action a nullity, and could be remedied by the appointment of a guardian *ad litem*.

In short, it is unclear whether a legal disability for the purposes of Rule 6 means a determination of incapability under the PPA, as in *Beadle v. Beadle*, or an informal determina-

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59. (1998), 53 B.C.L.R. (3d) 356 (S.C.).

60. (1978), 83 D.L.R. (3d) 598 (B.C.S.C.).

61. S.B.C. 1964, c. 29 at ss. 2, 30 (1), (3).

62. *Supra*, note 61.

63. (1984), 56 B.C.L.R. 386 (C.A.).

64. 2001 B.C.S.C. 576.

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tion that the person is incapable of instructing counsel as a reasonable person, as in *Grieg v. Stretch*.

### 5. INFORMAL DETERMINATIONS OF INCAPABILITY

Quite often, health care providers make informal assessments or give “on the spot” medical opinions to family or friends of the allegedly incapable adult during routine medical visits. Sometimes, such informal assessments are done at the behest of friends or family members. At times, family doctors or “GPs” take it upon themselves to opine on the issue of an adult’s capability.

In addition, “non-court” incapability determinations are made pursuant to the *Health Care Consent (Care Facility Admissions) Act (HCCA)*<sup>65</sup> when some pressing need for a discrete health care decision is required. Theoretically, such an incapability finding should be made only for the purpose of locating a substitute decision-maker to obtain medical consent for a particular medical procedure. However, health care providers may be unclear on the law of substitute medical consent, and often prefer to communicate with a substitute decision-maker rather than the adult, who, at law, is still presumed to be capable.

Due to ageism and a lack of legal understanding or experience, health care providers may work from an assumption of incapability. Further, a low score on purely cognitive assessment tools such as the mini-mental status exam (MMSE) is often erroneously presumed to be determinant of incapability. Indeed, the MMSE was never intended to be a “one-off” capacity determinant tool. Rather, it was designed to test for cognitive status, which is too often confused with a legal determination of capacity. It was developed as a single tool to complement a basket of tests in assessing a single individual over time.

More troubling, informal determinations of incapability are often conducted without the knowledge or consent of the adult in question, on the premise that health care providers do not wish to upset the affected adult.

Because the legal framework governing incapability determinations is insufficiently defined, health care providers may inadvertently undermine an adult’s legal rights. Further, many health care providers are inadequately trained to conduct thorough assessments, simply opining that, “in my opinion, this person is incapable.” Often, health care providers assume that incapability is a medical determination, rather than a legal determination. Confusion regarding best practices with respect to incapability assessments, ethical obligations and legal frameworks can have serious repercussions for the adult in question, undermining the presumption of capability and negatively impacting access to justice and procedural fairness.

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65. R.S.B.C. 1996, c. 181 [HCCA].

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Such “informal” determinations of incapability also have serious repercussions for the affected adult in terms of “functional” or “de facto” guardianship. Where legal planning tools such as Enduring Powers of Attorney or Representation Agreements have been created by the adult in question, such an informal determination may have the effect, correctly or not, of “springing” the document into action.

In that case, the appointed Attorney or Representative then holds power over financial or personal care choices, or both, for the adult. An unscrupulous Attorney or Representative could substantially gain from such an informal incapability assessment, and indeed, may have sought the medical opinion for nefarious purposes. Hence, confusion over the meaning and effect of a determination of incapability may, in fact, facilitate the financial abuse and neglect of vulnerable adults, and add to the already difficult task of distinguishing unscrupulous Attorneys or Representatives, or self-serving friends and family members, from those honestly wishing to assist the allegedly incapable adult in a proper fiduciary role.

### **B. Criticisms of “Global Committeeship” under the *Patients Property Act***

#### **1. AN OUTMODED, PATERNALISTIC SYSTEM**

The PPA has been legitimately criticized on the basis that it perpetuates an outmoded, paternalistic view of “necessary state intervention” to “protect” adults who are deemed incapable for any reason.

The PPA’s binary, all-or-nothing approach fails to recognize that an adult may retain the capacity to make certain types of decisions, even though they may be incapable of making others. Although in theory a patient under the Act may be deemed incapable with respect to personal decisions but not property decisions, or vice versa, this distinction between person and property has its roots in the history of the *parens patriae* jurisdiction, and in nineteenth-century theories of property, and comes down to us through the 1890 lunacy law reforms. It was never intended to be an alternative to global committeeship, but rather appears to be a remnant of the old distinction between “idiots” and “lunatics.”<sup>66</sup>

Global committeeship is at the heart of the PPA system, and by appointing a committee to take over the adult’s personal and/or property decision-making powers, the state infantilizes the adult in the name of protection. The cost of protection is a complete loss of

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66. S. 18, which requires the committee to exercise his or her powers for the benefit of the patient and the patient’s family, having regard to the nature and value of the property of the patient and the circumstances and needs of the patient and the patient’s family, also has its roots in the history of the *parens patriae* jurisdiction. It reflects the Chancery’s practice of making orders respecting distribution of the lunatic’s income to members of his or her family under the pretence of “tenderness toward the lunatic himself.” (See note 15).

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autonomy over the adult's personal and/or property affairs once they are deemed incapable.

Furthermore, the Act's terminology, which refers to the subject adult as the "patient," reflects the statute's roots in outmoded mental health law, and anticipates a finding of incapability. The label "patient" is infused with associations of weakness, incapability and inequality. The title of the Act implies a negative concept: "clearly someone must step in to manage this person's affairs, and this Act merely facilitates that process."

### 2. A LACK OF PROCEDURAL FAIRNESS

Although the PPA requires that notice be given to the adult when an application for committeeship is made, the Courts have often acceded to the applicant's request that the adult not be served in order to avoid unnecessarily upsetting the adult whose capability is being challenged.<sup>67</sup>

Yet the result of a finding of incapability is neither limited nor inconsequential. If a committeeship application under the Act is approved, the adult loses all of their fundamental rights, and may be unable to marry, drive, control property and/or finances, vote, or make any other important personal and/or property decisions. In short, the patient loses their basic rights to autonomy and self-determination, which rights are removed and placed in the hands of the committee. On the other hand, if the application is denied, the adult receives no assistance at all.

### 3. THE THREAT TO *CHARTER* RIGHTS AND FREEDOMS

As soon as an application for committeeship, and in particular for committeeship of the person, is made, the subject adult's section 7 *Charter* rights to life, liberty and security of the person are threatened. If the application is granted, the committee of the person has the authority to make important end of life decisions, to determine where the adult will live, and to give consent to medical procedures on behalf of the patient.

### 4. THE LACK OF AN OUT-OF-COURT CAPACITY REVIEW PROCESS

BC has no history of a focused, informal and standing review board or tribunal to review issues of incapacity, except for matters that fall under the mental health in-patient regime.<sup>68</sup>

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67. The question of notice is another area for critical review in terms of procedural fairness. See Gordon, *supra* note 15 at 1-25.

68. The authors would like to thank Kerry Baisley for his thoughts and perspective in the development of this section.



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Some incremental movement in this regard occurred with the introduction of the HCCA<sup>69</sup> and its accompanying Health Care and Care Facility Review Board (the Review Board) in 2000. The Review Board was established on an *ad hoc* basis to consider appeals from single health care decisions related to a particular individual. It could be described as a “pinpoint” board, operating sporadically and lacking both an institutional history, and a trackable, decision-based system. It did not have a mandate to address general capacity issues or establish precedents.

Consequently, the Review Board was short-lived. Described as “a separate, costly process that heard few appeals,”<sup>70</sup> it was abolished in 2004 by s. 30 of the *Miscellaneous Statutes Amendment Act* (No. 3), 2003.<sup>71</sup> Since the Board was not particularly active, the implication was that it must not be worthwhile. However, upon closer examination, the Review Board may have remained largely dormant because it lacked the correct tools, setup or mandate to fill the capacity review void.

With the Board’s demise, the capacity review void has only deepened. However ineffective, the Review Board did at least provide a forum in which one could challenge a specific finding of incapability or health care decision. After it was abolished, the system was left without a non-court capacity appeal process. This has added to the risk of substantive deprivation of *Charter*-protected procedural fairness rights for persons wishing to challenge a finding of incapability.

### C. New Initiatives for Reform

#### 1. THE DECEMBER 2005 GOVERNMENT POLICY ANNOUNCEMENT

On December 22, 2005, the Ministry of Attorney General’s Strategic Planning and Legislation department issued a very brief policy paper entitled “Adult Guardianship and Personal Planning Instruments Legislative Review.”<sup>72</sup> It described the Ministry’s determination to:

- modernize BC’s adult guardianship laws;
  
- implement key recommendations made in 2002 by Professor A.J. McClean;

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69. *Supra*, note 66.

70. British Columbia, Ministry of Economic Development, Regulatory Reform Office, “Regulatory Reduction and Regulatory Reform Highlights 2001 to 2005” (December 2005) online: Regulatory Reform Office <<http://www.deregulation.gov.bc.ca/RR%20Report%202001-2005.doc>>.

71. S.B.C. 2003, c. 96.

72. *Supra*, note 38.

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- strengthen and clarify personal planning instruments; and
  
- provide legislative standards for advance directives.

The paper acknowledged that BC's long-term guardianship laws had fallen markedly behind other jurisdictions, even within Canada. In the document, the government proposed new legislation to reflect "modern adult guardianship principles of autonomy, dignity, procedural fairness and the use of the least restrictive and least intrusive approach." As noted above, comments were invited during a brief 30-day consultation period, suggested changes to the *Representation Agreement Act* once again sparked a great deal more interest than proposed changes to guardianship law.<sup>73</sup>

As noted earlier, the plan to replace the PPA's binary "ON/OFF" system with a more graduated, "rheostat" system, establishing modern goals of providing only the assistance necessary for an adult, with global guardianship as a last resort, was neither new nor contentious. The broad policy strokes announced in the memorandum of December 22, 2005 are commendable; however, feedback on the guardianship portion of the policy statement has been muted. As noted above, other issues referred to in the document, such as advance directives, have consumed most of the public discourse.

