



BRITISH COLUMBIA
LAW INSTITUTE

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1822 East Mall, University of British Columbia
Vancouver, British Columbia V6T 1Z1
Voice: (604) 822 0142 Fax: (604) 822 0144 E-mail: bcli@bcli.org
Website: www.bcli.org

HEALTH CARE CONSENT AND CAPACITY ASSESSMENT TRIBUNALS PROJECT – SEEKING A MODEL FOR BRITISH COLUMBIA

PROJECT BACKGROUNDER

Overview

The right to make decisions about one's health, living arrangements, and association with others goes to the essence of personal independence and quality of life. The importance of this right is reflected in the fact that it is protected by the guarantee of life, liberty, and security of the person under section 7 of the *Canadian Charter of Rights and Freedoms*, in addition to being reflected in ordinary enactments like the *Health Care (Consent) and Care Facility (Admission) Act*. It is also recognized as a human right by the *UN Convention on the Rights of Persons with Disabilities*, which Canada ratified in 2010.

If the rights these domestic laws and international conventions ostensibly protect are to have practical meaning, findings of mental incapability and decisions made on behalf of an individual who is the subject of those findings must be open to review by an impartial, independent decision-maker, and legal systems must provide an accessible mechanism for this.

At the present time in British Columbia, a challenge to an assessment of mental incapability to consent to health care, or to a decision about health care made on behalf of a person considered incapable of giving consent, normally requires a court application. The same is true with respect to decisions about admission to a hospital or other care facility to receive treatment and/or personal care. Provisions on care facility admission and protocols for mental capacity assessments that recently came into force in British Columbia have not altered this. The Supreme Court of British Columbia exercises jurisdiction over these matters pursuant to specific enactments, or the historic *parens patriae* powers of superior courts with respect to minors and persons found to be mentally incapable of managing their own affairs.

Reliance on court processes to deal with matters of mental capability assessment in connection with health care and care facility admission brings to the fore issues of accessibility, timeliness, and cost, and raises the question whether disputes in these areas might be better handled by a specialized administrative tribunal. Some of the reasons are:

- *Delay* – Decisions regarding health care and care facility admission must often be made on an urgent basis. The court system and court calendars are notoriously overcrowded, and hearing dates may not be obtainable within a feasible timeframe. By contrast, a specialized tribunal can be designed to hear and decide a matter within a timeframe specified in its governing legislation.
- *Privacy* – Court procedures are generally conducted in public, and most court documents are available for public inspection. Much of the evidence in matters of mental capacity, guardianship, and health care, however, consists of highly private and personal information that people do not want to have revealed to the world at large. The public nature of court applications can make vulnerable individuals and those concerned with their care or well-being reluctant to seek a fair and proper resolution of a dispute. A much greater level of privacy is possible in tribunal proceedings.
- *Cost* – The cost of pursuing court remedies, including the cost of legal representation, court fees, and potential liability for the costs of an opponent, is generally acknowledged to be a barrier to access to justice for people of ordinary means in many situations. It is an especially daunting one for those whose financial affairs may be under the control of someone else, or whose impecuniosity may be partly related to a mental or physical disability. Others legitimately seeking review of a health care consent or care facility admission matter, such as temporary substitute decision-makers who have been improperly passed over, also face cost barriers. Legal aid is not available for most matters connected with capacity assessment, health care and care facility admission.
- *General accessibility* – The formality of court procedure is such that it is impractical to expect persons who may have some cognitive impairment to pursue court remedies without legal representation.
- *Expertise* – The regular civil courts are generalist out of necessity, while a tribunal can be composed of decision-makers with expertise in mental capacity issues.

A recent Canadian Centre for Elder Law report, *Conversations About Care: The Law and Practice of Health Care Consent for People Living with Dementia in British Columbia*, identified a need for a more readily accessible and expeditious mechanism in British Columbia to deal with challenges to incapability findings and disputes surrounding substitute decision making in health care.

British Columbia had a Health Care and Care Facility Review Board between 2000 and early 2004, established under Part 4 of the *Health Care (Consent) and Care Facility (Admission) Act*. The legislation called for a three-member panel to hear applications within seven days and render decisions within 72 hours of a hearing. The panels consisted of a health care provider, a member of the Law Society, and a person who was neither of these. Only eight hearings took place before the Board was abolished. The low level of activity was given as the chief reason for abolition of the Board, but in fact most of the provisions relating to its jurisdiction

were never brought into force. As a result, the mandate the Board actually exercised during its brief existence was extremely narrow.

Capacity assessment and health care consent tribunals operate in two Canadian jurisdictions, namely Yukon and Ontario. The Yukon Capacity and Consent Board is empowered to review decisions regarding capacity to consent to health care or care facility admission, the selection of a substitute decision-maker by a health care provider, and decisions of substitute decision-makers concerning major health care and admission to a care facility. It also discharges a function similar to that performed by the Mental Health Review Board established under the *Mental Health Act* (BC) with respect to reviewing the continuation of involuntary detention in a mental health institution.

The Ontario Consent and Capacity Board has a broader jurisdiction conferred by a number of enactments. In addition to dealing with challenges to substitute decision-making in health care and capacity assessments relating to health care consent, it is empowered to review assessments of incapacity to manage property for the purpose of determining whether individuals require statutory guardianship. It also hears applications for review of the status of persons detained involuntarily in mental health institutions or who are the subject of community treatment orders under Ontario's *Mental Health Act*.

Various other non-court models for review of mental capacity and health care consent decisions exist around the world. In Australia, specialized guardianship tribunals play a prominent role. While the superior courts have concurrent jurisdiction, the tribunals hear the vast majority of review applications. England and Wales, by contrast, have a specialist court to deal with challenges to capacity determinations, health care decision-making, and accommodation of persons with disabilities.

The recent CCEL report *Conversations About Care* contains a recommendation for the re-introduction of an independent, non-court review mechanism in British Columbia to deal with challenges to

- Findings of incapability to consent to health care treatment;
- Choice of temporary substitute decision makers;
- Care facility admission decisions; and
- Decisions made by substitute decision makers with respect to the person's health care, including the use of restraints.

Conversations About Care also urges that "robust research and consultation to determine the most appropriate and effective mechanism" be undertaken. The Health Care Consent and Capacity Assessment Tribunals Project follows upon that recommendation.

Objectives of Project

The objectives of the Health Care Consent and Capacity Assessment Tribunals Project are to:

- (a) carry out consultation and comparative research on health care, guardianship, and capacity tribunals, and
- (b) publish a study paper embodying the research and findings,

with a view to laying an informational foundation for consideration by government policy-makers and legislators of the merits of re-introducing a review tribunal in British Columbia.

Supporter

Financial support for this project was generously provided by the Law Foundation of British Columbia.

Timeline

The project began in September 2019 and is scheduled for completion in March 2021.

About BCLI / CCEL

BCLI was incorporated in 1997 as an independent, not-for-profit society dedicated to modernization and improvement of the law. The Canadian Centre for Elder Law (CCEL) was formed in 2003 as a division of BCLI. The mandate of CCEL includes research, law reform, and outreach relating to legal issues of concern to older adults.

Contact

Greg Blue, Q.C.
Senior Staff Lawyer
British Columbia Law Institute
1822 East Mall
Vancouver, BC V6T 1Z1
604-827-5337 (direct)
gblue@bcli.org