

NO LONGER YOUR DECISION:

BRITISH COLUMBIA'S PROCESS FOR
APPOINTING THE PUBLIC GUARDIAN AND TRUSTEE
TO MANAGE THE FINANCIAL AFFAIRS OF INCAPABLE ADULTS



ombudsperson
B.C.'s Independent Voice For Fairness

Public Report No. 49 | FEBRUARY 2013
to the Legislative Assembly of British Columbia

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FROM THE OMBUDSPERSON

This investigation and the resulting report and recommendations focus on a statute-based administrative process that is still regularly used in British Columbia to declare adults incapable of making their own financial and legal decisions and to transfer the authority for making those decisions and control of the adults' finances and property to the Public Guardian and Trustee. This statutory "certificate of incapability" process is authorized in the *Patients Property Act*. Today it remains an important component of the system of adult guardianship in British Columbia.

The process has been recognized for a number of years as being outdated and failing to meet the requirements of a fair and reasonable procedure. It has not changed significantly in the past 50 years. It reflects not only an older approach to the treatment of mental health issues but also a pre-*Charter of Rights and Freedoms* approach to respecting the procedural rights of individuals.

In our report and through our recommendations we have looked at what needs to be done to ensure that the current process is changed to acknowledge the inherent autonomy of an adult and fully respect his or her rights in a process that assesses whether that autonomy should be diminished or removed. We adopted this approach because for some time we have been waiting for the *Patients Property Act* to be replaced by newer and better legislation that has still not been proclaimed. Many of the recommendations could be addressed by promptly bringing into force some of the sections of the *Adult Guardianship and Planning Statutes Amendment Act* that have been awaiting proclamation since 2007.

Adult guardianship is an important protective system in our province. One of the enduring challenges that we face as a society is to recognize that individuals acting with good will and good intentions in difficult circumstances cannot replace statutory authorization or procedural fairness; they can only supplement them. Implementing the changes recommended in this report will not only help those adults and their families who face a certificate of incapability process, it will, I believe, help all those who in good faith administer the process.

I am pleased that the majority of the recommendations in this report have been accepted by the Public Guardian and Trustee, the health authorities, the Ministry of Health and the Ministry of Justice. The implementation of these recommendations by the Public Guardian and Trustee, the health authorities and the Ministry of Health will result in practical improvements to the current process. It is, however, the acceptance of 11 of the 14 recommendations for legislative change made to the Ministry of Justice and its commitment to implementing those changes by or before July 1, 2014 that allows me to be cautiously optimistic that what has been a very long wait for a modern, procedurally fair adult guardianship process may finally be coming towards an end. Our office will, of course, supplement that cautious optimism with ongoing monitoring of the implementation of the recommendations that have been accepted by all the authorities.



Kim S. Carter
Ombudsperson
Province of British Columbia





This investigation was initiated to examine the fairness of the process that results in the Public Guardian and Trustee being appointed to manage the financial affairs of adults for whom a certificate of incapability is issued by a health authority because they are determined to be incapable of making their own financial decisions. Concerns about the fairness of the process were raised with the Ombudsperson during the Ombudsperson's seniors' care investigation.

The adult guardianship process, of which certificates of incapability are a part, provides an important safety net for adults who become mentally incapable of making decisions on their own and who have not taken steps to plan in advance for another adult to act as their substitute decision-maker. It is what we as a society have identified as a protective and supportive mechanism to ensure vulnerable adults are not taken advantage of.

In British Columbia, adults can plan for a time when they might need help making decisions. This can be done through an enduring power of attorney, a representation agreement or an advance directive. Someone else, usually a family member, may also apply to the court for the authority to make decisions on the adult's behalf. Unfortunately, not everyone can or does plan in advance, and not everyone has someone willing to make decisions on their behalf. In these cases, the Public Guardian and Trustee can be appointed to manage an adult's financial affairs either by an order of the Supreme Court of British Columbia or by a certificate of incapability issued by a health authority. Both processes are governed by the *Patients Property Act* and are intended to assist and protect vulnerable adults who may be incapable and in need of support.

The certificate of incapability process provides a mechanism for adults to have a committee appointed if they have not planned in advance or do not have anyone in their life who is willing or able to act on their behalf.

The origins of the *Patients Property Act* are in the English *Lunacy Act* of 1890, which became part of the law of British Columbia in 1897. The British Columbia *Lunacy Act* was intended to provide for the care and committal of both the person and estate (financial affairs) of "lunatics." The *Lunacy Act* was repealed in 1962 and replaced with the *Patients' Estates Act*. The *Patients Property Act* that is in force in 2013 is to a large extent similar to the *Patients' Estates Act* of 1962.

The model for mental health care has changed dramatically since 1962. The large, centralized facilities that used to house the vast majority of mental health patients have been largely abandoned in favour of regional community-based care. Previously, certificates of incapability were mainly issued by the directors of psychiatric institutions to allow for the management of the financial or legal affairs of the institution's patients. In these situations, the person who signed the certificate was often the same person who was providing care to the patient. The provisions of the *Patients Property Act* made sense in this context – directors needed a way to manage the lives of the patients they were treating inside the institution outside the institution, and the certificate allowed for this. As a consequence of the closure of many of the beds in those types of psychiatric institutions, the use of certificates has expanded beyond hospitals and mental health facilities over the past few decades to those who live in residential care and to those who receive services and support in the community, including in their own homes. Quite simply, the world has changed but the certificate of incapability process has not.

There has been recognition of the need for change and effort to make this change happen. The *Patients Property Act* has been the subject of significant law reform efforts. The first major steps toward reform in British Columbia began more than 20 years ago in 1992. When law reform initiatives began in the early 1990s, one of the objectives was to replace the outdated *Patients Property Act* with a modern system for adult guardianship. Law reform was seen as necessary and long overdue, and the *Patients Property Act* was identified as vulnerable to a challenge under the *Charter of Rights and Freedoms* and as not providing adequate procedural safeguards.

Since 1992, despite these law reform efforts, the government, though it has enhanced the personal planning options available to British Columbians, has not modernized adult guardianship legislation.

The *Patients Property Act*

The *Patients Property Act* establishes mechanisms to appoint a guardian (a “committee”) to make decisions on behalf of the incapable adult. Under the Act, there are two different kinds of committee: a committee of estate and a committee of person. A “committee of estate” can make decisions on financial and legal matters. A “committee of person” is authorized to make health care and other personal decisions.

There are also two different processes for becoming a committee – a court process and an administrative process. The *Patients Property Act* establishes that a person can become a private or public committee of estate or committee of person by a court order, following a hearing deeming the adult incapable of managing his or her affairs. The Act also establishes that the director of a provincial mental health facility or psychiatric unit can issue a certificate of incapability resulting in the Public Guardian and Trustee (PGT) becoming the adult’s committee of estate.

Once appointed, a committee of estate has all the rights, privileges and powers regarding the estate of the adult as the adult had previously, including handling property, real estate and banking matters, entering into contracts, dealing with lawsuits, filing income tax returns and applying for pension benefits. The committee controls all of the adult’s money. The *Patients Property Act* requires the committee to exercise its powers for the benefit of the adult and the adult’s family.

The procedure for ending a committee’s authority depends on how the committee was created. If created by court order, the authority can be ended by applying to the court to be declared no longer incapable. If created by a certificate of incapability, the authority can be ended by the adult being declared capable through a certificate issued by a director or by court order, and by being discharged from a mental health facility or psychiatric unit. The court can also replace the PGT with a private committee and the PGT can restore a pre-existing power of attorney or appointed representative (both of which are suspended when a certificate of incapability is issued).

Certificate Process

The decision to issue a certificate of incapability is a discretionary decision made by directors of provincial mental health facilities or psychiatric units as defined in the *Mental Health Act* and the people to whom they delegate that authority. While the *Patients Property Act* establishes statutory procedures for court appointed committees, there are no such procedures that must be followed to issue certificates of incapability. In the absence of statutory or regulatory procedures, the Public Guardian and Trustee (PGT), in consultation with other stakeholders, created non-binding guidelines for those involved in the certificate process.¹ The guidelines were created by the PGT to promote consistent procedures throughout British Columbia.

Public Guardian and Trustee as Committee

When the Public Guardian and Trustee (PGT) is appointed as committee to manage an adult's affairs, the adult becomes its client even though the status is involuntary on the part of the adult. The adult's property is then held in trust by the PGT. The PGT handles an adult's financial affairs by managing the adult's assets and the money payable to him or her, and by paying the adult's bills and expenses. When it feels it is possible, the PGT will minimize its involvement in day-to-day decisions and allow adults limited access to their bank accounts.

The PGT charges its clients for expenses incurred in administration of their estate.

Investigative Process

The public authorities involved in this investigation were the Ministry of Health, the Ministry of Justice, the Public Guardian and Trustee of British Columbia, the Fraser Health, Interior Health, Northern Health, Provincial Health Services, Vancouver Coastal Health and Vancouver Island Health authorities.

Our investigation included a review of legislation and regulations, both in British Columbia and across Canada, as well as meetings with the staff of each of the public authorities involved. We obtained and reviewed extensive information provided by each of the authorities involved in the investigation. In each of the health authorities, Ombudsperson staff interviewed two directors who issue certificates of incapability and two staff who conduct incapability assessments.² In total, 22 health authority staff were interviewed. We also met with and obtained input from advocacy organizations, practitioners and academics. Ombudsperson staff randomly selected and reviewed 67 files provided by the Public Guardian and Trustee and the health authorities where a certificate of incapability was issued in 2008 and in 2010.³

¹ Public Guardian and Trustee of British Columbia, *Guidelines for Issuing a Certificate of Incapability Under the Patients Property Act*, October 2011, 3 <http://www.trustee.bc.ca/pdfs/STA/Guidelines_for_issuing_Cert_Incapability_Fall_2011_FINAL.pdf>.

² We interviewed one director and one assessor from the Provincial Health Services Authority (PHSA), as all certificates are issued by one director at the PHSA. The PHSA issues a relatively small number of certificates.

³ In total Ombudsperson staff reviewed 67 files. Of these, 57 include 5 files for each regional health authority from both 2008 and 2010 and 7 files from the Provincial Health Services Authority (the total number of certificates issued by the PHSA in 2008 and 2010). The other 10 files reviewed were files where the Public Guardian and Trustee was appointed committee of estate and the authority ended for a reason other than the adult's death.

In a 10-year period, between 2002 and 2011 inclusive, 4,077 certificates of incapability were issued in British Columbia

The Office of the Ombudsperson considered the fairness and reasonableness of the certificate of incapability process during each of the steps in the process. We also considered the existing legal framework and whether it provides for a fair and reasonable process.

Reports to the Public Guardian and Trustee

The first step in the certificate of incapability process is a report to the Public Guardian and Trustee that an adult is being abused or neglected, or that there are concerns about how the adult's affairs are being managed. Reports may be made by an adult's family, friends, financial institution or others who interact with the adult; however, the majority of reports come from staff in the health authorities.

When a report is received, the PGT Guidelines state that an investigation should occur if there is a concern that the adult is in need of a substitute decision-maker or if an existing substitute decision-maker needs to be replaced.

In 2011, the PGT received over 1,500 reports. In the past five years, it investigated 82 per cent of the reports it received. Forty-one per cent of those investigations resulted in a certificate of incapability.

Notice of Investigation

Neither the *Patients Property Act* nor the *Public Guardian and Trustee Act* include any requirements that an adult or his or her family members be notified of a PGT investigation into the adult's incapability. The PGT guidelines state that the PGT will inform the adult of the investigation unless doing so will put the adult at risk. The letter that the PGT sends to adults and family members says that it has received a report about the management of the adult's affairs and "will be assessing the situation to determine whether you need the services of our office to help you with the management of these affairs." The letter does not include information about the purpose, steps, potential outcome, costs and implications of the PGT's investigation. This is inadequate when a finding of financial incapability will result in the PGT assuming control of all the adult's financial and legal decisions. I found that the Public Guardian and Trustee does not provide adequate information to adults about an investigation of the adult's financial incapability.

(R1) I recommended that the Public Guardian and Trustee provide written notice to all adults who are the subject of an investigation, at the start of an investigation, that includes:

- the steps that will occur during the investigation,
- the possible outcomes and their significance and
- an explanation that an adult can seek legal advice or assistance.

The Public Guardian and Trustee has accepted this recommendation.

Public Guardian and Trustee Investigation

An investigation by the Public Guardian and Trustee (PGT) determines whether the PGT should pursue a certificate of incapability in order to become committee of estate for an incapable adult.

When conducting an investigation where there is no substitute decision-maker in place, the PGT inquires into the capability of the adult as well as the need for protection, considering whether financial loss has already occurred or is likely to occur.⁴ For example, the PGT may look into whether or not bills are being paid and whether appropriate expenditures are being made.

Protection of Assets in Urgent Cases

The *Public Guardian and Trustee Act* gives the PGT authority to take measures to protect an adult's income or assets, such as instructing a bank to freeze an adult's account when it believes an adult's financial affairs, business or assets are in immediate need of protection. Since the PGT does not have authority to manage an adult's financial affairs while these measures are in place, adults are left in financial limbo until the instructions are withdrawn or until the PGT or another party obtains authority to act for the adult.

Although the *Public Guardian and Trustee Act* states that any steps taken remain in effect for seven days or a shorter period, the PGT reissues the instructions when further authority, for example, a certificate of incapability, is being explored. This means the financial limbo can last two to six months or longer. In the files we reviewed, the instructions were kept in place for an average of 45 days.

To determine whether the PGT has authority to reissue instructions to protect the assets of adults in urgent cases beyond the seven days, we considered the clear wording of the legislation and the context within which the PGT operates. I found that the Public Guardian and Trustee does not have the authority to extend the period of seven days set out in section 19(3) of the *Public Guardian and Trustee Act*.

Even if the legislation was amended to extend the period or renewal options authorizing protective measures, there are still difficulties with relying on protective measures for the length of time that it may take to obtain a certificate of incapability. While protective measures are in place, the adult may be restricted from accessing his or her funds and the PGT can only direct funds to be used to protect or maintain health and safety. Authorizing the PGT to act as committee or property guardian for a temporary period would limit this impact.

Under Part 2 of the *Adult Guardianship Act*, which has not been brought into force, the PGT would be able to apply for a court order appointing the PGT as a temporary property guardian, if there is reason to believe the adult is incapable of making decisions about his or her financial affairs and an order is urgently needed to protect the adult's financial affairs from damage or loss. This court approved temporary guardianship would last for 90 days and allow the PGT to take most of the actions it would be able to take as a regular property guardian. It is unfortunate that these provisions, have not been brought into force. However, the resulting gap does not authorize the extension of the limited powers of section 19(3) of the *Public Guardian*

⁴ Public Guardian and Trustee of British Columbia, "Investigations, Assessment and Investigation Services," policy, September 2011, 6302.

and Trustee Act. If the legislature had intended to provide the PGT ongoing authority with such a profound impact on an adult's financial affairs, it would have used clear and explicit language.

(R2) I recommended that the Public Guardian and Trustee discontinue the practice of extending the period of seven days set out in section 19(3) of the *Public Guardian and Trustee Act*.

The Public Guardian and Trustee has indicated that it believes it does have statutory authority to extend the seven-day period set out in section 19(3) and has not accepted this recommendation.

(R3) I also recommended that the Ministry of Justice take steps to provide the Public Guardian and Trustee with access to a court process to apply to act as a temporary property guardian in urgent situations.

The Ministry of Justice has accepted this recommendation.

The Medical Assessment

The purpose of a medical assessment by a physician is to establish evidence for the basis of pursuing a certificate of incapability. Surprisingly, the *Patients Property Act* does not require that an assessment or opinion from a physician be obtained before a certificate of incapability is issued, nor does it establish any standards for such an assessment.

The PGT Guidelines recommend that the PGT arrange for a medical assessment, referred to by the PGT as a "physician preliminary opinion of incapability," as part of its investigation. In the files we reviewed, we found that the PGT typically arranged for a medical assessment. The *Patients Property Act* does not require that the physician knows the adult and has examined the adult recently. The Act also does not require physicians to follow practice guidelines or to complete a standard assessment report form. On 4 per cent of the files we reviewed, the medical assessment was conducted six months or more prior to the certificate of incapability being issued. On 14 per cent of the files, the medical assessment was conducted three to six months prior to the certificate. On 42 per cent of the files we reviewed, the physician conducting the assessment had known the adult for less than six months, including 9 per cent of files where the assessment was based on the physician's first meeting with the adult. Some files (12 per cent) did not indicate how long the physician knew the adult before completing the assessment. I found that a decision that an adult is incapable of managing his or her financial affairs is not legally required to be based on an assessment conducted by a physician.

We found inconsistencies in the thoroughness of the medical assessment reports we reviewed. There is no requirement for information to be provided to the adult before the assessment about the assessment process. Without minimum standards for medical assessments, there is a lack of certainty that a decision to issue a certificate of incapability will be based on current, accurate information about the adult's medical condition or that adults will be treated consistently.

When we reviewed the files, it became clear that physicians who are assessing an adult's incapability have varying involvement with the adult prior to conducting the assessment. This is concerning given the individual and the sometimes fluctuating nature of financial and legal capability.

(R4) I recommended that the Ministry of Justice take steps to require that all certificates of incapability are based on a current in-person assessment conducted by a physician.

(R5) I also recommended that the Ministry of Justice, in consultation with the Ministry of Health, include in regulation standards for conducting medical assessments as part of the certificate of incapability process.

The Ministry of Justice has accepted these recommendations.

Informing the Adult about the Medical Assessment

The medical assessment is used by the PGT to decide whether or not to pursue a certificate of incapability. It is also one of the pieces of information that health authority staff consider when deciding whether or not to issue a certificate of incapability. As a matter of fairness, it is important that the adult is informed that the PGT has requested a medical assessment and that the adult understands the purpose of the assessment and its possible implications. It is also important that an adult is notified in advance of the assessment because an adult can decide whether or not to participate.

I found that when the Public Guardian and Trustee is investigating an adult's incapability, it does not routinely inform the adult

- that it has requested a medical assessment
- what the purpose of the medical assessment is
- that the adult can refuse to be assessed
- that the adult can have a support person present
- how to obtain a copy of the medical assessment
- how to challenge the medical assessment or to request a reassessment

Although the assessment is requested for the purpose of the PGT investigation, the PGT leaves it to the physician to decide whether to and how to notify the adult about the assessment and what information to provide.

(R6) I recommended that when the Public Guardian and Trustee is investigating an adult's incapability, it inform the adult in writing that it has requested a medical assessment of the adult's incapability and

- the purpose of the medical assessment
- that the adult can refuse to be assessed
- that the adult can have a support person present
- how the adult can obtain a copy of the medical assessment, and
- how the adult can challenge the medical assessment or request a reassessment

The Public Guardian and Trustee has accepted this recommendation.

How the Medical Assessment Is Paid For

The PGT Guidelines state that if the PGT requests a medical assessment as part of its investigation, it will “coordinate” payment for the medical assessment and later recover the cost of the assessment from the adult if the PGT is appointed committee of the adult’s estate.⁵ The cost of the assessment usually ranges from \$50 to \$400 and, on rare occasions, may cost over \$1,000.⁶

The PGT does not inform the adult that the adult might be responsible for the cost of the medical assessment and it does not recover the cost of the assessment if the investigation does not result in a certificate of incapability, which occurs in nearly two thirds of its investigations.⁷

We considered the fairness of charging adults for the cost of the medical assessment if the PGT is appointed committee.⁸ Although an adult is presumed to be capable at the time the PGT requests the medical assessment, a fee is incurred for this assessment which can be recovered at a later date without the adult being made aware that he or she is incurring the fee and without the adult authorizing it. This is inconsistent with the legal presumption of capability.

While the Public Guardian and Trustee can receive monies spent in conducting investigations, I found that it was not fair and reasonable for the Public Guardian and Trustee to recover the cost of a medical assessment conducted during an investigation of an adult’s financial incapability from the adult’s estate after the Public Guardian and Trustee is appointed committee of the estate.

(R7) I recommended that the Public Guardian and Trustee seek authority and support from the provincial government to cover the costs of the medical assessment conducted during the investigation of financial incapability and stop recovering the costs from the adult’s estate after it becomes committee.

The Public Guardian and Trustee has accepted the first part of this recommendation but not the second part.

Health Authority Investigation

The Public Guardian and Trustee (PGT) Guidelines describe the health authority investigation as occurring after the PGT has completed its investigation; however, sometimes the health authority is involved earlier. The *Patients Property Act* does not set out a process to be followed by the health authorities in investigating an adult’s incapability.

⁵ Public Guardian and Trustee of British Columbia, *Guidelines for Issuing a Certificate of Incapability Under the Patients Property Act*, October 2011, 7 < http://www.trustee.bc.ca/pdfs/STA/Guidelines_for_issuing_Cert_Incapability_Fall_2011_FINAL.pdf>.

⁶ British Columbia Medical Association guidelines recommend that doctors charge approximately \$300 to complete the medical assessment form. British Columbia Medical Association, *Revised Fees For Uninsured Services Effective April 1, 2012*, 2 < https://www.bcma.org/files/Uninsured_Services1Apr2012.pdf>.

⁷ From 2007 to 2011, 41 per cent of the investigations conducted resulted in certificates of incapability being issued.

⁸ We did not consider the fairness of the practice of charging investigation fees to adults generally because PGT practice is to not charge an investigation fee for investigations of an adult’s financial incapability.

As a designated agency under the *Adult Guardianship Act*, a health authority may receive reports directly from concerned families, friends and others about suspected abuse and neglect, and investigate reports that an adult is abused or neglected.

In those cases, a health authority's involvement may include providing the PGT with collateral information, providing the medical assessment, reporting concerns to the PGT about a substitute decision-maker, investigating abuse or neglect reports or conducting a functional assessment in anticipation of a PGT request for a certificate.

A "functional assessment" is conducted or coordinated by the health authority and is separate from the medical assessment referred to in the previous section. A functional assessment involves examining the adult's ability to make financial decisions and carry out these decisions, as well as collecting other relevant information.

A decision to issue a certificate based solely on the medical assessment may reflect the adult's medical condition but not whether the adult is actually functioning capably on his or her own, or with the supports available to him or her. Both the medical and functional assessments play important roles in the process leading to the issuing of a certificate of incapability.

On 10 of the files we reviewed (18 per cent), there was no record of the health authority conducting a functional assessment. I found that the *Patients Property Act* does not require that a certificate of incapability be based on a functional assessment.

(R8) I recommended that the Ministry of Justice take steps to require that all certificates of incapability be based on both a medical and a functional assessment.

The Ministry of Justice has accepted this recommendation.

Staff Who Conduct Functional Assessments

There is no legally binding standard establishing who can conduct functional assessments, although we found that they are typically conducted by social workers, nurses, occupational therapists, psychologists, psychiatrists or doctors.

Health authorities estimated that staff who conduct functional assessments spend a small amount of their time performing this task compared to their other duties. Given the limited amount of time spent conducting assessments and the importance of the assessments, these staff should be properly trained and receive training on an ongoing basis. However, many of the staff we spoke to who conduct assessments said that they had not had training specific to functional assessments, and health authorities confirmed that they do not provide this training. I found that the health authorities do not consistently provide training to staff who conduct functional assessments.

(R9) I recommended that the Ministry of Health, in consultation with the health authorities, develop a provincial training program that must be completed by health authority staff before conducting functional assessments and ensure this training is provided on an ongoing basis.

The Ministry of Health has accepted this recommendation.

Before Conducting an Assessment

The *Patients Property Act* is silent on the process for conducting functional assessments, including whether an adult can have a support present during an assessment, and whether an adult can refuse to participate in an assessment. There are also no legislated requirements regarding notifying the adult of the assessment or providing information about the assessment before it is conducted. As a matter of fairness, an adult should be given timely notice of the process and the nature of the resulting decision and its possible implications. I found that the health authorities do not consistently provide adults with timely notice of and adequate information about functional assessments.

(R10) I recommended that the health authorities ensure that adults receive timely notice of and adequate information about functional assessments.

The information provided to adults should include

- the purpose of the assessment
- that the adult can refuse to participate in the assessment
- that the adult can have a support person present
- how the adult can obtain a copy of the assessment and
- how the adult can challenge the assessment or request a reassessment.

In exceptional circumstances, when the health authorities have concluded on reasonable grounds that providing notice would put an adult at risk, notice is not required.

The health authorities have accepted this recommendation.

(R11) I also recommended that the Ministry of Justice take steps to require in regulation that adults be provided with timely notice of and adequate information about functional assessments.

The Ministry of Justice has accepted this recommendation.

Assessment Process

The *Patients Property Act* does not include any requirements regarding functional assessments. While the PGT Guidelines provide some direction, the guidelines are not legally binding on health authorities. We were also told by some assessors that they were uncertain as to how they should be conducting incapability assessments and how they should be forming their opinions regarding incapability. In order to ensure consistency, minimum legally binding assessment standards should be established. I found that in the absence of legally binding minimum assessment standards health authority staff who conduct functional assessments follow different assessment practices resulting in inconsistent treatment for individual adults.

(R12) I recommended that the Ministry of Justice, in consultation with the Ministry of Health, include in regulation standards for conducting functional assessments as part of the certificate of incapability process.

The Ministry of Justice has accepted this recommendation.

After Conducting the Assessment

The health authority assessment is a key piece of information that is used by directors to decide whether a certificate of incapability will be issued. Given the possible implication of the assessment, it is important that an adult be able to obtain a copy of it. I found that the health authorities do not offer adults copies of their functional assessments. Only one health authority said that it provides copies of the assessment upon request.

(R13) I recommended that the health authorities offer adults copies of their functional assessments. If the adult wishes to receive a copy, any third-party information should be removed from the copy provided to the adult.

The health authorities have accepted this recommendation.

(R14) I also recommended that the Ministry of Justice take steps to require in regulation that adults are offered copies of their functional assessments.

The Ministry of Justice has accepted this recommendation.

Issuing a Certificate of Incapability

Certificates of incapability are issued by directors of provincial mental health facilities or psychiatric units and their delegates. Issuing a certificate is a legal decision that is usually based on medical and other information and evidence.

Health Authority Staff with Responsibility for Issuing Certificates

Given the significant impact issuing a certificate of incapability has, it is reasonable to expect that the person making this decision is well trained and sufficiently prepared for the task. However, none of the health authorities provide standard training to staff who issue certificates. I found that the Ministry of Health has not developed a training program for health authority staff who issue certificates of incapability.

Ensuring that training is required and provided is a province-wide responsibility, and it needs to occur in all of the health authorities. The Ministry of Health is in the best position to develop and implement this training.

(R15) I recommended that the Ministry of Health, in consultation with the health authorities, develop a provincial training program that must be completed by health authority staff before issuing certificates of incapability and ensure this training is provided on an ongoing basis.

The Ministry of Health has accepted this recommendation.

How Health Authority Staff Decide to Issue a Certificate

The *Patients Property Act* defines a patient as a person who is incapable of managing his or her affairs, but it does not define what it means for an adult to be incapable or establish any criteria or test for this determination. Neither the Public Guardian and Trustee (PGT) nor the health authorities have defined what incapable means.

The PGT Guidelines include a Director's Checklist for Issuing a Certificate of Incapability Under the *Patients Property Act* to provide some guidance to directors on what they should consider when issuing a certificate. Over half of the files we reviewed did not include a completed checklist.

It is difficult for a director to make an effective and fair decision about whether a person is incapable of managing his or her affairs when there are no clear criteria for what incapable really means. Without a test or definition, the director must rely on his or her own interpretation of what incapable means, and this can result in inconsistency as to how the term "incapable" is applied, and ultimately whether a certificate of incapability is issued. The result of not having clear criteria was demonstrated by the wide-ranging responses we received from directors about how they decide whether to issue a certificate of incapability. I found that the *Patients Property Act* does not define financial incapability or establish a test for determining when an adult is incapable of managing his or her finances.

(R16) I recommended that the Ministry of Justice take steps to establish a legally binding definition of financial incapability and a test for determining when an adult is incapable of managing his or her finances.

The Ministry of Justice has accepted this recommendation.

Notice of Intent to Issue a Certificate

A fundamental principle of administrative fairness is that a person has an opportunity to be heard before a decision that may adversely affect him or her is made. The *Patients Property Act* does not require a health authority to provide an adult with notice that it is intending to issue a certificate of incapability. The Act also does not require the health authority to provide the adult with an opportunity to respond before the certificate is issued.

The Public Guardian and Trustee's (PGT) Guidelines recommend that an adult and his or her family should be provided with appropriate notice from the health authority that the director intends to issue a certificate of incapability along with a summary of assessment. The guidelines indicate that the adult and his or her family should have 10 days to respond to the notice and provide any additional information to the director, though they do not specify how this notice should be sent or when the 10-day response period should begin.

Despite what the guidelines recommend, we found that many adults and their families did not receive notice before a certificate was issued or were not provided with 10 days to respond. Sixty per cent of the files we reviewed did not include a record that notice had been provided to the adult or a reason why no notice was provided. On 23 per cent of the files we reviewed, the adult was provided notice but given less than 10 days to respond. Eighty-two per cent of the files did not include a record that notice was provided to a family member. On nine per cent of files, the family member was provided less than 10 days to respond. This divergence between the recommended practice and the actual practice speaks to the shortcomings of having standards that are not mandatory or legally enforceable.

As mentioned above, the PGT Guidelines do not state how notice is to be provided. The stated policy of most health authorities is to send the notice letter by regular mail, and to provide 10 days from the date of the letter for the adult or family to respond. By the time the letter is received, the amount of time to respond could be much less than 10 days.

I found that there are no legally binding standards that require health authorities to:

- notify adults and families of the intent to issue a certificate of incapability
- confirm that adults and families have received the notice
- ensure that there is sufficient time for adults and families to respond to the notice

and health authority practices are inconsistent.

(R17) I recommended that when considering issuing a certificate of incapability, health authorities:

- notify adults and families of the intent to issue a certificate of incapability
- confirm that adults and families have received the notice
- ensure that there is sufficient time for adults and families to respond to the notice.

In exceptional circumstances, when the health authorities have concluded on reasonable grounds that providing notice would put an adult at risk, notice is not required.

The health authorities have accepted this recommendation.

(R18) I also recommended that the Ministry of Justice take steps to require in regulation that health authorities:

- notify adults and families of the intent to issue a certificate of incapability
- confirm that adults and families have received the notice and
- ensure that there is sufficient time for adults and families to respond to the notice.

The Ministry of Justice has accepted this recommendation.

Summary of Assessment

A fundamental principle of administrative fairness is that an adult should be provided with adequate and appropriate reasons for decisions that may affect him or her.

The *Patients Property Act* does not require a health authority to explain its reasons to an adult for deciding to issue a certificate of incapability. The Public Guardian and Trustee (PGT) Guidelines recommend that health authorities provide a summary of assessment to the adult and his or her family after the decision is made. Most of the health authorities believe they subscribe to this practice. We found, however, in only approximately 20 per cent of the files we reviewed that the summary of assessment had been provided to the adult.

The summaries of assessment we reviewed typically contained basic information such as the name of the adult and assessors, the date of assessments and the adult's diagnosis. Many of the summaries did not include enough information to explain why the certificate would be (or had been) issued. It would be difficult for the adult and his or her family member to challenge a certificate based on this information. I found that the health authorities do not adequately or consistently explain their reasons to the adult and his or her family for the decision to issue a certificate of incapability.

(R19) I recommended that the health authorities provide adults and families with adequate reasons in writing for the decision to issue a certificate of incapability.

The health authorities have accepted this recommendation.

(R20) I also recommended that the Ministry of Justice take steps to require that health authorities provide the adult and his or her family with adequate written reasons for the decision to issue a certificate of incapability.

The Ministry of Justice has accepted this recommendation.

Notification of a Certificate of Incapability

The Public Guardian and Trustee (PGT) Guidelines recommend that a copy of the certificate is to be provided to the adult. Despite this, most of the health authorities acknowledged that they do not provide a copy of the certificate to the adult or to his or her family. While the Fraser Health and Provincial Health Services Authority stated they provided a copy to the adult, there was no evidence of this practice on the files we reviewed for either health authority.

On 93 per cent of the files we reviewed, the health authorities did not inform the adult that they had issued a certificate of incapability. The PGT informs the adult that it is now responsible for assisting the adult with managing his or her financial and legal affairs. I found that the health authorities decide whether to issue a certificate of incapability, but they do not inform the adult and his or her family that a certificate has been issued and do not provide a copy of the certificate to the adult and his or her family once it has been issued.

(R21) I recommended that the health authorities inform adults and families of the decision to issue a certificate of incapability and provide them with a copy of the certificate.

The health authorities have accepted this recommendation.

(R22) I also recommended that the Ministry of Justice take steps to require that the health authority making the decision to issue a certificate of incapability is required to inform the adult and his or her family of its decision, and provide them with a copy of the certificate.

The Ministry of Justice has accepted this recommendation.

The notice that the PGT provides to the adult states that the PGT “has been given the legal responsibility to assist you with the management of your financial and legal affairs.” It may be sent with a document that explains what it means when the PGT is committee of estate. The letter, however, does not state that the PGT is now the adult’s committee of estate. I also found that the Public Guardian and Trustee does not provide clear notification to the adult and his or her family that it has been appointed committee of the adult’s estate.

(R23) I recommended that the Public Guardian and Trustee ensure that it provides clear written notice to the adult and his or her family that it has been appointed as committee of the adult’s estate and an explanation of what that means.

The Public Guardian and Trustee has accepted this recommendation.

Reassessment and Appeal

A decision that an adult is incapable of managing his or her finances is a significant decision that results in an adult losing the ability to manage his or her finances. Given the significance of the decision and the rights that are at stake, there should be a straightforward and accessible way to challenge it.

Information Provided to Adults

Though the decision to issue a certificate of incapability is made by a health authority director, the health authorities do not inform the adult of the decision. Only after it receives the certificate does the Public Guardian and Trustee (PGT) send the adult a document that explains briefly how committeeship may be terminated. The document does not describe the steps that an adult can take if he or she disagrees with the decision to issue a certificate of incapability. The PGT informed us that a person may also use its internal complaints process if he or she has a complaint. However, I found that the Public Guardian and Trustee does not inform adults about its internal complaint process when it becomes their committee of estate.

(R24) I recommended that the Public Guardian and Trustee inform adults about its internal complaint process when it becomes their committee of estate.

The Public Guardian and Trustee has accepted this recommendation.

Reassessment

The *Patients Property Act* states that a certificate of incapability can be reversed by a court or through a certificate of capability. In both cases, a reassessment of the adult may be required. Under the existing legislative framework, there is no provision that guarantees that the adult has access to a reassessment. At present, reassessment is at the discretion of the PGT and the health authorities. The PGT Guidelines suggest conducting a reassessment of an adult on the adult's request if six months have passed since the adult's assessment or reassessment, or if there is a change in his or her circumstances. If the adult is not successful in convincing the PGT or health authorities a new assessment is required, he or she may arrange for a reassessment privately, but the cost may have to be covered by a source other than the adult as his or her finances are controlled by the PGT.

Our interviews with health authority staff and our review of files where a reassessment had occurred revealed confusion about the appropriate procedure for conducting a reassessment. We also found that a clear process for determining when a reassessment will be approved by the PGT and the health authorities has not been established.

Having a clear process for reassessment to determine if guardianship is, or is still, necessary is consistent with the goal of having the least restrictive and least intrusive support in place. However, I found that the *Patients Property Act* does not require that an adult have access to a reassessment.

