

PROJECT SELECTION CRITERIA FORM

PROJECT SUBJECT: Substitute Health and Personal Care Decision-making in Canada

For Consideration: ULCC August 2009

Project Summary

This is a proposal by the British Columbia Law Institute (BCLI) to the Uniform Law Conference of Canada (ULCC) to consider a two-part law reform project on **Substitute Health and Personal Care Decision-making**.

The proposed project includes 2 Phases:

1. A Phase 1 'landscaping' of current legislation and areas of possible harmonization for health care substitute decision-making in Canada
2. A Phase 2 development of uniform or standardized processes, forms or legislation based on the findings of Phase 1.

Phase 1:

This project phase would include a 'landscape' review of all provincial and territorial health and personal care substitute decision-making legislation. A matrix would be developed to allow for clear inter-jurisdictional comparison of key legislative elements. Areas of success and challenge will be identified, weighed and analyzed. Some areas of exploration for uniformity or standardization might include: default temporary substitute decision-makers, emergency medical responses, language commonly found in health and personal care directives, formal validity of documents, and inter-jurisdictional recognition etc. Based on these findings, the Phase 1 report will make recommendations for Phase 2 of this project.

Phase 2:

Recommendations in Phase 1 will be presented to ULCC for approval of Phase 2. Some Phase 2 activities may include: a harmonization of default temporary substitute decision-makers for health and personal care decisions, a standardized document which would be valid for discrete areas of harmonization for health and personal care decisions across Canada, an easily understood

process and mechanism for inter-jurisdictional recognition of substitute health and personal care decision-making documents across Canada (in a non-standardized format), etc.

Background

The Canadian population is increasingly mobile and interested in understanding and using systems for health and personal care substitute decision-making. This is particularly relevant to the dramatically aging population, but applies to all adults Canada equally.

In the last 15 years, the laws regarding health and personal care substitute decision-making have significantly developed across Canada. These laws have developed independently and with some different approaches, terminology and formal validity requirements. The result is a system ripe for harmonization:

- Canadians are increasingly interested in creating advance care plans, which include creation of documents and better understandings of default systems and protocols.
- Canadians are currently inhibited from making substitute health and personal care documents as such documents are highly jurisdictionally bound and not broadly understood.

A harmonization of substitute health and personal care systems will benefit individual Canadians who wish to make choices regarding future incapacity. In the current absence of harmonization, individuals are often left to commence costly and lengthy guardianship proceedings or to negotiate the systems themselves.

Health care systems will also benefit by a better understanding of improved laws, rights, protocols of substitute health and personal care systems:

- Significant evidence suggests that health care providers have little understanding of the laws of health and personal care substitute decision-making in their own jurisdiction and across Canada.
- Health care providers have increasingly called for some degree of harmonization across the provinces and territories in recent years.

Pursuant to the 1992 proceedings of ULCC, the *Advance Directives in Health Care (Formal Validity and Recognition of Advance Health Care Directives)* was created. It appears that this Draft Act was never adopted as it was overtaken by significant new development in the provinces and territories shortly thereafter. Indeed most of the legislation in this area across Canada has been developed in

the past 15 years. Again, this is a key indicator that the time is now right to move forward on harmonization of laws and protocols in this area.

This lack has significant impact. Currently, in order to have any predictability or to avoid lengthy and confusing legal challenges, travel to, or partial residence, in another Canadian jurisdiction requires, in practice, the creation of new sets of 'local' provincial documents. This requirement is time consuming, costly, inefficient and rarely done or known by the average Canadian. Indeed, many legal, financial and health care professionals are stymied by this current situation.

In the case where no health or personal care planning documents have been created

a temporary substitute decision-maker is needed, Canadian jurisdictions have a high degree of consistency, although not uniformity, about the existence or 'ranking' of these default decision-makers.

In Phase 1 this project will explore whether Canadians would benefit from a 'default' list of temporary health and personal care decision-makers which was predictable, uniform and well-known. This project will consider issues of reliability and efficiencies both for the average Canadian and for industries related to health and personal care decision-making, such as acute and general health care providers, emergency responders, lawyers, notaries, financial professionals, caregivers.

After this foundational research is conducted, this project can revisit options for harmonization or uniformity of laws or planning documents in Phase 2.

BCLI proposes that ULCC undertake the first of a potential 2 Phase project with the goal of creating a useful and practical method of inter-jurisdictional recognition of health and personal care substitute decision-making systems.

BCLI would be pleased to be involved in this project.

Appropriate Nature of the Proposed Project

The remainder of this document discusses the proposed project in relation to the Project Selection Criteria which have been provided by the ULCC.

1. Uniform legislation is desirable

1.1 Fairly widespread agreement that uniform legislation in this subject area is desirable, by industry as well as government

The industries involved with substitute decision-making are primarily the health and personal care industries as well as the legal, notarial, financial professions.

Commentaries by various members of the health care industry and the various advisers indicate that there are significant discrepancies in the knowledge and understanding of health care substitute decision-making schemes.

This ranges from failure to understand rules in the relevant jurisdiction, to failure to appreciate the differences of rules in various jurisdictions, to lack of clarity in the rules themselves. There is a significant need for harmonization or uniformity due to the increasing mobility of Canada's population.

Industry leaders recognize the need for the reasons set out above and consistent calls are being made within the related professions for harmonization or uniformity of law in this area.

There has been significant discussion and recognition by government of the challenges faced by Canadians regarding health and personal care substitute decision-making. In April 2009, the Canadian Senate released its Special Senate Committee Report on Aging, entitled 'Seizing the Opportunity', which considered testimony on the need to harmonize health and personal care substitute decision-making in Canada. The report emphasizes the need for Canadians to have accessible and flexible advance planning documents across Canada. Additionally, the National Elder Law Section of the Canadian Bar Association has consistently identified this issue as a key priority for reform.