The government's policy announcement was followed up, in the spring legislative session of 2006, with the introduction of Bill 32, the *Adult Guardianship and Personal Planning Statutes Amendment Act*. At that time, the Attorney General stated that "planning for the possibility for future incapacity, both individually and collectively, is timely and extremely important," and described the legislation as follows:

Bill 32 amends several statutes to strengthen, simplify and synchronize three personal planning instruments to provide, first, a representation agreement that will be the only planning tool for an adult to appoint a substitute to make personal and health care decisions. This instrument will continue to be available for all adults in British Columbia. Next, an enduring power of attorney will be the primary instrument for capable adults to appoint a substitute to make decisions about financial matters. Finally, an advance care directive will enable capable adults to refuse, in advance, consent to health care in non-emergency situations and without involvement of a substitute decision-maker.<sup>74</sup>

Initially, it appeared that Bill 32 would be fast-tracked, but in May of 2006, just prior to the end of the spring session, the government announced that the legislation had been withdrawn after first reading. Whether this decision resulted from the opposition to the in-

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73. This silence may, however, be due to the fact that the draft legislation was not circulated, nor input widely sought.

74. British Columbia, Legislative Assembly, *Hansard*, 1 (27 April 2006) at 4091 (Hon. W. Oppal), online: Legislative Assembly of British Columbia <<http://www.leg.bc.ca/hansard/38th2nd/h60427a.htm>>.

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roduction of advance directives in BC is unclear, and it remains uncertain whether Bill 32 will be reintroduced in the same or substantially similar form in the near future, or whether there will be a repeat of the abortive reform efforts of the 1990s. In either case, it is useful to undertake an analysis of the strengths and weaknesses of Bill 32, and how it does or does not fulfill the objectives of the policy announcement or address the shortcomings of the existing guardianship legislation.

### 2. BILL 32: *ADULT GUARDIANSHIP AND PERSONAL PLANNING STATUTES AMENDMENT ACT, 2006*

As noted above, the 2005 government policy announcement promised to modernize the statutory and Court-ordered guardianship frameworks, and to repeal the outdated PPA. The new legislation was drafted to reflect autonomy, dignity, procedural fairness and the use of the least restrictive and least intrusive approach tailored to an individual's needs and circumstances. Specifically, the provisions of Bill 32 respecting Court-ordered guardianships were designed to:

- allow for temporary guardianship where required;
- require the Court to consider the views of the adult;
- require a guardianship applicant to prepare a guardianship plan;
- allow for periodic review by the Courts of a guardianship order;
- implement mediation for certain types of disputes;
- clarify the powers and duties of guardians; and
- reflect the underlying policy principles and proposals outlined by the Public Guardian and Trustee in its 2004 publication "Court and Statutory Guardianship: *The Patients Property Act* and the *Adult Guardianship Act (Part 2)*" revised and republished in 2005 with the subtitle "An Updated Discussion Paper on Modernizing the Legal Framework" (the PGT Discussion Paper).

The PGT Discussion Paper proposed improvements to procedural fairness in both Court and statutory guardianships. Specifically, the PGT recommended, *inter alia*, that:

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- service of an application for guardianship be required on the adult as well as a near adult family member;
- no guardian be appointed unless there were reasonably foreseeable decisions that needed to be made;
- no guardian be appointed if a less restrictive alternative would be suitable;
- the adult's views would be considered regarding who should be appointed guardian;
- applicants would be required to submit a guardianship plan; and
- mediation would be provided for regarding the choice of guardian and the adequacy of the guardianship plan.

Bill 32 goes a long way toward creating a modern guardianship regime for BC. It addresses the paternalism of PPA by repealing that statute and replacing it with more nuanced legislation. This new legislation refers to adults *as* adults, rather than as patients, and, unlike the PPA, is concerned with support and decision making rather than simply protection of the adult's estate. However, it falls short in a number of critical aspects:

- it does not fully address issues of procedural fairness and *Charter* rights in the context of Court-ordered guardianships, particularly with respect to the issue of legal representation;
- it does not define incapacity or inability or address the fact that the term is used inconsistently in different statutes; and
- it fails to simplify and clarify the interrelationships among the various personal planning instruments.

For example, with respect to procedural fairness and *Charter* issues, the proposed legislation provides for mandatory service of an application on the affected adult as well as near relatives of the adult, as recommended in the PGT Discussion Paper. However, it does not

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contain any provisions respecting legal representation, either mandatory or Court-ordered, and no changes to BC's legal aid policy in connection with Bill 32 are contemplated.

Further, Bill 32 contains no definition of incapability, nor does it clarify the meaning of incapability in different contexts. If the adult refuses to be assessed, the proposed legislation provides for an assessment of incapability to be conducted by a "qualified health care provider in accordance with prescribed procedures." However, the prescribed procedures are not yet available, and presumably the regulation has not yet been drafted. In addition, "qualified health care provider" is not a defined term, although a "health care provider" is defined as "a person who is licensed, certified or registered under a prescribed Act to provide health care." Thus, it is not possible to evaluate whether the proposed legislation will adequately define incapability or have the effect of standardizing capacity assessments in BC.

As recommended in the PGT Discussion Paper, Bill 32 provides for mediation in respect of the choice of guardian and the adequacy of the guardianship plan. Although the proposed legislation also provides for mediation as to the issue of whether or not the adult requires a guardian, it specifically excludes the question of whether or not the adult is incapable as an issue for mediation. It is unclear how a mediation with respect to whether the adult requires a guardian could proceed without touching on the subject of whether the adult is incapable.

An additional problem respecting mediation concerns the constitutionality of this section vis-à-vis the *Constitution Act*, 1867. Section 96 of that Act, which provides, in part, that "The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province," has been interpreted to prevent provinces from conferring the powers of a Superior Court on a provincially appointed tribunal. Thus, the question arises as to whether the provincial legislature has the authority to enact mandatory mediation provisions in the proposed legislation. In particular, mediation in respect of whether an adult requires a guardian could be seen as entrenching on the Crown's *parens patriae* jurisdiction, and thus *ultra vires* the provincial legislature.

Finally, Bill 32 does provide for a more nuanced, and less rights restrictive approach to the appointment of a guardian than the PPA. Before appointing a guardian, the Court must be satisfied that:

- (1) the adult needs to make decision;
- (2) is incapable of making those decisions;
- (3) needs and will benefit from the assistance and protection of a guardian; and

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- (4) the needs of the adult would not be sufficiently met by alternative means of assistance.

The Court must consider any wishes the adult expressed when capable in respect of the choice of guardian. In addition, the Court may, upon application by the PGT, appoint a temporary property guardian if the PGT has reason to believe the adult is incapable and an order is needed urgently to protect the adult from financial damage or loss.

Once a guardian is appointed, the proposed legislation makes it clear that the guardian has only the powers granted in the Court order, or any enactment, and sets out the duties and liabilities of the guardian. The guardian is mandated to comply with the adult's pre-expressed capable wishes, unless to do so would be inconsistent with an order of the Court. If there are no pre-expressed capable wishes, the proposed legislation sets out precisely what factors must be taken into account when making a decision in the *best interests* of the adult. As a result, the concept of best interests is virtually a defined term, and is stripped of its paternalistic connotations.

However, the proposed legislation does not make it clear that the adult retains capacity in respect of decisions that fall outside the scope of powers granted to the guardian. For instance, an adult who needs to make decisions respecting medical treatment, is found incapable of making those decisions, and has a guardian pointed to assist with those decisions, may nevertheless be capable of making other types of decisions. Without that clarification, a nuanced approach to assistance may exist in theory only.

Although Bill 32 does address many of the concerns related to the PPA, its shortcomings, particularly with respect to procedural fairness and the meaning of incapacity, must be addressed. For instance, it is still possible, under the proposed legislation, for an adult to be stripped of their section 7 *Charter* rights with respect to end-of-life decisions, the right to choose where and how they will live, and the right to consent to or refuse medical treatment or make personal care decisions, without legal representation.

### **V. THE NEW ZEALAND EXPERIENCE**

#### **A. The History of the PPPRA 1988**

New Zealand is a common law jurisdiction that adopted modern and innovative guardianship legislation early on.

Prior to the enactment of the *Protection of Personal and Property Rights Act 1988* (PPRA), adult protection in New Zealand was governed by the *Aged and Infirm Persons Protection Act 1912*, the *Mental Health Act 1969* and the High Court's inherent jurisdiction.

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The inherent powers of the common law English Courts, including *parens patriae* jurisdiction, were preserved for New Zealand's High Court under section 17 of the *Judicature Act 1908*. While the matter has been placed in doubt in the lower Courts,<sup>75</sup> it appears to be settled that the High Court retains inherent jurisdiction over personal matters: *Re R (a protected person)*.<sup>76</sup> Further, Williams J. in *Re BM*<sup>77</sup> opined that "there may well be that residual jurisdiction." Neazor J. in *Re W*<sup>78</sup> confirmed that the jurisdiction conferred by section 17 extended beyond property matters and can be exercised wherever "health or related matters or the protection or disposition of property" is in issue.

Part VII of the *Mental Health Act 1969* dealt with property administration, placing the property of committed psychiatric patients under administration, usually under the control of the Public Trustee.<sup>79</sup> The *Aged and Infirm Persons Protection Act 1912* governed the administration of property of adults with incapacities. By the 1980s, that Act, protective and paternalistic in nature, was considered to "embrace a philosophy of a bygone era."<sup>80</sup> The PPPRA repealed both the *Aged and Infirm Persons Protection Act* and Part VII of the *Mental Health Act*.

The PPPRA came into force on October 1, 1988, at a time when demands on governments in many countries to recognize and enhance disability rights were at their zenith. The Act's two objectives are 1) to make the least restrictive intervention into an adult's life, having regard to the extent of their incapacity and 2) to enable or encourage the adult to exercise and develop existing capacity to the greatest extent possible.<sup>81</sup>

The impetus behind the reform of New Zealand's adult guardianship laws came primarily from lobby groups and voluntary agencies representing persons with disabilities and advancing the recognition of their interests.<sup>82</sup> Their primary concern was that there was no effective legislative machinery to deal with personal care issues.

The original emphasis of the PPPRA was on its potential "for proactive, developmental uses of welfare guardianship, for advocacy, for promotion of community integration and

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75. *In Re H*, [1993] N.Z.F.L.R. 225, Judge Inglis doubted whether inherent jurisdiction continues in New Zealand.

76. [1974] 1 N.Z.F.L.R. 399.

77. [1993] N.Z.F.L.R. 531 at 533.

78. [1994] 3 N.Z.F.L.R. 600.

79. W.R. Atkin, "Adult Guardianship Reforms – Reflections on the New Zealand Model" (1997) 20:1 International Journal of Law and Psychiatry 77 at 78 [Atkin].