(R25) I recommended that the Ministry of Justice take steps to require that an adult has access to a reassessment on request before a certificate of incapability is issued and within a reasonable time frame after a certificate of incapability is issued.

The Ministry of Justice has not accepted this recommendation.

Appeal

The decision to issue a certificate of incapability results in a person losing control of his or her ability to make decisions about financial and legal matters. This is an important decision that affects an individual's autonomy and liberty.

Currently, people who wish to challenge a certificate of incapability have the following options available to them: seek a reassessment and a new decision from a health authority, seek judicial review or apply to the courts for a declaration of capability.

The *Patients Property Act* does not establish a mechanism that allows an adult to appeal a decision of financial incapability. As a matter of fairness, there should be an appropriate and accessible administrative appeal process for a decision that results in a person losing his or her right to make financial and legal decisions. I found that an adult who loses the ability to make his or her own financial and legal decisions as a result of an administrative decision to issue a certificate of incapability does not have access to an independent appeal of that decision.

Many administrative decisions in British Columbia are subject to an appeal or review by an independent tribunal. The decision that a person should no longer manage his or her financial and legal matters is certainly one significant enough to merit an appeal process. In both Yukon and Ontario, a legal and financial incapability decision can be appealed to an independent tribunal, which can confirm the original decision or substitute its own decision to declare an adult capable.

(R26) I recommended that the Ministry of Justice take steps to establish an appeal to a tribunal for an adult who wishes to dispute a decision that has found him or her incapable of managing his or her financial and legal affairs.

The Ministry of Justice has not accepted this recommendation.

Hiring a Lawyer after a Certificate is Issued

A committee of estate is an adult's litigation guardian, which means that the committee is responsible for deciding on behalf of the adult when to initiate legal action, when to retain legal counsel and how to instruct legal counsel. The *Patients Property Act* states that a person other than the committee of the adult's estate must not initiate a lawsuit on behalf of an incapable adult and that a lawsuit against an incapable adult must be brought against the adult's committee. An incapable adult can apply to court to appoint someone other than the PGT to act as the adult's litigation guardian.⁹

Although the PGT becomes the litigation guardian for adults when it is appointed committee of an adult's estate, the Ministry of Justice provided information supporting the view that an adult has a right to retain and instruct counsel in matters related to the determination of incapability.

An adult for whom a certificate of incapability has been issued should be informed that he or she can still retain and instruct counsel to challenge a certificate. Without being told otherwise, an adult may believe that hiring a lawyer to challenge a

⁹ *Supreme Court Family Rules*, B.C. Reg. 169/2009, s. 20–3(5), (11).

certificate of incapability in court is not an option available to him or her. I found that the Public Guardian and Trustee has not consistently communicated to adults that they have the right to retain counsel to challenge a certificate of incapability.

(R27) I recommended that when it becomes committee of estate, the Public Guardian and Trustee inform adults in writing that they can retain and instruct counsel to challenge a certificate of incapability.

The Public Guardian and Trustee has accepted this recommendation.

Duties of Committees and Committees Appointed by the Court

Duties of Committees under the *Patients Property Act*

Under the *Patients Property Act*, the Public Guardian and Trustee has complete authority to manage the adult's financial and legal affairs or the Public Guardian and Trustee has no authority at all.

Section 2(b) of the *Adult Guardianship Act* requires that the Act be administered and interpreted according to the principle that all adults should receive the most effective but the least restrictive and intrusive form of support, assistance or protections when they are unable to care for themselves or their financial affairs.¹⁰ I found that the *Patients Property Act* does not require a committee of estate to involve the adult in the management of his or her financial affairs.

By not requiring the guardian to involve the adult in the handling of his or her affairs, it fails to recognize that the adult may be capable in some aspects of managing his or her affairs. This does not promote the independence and autonomy of the adult.

(R28) I recommended that the Ministry of Justice take steps to require a committee to encourage the adult's participation in the decision making and management of the adult's financial affairs.

The Ministry of Justice has accepted this recommendation.

Committees Appointed by the Court

The court process that leads to the appointment of a committee of estate has more procedural safeguards than the administrative certificate process. Once the certificate process has been properly revised to ensure appropriate procedural safeguards, we would expect the Ministry of Justice, working in conjunction with the courts, will ensure that the court process incorporates similar protective provisions.

¹⁰ *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, s. 2(b).

Conclusion

The work done in developing the *Adult Guardianship and Planning Statutes Amendment Act, 2007* together with these recommendations support Canada's obligations under the UN Convention on the Rights of Persons with Disabilities; are consistent with recommendations made by the Premier's Council on Aging and Seniors' Issues, and with adult guardianship laws in other Canadian jurisdictions.

This report has resulted in 21 findings and 28 recommendations. Seven recommendations were made to the Public Guardian and Trustee (PGT) to improve its practices and the PGT has accepted five of these in full and one in part. Five recommendations were made to the health authorities to improve their practices and the health authorities have accepted all five recommendations. Two recommendations were made to the Ministry of Health regarding developing provincial training programs for health authority staff who conduct assessments and who issue certificates. The Ministry of Health has accepted both recommendations.

Fourteen recommendations were made to the Ministry of Justice on actions that need to be taken to ensure that procedural safeguards are established in legislation or regulation. The Ministry of Justice has accepted 11 of those 14 recommendations, recommendations 4, 5, 8, 11, 12, 14, 16, 18, 20, 22 and 28 and has committed to implementing those recommendations by or before July 1, 2014. It has also accepted recommendation 3 and pending full implementation is looking at an interim measure that would move towards this goal. While the Ministry of Justice has not accepted recommendations 25 and 26 it has agreed to review those recommendations and report publicly on the results within 18 months.



Throughout their lives, adults make decisions ranging from everyday choices to important life decisions. These may range from decisions about family, school, housing, recreation, travel and work to those concerning finances, health care and personal care.

Adults are presumed to be capable of making decisions until the contrary is demonstrated. Mental capability refers to an adult's ability to make decisions and is decision-specific, meaning that a person might be capable of making some decisions but not others.

Declining health, illness, accidents or the aging process can, however, make it difficult for some adults to make decisions. This can affect their ability to care for themselves or to access support, and may make them vulnerable to abuse, neglect or self-neglect.

In British Columbia, adults can plan for a time when they might need help making decisions or to have someone else make decisions on their behalf. For example, an adult may appoint another person to make decisions on his or her behalf if help is needed in the future. This can be done through an enduring power of attorney or a representation agreement. Through an advance directive, an adult can also provide instructions that specify the type of health care and treatment the adult wants to receive or not receive if he or she later becomes incapable of making those decisions.¹¹

Unfortunately, not everyone can or does plan in advance for a time when he or she might need help making decisions or need someone else to make these decisions for him or her. In these cases, a person or public body may intervene to obtain control of the adult's decision-making authority and financial and legal affairs.¹² The person or public body who obtains this control must exercise it in a way that they consider is in the best interests of the individual whose financial and legal affairs they control.

The western legal system has, from its early origins, sought to protect adults who, due to mental infirmity, are incapable of managing themselves or their affairs. One of several current British Columbia statutes with this purpose is the *Patients Property Act*.¹³ The Act provides statutory mechanisms under which a public or private committee (a government agency or private person) may exercise what is essentially guardianship over the estate (financial and legal decisions) and/or the person (health and personal care decisions) of incapable adults.

Under the *Patients Property Act*, a substitute decision-maker, referred to in the Act as a committee, can be appointed through a court process or an administrative process. When a certificate of incapability is issued, a government agency, the Public Guardian and Trustee, is appointed to manage the person's financial and legal affairs.

The focus of this investigation is on the administrative process that results in issuing a certificate of incapability.

The adult guardianship process of which certificates of incapability are a part provides an important safety net for adults who become mentally incapable of making decisions on their own and who have not taken steps to plan in advance



¹¹ See Appendix 1 for a description of the personal planning tools available in British Columbia.

¹² The Public Guardian and Trustee in British Columbia is a public body.

¹³ *Patients Property Act*, R.S.B.C. 1996, c. 349.

for another adult to act as their substitute decision-maker. It is what we as a society have identified as a protective and supportive mechanism to ensure that vulnerable adults are not taken advantage of.

The certificate of incapability process provides a mechanism for people who may not have anyone in their life who is willing or able to apply for appointment as a committee or to act as guardian to have a committee appointed.

Administrative Fairness

The role of the Ombudsperson is to uphold the democratic principles of openness, transparency and accountability, to ensure that people in British Columbia are treated fairly in the provision of public services, and to promote and foster fairness in public administration. The Ombudsperson does this by receiving and investigating individual complaints and conducting systemic investigations to consider issues from a broad and systemic perspective.

What fairness requires in a given circumstance depends on the nature of a decision made by a public agency, the relationship between the individual and the public agency, and the effect of a decision by that agency on a person's life.

In the case of a decision to issue a certificate of incapability, once it is issued, an adult is deemed to be incapable of managing his or her financial and legal affairs. Control of the adult's estate (financial affairs and assets) is transferred to the Public Guardian and Trustee of British Columbia, who becomes the adult's committee of estate. This is done even though the adult has not consented. As the committee of a person's estate, the Public Guardian and Trustee has complete control of the person's financial decision making. The Public Guardian and Trustee also becomes the adult's litigation guardian and decides whether to initiate and defend lawsuits involving the adult.

In "Guardianship of Adults: Good Faith and Philosophy of Mental Disability in British Columbia," the granting of guardianship, which includes the ability to issue a certificate of incapability, is described as a major decision that significantly affects the rights of an adult.

The act of becoming guardian or committee is arguably the most profound legal relationship into which one can enter, whether viewed from the perspective of the guardian or the guarded. The guarded adult loses all rights to make decisions as to the management of his or her person or affairs. In a sense he or she loses legal personality. The guardian or committee is vested with the legal rights once possessed by the guarded adult. In a sense he or she takes on the legal personality of the other. The guarded adult, unlike an adult entering into contractual relations, does not retain the power to repudiate, breach or renegotiate the terms of the relationship. Unlike a power of attorney, the relationship is not entered into voluntarily.¹⁴

In light of the profound and pervasive effect of this decision on the life of the "guarded" adult, it is clear that the decision to issue a certificate of incapability is one where significant procedural protections are required to protect the adult whose right to make his or her own decisions is being taken away. Because this is an administrative process that happens without a hearing outside of the courts,

¹⁴ M.M. Munro, "Guardianship of Adults: Good Faith and Philosophy of Mental Disability in British Columbia," *Canadian Journal of Family Law* 1997;14:217.

these procedural rights are the only way to ensure that adults have a reasonable opportunity to present any arguments they may wish to make about why they are still legally capable of managing their own finances (or making their own financial decisions).

The Ombudsperson has produced an Administrative Fairness Checklist as a guide to assessing whether an agency is meeting general standards of fairness in making decisions that affect people. The checklist includes aspects of fairness required in both service delivery and decision making. The following is a list of questions from the checklist that were considered during this investigation.¹⁵

Information/Communication

During the initial contact, do individuals receive an adequate explanation of the role of the agency representative and the procedures to be followed?

Investigation/Decision Procedures

Are all parties who may be adversely affected by a decision or action of the agency (including an appeal or review of a decision) given adequate and timely notice of the investigation/hearing process, the nature of the resulting decision or action and its possible implications?

Are decisions always based on all of the relevant information, excluding all irrelevant considerations?

Are the affected parties provided with adequate and appropriate reasons for the agency's decisions and actions? Are written reasons available on request?

Exercise of Power/Legal Framework

Are the existing statutory and regulatory powers, including the formal policies and procedures developed from them, sufficient to achieve the agency's mandate effectively and fairly?

Are the agency's legislation, regulation and policies consistent with the letter and intent of other legislation, federal and provincial, to which they are subject, including the Canadian Charter of Rights and Freedoms?

Appeal, Review and Complaint Procedures

Is there an appropriate and accessible (affordable, simple and prompt) appeal or review procedure for each decision and action that will directly affect an individual's interest?

Are individuals fully informed at the time decisions are made, or actions taken, of all available internal and external avenues of appeal, review and complaint?

Are there clearly defined complaint procedures at all levels in the organization for considering and responding to individuals' concerns about policy, procedural and service quality issues?

Organization/Management Issues

Are personnel training programs and supervision adequate to meet performance expectations of management and the public?

¹⁵ See Appendix 2 for the Ombudsperson's Administrative Fairness Checklist.

"I am painfully aware that the Patients Property Act does not work very well (for myself) and maybe if it is dated, it should be updated."

Source: Complaint made to the Ombudsperson.

What We Heard

The Ombudsperson receives and investigates complaints from individuals with concerns about the certificate of incapability process. Complaints can be about the role of the Public Guardian and Trustee or the role of a health authority or both.

We have received complaints from adults who:

- were not given adequate notice of an incapability assessment
- were not adequately informed of the consequences of an assessment or certificate
- were not told how to obtain a copy of an assessment report or were told to make a freedom of information request to obtain a copy
- were not given notice that a certificate would be issued
- did not have an opportunity to respond before a certificate was issued

While many certificate processes proceed smoothly, the current lack of procedural detail means that problems can occur. The following case is an example of what can happen when things go wrong and an illustration of the need for enhanced procedural safeguards in the certificate of incapability process.

CASE SUMMARY *Sam's Story*

In September 2008, the Public Guardian Trustee (PGT) received a report that Sam, a man in his 60s, who lived on his own in an apartment, was incapable of managing his affairs. The person making the report said that Sam's friend Joan was his power of attorney and there were concerns about how Joan was managing Sam's finances.

In October 2008, the PGT informed Sam in a letter that it had received a report about the management of his affairs and would be assessing whether he needed the PGT's services to help him with his affairs. The PGT attempted to contact Sam's power of attorney Joan but were unable to do so. The PGT also began the process of reviewing Sam's finances and assets.

In November 2008, the PGT requested a medical assessment from a geriatrician who had examined Sam in October 2008. Based on his examination in October, the geriatrician reported that Sam had a mild cognitive impairment that would likely remain stable but might improve. The geriatrician gave an opinion that Sam was incapable of making decisions regarding financial or legal affairs, but noted that Sam had a power of attorney who was already assisting him.

The PGT made additional attempts to contact Joan but did not hear back from her. Meanwhile, in March 2009, Sam changed his power of attorney, shifting this responsibility from Joan to his accountant.

On April 21, 2009, Joan received a letter from the PGT stating that it had been made aware of concerns about her actions as Sam's power of attorney. The letter also said the PGT had made several unsuccessful attempts to contact her, and that unless she responded by April 22, it would take steps to apply to be Sam's committee of estate. The letter was dated April 15, 2009, and postmarked April 19. Joan responded the next day – April 22, 2009 – explaining that she was not aware of any previous attempts to contact her, and that it was Sam's accountant who was now his power of attorney.¹⁶

¹⁶ The PGT's records showed that its staff had spoken with Joan by telephone on November 29, 2008, and had sent her a letter on November 28. Joan did not recall receiving this letter.

On April 17, before Joan had received the PGT's letter, which gave her until April 22, 2009, to respond, the PGT had already written to a director for a health authority requesting that a certificate of incapability be issued for Sam. The PGT's letter included a brief account of Sam's financial affairs, including a description of reports that his finances were "not well managed." The PGT said that it had been unable to locate evidence of the residual assets from the sale of property Sam had owned, and that there were "frequent large withdrawals" from his bank account. The letter also stated that the PGT had tried to contact Sam's power of attorney but had been unable to do so.

After receiving the April 17 letter from the PGT, the director, who did not know Sam and was not treating him, sent a letter to Sam dated April 20, 2009, notifying him of the director's intent to issue a certificate. The director enclosed a summary of the assessment that had been conducted in November 2008. The geriatrician's assessment that was relied upon was already five months old at this time, and it said improvement was possible. The director's letter said that Sam had 10 days (which would have been until April 30) to respond if he wished to oppose the decision. The director then issued the certificate that same day (April 20) and sent it to the PGT.

Sam received a letter from the PGT on April 21, 2009, stating that it had "been given the legal responsibility to assist [him] with the management of [his] financial and legal affairs."

On April 21, the PGT also wrote to Sam's bank and to the geriatrician who had conducted his assessment and said that it now had the authority to act on Sam's behalf.

Sam hired a lawyer, who wrote to the director and to the PGT on April 29, which was within the 10 days that the health authority's director had given Sam to oppose the issuing of the certificate. The lawyer advised the PGT and the health authority that Sam opposed the director's intention to issue a certificate. However, PGT staff told Sam's lawyer that they did not recognize him as Sam's representative because the certificate had already been issued and the PGT was now Sam's litigation guardian. The PGT initially refused Sam's lawyer's requests for records on these grounds.

Sam's lawyer wrote to our office in June 2009 to complain about the PGT's refusal to acknowledge him as Sam's legal representative or to provide the documents he had requested. We investigated his complaint. In mid-July 2009, after Sam's lawyer had complained to us and also initiated a court action against the PGT, the PGT agreed to terminate its authority as committee.¹⁷

There are numerous issues of administrative unfairness illustrated by this case and that are examined in this investigation.

¹⁷ The committee's authority was terminated under section 19.1(4) of the *Patients Property Act*. This section authorizes the PGT to terminate its authority when it determines that it is not necessary or desirable to manage the patient's property and there is a power of attorney in place.

Investigative Process

Origins of Investigation

In February 2012, the Office of the Ombudsperson released *The Best of Care: Getting It Right for Seniors in British Columbia (Part 2)*. During that systemic investigation, we heard from people who had concerns about the certificate of incapability process. As the certificate of incapability process does not only affect seniors, the Ombudsperson decided that it was an issue that should be the subject of its own systemic investigation.

Issues Considered

The Office of the Ombudsperson considered the fairness and reasonableness of the certificate of incapability process during each of the following steps in that process:

- the reports to the Public Guardian and Trustee of British Columbia
- the Public Guardian and Trustee investigation
- the health authority investigation
- the issuing of the certificate
- reassessment and appeal
- duties of committees and committees appointed by the courts

We also considered the existing legal framework and whether it provides for a fair and reasonable process.

Agencies Involved

The public agencies involved in this investigation are:

- Ministry of Health
- Ministry of Justice
- Public Guardian and Trustee
- Fraser Health Authority
- Interior Health Authority
- Northern Health Authority
- Provincial Health Services Authority
- Vancouver Coastal Health Authority¹⁸
- Vancouver Island Health Authority

Document Review

Our investigation included a review of existing legislation, including:

- *Adult Guardianship Act*
- *Mental Health Act*
- *Patients Property Act*
- *Power of Attorney Act*
- *Public Guardian and Trustee Act*
- *Representation Agreement Act*
- regulations made under the authority of those acts

¹⁸ Providence Health Care is a faith-based health care provider that provides health care services in Vancouver in partnership with the Vancouver Coastal Health Authority. For the purposes of this investigation, Providence Health Care was considered part of the Vancouver Coastal Health Authority.

We also reviewed the not-in-force sections of the *Adult Guardianship Act* (1993) and Bill 29, *Adult Guardianship and Planning Statutes Amendment Act, 2007*, and the draft *Incapacity Assessments Regulation* and legislation in force in other jurisdictions. We examined policies, procedures, guidelines, job descriptions and training documents related to the certificate of incapability process, as well as extensive information provided by the Public Guardian and Trustee, the Ministry of Justice, the Ministry of Health and each of the health authorities. The investigation included a review of papers and articles related to the certificate process.

Interviews and Consultation Meetings

During the investigation, the Ombudsperson and staff met with each of the health authorities, the Public Guardian and Trustee and staff from the Ministry of Health and Ministry of Justice. Ombudsperson staff interviewed two directors who issue certificates of incapability and two staff who conduct incapability assessments, in each of the health authorities.¹⁹ In total, 22 health authority staff were interviewed.

We also met with and obtained input from advocacy organizations, practitioners and academics.

We would like to thank all those who shared their expertise, experiences and concerns with our office. It was of significant assistance in allowing us to understand how the current process actually operates and where challenges and problems exist and need to be remedied.

File Reviews

Ombudsperson staff randomly selected and reviewed files provided by the Public Guardian and Trustee and the health authorities where a certificate of incapability was issued in 2008 and in 2010. Specifically, we reviewed:

- 5 files for each of the regional health authorities from both 2008 and 2010
- 10 files where the Public Guardian and Trustee had been committee of estate, and the authority ended for a reason other than the adult's death
- 7 files where the Provincial Health Services Authority (PHSA) issued certificates of incapability (this is the total number of certificates issued by the PHSA in 2008 and 2010).²⁰

For each of these 67 cases, we obtained copies of relevant electronic and paper records kept on file by the Public Guardian and Trustee and the health authority. The files we reviewed represent 5.8 per cent of the certificates issued for 2008 and 7.5 per cent of the certificates issued for 2010.

¹⁹ We interviewed one director and one assessor from the Provincial Health Services Authority (PHSA), as all certificates are issued by one director at the PHSA, and the PHSA issues a relatively small number of certificates.

²⁰ Ombudsperson staff reviewed five files from each regional health authority from 2008 and five files from each regional health authority from 2010. The review was not weighted by population or by the number of certificates issued by the health authority. In other words, health authorities issuing a lower number of certificates had a higher proportion of their certificates sampled than those issuing a high number of certificates. In the case of the PHSA, we sampled 100 per cent of the certificates it issued for 2008 and 2010. For 2008 and 2010, the PHSA issued 0.7 per cent of the total number of certificates of incapability issued in the province for these years.

Roles and Responsibilities

There are several key agencies involved in the certificate of incapability process in British Columbia.

The Public Guardian and Trustee

The Public Guardian and Trustee of British Columbia (PGT) is an office created by the *Public Guardian and Trustee Act*.²¹ It is headed by the Public Guardian and Trustee, who holds office for a fixed six-year term, and has 249 funded employee positions.²²

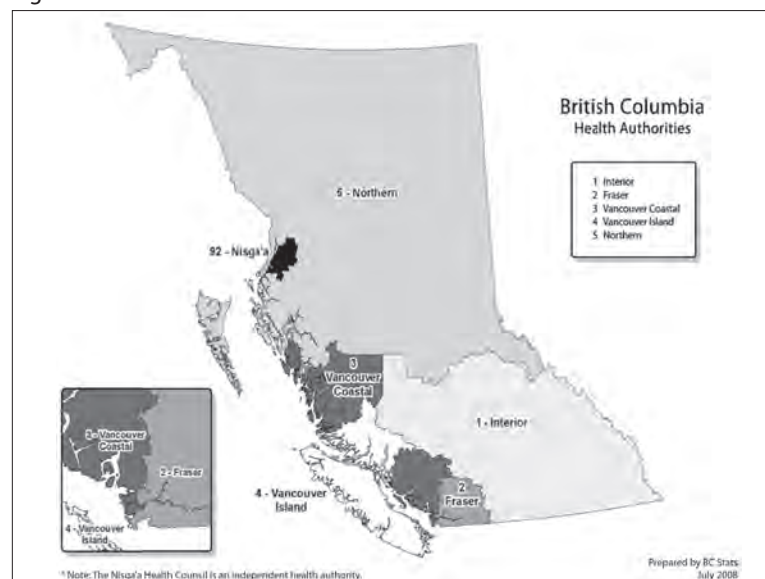
The PGT is mandated to serve three core groups. First, it protects the legal and financial interests of children and youth under the age of 19. Second, it administers the estates of missing and deceased persons. Third, and most relevant to this investigation, it protects the legal, financial and personal care interests of incapable adults.²³

In dealing with this third core group, the PGT is authorized to act in two ways: as a protector and as a fiduciary.²⁴ As a protector, the PGT investigates concerns about adults who are unable to manage their financial or legal matters. As a fiduciary, if a certificate of incapability is issued, the PGT becomes responsible for the adult's financial and legal matters.

Health Authorities

Health services in British Columbia are provided by the Ministry of Health and the six health authorities. Five of the authorities are regional health authorities that deliver a full continuum of health services within their respective geographic regions. Those regional health authorities are the Fraser Health Authority, the Interior Health Authority, the Northern Health Authority, the Vancouver Coastal Health Authority and the Vancouver Island Health Authority. The sixth health authority, the Provincial Health Services Authority, is responsible for managing province-wide health programs.

Figure 1 *British Columbia Health Authorities*



²¹ *Public Guardian and Trustee Act*, R.S.B.C. 1996, c. 383.

²² Public Guardian and Trustee of British Columbia, *Service Delivery Plan: April 1 2011–March 1 2014*, May 2011, 7–8 <http://www.trustee.bc.ca/reports_publications/2011-2014_Service%20_Delivery_Plan.pdf>.

²³ Public Guardian and Trustee, *Service Delivery Plan: April 1 2011–March 1 2014*, May 2011, 7.

²⁴ Public Guardian and Trustee, *Service Delivery Plan: April 1 2011–March 1 2014*, May 2011, 11.

The regional health authorities are designated agencies under the *Adult Guardianship Act*, and as such receive and can investigate allegations of abuse and neglect of adults.²⁵ As part of an investigation into allegations of abuse and neglect, health authorities may receive reports or have concerns about adults' ability to manage their own financial and legal affairs. When the option of a certificate of incapability is being considered, the health authorities share responsibility for investigating whether adults are incapable of managing their affairs with the Public Guardian and Trustee.

Directors of provincial mental health facilities or psychiatric units and anyone delegated by them are authorized under the *Patients Property Act* to sign certificates of incapability.²⁶

Ministry of Health

The Ministry of Health has overall responsibility for health services in British Columbia. The Ministry of Health is responsible for the *Mental Health Act*, the *Continuing Care Act*, the *Health Professions Act*, the *Health Care (Consent) and Care Facility (Admission) Act*. It can also establish province-wide policies that apply to all health authorities.

Ministry of Justice

The Ministry of Justice leads law reform, administers the courts and police and ensures public safety in British Columbia.²⁷ The ministry's portfolio includes protection of vulnerable adults.

The Ministry of Justice is responsible for the *Adult Guardianship Act*, the *Patients Property Act*, the *Power of Attorney Act*, the *Public Guardian and Trustee Act* and the *Representation Agreement Act*.

The Public Guardian and Trustee acts independently of government in its day-to-day operations but has a reporting relationship with the Attorney General/Minister of Justice. The Attorney General approves the Public Guardian and Trustee's service delivery plan and requires the Public Guardian and Trustee to report to the Attorney General on the operations of the office.²⁸

The Patients Property Act

The *Patients Property Act* has been the legislation that authorizes the issuing of certificates of incapability in British Columbia since 1979. The *Patients Property Act* establishes procedures to appoint a guardian to make decisions on behalf of an incapable adult. The Act refers to the guardian as a "committee."

Under the Act, there are two kinds of committee: a committee of estate and a committee of person. A "committee of estate" can make decisions on financial and legal matters. A "committee of person" is authorized to make health care and other personal decisions.

²⁵ The designated agencies under the *Designated Agencies Regulation* are Fraser Health Authority, Interior Health Authority, Northern Health Authority, Vancouver Coastal Health Authority, Vancouver Island Health Authority, Providence Health Care Society and Community Living BC.

²⁶ *Patients Property Act*, R.S.B.C. 1996, c. 349, s. 1.

²⁷ Ministry of Justice, *2012/13–2014/16 Service Plan*, 6 <<http://www.bcbudget.gov.bc.ca/2012/sp/pdf/ministry/jag.pdf>>.

²⁸ *Public Guardian and Trustee Act*, R.S.B.C. 1996, c. 383, s. 22 and 25.

“The rigid intrusive manner in which public services were generally provided in the past to minor children and incapable adults is no longer acceptable in modern society...”

“British Columbia legislation in this regard is currently very outdated and some statutes, such as the Patients Property Act, would be unlikely to survive a legal challenge under the Canada Charter of Rights and Freedoms.”

Source: Public Guardian and Trustee of British Columbia, 2010–2011 Annual Report, 26.

Under the *Patients Property Act*, there are two processes for appointing a committee. The Supreme Court can appoint a public agency or private individual committee of estate and/or person by court order. Health authorities can appoint a committee of estate and that committee of estate must be a public agency, namely the Public Guardian and Trustee.

Legislative History

The origins of the *Patients Property Act* are in the English *Lunacy Act* of 1890, which became part of the law of British Columbia in 1897. The British Columbia *Lunacy Act* was intended to provide for the care and committal of both the person and estate of “lunatics.” The definition of “lunatic” included people who were incapable of managing their own affairs because of “mental infirmity arising from disease or age or otherwise.”²⁹ Under the *Lunacy Act*, a judge could determine whether a person was of unsound mind and incapable of managing his or her affairs and could appoint a committee to act on his or her behalf. The committee then had full power over the person and his or her estate, subject only to the court’s instructions. The *Lunacy Act* was amended in 1911 to allow the Attorney General to become the committee for a person who had been committed to a hospital for the insane and didn’t already have a committee. This became the responsibility of the Public Guardian and Trustee on March 20, 1964.

In the 1950s, amendments to the *Lunacy Act* required that a person admitted to a “clinic of psychological medicine” not be deemed a lunatic under the Act unless he or she had been certified as incapable by the facility’s medical officers.³⁰ This was done by issuing a certificate of incapability. This process was introduced to allow for case-by-case decisions on whether an institutional patient was capable of managing his or her affairs.

The *Lunacy Act* was repealed in 1962 and replaced with the *Patients’ Estates Act*, which expanded some of the provisions of the *Lunacy Act* and introduced a revised court process for appointing a committee. The court process was meant to apply to those who were not in mental hospitals or psychiatric clinics. The process of appointing a committee by issuing a certificate of incapability for those who were in mental hospitals or psychiatric clinics remained in place.

The *Patients Property Act* that is in force in 2012 is to a large extent similar to the *Patients’ Estates Act* of 1962, although the language identifying those authorized to issue certificates has been updated periodically to reflect changes in mental health legislation. Until 1997, the only people who had the authority to issue certificates were the directors of provincial mental health facilities and psychiatric units. However, in 1997, the *Mental Health Act* was amended to allow directors to delegate this power to others. It is now these delegates – often the administrators of regional mental health units – who issue many certificates. For example, the Vancouver Coastal Health Authority has appointed eight directors of designated facilities under the *Mental Health Act*, and those directors have, in turn, delegated their power to issue certificates to 15 additional people.

The model for mental health care, however, has changed dramatically since 1962. The large, centralized facilities that used to house the vast majority of mental health patients have been largely abandoned in favour of regional community-based care. Previously, certificates were mainly issued by the directors of psychiatric institutions

²⁹ *Lunacy Act*, R.S.B.C. 1897, c. 126.

³⁰ British Columbia Law Institute, *Report on the Recognition of Adult Guardianship Orders from Outside the Province*, March 2005, 1–2.

for the purpose of allowing for the management of the financial or legal affairs of the institution's patients. In these situations, the person who signed the certificate was often the same person who was providing care to the patient. The provisions of the *Patients Property Act* made sense in this context – directors needed a way to manage the lives outside the institution of the patients they were treating inside the institution and the certificate allowed for this.

As a consequence of the closure of many of the beds in those types of psychiatric institutions, the use of certificates has expanded beyond hospitals and mental health facilities over the past few decades. Delegated health authority staff now routinely issue certificates of incapability for those who live in residential care and for those who receive services and supports in the community, including in their own homes. These people are not “patients” in the sense that they do not reside in psychiatric facilities and, in most cases, do not receive care or treatment from the person who issued the certificate.³¹ Quite simply, the world has changed but the certificate of incapability process has not kept up with these changes. The *Patients Property Act* is now outdated and does not respect the procedural rights of those whom it is supposed to protect.

Appointing a Committee

An adult who is deemed incapable of managing his or her affairs becomes a “patient” under the *Patients Property Act*. A patient is defined as:

- (a) a person who is described as one who is, because of mental infirmity arising from disease, age, or otherwise, incapable of managing his or her affairs, in a certificate signed by the director of a Provincial mental health facility or psychiatric unit as defined in the *Mental Health Act*, or
- (b) 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 both himself or herself or his or her affairs³²

The *Patients Property Act* establishes two ways for a person or the Public Guardian and Trustee to obtain legal authority for managing the estate and/or the person of an incapable adult:

- By order of the British Columbia Supreme Court following a hearing deeming the adult incapable of managing his or her person, or incapable of managing his or her affairs. Through this process, a private or public committee can be appointed to manage the adult's estate and the adult's person.
- By certificate of incapability issued by a director of a provincial mental health facility or psychiatric unit (or his or her delegate) stating that the adult is incapable of managing his or her own affairs due to mental infirmity arising from disease, age or otherwise. The certificate process results in the Public Guardian and Trustee assuming control of the adult's estate (financial and legal decision making) but not the adult's person (health care and personal care decision making).

³¹ The exception to this is the Provincial Health Services Authority, where adults to whom certificates are issued are inpatients in hospitals – for example, of the Forensic Psychiatric Hospital.

³² *Patients Property Act*, R.S.B.C. 1996, c. 349, s. 1.

Whether the court process or the certificate process is used, once appointed a committee of estate has all the rights, privileges and powers regarding the estate of the adult as the adult had previously. The committee assumes responsibility for the adult’s financial and legal affairs, including handling property, real estate and banking matters; entering into contracts; dealing with lawsuits; filing income tax returns; and applying for pension benefits. The committee controls all of the adult’s money.

Section 18 of the *Patients Property Act* imposes a duty on the committee to exercise its powers for the benefit of the adult and the adult’s family.

Table 1 *Number of Times the Public Guardian and Trustee (PGT) Has Been Appointed Committee of Estate, 2002–2011*

Year	PGT appointed committee of estate by certificate	PGT appointed committee of estate by court	Total PGT appointed committee of estate
2002	387	34	421
2003	307	24	331
2004	270	37	307
2005	329	27	356
2006	380	37	417
2007	462	26	488
2008	587	20	607
2009	493	25	518
2010	442	29	471
2011	420	20	440
Total	4,077	279	4,356

Between 2002 and 2011, the Public Guardian and Trustee (PGT) was appointed committee of estate by certificate of incapability 4,077 times, and by the court 279 times. In other words, 6 per cent of the appointments were by the courts and 94 per cent were by certificates of incapability.

Court Process

The court may appoint a family member, the PGT or another person as committee of estate, committee of person, or both. Although any capable adult may apply to be another person’s committee, close family members or friends are most frequently appointed. An application for such an order may be brought forward by the Attorney General of British Columbia or by any capable person.³³

The adult who is the subject of the application has a right to be notified of an application. Notice must be served personally on the adult not less than 10 days before the date of the application.³⁴ Section 2 of the Act allows the court to dispense with notice of the application, but only if the court is satisfied that notice would be harmful to the adult’s health or not in his or her interests.

The adult who is the subject of the application can participate in the hearing through a letter to the court or by legal counsel.

Committee of Estate by Court or Certificate

As of March, 2012, the PGT was committee of estate for 331 clients by court order and 2,917 clients from certificates of incapability.

³³ *Patients Property Act*, R.S.B.C. 1996, c. 349, s. 2.

³⁴ *Patients Property Act*, R.S.B.C. 1996, c. 349, s. 2(2).

A judge's decision to appoint a committee must be based on the opinions of two medical practitioners regarding the adult's capacity to manage his or her person or estate. At a minimum, these opinions must be set out in affidavits, which are written statements signed under oath.

