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# Elderlaw: relationships and relevance to the needs of Aboriginal elders

The paper focuses on four significant Elderlaw issues:

- Supportive housing
- Adult guardianship/substitute decision making
- Adult protection/abuse and neglect
- Wills and estates

## 1. Supportive housing

"Supportive housing" is a term used to describe a range of housing options designed to accommodate the needs of older adults. In British Columbia "supported living" refers to supportive housing for older adults who require a relatively low level of support services. "Assisted living" is a form of supportive housing intended for more frail individuals with greater care needs, but who do not require an institutional care setting such as a care facility. Supported and assisted living in British Columbia generally are regulated by provincial legislation (the *Community Care and Assisted Living Act*[1] and the *Residential Tenancy Act*[2]).

There appear to be no current initiatives to develop supportive housing for Aboriginal elders on reserve. The Aboriginal Housing Management Association, with responsibility for off-reserve housing for Aboriginal people in the province, has submitted a proposal to the Aboriginal Healing Foundation to develop supportive housing for Aboriginal elders. The development would provide a safe and supportive environment for traditional practice and ceremonies, providing elders with peace and the community with an irreplaceable resource and source of cultural renewal. The proposal is

[1] S.B.C. 2002, c. 75.
[2] S.B.C. 2002, c. 78.

compelling; perhaps similar development should be considered as an option for reserve communities.

## 2. Adult guardianship and substitute decision making

A representation agreement is a document in which an individual designates someone (a substitute decision maker) to make personal and health care decisions on the individual's behalf should he or she become incapable of making those decisions independently. A power of attorney is a document in which an individual designates a representative to deal with the individual's financial and legal affairs. Powers of attorney and representation agreements are governed by provincial legislation (the *Representation Agreement Act*[3] and the *Power of Attorney Act*[4]). There are no equivalent provisions in the *Indian Act*[5].

A substitute decision maker may be appointed by the court where an adult is deemed incapable. The currently applicable legislation in British Columbia is the *Patients Property Act*;[6] (Part 2 of the *Adult Guardianship Act*[7] has yet to be proclaimed, but it is intended to eventually replace the *Patients Property Act*.) The court may appoint a substitute decision maker to make personal and health care decisions on a person's behalf, and/or to make decisions regarding the person's property and legal affairs.

The *Indian Act* gives the Minister of Indian and Northern Affairs Canada authority regarding the property of "mentally incompetent Indians." Determination of capacity and personal guardianship fall under the provincial legislation.

## 3. Adult protection/abuse and neglect

The *Adult Guardianship Act* Part 3 allows for a "designated authority" to investigate potential situations of abuse or neglect. On receiving a complaint of abuse or neglect, the representative of the designated agency is to make contact and carry out an initial

[3] R.S.B.C. 1996, c. 405.

[4] R.S.B.C. 1996, c. 370.
[5] R.S. 1985, c.I-5.
[6] R.S.B.C. 1996, c. 349.
[7] R.S.B.C. 1996, c. 6.

assessment of the situation. Health authorities are empowered to act as designated authorities. If a determination of abuse or neglect (as defined in the Act) is made, the designated agency offers assistance and support to the person being neglected or abused. If that person refuses, an assessment of capacity may follow to determine if the individual is capable of refusing. If capable of making a choice, a person may choose to refuse assistance and remain within the situation.

British Columbia has opted not to develop a separate "ground-up" bureaucracy (the traditional child-welfare model) to provide assistance in this context, but instead to draw on and develop existing community support groups through a "community response network" model. This model brings together people in the community already involved in assisting vulnerable adults, or interested in doing so, and facilitates their working together. The designated agency, on a finding of abuse and neglect, would connect the vulnerable person with services provided by network members as well as the Public Guardian and Trustee if protection of property is an issue. The community-based approach to responding to abuse and neglect potentially avoids problems associated with distrust of authority and physical distance from service centres.

## 4. Wills and estates

Wills and estates are governed in British Columbia generally by the *Wills Act*[8] and by the *Wills Variation Act*.[9] The *Indian Act* governs wills and estates for those registered or entitled to be registered as Indians under the Act and ordinarily resident on reserve land.

There are important difference between the provincial wills legislation and the "wills and estates" provisions of the *Indian Act*:

- **Formalities**: the only formal requirement under the *Indian Act* is that a will be in writing. The *Wills Act* contains this requirement in addition to a number of other formal requirements which, if not met, will make the will void. There is

[8] R.S.B.C. 1996, c. 489, s. 4.
[9] R.S.B.C. 1996, c. 490.

a proposal currently being considered to alter the formalities requirements in the *Wills Act* to allow the court to recognize a will that would otherwise fail on formalities if it is satisfied that the will represents the true intention of the person who made it (the testator).

- **Wills variation**: the *Wills Variation Act* allows a spouse or child (including an adult independent child) to apply to have the will altered or varied if it does not adequately provide for him or her. There is no requirement that the child be in need. The *Indian Act* allows a wider range of persons to apply to vary the will ("anyone for whom the testator had responsibility"), but those persons are required to show that not being provided for causes hardship. If the will is successfully challenged on this basis under the *Indian Act*, it is void (i.e., there is no power to vary it).

- A person who is not entitled to reside on the reserve cannot inherit reserve land either under a will or as an heir if the testator dies without a will. (If there is no will, or where the will is found to be void, the *Indian Act* sets out a list of people who will inherit; the *Wills Act* also does this). If a person not entitled to reside on reserve land is left reserve land in a will or would otherwise stand to inherit, the Minister must sell the land to the highest bidder among people entitled to live on the reserve, and pay the proceeds to the person who would otherwise inherit. If no one is found to purchase the land, it goes to the band. The Minister may compensate the person who would otherwise inherit if permanent improvements to the land are made.

The *Wills Variation Act* was amended in 1999 to allow for variation of a will of a Nisga'a citizen that provides for the devolution of cultural property.