80. Atkin, *supra* note 79 at 77.

81. PPPRA, *supra* note 2 at s. 8.

82. Atkin, *supra* note 79 at 79.

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deinstitutionalization.”<sup>83</sup> However, a pilot study in Dunedin in 1994 found that most of the cases concerned older adults,<sup>84</sup> and that three quarters of the Court orders under the Act were for the appointment of a property manager rather than a welfare guardian.<sup>85</sup>

That study, although of limited scope, raised the question of whether such goals as community integration and deinstitutionalization were relevant to older adults, for whom degenerative disabilities such as dementia and Alzheimer’s are more common, as opposed to younger adults whose disabilities are more likely to be long-standing and static.

Accordingly, the PPPRA was amended to include Part IX, which provides for Enduring Powers of Attorney, which are more relevant to older adults looking toward the possibility of future incapacity than to the developmentally disabled, who may already lack capacity.

Consequently, the scope of the PPPRA extends beyond the disabled community. The PPPRA is comprehensive, omnibus guardianship legislation intended to address the myriad circumstances in which an adult is either temporarily or permanently incapacitated. It can apply to a broad range of adults who are temporarily or permanently incapable: e.g., those suffering from degenerative diseases such as dementia; those in a coma or affected by alcohol and drug dependency; those with psychiatric disturbances; and, those with intellectual disabilities.

However, it is important to recognize that the needs and interests of older adults and those of younger adults with injuries, illnesses or disabilities, will necessarily differ. While the underlying principles of liberty, dignity and autonomy remain the same, the appropriate expression of these principles will depend upon the needs and interests of the individual or group concerned. Omnibus legislation must be flexible enough to accommodate those differing needs and interests.

### **B. The Current NZ System Explained**

The PPPRA is based on the basic principle that any intervention in a person’s life represents a denial of their civil rights.<sup>86</sup> The Act’s dual objectives of least restrictive interven-

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83. Dawson *et. al.* *Implementation of the Protection of Personal and Property Rights Act 1988: The Report of a Pilot Study in Dunedin* (Otago: Bioethics Research Centre, University of Otago, 1994) at 26 cited in Atkin, *supra* note 79 at 91.

84. The breakdown of cases was: 10% intellectual disability; 48% dementia; 9% stroke victims; 8% psychiatric disorders; 8% brain injuries; 4% other medical conditions; and 10% for alcoholism.

85. This breakdown does not indicate how many personal orders were made – other than the most drastic one, appointment of a welfare guardian.

86. Austl., Commonwealth, Human Rights Commission, *Ethical and Legal Issues in Guardianship Options for Intellectually Disadvantaged People* (Monograph No.2) by Peter Singer and Terry Carney



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tion and normalization find expression in various mechanisms and safeguards throughout the legislation. In addition, efforts have been made to ensure that the Act's provisions are accessible.

### 1. JURISDICTION OF THE DISTRICT COURT, FAMILY DIVISION

The provisions of the PPPRA are readily accessible. The Family Division of the District Court has been given jurisdiction with respect to orders under the Act,<sup>87</sup> and there is a right of appeal to the High Court from final orders. Leave may be sought with respect to the appeal of interlocutory orders.

Access to the Family Court is faster and cheaper than to the High Court, and the Court employs informal procedures,<sup>88</sup> specialist judges, counselling and alternative dispute settlement processes. There have been few appeals from District Court decisions to the High Court, and those have generally related to relatively minor technical matters.<sup>89</sup>

The Court's jurisdiction with respect to personal matters and property matters is set out in sections 6 and 25, respectively.

### 2. PERSONAL ORDERS

Section 6 gives the Court jurisdiction over personal orders in respect of any person who:

- (a) Lacks, *wholly or partly*, the capacity to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to his or her personal care and welfare; or
- (b) Has the capacity to understand...decisions in respect of his or her personal care and welfare, but *wholly* lacks the capacity to communicate decisions in respect of such matters. [emphasis added]

Once the Court assumes jurisdiction, it must then decide if any order should be made.<sup>90</sup> The Court may make a variety of personal orders with respect to the adult's care and welfare. A personal order is an instruction by a Judge requiring an action to be taken to look after a specific part of an incapacitated person's care and welfare. A list of the kind of orders that may be made is contained in section 10 of the Act.

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(Canberra: Australian Government Publishing Service, 1986).

87. The Family Division was established in 1981 to deal primarily with separation and divorce cases.

88. For example, the Court may take into account any evidence it considers appropriate, whether or not it would be admissible otherwise.

89. Atkin, *supra* note 79 at 92.

90. PPPRA, *supra* note 2 at s. 9(2).

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Personal orders may expire at a set time,<sup>91</sup> or when the subject matter of the order is fulfilled.<sup>92</sup> Otherwise an order expires automatically 12 months after it is made.<sup>93</sup>

On review of the order, the person's capacity is also reviewed.<sup>94</sup>

The Court also has the discretion to make non-binding recommendations as to what it thinks should be done instead of making an order, in which case the Court formally dismisses the application but reserves leave to the parties and the person in respect of whom the application is made to apply to the Court for directions relating to the implementation of any of the Court's recommendations.<sup>95</sup>

### 3. WELFARE GUARDIANS

The personal order of "last resort" is the appointment of a welfare guardian under section 12 of the Act. Unlike the jurisdiction under section 6, which may be exercised where the adult *wholly or partly* lacks capacity, the jurisdiction to appoint a welfare guardian may be exercised only where the adult *wholly* lacks capacity to make or to communicate decisions relating to particular aspects of their personal care and welfare, and the Court believes that the appointment of a welfare guardian is the only satisfactory way to ensure that appropriate decisions are made.<sup>96</sup>

Under section 12(7), the Court must attempt to ascertain the wishes of the adult when determining whom to appoint as welfare guardian. Under section 18(2), a welfare guardian is given those powers reasonably required to make and implement decisions for the adult in respect of each aspect specified in the Court order appointing them. Thus, the powers of the welfare guardian are constrained by the terms of their appointment, and the Act enumerates a number of decisions over which the welfare guardian has no authority.<sup>97</sup>

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91. *Ibid.* at s. 10(3).

92. *Ibid.* at s. 17(3)(b)(ii).

93. *Ibid.* at s. 17(3)(b)(i).

94. *Ibid.* at s. 86(2).

95. *Ibid.* at s. 13.

96. *Ibid.* at s. 12(2).

97. Under s. 18, a welfare guardian has no authority in the following areas:

- Marriage and divorce;
- Adoption of the adult's child;
- Withholding consent to "standard medical treatment or procedures" intended to save the adult's life or prevent serious damage to health;
- Electro-convulsive treatment;
- Psychosurgery;
- Pure medical experimentation.

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Additionally, there must be no potential conflict between the proposed welfare guardian and the adult.<sup>98</sup>

A welfare guardian is statutorily required to promote and protect the adult's welfare and best interests, while encouraging the adult to develop and exercise such capacity as they might have.<sup>99</sup> To that end, the welfare guardian must encourage the adult to act on their own behalf wherever possible, seek to facilitate integration of the adult into the community, and consult the adult and others who are interested in the adult's welfare and competent to advise the welfare guardian with respect to the adult's personal care and welfare.<sup>100</sup> The affected adult, or any other person with leave of the Court, may apply for a review of decisions made by a welfare guardian.<sup>101</sup>

#### 4. PROPERTY ORDERS

Section 25 provides that a Court has jurisdiction in respect of any property owned by any person domiciled or ordinarily resident in New Zealand:

- (b) Who, in the opinion of the Court, lacks wholly or partly the competence to manage his or her own affairs in relation to his or her property.

Again, the jurisdiction may be exercised where the adult lacks competence either wholly or partly, and, once the Court takes jurisdiction, it must decide whether or not to exercise its discretion to make an order, taking into account the principles of least restrictive intervention and the encouragement of normalization and community integration. However, the only order it can make (other than consequential orders) is a management order, under section 31, appointing one or more suitable persons to act as manager of the adult's property as specified in the order. Again, the Court must attempt to ascertain the wishes to the subject adult when determining whom to appoint,<sup>102</sup> and the management order must be reviewed within three years.<sup>103</sup>

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98. PPPRA, *supra* note 2 at s. 12(5)(c).

99. *Ibid.* at s. 18(3).

100. *Ibid.* at s. 18(4).

101. *Ibid.* at s. 89.

102. *Ibid.* at s. 31(7).

103. *Ibid.* at s. 31(8).

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### 5. INTERIM AND TEMPORARY ORDERS

In accordance with the objective of least restrictive intervention, the PPPRA provides for interim and temporary orders with respect to both personal and property matters.<sup>104</sup>

### 6. THE SPECTRE OF UNDUE INFLUENCE

The PPPRA also acknowledges that, in many cases involving a potentially vulnerable adult, family members, caregivers, or others may be motivated by improper motives (usually financial) to have the adult declared either capable or incapable. Section 25 of the Act, dealing with the jurisdiction of the Court with respect to property orders, specifically addresses the importance of this factor in determining whether a Court should intervene:

- (4) In determining whether or not it should exercise its jurisdiction under this Part of this Act in relation to any person, a Court may have regard to the degree to which the person is subject, or is liable to be subjected, to undue influence in the management of his or her own affairs in relation to his or her property.

### 7. CAPACITY NOT TO BE CONFUSED WITH BAD JUDGMENT

Another unique provision, which appears in section 6(3) in the context of personal rights, and is repeated in section 25(3) in the context of property rights, alerts the Court to determine the issue of capacity without being overly influenced by the perceived “unreasonableness” of the adult’s actions or behaviour. The provision reads as follows:

- (3) The fact that the person is managing or is intending to manage his or her own affairs in relation to his or her property in a manner that a person of ordinary prudence would not adopt given the same circumstances is not in itself sufficient ground for the exercise of that jurisdiction by the Court.

This provision reflects the principle of *individual referencing*, which respects an adult’s individual right to make decisions that others might not agree with. Under this principle, the adult’s past behaviour is taken into account in attempting to determine whether the behaviour leading to the question of their capability is, in fact, unusual for that specific adult.<sup>105</sup> In short, a risky decision, which might otherwise be considered evidence of extremely poor judgment by a more conservative decision-maker, is not in itself evidence of incapability.