To reach its decision, the court hears the application and reviews the affidavits. The court considers whether the adult has a mental infirmity from disease, age or otherwise, or a disorder or disability of the mind arising from the use of drugs. If the court is satisfied that the adult has a mental infirmity, disorder or disability and is incapable of managing his or her affairs or incapable of managing himself or herself, or both, it must make an order stating that the person is incapable and may appoint a person to be the adult's committee.³⁵

The court may restrict the scope of the committee's authority. However, in practice, this rarely happens and committees are usually provided with the authority to make all necessary decisions. The consequence is that the adult loses the freedom to make his or her financial and legal decisions, or personal and health care decisions, or all of these.³⁶

Once a judge declares someone incapable, all existing powers of attorney and representation agreements are automatically terminated.³⁷

The court can authorize the cost of the court process, such as legal representation for the person applying to be committee of estate, to be taken out of the funds of the estate that is being administered if committeehip is granted.

An adult declared incapable by court order can apply after one year (or sooner by leave of the court) to have the order discharged. However, a new hearing and supporting affidavits from medical practitioners are required. Orders declaring someone incapable and orders appointing a committee can both be appealed to the British Columbia Court of Appeal. However, this is a costly and time-consuming option.

Certificate Process

While the *Patients Property Act* establishes statutory procedures for court appointed committees, there are no such procedures that must be followed to issue certificates of incapability. The only reference in the *Patients Property Act* to a certificate of incapability is included in the definition of "patient" in section 1 of the Act.

The decision to issue a certificate of incapability is a discretionary decision made by directors of provincial mental health facilities or psychiatric units as defined in the *Mental Health Act* and the people to whom they delegate that authority. The professional background of delegates varies from health authority to health authority. For example, the professional backgrounds of those we interviewed included medicine, psychiatry, psychiatric nursing, occupational therapy and social work.

Since the decision to issue a certificate is the exercise of a statutory power, the decision is subject to judicial review on the grounds of procedural unfairness, lack of jurisdiction and unreasonableness.

In British Columbia between January 1, 2002 and December 31, 2011, 4,077 people were issued a certificate of incapability.

³⁵ *Patients Property Act*, R.S.B.C. 1996, c. 349, s. 3(1), s. 6.

³⁶ Public Guardian and Trustee of British Columbia, *Court and Statutory Guardianship: The Patients Property Act and the Adult Guardianship Act (Part 2): An Updated Discussion Paper on Modernizing the Legal Framework*, October 2005, 14.

³⁷ *Patients Property Act*, R.S.B.C. 1996, c. 349, s. 19.

In the absence of statutory or regulatory procedures, in 1993, the PGT created non-binding guidelines to assist those involved in the certificate process. The Guidelines were updated by the PGT a number of times, including in 2011, in consultation with the Incapability Assessment Regulation and Guidelines Working Group.³⁸

The PGT Guidelines set out 10 guiding principles:

1. Incapability assessments should only be conducted as a last resort and are unnecessary if there are alternate ways of adequately meeting the adult's needs.
2. Incapability assessments are undertaken only if the assessment will serve the interests of the adult.
3. An adult has the right to be informed of the intention to conduct an incapability assessment and to be informed of the outcome of the assessment.
4. Incapability assessments begin with the presumption that the adult is capable of making decisions.
5. Incapability assessments are conducted fairly and with respect for the adult.
6. A capable adult has a right to make decisions about his or her financial affairs and must not be assessed as incapable solely because others disagree with the adult's decisions.
7. An incapability assessment is a process to be completed in consultation with the adult, those who are supportive of the adult and an inter-professional team as appropriate.
8. Incapability assessments in the Certificate of Incapability context are concerned solely with the adult's ability to make decisions about his or her financial and legal affairs.
9. Incapability assessors respect the adult's right to privacy, dignity and well-being.
10. A determination of incapability does not automatically mean a Certificate of Incapability is issued. A Certificate of Incapability is only issued as a last resort when the adult needs the PGT as Committee of Estate to protect and manage his or her financial and legal affairs.³⁹

The PGT Guidelines also outline what a certificate is, the steps in the process, the scope of authority it grants, and procedures that promote the guiding principles.

Included in the PGT Guidelines is additional information for those who conduct incapability assessments. This information includes factors that assessors should consider before, during and after an assessment. The appendices to this guide contain a variety of sample documents that the PGT suggests should be used as templates by those involved in the certificate process.

Ending a Committee of Estate

The procedure for ending a committee's authority depends on how the committee was created. When a certificate of incapability is issued, the authority can be ended under the *Patients Property Act* by:

³⁸ The Incapability Assessment Regulation and Guidelines Working Group includes representatives from health authorities, the College of Physicians and Surgeons and other health care professional organizations.

³⁹ Public Guardian and Trustee of British Columbia, *Guidelines for Issuing a Certificate of Incapability Under the Patients Property Act*, October 2011, 3 <http://www.trustee.bc.ca/pdfs/STA/Guidelines_for_issuing_Cert_Incapability_Fall_2011_FINAL.pdf>.

- the adult's discharge from a mental health facility or psychiatric unit, unless the PGT determines it is necessary or desirable to continue to act as committee of estate
- an order being made with respect to the person under section 33(8)(a) or (b) of the *Mental Health Act*⁴⁰
- the release of the adult on leave from a provincial mental health facility under section 37 of the *Mental Health Act*, if one of the conditions specified by the director is that the released adult ceases to be a patient for the purposes of the *Patients Property Act*
- the transfer of the adult from a provincial mental health facility to an approved home under section 38 of the *Mental Health Act*, if one of the conditions specified by the director is that the transferred adult ceases to be a patient for the purposes of the *Patients Property Act*
- a certificate signed by the director of a mental health facility or psychiatric unit or his or her delegate indicating that the adult is no longer incapable of managing his or her affairs
- a court order declaring that the adult is no longer incapable of managing his or her affairs, no longer incapable of managing himself or herself, or no longer incapable of managing both himself or herself and his or her affairs⁴¹
- where there is an existing power of attorney or representation agreement that has been suspended through the PGT becoming committee, the representative or attorney can request a review and submit documents to demonstrate that it is in the adult's best interests that the authority remains in place (The PGT may terminate its authority as committee if it is satisfied upon review that the representation agreement or power of attorney is valid, the decisions of the attorney or representative complied with statutory duties and responsibilities, and that maintaining the authority is in the adult's best interests.)⁴²

Public Guardian and Trustee as Committee

When the Public Guardian and Trustee (PGT) is appointed as committee to manage an adult's affairs, the adult becomes its client. The adult's property is held in trust by the PGT, and his or her affairs are managed by a team that includes a case manager and a staff member with financial expertise.

The PGT handles an adult's financial affairs by managing the adult's assets and the money payable to him or her, and by paying the adult's bills. The PGT may, for example:

- restrict an adult's bank account
- credit an adult's cash to his or her trust account with the PGT
- close any safety deposit boxes, inventory their contents and store the items
- evaluate any stocks or bonds and transfer them into a PGT management investment account
- preserve, rent or sell real estate, including the adult's home
- maintain, store or sell furniture and other personal belongings, including vehicles

⁴⁰ Section 33(8)(a) and (b) of the *Mental Health Act* states that if the court is not satisfied that there is sufficient reason or legal authority for the certificate, the court may order that the patient not be apprehended, transported or admitted to a facility.

⁴¹ *Patients Property Act*, R.S.B.C. 1996, c. 349, s. 11.

⁴² *Patients Property Act*, R.S.B.C. 1996, c. 349, s. 19.1.

"The Committee has many responsibilities, including receiving the adult's income, securing assets, conducting banking, paying all expenses, and budgeting for their family. If it is in the adult's best interest, the Committee may sell personal effects and real estate and enter into contracts on their behalf. The Committee is also responsible for making investment decisions and initiating and defending all lawsuits involving the adult."

Source: Public Guardian and Trustee of British Columbia, *When the Public Guardian and Trustee is Committee*, October 2011, 3.

The PGT, when it believes it is possible, will support adults' independence by minimizing its involvement in day-to-day decisions such as grocery shopping and entertainment and allowing adults appropriate access to their bank accounts.

The PGT charges clients, for whose estates it is committee, expenses incurred in administration of the estate. Under the *Public Guardian and Trustee Act*, when the PGT is committee of estate, it charges the fees shown in the table below.

Table 2 *Public Guardian and Trustee Fees for Service*

Service	Fee	Payable by	When payment is due
Acting as committee of estate of an adult	(i) 3% of gross sale price of real property sold by an agent, plus	The estate ⁴³	On receipt of proceeds
	(ii) 5% of cash received whether as capital or income, other than from the sale of real property by an agent, plus	The estate	On receipt of cash
	(iii) 5% of the gross value of securities at the time administration commences and 5% of their growth in value, plus	The estate	On commencement of administration and on recognition of capital growth
	(iv) 0.4 of 1% per annum, computed monthly, on the gross value of all assets, plus	The estate	Monthly
	(v) 5% of the gross value of all assets other than securities	The estate	On demand of payment

The following examples illustrate the fees the PGT would charge when managing an adult's financial and legal affairs.

Adult 1 – Lynn

Lynn does not own her home, collects \$1,283 per month in federal pension payments, has \$7,000 in other assets (car, television, computer), and has no securities (stocks or bonds). Applying the formula above, Lynn would be charged the following amounts based on her existing assets and her current income:

- (i) $\$1,283 \times 0.05 \times 12 = \$769/\text{year}$
- (ii) \$0
- (iii) \$0
- (iv) \$0

Lynn would be charged \$769 per year for every year that the PGT is managing her estate (5% of her total yearly income). In addition, at the end of the PGT's involvement or when an asset is sold, the PGT could assess a capital fee based on the disposition of that asset, such as her car, television and computer, of 5 per cent of the sale price.

⁴³ The "estate" in this context refers to the assets of the adult being managed by the PGT as committee of the adult's estate.

Adult 2 – Lee

Lee owns a house valued at \$500,000, receives approximately \$1,500 per month in pension payments, has \$50,000 in other assets (car, boat), and has securities (stocks) worth \$100,000. The stocks grow at a rate of 5% a year.

Applying the formula above and assuming that the PGT sold Lee's house, Lee would be charged the following amounts based on his existing assets and his current income:

(i) $\$500,000 \times 0.03 = \$15,000$ (one time)

(ii) $\$1,500 \times 0.05 \times 12 = \$900/\text{year}$

(iii) $\$100,000 \times 0.05 = \$5,000$ (one time)
 $+ \$5,000 \times 0.05 = \250 (year 1)

The amount charged increases at a rate of 5% each year due to the 5% growth of the stocks.

(iv) $\$600,000 \times 0.004 / 12 = \$200/\text{month}$

Lee would be charged a one time fee of \$20,000 (3% of his total assets) plus \$3,550 per year for every year that the PGT is managing his estate (20% of his annual income). In addition, at the end of the PGT's involvement or when an asset is sold, the PGT could assess a capital fee based on the disposition of that asset, such as his car or boat, of 5 per cent of the sale price.

According to the *Public Guardian and Trustee Fees Regulation*, the PGT may excuse, refund or reserve (not collect at the time payable) the fees described above on the basis of hardship or unfairness.⁴⁴ The PGT's policy states that a fee may be excused or refunded on the basis of hardship at the end of the PGT's committee ship when collection of the fee "would have a significant impact on the client's health and safety."⁴⁵ A fee may likewise be reserved (for collection at a later date) if collection would significantly affect health and safety. A fee may also be reserved if it is uncollectable at the time it becomes payable and the PGT expects the fee will be collectible in the future. If the adult dies, the PGT does not excuse or refund fees on the basis of hardship to the adult's beneficiaries. A fee may be excused or refunded on the basis of unfairness when the fee is "disproportionate to the risks and obligations assumed by the PGT" in managing the adult's estate. This is determined by the PGT considering the reasonableness of the fees based on:

- risk assumed by the PGT
- complexity of administering the estate
- amount of activity on the file and anticipated activity
- errors, omissions or delays in service not resulting in loss to the client
- whether the estate is being charged by more than one division of the PGT⁴⁶

⁴⁴ *Public Guardian and Trustee Fees Regulation*, B.C. Reg. 312/2000, s. 3.

⁴⁵ Public Guardian and Trustee of British Columbia, "Fairness and Hardship Considerations in Excusing or Refunding Public Guardian and Trustee Commissions and Fees", policy, October 2012, 2206.

⁴⁶ Public Guardian and Trustee of British Columbia, "Fairness and Hardship Considerations in Excusing or Refunding Public Guardian and Trustee Commissions and Fees", procedure, October 2012, 2206.

Minister of Aboriginal Affairs and Northern Development Canada as Guardian for Status Indians

Section 51 of the *Indian Act* allows the Minister of Aboriginal Affairs and Northern Development Canada to manage the property of those people who are described in that Act as “mentally incompetent Indians.” When a registered aboriginal adult who is ordinarily a resident on a reserve is found to be incapable of managing his or her own financial affairs by a health authority, the Department of Aboriginal Affairs and Northern Development Canada becomes responsible for ensuring that the adult’s property is managed for his or her benefit. Section 51(2) of the Act allows the Minister of Aboriginal Affairs and Northern Development Canada to sell any property owned by the adult to pay debts, meet engagements, discharge encumbrances and pay expenses on present and future maintenance of that property.

Section 51(3) gives the minister broad authority to “make such orders and give such directions as he considers necessary to secure the satisfactory management of the estates of mentally incompetent Indians.”

Where it believes it is in the adult’s best interests to do so, Aboriginal Affairs and Northern Development Canada may appoint a family or friend to manage some or all of the adult’s property and financial affairs. Where the adult’s property includes reserve land, a family member or friend may submit an Application to Administer a Mentally Incapable Adult’s Interest in Reserve Land to the Manager of Estates. Once this application has been submitted, the adult’s next of kin (and, if applicable, any committee of person) will be notified and may be asked for consent before the minister grants the applications.

Aboriginal Affairs and Northern Development Canada may only become involved in managing an aboriginal adult’s affairs after a certificate of incapability has been issued for the adult by provincial authorities. The department plays no part in determining whether an adult is incapable and does not have the authority to investigate claims of physical or financial abuse. If the adult is deemed incapable by the provincial courts or by a provincial certificate of incapability, the department may manage the adult’s property and financial affairs.

The regional health authorities follow the same general assessment and issuance process for registered Indians. They highlighted that the agencies involved may differ because aboriginal adults on reserve may receive health care through Health Canada or band-operated health centres. Additionally, aboriginal liaisons within the health authority may be contacted to ensure that the process is culturally appropriate. Interior Health has, for example, developed engagement guidelines for many of the aboriginal communities within its jurisdiction. These guidelines may recommend enhancements to the normal assessment process, such as conducting incapability assessments in a collaborative fashion and with the participation of both Interior Health staff and its aboriginal health care partners.

The health authorities told us that the certificate of incapability process for a registered aboriginal adult was the same as that used for a non-aboriginal adult. The PGT told us that there was no difference in its assessment and issuance process for registered Indians. However, its initial investigations would usually be done in collaboration with regional health authority staff to ensure established protocols for interacting with adults living on reserve. The PGT meets regularly with Aboriginal Affairs and Northern Development Canada to improve communication between the agencies.

Law Reform

The *Patients Property Act* has been the subject of significant law reform efforts.⁴⁷ The first major steps toward reform in British Columbia began more than 20 years ago, in 1992. At that time, the Joint Working Committee on Adult Guardianship, which was made up of government and community representatives, released a report recommending the creation of a new framework to govern substitute decision making and adult guardianship.⁴⁸

The report's recommendations led to the development of the *Adult Guardianship Act*, the *Health Care (Consent) and Care Facility (Admission) Act*, the *Public Guardian and Trustee Act* and the *Representation Agreement Act*. The focus of this legislation was twofold: (1) to establish a range of guardianship planning tools for adults who are still capable, and (2) to replace the *Patients Property Act* with a new model of guardianship for incapable adults. The 1993 *Adult Guardianship Act* would have eliminated certificates of incapability issued by health authorities. Under that Act, guardians would only have been appointed by the court. This package of legislation received royal assent on July 29, 1993, but was not brought into force at that time.

In 1996, a review of the legislation was undertaken to recommend an appropriate schedule for proclamation and identify how to achieve the objectives of the legislation in a cost-effective way. The review was completed in July 1997, and in 1999, after subsequent discussion with stakeholders, legislative amendments were introduced to enable partial proclamation of the 1993 legislative package.⁴⁹

The following legislation came into force on February 28, 2000:

- most of Parts 1, 3 and 4 of the *Adult Guardianship Act* (Part 2 did not come into force)
- the health care consent and Health Care and Care Facility Review Board provisions in Part 2 of the *Health Care (Consent) and Care Facility (Admission) Act* Part 3, related to care facility admission and other provisions, such as those relating to prescribed advocacy services, did not come into force)
- most of the *Public Guardian and Trustee Act*
- most of the *Representation Agreement Act* (the provisions related to a registry did not come into force)

At the same time, the following implementing regulations were enacted:

- the *Health Care Consent Regulation*
- the *Representation Agreement Regulation*
- the *Adult Guardianship (Abuse and Neglect) Regulation*
- the *Designated Agencies Regulation*
- the *Public Guardian and Trustee Fees Regulation*

The *Provincial Court (Adult Guardianship) Rules* were also enacted on February 28, 2000.

⁴⁷ See Appendix 3 for a detailed chronology of law reform of adult guardianship in B.C.

⁴⁸ Joint Working Committee on Adult Guardianship, *How Can We Help? A New Look at Self-Determination, Interdependence, Substitute Decision Making and Guardianship in B.C.: A Report Providing Recommendations for Legislation and Policy*, September 1992.

⁴⁹ Bill 92, *Adult Guardianship Statutes Amendment Act*, 3rd Sess, 36th Parl, British Columbia, 1999.

"Of course, in the current legal regime, if they avoid making planning decisions, what may happen is that if they become incapable, they may end up being the subject of an order under the Patients Property Act for the appointment of a committee. It's always struck me that the appointment-of-a-committee process is a bit Dickensian. It's sort of nineteenth century in its approach to these things."

Source: Hon. Geoff Plant, British Columbia Legislative Assembly, Hansard, 10 May 2004, 10981 <<http://www.leg.bc.ca/hansard/37th5th/h40510p.htm>>.

The adult guardianship provisions in Part 2 of the *Adult Guardianship Act*, however, were not brought into force in 2000, leaving the certificate and court processes in the *Patients Property Act* to continue to govern adult guardianship in British Columbia.⁵⁰

In 2004, the Ministry of Attorney General conducted consultations on a Public Guardian and Trustee's report, *Court and Statutory Guardianship: The Patients Property Act and the Adult Guardianship Act (Part 2): An Updated Discussion Paper on Modernizing the Legal Framework*. The report made a number of recommendations for improvements to court guardianship applications and to the statutory guardianship process.⁵¹ Key recommendations by the Public Guardian and Trustee for improvements to the statutory guardianship process included that:

- no certificate of incapability be issued unless an assessment has been performed that indicates that the adult is not capable of managing his or her property
- assessors provide notice to the adult that they are the subject of an assessment
- assessors not conduct an assessment where they have reason to believe statutory guardianship is not required
- the Public Guardian and Trustee be required to advise an adult of his or her right to seek a second assessment and a review of an issuance of a certificate of incapability⁵²

On April 27, 2006, the government introduced Bill 32, the *Adult Guardianship and Personal Planning Statutes Amendment Act, 2006*. In May 2006, the government announced that Bill 32 would not proceed in the spring 2006 legislative session. This delay was to allow further review and consultation related to advanced directives, which occurred in the fall of 2006.

Bill 29, the *Adult Guardianship and Planning Statutes Amendment Act, 2007*, received royal assent on November 22, 2007. Bill 29 was a revised version of Bill 32. Bill 29 was also intended to replace the *Patients Property Act* with new provisions in the *Adult Guardianship Act* for court-ordered guardianship (Part 2) and statutory guardianship (Part 2.1). Bill 29 retained statutory property guardians (certificates of incapability issued by health authorities), which would have been eliminated under the 1993 *Adult Guardianship Act*. Bill 29 was intended to enhance planning options and introduce advanced directives as a personal planning option.⁵³

In committee debates on October 21, 2009, relating to amendments to the 2007 legislation, the minister noted that government was not in a position to proceed with proclamation of the adult guardianship provisions in Bill 29 because government was not in a position to provide financing at that time.⁵⁴

On September 1, 2011, the incapacity planning provisions of the *Adult Guardianship and Planning Statutes Amendment Act, 2007* came into force. It revised the *Power of Attorney Act*, *Representation Agreement Act* and *Health Care (Consent) and Care Facility*

⁵⁰ See Appendix 4 for a description of Part 2 of the *Adult Guardianship Act* (1993).

⁵¹ In October 2005, the Public Guardian and Trustee released a revised version of *Court and Statutory Guardianship: The Patients Property Act and the Adult Guardianship Act (Part 2): An Updated Discussion Paper on Modernizing the Legal Framework*.

⁵² See Appendix 5 for a list of the Public Guardian and Trustee's recommendations for improvements to court guardianship applications and to the statutory guardianship process.

⁵³ See Appendix 6 for a description of Parts 2 and 2.1 of Bill 29, the *Adult Guardianship and Planning Statutes Amendment Act, 2007*.

⁵⁴ Hon. Michael de Jong, British Columbia Legislative Assembly, Hansard, 21 October 2009, 1376 <<http://www.leg.bc.ca/hansard/39th1st/h91021p.htm>>.

(Admission) Act. Changes included streamlining requirements for representation agreements, clarifying the law on enduring powers of attorney, and establishing advanced directives for health care decisions.

However, Parts 2 and 2.1 of the *Adult Guardianship Act* did not come into force in September 2011. As a result, the certificate of incapability process and the judicial process for appointing committees under the *Patients Property Act* continue to govern adult guardianship in British Columbia today.

Summary

When law reform initiatives began in the early 1990s, one of the objectives was to replace the outdated *Patients Property Act* with a modern system for adult guardianship. Law reform was seen as necessary and long overdue, and the *Patients Property Act* was seen as vulnerable to a challenge under the Charter of Rights and Freedoms and as not providing adequate procedural safeguards.

Since 1992, despite these law reform efforts, while the government has enhanced the personal planning options available to British Columbians, it has not yet modernized adult guardianship legislation. More than 20 years later, the legislation that continues to govern adult guardianship in British Columbia is the outdated and much criticized *Patients Property Act*.

Structure of the Report

The next six sections of this report detail our investigations into the processes used in British Columbia to issue certificates of incapability. These sections follow the order that the certificate process generally follows:

1. Reports to Public Guardian and Trustee
2. Public Guardian and Trustee Investigation
3. Health Authority Investigation
4. Issuing a Certificate of Incapability
5. Reassessment and Appeal
6. Duties of the Committees and Committees Appointed by the Court





“abuse”

means the deliberate mistreatment of an adult that causes the adult ... damage or loss in respect of the adult's financial affairs ...

Source: *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, s.1.

“neglect”

means any failure to provide necessary care, assistance, guidance or attention to an adult that causes, or is reasonably likely to cause within a short period of time, ... substantial damage or loss in respect to the adult's financial affairs, and includes self-neglect

Source: *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, s.1.

REPORTS TO THE PUBLIC GUARDIAN AND TRUSTEE

Reports of abuse, neglect or concerns about how an adult's affairs are being managed from family, friends, caregivers or concerned members of the public are often the first step in the process leading to a certificate of incapability. If Public Guardian and Trustee of British Columbia (PGT) staff receive a report, they will decide whether to investigate and whether to notify the adult and involved family and friends.

A report can be made by phoning the PGT or by completing and submitting the Public Guardian and Trustee Referral Form, which is available on the PGT website.⁵⁵ (The PGT uses the word “referral” to describe a report that an adult may be incapable of managing his or her affairs and may be in need of protection by the PGT.)

The form states that a report to the PGT is appropriate if:

- there is concern about the adult's mental capability to manage financial and legal affairs
- there is a specific, urgent and immediate need, and
- no other suitable person has the authority or is willing and able to act on the adult's behalf

The PGT Referral Form asks for personal details about the adult the report is about, the reasons for the report, the adult's financial information, the adult's family and other contacts and information about the person making the report. The PGT is prohibited from disclosing the identity of a person who makes a report that results in an investigation.⁵⁶

Reports are made by family members or friends of the adult, financial institutions, care facilities, police, lawyers or health authority staff.

The majority of the reports or requests that lead to an investigation come from health authority staff.⁵⁷ As designated agencies under the *Adult Guardianship Act*, the health authorities receive and investigate allegations of abuse and neglect of adults. Under the *Adult Guardianship Act*, health authority staff may report to the PGT if they believe PGT services are required or where an assessment for the purposes of a court ordered support and assistance plan is needed.

In 2011, the PGT received 1,658 reports related to concerns of financial incapability. Over the past five years, the PGT has investigated 82 per cent of the reports it has received. Forty-one per cent of these investigations resulted in a certificate of incapability.

⁵⁵ Public Guardian and Trustee of British Columbia, Referral Form, Services to Adults <http://www.trustee.bc.ca/pdfs/STA/AIS_Referral%20form_Manual_Fall_2011.pdf>.

⁵⁶ *Public Guardian and Trustee Act*, R.S.B.C. 1996, c. 383, s.17(3).

⁵⁷ Under the Designated Agencies Regulation, Community Living BC, the five regional health authorities and Providence Health Care Society are designated for performing functions under Part 3 of the *Adult Guardianship Act* for the persons each agency serves. For the purposes of our investigation, we have included Providence Health Care as part of the Vancouver Coastal Health Authority.

Table 3 *Reports of Concerns about Financial Incapability Received by the Public Guardian and Trustee (PGT)*

Year ⁵⁸	Number of reports received	Number of investigations conducted ⁵⁹	Number of certificates issued
2002	774	Not tracked	387
2003	639	Not tracked	307
2004	650	Not tracked	270
2005	736	Not tracked	329
2006	818	Not tracked	380
2007	1,259	1,068	462
2008	1,407	1,215	587
2009	1,359	1,163	493
2010	1,469	1,154	442
2011	1,658	1,283	420

Decision to Investigate

Section 17(1) of the *Public Guardian and Trustee Act* authorizes the PGT to investigate:

- an adult who is without a representative or an attorney and is apparently abused or neglected, according to the definitions in the *Adult Guardianship Act* or
- an attorney under a power of attorney or enduring power of attorney, a representative, or a guardian (a person who exercises control over the affairs of an adult) if there is reason to believe that the interest in the adult's assets may be at risk or that the representative, guardian or attorney has failed to comply with his or her duties.⁶⁰

The PGT will confirm with the person making the report whether:

- there is a risk to the adult's assets and need for assistance
- there is a question about the adult's ability to address the problem due to a condition that affects his or her ability to make decisions, and
- there is no one else able, willing or appropriate to assist the adult⁶¹

When a report is received, according to the PGT Guidelines, an investigation should occur if there is a concern that the adult is in need of a substitute decision-maker or if an existing substitute decision-maker needs to be replaced.

The PGT informed us that a report about how an adult's finances are being managed does not result in an investigation if:

- the report indicates that the adult is vulnerable but capable⁶²

⁵⁸ The PGT was unable to provide the total number of reports for 2002, 2003, 2004, 2005 and 2006, as prior to 2007, its system accounted only for some of the referrals received.

⁵⁹ These numbers include all types of investigations that can be referred to the Assessment and Investigations Services staff at the PGT. Not all investigations involve a request for an assessment of incapability. The PGT does not separately track this information.

⁶⁰ *Public Guardian and Trustee Act*, R.S.B.C. 1996, c. 383, s.17(1)(a)(b)(c)(d).

⁶¹ Public Guardian and Trustee of British Columbia, "Investigating: Assessment and Investigation Services," policy, September 2011, 6302.

⁶² The PGT said that in this circumstance, the person making the report would be given referrals for assistance from the community. In rare situations where the adult wants the PGT's assistance and abuse is an issue, the PGT may offer to act as power of attorney for the adult.

"self-neglect"

means any failure of an adult to take care of himself or herself that causes, or is reasonably likely to cause within a short period of time, ... loss in respect of the adult's financial affairs, and includes

(d) creating a hazardous situation that will likely cause ... substantial damage to or loss of property, and

(e) suffering from an illness, disease or injury that results in the adult dealing with his or her financial affairs in a manner that is likely to cause substantial damage or loss in respect to those financial affairs

Source: *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, s.1.

Issue Investigated

At the beginning of the PGT investigation, do adults and their families receive an adequate explanation of the role of the PGT and the procedures to be followed?

- the adult who is the subject of the report is not a resident of British Columbia
- the PGT is aware, without investigating, that there are others available, willing and appropriate to assist the adult
- committeeship will not resolve the problem identified
- the adult is receiving income assistance from the Ministry of Social Development, though some investigation may be done to determine the level of risk and whether other appropriate options exist
- the allegation is historical but no current problem exists (for example, an allegation that a power of attorney given 10 years ago was established under undue influence, but there are no current concerns about the attorney's actions)

In urgent situations where an adult's assets are at imminent risk, the PGT can take steps under section 19 of the *Public Guardian and Trustee Act* to safeguard the adult's assets until a more permanent solution can be put in place.

Notice of Investigation

Neither the *Patients Property Act* nor the *Public Guardian and Trustee Act* include any requirements that an adult or his or her family members be notified of a PGT investigation into the adult's incapability.

The PGT Guidelines state that "if an investigation is started, the PGT will normally notify both the adult and the referring party in writing, unless risk or concerns are identified that suggest written notification is not advisable."⁶³ PGT policy states that the PGT will:

- notify the adult of the investigation in writing unless notification puts the adult at risk
- notify any existing attorney, representative or trustee unless notification puts the adult at risk
- consider notifying involved supportive family members and friends in writing, unless notification would put the adult at risk or is an unreasonable invasion of the adult's privacy⁶⁴

The PGT may decide not to inform an adult that he or she is the subject of an investigation if the PGT believes there is a risk to the adult – for example, in situations where the adult lives with the person who is allegedly abusing the adult. The PGT, for example, would not send the notification letter if it was concerned that the alleged abuser may intercept the adult's mail and interfere with the adult's assets, or subject the adult to harassment. Instead, the PGT would look for another way of notifying the adult.

As reports the PGT receives can be unfounded or about an adult who is capable, the PGT is cautious about notifying too many people early in the investigation in order to protect the adult's privacy. If there are allegations that a family or friend has been abusing or pressuring the adult, the PGT would generally only notify these individuals once it confirmed that known assets were protected.

⁶³ Public Guardian and Trustee of British Columbia, *Guidelines for Issuing a Certificate of Incapability Under the Patients Property Act*, October 2011, 17 < http://www.trustee.bc.ca/pdfs/STA/Guidelines_for_issuing_Cert_Incapability_Fall_2011_FINAL.pdf>.

⁶⁴ Public Guardian and Trustee of British Columbia, "Investigating: Assessment and Investigation Services," policy, September 2011, 6302.

To notify an adult that it is investigating an allegation of abuse, neglect or self-neglect, the PGT sends a letter that provides the contact information for the PGT. Enclosed with the letter is an information sheet that describes Assessment and Investigation Services, the section of the PGT that conducts the PGT's investigation. The information sheet describes the department's functions, the circumstances in which it investigates, the PGT's principles and the ways in which an adult may be assisted.

The letter and the information sheet do not describe the steps the PGT will be taking to investigate the adult's situation. The information sheet says that the PGT becoming committee of estate is one of the "options to assist adults who are not able to manage," but it does not describe the consequences of having a committee of estate appointed, including that the PGT will be managing the adult's financial affairs and will be assuming control of the adult's accounts and assets. The letter also does not describe what an adult can do if he or she wishes to dispute or challenge the decision.

The letter sent to family members is an abbreviated version of the letter sent to the adult and does not include the information sheet.

We reviewed the PGT and health authority files of 57 adults for whom the PGT became committee of estate as a result of a certificate of incapability.⁶⁵ Four of the 57 files (7 per cent) did not include any record of written notification of the PGT investigation. In two of these cases, the PGT had not conducted an investigation, as the health authority issued a certificate of incapability without the PGT's involvement, which is not in accordance with PGT Guidelines. In the other two cases, there was no explanation of why the adult was not provided with written notification.

Analysis

The possible outcome of a PGT investigation for an adult – a request that a health authority issue a certificate of incapability, making the PGT committee of the person's estate – is quite significant. If the PGT becomes committee of estate, it will be responsible for making all financial and legal decisions on the adult's behalf. The letter notifying the adult that an investigation has begun states that the PGT will be assessing whether its services will be needed to "help . . . with the management of these affairs." While not inaccurate, this description is wholly inadequate to explain to a person whose capability is in question that the consequence of a finding of financial incapability is that the PGT will be making the adult's financial and legal decisions based on its understanding of the individual's best interests and charging fees for their services in doing so.

To ensure fairness, it is essential that the PGT provide an adult with clear written notice that an investigation has begun. It is also important that the notice provided gives the adult accurate information about the purpose of the investigation, the potential outcome and its implications. To do this, the notice of the investigation sent to the adult should include a description of the steps in the investigation, including that the PGT might request a medical assessment from the adult's

Written Notification of an Investigation Provided to the Adult

"The Public Guardian and Trustee of British Columbia is in receipt of a referral regarding the management of your financial and legal affairs. I will be assessing the situation to determine whether you need the services of our office to help you with the management of these affairs."

Source: PGT's notification letter template.

⁶⁵ In total, Ombudsperson staff reviewed 67 files. These 57 files include 5 files for each of the regional health authorities from both 2008 and 2010, and 7 files from the Provincial Health Services Authority (the total number of certificates issued by the PHSA in 2008 and 2010). The other 10 files reviewed were files where the Public Guardian and Trustee was appointed committee of estate and the authority ended for a reason other than the adult's death.

physician, and potential outcomes so that the adult knows what to expect. The notice should include an explanation of the adult's options and should clearly explain that the adult might wish to seek legal advice or assistance.

Currently, the PGT does not provide notice of its investigation to the adult if it believes doing so will put the adult at risk. In those limited number of cases where that is the case, the PGT should be able to continue this practice but needs to ensure that the reasons are substantiated and well-documented.

Finding & Recommendation

F1 The Public Guardian and Trustee does not provide adequate information to adults about an investigation of the adult's financial incapability.

R1 The Public Guardian and Trustee provide written notice to all adults who are the subject of an investigation, at the start of the investigation, that includes

- the steps that will occur during the investigation,
 - the possible outcomes and their significance and
 - an explanation that an adult can seek legal advice or assistance.
-



PUBLIC GUARDIAN AND TRUSTEE INVESTIGATION



An investigation by the Public Guardian and Trustee of British Columbia (PGT) determines whether the PGT should pursue a certificate of incapability in order to become committee of estate for an incapable adult. The investigation is conducted by PGT Assessment and Investigation Services staff.

When conducting an investigation when there is no substitute decision-maker in place, the PGT inquires into the adult's financial situation. The inquiry is focused on the capability of the adult as well as the need for protection. The PGT is concerned with whether financial loss has already occurred or is likely to occur.⁶⁶ For example, the PGT may look into whether or not bills are being paid and whether appropriate expenditures are being made.

When conducting an investigation where there is a substitute decision-maker in place, the PGT considers whether the agreement is valid and whether the substitute decision-maker is fulfilling his or her duties. PGT procedure recommends that if a plan cannot be made to address the concerns or if the substitute decision-maker will not follow the PGT's recommendations, the PGT consider whether to seek to have the PGT appointed committee of estate.

If the PGT is appointed committee of estate for an adult, every power of attorney, including an enduring power of attorney, and every provision of a representation agreement regarding the adult's property is automatically suspended.⁶⁷

Information Obtained by the Public Guardian and Trustee

Section 18 of the *Public Guardian and Trustee Act* allows the PGT to request information from third parties that the PGT considers necessary for the investigation, including any information relevant to the incapability of the adult. This includes requiring any person or institution having records related to the adult to produce these records, which are often financial records.⁶⁸

We reviewed 57 files where the PGT had become committee of estate for an adult as a result of a certificate of incapability.⁶⁹ We looked at the kind of information the PGT obtained during its investigation and found that it varied. The following are two examples of information that the PGT obtained during its investigation, for two different adults:

⁶⁶ Public Guardian and Trustee of British Columbia, "Investigations, Assessment and Investigation Services," policy, September 2011, 6302.