1.2 Jurisprudence can be better developed by the courts of a number of provinces

The area of health and personal care substitute decision-making is not a good area for judicial intervention. Patients, substitute decision makers and their advisers and health care supporters require clear, understandable rules which can be implemented immediately in the vast majority of cases. Resort to the courts is not practical in most cases as most cases are urgent crisis-based decisions.

1.3 The subject matter and legal and policy issues are the same in every jurisdiction

The need for a useful, accessible, transparent and effective method of engaging in advance care planning across Canada is pervasive.

Substitute decision-making in health and personal care are required equally in every jurisdiction. Different jurisdictions have adopted different legal and policy approaches to the issue and in some cases, the issues

have not been adequately addressed. For this reason, a review and comparison is needed to bring awareness of the problems for Canadians.

2. Uniform legislation elsewhere

2.1 High degree of compatibility with American legislation would be desirable

The American Bar Association Commission on Law and Aging has done significant work on harmonization of advance health and personal care decisions. The American Uniform Law Commission has committees on Durable Powers of Attorney, Mental Health Advance Directives and a Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act which are all relevant in some degree to this project and would benefit in the later creation of a bi-lateral approach to advance planning documents.

There is significant need for the Canadian and American health and personal care substitute decision-making schemes to work well together, in particular view of the high degree of mobility of 'Snowbirds', travelers, workers and joint citizens.

2.2 There is a model law or international work that can be adopted

There has been a significant amount of work in the American Uniform Law Commission, which can contribute usefully to this project. Additionally, work done of inter-jurisdictional recognition of Adult Guardianship orders can also play a role in assisting this project's development. The Council of Europe has recently released its Draft Recommendation on Principles Concerning Continuing Powers of Attorney and Advance Directives for Incapacity, which directly relate to this issue.

http://www.coe.int/t/e/legal_affairs/legal_co-operation/steering_committees/cdcj/Documents/2009/CJ-FA%202009_%202%20E%2023%20April%20clean%20version.pdf

Australia is currently in an analogous situation to Canada, in its need for health and personal care substitute decision-making legislation which can be used across jurisdictions. Efforts are underway in Australia to move this issue forward including funding by various Public Trustees and government discussions.

3. Industry operates beyond provincial boundaries

3.1 Business transcends provincial boundaries and the legal system should provide similar laws and procedures across the country to accommodate it, to reduce the administrative burden for business.

Health and personal care decisions are needed equally across Canada. Each province has an analogous system for health and personal care delivery of services. Industry would be better served by harmonization.

The industry and advisers which serve patients and substitute decision-makers provide the services both within particular provincial and territorial borders and beyond, to the extent that clients and substitute decision-makers travel beyond a specific provincial or territorial border.

3.2 Companies use the same technology on both sides of the border

As above. (Note: specific technologies are not at issue in this proposed project.)

4. No one else is undertaking this work

4.1 Undertaking a project would not duplicate the work of another body that is attempting to achieve uniformity in this area

Despite repeated calls for the need to do this analysis and harmonized work, to our knowledge, no other legal research or law reform body is undertaking a similar project.

5. Conference has been requested to undertake the project

5.1 Referral from Ministers or Deputy Ministers

It is premature to have a referral from Ministers or Deputy Ministers to undertake the project. Phase 1 should be completed and circulated to governments and the relevant industry and advisers for comments and views. The feedback will inform ULCC of the need for Phase 2.

6. Current issue

6.1 Provinces are undertaking work in the area

Provinces and territories have created substitute decision-making schemes for health and personal care in their own jurisdictions.

6.2 The need for reform is apparent to government and other interested groups,

As noted above, there is significant call for increased harmonization in this area of law.

6.3 Demand for reform

Strong evidence exists at the national, provincial, municipal, non-governmental organization, health care advocacy and media levels on the consistent desire for some form of landscaping and harmonization.

6.4 Widespread desire for a modern Act

Phase 1 will determine this.

6.5 Great amount of reform activity

Laws in health and personal care substitute decision-making have significantly developed in Canada in the past 15 years. This has been an active area of reform activity in the various Canadian and other international jurisdictions (USA, Australia, NZ, UK etc.).

6.6 Growing interest in reform in this area.

As above.

7. Likelihood of adoption:

7.1 The state of the law is very non-uniform, although those jurisdictions that have enacted reformed legislation have addressed many issues in a similar way

Yes.

7.2 Adoption of a uniform Act could encourage activity in those jurisdictions that have taken no steps to reform the law in this area

Yes. For example, New Brunswick currently has a Discussion Paper for the Standing Committee on Law Amendments, September 2008, which reviews New Brunswick's desire to create laws of health and personal care substitute decision-making. Alberta has legislation on health and personal care substitute decision-making, but this scheme does not currently include a 'default' list of substitute decision-makers. This project may assist these jurisdictions and others to more fully explore their systems and to encourage activity.

8. Past consideration by Conference:

8.1 There is an existing Uniform Act that needs to be updated.

Pursuant to the 1992 proceedings of ULCC, the *Advance Directives in Health Care (Formal Validity and Recognition of Advance Health Care Directives)* was created but never adopted. It was a limited approach Act.

9. Defined questions of policy to be considered by Conference:

9.1 The policy issues for the Conference are capable of definition

The policy issues for the Conference are capable of definition. The work of Phase 1 would include description of the policy approaches and issues.

9.2 The Conference has the ability to address the issue.

Yes. Many Canadian law reform agencies have been actively engaged in these issues in their own jurisdictions.