### 8. SAFEGUARDS

In addition to the above-noted mechanisms, the PPPRA contains several legal and procedural safeguards to ensure that the state’s intervention occurs only after due process has

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104. *Ibid.* at ss. 14 and 30.

105. See Chapter VII B for elaboration of this principle.

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been followed. The primary safeguards, those embodying fundamental concepts of due process and procedural fairness, are these:

- The adult subject to an application under the Act, and a wide range of other interested persons, must be served with notice of the proceedings (section 63);
- The subject adult must be present in Court (section 74);
- The subject adult must receive legal representation (section 65); and
- Orders made are automatically reviewed or terminated (section 17).

### 9. LEGAL REPRESENTATION GUARANTEED

Section 65 of the PPPRA provides that, when the Court exercises jurisdiction, it “shall” appoint counsel to represent the person who is the subject of any application, unless that person already has, or will have, a lawyer. A Practice Note issued by the Family Court sets out the procedures to be followed with respect to applications for personal or property orders.<sup>106</sup> The lawyer is required to report to the Court within 28 days on the following matters:

- whether the subject person should be served with the application;
- whether the subject person’s attendance is desirable or should be excused at subsequent Court hearings;
- whether any further medical evidence is required;
- whether any (further) consents are required from family/whanau<sup>107</sup> members;

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106. N.Z., Family Court of New Zealand, “Practice Note – Applications under the Protection of Personal and Property Rights Act” (1 October 2005) online: Family Court of New Zealand <<http://www.justice.govt.nz/family/practice/notes/default.asp?inline=application-property-rights.asp>>.

107. Whanau is a Maori word for family, but whanau denotes a wider concept than just an immediate family made up of parents and siblings - it links members of an extended family group to a common ancestor. See the glossary of the Maori Land Court, available at: Maori Land Court, “Glossary” online:

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- whether the provisions of the *Mental Health Act* and/or the *Intellectual Disability Act* apply or are likely to apply to the subject person;
- specific powers sought under the First Schedule of the Act in relation to the management of property (section 31);
- the type and suitability of any personal order proposed (section 10);
- the appropriateness of an order to administer property (section 11);
- the aspects of personal care and welfare in respect of which the appointment of a welfare guardian is sought (section 12);
- whether anyone else should be served (including the District Inspector of Mental Health); and
- such other matters relating to the application that the lawyer considers appropriate.

Counsel are nominated by the Family Court Coordinator for approval and appointment by a Judge. Nominees are drawn from an approved list of lawyers experienced in dealing with people who have significant difficulties communicating or who have unusual personal characteristics. Additionally, they understand medical evidence and the intricacies of property law. As a result, they can undertake their duties efficiently and relatively cheaply. According to Judge Boshier, the Principal Family Court Judge, the selection procedure has resulted in a very smooth operation for the resolution of PPPRA matters.

The PPPRA delineates the duties of the lawyer toward the subject person.<sup>108</sup> It is the lawyer's duty to:

1. contact the person;
2. explain the nature and purpose of the application;
3. ascertain and give effect to that person's wishes re the application;

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New Zealand Ministry of Justice <<http://www.courts.govt.nz/maorilandcourt/glossary.htm#w>>.

108. PPPRA, *supra* note 2 at s. 65(2).

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4. evaluate the solutions offered by other parties for the problem for which an order is sought, taking into account the need for a solution that:
  - (a) makes the least restrictive intervention in the person's life, having regard to their incapacity and;
  - (b) enables or encourages the person to develop and exercise capacity to the greatest extent possible.

In addition, the Court may also appoint counsel to assist the Court.<sup>109</sup>

All applications under the Act must be supported by affidavits specifying in detail the relief sought, particulars with respect to the capacity of the subject person, and particulars of the applicant's suitability. The appellant must also provide an undertaking to protect and promote the welfare and best interests of the subject person.

This procedure enables the Court to determine:

- the merits of the application;
- whether the applicant is a suitable appointee;
- whether the applicant can carry out his or her responsibilities and duties under the PPPRA; and
- whether there is an overlap between the PPPRA and other mental health enactments.

If the application is undefended, the Registrar of the Court makes appropriate recommendations to the Judge, who may make an order, require further information, or call a pre-hearing conference.

### 10. PAYMENT OF COUNSEL'S FEES

Fees for services of counsel and reasonable expenses are payable out of the Department Bank Account.<sup>110</sup> Each year, Parliament appropriates approximately NZ \$40 million

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109. *Ibid.* at s. 65(3).

110. *Ibid.* at s. 65(5).

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through a Crown prerogative grant. The fund is not the subject of a parliamentary vote. Those monies are made available to the Family Court to spend on services that the Judges require. Those services include appointments of psychologists to write reports, appointments of lawyers for children and appointments of lawyers under the PPPR Act. The actual expenditure in 2005 for PPPRA-appointed lawyers was NZ \$1,242,416.<sup>111</sup>

Because the monies are not legal aid funds, they are not administered by the legal services agency. The rationale behind this procedure reflects the separation of powers that requires the Judges to administer the statute with constitutional independence.<sup>112</sup>

At the end of the proceedings, the Registrar may tax counsel's bill of costs.<sup>113</sup>

The Court has the discretion to recoup the fees or expenses paid, or any part of them, from the estate of the represented person or from any party.<sup>114</sup>

### 11. PRE-HEARING CONFERENCES

The PPPRA also provides for the conduct of in-camera<sup>115</sup> pre-hearing conferences.<sup>116</sup> Any party served may request a conference, including the subject adult or counsel.<sup>117</sup> A Family Court Judge presides, and counsel for the adult must be present.<sup>118</sup>

The purpose of a pre-trial conference is to identify the problem that led to the application and to attempt to resolve matters without litigation.<sup>119</sup>

The Judge may make consent orders, but only if the subject person "understands the nature and foresees the consequences of the order."<sup>120</sup>

## C. Key Components of the New Zealand Adult Guardianship System

Although the PPPRA is almost 20 years old, it embodies a number of key components for modern guardianship legislation that the PPA lacks:

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111. Interview of Judge Boshier, Principal Family Court Judge, Wellington, New Zealand [Judge Boshier].

112. Judge Boshier, *supra* note 111.

113. PPPRA, *supra* note 2 at s. 65(6).

114. *Ibid.* at s. 65(8).

115. *Ibid.* at s. 66.

116. *Ibid.* at s. 68(4).

117. *Ibid.* at s. 66.

118. *Ibid.* at s. 68(2).

119. *Ibid.* at s. 67.

120. *Ibid.* at s. 70(2).



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- Court intervention is graduated and nuanced, ranging from resolution of the issues at a pre-trial conference, to the making of recommendations for solving the problems underlying applications, through specific personal or property orders relating to the decision to be made, to, in the extreme, appointment of a welfare guardian;
- The Court can make both interim and temporary orders in appropriate circumstances;
- The statute alerts the Court to have regard to the possibility of undue influence;
- Applications for orders under the Act are supported by lengthy specimen affidavits that contain all of the relevant evidence necessary for the Court's consideration;
- Mandatory legal representation of the subject adult is ensured, and regardless of the adult's alleged incapacity, their lawyer is required to make all efforts to take and implement their instructions and robustly represent them;
- The financial resources of the adult are never an impediment to full representation; and
- Individual referencing ensures that the adult's "imprudent" management of his or her property is not sufficient evidence of incapacity.

The Court-based system under the PPPRA delivers accessible and flexible support to adults who may need assistance managing their personal care and property. The Act contains strong statements of principle, clear objectives and nuanced mechanisms for intervention. In addition, uniform procedures, experienced legal professionals and fundamental procedural safeguards, bolstered by the necessary funding, ensures that support is made available for adults who need assistance managing their personal care and property. In this way, the statute attempts to strike a balance between the state's duty to protect its citizens and the adult's autonomy and procedural fairness rights.

### **D. New Initiatives for Reform**

While the New Zealand Law Commission has recently considered the clarification and extension of the Court's jurisdiction to impose coercive physical restrictions under the PPPRA,<sup>121</sup> no other reform initiatives appear to be on the horizon with respect to guardianship law in New Zealand.

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121. Law Commission of New Zealand, "Protections Some Disadvantaged People May Need" (April 2002)

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### VI. THE ONTARIO EXPERIENCE

#### A. History of the *Substitute Decisions Act*

Prior to the proclamation of the *Substitute Decisions Act* (SDA)<sup>122</sup> in 1995, adult guardianship in Ontario was governed by the *Mental Incompetency Act* (MIA).<sup>123</sup> The MIA,<sup>124</sup> allowed for substitute consent on issues of property management and access to records for incapable in and out patients of psychiatric facilities, as well as treatment for incapable in-patients.

Under the MIA, a “mentally incompetent person” was defined as a person:

- (a) in whom there is such a condition of arrested or incomplete development of mind, whether arising from inherent causes or induced by disease or injury; or
- (b) who is suffering from such a disorder of the mind;
- (c) that the person requires care, supervision and control for his or her protection and the protection of his or her property.

Where the evidence established incompetency beyond a reasonable doubt,<sup>125</sup> the Court had

all the powers, jurisdiction and authority of Her Majesty over and in relation to the persons and estates of mentally incompetent persons, including the care and the commitment of the custody of mentally incompetent persons and of their persons and estates.<sup>126</sup>

Like BC’s PPA, the MIA can be traced back to nineteenth-century lunacy laws, a fact apparent from its title.

In November 1985, the Ontario Ministers of Health, Community and Social Services and Senior Citizens’ Affairs, together with the Attorney General for Ontario, commissioned an Advisory Committee on Substitute Decision Making for Incapable Persons (“the Fram Committee”) with a mandate “to review all aspects of the law governing and related to

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online: Law Commission <<http://www.lawcom.govt.nz/ProjectReport.aspx?ProjectID=86>>.

122. *Supra*, note 3.

123. R.S.O. 1990, c. M.9 [MIA].

124. R.S.O. 1990, c. M.7

125. MIA, *supra* note 123 at s. 4.

126. *Ibid.* at s. 2.