⁶⁷ *Patients Property Act*, R.S.B.C. 1996, c. 349, s. 19.1.

⁶⁸ *Public Guardian and Trustee Act*, R.S.B.C. 1996, c. 383, s. 18.

⁶⁹ In total, Ombudsperson staff reviewed 67 files. These 57 files include 5 files for each of the regional health authorities from both 2008 and 2010, and 7 files from the Provincial Health Services Authority (the total number of certificates issued by the PHSA in 2008 and 2010). The other 10 files reviewed were files where the Public Guardian and Trustee was appointed committee of estate and the authority ended for a reason other than the adult's death.

Issue Investigated

Are the existing statutory powers sufficient to allow the PGT to effectively protect the financial interests of adults who may be abused or neglected?

Adult A

- land title search for real property
- banking information from the adult's local branch
- Wills Notice Registry search

Adult B

- land title search for real property
- banking information from the adult's local branch
- Wills Notice Registry search
- birth certificate
- bankruptcy report and notice to creditors
- correspondence with ICBC regarding a possible outstanding claim
- divorce documents
- manufactured home registry search

As these two examples illustrate, the amount of information obtained by the PGT during an investigation varies.

Protection of Assets in Urgent Cases

Section 19 of the *Public Guardian and Trustee Act* gives the PGT the authority to take certain temporary, time-limited actions when it has reason to believe that an adult's financial affairs, business or assets are in immediate need of protection.

If the PGT determines that an adult's assets or affairs are in need of immediate protection, section 19 of the *Public Guardian and Trustee Act* allows the PGT to:

- instruct the institution where the adult has an account, that no funds be withdrawn or paid out of the account
- direct any source of the adult's income to send the income to the PGT, or a person named by the PGT, to be held in trust or to be used to protect or maintain the health and safety of the adult
- halt the sale or transfer of the adult's property
- take any other steps that are reasonable under the circumstances to protect the adult's financial affairs, business or assets

Section 19(3) of the *Public Guardian and Trustee Act* states if the PGT takes any of the steps outlined above, they remain in effect for seven days or a shorter period set by the Public Guardian and Trustee.

According to PGT procedure, the first step in initiating protective measures is assessing the level of risk to the adult. The PGT considers whether:

- there is a substitute decision-maker and whether that decision-maker's actions are already under investigation by the PGT
- there is evidence that a lack of protection will result in harm to the adult
- there is information indicating that the adult has a condition that affects his or her ability to make decisions about abuse or neglect
- the adult has property, the sale or transfer of property is pending or the adult has assets held in a financial institution⁷⁰

⁷⁰ Public Guardian and Trustee of British Columbia, "Protection of Assets for Adults in Urgent Cases Under Section 19 of the *Public Guardian and Trustee Act*," policy, September 2011, 6303.

In taking steps under section 19 of the *Public Guardian and Trustee Act*, the PGT also considers how its actions will affect the adult's ability to meet his or her basic needs (how the adult will be able to obtain food and pay rent while his or her bank account is frozen). The PGT may or may not inform the adult when it has taken protective measures, depending on how the adult's affairs were being managed. For example, the adult may not be informed that an account has been frozen if that account was being managed by another person through a power of attorney and the PGT had concerns with the actions of the power of attorney.

PGT procedure includes examples of protective steps that may be taken to address health and safety concerns, such as:

- directing a bank to pay an adult's residential care facility payments from the adult's account
- directing an adult's income source to send cheques to the bank rather than to the adult's home⁷¹

In addition to these steps, when there is no other way to safeguard the adult's assets, the PGT can have the adult's funds directed to the PGT.

According to PGT policy, if the PGT takes temporary protective measures, they remain in effect for seven days but can be extended for further periods of seven days if the PGT finds that necessary to protect assets while it pursues a certificate of incapability. Obtaining a certificate of incapability can take two to six months or longer. If protective measures are used, they generally extend throughout this entire period.

If there is a significant and imminent risk, the PGT may quickly seek a certificate of incapability, even if there is an alternate substitute decision-maker available and willing to act on the adult's behalf. The PGT would take this step pending the substitute decision-maker being appointed a private committee.

In the course of our investigation, we learned that when the PGT uses its authority under section 19 of the *Public Guardian and Trustee Act*, its practice is to write a letter with specific instructions to financial institutions or others. For example, the PGT may instruct a bank to not allow funds to be withdrawn from an account. The PGT letters state that "the instructions take effect immediately and are in place until further notice" and that the PGT "will be reviewing and reissuing these provisions every seven days; however you will not be further notified unless there are changes or the freeze is terminated."

We reviewed 57 files where the PGT had become committee of an adult's estate as a result of a certificate of incapability.⁷² On five of these files (9 per cent), the PGT took protective measures to protect assets, in some cases providing more than one set of instructions. On these files, the PGT:

- instructed a financial institution to freeze the adult's bank account five times
- instructed a financial institution to freeze the adult's investments two times
- once directed a care facility to hold an adult's residential school settlement cheque and not provide it to the adult
- once requested that a financial institution "capture" the adult's debit card⁷³

⁷¹ Public Guardian and Trustee of British Columbia, "Protection of Assests for Adults in Urgent Cases Under Section 19 of the *Public Guardian and Trustee Act*," policy, September 2011, 6303.

⁷² In total, Ombudsperson staff reviewed 67 files. These 57 files include 5 files for each of the regional health authorities from both 2008 and 2010, and 7 files from the Provincial Health Services Authority (the total number of certificates issued by the PHSA in 2008 and 2010). The other 10 files reviewed were files where the Public Guardian and Trustee was appointed committee of estate and the authority ended for a reason other than the adult's death.

⁷³ On some of these files, the PGT gave more than one instruction to one or more financial institutions.

The measures taken by the PGT were in place for an average of 45 days. The longest period of time that a protective measure was in place was 70 days. The shortest period was 19 days. On one file, the measure was ceased after 19 days when the PGT ended its investigation, having concluded that it was not necessary to seek a certificate of incapability at the time.⁷⁴ On the other four files, the protective measure ceased once the PGT became committee of estate.

Section 19 of the of the *Public Guardian and Trustee Act* was intended to work in combination with Part 2 of the *Adult Guardianship Act*, which was passed as part of the *Adult Guardianship and Planning Statutes Amendment Act, 2007*, which is not yet in force. The PGT would be able to apply for a court order appointing the PGT as a temporary property guardian. This application could be made if there is reason to believe the adult is incapable of making decisions about his or her financial affairs and an order is urgently needed to protect the adult's financial affairs from damage or loss. This court approved temporary guardianship would last for 90 days and allow the PGT to take any of the actions it would be able to take as a regular property guardian, except for appointing another party as property guardian.⁷⁵

Analysis

Section 19 gives the PGT authority to take time-limited action to protect an adult's income or assets when it believes an adult's financial affairs, business or assets are in immediate need of protection. The PGT may, for example, instruct a bank to freeze an adult's bank account. The power to freeze a person's assets without notice to them and without their consent is a significant decision. It directly impacts a person's economic and legal rights. Section 19 does not, however, give the PGT authority to manage an adult's financial affairs while protective measures are in place. The result for the adult is that they are left in financial limbo until the instructions are withdrawn or the PGT or another party obtains authority to act for the adult.

Although the *Public Guardian and Trustee Act* states that any steps taken under section 19 remain in effect for seven days or a shorter period, the PGT has adopted a more expansive approach and simply reissues the instructions when further authority, for example, a certificate of incapability, is being explored. This means the financial limbo can last two to six months or longer.⁷⁶ In the files we reviewed, the instructions were in place for an average of 45 days.

We considered whether the PGT has authority to reissue instructions to protect the assets of adults in urgent cases beyond the seven days outlined in section 19(3) *Public Guardian and Trustee Act*.

In our view, the *Public Guardian and Trustee Act* does not provide the PGT with authority to reissue instructions to protect the assets of adults beyond the seven days outlined in section 19(3) of the *Public Guardian and Trustee Act*. It is unfortunate that the temporary property guardian provisions under Part 2 of the *Adult Guardianship Act*, which this power was to be used in conjunction with, has not been brought into force. However, the resulting gap does not authorize the extension of the limited powers of section 19(3) of the *Public Guardian and Trustee Act*. If anything, the existence of the unproclaimed provisions indicate that the current process must be read as limited.

⁷⁴ A certificate was eventually issued two years later when new concerns were reported to the PGT.

⁷⁵ Bill 29, *Adult Guardianship and Planning Statutes Amendment Act*, 3rd Sess, 38th Parl, British Columbia, 2007, s. 11.

⁷⁶ According to the PGT, obtaining a certificate can take two to six months or longer, and if protective measures are used, they extend to this entire period.

In our view, if the legislature had intended to provide the PGT ongoing authority with such a profound impact on a person's financial affairs, it would have used much different and much clearer language. The legislature has, in fact, enacted this type of authority, but it has not been proclaimed.

On November 22, 2007, the legislature gave royal assent to the *Adult Guardianship and Planning Statutes Amendment Act*.⁷⁷ The *Amending Act* includes provisions – section 110 (b) and (c) – that amend section 19(3) of the *Public Guardian and Trustee Act* by:

- changing the period of time that protective measures may stay in place, from 7 days to 30 days
- authorizing protective measures to be renewed for 30-day periods
- limiting the length of time that a protective measure may be taken to 90 days

However, subsections 110(b) and (c) were not brought into force on September 1, 2011, when the rest of section 110 was proclaimed.

The enactment of subsections 110(b) and (c) reinforces our view that section 19 does not give the PGT authority to reissue instructions to protect assets in an emergency situation. That being said, there may be situations where because of new circumstances, the PGT is justified in a fresh exercise of the power in section 19 for up to seven days. This is different from renewing and extending the time limit regarding the same person in the same circumstances.

The clear language of section 19 supports the position that it provides an exceptional power that the legislature intended to be used for a limited period of time, in other words, as a short-term measure in an urgent situation.

Even if the legislation was amended to extend the period protective measures could be in place and/or to allow them to be renewed, there are still difficulties with relying on protective measures for the length of time that it may take to obtain a certificate of incapability. While protective measures are in place, the adult may be restricted from accessing his or her funds, and the PGT can only direct funds to be used to protect or maintain health and safety. Authorizing the PGT to act as committee or property guardian for a temporary period would limit this adverse impact by allowing the PGT to manage the adult's affairs on a temporary basis.

Finding & Recommendations

F2 The Public Guardian and Trustee does not have authority to extend the period of seven days set out in section 19(3) of the *Public Guardian and Trustee Act*.

R2 The Public Guardian and Trustee discontinue the practice of extending the period of seven days set out in section 19(3) of the *Public Guardian and Trustee Act*.

R3 The Ministry of Justice take steps to provide the Public Guardian and Trustee with access to a court process to apply to act as a temporary property guardian in urgent situations.

⁷⁷ *Adult Guardianship and Planning Statutes Amendment Act*, S.B.C. 2007, c. 34.

St. James Community Service Society

Adults who are no longer able to manage their financial needs may also use the services of St. James Community Service Society, a non-profit organization that may help incapable adults in the Lower Mainland manage finances related to old age security, guaranteed income supplement and Canada Pension Plan only. The Society assists incapable adults by receiving the incapable adult's above-mentioned income and paying their basic living expenses.

Source: St. James Community Service Society brochure.

Alternatives to Guardianship

One of the guiding principles listed in the *Adult Guardianship Act* is that adults should receive the most effective, but the least restrictive and intrusive, form of support when they are unable to manage their financial affairs.⁷⁸ As an alternative to seeking a certificate of incapability, the PGT may consult with the adult and his or her representative or family and friends in order to develop a plan that safeguards the adult's interests. In developing a plan, the PGT will consider whether another party is willing and able to act as a substitute decision-maker.⁷⁹ Another alternative involves arranging help for the adult with aspects of his or her finances, such as making deposits, planning for retirement or filing income tax.

At the commencement of an investigation, the PGT finds out from those providing information whether anyone has a pre-existing substitute authority (power of attorney or representative) and searches the Nidus registry for any representation agreements or powers of attorney that the adult has made.⁸⁰ If there is no pre-existing substitute decision-maker in place, the PGT tries to determine whether there is someone involved in the adult's life who can act as a substitute.

An adult's circumstances and the source of his or her income may indicate an alternative option to the PGT becoming committee of estate. For example, if an adult is receiving assistance from the Ministry of Social Development, it can be arranged that the adult's rent is paid directly by the ministry. An adult receiving services from Community Living BC (CLBC) may be able to receive financial management assistance from CLBC. If an adult's primary source of income is Old Age Security and the Guaranteed Income Supplement, a friend, family member or an organization such as St. James Society can act as a pension trustee. In addition to being less intrusive, it may be advantageous as the cost of having the PGT manage an adult's estate is proportionally higher if the estate is relatively small.

Out of the 57 files reviewed, 56 files (98 per cent) included evidence that the alternatives to guardianship were considered. Steps taken by the PGT included contacting family members and friends, giving them information about applying to be a private committee and exploring options such as a pension trustee or St. James Society.

The Medical Assessment

Surprisingly, the *Patients Property Act* does not require that an assessment or opinion from a physician be obtained before a certificate of incapability is issued. The legislation is silent regarding how an adult should be assessed.

The purpose of a medical assessment by a physician is to establish evidence of the basis for pursuing a certificate of incapability. When the adult has a power of attorney, the PGT can only investigate if it has reason to believe that the adult is incapable of managing his or her affairs.⁸¹ A medical assessment can establish this reason.

⁷⁸ *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, s. 2(b).

⁷⁹ Public Guardian and Trustee of British Columbia, "Investigating: Assessment and Investigation Services," policy, September 2011, 6302.

⁸⁰ The Nidus Personal Planning Resource Centre and Registry is a non-profit organization where British Columbians can register a representation agreement, power of attorney or other planning document.

⁸¹ *Public Guardian and Trustee Act*, R.S.B.C. 1996, c. 383, s. 17(c).

The PGT Guidelines recommend that the PGT arrange for a medical assessment, referred to by the PGT as a “preliminary opinion of incapability,” as part of its investigation. The guidelines say this is generally provided by a physician, usually the adult’s family physician. The PGT Guidelines include the Physician Preliminary Opinion of Incapability form as an appendix.

The PGT informed us that if the adult does not have a family physician or the physician is unavailable, it will contact the health authority to find another physician. If the adult is in a facility or hospital, the PGT may request an assessment by an attending physician.

The PGT sends the Physician’s Preliminary Opinion of Incapability form to a physician with a cover letter. The cover letter asks for the physician’s assistance in assessing whether the adult “is mentally capable of managing his/her financial affairs.” The letter explains that the assessment will help the PGT to determine “whether support from [the PGT] is required” or enable the PGT to give direction to others who may assist.

The letter requests that the form be completed and submitted within three weeks. The letter does not state whether the doctor is expected to provide information about the assessment to the adult. The letter also does not state that the opinion is one of the pieces of information that will be used by the health authority in determining whether to issue a certificate of incapability.

The form asks the physician to include information about the adult, including personal information, mental status (including MMSE score), mental health status, communication skills, medical and psychiatric diagnosis, functional status, and a statement of opinion of capability to manage financial or legal affairs. The physician is also asked to indicate whether the adult was notified of the assessment.

While the PGT expects information in the medical assessment to be based on an assessment that is not more than six months old, it is not clear how this expectation is communicated to the physician as it is not included in the cover letter.

We reviewed 57 files where the PGT had become committee of estate as a result of a certificate of incapability. One file did not include a medical assessment and two files (4 per cent) included medical assessments that were conducted six months or more prior to the certificate of incapability being issued.⁸² On eight files (14 per cent) the medical assessment occurred between three and six months prior to issuing the certificate. On 28 files (49 per cent) the medical assessment was done one to three months prior to issuing the certificate. On 18 files (32 per cent), the medical assessment was conducted less than a month prior to issuing the certificate.

In the files we reviewed, it was clear that physicians who were assessing an adult’s incapability, have had little involvement with the adult prior to conducting the assessment.⁸³ On five files (9 per cent), the medical assessment was based on the physician’s first meeting with the adult. On nine files (16 per cent) the physician had known the adult for one month or less. On seven files (12 per cent) the physician had known the adult between one and three months. On three files (5 per cent) the physician had known the adult between three and six months. On 26 files

“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 a determinant of incapability. Indeed, the MMSE was never intended to be a ‘one-off’ capability determinant tool. Rather, it was designed to test for cognitive status, which is too often confused with a legal determination of capacity.”

Source: BC Law Institute, *A Comparative Analysis of Adult Guardianship, Laws in British Columbia, New Zealand and Ontario*, 22–23

⁸² On one file, the medical assessment was done over 15 months prior to the certificate being issued.

⁸³ While we were able to determine how long a physician had been treating an adult based on information from the medical assessment form, we did not have information about how often the physician had seen the adult and the nature of the treatment. For example, a physician treating an adult in an in-patient context may have had more frequent contact with and knowledge of the adult than a physician who sees an adult in the community.

(46 per cent), the physician had known the adult for over six months. On the remaining seven files (12 per cent), the documentation did not indicate how long the physician had known the adult.⁸⁴

Analysis

Unlike the certificate of incapability process where there are no statutory requirements for a medical assessment, under the court process set out in the *Patients Property Act*, a judge's decision to appoint a committee must be based on the opinions of two physicians regarding the adult's capability to manage his or her estate. Although the PGT Guidelines recommend that a medical assessment be obtained, this is not a requirement. Currently, there is a significant difference between the medical evidence required for the court to appoint a committee (two physician opinions) and what is required for the health authority to issue a certificate (no requirement for physician opinion), even though the end result is the same for the adult.

This significant difference may be explained by the way in which mental health services were previously provided. Large centralized facilities used to house the vast majority of mental health patients. These facilities have been largely abandoned in favour of regional community-based care. In mental health facilities, certificates were usually issued by medical professionals who were either responsible for the adult's day-to-day psychiatric care, had knowledge of the adult, and may have personally assessed the adult.

Today, health authority staff who issue certificates are rarely in the position that the medical professionals who issued certificates in facilities used to be in. We interviewed directors responsible for issuing certificates of incapability at each of the health authorities and they consistently told us that they rarely meet or speak to the adult before issuing a certificate and do not personally assess the adult.

Like a judge who is considering a committee application, health authority staff who issue certificates told us they rarely have had direct contact with the adult for whom guardianship is being considered. A finding of financial incapability requires both a judge and health authority staff to be of the opinion that an adult has a mental infirmity or disorder or disability of the mind. However, unlike a judge, health authority staff can make this decision in the absence of both a medical assessment and a hearing.

Part 2 of the *Adult Guardianship Act*, which has not been brought into force, would require that a court application for the appointment of a property guardian be accompanied by two assessment reports, each from a "qualified health care provider." A qualified health care provider is defined as a medical practitioner or a member of a prescribed class of health care providers.

Part 2.1 of the *Adult Guardianship Act*, which has also not been brought into force, would require one assessment by a qualified health care provider in order to issue a certificate of incapability.⁸⁵

The draft *Incapacity Assessments Regulation*, which accompanies Part 2 and 2.1 of the *Adult Guardianship Act*, includes nurses, occupational therapists, psychologists and social workers as prescribed classes of health care providers, if the professional

⁸⁴ This includes one file where a medical assessment was not conducted.

⁸⁵ Bill 29, *Adult Guardianship and Planning Statutes Amendment Act*, 3rd Sess, 38th Parl, British Columbia, 2007, s. 32.

colleges for each profession meets certain conditions. This means that a court application to appoint a committee of estate could be made on the basis of an assessment provided by a nurse and another provided by an occupational therapist, for example, without an in-person medical assessment. A certificate of incapability could be issued on the basis of one assessment conducted by a physician or a qualified health care provider, for example, a nurse, occupational therapist or a social worker.

The regulation would also require that if the qualified health care provider is not a medical practitioner, that the qualified health care provider review information from a medical practitioner who has examined the adult or reviewed the adult's medical status, and provided information about relevant diagnoses and prognoses. Under the draft regulation, a certificate could be issued on the basis of an assessment by a qualified health care provider who has considered information provided by a physician who has either examined the adult or reviewed the adult's medical information. While experts recommend that a team approach to capacity assessments be adopted, it is unclear why a process would be developed that would permit, except in the most extreme cases, the medical component of the assessment to be conducted on the basis of a review of the adult's medical information as opposed to an in-person meeting with the adult.

Currently, there are no binding standards regarding how medical assessments must be conducted. As the *Patients Property Act* does not require any assessment to be conducted, there is no requirement that a medical assessment is conducted by a physician or that the physician knows the adult and has examined the adult recently. There is no requirement for physicians to follow practice guidelines or to complete a standard assessment report form. There is no requirement for information to be provided to the adult before the assessment and about the assessment process. There was inconsistency in the thoroughness of the medical assessment reports we reviewed. Without minimum standards for medical assessments, there is a lack of certainty that a decision to issue a certificate of incapability will be based on current, accurate information about the adult's medical condition or that the adult will be treated consistently.

One way to improve consistency is to establish minimum legally binding assessment standards. The *Adult Guardianship Act* already has an assessment regulation. The *Adult Guardianship (Abuse and Neglect) Regulation* establishes standards for assessments conducted in order to determine if an adult is incapable of deciding not to accept the services in a proposed support and assistance plan, in cases where the adult may be abused or neglected. Standards include:

- who can conduct an assessment
- that the adult must be informed of the assessment and the purpose of the assessment
- that an assessor must follow prescribed practice guidelines
- that an adult may refuse to be assessed and what should occur if the adult does so
- that an assessor can have a support person present for the assessment
- that the assessor must advise the adult of the outcome of the assessment
- that the assessor must produce a report on a prescribed form

Standards equivalent to the ones described above should be established in regulation for medical assessments used for issuing certificates of incapability.

Finding & Recommendations

- F3** A decision that an adult is incapable of managing his or her financial affairs is not legally required to be based on an assessment conducted by a physician.
- R4** The Ministry of Justice take steps to require that all certificates of incapability are based on a current in-person assessment conducted by a physician.
- R5** The Ministry of Justice, in consultation with the Ministry of Health, include in regulation standards for conducting medical assessments as part of the certificate of incapability process.
-

Informing the Adult about the Medical Assessment

The *Patients Property Act* does not require the PGT to notify the adult that it will be seeking a medical assessment. The PGT Guidelines also do not recommend that the adult be informed that a medical assessment will be completed. In addition, both the legislation and the PGT Guidelines are silent regarding what information should be shared with the adult about the medical assessment after it has been completed.

The PGT does not inform the adult that a medical assessment has been requested. It leaves notification to the physician who conducts the assessment. If an adult refuses to participate in a medical assessment, the PGT may consult the appropriate agency designated under the *Adult Guardianship Act*, which can take steps under Part 3 of the *Adult Guardianship Act* if it determines this is necessary. Part 3 of the Act includes a provision that allows a designated agency to seek a court order to enter a premises to interview an adult, even if the adult is denying entry, to determine if the adult is abused or neglected and is unable to seek support and assistance.⁸⁶ In rare high-risk situations, if an adult cannot be assessed by a doctor for the purpose of the PGT's investigation, the PGT and health authority may collaborate to compile collateral information, which may include past medical assessments.

When seeking a medical assessment, the PGT sends its Physician Preliminary Opinion of Incapability form to the physician. In the notification section of the form, the physician is asked whether the adult was notified of the assessment, and if not, why not. The form also asks if it would be injurious to the health of the adult to serve him or her with copies of the documents related to the application to appoint a committee, and asks for an explanation if the answer is yes.

We reviewed 57 files where the PGT had become committee of estate as a result of a certificate of incapability. On eight of the files (14 per cent), there was no indication that the adult was notified that the physician had been asked for a medical assessment (the physician may also have completed the assessment on the basis of an examination that occurred before the physician was asked for an opinion). In five of these cases (9 per cent), it was noted that the adult was not notified about the assessment because the adult would not understand, and in one case it was indicated that the adult was not notified because of urgency. On 49 files (86 per cent), notification was indicated by the physician checking the box on the form that says the adult was notified. There was no indication in any of the files we reviewed that information about the purpose of the assessment was provided to the adult prior to it being conducted or that the adult being assessed received written notification of the assessment.

"... [I]nformal 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."

Source: BC Law Institute, *A Comparative Analysis of Adult Guardianship, Laws in British Columbia, New Zealand and Ontario*, 22–23

The Physician Preliminary Opinion of Incapability form states that a copy of the form may be shared with the adult. The PGT's position is that it is up to the physician to decide whether to provide the adult with a copy of the form. The PGT does not provide a copy of the Physician Preliminary Opinion of Incapability form to the adult or inform the adult of the outcome of the medical assessment. The PGT Guidelines do not recommend the adult be informed that he or she can seek a second opinion if the adult disagrees with the medical assessment. There was no indication in any of the files we reviewed that the adult was provided with a copy of the Physician Preliminary Opinion of Incapability form, or that the adult was informed that he or she could seek a reassessment or second opinion if he or she disagreed with the assessment.

Analysis

An important aspect of administrative fairness is that a person who may be adversely affected by a decision or action of an agency be given timely notice of the decision-making process, the nature of the resulting decision and its possible implications. Although the assessment is requested for the purpose of the PGT investigation, the PGT leaves it to the physician to decide whether to and how to notify the adult about the assessment and what information to provide. Because physicians might complete the assessment on the basis of a previous visit with the adult, in the absence of notification, it is possible for the adult to be unaware that he or she was assessed and for what purpose. The PGT is conducting the investigation and requesting the assessment and should also be responsible for notifying the adult of the medical assessment. The PGT could include information about the medical assessment as part of its notice of investigation.

The medical assessment is used by the PGT to decide whether or not to pursue a certificate of incapability. It is also one of the pieces of information that health authority staff consider when deciding whether or not to issue a certificate of incapability. It is important that the adult is informed that the PGT has requested a medical assessment and that the adult understands the purpose of the assessment and its possible implications. It is also important that an adult is notified in advance of the assessment because an adult can decide whether or not he or she wishes to be assessed.

Because of the significance of the medical assessment, adults should be told how they can obtain a copy of the assessment and how they can challenge the assessment or request a second opinion if they disagree with the results.

There are instances where the health authority may obtain a medical assessment prior to making a report to the PGT and therefore prior to the PGT's involvement. When this is the case, the onus is on the health authority to provide the notice that would normally be provided by the PGT.

Finding & Recommendation

F4 When the Public Guardian and Trustee is investigating an adult's incapability, it does not routinely inform the adult

- that it has requested a medical assessment
- of the purpose of the medical assessment
- that the adult can refuse to be assessed
- that the adult can have a support person present
- how to obtain a copy of the medical assessment and
- how to challenge the medical assessment or to request a reassessment

R6 When the Public Guardian and Trustee is investigating an adult's incapability, it inform the adult in writing that it has requested a medical assessment of the adult's incapability and

- the purpose of the medical assessment
- that the adult can refuse to be assessed
- that the adult can have a support person present
- how the adult can obtain a copy of the medical assessment, and
- how the adult can challenge the medical assessment or request a reassessment

How the Medical Assessment Is Paid For

If the PGT requests a medical assessment as part of its investigation, the PGT will coordinate payment for the medical assessment and then later recover the cost of the assessment from the adult, if the PGT is appointed committee of the adult's estate. The cost of the assessment usually ranges from \$50 to \$400.⁸⁷ On rare occasions, an assessment may cost over \$1,000.

The PGT does not inform the adult that he or she might be responsible for the cost of the medical assessment. According to the PGT, this is because if the investigation does not result in a certificate of incapability, the PGT does not recover the cost of the assessment. From 2007 to 2011, 41 per cent of the investigations conducted resulted in certificates of incapability being issued.

If paying the cost of the medical assessment at the time that the PGT becomes committee of estate will cause hardship, payment is deferred until the PGT assesses that the adult has sufficient funds to cover this cost. If it has not been paid by the time the PGT ceases to be committee of estate (because the adult has died or been declared capable), the amount can be waived.

We considered the fairness of the practice of recovering the cost of medical assessments from adults and the authority of the PGT to do so. Section 23 of the *Public Guardian and Trustee Act* gives authority to the Lieutenant Governor in Council to make "regulations prescribing fees or a scale of fees, including commissions and charges, payable to the Public Guardian and Trustee for performing a duty or service or for acting as trustee under this Act, another enactment or an agreement."⁸⁸ One of the fees prescribed in the *Public Guardian and Trustee Fees Regulation*

⁸⁷ British Columbia Medical Association guidelines recommend doctors charge approximately \$300 to complete the medical assessment form. British Columbia Medical Association, *Revised Fees For Uninsured Services Effective April 1, 2012*, 2 <https://www.bcma.org/files/Uninsured_Services1Apr2012.pdf>.

⁸⁸ *Public Guardian and Trustee Act*, R.S.B.C. 1996 c. 383, s. 23.

("Fees Regulation") is for conducting investigations under section 17(1) of the *Public Guardian and Trustee Act* of an adult who may be abused or neglected, if the PGT has reason to believe that the assets of the adult may be at risk, or that the representative, guardian or attorney has failed to comply with his or her duties.

The Fees Regulation (table provided below) lays out the amount that the PGT can charge the adult for costs incurred during an investigation of this type.

Table 4 *Public Guardian and Trustee Fees Regulation Fee Schedule*

Value of asset or gross value of estate	Fee charged
not over \$100,000	\$125
\$100,000 – \$250,000	\$200
\$250,000 – \$375,000	\$250
\$375,000 – \$500,000	\$300
\$500,000 – \$600,000	\$350
over \$600,000	\$400

Interestingly, the fee is not based on the complexity of the investigation but rather on the amount of assets at risk. In addition to charging a fee for conducting an investigation, section 23(4) of the *Public Guardian and Trustee Act* indicates that the PGT may recover costs incurred and loans made in performing its duties and delivering services under the Act. Although the PGT does not have any policy on recovery of expenses incurred during an investigation, it informed us that its practice is to recover costs for medical assessments and court applications from adults if the PGT later becomes committee of the adult's estate.

Analysis

The Fees Regulation authorizes the PGT to charge a fee for an investigation of an adult who may be abused or neglected, if the PGT has reason to believe that the assets of the adult may be at risk, or that the representative, guardian or attorney has failed to comply with his or her duties. PGT procedure indicates that an investigation is conducted when the PGT carries out any series of activities to determine whether an adult's assets are at risk, including telephone calls to friends, families, financial institutions and other professionals and property searches.⁸⁹

Section 23(4) of the *Public Guardian and Trustee Act* authorizes the PGT to recover costs incurred in carrying out its duties in addition to the flat fee it can charge for conducting an investigation. The amount of fee the PGT can charge ranges from \$125 to \$400, depending on the value of the adult's estate. Although the PGT has not established a policy on when it will recover costs incurred during an investigation, in addition to the fee charged for conducting the investigation, PGT practice is to recover the full cost of the medical assessment (ranging from \$50 to \$400) from the adult if the PGT is later appointed committee of the adult's estate.

We considered the fairness of charging adults for the cost of the medical assessment if the PGT is appointed committee.⁹⁰ Although the cost of the medical assessment varies, the PGT does not have a policy on what it will pay and when it will authorize

⁸⁹ Public Guardian and Trustee of British Columbia, "Investigations of Private Committees," procedures, June 2010, 6301.

⁹⁰ We did not consider the fairness of the practice of charging investigation fees to adults generally because PGT practice is to not charge an investigation fee for investigations of an adult's financial incapability.

a higher amount to be paid. The PGT does not notify the adult that the adult might be responsible for the cost of the assessment or how much it might cost. An adult is presumed to be capable until he or she is determined to be incapable. This means that although the adult is presumed to be capable at the time the PGT requests the medical assessment, the adult's estate can incur a fee for this assessment, to be recovered at a later date, without the adult being made aware that he or she is incurring the fee and without the adult authorizing it. This is inconsistent with the presumption that the adult is capable at this stage.

Finding & Recommendation

F5 It is unfair for the Public Guardian and Trustee to recover the cost of a medical assessment conducted during an investigation of an adult's financial incapability from the adult's estate after the Public Guardian and Trustee is appointed committee of the estate.

R7 The Public Guardian and Trustee seek authority and support from the provincial government to cover the costs of the medical assessment conducted during the investigation of financial incapability and stop recovering the costs from the adult's estate after it becomes committee.

Public Guardian and Trustee Decision to Pursue Guardianship

In addition to considering whether the adult is incapable of managing his or her affairs and whether another person is available to assist or act on the adult's behalf, the PGT also assesses risk and the need for protection before deciding to seek a certificate of incapability. The PGT informed us that it considers whether loss has already occurred or is very likely to occur. It looks at whether:

- bills are being paid
- income and applicable benefits are being received
- assets are appropriately in the adult's name or at risk (for example, if a tax sale of property is pending)
- expenditures are appropriate
- there are any health and safety implications for the adult as a result of his or her current vulnerability

According to the PGT Guidelines, if the PGT determines that the adult needs a guardian and there are no alternative options available, it may consider pursuing a formal authority by either requesting a certificate of incapability or applying for a court order appointing the PGT as committee of estate. Once it decides to pursue authority, the PGT looks at the following factors to determine whether it will pursue a certificate of incapability or a court order:

- the urgency of the situation
- whether protective measures are in place
- whether the costs of a court application would cause economic hardship for the adult (because the PGT will recover these costs from the adult's estate if it is granted committee ship)

- whether the adult has assets in a jurisdiction outside of British Columbia that will require a court order in order to be able to manage them
- whether a court process is already underway
- whether other court orders are needed in addition to a possible committee order (such as a support and assistance order under the *Adult Guardianship Act*)

The PGT informed us that, after obtaining the required assessments, it takes about three months to obtain a court order appointing the PGT as committee of estate. The cost of a court order may be \$5,000, or more if it is contested, which is collected from the adult's estate. The PGT estimated that it seeks to be appointed committee of estate through a court order 12 to 15 times a year and might also be appointed because a private committee died or had his or her authority rescinded by the court.

Table 5 *Number of Times the Court has Appointed the PGT Committee of Estate*

Year	PGT appointed committee of estate ⁹¹
2002	34
2003	24
2004	37
2005	27
2006	37
2007	26
2008	20
2009	25
2010	29
2011	20
Total	279

The PGT chooses the court route relatively rarely compared to choosing the administrative certificate process.



⁹¹ This table represents the number of times a court has appointed the PGT committee of estate. It does not represent the number of times the PGT has applied to the court.



HEALTH AUTHORITY INVESTIGATION

The *Patients Property Act* does not set out a process to be followed by the health authorities in investigating an adult's incapability. We asked each of the health authorities how many requests they have received from the Public Guardian and Trustee of British Columbia (PGT) for certificates of incapability, and how many certificates they have issued, for each of the past 10 years.