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substitute decision-making for persons who are mentally incapacitated, including personal guardianship, and to recommend revision of this law where appropriate.”<sup>127</sup>

The mandate of the Fram Committee included broad representation from government, advocacy and community groups, and culminated in a 1987 report. Public hearings on the development of this legislation encouraged an open process, which sought to deal with many of the same conflicts in theory, and practice, as currently exist in BC.<sup>128</sup> The resulting legislation took the form of a trilogy of statutes, the SDA, the *Consent to Treatment Act* and the *Advocacy Act*, which “were intended...to modernize the laws with respect to consent to treatment, mental capacity, substitute decision-making and advocacy for vulnerable adults.”<sup>129</sup>

Proclamation of these statutes was delayed until 1995, both for fiscal reasons and because they represented a significant change to Ontario health law.<sup>130</sup>

Subsequently, a change in government in 1996 led to the repeal of both the *Consent to Treatment Act*, which was replaced by the *Health Care Consent Act, 1996*, and the *Advocacy Act*, which was not replaced.

In comparison to the PPA, Ontario’s current guardianship system under the SDA is modern, internally coordinated and fairly thorough.

### **B Current SDA System Explained**

The SDA governs, in an omnibus fashion, what occurs when an adult is not mentally capable of making certain decisions about their own property or personal care. Under the SDA, a capable adult can execute a Continuing Power of Attorney for property,<sup>131</sup> and/or a Power of Attorney for personal care.<sup>132</sup> Where no such personal planning documents

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127. From the cover sheet of the December 1987 report of the Fram Committee. The authors gratefully acknowledge the assistance of Stephen Fram, who provided original correspondence relating to the Advisory Committee’s work, and shared his first-hand knowledge and experience with the process culminating in the *Substitute Decisions Act* and accompanying legislation in Ontario.

128. Judith Wahl, who very kindly shared her knowledge and experience with guardianship law reform in Ontario, and put the authors in touch with Stephen Fram.

129. Jan Goddard, “Ontario’s *Substitute Decisions Act*: Things past and looking forward” (Paper presented to the Canadian Conference on Elder Law, 29 October 2005) [unpublished].

130. Canadian HIV/AIDS Legal Network, “New Ontario Legislation Important for Persons Living with HIV/AIDS” (April 1995) 1:3 HIV/AIDS Policy & Law Review 1 at 1, online: Canadian HIV/AIDS Legal Network <<http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=678>>.

131. SDA, *supra* note 3 at s. 7.

132. *Ibid.* at s.46.

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have been created, the Act provides for statutory guardians of property<sup>133</sup> and Court-appointed<sup>134</sup> guardianships for property and personal care, and sets out the procedural requirements for guardianship applications.<sup>135</sup> (*The Health Care Consent Act*, discussed later in this paper, provides the framework for decision-making in the areas of treatment, admission to long-term care homes, and personal assistance services in long-term care homes.) As such, the SDA is function-based legislation. It is, in essence, all about decision-making.<sup>136</sup> Compared to BC's more paternalistic PPA, it is an individual rights-based legislative scheme.

### 1. GUARDIANSHIP OF PROPERTY

The SDA defines incapacity with respect to property as follows:

6. A person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

The Court may, upon "any person's" application, appoint a guardian of property if the Court determines that the adult is incapable of managing their property, and that decisions about their property need to be made.<sup>137</sup> However, the Court must not appoint a guardian if the need for decisions to be made will be met by an alternative course of action that:

- (a) does not require the Court to find the person to be incapable of managing property; and
- (b) is less restrictive of the person's decision-making rights than the appointment of a guardian.<sup>138</sup>

In an order appointing a guardian of property, the Court may require that the guardian post security, make the appointment for a limited period, or impose such other conditions on the appointment as the Court considers appropriate.<sup>139</sup>

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133. *Ibid.* at s. 15.

134. *Ibid.* at ss. 22 and 55.

135. *Ibid.* at ss. 69-77.

136. Judith Wahl, "Consent and Capacity / Substitute Decision-making – The Basics." (6 June 2003) online: Advocacy Centre for the Elderly <[http://www.advocacycentreelderly.org/pubs/poa/Consent\\_and\\_capacity\\_basics.pdf](http://www.advocacycentreelderly.org/pubs/poa/Consent_and_capacity_basics.pdf)> at 1.

137. SDA, *supra* note 3 at s. 22(1).

138. *Ibid.* at s. 22(3).

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Upon application by the PGT, who has a statutory duty to investigate any allegation that a person is incapable of managing property and that serious adverse effects are occurring or may occur as a result, the Court may appoint the PGT as temporary guardian.<sup>140</sup>

Under section 32 of the Act, a guardian of property, when making a decision that will have an affect on the incapable person's personal comfort or well-being, is statutorily required to consider whether the decision is for the incapable person's benefit. The guardian is also statutorily required to manage a person's property in a manner consistent with decisions concerning the person's personal care that are made by the person who has authority to make those decisions. Guardians must also explain their powers and duties to the incapable person, encourage the incapable person to participate in decisions, and foster regular personal contact between the incapable person and supportive family and friends.

### 2. GUARDIANSHIP OF THE PERSON

The SDA defines incapacity with respect to the person as follows:

45. A person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

In cases where no valid Power of Attorney for Personal Care exists, the Court may appoint a guardian of the person.<sup>141</sup> The Court must be satisfied that the affected adult is incapable of maintaining their own personal care and needs decisions to be made by a person authorized to do so. As with property guardians, no guardian of the person will be appointed if the need for decisions will be met by an alternative course of action that does not require a finding of incapability, and is less restrictive than the appointment of a guardian.<sup>142</sup> Again, when considering an application, the Court must consider the incapable person's current wishes, if they can be determined, and the closeness of the applicant's personal relationship to the incapable person.<sup>143</sup>

An order may be for a limited period, and other conditions may be imposed.<sup>144</sup> Additionally, an order may be made for full or partial guardianship.<sup>145</sup> Section 59 provides that a

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139. *Ibid.* at s. 25(2).

140. *Ibid.* at s. 27.

141. *Ibid.* at s. 55(1).

142. *Ibid.* at s. 55(2).

143. *Ibid.* at s. 57(3).

144. *Ibid.* at s. 58(2): an order appointing a guardian may make the appointment for a limited period as the

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Court may make an order for full guardianship of the person only if it finds that the person is incapable in respect of all the functions referred to in section 45. As with property, upon application by the PGT following the investigation of an allegation of incapability, the Court may appoint the PGT as temporary guardian of the person.

Under section 66(3) of the Act, the guardian of the person is required to make decisions according to any wishes or instructions expressed by the incapable person while capable, if known, and to use reasonable diligence to ascertain whether there are such wishes or instructions. If there are none, the guardian is required to make decisions in the incapable person's best interests, and must consider the values and beliefs the incapable person held while capable; the person's current wishes, if they can be ascertained; whether the decision is likely to improve the person's quality of life, prevent it from deteriorating, or reduce the extent or rate at which it is likely to deteriorate; and, whether the expected benefit from the decision outweighs the risk of harm to the person from an alternate decision.<sup>146</sup>

### 3. URGENT INVESTIGATIONS

The Public Guardian and Trustee also has a duty to investigate where persons are alleged to be incapable and may suffer adverse effects either to their property<sup>147</sup> or person.<sup>148</sup> The Public Guardian and Trustee is given various authorities for entry, access to records, etc., in order to fulfill their duties.<sup>149</sup> While anyone may contact the Public Guardian and Trustee to report a situation, the Public Guardian and Trustee will only act where the person is able to provide evidence of the alleged incapacity and the serious adverse effects which have occurred or may occur.

### 4. CAPACITY ASSESSORS

Ontario Courts have the discretion to use any assessor. However, for some purposes, a certificate issued by a qualified capacity assessor is required. For example, such a certificate is required to spring a Continuing Power of Attorney for property,<sup>150</sup> and to spring some Powers of Attorney for personal care.<sup>151</sup> In addition, any person may request a

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Court considers appropriate; or impose such other conditions on the appointment as the Court considers appropriate.

145. *Ibid.* at s. 58(3).

146. *Ibid.* at s. 66(4).

147. *Ibid.* at s. 27

148. *Ibid.* at s. 62.

149. *Ibid.* at ss. 81-83.

150. *Ibid.* at s. 9(3).

151. *Ibid.* at s. 49(1).

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qualified capacity assessor to perform an assessment for the purpose of determining whether the PGT should become the statutory guardian of property.<sup>152</sup> Ontario has developed clear rules about the qualifications for those who may conduct these capacity assessments, and about the form and contents of a capacity assessment.

The Ontario Capacity Assessment Office oversees the training of capacity assessors, provides financial assistance to people unable to pay for a capacity assessment and develops capacity assessment practice guidelines.<sup>153</sup> Capacity assessors must be physicians, nurses, psychologists, registered social workers or occupational therapists.<sup>154</sup> Assessors must undergo specific standardized training in order to become licensed to conduct assessments, they must meet continuing education requirements, and they must perform a minimum number of assessments each year.<sup>155</sup>

Ontario capacity assessors are not employed by the government, and unless a financial need is established, the cost of the assessment is privately paid, usually by the person requesting the assessment. If the person is found incapable, then the cost of the assessment may be reimbursed from the incapable adult's estate.

An adult can refuse a capacity assessment unless ordered by the Court. Such an order, however, is rarely made and when done, is usually part of a Court application for guardianship. In addition, a person who has a statutory guardian of property may apply to the Consent and Capacity Board for a review of a finding of incapacity.<sup>156</sup>

#### 4. THE ONTARIO CONSENT AND CAPACITY BOARD

The Consent and Capacity Board is an independent body created by the Ontario government pursuant to the HCCA whose purview includes hearings under the HCCA, the MHA, the *Personal Health Information Protection Act* and the SDA. The Board is composed of panel members from the fields of law and psychiatry, and members of the public, all of whom have been appointed by the Lieutenant Governor in Council.<sup>157</sup> The Board can sit with a sole decision-maker, or be comprised of either three or five members.<sup>158</sup> The hearings are recorded and transcripts of the proceedings are available.<sup>159</sup> A

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152. *Ibid.* at s. 16(1).

153. Ontario, Ministry of Attorney General, "Capacity Assessment" (16 May 2006) online: Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacity.asp>> at 1.

154. Capacity Assessment, O. Reg. 460/05 at s. 2(2) [O.Reg. 46/05].

155. O.Reg. 46/05, *supra* note 154 at s. 2(1).

156. SDA, *supra* note 3 at s. 20.2(1).

157. HCCA, *supra* note 66 at s. 70(2).

158. *Ibid.* at s.73(1).

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person wishing to appeal from the Board may do so to the Ontario Superior Court of Justice.<sup>160</sup>

A hearing is held at no cost to any of the parties. It must be commenced within seven days of the request, unless all parties agree to a postponement.<sup>161</sup> Hearings are held in a place which is most convenient to the allegedly incapable person. These hearings often take place in hospitals, long-term care homes, or in the homes of the allegedly incapable person. The Board must render its decision within one day after the hearing ends.<sup>162</sup> Any party to the hearing may, within 30 days after the hearing ends, request written reasons for the decision. The Board then has two days to provide reasons to all parties.<sup>163</sup>

The Board is governed by the *Statutory Powers Procedures Act*,<sup>164</sup> as well as its own Rules of Practice.<sup>165</sup> While it is a judicial hearing, the rules of evidence are relaxed. Parties are entitled to be represented by legal counsel and, where the incapable person is not represented and the Board feels it is appropriate, they may order the Public Guardian and Trustee to appoint counsel to act on behalf of the alleged incapable person.<sup>166</sup> That person is responsible for any legal fees<sup>167</sup> (although in most situations, they are entitled to legal aid funding).

### 5. SAFEGUARDS

The fundamental procedural safeguards regarding guardianships under the SDA:

- Under section 69, notice of applications under the Act must be served on the subject adult and a variety of interested persons including the PGT;
- The applicant must provide a signed statement that the subject adult has been informed of the nature of the application, the right to oppose it, and the manner in

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159. *Ibid.* at s. 80(4).

160. *Ibid.* at s. 80(1).

161. *Ibid.* at s. 75(2).

162. *Ibid.* at s. 75(3).

163. *Ibid.* at s. 75(4).

164. R.S.O. 1990, c. S.22.

165. Ontario, Consent and Capacity Board, "Consent and Capacity Board Rules of Practice" (1 March 2004) online: Consent and Capacity Board  
<<http://www.ccboard.on.ca/english/legal/documents/rulesofpractice.pdf>>

166. HCCA, *supra* note 66 at s. 81(1).

167. *Ibid.* at s. 81(2).

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which the subject adult was informed. If it was not possible to do so, the applicant must provide a signed statement describing why it was not possible;<sup>168</sup>

- Applications for guardianship of property must be accompanied by a management plan, and those for guardianship of the person must be accompanied by a guardianship plan, if the proposed guardian is not the PGT; and<sup>169</sup>
- The importance of legal representation is recognized, and incapable or allegedly incapable adults are deemed capable to instruct counsel in proceedings under the Act in which their capability is in issue.<sup>170</sup>

### 6. LEGAL REPRESENTATION

In Ontario, legal representation is not mandated, as in New Zealand. However, section 3 of the SDA, under the heading “Counsel for person whose capacity is in issue,” provides that

- 3(1) If the capacity of a person who does not have legal representation is in issue in a proceeding under this Act
- (a) the court may direct the Public Guardian and Trustee arrange for legal representation to be provided for the person; and
  - (b) the person shall be deemed to have capacity to retain and instruct counsel.

In addition, section 81 of the HCCA, under the heading “Counsel for the incapable person,” provides that

- 81(1) If a person who is or may be incapable with respect to a treatment, admission to a care facility or a personal assistance service is a party to a proceeding before the Board and does not have legal representation,
- (a) the Board may direct the Public Guardian and Trustee or the Children’s Lawyer to arrange for legal representation to be provided for the person; and
  - (b) the person shall be deemed to have capacity to retain and instruct counsel.

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168. SDA, *supra* note 3 at ss. 70(1)(c) and 70(2)(c).

169. *Ibid.* at ss. 70(1)(b) and 70(2)(b).

170. *Ibid.* at s. 3(1).

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Thus, the Ontario legislation explicitly recognizes the need for legal representation for adults subject to incapability determinations, and deems an incapable or allegedly incapable adult to be capable of instructing counsel.

In Ontario, the onus is on either a rights adviser or the assessor to advise the person of their right to counsel. Lists of qualified legal counsel are available from Legal Aid Ontario. Where the allegedly incapable person does not already have legal representation, the Consent and Capacity Board may order the Public Guardian and Trustee to appoint counsel. The lawyer to be appointed must be trained in capacity matters before the Consent and Capacity Board. While an appointment may be made, there is no obligation on the person to accept counsel, and counsel may not act where the person gives this instruction.

Representation will be paid by personal funds, if available, or by legal aid certificates. In contrast to BC, civil legal aid certificates are more readily available in Ontario. Additionally, there is an understanding that even if personal assets exist, the subject person may not be able to access funds. Legal aid certificates are more generously granted on the basis that the financial resources of the subject person should never be an impediment to full representation when it is deemed necessary to determine issues of capacity.

### **C. Key Components of the Ontario Adult Guardianship System**

The Ontario system is now more than a decade old. However, it embodies a number of key components for modern guardianship legislation that the PPA lacks. These include:

- A licensing system for capacity assessors, with minimum standards for education, training and skills, as well as requirements for the minimum number of annual capacity assessments. Although licensed capacity assessors are not mandated in all, or even most, circumstances, they at least represent some attempt to standardize and regulate capacity assessments in Ontario;
- An independent body, the Consent and Capacity Board, a specialized, expert group providing accessible decisions outside of a formal Court structure, maintains a record of decisions. Appeals are taken to Ontario Superior Court of Justice;
- Legal representation may be available for the subject adult through a referral to a lawyer, who is trained to appear in incapacity matters before the Review Board. Representation may be paid by personal funds (if available) or by legal aid certificates;

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- Legal aid certificates are easily available. There is an understanding that even if the subject person has personal assets, they may not be able to access funds. Legal aid certificates are generously granted on the basis that the financial resources of the subject person should never be an impediment to full representation when it is deemed necessary;
- There are explicit statutory provisions allowing an incapable or allegedly incapable adult to retain and instruct counsel;
- The legislation respects individual rights and graduated substitute decision-making;
- Global guardianship is a last resort; and
- The Ontario PGT may transfer statutory guardianship to an appropriate person.

### **D. New Initiatives for Reform**

Concerns related to four main issues led to changes with respect to some functional aspects of Ontario's system in 2005.

First, appointments to the Consent and Capacity Board are based on a political appointment process. Accordingly, a concern arose as to whether the Board members were adequately educated on the role and purview of the Board as well as the underlying issues they faced. In order to address this concern, new policies have been established which require Board members to undergo specific training on the law regarding capacity as well as the scope of the Board and the assessment / guardianship continuum. Respect for individual rights is emphasized as a component of that training.<sup>171</sup>

Second, although the capacity assessor system is a regulated one, concerns arose about the consistency and quality of assessments, as well as the lack of initial training and continuing education for assessors under the SDA. Prior to December 1, 2005, a capacity assessor merely had to complete a training course, which included instruction on 1) the SDA, 2) procedures for assessments and the guidelines to be used, and 3) instruction on the procedures for determining substitute decision-making needs. Training sessions were limited to one half-day session, and originally there were no requirements as to the num-

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171. The authors acknowledge Judith Wahl's helpful information about the internal training processes and issues being addressed by the CCB.

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ber of assessments one had to complete, nor were there any provisions for the continuing professional education of capacity assessors.

In order to address these weaknesses in the system, additional regulations were promulgated on December 1, 2005.<sup>172</sup> These new regulations instituted requirements for preliminary education. Section 4 details the training requirements:

4. The qualifying course required by clause 2 (1) (b) shall be given or approved by the Attorney General, and shall include,
  - (a) instruction in,
    - (a) the *Substitute Decisions Act, 1992*,
    - (b) best practices in completing forms and reports under that Act,
    - (c) standards for the performance of assessments of capacity, as set out in the guidelines referred to in section 3, and
    - (d) procedures for determining if a person needs decisions to be made on his or her behalf by a person authorized to do so, as set out in the guidelines referred to in section 3; and
  - (b) an evaluation of the trainee's mastery of the training.

In addition, because issues and theories pertaining to capacity assessments change with new research and scholarship, ongoing education is also important. Concerns over the lack of continuing education were addressed in section 5 of the regulation, which details requirements for continuing education:

- 5(1) To remain qualified to do assessments of capacity, an assessor is required to successfully complete a continuing education course given or approved by the Attorney General,
  - (a) on or before the second anniversary of his or her qualification date; and
  - (b) thereafter, at intervals of two years or less.
- (2) A continuing education course shall include,

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172. *Supra*, note 154.

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- (i) participation in one or more training activities; and
- (ii) submission to the Ministry of the Attorney General, for review and comment, of at least two recently completed Statements of Assessor in Form A or Form B and the recently completed corresponding Assessment Reports in Form C.

Section 6 requires a licensed capacity assessor to undertake a minimum numbers of assessments each year:

- 6. To remain qualified to do assessments of capacity, an assessor is required to do at least five assessments,
  - (a) during the two-year period following his or her qualification date; and
  - (b) thereafter, during each two-year period.

It is too early to evaluate the outcomes and effectiveness of these enhancements. However, the measures taken to resolve the perceived deficiencies appear prudent and likely to further improve the uniformity and quality of capacity assessments in Ontario.

The third broad area of concern under the SDA system related to the need for specialized training to augment the skill set of lawyers acting at the Board level. As in New Zealand, Ontario legislators decided that a designated pool of lawyers experienced in capacity issues should be trained and maintained. To this end, lawyers at the Toronto-based Advocacy Centre for the Elderly were asked to film training modules in order to educate Ontario lawyers who appear before the Consent and Capacity Board.

The final, and most important, issue is the lack of understanding of incapacity and the rules under the HCCA. Those making findings under this legislation, either as a health practitioner or evaluator, do so because of their membership in a Regulated College, not because of any specific training. While education has been available, many of the key players have not taken the time to learn about evaluating capacity or the patient's rights.

While Ontario has a seemingly well-established and regulated system of substitute decision-making, the actual implementation may not yet have reached the level that advocates desire. Increased early training of health practitioners and education for the public will hopefully help resolve this problem.

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### VII. BC RECOMMENDATIONS FOR REFORM

There is no question that reform of BC's guardianship and personal planning legislation is overdue. As noted, Bill 32 represents a significant step in that direction. Whether or not it is reintroduced in the same or a substantially similar form in the near future, it provides a useful framework for public discussion and debate around the types of personal planning documents available in BC, and the essential features of a Court-appointed guardianship system.

This Chapter contains a number of recommendations, informed by the experiences in New Zealand and Ontario, for reform with respect to assessment guidelines, procedural fairness, and informal resolution processes.