Table 6 *Number of Certificates of Incapability (CI) Requested and Issued by Health Authority, by Year*

Health Authorities*		2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
FHA	CI requested ⁹²	N/A*	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	CI issued	N/A	N/A	N/A	N/A	N/A	N/A	N/A	27	76	77
IHA	CI requested ⁹³	N/A	N/A	N/A	100	116	138	157	131	115	112
	CI issued	N/A	N/A	N/A	96	109	130	146	123	104	94
NHA	CI requested ⁹⁴	N/A	N/A	N/A	N/A	27	43	37	45	31	25
	CI issued	N/A	N/A	N/A	N/A	21	40	33	36	23	20
PHSA	CI requested	4	2	6	4	5	4	4	6	3	2
	CI issued	4	1	6	4	5	4	4	6	3	2
VCHA	CI requested ⁹⁵	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	CI issued ⁹⁶	N/A	N/A	N/A	N/A	N/A	N/A	145	99	93	80
VIHA	CI requested ⁹⁷	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	CI issued ⁹⁸	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Provincial total CI issued⁹⁹		387	307	270	329	380	462	587	493	442	420

* Fraser Health Authority (FHA); Interior Health Authority (IHA); Northern Health Authority (NHA); Provincial Health Services Authority (PHSA); Vancouver Coastal Health Authority (VCHA); Vancouver Island Health Authority (VIHA)

* Not available (N/A)

As the table above shows, only the Interior Health, Northern Health and Provincial Health Services authorities are currently tracking the number of requests they receive for certificates of incapability and the number they issue. The Interior Health Authority has issued certificates 92 per cent of the times that they were requested from the PGT, and the Northern Health Authority has issued certificates of incapability 83 per cent of the times that they were requested by the PGT. The Provincial Health Services Authority has issued certificates of incapability

⁹² The FHA informed us that it does not have a centralized process for tracking the number of certificates requested.

⁹³ The IHA informed us that it does not have a central registry of certificates requested. Smaller sites within the IHA did not catalogue certificate information prior to 2004.

⁹⁴ The NHA informed us that it did not keep statistics regarding certificate requests until part way through 2005.

⁹⁵ The VCHA informed us that neither it nor Providence Health Care has been tracking certificate requests.

⁹⁶ The VCHA informed us that these data have been kept by directors and not stored centrally. Some data were inaccessible. Providence Health Care did not record or track certificates centrally until 2008 and Providence Health Care was unable to access the data for the years prior to 2008.

⁹⁷ VIHA informed us that it does not have a central database for tracking certificate requests.

⁹⁸ VIHA informed us that it does not have a central database for tracking certificates issued, and the information that it provided may not be completely accurate. The data provided by VIHA were therefore not included in this table. VIHA said that it would explore options for automating the tracking of these data.

⁹⁹ These totals are based on data provided by the PGT. Totals based on health authority data could not be calculated, since not all health authorities have tracked this information for each year.

100 per cent of the time it has received a request from the PGT. It is difficult to draw any conclusions about this data when it is unavailable from the Fraser, Vancouver Coastal and Vancouver Island health authorities.

When the Health Authority Investigation Occurs

The Public Guardian and Trustee (PGT) Guidelines describe the health authority investigation as occurring after the PGT has completed its investigation. Sometimes, however, the health authority is involved earlier. As a designated agency under the *Adult Guardianship Act*, the health authority may receive reports directly from concerned families and friends. It may also receive reports from staff of the health authority and other agencies supporting the adult, and investigate reports that an adult is abused or neglected.

In those cases, the health authority's involvement may include:

- providing the PGT with collateral information while the PGT is investigating the adult's need for a committee of estate
- providing the medical assessment reporting concerns about a substitute decision-maker to the PGT
- making a report to the PGT about abuse or neglect, and/or the possible need for guardianship
- investigating possible abuse or neglect in its role as a designated agency
- conducting a functional/decision-making assessment in anticipation of a request for a certificate from the PGT

As the *Patients Property Act* authorizes a health authority to issue a certificate of incapability, it is possible for this to be done without the PGT requesting a certificate or even being involved. The PGT has discouraged this practice, referring to it as issuing an "unsolicited certificate." The PGT provided several reasons why it prefers to be involved before a health authority issues a certificate of incapability:

- If the situation is urgent and financial loss may be imminent, the PGT can use protective measures as soon as it is aware of the situation. (See "Protection of Assets in Urgent Situations" in the Public Guardian and Trustee Investigation of this report.)
- The PGT may have additional information based on a previous report or other contact, including whether the adult made a "nomination" indicating whom he or she wanted to act as committee of estate
- The PGT has access to information sources, such as the land titles office and financial institutions, which may indicate a resolution other than guardianship
- The PGT would like to prepare for becoming committee of a person's estate. The PGT becomes committee of estate upon a certificate of incapability being issued, and if a certificate is issued without its knowledge, the PGT must start acting in this role without having an action plan in place

We reviewed 57 files where the PGT had become committee of estate as a result of a certificate of incapability being issued. On two (4 per cent) of the files we reviewed, the health authority issued a certificate of incapability without consulting or involving the PGT.

In one of these cases, a certificate of incapability was issued without the health authority obtaining a functional assessment or a recent medical assessment. The director issued a certificate of incapability in July 2010 relying on a physician's

Guiding Principles for Issuing a Certificate of Incapability

"Incapacity assessments:

- *should only be conducted as a last resort and are unnecessary if there are alternate ways of adequately meeting the adult's needs*
- *are undertaken only if the assessment will serve the interests of the adult*
- *begin with the presumption that the adult is capable of making decisions*
- *are conducted fairly and with respect for the adult*
- *in the Certificate of Incapability context are concerned solely with the adult's ability to make decisions about his or her financial and legal affairs."*

Source: Public Guardian and Trustee of British Columbia, *Guidelines for Issuing a Certificate of Incapability Under the Patients Property Act*, October 2011, 5.

notes from a visit with the adult in July 2008. The notes on the health authority file indicated that the director issued the certificate of incapability believing that a certificate had previously been issued. However, when the PGT received the certificate, it did not have a record of previously receiving a certificate of incapability for the adult or of acting on the adult's behalf. The PGT believed there were other alternatives that should have been considered before appointing the PGT as committee of estate. However, it does not appear that the PGT or health authority explored taking steps to pursue a less intrusive option either before or after the certificate was issued.

Part 2.1 of the *Adult Guardianship Act*, which has not been brought into force, would require a health authority to consult with the PGT before issuing a certificate of incapability.¹⁰⁰ The proposed legislation would also require that the PGT accept a certificate of incapability before becoming an adult's statutory property guardian.¹⁰¹ This would mean that the PGT would not automatically become guardian upon the health authority issuing a certificate. The proposed legislation would require the PGT to provide reasons to the health authority if it did not accept a certificate of incapability issued by the health authority.¹⁰² The legislation would mean a health authority could not issue an "unsolicited" certificate. This would promote good practice as it would enhance consistency and protection.

Information Considered by the Health Authority

When the Public Guardian and Trustee (PGT) requests a certificate of incapability from a health authority, it sends a letter to the health authority describing the reasons for the request, and provides a copy of the referral form, a copy of the medical assessment and other information.

Section 62 of the *Adult Guardianship Act* authorizes designated agencies such as the health authorities to obtain information they need to investigate when it appears that an adult is being abused or neglected.

As part of its investigation, the health authority collects collateral information. Collateral information is information gathered from sources other than the adult and assessments of the adult.

The PGT Guidelines recommend that health authority staff who conduct functional assessments may need to gather collateral information in order to verify or dispute some of the information given by the adult, if the adult has had the opportunity to provide such information, or to supplement the information that the assessor already has access to. The guidelines state that the assessor may ask a range of potential sources for information, including family, friends, health care workers, bank tellers and other people who have had financial dealings with the adult.¹⁰³ Health authorities confirmed that they collect this information from these sources.

¹⁰⁰ *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, s. 32(3).

¹⁰¹ *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, s. 32(5).

¹⁰² *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, s. 32(6)(a).

¹⁰³ Public Guardian and Trustee of British Columbia, *Guidelines for Issuing a Certificate of Incapability Under the Patients Property Act*, October 2011, 16 < http://www.trustee.bc.ca/pdfs/STA/Guidelines_for_issuing_Cert_Incapability_Fall_2011_FINAL.pdf>.

Functional Assessments

A key part of a health authority's investigation is its own functional assessment of the adult.

A “functional assessment” for the purpose of this report is the functional and decision-making assessment conducted or coordinated by the health authority, not the medical assessment referred to in the Public Guardian and Trustee Investigation section. A functional and decision-making assessment involves examining the adult's knowledge of his or her financial circumstances, and collecting other relevant information. The purpose of the medical assessment is to determine whether the adult has a mental infirmity arising from age, disease or otherwise. The purpose of the functional assessment is to determine whether the adult is incapable of managing his or her financial affairs.¹⁰⁴ A functional assessment typically involves an assessment of the adult's ability to make decisions about his or her finances and the adult's ability to carry out these decisions. Both the medical and functional assessments result in opinions from the professional conducting the assessment whether the adult is incapable of managing his or her affairs.

We reviewed 57 files where the PGT has become committee of estate as a result of a certificate of incapability. Although the *Patients Property Act* does not require a functional assessment in order for a certificate of incapability to be issued, 47 of the 57 files (82 per cent) included a functional assessment conducted by the health authority. Ten files (18 per cent) did not include a functional assessment conducted by the health authority.¹⁰⁵

The PGT Guidelines recommend that the functional assessment include at least one personal interview in which the assessor asks the adult about his or her financial decision making.¹⁰⁶ The health authorities all stated that the functional assessments they rely on for issuing a certificate of incapability are based on a current or recent visit with the adult.

We reviewed 57 files where the PGT had become committee of estate as a result of a certificate of incapability. None of the functional assessments occurred more than six months prior to the certificate of incapability being issued. Three assessments (5 per cent) occurred between three and six months prior to the certificate being issued. Twelve assessments (21 per cent) were conducted between one and three months prior to the certificate being issued. Thirty-two (56 per cent) of the functional assessments occurred less than a month prior to the certificate being issued.

Analysis

The current legislative framework allows a health authority to issue a certificate of incapability without the health authority conducting a functional assessment of the adult's incapability. On 10 of the files we reviewed (18 per cent), there was no record of the health authority conducting a functional assessment. One file lacked not only a health authority assessment but also a medical assessment coordinated by the PGT.¹⁰⁷

¹⁰⁴ Public Guardian and Trustee of British Columbia, *Practice Guidelines for Certificate of Incapability Assessments Under the Patients Property Act*, March 2005, <<http://www.trustee.bc.ca/pdfs/STA/Certificate%20of%20Incapability%20Package.pdf>>.

¹⁰⁵ While two of these files did not include a functional assessment, they did include assessments beyond the medical assessment, including neuropsychological assessments.

¹⁰⁶ Public Guardian and Trustee of British Columbia, *Guidelines for Issuing a Certificate of Incapability Under the Patients Property Act*, October 2011, 13.

¹⁰⁷ The file did contain notes where the physician offered the opinion that the adult was “not competent to make a decision about [the adult's] person.” The date on the notes was more than two years before the certificate was issued.

The focus of the medical assessment, which is typically coordinated by the PGT, is on whether the adult has a “mental disorder/disability” that affects the adult’s ability to manage his or her financial and legal affairs. The form used for the medical assessment asks some basic questions about how the adult is functioning, such as whether the adult is able to perform simple financial transactions and whether the adult is able to do his or her own banking and shopping.

The focus of a functional assessment is on the adult’s awareness of his or her financial and legal affairs and how the adult is actually functioning with regard to these affairs. The Functional and Decision Making Assessment form includes 17 questions that the person conducting the assessment is expected to ask the adult. These include whether the adult knows his or her income and its sources; whether the adult knows what regular bills he or she has to pay; what debts, assets, investment and property he or she has; and whether he or she ever needs the help of a lawyer. The person conducting the assessment is expected to compare the adult’s responses with information that he or she has learned from other sources and to identify whether there are discrepancies that may indicate a concern.

As outlined in the Public Guardian and Trustee Investigation section, in many cases, a medical assessment may be conducted by a physician who is not the adult’s regular physician or has not known the adult for very long. It seems unlikely that all physicians will explore functioning issues in depth. This is especially the case where the physician bases the assessment on a previous examination of the patient. Nonetheless, when a physician is familiar with an adult, the physician may be able to complete both a medical and functional assessment.

A decision to issue a certificate based solely on the medical assessment may reflect the adult’s medical condition but not their actual functioning. In other words, a certificate issued on the basis of a medical assessment alone may be a certificate that does not need to be issued if the adult is actually functioning capably with the supports available to him or her.

Both the medical and functional assessments meet important needs in the process leading to a certificate of incapability. By issuing a certificate of incapability based on only one of these assessments, a director might not be taking all relevant considerations into account. Both assessments should be conducted whenever possible.

Finding & Recommendation

F6 The *Patients Property Act* does not require that a certificate of incapability be based on a functional assessment.

R8 The Ministry of Justice take steps to require that all certificates of incapability be based on both a medical and a functional assessment.

Staff Who Conduct Functional Assessments

There are currently no legislated or regulatory requirements regarding which health authority staff can conduct a functional assessment or what training a person must have in order to do so.

The Public Guardian and Trustee (PGT) Guidelines state that a functional assessment may be conducted by a single assessor or carried out by an assessment team.

An assessment team may include a:

- psychiatrist
- general practitioner
- nurse
- social worker
- occupational therapist
- continuing care case manager

The PGT Guidelines, however, do not specify what training a person should have before conducting an assessment.

In the health authorities, it is primarily social workers, nurses and occupational therapists who conduct functional assessments. In the Fraser, Interior and Vancouver Island health authorities, psychologists may also conduct functional assessments. The Vancouver Island Health Authority includes physiotherapists in its list of registered professionals who may be involved in an assessment.

We reviewed 57 files where the PGT had become committee of estate as a result of a certificate of incapability being issued. Forty-seven (82 per cent) of these included documentation of an assessment. On these files, the assessments were conducted by a:¹⁰⁸

- social worker 32 times
- nurse 11 times¹⁰⁹
- occupational therapist 4 times
- doctor/psychiatrist 3 times
- psychologist 1 time
- other 2 times¹¹⁰

In our review, we found that the majority of health authority assessments were conducted by a social worker.

During our interviews with health authority staff who issue certificates of incapability as appointed or delegated directors under the *Mental Health Act*, we were told by some that they prefer to have an assessment conducted by an occupational therapist, as occupational therapists have specific training in conducting functional assessments. Others preferred that the assessment be conducted by any professional provided that they had prior contact with the adult.

Issue Investigated

Are health authority staff who conduct functional assessments given sufficient training to effectively fulfill their responsibilities?

Role of Staff Who Conduct Functional Assessments

- notifies the adult of the assessment
- conducts the assessment
- consults the PGT
- consults with the Director, who makes the final decision about whether to issue a certificate of incapability

Source: Public Guardian and Trustee of British Columbia, *Guidelines for Issuing a Certificate of Incapability Under the Patients Property Act*, October 2011,9.

¹⁰⁸ The total of professionals exceeds 47 as there were several assessments conducted by more than one person. One assessment involved three professionals and three assessments involved two professionals.

¹⁰⁹ Includes both registered nurses and registered psychiatric nurses.

¹¹⁰ One assessment was conducted by a "mental health housing coordinator" and one by a "case manager." We were unable to determine what type of professionals these staff were.

The number of staff who conduct functional assessments varies between the health authorities. The Vancouver Island Health Authority estimated that it has 100 staff who may conduct these assessments compared to an estimated 143 in Interior Health, 750 in Fraser Health and 882 in Vancouver Coastal Health (including Providence Health Care staff).¹¹¹

The health authorities estimated that staff who conduct functional assessments spend 2–8 per cent of their time doing these assessments. Specifically, Fraser Health estimated that staff spend 2 per cent of their time doing functional assessments; Interior Health estimated less than or equal to 5 per cent; VIHA estimated 2–8 per cent; and Vancouver Coastal Health commented that the amount of time spent by staff is statistically “insignificant.”¹¹²

Despite the number of staff who can potentially conduct a functional assessment, none of the health authorities provide training to staff on conducting functional assessments. Northern Health provides general adult guardianship training.

Section 14 of the draft *Incapacity Assessments Regulation* under the *Adult Guardianship and Planning Statutes Amendment Act*, Part 2.1 (which is not yet in force), would require that, for assessments of incapability made for the purposes of appointing a statutory property guardian, a qualified health care provider must conduct the assessment. The draft regulation would require that a qualified health care provider be a nurse, occupational therapist, psychologist or social worker if the respective professional college has “established standards, limits or conditions” regarding its members’ performance when conducting incapability assessments for the purpose of the *Adult Guardianship Act*.¹¹³

We reviewed the qualifications required for conducting incapability assessments in other jurisdictions.¹¹⁴ In Ontario, for example, an assessor may be a physician, psychologist, social worker, occupation therapist or nurse.¹¹⁵

We also found that many staff learned how to conduct functional assessments on the job through informal mentorship from a senior employee who had been conducting assessments. Many did not receive specific training on conducting functional assessments. Most health authority staff we spoke to who conduct functional assessments felt that more training and more focused training would

¹¹¹ In Northern Health, the number of staff who conduct these assessments vary by community, program and number of requests for assessments. The Provincial Health Services Authority explained that since Riverview closed in 2012, none of its staff conduct functional incapability assessments. If it received a request for a certificate of incapability for an adult who was in the Forensic Psychiatric Hospital, it would need to train existing staff to conduct the assessment. Fraser Health explained, in relation to the large number of staff who may conduct functional assessments, that it has 27,000 staff, 2,000 physicians and serves a population of 1.7 million people.

¹¹² In Northern Health it was difficult to quantify the proportion of staff’s time spent on functional assessments because of variations in communities’ compositions and types of assessment required, as well as client’s program involvement. The Provincial Health Services Authority said the percentage of time is 0% since Riverview closed in 2012. It has not received a request for a certificate of incapability for an adult at the Forensic Psychiatric Hospital since 2008. VCHA noted that a functional assessment is for the purpose of determining incapability to perform any/all activities of daily living and involves assessment of cognitive function, physical function, executive function and psychiatric condition. Most patients upon admission into a VCHA program will be assessed comprehensively for all of the above and referred appropriately to those supports and services deemed necessary as a result of the assessment. VCHA explained that only about 70 – 90 assessments conducted per year result in completion of the functional assessment form.

¹¹³ *Incapacity Assessment Regulation*, consultation draft, 2007, s. 3.

¹¹⁴ During our investigation, we reviewed the guardianship schemes for every province and territory in Canada and identified three jurisdictions with certificate processes (Manitoba, Ontario and Yukon), which are highlighted as examples for best practice throughout the report.

¹¹⁵ *Capacity Assessment Regulation*, O.N. Reg. 460/05, s. 2(2).

benefit those who are new to the process and that refresher training would benefit those who have been conducting assessments for a period of time. One assessor we spoke with relied on professional guidelines from 1988 for conducting assessments.

We reviewed the training requirements for assessors in other jurisdictions.¹¹⁶ An assessor in Ontario, for example, must complete a prescribed assessment course and, to remain qualified, must meet a continuing education requirement and conduct a minimum of five assessments in a two-year period.

Analysis

There is no legally binding standard regarding who can conduct functional assessments, although we found that they are typically conducted by social workers but may be conducted by a nurse, occupational therapist, psychologist, psychiatrist or doctor. In order to ensure that all functional assessments are conducted by qualified professionals, the government plans to define what professionals they consider to be qualified for this purpose.

In each health authority, there are many staff in different communities that might be asked to conduct a functional assessment. Health authorities estimated that staff who conduct functional assessments spend a small amount of their time (2 per cent to 8 per cent) performing this task compared to their other duties. Given the amount of time spent conducting assessments, it is important that these staff are properly trained and that they receive training on an ongoing basis. However, many of the staff we spoke to who conduct assessments said that they had not received training specific to functional assessments.

Finding & Recommendation

- F7** The health authorities do not consistently provide training to staff who conduct functional assessments.
- R9** The Ministry of Health, in consultation with the health authorities, develop a provincial training program that must be completed by health authority staff before conducting functional assessments and ensure this training is provided on an ongoing basis.

Before Conducting an Assessment

The *Patients Property Act* is silent on the process for conducting functional assessments, including the process for notifying the adult and providing the adult with information about the assessment process.

The Public Guardian and Trustee (PGT) Guidelines recommend that before the interview, the assessor determine the best way to communicate with the adult, which may include determining whether an interpreter is required; whether the

Issue Investigated

At the beginning of a health authority investigation, do adults and their families receive an adequate explanation of the role of the health authority and the procedures to be followed?

¹¹⁶ During our investigation, we reviewed the guardianship schemes for every province and territory in Canada and identified three jurisdictions with certificate processes (Manitoba, Ontario and Yukon), which are highlighted as examples for best practice throughout the report.

adult uses sign language; whether the level of communication used during the interview will be appropriate, given the adult's intellectual development; or whether family, friends or caregivers are available to help communicate with the adult.¹¹⁷

Notice of Assessment

The non-binding PGT Guidelines suggest that the assessor or assessment team inform the adult of its intention to conduct a functional assessment. The PGT Guidelines also state that, "to the extent reasonable, the assessor or team involves the adult in the overall process ... though notification can be waived if the information would be seriously injurious to the adult's health and well being."¹¹⁸

The health authorities indicated that, in most cases, they notify adults of their intention to conduct a functional assessment verbally. The Fraser and Interior health authorities said that this notification may occur when staff call to arrange an assessment. While the Vancouver Coastal Health Authority told us that it is best practice to notify the adult of the assessment before it is conducted, each of the health authorities confirmed that the adult may be notified about the assessment at the time that the assessment is conducted.

Vancouver Coastal Health explained that if the assessment occurs prior to a report to the PGT, the assessment may be part of a more comprehensive series of tests. In these circumstances, staff may not yet be aware that the adult's financial incapability is an issue, and therefore staff may not inform the adult specifically about this aspect of the assessment.

The Fraser Health Authority told us that it may not notify the adult of the assessment if staff believe doing so would be injurious to the adult. The Vancouver Island Health Authority said it may not notify an adult if doing so would, in the staff's view, put him or her at unacceptable risk of abuse, neglect or self-neglect. Vancouver Coastal Health said that it may not notify the adult about the assessment for clinical reasons – for example, if staff anticipate that it would cause confusion or agitation.

The health authorities indicated that it would be exceptional to notify a family member or friend of an adult about a functional assessment.

During our interviews with health authority staff who conduct functional assessments, staff told us that notice is given to the adult in most cases. Staff commented that in some cases, notice is not provided in advance, but rather the notice and an explanation is provided just prior to the adult being assessed. One assessor phones the adult directly to provide notice and arrange the assessment. Some commented that notice may not be provided if there is concern about whether the adult will participate.

We reviewed 57 files where the PGT had become committee of estate as a result of a certificate of incapability being issued. Forty-seven files (82 per cent) included documentation of an assessment by the health authority. Forty-three files (75 per cent) included evidence that the adult was notified of the assessment.

The Functional and Decision-Making Assessment Form includes a box where it asks the health authority staff person who conducted the assessment if the adult was notified of the assessment and if so, how – by mail, phone or in person. On all of

¹¹⁷ Public Guardian and Trustee of British Columbia, *Guidelines for Issuing a Certificate of Incapability Under the Patients Property Act*, October 2011, 14.

¹¹⁸ Public Guardian and Trustee of British Columbia, *Guidelines for Issuing a Certificate of Incapability Under the Patients Property Act*, October 2011, 9.

the files we reviewed, where this form was present and the adult was notified, the form indicated that notification was provided in person. It was not clear, however, whether the adult was notified prior to the assessment being initiated. This distinction is relevant because if the notice is provided as the assessment is starting, the adult doesn't have an opportunity to have a support person present.

In addition to asking whether the adult was notified of the assessment, the Functional and Decision Making Assessment Form asks whether the adult was informed that the "PGT may be appointed to manage his or her financial or legal affairs." Twenty (35 per cent) of the files we reviewed did not indicate that the adult was informed of the implications of the assessment.¹¹⁹

The *Incapacity Assessments Regulation* was drafted to accompany section 2.1 of the *Adult Guardianship Act*, which is not yet in force. The regulation would require that before performing the assessment, the assessor must advise the adult that he or she is being assessed to determine whether the adult is incapable of making decisions about his or her financial affairs. The regulation does not specify whether notification should be provided orally or in writing. It would also require the assessor to advise the adult that if he or she is found incapable, the assessment may be used to appoint a guardian.

We reviewed the requirements in other jurisdictions for providing information to the adult before the assessment.¹²⁰ In Ontario, section 78(2) of the *Substitute Decisions Act* requires the assessor to tell the adult the purpose of the assessment, the significance and effect of a finding of capacity or incapacity, and the adult's right to refuse to be assessed.¹²¹

Support Person

The PGT Guidelines indicate that an adult may have a support person present during an assessment. The guidelines note that the assessor may refuse to allow a person to be present during the assessment if, in the assessor's view, the person's presence will not benefit the adult, will disrupt the assessment or will otherwise have an adverse effect.

Each of the health authorities told us that an adult may have a suitable person present to support him or her during the assessment, although it is unclear how an adult is informed of this. VIHA stated that a support person could be present to assist with communication, but normally the adult is assessed alone.

Assessors consistently told us that an adult can have a support person during the assessment, though some said this is not common and that they prefer that a support person not be present. Only one assessor expressed a preference for having a support person present and that was to serve as a witness to the fair conduct of the assessment.

¹¹⁹ This includes four files where the health authority had not conducted or arranged an assessment, and six files where the health authority had conducted an assessment other than a functional and decision-making assessment and therefore did not use the form that indicates whether the adult was informed.

¹²⁰ During our investigation, we reviewed the guardianship schemes for every province and territory in Canada and identified three jurisdictions with certificate processes (Manitoba, Ontario and Yukon), which are highlighted as examples for best practice throughout the report.

¹²¹ These provisions do not apply if the assessment is ordered by a court, or if a power of attorney authorizes someone to force the adult to be assessed.

The draft *Incapacity Assessments Regulation* would permit an assessor to allow someone other than the adult being assessed to be present during all or part of an incapability assessment if:

- it is necessary or advisable for the purpose of communicating with the adult
- it is necessary or advisable for the purpose of conducting the assessment, or
- it is requested by the adult¹²²

The draft regulation would give the assessor the authority to prevent a support person from being present during an assessment if the person's presence would, in the opinion of the assessor, disrupt or adversely affect the assessment.

Participation in the Assessment

The PGT Guidelines indicate that an adult may refuse to participate in an assessment and that if the adult refuses, the assessor must decide whether the assessment can be accurately completed by using observational and collateral information. The guidelines caution against using the adult's refusal as an indication of capability.

The health authorities may use observational and collateral information if the adult refuses an assessment. The Fraser and Vancouver Island health authorities said that in these cases they may take action authorized by the *Adult Guardianship Act* if necessary. Section 59 of the Act authorizes designated agencies (which include health authorities) to take measures when an adult is apparently abused or neglected and apparently incapable of providing consent, and the designated agency staff is of the opinion that it must act to prevent significant damage or loss. These measures include:

- entering a premises without a warrant or court order, and using reasonable force as necessary
- removing an adult from the premises and transporting him or her to a safe place
- providing the adult with emergency health care
- informing the PGT that the adult's financial affairs need immediate protection
- taking any other emergency measures necessary to protect the adult from harm¹²³

Approximately 70 per cent of the assessors we interviewed believed that an adult can refuse to participate in the assessment. The assessors' responses varied with regard to what they would do if an adult refused. Some said they would make repeated attempts and perhaps try to conduct the assessment in a different setting. One commented that if the adult refused to participate, the assessor would arrange for a police officer to attend the assessment with the assessor in order to have the adult cooperate. Some assessors explained that they would inform the adult that the process would continue whether the adult participated in an assessment or not. One assessor stated that if an adult refused, the assessor would presume incapability unless information to the contrary was obtained.

¹²² Public Guardian and Trustee of British Columbia, *Guidelines for Issuing a Certificate of Incapability Under the Patients Property Act*, October 2011, 9.

¹²³ *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, s. 59.

The draft *Incapacity Assessments Regulation* states that if the adult refuses to participate in all or part of an assessment, the assessment could be conducted using information based on observations and other sources, if the assessor believes that the assessment can reasonably be completed by doing so.

We reviewed the requirements in other jurisdictions for providing information to the adult before the assessment.¹²⁴ When an adult refuses an assessment, Ontario's *Substitute Decisions Act* states that he or she must not be assessed unless the assessment is ordered by a court or the person being assessed has previously authorized a substitute decision-maker to allow the use of force to ensure an assessment is conducted.¹²⁵

Analysis

An important aspect of administrative fairness is that if a person could be adversely affected by a decision or action of an agency, the person should be given timely notice of the process and the nature of the resulting decision and its possible implications.

When an adult is going to be assessed by the health authority, there are a number of decisions the adult can make about the assessment, including:

- whether to participate
- whether to arrange for a support person to be present
- whether to seek advice regarding his or her legal rights

Notice is timely if it is given with sufficient time for the adult to consider these questions – whether to participate, whether to invite a support person and whether to seek legal advice. In order to make these decisions in a meaningful way, it is necessary that the adult be informed of the assessment prior to it being initiated and that the adult be informed of its purpose and the significance of a finding of incapability.

Health authority staff come into contact with adults in different situations and so in some circumstances an informal evaluation may begin before an actual decision is made to seek an assessment of an adult's capability. In those situations, notice should be given once a decision to move to an assessment is made.

In situations where health authority staff, based on an evaluation of the information they have reviewed, reasonably conclude that providing notice would put an adult at risk, notice should not be required. The conclusion and the reasons for it must, however, be clearly documented.

As part of the notification, the adult should be made aware that he or she can refuse to participate in the assessment, but that the assessment may still be conducted and would rely on collateral information.

The adult should also be informed that he or she can invite a support person to be present and can seek legal advice. The assessor should have the ability in those cases, where the assessor has reasonable grounds to believe that a particular person's presence would adversely affect the assessment, to advise the adult that

¹²⁴ During our investigation, we reviewed the guardianship schemes for every province and territory in Canada and identified three jurisdictions with certificate processes (Manitoba, Ontario and Yukon), which are highlighted as examples for best practice throughout the report.

¹²⁵ *Substitute Decisions Act*, S.O. 1992, c. 30, s. 78(1)(3).

the person will not be permitted to act as a support person, but that the adult may have a different support person or proceed without a support person. The decision not to allow a particular support person should be clearly documented.

In addition, it would enhance the transparency and accountability of the process if the adult were told how to obtain a copy of the assessment and what options the adult has if he or she disagrees with the assessment or would like to request a reassessment or second assessment.

Finding & Recommendations

F8 The health authorities do not consistently provide adults with timely notice of and adequate information about functional assessments.

R10 Health authorities ensure that adults receive timely notice of and adequate information about functional assessments. The information provided to adults should include:

- the purpose of the assessment
- that the adult can refuse to participate in the assessment
- that the adult can have a support person present
- how the adult can obtain a copy of the assessment and
- how the adult can challenge the assessment or request a reassessment.

In exceptional circumstances, when the health authorities have concluded on reasonable grounds that providing notice would put an adult at risk, notice is not required.

R11 The Ministry of Justice take steps to require in regulation that adults be provided with timely notice of and adequate information about functional assessments.

Goal of the Assessment

“...to obtain information on the capabilities of the person to manage their financial and legal affairs...”

Source: Functional and Decision Making Assessment Form

Assessment Process

The *Patients Property Act* does not include any requirements with regard to what type of assessment is conducted, how an assessment is conducted or how it is documented. The Public Guardian and Trustee (PGT) Guidelines, however, provide direction for conducting a functional assessment.

According to the PGT Guidelines, assessors may look at various cognitive abilities, including:

- whether the adult’s ability to make decisions or solve problems has become significantly worse compared to his or her past abilities
- any discrepancies between the adult’s answers to questions about his or her financial affairs
- the adult’s knowledge and understanding of his or her income and its sources
- the adult’s knowledge and understanding of his or her bills and debts that require payment on a regular basis¹²⁶

The PGT Guidelines also contain a list of indicators that may help in determining whether the adult understands the basic information needed to make decisions about his or her financial affairs, including:

¹²⁶ Public Guardian and Trustee of British Columbia, *Guidelines for Issuing a Certificate of Incapability Under the Patients Property Act*, October 2011, 37.

- whether the adult gives consistent and unambiguous answers to questions
- whether the adult is able to participate in the discussion about his or her financial affairs
- whether the adult asks pertinent questions that reflect an understanding of the situation and/or the adult's financial affairs
- whether the adult identifies the actions that are necessary to ensure the reasonably effective management of his or her financial affairs¹²⁷

In addition to assessing cognitive abilities and understanding of financial decisions, an assessor may consider functional abilities in order to determine whether the adult is able to take steps to ensure that his or her decisions regarding financial affairs can be implemented. The PGT Guidelines include a Functional and Decision Making Assessment Form for this purpose.

The Functional and Decision Making Assessment Form includes seven sections for the assessor to fill out and contains a variety of questions relating to the adult's ability to communicate, the adult's understanding of his or her financial and legal affairs and what issues he or she is experiencing. At the end of the form, the assessor is asked for an opinion as to whether the adult is capable or incapable of managing his or her financial or legal affairs.

The health authorities told us that it is their practice to conduct functional assessments based on the PGT's Functional and Decision Making Assessment Form.

During our interviews with health authority staff who conduct functional assessments, we received varied responses to the question of how assessments are conducted. Some referred to using the PGT's Functional and Decision Making Form and some stated that they do not use the form. Some assessors commented that they were not clear about how the Functional and Decision Making Assessment Form is to be used, or had difficulty using it when they first started conducting assessments. One specifically said that she could use more guidance on how to use the form and on what to base her opinion on.

Some assessors stated that they use one of several other assessment tools, such as the Mini Mental Status Exam or Independent Living Scales. Other assessors said that they base their assessment on a discussion of or demonstration of the adult's specific functioning with regard to finances. For example, the adult may be asked what bills he or she pays and how he or she pays them. The adult may also be asked to fill out a cheque or perform other tasks to demonstrate functioning.

The *Incapacity Assessments Regulation* was drafted to accompany Parts 2 and 2.1 of the *Adult Guardianship Act*, which is not in force. The regulation would establish what information must be considered when assessing whether an adult is incapable. The draft regulation would require that when assessing incapability, an assessor must determine whether the adult demonstrates an understanding of:

- the nature of his or her financial affairs, including the value of the adult's business and property
- the obligations owed to the adult's dependents
- the decisions or actions that must be taken for the reasonable management of his or her financial affairs
- the risks and benefits of making particular decisions about his or her financial affairs

¹²⁷ Public Guardian and Trustee of British Columbia, *Guidelines for Issuing a Certificate of Incapability Under the Patients Property Act*, October 2011, 14.

- information given to the adult about the above points
- the fact that the information referred to above applies to his or her situation

An assessor would also need to determine whether the adult is able to take steps to ensure that his or her financial decisions can be implemented.¹²⁸

The draft regulation includes a prescribed form in which the assessor would indicate his or her opinion as to whether the adult is incapable or capable of managing his or her financial affairs. Section 8 of the regulation would also require the assessor to attach the details of the assessment, including:

- the factors considered in making the determination
- the conclusions reached on the basis of those factors
- the information used if the adult refused to participate in the assessment¹²⁹

We reviewed the requirements for assessments in other jurisdictions.¹³⁰ Ontario also has prescribed guidelines that assessors must follow when conducting an assessment. The guidelines are contained in a 59-page document that covers topics such as ethical and legal considerations, questions to be asked, performing capacity assessments with special populations, and steps to be taken when performing an assessment.¹³¹

Analysis

The *Patients Property Act* does not include any requirements regarding functional assessments. The PGT Guidelines provide some direction regarding assessing whether an adult is incapable; however, the guidelines are not legally binding on health authorities.

We found that assessment practices varied significantly among health authorities and among assessors. We were also told by some assessors that they were uncertain as to how they should be conducting incapability assessments and how they should be forming their opinions regarding incapability. In order to ensure consistency, minimum legally binding assessment standards should be established.

In case where an adult may be abused or neglected, there already is an assessment regulation under the *Adult Guardianship Act* that applies to assessments conducted to determine if the adult is incapable of deciding not to accept the services in a proposed support and assistance plan. The *Adult Guardianship (Abuse and Neglect) Regulation* sets out:

- who can conduct an assessment
- that the adult must be informed of the assessment and the purpose of the assessment
- that an assessor must follow prescribed practice guidelines
- that an adult may refuse to be assessed and what should occur if the adult does so
- that an assessor can have a support person present for the assessment

¹²⁸ *Incapacity Assessment Regulation*, consultation draft, 2007, s. 14.

¹²⁹ *Incapacity Assessment Regulation*, consultation draft, 2007, s. 8.

¹³⁰ During our investigation, we reviewed the guardianship schemes for every province and territory in Canada and identified three jurisdictions with certificate processes (Manitoba, Ontario and Yukon), which are highlighted as examples for best practice throughout the report.

¹³¹ Ontario Ministry of the Attorney General, *Guidelines for Conducting Assessments of Capacity*, May 2005 <<http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacity/2005-05/guide-0505.pdf>>.

- that the assessor must advise the adult of the outcome of the assessment
- that the assessor must produce a report on a prescribed form

In order to enhance consistency and ensure that all functional assessments meet minimum standards, requirements equivalent to the ones described above should be established in regulation for functional assessments used for issuing certificates of incapability.

Finding & Recommendation

F9 In the absence of legally binding minimum assessment standards health authority staff who conduct functional assessments follow different assessment practices resulting in inconsistent treatment for individual adults.

R12 The Ministry of Justice, in consultation with the Ministry of Health, include in regulation standards for conducting functional assessments as part of the certificate of incapability process.

After Conducting the Assessment

The *Patients Property Act* does not require staff to inform an adult about the outcome of an incapability assessment. The Public Guardian and Trustee (PGT) Guidelines recommend that the assessor inform the adult of the results of the assessment. The guidelines state that it is up to the assessor to determine whether to inform the adult verbally or in writing of the results of the assessment, depending on the adult's condition and circumstances.

We asked the health authorities whether they provide the adult with a copy of any assessments conducted. All of the health authorities, except the Fraser Health Authority, indicated that they do not give copies of assessments to the adult. Interior Health, Northern Health, Vancouver Coastal Health and the Provincial Health Services authorities informed us that they provide the adult with a summary of assessment but not the assessment itself.¹³² Fraser Health stated that it will provide a copy of an assessment to the adult on request, depending on the adult's mental status and ability to understand the information. Fraser Health said it would not provide a copy of the assessment if, in its view, doing so would be injurious to the adult. The Vancouver Island Health Authority stated that it is revising its guidelines in order to provide copies of assessments when requested.¹³³

During our interviews with health authority staff who conduct functional assessments, we heard that most assessors will inform the adult verbally of the outcome of the assessment but will not provide a copy of the assessment. Four assessors stated that the adult would need to request a copy of the assessment to receive it, and that this rarely occurred. Another assessor said that it is the adult's legal right to have access to the assessment.

Issue Investigated

Are adults and their families given timely notice of the health authority's actions and informed of the nature of the health authority decision and its implications?

¹³² A summary of assessment is often included with a letter notifying the adult that the health authority intends to issue a certificate of incapability. For more information about this step in the process, see the Issuing the Certificate of Incapability section of this report.

¹³³ VIHA referred to recommendation 10 in the Ombudsperson's report, *The Best of Care, Getting it Right for Seniors in British Columbia (Part 2)*. This recommendation states that the health authorities should offer seniors copies of their home and community care assessments.

We reviewed 57 files where the PGT had become committee of estate as a result of a certificate of incapability being issued. Forty seven files (82 per cent) included evidence of an assessment by the health authority. The Functional and Decision Making Assessment Form includes a box where the assessor is asked to describe the plan for informing the adult of the outcome of the assessment.

Twenty-three of the files that we reviewed (40 per cent) indicated that an assessment had been conducted but did not include a plan for the health authority to inform the adult of the outcome of the assessment. On three files (5 per cent), the assessment form stated that the adult had already been informed of the outcome. Twenty-one files (37 per cent) included a plan for the health authority to inform the adult. The information on these files was not sufficient to indicate whether or not the adult was informed as planned. Ten files did not include evidence of a functional assessment.

The *Incapacity Assessments Regulation*, which was drafted to accompany section 2.1 of the *Adult Guardianship Act* (which is not in force), would require the assessor to inform the adult of the determination of capability or incapability.

We reviewed the requirements for informing an adult of the results of an incapability assessment in other jurisdictions.¹³⁴ Ontario's *Substitute Decisions Act* requires an assessor to provide an adult with written notice of his or her findings when an assessment of the adult's capacity has taken place.¹³⁵

We asked the health authorities about what information they provide to adults and families who disagree with the outcome of an assessment. Each of the health authorities told us that an adult or a member of the adult's family can request a reassessment or second opinion if he or she disagrees with the outcome of the health authority assessment. The Provincial Health Services Authority told us that the adult and family are told to contact the social worker if they have questions or concerns about the assessment process, or wish to provide information to be considered. The Northern Health Authority said that it informs the adult and family in writing that they can contact the health authority if they disagree with the outcome of the assessment or to request additional information. This information is included in the letter that Northern Health sends to notify the adult or family that it intends to issue a certificate of incapability. Northern Health said that if a family member contacts the Mental Health and Addictions Director, he or she is informed of the right to reassessment.

We asked assessors about informing the adult as to what to do if he or she disagrees with the results of the assessment. Two assessors, both from the same health authority, said that they tell the adult what steps the adult can take if he or she disagrees with the assessment. Assessors from other health authorities were not clear about what the adult could do if he or she disagreed with the assessment.

Analysis

The health authority assessment is a key piece of information that is used by directors along with other information to decide whether a certificate of incapability will be issued. Given the significance of the assessment, it is important that an adult be able to obtain a copy of it. Allowing an adult access to an assessment may help

¹³⁴ During our investigation, we reviewed the guardianship schemes for every province and territory in Canada and identified three jurisdictions with certificate processes (Manitoba, Ontario and Yukon), which are highlighted as examples for best practice throughout the report.

¹³⁵ *Substitute Decisions Act*, S.O. 1992, c. 30, s. 78(5).

him or her understand why the health authority is considering issuing a certificate, and would give the adult who wishes to oppose the issuing of a certificate the information needed to challenge the determination. In the event that functional assessments include third-party information, health authorities should remove any third-party information.

However, none of the health authorities said that they offer to provide a copy of the assessment to the adult. Only one health authority said that it provides copies of the assessment upon request.

Finding & Recommendations

- F10** The health authorities do not offer adults copies of their functional assessments.
- R13** The health authorities offer adults copies of their functional assessments. If the adult wishes to receive a copy, any third-party information should be removed from the copy provided to the adult.
- R14** The Ministry of Justice take steps to require in regulation that adults are offered copies of their functional assessments.
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ISSUING A CERTIFICATE OF INCAPABILITY

The *Patients Property Act* defines a patient as:

a person who is described as one who is, because of mental infirmity arising from disease, age or otherwise, incapable of managing his or her affairs, in a certificate signed by the director of a Provincial mental health facility or psychiatric unit as defined in the *Mental Health Act*.¹³⁶

Certificates of incapability are issued by directors of provincial mental health facilities or psychiatric units and their delegates. Issuing a certificate is a legal decision that is usually based on medical and other information and evidence, and results in the appointment of the Public Guardian and Trustee of British Columbia (PGT) as an adult's committee of estate.

The decision to issue a certificate is a significant one, as it results in the adult losing the ability to manage his or her financial and legal affairs and with that comes a loss of autonomy and independence.

One complaint our office received highlights some of the issues that may arise during the certificate process. Sam's story demonstrates what can happen when an adult does not receive proper notice that a certificate of incapability will be issued, and is not provided with an adequate opportunity to respond before it is issued.

CASE SUMMARY *Sam's Story Revisited*¹³⁷

Sam was in his 60s and lived on his own in an apartment where he received home support services and help with daily activities. Sam's friend had been his power of attorney until recently when he made his accountant power of attorney.

The PGT received a report of concerns about how Sam's finances had been managed. On April 17, 2009, the PGT wrote to the regional health authority and requested that a certificate of incapability be issued for Sam. On April 20, 2009, the health authority director sent a letter to Sam notifying him that the director intended to issue a certificate of incapability. The director enclosed a summary of assessment that referred to a medical assessment of Sam, which was conducted by a geriatrician in November 2008. The letter stated that Sam had 10 days to respond if he opposed the decision.

Although the November 2008 medical assessment said that Sam's condition may improve, the health authority did not take steps to assess Sam's current condition or look into Sam's current circumstances (such as whether Sam had a new power of attorney, which he did). The director issued a certificate of incapability on April 20, 2009, the same day that the director wrote to Sam and said he had 10 days to respond. The PGT sent a letter to Sam dated April 21 stating that it had "been given the legal responsibility to assist [Sam] with the management of [his] financial and legal affairs."

Sam hired a lawyer who wrote to the PGT and health authority on April 29, which was within the 10 days that the health authority director had given to respond. The certificate of incapability had already been issued, however. Initially, the PGT did not recognize Sam's lawyer as the PGT was now responsible for Sam's legal affairs. Ultimately, the PGT terminated its authority as committee of estate.¹³⁸

¹³⁶ *Patients Property Act*, R.S.B.C. c. 349, s. 1.

¹³⁷ See the Background section of this report for the more detailed version of Sam's story.

¹³⁸ The committee's authority was terminated under section 19.1(4) of the *Patients Property Act*. This section authorizes the PGT to terminate its authority when it determines it is not necessary or desirable to manage the patient's property and there is a power of attorney in place.

There are numerous issues of administrative unfairness in the above case. The director issued a certificate of incapability for Sam without a current assessment from the health authority. Even though the director’s letter said Sam had 10 days to oppose the issuing of the certificate, the director issued the certificate on April 20, the same day the director sent the letter. This meant that Sam had no opportunity to provide more information as to why a certificate of incapability should not be issued. If Sam had been given the opportunity to provide information, he could have informed the director that his accountant was his power of attorney, and that a certificate was not needed. Sam hired a lawyer to oppose the certificate. However, the PGT did not recognize Sam’s lawyer as his representative because the PGT was already his litigation guardian. Only the PGT could approve hiring a lawyer to represent Sam’s interests.

Health Authority Staff with Responsibility for Issuing Certificates

The *Patients Property Act* authorizes the director of a provincial mental health facility or psychiatric unit, designated under the *Mental Health Act*, to issue a certificate of incapability. The *Mental Health Act* defines a director as:

a person appointed under the regulations to be in charge of a designated facility and includes a person authorized by a director to exercise a power or carry out a duty conferred on the director under [the *Mental Health Act*] or the *Patients Property Act*.¹³⁹

The *Mental Health Act* gives directors the authority to delegate their responsibility to another person for issuing certificates of incapability.

Health authorities are responsible for the appointment of directors and have been since the establishment of regional health boards in 1993. Before 1993, the Ministry of Health had a more direct role in appointing directors under the *Mental Health Act*. Generally, the directors appointed by health authorities are medical or health professionals in leadership positions – the directors of psychiatric units, mental health facilities, observation units and the heads of psychiatry departments in hospitals. In Northern Health, the appointed directors are the health authority’s three chief operating officers.

The qualification of those delegated the director’s responsibility vary across the health authorities. They include medical professionals in leadership positions – senior psychiatrists, chiefs of psychiatry, clinical program directors and mental health and addictions managers.

Table 7 *Health Authority Staff Who Issue Certificates*

Health authorities*	Number of board appointed directors	Number of delegated directors
FHA	12	26
IHA	4	25
NHA	3	3
PHSA	3	0
VCHA	8	15
VIHA	13	3

* Fraser Health Authority (FHA), Interior Health Authority (IHA), Northern Health Authority (NHA), Provincial Health Services Authority (PHSA), Vancouver Coastal Health Authority (VCHA) and Vancouver Island Health Authority (VIHA)

Issue Investigated

Are directors who issue certificates of incapability given sufficient training to effectively fulfill their responsibilities?

¹³⁹ *Mental Health Act*, R.S.B.C. 1996 c. 288, s. 1.

The Fraser Health Authority has 12 appointed directors and 26 delegated directors, which means there are 38 people within this health authority who can issue certificates of incapability. The Northern Health Authority has three appointed directors and three delegated directors, which means six people have the responsibility for issuing certificates. The Provincial Health Services Authority has three appointed directors and no delegated directors, and it informed us that certificates are issued by only one of the appointed directors.

There is a range of professional backgrounds and experience among those who are appointed or delegated as directors. We interviewed 11 health authority staff who issue certificates. On average, they had been issuing certificates for 4.75 years, but their experience ranged from 6 months to 10 years. Their estimate of the number of certificates that they issued ranged from 9 to 250 certificates. The professional backgrounds of those we interviewed included medicine, psychiatry, psychiatric nursing, occupational therapy and social work.

The Fraser, Interior and Vancouver Coastal health authorities have three levels of directors: board appointed, primary delegated and alternate delegated. In both Fraser Health and Vancouver Coastal, the primary delegated director issues the certificate when the board appointed director is not on site, and the alternate delegated director issues the certificate when both the board appointed and primary delegated directors are unavailable. By contrast, in Interior Health, the board appointed directors only issue certificates by exception; most certificates are issued by delegates.

We asked about the training provided to directors and their delegates who are responsible for issuing certificates of incapability. Only Interior Health indicated that it had provided training to directors and delegates. Interior Health has developed a director's guide that informs directors about the legislation, PGT Guidelines and the health authority's process for issuing a certificate of incapability. The Interior, Vancouver Coastal and Vancouver Island health authorities all expressed a commitment to develop and provide training to directors in the future. The Ministry of Health confirmed that it has not established provincial guidelines or a provincial training program for those who issue certificates of incapability.

During our interviews of health authority directors, seven (64 per cent) stated that they had no had formal training related to their role in issuing certificates of incapability. Another two (18 per cent) indicated they had very little training. Most directors described learning how to issue certificates on the job. Knowledge of the certificate process resulted from the activities of staff, such as reading the PGT Guidelines and other documents, and job shadowing or being mentored by the person who had been doing the job previously. These experiences did not necessarily leave them feeling well prepared.

Almost all of the directors recommended regular and ongoing education for directors and delegates who issue certificates. They felt that a formal training process would be most valuable.

Under Part 2.1 of the *Adult Guardianship Act*, which was passed as part of the *Adult Guardianship and Planning Statutes Amendment Act, 2007*, but which is not yet in force, a certificate of incapability could be issued by a "health authority designate." According to the proposed legislation, a health authority designate would be "any

person designated by a prescribed body as having authority to issue a certificate” under the applicable section of the *Adult Guardianship Act*.¹⁴⁰ The amendment does not, however, mandate training for health authority staff who issue certificates.

Analysis

Health authority staff who must decide on adults’ fundamental rights to manage their legal and financial affairs require adequate training so that they can meet the performance expectations of government and the public.

The decision whether to issue a certificate of incapability is a significant one, which has a major impact on an adult’s life. It is reasonable to expect that the person making this decision is well trained and sufficiently prepared for the task. However, none of the health authorities provides standard training to staff who issue certificates.

Nearly all the directors we spoke with identified the need for more training for those in their positions. Experienced directors identified that this was lacking for staff who are new to the responsibility of issuing certificates. Most of the less experienced directors clearly expressed that they were not adequately prepared for the responsibility when they first began issuing certificates. Training should be sufficient that directors are adequately prepared before they issue any certificates.

Ensuring that training is required and provided is a province-wide responsibility, and needs to occur in all of the health authorities. The Ministry of Health is in the best position to develop and implement this training.

Finding & Recommendation

F11 The Ministry of Health has not developed a training program for health authority staff who issue certificates of incapability.

R15 The Ministry of Health, in consultation with the health authorities, develop a provincial training program that must be completed by health authority staff before issuing certificates of incapability and ensure this training is provided on an ongoing basis.

How Health Authority Staff Decide to Issue a Certificate

The *Patients Property Act* defines a patient as a person who is incapable of managing his or her affairs but does not define what it means for an adult to be incapable or establish any criteria or test for this determination. Neither the Public Guardian and Trustee (PGT) nor the health authorities have defined what incapable means.

The PGT has provided some guidance to directors on what they should consider when deciding whether to issue a certificate. The PGT Guidelines include a Director’s Checklist for Issuing a Certificate of Incapability Under the *Patients Property Act*, which suggests that directors consider:

- whether the adult and family have been informed of the outcome of the assessment

¹⁴⁰ Bill 29, *Adult Guardianship and Planning Statutes Amendment Act*, 3rd Sess, 38th Parl, British Columbia, 2007, s. 1(k).

Best Practice: Interior Health Authority

The Interior Health Authority has developed its own quality checklist to guide the certificate process. Items on the checklist include:

- *what occurs if assessments have conflicting opinions about incapability*
- *whether communication has occurred with all affected parties about the assessment results*
- *whether the director has been informed when the assessments will be done and whether the file is urgent*

Source: Information provided by Interior Health Authority.

- whether less intrusive and alternative measures have been considered and ruled out
- whether the PGT has been involved and agrees that a certificate should be issued
- whether assessments consistently indicate that the adult is incapable of managing his or her financial and legal affairs

Each of the health authorities stated that they use the director's checklist, and this was confirmed by all of the directors we interviewed.

Despite this, 33 of the 57 files we reviewed (58 per cent) did not include a completed director's checklist.¹⁴¹ This is an example of how, in the absence of a legal requirement, practice among staff can and does vary.

During our interviews, we asked directors who issue certificates of incapability what they consider when deciding whether to issue a certificate. Some consider all of the assessments, while others put more weight on certain types of assessments (such as a medical assessment or a geriatric psychiatrist's assessment). The directors confirmed that they rarely meet with or speak to the adult concerned before issuing a certificate of incapability.

Directors also told us that it is rare for them not to issue a certificate that has been requested, and three told us that they have always issued a certificate when requested by the PGT to do so. One director said that a certificate is always issued if the assessment was conducted by an assessor the director trusts, and the assessor believed the adult to be incapable.¹⁴² Another director told us that after receiving the package of documents, the director signs the certificate. This director described the role of director as being like a "rubber stamp."

We asked directors what process they follow and how much time they take reviewing information and deciding whether to issue a certificate. There were a range of responses. Some directors described a careful decision-making process that involved consulting with other professionals and the PGT. Other directors described a brief process that involved little more than signing the certificate. The amount of time taken to consider whether to issue a certificate ranged from half an hour to 20 hours.

Several directors described issuing a certificate as a task done "off the side of their desk." In other words, they perceived their responsibility in performing this task as being in addition to their primary responsibilities.

Part 2.1 of the *Adult Guardianship Act*, which is currently not in force, would require the health authority to consult with the PGT before issuing a certificate, and to only issue a certificate if satisfied that:

- the adult needs to make decisions about his or her financial affairs
- the adult is incapable of making those decisions
- the adult needs, and will benefit from, the assistance and protection of a statutory property guardian

¹⁴¹ The PHSA informed us that its practice is to complete a checklist, but that it does not keep a copy of it on the patient's file.

¹⁴² Assessors are health authority staff who conduct functional assessments.

- the needs of the adult would not be sufficiently met by alternative means of assistance
- the adult has not granted a power of attorney or the power of attorney is not complying with his or her duties¹⁴³

The proposed legislation would also require the health authority designate to forward the certificate to the PGT to determine whether or not the PGT will accept the certificate and become the adult's statutory property guardian.¹⁴⁴

Giving the PGT the option of whether or not to accept a certificate would let the PGT, at this later stage, consider whether there are alternatives before becoming property guardian. The PGT supports this requirement.¹⁴⁵

This proposed legislation and the *Incapacity Assessments Regulation* that was drafted to accompany it would provide greater certainty and direction on the meaning of financial incapability than the *Patients Property Act* does. The regulation would require that when assessing an adult's incapability that consideration be given to whether the adult demonstrates an understanding:

- of the nature of his or her financial affairs, including the value of the adult's business and property
- of the obligations owed to the adult's dependents
- of the decisions or actions that must be taken for the reasonable management of his or her financial affairs
- of the risks and benefits of making particular decisions about his or her financial affairs
- of information given to the adult about the above points
- that the information referred to above applies to his or her situation¹⁴⁶

We reviewed legislation in other jurisdictions to see if they have definitions, criteria, or tests for determining whether a person is incapable of managing his or her affairs. Alberta's *Adult Guardianship and Trusteeship Act* defines "capacity" as "the ability to understand the information that is relevant to the decision and to appreciate the reasonably foreseeable consequences of (i) a decision; (ii) failure to make a decision."¹⁴⁷ Ontario's *Substitute Decisions Act* states that "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."¹⁴⁸

The relevant legislation in Yukon does not define capability or incapability. However, its binding *Guidelines for Conducting Incapability Assessments*, which are prescribed under the *Adult Protection and Decision-Making Act*, establish the following test for determining whether a person is capable of managing his or her affairs:

- the adult understands the facts of a situation
- the adult understands the decision to be made

¹⁴³ Bill 29, *Adult Guardianship and Planning Statutes Amendment Act*, 3rd Sess, 38th Parl, British Columbia, 2007, s. 32(3).

¹⁴⁴ Bill 29, *Adult Guardianship and Planning Statutes Amendment Act*, 3rd Sess, 38th Parl, British Columbia, 2007, s. 32(4) and (5).

¹⁴⁵ Also see Public Guardian and Trustee of British Columbia, *Court and Statutory Guardianship: The Patients Property Act and the Adult Guardianship Act (Part 2) An Updated Discussion Paper on Modernizing the Legal Framework*, October 2005, 22–23.

¹⁴⁶ *Incapacity Assessments Regulation*, consultation draft, 2007, s. 12.

¹⁴⁷ *Adult Guardianship and Trusteeship Act*, S.A. 2008, c. A-4.2, s. 1(d).

¹⁴⁸ *Substitute Decisions Act*, 1992, S.O. 1992, c. 30, s. 6.

The Meaning of Incapability

"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..."

"Yet, with the possible exception of the wording in section 1(a), which refers to 'mental infirmity arising from disease, age or otherwise, the term 'incapable' is not defined in the [Patients Property Act]."

Source: BC Law Institute, *A Comparative Analysis of Adult Guardianship Laws in BC, New Zealand and Ontario*, October 2006, 12–14.

- the adult understands the options/choices
- the adult appreciates the realistic appraisal of outcomes of choices
- the adult appreciates the justification of his or her choice
- the adult can operationalize his or her decision¹⁴⁹

Analysis

Existing statutory and regulatory powers should be sufficient to allow an agency to effectively and fairly achieve its mandate. It is difficult to ensure that directors and delegates make consistent decisions when there are no clear criteria for what incapable means. Without a test or definition, the director must rely on his or her own interpretation of what incapable means. This lack of clarity can result in inconsistency as to how the term “incapable” is applied, and ultimately whether a certificate of incapability is issued. This inconsistency may be made worse by the wide range of directors’ backgrounds, experience and lack of relevant training. This is demonstrated by the wide-ranging responses we received from directors about how they decide whether to issue a certificate of incapability.

Finding & Recommendation

F12 The *Patients Property Act* does not define financial incapability or establish a test for determining when an adult is incapable of managing his or her finances.

R16 The Ministry of Justice take steps to establish a legally binding definition of financial incapability and a test for determining when an adult is incapable of managing his or her finances.

Notice of Intent to Issue a Certificate

It is important that adults and their families receive notice before a certificate of incapability is issued, because issuing a certificate is a significant decision that greatly impacts the rights of the adult named in the certificate. Providing notice that a certificate is going to be issued allows the adult and his or her support network to respond before a decision is made. This response may involve presenting information and arguments against the issuance of a certificate, disputing the information that is before the decision-maker, or seeking more information about how exactly a certificate will affect the adult’s life. One of the most fundamental principles of administrative fairness is that adults are informed of the case against them and have the opportunity to respond.

The *Patients Property Act* does not require a health authority to provide an adult with notice that it is intending to issue a certificate of incapability. The Act also does not require the health authority to provide the adult with an opportunity to respond before the certificate is issued.

The Public Guardian and Trustee (PGT) Guidelines recommend that if a director is satisfied that a certificate should be issued, the director ensures that notice is given to the adult that the adult has been assessed and that the director intends to issue

Issue Investigated

Are adults and their families provided with an adequate explanation of why a health authority has issued or intends to issue a certificate of incapability?

¹⁴⁹ Yukon Department of Justice, *Guidelines for Conducting Incapability Assessments for the Purpose of Guardianship Applications, Under Part 3 of the Adult Protection and Decision-Making Act*, March 2005, 8 <http://www.yukonflic.ca/pdf/guidelines_for_conducting_assessments.pdf>.

a certificate of incapability. The notice should also explain that unless the adult or family have any further information they wish to provide, the PGT will be appointed as committee of estate. The PGT Guidelines suggest that the director may decide not to send the notification letter where he or she feels doing so would be injurious to the health or well-being of the adult.

The PGT Guidelines suggest that the director give the adult and his or her family 10 days to respond; however, this period is at the director's discretion and may be extended or shortened depending on the urgency of the situation.¹⁵⁰ The guidelines state that a summary of the assessment should be attached to the letter.

We asked the health authorities about their policies and procedures on providing notice. Health authorities told us they provide the adult with written notice of the intent to issue a certificate of incapability before issuing the certificate. All of the health authorities indicated that this notice is also provided to family members or supportive and involved persons, when appropriate. All of the health authorities said that the written notice includes a summary of assessment (see "Summary of Assessment" in this section).

The Northern and Vancouver Island health authorities said that they give the adult and the family 10 business days to respond before issuing a certificate of incapability. The Interior Health Authority said that it gives 10 days for the adult or family to respond, but that it varies across the health authority whether this is 10 business or calendar days. In rural or remote areas, Interior Health directors may factor in expected delivery time when determining the amount of response time to provide.

The Vancouver Coastal Health Authority said that, in most cases, the notice letter is sent 10 days before the certificate is issued, but that, in some cases, the certificate may be issued on the same day the written notice is sent. Vancouver Coastal Health explained that this may be done due to urgency, or to ensure the certificate is issued and "not lost in administrative processes ... as the adult travels between health services, sites, programs [and] units." In other words, in such cases, the certificate may be issued at the same time that notice is sent to prevent the health authority from losing track of the process while the adult is transferred to a different program area in the health authority.

Providence Health Care, which operates some sites within the Vancouver Coastal Health region, said that in March 2012, it changed its practice. Providence now provides the adult and his or her family written notification of its intent to issue a certificate and gives them 10 days to respond. Providence told us that it previously communicated this information verbally.

The Provincial Health Services Authority said that it usually informs the adult and his or her family of its intent to issue a certificate two weeks before the certificate is issued.

Most directors said that the health authority notifies the adult; however, two directors were unsure if their health authorities provide notice before a certificate is issued. One director told us that no notice from the health authority is provided. Of those directors who confirmed that notice was provided, most said that the adult is given 10 days to respond. Two directors told us that the adult is given two weeks.

¹⁵⁰ Public Guardian and Trustee of British Columbia, *Guidelines for Issuing a Certificate of Incapability Under the Patients Property Act*, October 2011, 10 <http://www.trustee.bc.ca/pdfs/STA/Guidelines_for_issuing_Cert_Incapability_Fall_2011_FINAL.pdf>.

One director informed us that notice is provided by registered mail. Another director said that notice is mailed and that a case manager follows up with the adult to ensure he or she has received the notice and understands it.

We reviewed 57 files where the PGT had become committee of estate as a result of a certificate of incapability. Our review of the practices followed in these files raised concerns about the adequacy of the notice actually provided to adults and families. While the PGT Guidelines recommend that the health authority notify the adult of the director's intention to issue a certificate, 34 of the files we reviewed (60 per cent) had no record that any notice, written or oral, had been provided. Six files (11 per cent) indicated that the adult had been notified verbally of the director's intent to issue a certificate. Only 17 of the files we reviewed (30 per cent) contained written notice. This information was inconsistent with what the health authorities and the directors told us they believed happened; that is, that health authorities notify the adult about the intent to issue a certificate.

Of the 17 files with written notice, there were:

- 10 files where notice was dated 10 or more days before the certificate was issued
- 1 file where notice was dated 8 days before the certificate was issued
- 2 files where notice was dated 1 day before the certificate was issued
- 3 files where the certificate was issued on the same date as the date on the notice letter
- 1 file where the notice was dated the day after the certificate was issued

Of the 34 files where no notice was provided, 4 files included a documented reason why the notice was not provided to the adult. In three of these cases, the reason was that the director believed the adult would not understand, and, in one case, it was because the director felt notice would be injurious to the adult.

Despite the fact that the PGT Guidelines say that family members should be notified, if appropriate, 47 of the files we reviewed (82 per cent) did not include any record that the family had been notified, in writing or orally, of the intent to issue a certificate. The family was only notified in writing on 7 files (12 per cent) broken down as follows:

- 5 files where notice to the family was dated 10 or more days before the certificate was issued
- 1 file where notice to the family was dated 8 days before the certificate was issued
- 1 file where notice to the family was dated the day before the certificate was issued

Neither the legislation proposed to replace the *Patients Property Act*, nor the regulation drafted to accompany the new legislation, include any provisions to ensure that the adult and his or her family would be notified of the intent to issue a certificate of incapability, or provided an opportunity to respond before the certificate was issued.

We reviewed the requirements in other jurisdictions for notifying an adult and his or her family of the intent to issue a certificate of incapability and providing them an opportunity to respond.¹⁵¹

¹⁵¹ During our investigation, we reviewed the guardianship schemes for every province and territory in Canada and identified three jurisdictions with certificate processes (Manitoba, Ontario and Yukon), which are highlighted as examples for best practice throughout the report.

In Manitoba, for example, the *Mental Health Act* requires the director to notify the adult, his or her proxy, and the nearest relative of the intent to issue a certificate appointing the Public Trustee as committee. The director must inform them about the effect of such an order, as well as their right to provide a written objection to the director within seven days of receiving the notice. The notification must be done prior to issuing the certificate, and the adult and his or her family have seven days from receipt of the notice to make a written objection.¹⁵²

We also reviewed the practice of providing notice under other legislation in British Columbia. In general, notice appeared more generous than the stated or recommended practice of providing 10 days to respond to the issuing of a certificate of incapability. For example, under the Office of the Superintendent of Motor Vehicles' Driver Improvement Program, an adjudicator can temporarily revoke a person's driving privileges based on a review of the person's driving record. Under the policies and guidelines for this program, the adjudicator sends a Notice of Intent to Prohibit to the person whose driving record is of concern. The notice states that the person has 21 days from the date of the notice to submit information as to why his or her driving privileges should not be suspended. If the person does not make a submission within this time period, he or she is sent a Notice of Prohibition stating that his or her driving privileges have been suspended. The Notice of Prohibition is sent by certified mail, and the prohibition does not take effect until it is signed by the driver or until it is served on the driver by the police.¹⁵³

Under the *Community Care and Assisted Living Act*, if a medical health officer plans to take action against a facility's licence, he or she must give the licensee of the community care facility 30 days to respond before the action takes effect.¹⁵⁴ Community Care Facility guidelines state that the licensee must be informed in writing of the reasons for the action and of the licensee's right to request reconsideration. The licensing guidelines also recommend providing sufficient time for the licensee to respond and specifically identifying what information should be provided in the licensee's reconsideration request.¹⁵⁵ If the medical health officer receives a written response the medical health officer must confirm, rescind, vary or substitute the action. The medical health officer can also delay or suspend the proposed action, under certain conditions, if a response is received. The licensing guidelines state that if the reconsideration is denied written reasons must be provided to the licensee as well as information that the licensee can then appeal the medical health officers' decision within 30 days to the Community Care and Assisted Living Appeal Board.¹⁵⁶

¹⁵² *Mental Health Act*, C.C.S.M. 1998, c. M110, s. 60(6).

¹⁵³ Office of the Superintendent of Motor Vehicles, *Driver Improvement Program Policies and Guidelines*, September 2010, 17 <<http://www.pssg.gov.bc.ca/osmv/shareddocs/driver-improvement-policies-guidelines.pdf>>.

¹⁵⁴ *Community Care and Assisted Living Act*, S.B.C. 2002, c. 75, s. 17 (2)(b). Section 14 authorizes the medical health officer to take summary action without notice in cases where there is an immediate risk to health and safety.

¹⁵⁵ Ministry of Health, *A Guide to Community Care Facility Licensing in British Columbia*, February 2012, 43–44. <<http://www.health.gov.bc.ca/ccf/publications/a-guide-to-community-care-facility-licensing.pdf>>.

¹⁵⁶ Ministry of Health, *A Guide to Community Care Facility Licensing in British Columbia*, February 2012, 44. <<http://www.health.gov.bc.ca/ccf/publications/a-guide-to-community-care-facility-licensing.pdf>>.

Analysis

A fundamental principle of administrative fairness is that a person is informed of the case against him or her and has an opportunity to respond. This principle requires adequate notice and disclosure of information. The PGT Guidelines set out a process that, if followed, would adhere to this principle. The guidelines recommend that an adult and his or her family should be provided with appropriate notice that the director intends to issue a certificate of incapability and should receive a summary of assessment. The guidelines indicate that the adult and his or her family should have 10 days to respond and provide any additional information to the director. The guidelines do not specify how this notice should be sent or whether the 10-day response period is to begin when the notice is sent or when it is received.

The PGT Guidelines do not state how notice is to be provided. The stated policy of most health authorities is to send the notice letter by regular mail, and to provide 10 days from the date of the letter for the adult or family to respond. By the time the letter is received, the amount of time to respond could be much less than 10 days.

A letter must first go through internal mail processes with its inherent delays. It is not unreasonable for a letter to take at least 24 hours to be processed for delivery by Canada Post, which doesn't deliver on weekends or on statutory holidays. According to Canada Post's website, a letter sent by regular mail will take two days to arrive at its destination if the mailing address is in the same city as the letter was sent. If a letter is sent elsewhere in the province, it will take three days to arrive. This means the adult or family member may have less than 10 days to respond once they actually receive the notice.

Despite what the PGT Guidelines recommend, we found that many adults and their families are not receiving notice before a certificate is issued or are not receiving 10 days to respond. Thirty-four files (60 per cent) that we reviewed did not include a record that notice had been provided to the adult or a reason why no notice was provided. On an additional 13 files (23 per cent), less than 10 days was provided for the adult to respond. On 10 files (18 per cent), the adult was provided 10 or more days to respond.¹⁵⁷ Forty-seven files (82 per cent) did not include a record that notice was provided to a family member. On an additional five files (9 per cent), the family member was provided less than 10 days to respond. On five files (9 per cent), the family member was provided 10 or more days to respond. This divergence between the recommended practice and the actual practice speaks to the shortcomings of having standards that are not mandatory or legally enforceable. Between 2008 and 2010, a moderate improvement (from 31 to 46 per cent) was noted in how often notice of intent was provided to the adult.

On two of the files we reviewed, the adult was told that he or she had a week to provide further information. However, the certificate was then issued before the date that the notice said it would be issued, as was the case in Sam's story. In one case, the certificate was issued on the day the notice was sent. In another case, the certificate was issued the day before the notice was sent.