#### A. Clearing up the Confusion

##### 1. THE MEANING OF INCAPABILITY

Ontario has made concerted efforts to develop clear guidelines for capacity assessments, including the institution of a system of certified capacity assessors in respect of property, and in respect of personal care in certain cases, e.g., where an assessment of incapacity is necessary in order to spring a Continuing Power of Attorney or personal care agreement, and in the case of statutory or summary guardianship proceedings. Certified capacity assessors are not required in all, or even most, cases, and medical and legal professionals must still perform informal evaluations of capacity. However, the regulation of this professional group, along with creation of a single, independent body, the Consent and Capacity Board, to hear appeals from findings of incapacity performed in a variety of different contexts and under different pieces of legislation, infuses a degree of uniformity into the process.

By contrast, in BC little attention has been directed toward the need to develop uniform guidelines for all capacity assessments. The PGT (and its predecessor, the Public Trustee) has for many years issued guidelines reflecting best practice in the performance of assessments. While these guidelines have been widely followed, and constitute the only consistent approach to assessments in BC, compliance is voluntary. At present, no capacity assessment is necessary before a certificate is issued under section 1(a) of the PPA for the appointment of a committee of the estate, and there are no regulations or guidelines as to the content of the medical affidavits necessary for a declaration of incapability under section 1(b) of the PPA. In other contexts, e.g., in the *Representation Agreement Act*, the *Health Care (Consent) and Care Facility (Admission) Act* and the Handbook, the meaning of incapability varies. It is not always clear what the appropriate test is or what the consequences of a determination are. Although BC's Review Board never had a purview broad enough to acquire the unifying potential of the Ontario Board, its abolition in 2004 was a step backward.

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Uniform capacity assessments should be performed in both statutory guardianships (under section 1(a) of the PPA) and Court-ordered guardianships (under section 1(b) of the PPA). The PGT is in the best position to consult with the various stakeholders, including health care providers, lawyers and community advocates, in order to determine the content of such uniform assessments. Minimum mandatory standards of assessment, developed and updated as necessary by the PGT, should be established in any new legislation.<sup>173</sup> However, the PGT has raised a concern that because it becomes the statutory guardian upon the issuance of a certificate, it may be in a conflict of interest if it prescribes mandatory standards. This issue should be specifically addressed in any new legislation. It was not addressed in Bill 32, and the issue appears to have been left to regulations intended to accompany the proposed legislation. Without strongly supported and consistent best practices for capacity assessments, all guardianships order, either de facto or formal, may rest on unstable ground.

### 2. CLARIFYING THE RULES: THE INTERACTIONS AMONG STATUTORY PROVISIONS, ETHICAL GUIDELINES AND RULES OF COURT

As we have seen, the confusion as to the meaning of incapability in different contexts may result in confusion regarding the legal status of an allegedly incapable adult, and the consequences flowing from that status. This confusion undermines the common law and statutory presumption of capability, and poses ethical difficulties for lawyers. Informal medical determinations of incapability may facilitate the financial exploitation of allegedly incapable adults.

Guardianship legislation should specifically provide that adults deemed to be incapable may nevertheless instruct counsel for the purposes of appealing that determination. The *Representation Agreement Act* should be amended to clarify if and how Representation Agreements will interact with new graduated guardianship provisions in the AGA. The Handbook should be amended to clarify the meaning of incapability, and the interaction between a lawyer's reasonable belief as to incapability and relevant statutory provisions, as well as the Rules of Court. The Rules of Court themselves should be amended to define a legal disability and reflect the fact that an adult can challenge a finding of incapability.

At present, there is a grey area comprised of adults who may be "incapable" for some purposes, whether as a result of a lawyer's reasonable belief or some other informal determination of incapacity. For adults in this category, the common law presumption of capability is of little assistance, and they face serious consequences with respect to their autonomy and self-determination rights. This problem remains under Bill 32, which, al-

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173. Such standards, drafted by the PGT, are already mandatory under Part 3 of the AGA for incapability assessments for an application to Provincial Court for a Support and Assistance Order in the case of suspected abuse, neglect or self-neglect.

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though it establishes a system of nuanced intervention, does not clarify that an adult retains capacity with respect to those decisions outside the scope of powers granted in a Court order.

### **B. Ensuring Individual Autonomy Rights and Procedural Fairness**

Even a graduated, nuanced adult guardianship model has the potential to pose the same threat to liberty rights as the global committee system under the PPA. In the same way that a Court may hear a criminal case in which there are a range of sentencing options (i.e. probation, conditional sentences, or incarceration), a civil Court may hear a modern adult guardianship application in which there are a range of guardianship options (i.e. limited control over finances, assisted decision-making with health care or total global guardianship of person and estate).

Both the New Zealand and Ontario guardianship systems have developed mechanisms that respect individual autonomy and self-determination rights, even where an adult has been found to be incapable for some purposes. In New Zealand, for example, the serious consequences of adult guardianship are addressed in the PPPRA by the use of strong statements of purpose, repeated presumptions of competence, strong notice and legal representation requirements and clear appeal procedures. The New Zealand model makes a concerted effort to intervene in the least restrictive manner possible, and global guardianships are virtually non-existent. All guardians are restricted by the terms of their appointment.

#### 1. INDIVIDUAL REFERENCING

The purpose of individual referencing is to ensure that individual autonomy rights are respected, and that assessors do not go too far in their desire to protect an allegedly incapable adult. In New Zealand, statutory provisions embody the principle of individual referencing, while in Ontario, the Capacity Assessment Guidelines state:

Any existing incapacity must be of a nature and degree sufficient to interfere with the ability to manage property or meet essential personal care needs. The law recognizes that a capable individual can make unpopular, unwise or eccentric choices in the absence of incapacity. Capable but risky or even foolish decisions must be respected.<sup>174</sup>

Additionally, the principle of individual referencing is implicit in both legislative schemes insofar as they mandate the least restrictive intervention necessary in the circumstances, as opposed to global guardianship, should any intervention be deemed necessary.

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174. Ontario, Ministry of Attorney General, Capacity Assessment Office, "Guidelines for Conducting Assessments of Capacity" (May 2005) online: Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacity/2005-05/guide-0505.pdf>>. See also *Re Koch* 33 O.R. (3d) 485 (OCGD).



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For example, if adult ‘A’ has always been a risk taker, then investing all of their savings in high-risk stocks may not be out of character in contrast to adult ‘B,’ who has spent a lifetime of frugality and only ever held a conservative portfolio. In the former case, ‘A’s’ behaviour, which a more conservative decision-maker might consider to illustrate extremely bad judgment, would not be evidence of incapability. In the latter case, ‘B’ might properly be determined to be “at risk” and in need of protection.

In BC, under the global approach of the PPA, ‘B’ would get no help if they were deemed “capable,” but would lose all of their rights to make property decisions if found “incapable.” Pursuant to an *individually referenced* and graduated scheme of adult guardianship legislation, ‘B’ would be given assistance with investments but would be free to make other property decisions, in accordance with their actual decision-making capacity. In this way, a distinct move is made from paternalistic “best interests” to individual-centred referencing.

Modern guardianship legislation should mandate that an adult’s behaviour be viewed, or referenced, in the context of their unique, individual characteristics. Although Bill 32 gives some effect to an adult’s capable wishes, if known, it contains no provisions respecting individual referencing.

Additionally, modern guardianship legislation should be premised on the recognition that any intervention into the life of an adult with diminishing capacity must be gradual and nuanced. The assessment of an adult’s capability should relate to the adult’s specific capability with respect to the specific task in question. The move away from a blunt global committee model recognizes the fact that an adult may be incapable with respect to some decisions but not others. Bill 32 attempts to give effect to this principle by limiting a guardian’s powers to those specifically granted by order of the Court, or by an enactment. However, the proposed legislation does not mandate that capability be assessed on a task-specific basis.

### 2. PROCEDURAL FAIRNESS: NOTICE AND RIGHTS ADVICE

Both New Zealand and Ontario contain stronger notice requirements than those under the PPA. While there may be cases in which notice is impossible, the discretion to dispense with notice should be exercised only in exceptional circumstances, and not as a matter of ordinary practice.

Modern guardianship legislation should mandate that subject adults be notified of any applications with respect to their capacity. Effective notice should include rights advice. The adult should be advised not only of the application for guardianship, but also of the procedure for applications, their right to oppose the application and the consequences of a successful application, etc. With respect to assessments, adults should be notified that they are being assessed, and of the purpose and consequences of the assessment. If they

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object to the proposed assessment, they should be advised of their legal rights to object to it and of the procedures to be followed. Similarly, as discussed above, if the allegedly incapable adult disagrees with the result of the assessment, he or she should be given legal recourse and the resources to challenge it.

Bill 32 contains mandatory notice requirements, and both the subject adult and near adult relatives, *inter alia*, must be notified. In addition to a copy of the application and accompanying documents, the legislation provides that the adult be served with any prescribed informational material, which would presumably provide rights advice to the parties. In fact, the notice provisions contained in the proposed legislation may be too stringent, given that there is no saving provision dealing with situations in which the applicant fails, or is not able, to identify all of the persons entitled to notice. For instance, it may not be readily determinable in all cases whether there is an attorney or representative, or whether a marriage-like relationship has ended. Thus, there should be a saving provision to ensure the validity of a guardianship order and relieve the applicant of liability where reasonable efforts have been made to identify and serve all the enumerated parties.

### 3. PROCEDURAL FAIRNESS: LEGAL REPRESENTATION AND LEGAL AID

Both the New Zealand and Ontario guardianship systems recognize the importance of legal representation. In New Zealand, representation is mandated, a pool of experienced counsel is maintained and the necessary funding is made available through a legislative grant. In Ontario, legal representation is not mandated, but the PGT may be directed to arrange for legal representation; a pool of experienced counsel has been trained with respect to proceedings before the Consent and Capacity Board; and, funding is liberally made available through legal aid certificates.

Modern guardianship legislation should be accompanied by a system of accessible legal representation for adults facing incapacity proceedings, either through a Court appointment system or through a legal aid model.