As discussed above, when an adjudicator is considering prohibiting a person's driving privileges, he or she sends a notice of intent to the person and provides 21 days for the person to respond. Once the 21 days has passed, a second notice is sent informing the person of the prohibition. However, the prohibition does not take effect until there is confirmation that the person has been informed. When a medical

¹⁵⁷ The percentages add up to 101 because numbers were rounded up.

health officer intends to cancel a community care facility's licence, he or she must give the licensee 30 days to respond before the decision, which can significantly affect the licensee's financial affairs, takes effect.

In contrast, although vulnerable, an adult, who receives notice that a health authority intends to issue a certificate removing his or her right to manage his or her financial and legal affairs, typically has less than 10 days to respond, and there is no process in place to ensure that the adult will actually receive the notice before the certificate is issued.

The development of legally binding standards would ensure that adults and families are informed of the case for issuing a certificate and have an opportunity to respond before a certificate is issued.

In situations where health authority staff, based on an evaluation of the information they have reviewed, reasonably conclude that providing notice would put an adult at risk, notice should not be required. That conclusion and the reasons for it must, however, be clearly documented in the patient file.

Health authorities should work together to develop a consistent definition of families for the purpose of notification. The definition should be inclusive of various family structures and, where appropriate, friends who are involved in providing ongoing support to the adult. The definition could however establish reasonable limits on who and how many people need to be notified in any particular circumstance.

Finding & Recommendations

F13 There are no legally binding standards that require health authorities to

- notify adults and families of the intent to issue a certificate of incapability
- confirm that adults and families have received the notice and
- ensure that there is sufficient time for adults and families to respond to the notice

and health authority practices are inconsistent.

R17 When considering issuing a certificate of incapability, health authorities

- notify adults and families of the intent to issue a certificate of incapability
- confirm that adults and families have received the notice and
- ensure that there is sufficient time for adults and families to respond to the notice

In exceptional circumstances, when the health authorities have concluded on reasonable grounds that providing notice would put an adult at risk, notice is not required.

R18 The Ministry of Justice take steps to require in regulation that health authorities

- notify adults and families of the intent to issue a certificate of incapability
- confirm that adults and families have received the notice and
- ensure that there is sufficient time for adults and families to respond to the notice

Summary of Assessment

The *Patients Property Act* does not require a health authority to explain its reasons to the adult for deciding to issue a certificate of incapability. The Public Guardian and Trustee (PGT) Guidelines recommend that reasons in the form of a summary of assessment should be attached to the letter notifying the adult and family members that the director intends to issue a certificate of incapability. The PGT Guidelines suggest that the summary should include the following information:

- the name and date of birth of the adult
- the reasons why a report about the adult was made to the PGT
- the name of the person who conducted the functional and decision-making assessment and on what date
- the opinion of the assessor the name of the physician who examined the adult and on what date
- the medical condition that affects his or her ability to manage his or her affairs¹⁵⁸

All of the health authorities told us that it was their policy to provide adults and their families with a summary of assessment in accordance with the PGT Guidelines. The health authorities stated that they provide the summary to adults and their families when they send the notice informing them that the director intends to issue a certificate of incapability. The Fraser Health Authority and Vancouver Island Health Authority clarified that they may not send a summary if, in the opinion of the director or delegate, it would be injurious to the adult or place him or her at risk of harm. The Vancouver Coastal Health Authority said that it usually supplements the summary by explaining why a director intends to issue a certificate in a verbal discussion with the adult, at the time that it sends the notice letter.

During our interviews with health authority directors, we asked whether a summary of assessment is sent to the adult. Six of the 11 directors said that the adult is sent a copy of the summary of assessment. Two directors said that a summary is not sent, and three were unsure what is sent to the adult.

We reviewed 57 files where the PGT had become committee of estate as a result of a certificate of incapability to determine whether adults and their families received a summary of assessment. On 48 files (84 per cent), there was a summary of assessment in the file. On 36 files (63 per cent), there was no evidence that the summary was sent to either the adult or a family member. On seven files (12 per cent), the summary was sent to both the adult and a family member. On five files (9 per cent), the summary was only sent to the adult.

The following are examples we found during our file review of summaries of assessments considered by directors in making their decisions about incapability. (The names, dates and locations have been removed to protect confidentiality.)

Example A – Summary of Assessment

[Adult A] was assessed to determine whether he is mentally incapable of managing his financial and legal affairs. The reason for the referral was because [Adult A] is considered very vulnerable to financial abuse.

The assessment of [Adult A's] ability to function and make decisions was conducted by [physician] on [date] and [case manager] on [date]. The assessors were of the opinion that he suffers from Alzheimer's Disease, which affects his ability to manage his affairs.

Example B – Summary of Assessment

[Adult B] was assessed to determine whether he is mentally capable of managing his financial and legal affairs. The reason for the referral was because [Adult B] is unable to manage his finances due to the onset of dementia and continuous cognitive decline over the past year. [Adult B] had previously granted his Power of Attorney to his sister, but his sister has since died. [Adult B] has a son and a niece who both live out of town and are unable to assist in managing his financial affairs. They support the referral to the Public Trustees' Office to assist in these matters. [Adult B] will require specialized residential care following his discharge from [hospital] related to his cognitive decline and aggressive behaviour.

An assessment of [Adult B's] functional and decision-making capability was conducted by [social worker]. The assessor determined that [Adult B] is confused and cannot understand his financial and legal affairs and believes that his union is managing his finances for him. [Adult B] cannot understand the role of the Public Trustee, but agrees it is okay for others to look after his money. The assessor is of the opinion that [Adult B] is mentally incapable of managing his financial or legal affairs.

[Psychiatrist] examined [Adult B] on [date] and determined that [Adult B] has Dementia – mixed vascular/Alzheimer's type and Bipolar Disorder. [Physician] reviewed and agreed with this assessment and feels it is reflective of [Adult B's] current mental state. [Adult B] was assessed to have very poor cognition and recall, poverty of speech and thought, and his prognosis is poor. [Psychiatrist] and [physician] are of the opinion that [Adult B] is mentally incapable of managing his financial or legal affairs.

Clearly, example B is more thorough than example A. Example B includes information not included in example A, such as:

- specific information about the original concern that led the director to consider issuing a certificate
- detailed information about alternatives to guardianship that have been considered
- a description of the adult's current circumstances and what his circumstances are expected to be in the future
- information supporting the findings of the assessments
- the adult's perception of his circumstances
- an indication that someone has discussed guardianship with the adult and his response
- the adult's prognosis

Example B provides an adequate explanation of why a certificate might be issued, and how the director arrived at this decision. Example A is inadequate in these respects. The detail of the summaries we reviewed largely fell between these two examples in detail, though many were similar to Example A.

Neither the legislation proposed to replace the *Patients Property Act*, nor the regulation drafted to accompany the new legislation, require a health authority to provide the adult or his or her family with the reasons why a certificate of incapability is about to be or has been issued.

We reviewed the requirements in other jurisdictions for providing reasons to the adult about why a certificate of incapability or the equivalent was issued.¹⁵⁹ Yukon's *Care Consent Act* states that a copy of the certificate and written reasons why the issuer determined the adult to be incapable must be provided to the adult.¹⁶⁰ Manitoba's *Mental Health Act* also requires issuers of certificates to explain their reasons in writing.¹⁶¹

Analysis

A fundamental principle of administrative fairness is that persons should be provided with adequate and appropriate reasons for decisions that may affect them. In administrative law, a leading case related to the duty to provide reasons is *Baker v. Canada* where the majority of the Supreme Court of Canada stated:

... it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. ... It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached.¹⁶²

In a more recent Supreme Court of Canada case, *R. v. Walker* [2008], Justice Binnie explained the importance of providing reasons as:

- justifying and explaining the result
- telling the losing party why he or she lost
- providing for informed consideration of the grounds of appeal
- satisfying the public that justice has been done¹⁶³

The extent of the reasons required depends on the circumstances of the case. Where a decision is made to issue a certificate of incapability, reasons should help the adult and family understand why the certificate was issued. Reasons should explain the specific evidence or information relied on and the decision-maker's reasoning for making the decision. The reasons should provide enough information to allow an adult and family to make an informed decision about review.

The PGT Guidelines support this principle by recommending that health authorities provide a summary of assessment offering reasons to the adult and his or her family when notifying them that the director intends to issue a certificate. Most of the health authorities believe they subscribe to this practice. We found, however, that

¹⁵⁹ During our investigation, we reviewed the guardianship schemes for every province and territory in Canada and identified three jurisdictions with certificate processes (Manitoba, Ontario and Yukon), which are highlighted as examples for best practice throughout the report.

¹⁶⁰ *Care Consent Act*, S.Y. 2003, c. 21, Schedule B, s. 61(2)(c).

¹⁶¹ *Mental Health Act*, C.C.S.M. 1998, c. M110, s. 60.

¹⁶² *Baker v. Canada* (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817.

¹⁶³ *R. v. Walker*, 2008 SCC 34, [2008] 2 S.C.R. 245. This case is a criminal law case but the rationale for providing reasons has been adopted by the British Columbia Supreme Court in *McLean v. British Columbia* (Securities Commission) 2011 BCCA 455, an administrative law case.

in approximately 20 per cent of the files we reviewed indicated that the summary of assessment had been provided to the adult. As well, it may not have included sufficient information.

The summaries of assessment we reviewed typically contained the name of the adult, the dates of the assessments, the names of the persons who conducted the assessments and the adult's medical and psychiatric condition. The summaries did not consistently contain information about what was learned from the assessments. Many of the summaries we reviewed did not include enough information to explain why the certificate would be (or had been) issued. If the adult or his or her family wanted to challenge a certificate, it would be difficult for them to know what information to provide, without a more thorough explanation for the decision. The information in many of the summaries we reviewed did not provide adequate reasons for the issuing of the certificate.

Finding & Recommendations

F14 The health authorities do not adequately or consistently explain their reasons to the adult and his or her family for the decision to issue a certificate of incapability.

R19 The health authorities provide adults and families with adequate reasons in writing for the decision to issue a certificate of incapability.

R20 The Ministry of Justice take steps to require that health authorities provide the adult and his or her family with adequate written reasons for the decision to issue a certificate of incapability.

Notification of a Certificate of Incapability

We considered what information the adult and family receive once a health authority has decided to issue a certificate of incapability. The *Patients Property Act* does not require that:

- health authorities notify the adult that a certificate of incapability has been issued
- the Public Guardian and Trustee (PGT) notify the adult that the PGT has been appointed to manage the adult's financial and legal affairs
- the certificate of incapability be provided to the adult once it is issued.

After providing the adult and family with an opportunity to respond to the notice of intent to issue a certificate, the PGT Guidelines recommend that the director issue the certificate, and then forward it, the director's checklist and the summary of assessment to the PGT. The guidelines recommend that the health authority provide a copy of the certificate to the adult; however, this can be waived if the health authority determines that doing so would be detrimental to the well-being of the adult.

As indicated earlier in this section, all of the health authorities told us that they provide the adult notice that they intend to issue a certificate of incapability. We asked the health authorities what information they provide to the adult once a certificate of incapability has been issued. The Interior Health Authority told us that its staff advise the adult that the certificate has been issued. This is usually done in person but it may also be done in writing. The Vancouver Coastal Health Authority

said that its staff may advise the adult about the certificate, although notifying the adult may be left to the PGT. The Northern Health Authority told us that it does not advise the adult that a certificate of incapability has been issued.

The Fraser Health Authority and Provincial Health Services Authority told us that they provide a copy of the certificate of incapability to the adult once it is issued. The Interior, Northern, Vancouver Coastal and Vancouver Island health authorities indicated that they do not provide the adult with a copy of the certificate. The Vancouver Island Health Authority said that it is reviewing its current practice of not providing a copy of the certificate.

We interviewed directors from each of the health authorities and asked them what information is sent to the adult once a certificate of incapability is issued. Several directors were unsure what information is sent to the adult. Two directors told us that a copy of the certificate is provided to the adult. Two directors said that their health authority sends a letter to the adult informing him or her that the certificate has been issued. Another director said that a case manager meets with the adult to inform him or her. Two directors stated that nothing is sent to the adult by the health authority once the certificate is issued.

The PGT told us that once the certificate of incapability is issued, it sends a notification letter to the adult and any known, involved family members. The PGT said that in exceptional situations it may notify the adult in person if requested by the health authority. The PGT's letter is described as a "transfer letter," which states "The Public Guardian and Trustee of British Columbia has been given the legal responsibility to assist you with the management of your financial and legal affairs."

The letter provides the name and number of the adult's PGT case manager, and says that the case manager will contact the adult in the near future. The PGT informed us that it generally includes a copy of *When the Public Guardian and Trustee is Committee*. This document describes the PGT's role as committee of estate.

Fifty-five of the 57 files we reviewed (96 per cent) did not include evidence that the health authority had informed the adult that it had issued a certificate of incapability.¹⁶⁴ On all but two files (4 per cent), there was evidence that the PGT had notified the adult of the certificate.¹⁶⁵

For 17 of the 57 files (30 per cent), there was no evidence that either the health authority or the PGT had notified a supportive family member or friend of the adult that a certificate of incapability had been issued. When a supportive family member or friend was notified, this was done by the PGT. On some files, however, there was no record of a family member or friend who was involved in the adult's life.

None of the 57 files we reviewed included evidence that an adult or his or her family was provided with a copy of the certificate of incapability. On one file, the adult was required to submit a freedom of information request to obtain a copy of the certificate.

Section 2.1 of the *Adult Guardianship Act* (currently not in force) would require the PGT to notify the adult and the adult's spouse or nearest relative that it had become the adult's statutory property guardian (committee of estate).

¹⁶⁴ The PHSA informed us that it does inform the adult that a certificate of incapability has been issued but does so informally and does not document that the adult has been notified.

¹⁶⁵ The two files that lacked evidence that the PGT had notified the adult were not the same two files where the health authority had informed the adult of the certificate.

Neither the legislation proposed to replace the *Patients Property Act*, nor the regulation drafted to accompany the new legislation, would require a copy of the certificate of incapability to be provided to the adult.

It is important that an adult receives a copy of the certificate because it is the legal document that provides evidence of the adult's status. In other contexts, people receive copies of certificates as evidence of their status. For example, when a company is incorporated, a certificate of incorporation is provided as proof that the legal entity is a corporation. When a person is married, he or she receives a marriage certificate as proof of the person's marital status. When a designated agency obtains a support and assistance order from the court, it is required to provide a copy of the order to the person to whom it applies. A decision declaring a person to be incapable of managing finances is a significant decision that changes an adult's legal status. Consequently, the health authority that makes the decision should provide the adult with a copy of the certificate confirming the decision.

We reviewed the requirements in other jurisdictions for providing a copy of a certificate of incapability to the adult.¹⁶⁶ Ontario's *Substitute Decisions Act* requires a copy of the certificate of incapacity to be provided to the adult by the assessor.¹⁶⁷ Yukon's *Care Consent Act* requires a copy of the "certificate of need for financial protection" be provided to the "care recipient" by the health care provider.¹⁶⁸

Under Manitoba's *Mental Health Act*, if a director makes an order appointing the Public Trustee as committee, the director is required to send a copy of the order to "the person and person's proxy and nearest relative."¹⁶⁹

Analysis

A certificate of incapability is a powerful document. It removes a person's right to make his or her decisions about financial and legal matters. It does not seem reasonable or appropriate that a document that has such a significant effect on a person's life and provides evidence of an adult's status is not provided to the person it affects. Despite the fact that the PGT Guidelines recommend that a copy of the certificate is to be provided, most of the health authorities acknowledged that they do not provide a copy of the certificate to the adult or to his or her family. While Fraser Health and the Provincial Health Services Authority stated that they provided a copy to the adult, there was no evidence of this practice on the files we reviewed for either health authority. The Provincial Health Services Authority explained that when it issues a certificate of incapability, it is sent to the adult through its internal mail system but no record is kept of this on the patient's file.

On 53 files (93 per cent), the PGT was the only agency to inform the adult that a certificate of incapability had been issued. While it is appropriate for the PGT to contact the adult at this stage, given its new relationship with him or her, the PGT is actually informing the adult about a decision made by another agency, the health authority, usually on request of the PGT itself. It is not reasonable that the agency that made the decision passes off its responsibility to the PGT.

¹⁶⁶ During our investigation, we reviewed the guardianship schemes for every province and territory in Canada and identified three jurisdictions with certificate processes (Manitoba, Ontario and Yukon), which are highlighted as examples for best practice throughout the report.

¹⁶⁷ *Substitute Decisions Act*, 1992, S.O. 1992, c. 30, s. 16(4).

¹⁶⁸ *Care Consent Act*, S.Y. 2003, c. 21, Schedule B, s. 61(4).

¹⁶⁹ *Mental Health Act*, C.C.S.M. 1998, c. M110, s. 61(4).

If section 2.1 of the *Adult Guardianship Act* were brought into force, the PGT would be the agency that signs the certificate of incapability. In these circumstances, it may be appropriate for the PGT to inform the adult and provide a copy of the certificate.

The notice that the PGT provides to the adult states that the PGT “has been given the legal responsibility to assist you with the management of your financial and legal affairs.” It may be sent with a document that explains what it means when the PGT is committee of estate. The letter, however, does not accurately describe the new relationship between the PGT and the adult, and does not specifically state that the PGT is now the adult’s committee of estate.

Findings & Recommendations

F15 The health authorities decide whether to issue a certificate of incapability, but they do not inform the adult and his or her family that a certificate has been issued and do not provide a copy of the certificate to the adult and his or her family once it has been issued.

R21 The health authorities inform adults and families of the decision to issue a certificate of incapability and offer to provide them with a copy of the certificate.

R22 The Ministry of Justice take steps to require that the health authority making the decision to issue a certificate of incapability is required to inform the adult and his or her family of its decision, and provide them with a copy of the certificate.

F16 The Public Guardian and Trustee does not provide clear notification to the adult and his or her family that it has been appointed committee of the adult’s estate.

R23 The Public Guardian and Trustee ensure that it provides clear written notice to the adult and his or her family that it has been appointed as committee of the adult’s estate and an explanation of what that means.



REASSESSMENT AND APPEAL

A decision that an adult is incapable of managing his or her finances is a significant decision that results in an adult losing the ability to manage his or her finances. Given the significance of the decision and the rights that are at stake, there should be a straightforward and accessible way to challenge it.

However, in British Columbia, once a certificate is issued, the only way it can be terminated is:

- if a certificate of capability is issued by a health authority
- if a court orders that the adult is capable (on the basis of two medical assessments)
- if the adult is discharged from a psychiatric facility, unless the Public Guardian and Trustee of British Columbia (PGT) determines it should continue to act as committee of estate or
- if there is a valid enduring power of attorney or a representation agreement about which the PGT does not have concerns

The decision to issue a certificate of incapability is also subject to judicial review on the grounds of procedural unfairness, lack of jurisdiction and unreasonableness. However, there are significant barriers for adults who might wish to have a certificate judicially reviewed, including costs and the fact that the PGT is the adult's litigation guardian and that the PGT controls the adult's finances.

Because applying to court is not an option for many adults, in order to have a certificate reversed, most adults have to seek a certificate of capability from a health authority.

Information Provided to Adults

The *Patients Property Act* does not require that an adult and his or her family be notified of how to have a certificate of incapability reversed. The *Guidelines for Issuing a Certificate of Incapability Under the Patients Property Act* do not address this issue.

Although two health authorities told us that they advise the adult that a certificate of incapability has been issued, our file review indicated that it was exceptional for a health authority to provide the adult with any information once a certificate of incapability had been issued.

When the Public Guardian and Trustee (PGT) becomes an adult's committee of estate, the PGT writes to the adult and advises the adult of its role. With this letter, the PGT generally includes the document, *When the Public Guardian and Trustee is Committee*. This document explains how committeeship can be terminated.¹⁷⁰

The document states that the PGT may assist with coordinating the appropriate assessments in order to obtain a certificate of capability.

People with complaints about the certificate process may also use the PGT's internal complaint process, Review that Decision. We asked the PGT about the number of complaints it has received about certificates of incapability since 2002. The PGT told us that its Services to Adults Division had received five complaints related to certificates since 2002, and that its Review that Decision committee had reviewed



Issue Investigated

Once a certificate of incapability is issued, are adults and their families given adequate information about how to challenge or reverse the certificate?

¹⁷⁰ Public Guardian and Trustee of British Columbia, *When the Public Guardian and Trustee is Committee*, October 2011, 5 <http://www.trustee.bc.ca/pdfs/STA/When_the_PGT_is_Committee_FINAL%20Feb%202012.pdf>.

two complaints related to certificates of incapability since 2002. However, these internal processes are not mentioned in the PGT pamphlet adults receive after a certificate has been issued.

The following complaint Jasmine made to our office is an example of an adult and family who were not adequately informed of the PGT's complaint processes.

CASE SUMMARY *Jasmine's Story*

A certificate of incapability was issued for Jasmine's mother, Caroline, on November 20, 2009. The certificate stated that Caroline was deemed incapable of managing her financial and legal affairs and, as a result, the PGT was being appointed as committee of estate. The PGT informed Jasmine of this decision in writing however it did not provide her information about the decision review process. Jasmine did not agree with the director's decision to issue a certificate of incapability for her mother, nor with decisions that the PGT was making about her mother's estate. On several occasions she told PGT staff that she wanted these decisions reviewed. She contacted our office and we investigated her complaint. In December 2010 – over a year after the certificate of incapability was issued – the PGT provided Jasmine with its decision review application which included information about its review process. The PGT also agreed to review its own process to ensure consistency in providing information about accessing the review process.

The PGT's 2005 report, *Court and Statutory Guardianship: The Patients Property Act and the Adult Guardianship Act (Part 2): An Updated Discussion Paper on Modernizing the Legal Framework* recommends that when the PGT becomes a statutory guardian, it be required to advise the adult of the ways to challenge a certificate.¹⁷¹

Although not in force, Part 2.1 of the *Adult Guardianship Act* – which passed as part of the *Adult Guardianship and Planning Statutes Amendment Act, 2007* – would require the PGT to inform the adult that it has become his or her statutory property guardian and how to challenge the decision through reassessment and review.¹⁷²

Analysis

An important principle of administrative fairness is that individuals are informed of how to complain about or challenge a decision at the time the decision is made. Although the decision to issue a certificate of incapability is made by a health authority director, the health authorities do not inform the adult of the decision. Once it receives the certificate, the PGT sends the adult a document that explains briefly how committeeship may be terminated. The document does not describe the steps an adult can take if he or she disagrees with the decision to issue a certificate of incapability.

The PGT informed us that a person may also use its internal complaints process if he or she has a complaint. Such a complaint could result in the PGT facilitating a new assessment for the adult. Information about this process, however, is not included in the letter to the adult or family or in the PGT's document.

¹⁷¹ Public Guardian and Trustee of British Columbia, *Court and Statutory Guardianship: The Patients Property Act and the Adult Guardianship Act (Part 2): An Updated Discussion Paper on Modernizing the Legal Framework*, October 2005, 24.

¹⁷² Bill 29, *Adult Guardianship and Planning Statutes Amendment Act*, 3rd Sess, 38th Parl, British Columbia, 2007, s. 33(2)(b)(ii).

An adult can also use the PGT's complaint process when he or she objects to how the PGT is acting on his or her behalf. It seems appropriate that the PGT would inform adults about the complaint process when it becomes their committee of estate.

Finding & Recommendation

F17 The Public Guardian and Trustee does not inform adults about its internal complaint process when it becomes their committee of estate.

R24 The Public Guardian and Trustee inform adults about its internal complaint process when it becomes their committee of estate.

Reassessment

A certificate of incapability is usually issued after the adult is assessed by a physician and another health professional or social worker. The adult may wish to be reassessed because he or she disagrees with the results of an assessment, because there is a change in the adult's circumstances since the assessment was done, because the adult was not aware of the importance of the assessment being done, or for another reason. A reassessment may result in a health authority director deciding that an adult is capable or no longer incapable of managing his or her affairs and issuing a certificate of incapability.¹⁷³

The *Patients Property Act* does not include any provisions related to reassessments. The Act does not include a right to request a reassessment as a result of disagreement with an assessment or a change in circumstance or for any other reason.

In its *Guidelines for Issuing a Certificate of Incapability Under the Patients Property Act*, the Public Guardian and Trustee (PGT) states that adults may request a reassessment of the initial medical assessment before or after a certificate is issued, and may choose to engage a lawyer and obtain their own medical opinion to dispute the assessment.¹⁷⁴

The PGT's process for responding to reassessment requests is outlined in the PGT Guidelines.¹⁷⁵ In situations where an adult requests a reassessment after the certificate is issued, if the decision to issue a certificate is not in dispute, the PGT Guidelines state that the PGT will assist the adult by facilitating a reassessment on the adult's request:

- when the adult's circumstances have changed
- when more than six months have elapsed since the initial assessment or the last reassessment.¹⁷⁶

"In the event that an adult regains capacity, statutory guardianship should terminate. Under the Patients Property Act there is no clear obligation or mechanism to ensure this occurs. An individual under statutory guardianship should be entitled to request that their capability to manager their property be reassessed."

Source: Public Guardian and Trustee of British Columbia, *Court and Statutory Guardianship: The Patients Property Act and the Adult Guardianship Act (Part 2): An Updated Discussion Paper on Modernizing the Legal Framework*, October 2005, 23.

¹⁷³ *Patients Property Act*, R.S.B.C. 1996, c. 349, s.11(1)(d).

¹⁷⁴ If an adult chooses to hire a lawyer after the certificate is issued, this would have to be approved by the PGT.

¹⁷⁵ Public Guardian and Trustee of British Columbia, *Guidelines for Issuing a Certificate of Incapability Under the Patients Property Act*, October 2011, 12. <http://www.trustee.bc.ca/pdfs/STA/Guidelines_for_Issuing_Cert_Incapability_fall_2011_FINAL.pdf>.

¹⁷⁶ Public Guardian and Trustee of British Columbia, *Guidelines for Issuing a Certificate of Incapability Under the Patients Property Act*, October 2011, 12. <http://www.trustee.bc.ca/pdfs/STA/Guidelines_for_Issuing_Cert_Incapability_fall_2011_FINAL.pdf>.

As the cost of reassessment is the responsibility of the adult, a reassessment is subject to PGT approval. PGT approval for funding involves consideration of the following:

- the recommendation from a physician for a reassessment
- the number of times the adult has been assessed or requested a reassessment over the last six months
- improvements in the adult's functioning
- indicators that the adult is using informal supports¹⁷⁷

If an adult does not have sufficient funds to cover the cost of an assessment and the case manager supports the funding of the assessment, then other funding options may be explored.¹⁷⁸ The PGT told us that this may include considering whether it is expected that the adult will have additional funds in the future or whether the doctor will conduct the assessment at a reduced cost in the circumstances. There may be no cost if the assessment is to be done by the health authority.

If the PGT does not feel that a reassessment is required, that is the end of the matter unless the adult can arrange for someone else to pay for the reassessment, as the adult does not, at this stage, control his or her own finances.

The PGT Guidelines suggest that if a reassessment is requested by someone other than the adult, there must be evidence of procedural error or other oversight that is serious enough to call the validity of the certificate into question in order for the PGT to agree to facilitate the reassessment. Presumably, this means that the PGT would not facilitate a reassessment requested by someone other than the adult, unless one of these conditions is met.

The PGT explained that when an adult requests a reassessment, it will usually start with obtaining a medical assessment, as the PGT does when investigating a report that an adult is incapable. If there is suggestion that there has been a change in the adult's condition, the PGT will usually seek a medical assessment from the adult's family doctor. If the adult is disputing the original assessment, the PGT may coordinate a medical assessment from a different or more specialized physician.

If the medical assessment indicates that the adult is now capable, this information will be provided to the health authority to consider whether to issue a certificate of capability. It is necessary for the health authority to be involved in this process, as only the health authority can issue a certificate of capability.

An adult can also request a reassessment directly from the health authority. The Fraser, Interior, Vancouver Coastal and Vancouver Island health authorities said they would only conduct a reassessment if they had information indicating that the adult's situation had changed. Fraser Health, Interior Health and Vancouver Coastal Health also indicated that they might decline a request for reassessment if they believe the adult was influenced to make the request by someone suspected of abusing the adult, or if an alleged abuser made the request. The Fraser and Vancouver Coastal health authorities told us they might also decline a request if less than six months has passed since the last assessment.

¹⁷⁷ Public Guardian and Trustee of British Columbia, "Facilitating a Review of Capability for Clients Whom the Public Guardian and Trustee is Committee of Estate," policy, October 1999, 6205, 3.2.1.

¹⁷⁸ Public Guardian and Trustee of British Columbia, "Facilitating a Review of Capability for Clients Whom the Public Guardian and Trustee is Committee of Estate," policy, October 1999, 6205, 3.2.3.

Interior Health said it would not conduct a reassessment if it was requested by someone other than the adult, and there was no information indicating a procedural error or that the certificate was invalid.

Northern Health said it has always conducted a reassessment when requested, and the Provincial Health Services Authority stated that it would always grant a request for reassessment.¹⁷⁹

When we interviewed health authority directors and delegates responsible for issuing certificates of incapability, they told us that requests for reassessments were rare. They described the reassessment process as being similar to the original assessment process. If an adult requested a reassessment, the health authority directors said that they would inform the adult that he or she could contact the PGT, their physician or assessment staff in the health authority to seek a reassessment.

We asked health authority staff who conduct functional assessments about their involvement in reassessments. Most said they had never been involved in a reassessment of an adult for whom a certificate of incapability had been issued.

Parts 2 and 2.1 of the *Adult Guardianship Act* were passed as part of the *Adult Guardianship and Planning Statutes Amendment Act, 2007*, but have not been brought into force.¹⁸⁰ The *Incapacity Assessments Regulation* was drafted to accompany these parts of the *Adult Guardianship Act*.

The Act would allow an adult, or a person acting on the adult's behalf, to request a second assessment of his or her incapability by a qualified health professional, if requested within the prescribed time. The draft Regulation establishes this time period as 30 days from the date on which the adult was informed that the PGT was appointed to manage his or her affairs.¹⁸¹

Section 34 of the Act would also require a reassessment if an adult requested one, and if the adult had not been reassessed in the past 12 months.¹⁸² Part 2.1 would also require a reassessment if the adult was to be discharged from a designated psychiatric facility, if the statutory property guardian (for example, the PGT) informed the health authority that the adult should be reassessed, or if the court ordered an assessment.¹⁸³

Analysis

Assessing functional and decision-making capability is complex and sensitive. As a result, differences in opinion may arise and because of this, it is important to have a clear process for conducting reassessments.

On the other hand, the decision to issue a certificate of incapability may result from an accurate assessment of an adult's capability at the time of the assessment. It is important to recognize that an adult's capability is not a constant; although an adult may lose capability, he or she may also regain it over time.

¹⁷⁹ The Provincial Health Services Authority informed us that it was not aware of any requests for reassessment that had been made regarding certificates of incapability that it had issued.

¹⁸⁰ See Appendix 3 – British Columbia Adult Guardianship Law Reform.

¹⁸¹ Bill 29, *Adult Guardianship and Planning Statutes Amendment Act*, 3rd Sess, 38th Parl, British Columbia, 2007, s. 33(3)(a).

¹⁸² Bill 29, *Adult Guardianship and Planning Statutes Amendment Act*, 3rd Sess, 38th Parl, British Columbia, 2007, s. 34(c).

¹⁸³ This may occur as a result of an application to the court to review a previous determination that the adult is incapable of managing his or her affairs. Bill 29, *Adult Guardianship and Planning Statutes Amendment Act*, 3rd Sess, 38th Parl, British Columbia, 2007, s. 34.

We reviewed files where a certificate of incapability was later followed by a certificate of capability, after the adult's circumstances improved. Examples of changes in capability included:

- an adult who was frail due to cancer, but who recovered and became capable of managing his affairs
- an adult whose functioning was affected by alcoholism, but whose capability improved once he ceased using alcohol
- an adult who experienced mental health issues and renal failure, but whose mental and physical health improved, enabling him to function better

Changes in capability, like the ones described above, may trigger the need for reassessment. Having a clear process for reassessment to determine if guardianship is still necessary is consistent with the goal of having the least restrictive and least intrusive support in place.

The *Patients Property Act* states that a certificate of incapability can be reversed by a court or through a certificate of capability. In both cases, a reassessment of the adult may be required. Under the existing legislative framework, there is no provision that guarantees that an adult has access to a reassessment. At present, reassessment is at the discretion of the PGT and the health authorities. The PGT Guidelines suggest conducting a reassessment of an adult if six months have passed since the adult's assessment or reassessment, or if there is a change in his or her circumstances. If the adult is not successful in convincing the PGT or health authorities that a new assessment is required, he or she may arrange for a reassessment privately, but the cost may have to be covered by a source other than the adult, as his or her finances are controlled by the PGT.

The current system creates a significant power imbalance. There is no requirement for the PGT to facilitate a reassessment or for the health authority to conduct a reassessment. Since the PGT controls how an adult's money is spent, it can prevent an adult from seeking a private reassessment. This puts the onus on the adult to demonstrate that his or her condition has changed and a reassessment is necessary or that the original assessment was flawed.

Our interviews with health authority staff and our review of files where a reassessment had occurred revealed that there is confusion about the appropriate procedure for conducting a reassessment. Health authority directors gave us different answers when we asked where they would refer someone seeking a reassessment.

We found that when a certificate of incapability is issued, an adult is not clearly informed about how to seek reassessment. We also found that a clear process for determining when a reassessment will be approved by the PGT and the health authorities has not been established.

Finding & Recommendation

F18 The *Patients Property Act* does not require that an adult have access to a reassessment.

R25 The Ministry of Justice take steps to require that an adult has access to a reassessment on request before a certificate of incapability is issued and within a reasonable time frame after a certificate of incapability is issued.

Appeal

Unlike a reassessment, which involves determining if the adult's condition/capability has changed since he or she was determined to be incapable, an appeal provides an opportunity for an adult who is dissatisfied with the decision to appeal it to an independent body. An appeal on the record is limited to examining the initial decision and considering whether legislation was reasonably applied or whether a decision is reasonably supported by evidence, while a *de novo* appeal can consider the matter as if for the first time, including allowing parties to present new evidence.

The *Patients Property Act* does not establish a mechanism that allows an adult to appeal a determination of financial incapability.

When we interviewed directors from each of the health authorities, some commented that there was no appeal process for a certificate decision and that they believed such a process should be available for an adult to dispute the decision.

On each of the files we reviewed where the PGT had become committee of estate as a result of a certificate, we considered whether the adult had complained about the decision to issue the certificate and sought to challenge the decision. On one file we reviewed, the adult obtained copies of the documents that were considered by the director in deciding to issue the certificate. The adult argued that the information did not indicate that a certificate was needed – in other words, that the decision was not reasonably supported by the evidence. When the adult expressed his concerns to the PGT, the PGT attempted to facilitate a reassessment. The adult pointed out that he was not seeking a new assessment but wished to challenge the decision made on the basis of the previous assessments. Under the existing system, he could only have the certificate reversed by being reassessed and seeking a certificate of capability or by pursuing the matter in court.

As described in “Reassessment” in this section, part 2.1 of the *Adult Guardianship Act* would allow an adult or a person acting on the adult's behalf to request a second assessment after a certificate of incapability is issued. If this second assessment also resulted in a determination of incapability, the Act would allow the adult, or a person acting on the adult's behalf, to apply to the court for a review of the determination.¹⁸⁴

Other Jurisdictions

The *Adult Guardianship and Planning Statutes Amendment Act, 2007*, would establish a right of review of a determination of incapability to the courts. This is in contrast to other jurisdictions that have established appeals to administrative boards or tribunals that can review determinations of incapability in a forum that is more accessible than the courts.