Currently in BC, legal aid has been restricted to minimal provision levels. At present, legal aid is primarily available only in criminal matters, and then only if the charge carries with it the likelihood of personal liberty deprivations as a result of incarceration. Criminal legal representation may also be provided to financially eligible applicants even if they do not face imprisonment if convicted, but they have a mental or emotional disability that prevents them from defending themselves (i.e. they cannot understand the nature or possible consequences of the proceeding, or they are unable to communicate effectively with counsel or the Court). Legal aid for civil matters in British Columbia does not substan-

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tively exist beyond a restricted number of family matters in which violence is a likelihood.<sup>175</sup>

The right of legal representation for the adult facing a guardianship application should not be a contentious issue. A determination of incapability strips the adult of fundamental rights and freedoms. As Gordon states:

there is no doubt that the legal and social relationship known as ‘guardianship’ is an extreme form of interference with the person. It involves a loss of some of the powers of adulthood and must, therefore, be viewed and treated as a serious deprivation of fundamental rights and freedoms.<sup>176</sup>

Section 7 of the *Charter* guarantees the right to life, liberty and security of the person. Yet an adult subject to a guardianship application may lose the right to make end-of-life decisions, to choose where they will live, and to choose whether or not they are hospitalized, and whether or not they will consent to medical treatments. These decisions are placed in the hands of the committee of the person. A number of compelling arguments can be made for the provision of legal aid in these circumstances.

First, the failure to provide legal aid where such fundamental rights are at stake may be an infringement of the principles of fundamental justice. In *New Brunswick (Minister of Health and Community Services) v. G.(J.)[J.G.]*,<sup>177</sup> the Supreme Court of Canada concluded that the failure to provide a parent with legal aid in custody proceedings infringed principles of fundamental justice. The Court held that, while a blanket right to state-funded counsel does not exist, a limited right to state-funded counsel arises under section 7 of the *Charter* where the seriousness of the interests at stake, the complexity of the proceedings and the capacities of the parent are such that a fair hearing would not be possible without legal representation.<sup>178</sup> The Court further held that the policy objective of controlling legal aid expenditures was insufficient to justify invoking section 1 of the *Charter*, stating:

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175. Currently, the rules governing civil legal aid provide that legal aid will only be given in certain family law matters involving 1) victims of domestic violence, or those at risk of violence, who need a physical restraining order or other legal assistance to protect their safety, 2) a child or children who are at risk of violence and need a supervised access order or need a restraining order to protect them, 3) a parent who needs a change to a current custody or access order to ensure their or their children’s safety, or need a non-removal order to prevent the other parent from permanently removing the children to another location where this is a real risk.

176. Gordon, *supra* note 15 at 6-38.

177. [1999] 3 S.C.R. 46, S.C.J. No. 47 [G.(J.)[J.G.]

178. G.(J.)[J.G.], *supra* note 177 at ¶99.

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First, the rights protected by s. 7 – life, liberty, and security of the person – are very significant and cannot ordinarily be overridden by competing social interests. Second, rarely will a violation of the principles of fundamental justice, specifically the right to a fair hearing, be upheld as a reasonable limit demonstrably justified in a free and democratic society.<sup>179</sup>

A guardianship application engages the same serious interests, and may involve complex medical testimony. The capacity of the subject adult has already been placed in question by the very nature of the proceedings. Hence, legal representation is essential to ensure that the adult is able to present his or her case effectively. Otherwise, the presumption of capacity is meaningless.

Second, under existing legal aid principles, an analogy can be drawn between the serious effects of incarceration and those of guardianship. The triggering event of an application to Court for an order of committeehip under the PPA places the allegedly incapable adult at a risk similar to, if not greater than, the risk a person faces if charged with an offence carrying the likelihood of incarceration. Certainly, it directly limits the affected adult's right to choose where they will live, and the result can be directly analogous to incarceration or house arrest. A finding of incapability unquestionably restricts the affected adult's livelihood, another enumerated ground for legal aid coverage. Additionally, legal aid already provides legal representation for persons under a mental disability, even where the risk of incarceration is not present. Thus, the circumstances that form the basis for legal aid coverage in criminal cases are clearly analogous to those faced by an adult who is the subject of a guardianship application.

Finally, a strong social policy argument can be made in favour of providing legal aid in guardianship proceedings. Governmental decisions to provide legal aid in particular areas usually entail a social policy feature. Obviously, the decision to grant legal aid in family matters in which there is domestic violence and/or a risk to the safety of children reflects important social values. An equally compelling social policy argument can be made in the context of guardianship, where legal aid may be critical to protect older adults who experience abuse and neglect. An application for a declaration of incapability is not always brought for unselfish reasons, or to best help the adult in question. In some cases they may be brought for the purpose of depriving predominately older and vulnerable adults of their property.

Indeed, financial abuse of vulnerable or older adults is dramatically on the rise. The BC Coalition to Eliminate Abuse of Seniors estimates that approximately 1 in 12 seniors currently experience financial abuse.<sup>180</sup> Considering the demographic reality, these numbers

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179. *Ibid.* at ¶107.

180. BC Coalition to Eliminate the Abuse of Seniors, "Frequently Asked Questions About Abuse of Sen-

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will rise dramatically. BC's PGT estimates that over 60% of its investigations involving adults aged 60 and over involve allegations of financial abuse.<sup>181</sup> The opportunity for one person to gain legal control over another's personal or financial affairs opens enormous potential for abuse. The PGT notes the irony that as adults have increasingly used Representation Agreements and/or Enduring Powers of Attorney, the rate of financial abuse has also risen. Unscrupulous people can benefit through increased legalized control of another adult. Ageism, paternalism and a sense of entitlement are all potential motivating factors for financial or physical abuse, and must be seriously considered in any guardianship application. A decision to make legal aid available in the context of guardianship proceedings sends a strong message that guardianship proceedings are a serious matter, and that redressing the abuse and neglect of vulnerable adults is an important social policy concern.

In short, legal representation must be both available and accessible to adults facing guardianship proceedings in order to ensure procedural fairness and the protection of section 7 liberty rights. Currently in BC, legal representation is neither mandated, nor even mentioned, in the PPA, and civil legal aid is not made available to persons who are the subject of a Court hearing into their capacity. Bill 32 is also silent on the subject of legal representation, and no proposed changes to legal aid policy have accompanied the introduction of the proposed legislation. Yet a strong case can be made that legal aid must be made available to these adults, in order to avoid offending the principles of procedural fairness.

#### 4. PRE-HEARING CONFERENCES

In New Zealand, a pre-hearing conference is available at the request of any party, and may result in the resolution of matters without litigation. BC could establish protocols for judicial conferences, in which Judges can informally hear from parties, review documents, make orders by consent, and facilitate or direct outcomes. Although Bill 32 provides for mediation in respect of certain matters, including whether or not an adult requires a guardian, the efficacy and even the constitutionality of these provisions remains quite unclear.

#### 5. REVIEW BOARD

In Ontario, an expert board has been created to review findings of incapacity in a variety of contexts. Procedures such as rules of evidence are somewhat more relaxed than in a formal Court setting, but important safeguards of procedural fairness are in place. BC should consider creating an informal, standing capacity assessment review system. Such

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iors" (2005) online: CEAS <<http://www.bcceas.ca/about.shtml>>.

181. "Issues and Responses Relating to Financial Abuse of Seniors: Observations of the PGT" (Vancouver: Public Guardian and Trustee of British Columbia, 8 November 2005) at 1.

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an informal resolution system might hear appeals of capacity assessments, guardianships, or both.

### **C. The PGT Discussion Paper and Bill 32**

The recommendations in the PGT Discussion Paper embody many of the key components of modern adult guardianship systems in New Zealand and Ontario.

The PGT recognized the reality that many of these reforms will entail costs that will affect private individuals, as well as health care providers, the PGT's office, government and the Courts. Perhaps for that reason, the PGT Discussion Paper does not consider the issue of legal representation and legal aid for affected adults. However, the issue of accessible legal representation is fundamental to any scheme that incorporates *Charter* values and guarantees of fundamental procedural fairness. Indeed, as we have suggested, there may be a constitutional obligation to provide legal aid in respect of some guardianship applications, particularly those in which global guardianship is sought.

### **D. Strong Public and Professional Education**

The media has increasingly focused on guardianship and substitute decision-making issues, and it is clear that the public is alive to the challenges that face an aging population. It is essential that British Columbians understand the basic concepts of voluntary advance planning (such as Enduring Powers of Attorney for financial matters and, currently, Representation Agreements for personal care decisions) as well as the process and consequences of a finding of incapability in the absence of voluntary advance planning. This remains true whether or not Bill 32 is reintroduced in its original or substantially similar form. The government, the PGT, and community organizations have important roles to play in this regard.

Ongoing professional education must also be available to legal professionals, doctors, nurses, occupational therapists and others, who are required to assess an adult's capability, and to make decisions with respect to the existence and applicability of the myriad personal planning documents currently available and those that will become available if new legislation is passed.

### **E. Summary of 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.

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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.

### VIII. CONCLUSION

BC continues to lag behind many jurisdictions, both within Canada and beyond, with respect to guardianship law reform. For example, New Zealand, Australia, Japan, some American states and some European countries have enacted modern adult guardianship regimes.<sup>182</sup> In those jurisdictions that have enacted reforms, the measures available to intervene when an adult requires assistance are more nuanced and layered than in our current, blunt system of committee-ship. The principle of "least restrictive and least intrusive intervention" is a recognized safeguard for the adult.

Worldwide, old, protective systems have been replaced, and it is time that BC follow suit. The common goal of reforms has been to support and emphasize the over-riding principle of the autonomy of the person. Modern adult guardianship theory is grounded upon respect for dignity and the autonomy of the person, in keeping with section 7 *Charter* rights to life, liberty and security of the person. It focuses on providing assistance on a needs basis, with a graduated scheme of intervention that incorporates strong principles of pro-

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182. Canada has a breadth of "guardianship" legislation. For a more complete review, see Gordon, *supra* note 15.

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cedural fairness. The affected adult can then retain, to the greatest extent possible, his or her individual rights of autonomy and self-determination. The Court should make a blanket determination of incapability only when it is considered absolutely necessary, and even then, such a serious deprivation of liberty rights should be made cautiously. As Madam Justice Wilson observed,

...an aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty.<sup>183</sup>

Legislation cannot simply be transplanted from one jurisdiction to another. However, both Ontario and New Zealand have experienced notable successes with their adult guardianship reforms, utilizing contextual, pragmatic and rights-based approaches. Legislators can learn from these different models, and should consider how they might contribute to the debate over personal planning instruments in general, and to an informed analysis of proposed guardianship reforms for BC in particular.

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183. *R. v. Morgentaler*, [1988] 1 S.C.R. 30, [1988] S.C.J. No. 1, at 230.

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