The Ontario Consent and Capacity Board

In Ontario, decisions about the capacity of individuals to manage their health care or their property can be reviewed by the Consent and Capacity (CCB). The CCB is an independent, publicly funded provincial tribunal whose key areas of activity are the adjudication of matters of capacity, consent, civil committal and substitute

“The consequences of issuing a Certificate of Incapability are significant – a major one being the loss of civil rights to manage one's own property. British Columbia's law, perhaps uniquely in Canada, provides no straightforward means of appeal in the event an adult disagrees with a finding of incapability resulting in statutory guardianship. Furthermore, it is the only statutory guardianship law in Canada in which such a decision can be made and an individual subjected to a scheme of protection, no matter how well meaning, without recourse to an administrative tribunal.”

Source: Public Guardian and Trustee of British Columbia, *Court and Statutory Guardianship: The Patients Property Act and the Adult Guardianship Act (Part 2): An Updated Discussion Paper on Modernizing the Legal Framework*, October 2005, 23.

¹⁸⁴ Bill 29, *Adult Guardianship and Planning Statutes Amendment Act*, 3rd Sess, 38th Parl, British Columbia, 2007, s. 33(3)(b).

decision making.¹⁸⁵ A CCB panel is usually composed of a lawyer, psychiatrist and a member of the public, although on some capacity hearings a senior lawyer member sits alone. The existence of the CCB ensures that there is a right to independent review of a decision that finds a person incapable of making his or her decisions. For example, if a person has been found to be incapable of managing property, that person may apply to the CCB for a review of that finding. Hearings must be held within one week of the Board receiving the application. The Board can decide that a person is capable of managing property, or incapable of managing property, which means that the guardianship will continue.

Table 8 *Incapacity to Manage Property Applications to the Ontario Consent and Capacity Board*¹⁸⁶

Year	Applications for review of financial incapacity	Percentage of all applications
2004/05	272	6.0
2005/06	349	7.6
2006/07	272	6.0
2007/08	259	6.0
2008/09	297	6.0
2009/10	259	5.0
2010/11	236	5.0

In its annual report, the CCB publishes the number of applications that are made to the board each fiscal year (e.g. April 2010–March 2011). In the 2010/11 fiscal year, 236 applications were made to review decisions of incapacity to manage property (see above table).¹⁸⁷ We randomly selected 12 decisions to review (5 per cent of the 236 applications). Out of the 12 decisions, 6 of them (50 per cent) resulted in the incapacity decision being reversed and 6 of them (50 per cent) upheld the decision.

The following case summary describes a decision by the CCB to reverse an incapacity decision.

Ontario Consent and Capacity Board Case *Fiona's Story*

Fiona suffered from short-term memory impairment and mild dementia. In 2003, she moved into a long-term care facility, where her husband Roger visited her on a daily basis.

After moving into the care facility, Fiona made minimal, sporadic payments for her care and, in 2005, stopped making payments altogether. By 2010, Fiona was in arrears by approximately \$117,000.

Fiona's mother passed away in 2007, and her estate was left to Fiona and her sisters, who lived outside the country. Sally, who was in charge of administering the estate, delayed transferring Fiona's portion of the estate because she had doubts about Fiona's capacity to manage her property, and she did not trust Roger. Until mid-2009, when Fiona granted Sally power of attorney, Roger managed Fiona's finances.

¹⁸⁵ Over 80 per cent of applications to the CCB involve a review of a person's involuntary status in a psychiatric facility under the *Mental Health Act*, or a review of a person's capacity to consent to or refuse treatment under the *Health Care Consent Act*. For more information, see www.ccboard.on.ca.

¹⁸⁶ Consent and Capacity Board, annual reports <<http://www.ccboard.on.ca/scripts/english/governance/Annual-Reports.asp>>.

¹⁸⁷ The Consent and Capacity Board's report outlines the percentage of applications by type but not the percentage of hearings.

In 2010, Sally hired a capacity assessor to conduct an assessment of Fiona's ability to manage her finances. In conducting the assessment, the assessor considered information provided by Sally, interviewed Fiona and interviewed staff members at the care facility. The assessor found Fiona to be incapable of managing property, and as a result of the assessment, control of Fiona's property was assumed by the Public Guardian and Trustee.

Fiona applied to Ontario's Consent and Capacity Board for a review of the decision. At the hearing, the panel found Fiona to be lucid and focused, and able to participate in conversation, follow the proceedings and give meaningful answers to questions. In general, she was a credible witness.

The panel heard information from Fiona that contradicted the information provided in the assessor's report. For example, the assessor reported that Fiona could not add or subtract complicated amounts of money, but at the hearing Fiona demonstrated that she could perform these calculations. The assessor also claimed that Fiona had no knowledge of her income or where it went, but at the hearing Fiona gave a reasonable account of this information.

The panel decided that because there were discrepancies between the assessor's report and the answers Fiona gave at the hearing, the panel would give more weight to the live testimony they heard from Fiona.

At the hearing, the panel asked two questions: (1) Was the applicant able to understand information needed to make a decision on the management of property? (2) Was the applicant able to appreciate the reasonably foreseeable consequences of a decision or lack of decision regarding the management of property?

In answering the first question, the panel found that Fiona had a fundamental understanding of her financial situation, even if she lacked a precise memory of some details. The knowledge and understanding Fiona had was determined by the panel to be sufficient for her needs and the types of transactions she undertook, such as buying snacks and cigarettes and getting her hair cut.

In answering the second question, the panel found that Fiona knew there was no real consequence of ignoring her debt with the care facility because she could continue to live there regardless. The panel noted that although Fiona had given her husband wide latitude to spend her income, she understood the implications and had no objection to how he managed her funds. The panel found that Fiona trusted her husband more than her sisters and had faith in his care of her. The panel reversed the finding of incapacity.

If Fiona had lived in British Columbia and had a certificate of incapability issued for her, she would not have had the option to appeal the decision. She would have had to convince the Public Guardian and Trustee or the health authority that she should be reassessed. She would need to demonstrate that her condition had changed or wait six months for a reassessment. If she was unable to convince the Public Guardian and Trustee or the health authority to conduct a reassessment, she could seek a private assessment; however, the Public Guardian and Trustee would have to agree to fund this assessment, since it would control Fiona's finances. Fiona's only other recourse would be to challenge the certificate in court. As the Public Guardian and Trustee would also be responsible for making her legal decisions, the PGT would have to agree to initiate an application to challenge the determination of incapability and have itself removed as committee.

Yukon's Capability and Consent Review Board

Yukon's *Care Consent Act* creates an independent Capability and Consent Review Board. This board can review, on request, whether a decision to issue a certificate of need for financial protection was in compliance with the Act.¹⁸⁸ In particular, the board can review whether there are reasonable grounds to believe that the care recipient is incapable of making reasonable judgments or decisions regarding his or her financial affairs, which is the basis for issuing a certificate under the Act.¹⁸⁹ The board can set aside the decision of the care provider and issue a certificate stating that the care recipient no longer needs financial protection.¹⁹⁰

Other British Columbia Models

Mental Health Review Board

The *Mental Health Act* is another piece of legislation that gives medical professionals the authority to make decisions which impact adults' freedom and autonomy. Under the *Mental Health Act*, a person can be involuntarily admitted and detained in a designated facility, for the protection of themselves or others, if certain criteria are met.

An adult detained under the Act can apply to the Mental Health Review Board, if a doctor refuses the adult's request to be discharged. The board is an independent tribunal that was established in April 2005 to conduct hearings under the *Mental Health Act*. The board's function is to ensure that patients admitted by physicians and detained involuntarily in provincial mental health facilities have access to an objective review process. A review panel must consist of a medical practitioner, a member in good standing of the Law Society of British Columbia or a person with equivalent training, and a third member who is neither a medical practitioner nor a lawyer. On hearing a review, the board can decide that either the patient should not be involuntarily detained or the patient should be involuntarily detained. If the board determines that the patient should be detained, the patient can appeal this decision to the court.

Other Decisions

We considered other types of decisions affecting people in British Columbia that can be appealed to an independent tribunal. These include:

- a person whose limousine licence has been suspended can appeal this decision to the Passenger Transportation Board
- a person who is refused a \$20 crisis supplement can appeal this decision to the Employment and Income Assistance Appeal Tribunal
- a person who is refused a hunting licence can appeal this decision to the Environmental Appeal Board

These are examples where a person's life has been impacted by a decision. In all of these examples, the person has the option of appealing the decision and having it reviewed by an independent body. The decision to issue a certificate of incapability

¹⁸⁸ *Care Consent Act*, S.Y. 2003, c. 21, Schedule B, s. 39(1)(d).

¹⁸⁹ *Care Consent Act*, S.Y. 2003, c. 21, Schedule B, s. 61(1)(b).

¹⁹⁰ *Care Consent Act*, S.Y. 2003, c. 21, Schedule B, s. 48(1) and 48(2)(a).

has an even greater impact on the rights and freedoms of an adult than the decisions in the examples above, but adults do not currently have the option of appealing the decision to issue a certificate of incapability.

Analysis

The role of the Office of the Ombudsperson is to ensure that the public authorities over which it has jurisdiction act fairly. What fairness requires depends on the nature of the activity for which the public authority is responsible and the importance of the interests at stake. The decision to issue a certificate of incapability results in a person losing control of his or her ability to make decisions about financial and legal matters. This is an important decision that affects an individual's autonomy and liberty. As a result, adults should have significant procedural protections, including access to an appropriate and accessible process for reviewing the decision.

Currently, people who wish to challenge a certificate of incapability have the following options available to them. They can:

- seek a reassessment and a new decision from a health authority
- seek judicial review
- apply to the courts for a declaration of capability

A reassessment may only be available if six months have passed since the initial or last assessment or, if in the opinion of the Public Guardian and Trustee (PGT) or health authority, a change has occurred in the adult's circumstances. Even if a reassessment occurs, the adult must go through some or all of the same steps as he or she did during the original assessment, and possibly with the same assessors and directors.

Judicial review can be time-consuming and costly, and is not accessible to many people, such as those on limited or fixed incomes. However, given that judicial review is the only process for challenging a certificate of incapability, it seems reasonable to expect that courts in British Columbia would have considered a substantial number of reviews. This is not the case. There is one reported case of an adult seeking to challenge a certificate of incapability through judicial review.¹⁹¹

Factors that may contribute to the lack of certificates challenged by judicial review include:

- the expense of pursuing a judicial review
- a lack of awareness about this option, as it is not explicitly stated in legislation
- the fact that the PGT would have to approve the use of funds, and possibly have to approve the decision to initiate such legal action
- the possibility that adults who are the subject to certificates accept the decisions and have no reason to contest the decisions

In addition, a judicial review should not be seen as a substitute for an appeal because it does not consider the merits of the decision.

Many administrative decisions in British Columbia are subject to an appeal or review by an independent tribunal. In *Reviewing Original Decisions: Guiding Principles and Options*, the Ministry of Justice explains when an appeal is appropriate:

¹⁹¹ *Hanlon v. Nanaimo* (District), [2009] B.C.J. No. 2215 (C.A.).

The primary argument for appeal is that errors are made and that appeal provides an appropriate mechanism for review – by a person or entity separate from the organization which made the original decision. When compared with the other two review options (internal review and judicial review), appeal is the only mechanism which reviews an original decision on the merits in a manner that is unbiased both in fact and in the perception of the public. Judicial review does not provide a review on the merits. Internal review lacks the independence and impartiality of an appeal. In most situations, appeal is the review process which maximizes the goal of reaching fair and just decisions. Like internal review, it also helps to achieve consistency.¹⁹²

The decision that a person should no longer manage his or her financial and legal matters is certainly one significant enough to merit an appeal process.

In both Yukon and Ontario, a legal and financial incapability decision can be appealed to an independent tribunal, which can confirm the original decision or substitute its own decision to declare an adult capable.

From 2000 to 2004, British Columbia had a similar review board. In February 2000, the Health Care and Care Facility Review Board was created when Part 4 of the *Health Care (Consent) and Care Facility (Admission) Act* was brought into force. At that time, the portions of the Act that dealt with facility admission and restraint use had not been brought into force. As a result, the board could only review decisions to give, refuse or revoke substitute consent to health care.¹⁹³

The board's structure and mandate was similar to Ontario's Consent and Capacity Board, although with narrower jurisdiction. The board and the chair were appointed by the Minister of Health. Decisions were heard by a three-member panel that consisted of one health care provider, one member of the Law Society of British Columbia, and one person who was neither a health care provider nor a member of the Law Society. A request for review could be brought by the adult, the adult's spouse, a relative or friend, the substitute decision-maker, the adult's guardian or representative, the health care provider, a prescribed advocacy organization or the Public Guardian and Trustee.

A request to the board to review a decision had to be made within 72 hours of the decision being made, and hearings were to be held seven days after the request was made. The board had the authority to confirm the decision or substitute its own decision. The *Health Care (Consent) and Care Facility (Admission) Act* created a right of appeal of the board's decision to the British Columbia Supreme Court. Such a broad statutory right of appeal from the board seems to be an acknowledgment of the seriousness and complexity of consent and capability issues.

However, in March 2004, the board was dissolved by the *Miscellaneous Statutes Amendment Act*, which repealed Part 4 of the *Health Care (Consent) and Care Facility (Admission) Act*. The Attorney General at that time explained that the board had only conducted eight hearings in its existence, and that the work of the board could be more effectively done through other existing dispute resolution processes.

¹⁹² J. Bruce McKinnon, "Reviewing Original Decisions: Guiding Principles and Options", background paper for the Administrative Justice Project, March 2002, 38.

¹⁹³ If the portions of the Act dealing with consent to facility admissions had been brought into force, the board would have also had the authority to review decisions that an adult was incapable of rejecting a facility care proposal. As well, the board would have been able to review decisions to accept or reject a care proposal, decisions to restrain an adult in a care facility, and decisions that an adult was incapable of moving out of a care facility.

The decision to dissolve the board was criticized for eliminating an incapable adult's right to an independent and impartial review of health care decisions made by substitute decision-makers. In its paper *A Comparative Analysis of Adult Guardianship Laws in BC, New Zealand and Ontario*, the BC Law Institute made the following comment about the elimination of the board:

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.¹⁹⁴

Finding & Recommendation

F19 An adult who loses the ability to make his or her own financial and legal decisions as a result of an administrative decision to issue a certificate of incapability does not have access to an independent appeal of that decision.

R26 The Ministry of Justice take steps to establish an appeal to a tribunal for an adult who wishes to dispute a decision that has found him or her incapable of managing his or her financial and legal affairs.

Hiring a Lawyer after a Certificate is Issued

A committee of estate is an adult's litigation guardian, which means that the committee is responsible for deciding on behalf of the adult when to initiate legal action, when to retain legal counsel and how to instruct legal counsel.

Section 22 of the *Patients Property Act* states that a person other than the committee of the adult must not initiate a lawsuit on behalf of the adult. Section 22 also states that a lawsuit against an adult must be brought against the committee as the adult's litigation guardian. An adult can also apply to court to appoint someone other than the Public Guardian and Trustee (PGT) to act as the adult's litigation guardian.¹⁹⁵

Although the PGT becomes the adult's litigation guardian after a certificate is issued, we considered whether an adult can still hire a lawyer to challenge a certificate. This problem was demonstrated in Sam's story, described in the Background section of this report. In his case, after a certificate of incapability was issued, Sam hired a lawyer to challenge the certificate. However, the PGT initially refused to recognize Sam's lawyer, since it considered itself to be Sam's litigation guardian. Sam's experience shows that the right to retain and instruct counsel after a certificate is issued may not always be clearly understood. The Ministry of Justice provided us with information that supports the view that an adult has a right to retain and instruct counsel in matters related to the determination of incapability.

As stated earlier in this section, a person should be made aware of the avenues of recourse regarding a decision that affects them. Without being told otherwise, an adult may believe that hiring a lawyer to challenge a certificate of incapability in court is an option not available to him or her. An adult for whom a certificate

¹⁹⁴ BC Law Institute, *A Comparative Analysis of Adult Guardianship Laws in BC, New Zealand and Ontario*, October 2006, 54.

¹⁹⁵ *Supreme Court Family Rules*, B.C. Reg. 169/2009, s. 20-3(5), (11).

of incapability has been issued should be informed that he or she can still retain and instruct counsel to challenge a certificate. We found that PGT does not clearly communicate this to adults, either in its public information or in its letters.

Finding & Recommendation

F20 The Public Guardian and Trustee has not consistently communicated to adults that they have the right to retain counsel to challenge a certificate of incapability.

R27 When it becomes committee of estate, the Public Guardian and Trustee inform adults in writing that they can retain and instruct counsel to challenge a certificate of incapability.



DUTIES OF COMMITTEES AND COMMITTEES APPOINTED BY THE COURT

Under the *Patients Property Act*, control and management of an adult's financial affairs, if obtained through a certificate of incapability, is "all-or-nothing." That is to say, either the Public Guardian and Trustee has complete authority to manage the adult's financial and legal affairs or the PGT has no such authority. This is highlighted by the circumstances of a woman who made a complaint that our office investigated.

CASE SUMMARY *Mary's Story*

Mary was a 63-year-old woman with a disability. Her finances were managed by the PGT. She lived with her husband, who received income assistance. She received monthly payments from her late husband's pension, which went to the PGT to be managed. The PGT was sending her \$100 per week for spending money. Mary and her husband did not think this was enough money for her to cover expenses. In particular, she felt that she did not receive enough money to buy new clothes and she was frustrated that she could not convince her case manager to let her control more of her own money. She believed she should be given more independence and that she could manage some of her money with the assistance she received from support workers. She also described a difficult relationship with her case manager. She complained to our office, and we investigated her complaint.

As a result of our investigation, the PGT agreed to increase the amount of money that Mary received on the condition that she continue to manage these funds carefully. Mary was also assigned a new case manager. Mary was satisfied with the outcome of the investigation, because it resulted in the PGT providing her with greater control of her money and greater participation in the management of her financial affairs.

Duties of Committees under the *Patients Property Act*

Section 15(1)(a) of the *Patients Property Act* states that an adult's committee has all the rights, privileges and powers with regard to the estate of the adult as the adult would have.

When a committee of estate is appointed by the court, the court can impose conditions or restrictions on the committee's authority. The committee, who can be a person other than the PGT, can be required by the court to obtain written consent from the PGT in order to exercise certain rights, privileges or powers.¹⁹⁶ However, when the PGT becomes committee of estate by a certificate of incapability, it has complete authority to manage the adult's financial and legal affairs.

The *Patients Property Act* only requires the committee to exercise the committee's powers for the benefit of the adult and the adult's family. The Act does not require the committee to consult with the adult or the adult's family, to consider the views of the adult or to encourage or allow the adult's participation in the management of some aspects of his or her finances.

¹⁹⁶ *Patients Property Act*, R.S.B.C. c. 349, s.16 (1).



"Global committee-ship is at the heart of the PPA [Patients Property Act] 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 autonomy over the adult's personal and/or property affairs once they are deemed incapable."

Source: BC Law Institute, *A Comparative Analysis of Adult Guardianship Laws in BC, New Zealand and Ontario*, October 2006, 23.

In its publication, *When the Public Guardian and Trustee is Committee*, the PGT states:

As Committee, the PGT supports and promotes a client's independence. To the extent that the assets are secure and the adult is able, the PGT will try to minimize its involvement in day to day decisions such as grocery shopping, entertainment, etc. Many clients still maintain and use their external bank account.¹⁹⁷

The PGT's 2005 publication, *Court and Statutory Guardianship: The Patients Property Act and the Adult Guardianship Act (Part 2): An Updated Discussion Paper on Modernizing the Legal Framework*, recommends that property guardians be required to consult with supportive involved family, friends and caregivers and personally visit the adult annually.¹⁹⁸ It also recommends that guardians seek to foster the adult's independence.¹⁹⁹

Part 2 of the 1993 *Adult Guardianship Act*, which was never brought into force, would have included a provision that allowed the court to limit the authority of a property guardian. It would have required that the court give a guardian "only the authority that:

- is necessary to make, or assist in making, decisions about the adult's ... legal matters or the adult's financial affairs, business or assets,
- will result in the most effective, but the least restrictive and intrusive, form of assistance and support for the adult, and,
- in the case of a guardian, is required to provide the care, assistance and protection necessary to meet the adult's needs."²⁰⁰

If it had been brought into force, this provision would have required the court to limit a guardian's power to that necessary to protect the adult in the areas where protection was needed. This version of Part 2 would also have allowed the court to appoint different levels of decision-makers or guardians – associate decision-makers, substitute decision-makers or guardians – and specify what responsibility each person had.

The 2007 version of Part 2 of the *Adult Guardianship Act* includes a provision that would require a guardian "to the extent reasonable, foster the independence of the adult and encourage the adult's involvement in any decision-making that affects the adult."²⁰¹

If brought into force, the 2007 *Adult Guardianship Act* would require a property guardian to act in the best interest of the adult and take into consideration any instructions or wishes the adult most recently expressed while capable, including any that were included in an enduring power of attorney.

The guardian would also be required to consider the adult's known beliefs and values. Legislative provisions in other jurisdictions limit a guardian's authority by allowing the court to restrict or place conditions on a guardian's authority when the guardian is appointed by the court. For example, the guardianship legislation

¹⁹⁷ Public Guardian and Trustee of British Columbia, *When the Public Guardian and Trustee is Committee*, October 2011, 6.

¹⁹⁸ Public Guardian and Trustee of British Columbia, *Court and Statutory Guardianship: The Patients Property Act and the Adult Guardianship Act (Part 2): An Updated Discussion Paper on Modernizing the Legal Framework*, October 2005, 30.

¹⁹⁹ Public Guardian and Trustee of British Columbia, *Court and Statutory Guardianship: The Patients Property Act and the Adult Guardianship Act (Part 2): An Updated Discussion Paper on Modernizing the Legal Framework*, October 2005, 39

²⁰⁰ Bill 49, *Adult Guardianship Act*, 2nd Sess, 35th Parl, British Columbia, 1993, s. 15.

²⁰¹ Bill 29, *Adult Guardianship and Planning Statutes Amendment Act*, 3rd Sess, 38th Parl, British Columbia, 2007, s. 19(1)(e).

in Ontario and Yukon include requirements that a guardian involve the person on whose behalf the guardian is acting in decision making. For example, section 32(3) of Ontario's *Substitute Decisions Act* states "a guardian shall encourage the incapable person to participate, to the best of his or her abilities, in the guardian's decisions about the property."²⁰²

This Act also requires the guardian to foster contact between the incapable person and supportive family members and friends, and to consult with these family members and friends, as well as with the incapable person.²⁰³

Section 43(1)(d) of Yukon's *Care Consent Act* states that a guardian has a duty "to encourage and assist the adult to care for, and make decisions about, the adult, and manage or participate in managing the adult's affairs." This Act also requires the guardian to consult with the adult to a reasonable extent and act on the adult's wishes if it is reasonable to do so.²⁰⁴

Analysis

On March 11, 2010, Canada ratified the UN Convention on the Rights of Persons with Disabilities. Article 12(4) of the Convention refers to measures used to safeguard persons from abuse when exercising legal capacity. It states that these measures "respect the rights, will and preferences of the person" and "are proportional and tailored to the person's circumstances".²⁰⁵ One way of ensuring these principles are adhered to is by requiring committees to involve the adult in the management of his or her estate. Under the *Patients Property Act*, a guardian is not required to involve the adult or his or her family in the decision making about, and management of, the adult's affairs. Without requiring this participation, the current legislation does not adhere to the principle of ensuring the least restrictive and intrusive form of protection. By not requiring the guardian to involve the adult in the handling of his or her affairs, it fails to recognize that the adult may be capable in some aspects of managing his or her affairs. This does not promote the independence and autonomy of the adult.

The provision in the proposed legislation that requires a guardian to foster the adult's independence and involve the adult in decision making would address this issue.

Finding & Recommendation

F21 The *Patients Property Act* does not require a committee of estate to involve the adult in the management of his or her financial affairs.

R28 The Ministry of Justice take steps to require a committee to encourage the adult's participation in the decision making and management of the adult's financial affairs.

²⁰² *Substitute Decisions Act*, 1992, S.O. 1992 C. 30, S. 32(3).

²⁰³ *Substitute Decisions Act*, 1992, S.O. 1992, c. 30, s. 32(4)(5).

²⁰⁴ *Care Consent Act*, S.Y. 2003, c. 21, Schedule B, s. 44.

²⁰⁵ *Convention on the Rights of Persons with Disabilities*, GA Res. 61/106, UN GA, 61st Sess., UN Doc. A/Res/61/106 (2007) 9.

Committees Appointed by the Court

There are two processes in which a committee of estate can be appointed to manage the financial and legal affairs of an adult – by the courts or by certificate of incapability.

In our investigation, we found the statutory process to be procedurally unfair in a number of ways, including the following:

- adults are not consistently provided with timely and adequate information about the PGT's investigation and about assessments
- adults are not consistently provided with adequate information regarding their rights with respect to assessments
- adults are not offered copies of assessments or of the certificate of incapability
- adults are not given a sufficient opportunity to provide information before a certificate of incapability is issued
- adults are not provided with adequate reasons for the issuing of a certificate of incapability
- adults do not have the opportunity to appeal the decision to issue a certificate of incapability

If the recommendations in the report are accepted, we will have a statutory process that would include the following procedural protection. The person affected will:

- receive appropriate notice and adequate information about the steps in the certificate process
- receive adequate information about his or her options regarding assessments
- be offered copies of assessments
- have the opportunity to obtain and review documents relevant to the certificate process
- consistently have an opportunity to provide information before a certificate is issued
- receive reasons for the decision to issue a certificate
- be able to appeal a decision to issue a certificate.

The court process that leads to the appointment of a committee of estate has more procedural safeguards than the administrative certificate process. Once the certificate process has been properly revised to ensure appropriate procedural safeguards, we would expect the Ministry of Justice, working in conjunction with the courts, to ensure that the court process incorporates similar protective provisions.





REPORTS TO THE PUBLIC GUARDIAN AND TRUSTEE

Notice of Investigation

- F1** The Public Guardian and Trustee does not provide adequate information to adults about an investigation of the adult's financial incapability.
- R1** The Public Guardian and Trustee provide written notice to all adults who are the subject of an investigation, at the start of the investigation, that includes
- the steps that will occur during the investigation,
 - the possible outcomes and their significance and
 - an explanation that an adult can seek legal advice or assistance.

PUBLIC GUARDIAN AND TRUSTEE INVESTIGATION

Protection of Assets in Urgent Cases

- F2** The Public Guardian and Trustee does not have authority to extend the period of seven days set out in section 19(3) of the *Public Guardian and Trustee Act*.
- R2** The Public Guardian and Trustee discontinue the practice of extending the period of seven days set out in section 19(3) of the *Public Guardian and Trustee Act*.
- R3** The Ministry of Justice take steps to provide the Public Guardian and Trustee with access to a court process to apply to act as a temporary property guardian in urgent situations.

The Medical Assessment

- F3** A decision that an adult is incapable of managing his or her financial affairs is not legally required to be based on an assessment conducted by a physician.
- R4** The Ministry of Justice take steps to require that all certificates of incapability are based on a current in-person assessment conducted by a physician.
- R5** The Ministry of Justice, in consultation with the Ministry of Health, include in regulation standards for conducting medical assessments as part of the certificate of incapability process.

Informing the Adult about the Medical Assessment

- F4** When the Public Guardian and Trustee is investigating an adult's incapability, it does not routinely inform the adult
- that it has requested a medical assessment
 - of the purpose of the medical assessment

- that the adult can refuse to be assessed
- that the adult can have a support person present
- how to obtain a copy of the medical assessment and
- how to challenge the medical assessment or to request a reassessment

R6 When the Public Guardian and Trustee is investigating an adult's incapability, it inform the adult in writing that it has requested a medical assessment of the adult's incapability and

- the purpose of the medical assessment
- that the adult can refuse to be assessed
- that the adult can have a support person present
- how the adult can obtain a copy of the medical assessment, and
- how the adult can challenge the medical assessment or request a reassessment

How the Medical Assessment Is Paid For

F5 It is unfair for the Public Guardian and Trustee to recover the cost of a medical assessment conducted during an investigation of an adult's financial incapability from the adult's estate after the Public Guardian and Trustee is appointed committee of the estate.

R7 The Public Guardian and Trustee seek authority and support from the provincial government to cover the costs of the medical assessment conducted during the investigation of financial incapability and stop recovering the costs from the adult's estate after it becomes committee.

HEALTH AUTHORITY INVESTIGATION

Functional Assessments

F6 The *Patients Property Act* does not require that a certificate of incapability be based on a functional assessment.

R8 The Ministry of Justice take steps to require that all certificates of incapability be based on both a medical and a functional assessment.

Staff Who Conduct Functional Assessments

F7 The health authorities do not consistently provide training to staff who conduct functional assessments.

R9 The Ministry of Health, in consultation with the health authorities, develop a provincial training program that must be completed by health authority staff before conducting functional assessments and ensure this training is provided on an ongoing basis.

Before Conducting an Assessment

F8 The health authorities do not consistently provide adults with timely notice of and adequate information about functional assessments.

R10 Health authorities ensure that adults receive timely notice of and adequate information about functional assessments. The information provided to adults should include

- the purpose of the assessment
- that the adult can refuse to participate in the assessment
- that the adult can have a support person present
- how the adult can obtain a copy of the assessment and
- how the adult can challenge the assessment or request a reassessment

In exceptional circumstances, when the health authorities have concluded on reasonable grounds that providing notice would put an adult at risk, notice is not required.

R11 The Ministry of Justice take steps to require in regulation that adults be provided with timely notice of and adequate information about functional assessments.

Assessment Process

F9 In the absence of legally binding minimum assessment standards health authority staff who conduct functional assessments follow different assessment practices resulting in inconsistent treatment for individual adults.

R12 The Ministry of Justice, in consultation with the Ministry of Health, include in regulation standards for conducting functional assessments as part of the certificate of incapability process.

After Conducting the Assessment

F10 The health authorities do not offer adults copies of their functional assessments.

R13 The health authorities offer adults copies of their functional assessments. If the adult wishes to receive a copy, any third-party information should be removed from the copy provided to the adult.

R14 The Ministry of Justice take steps to require in regulation that adults are offered copies of their functional assessments.

ISSUING A CERTIFICATE OF INCAPABILITY

Health Authority Staff with Responsibility for Issuing Certificates

- F11** The Ministry of Health has not developed a training program for health authority staff who issue certificates of incapability.
- R15** The Ministry of Health, in consultation with the health authorities, develop a provincial training program that must be completed by health authority staff before issuing certificates of incapability and ensure this training is provided on an ongoing basis.

How Health Authority Staff Decide to Issue a Certificate

- F12** The *Patients Property Act* does not define financial incapability or establish a test for determining when an adult is incapable of managing his or her finances.
- R16** The Ministry of Justice take steps to establish a legally binding definition of financial incapability and a test for determining when an adult is incapable of managing his or her finances.

Notice of Intent to Issue a Certificate

- F13** There are no legally binding standards that require health authorities to
- notify adults and families of the intent to issue a certificate of incapability
 - confirm that adults and families have received the notice and
 - ensure that there is sufficient time for adults and families to respond to the notice
- and health authority practices are inconsistent.
- R17** When considering issuing a certificate of incapability, health authorities
- notify adults and families of the intent to issue a certificate of incapability
 - confirm that adults and families have received the notice and
 - ensure that there is sufficient time for adults and families to respond to the notice

In exceptional circumstances, when the health authorities have concluded on reasonable grounds that providing notice would put an adult at risk, notice is not required.

- R18** The Ministry of Justice take steps to require in regulation that health authorities
- notify adults and families of the intent to issue a certificate of incapability
 - confirm that adults and families have received the notice and
 - ensure that there is sufficient time for adults and families to respond to the notice

Summary of Assessment

- F14** The health authorities do not adequately or consistently explain their reasons to the adult and his or her family for the decision to issue a certificate of incapability.
- R19** The health authorities provide adults and families with adequate reasons in writing for the decision to issue a certificate of incapability.
- R20** The Ministry of Justice take steps to require that health authorities provide the adult and his or her family with adequate written reasons for the decision to issue a certificate of incapability.

Notification of a Certificate of Incapability

- F15** The health authorities decide whether to issue a certificate of incapability, but they do not inform the adult and his or her family that a certificate has been issued and do not provide a copy of the certificate to the adult and his or her family once it has been issued.
- R21** The health authorities inform adults and families of the decision to issue a certificate of incapability and offer to provide them with a copy of the certificate.
- R22** The Ministry of Justice take steps to require that the health authority making the decision to issue a certificate of incapability is required to inform the adult and his or her family of its decision, and provide them with a copy of the certificate.
- F16** The Public Guardian and Trustee does not provide clear notification to the adult and his or her family that it has been appointed committee of the adult's estate.
- R23** The Public Guardian and Trustee ensure that it provides clear written notice to the adult and his or her family that it has been appointed as committee of the adult's estate and an explanation of what that means.

REASSESSMENT AND APPEAL

Information Provided to Adults

- F17** The Public Guardian and Trustee does not inform adults about its internal complaint process when it becomes their committee of estate.
- R24** The Public Guardian and Trustee inform adults about its internal complaint process when it becomes their committee of estate.

Reassessment

- F18** The *Patients Property Act* does not require that an adult have access to a reassessment.
- R25** The Ministry of Justice take steps to require that an adult has access to a reassessment on request before a certificate of incapability is issued and within a reasonable timeframe after a certificate of incapability is issued.

Appeal

- F19** An adult who loses the ability to make his or her own financial and legal decisions as a result of an administrative decision to issue a certificate of incapability does not have access to an independent appeal of that decision.
- R26** The Ministry of Justice take steps to establish an appeal to a tribunal for an adult who wishes to dispute a decision that has found him or her incapable of managing his or her financial and legal affairs.

Hiring a Lawyer after a Certificate is Issued

- F20** The Public Guardian and Trustee has not consistently communicated to adults that they have the right to retain counsel to challenge a certificate of incapability.
- R27** When it becomes committee of estate, the Public Guardian and Trustee inform adults in writing that they can retain and instruct counsel to challenge a certificate of incapability.

DUTIES OF COMMITTEES AND COMMITTEES APPOINTED BY THE COURT

Duties of Committees under the *Patients Property Act*

- F21** The *Patients Property Act* does not require a committee of estate to involve the adult in the management of his or her financial affairs.
- R28** The Ministry of Justice take steps to require a committee to encourage the adult's participation in the decision making and management of the adult's financial affairs.



**BRITISH
COLUMBIA**

January 31, 2013

Ms. Kim S. Carter
Ombudsperson
Province of British Columbia
947 Fort Street
PO Box 9039 Stn Prov Govt
Victoria BC V8W 9A5

Dear Ms. Carter:

Thank you for your letter of January 17, 2013, advising of the next steps to be taken with respect to your investigation and report into the certificate of incapability process under the *Patients Property Act*.

I appreciate the recommendations directed to the Ministry of Justice in your report on the certificate of incapability process. The government recognizes the importance of having an effective and appropriate adult guardianship framework in place that ensures procedural fairness requirements are met. Therefore, in 2007, we introduced the *Adult Guardianship and Planning Statutes Amendment Act, 2007*, which was subsequently passed by the Legislative Assembly, to modernize the province's adult guardianship laws. Unfortunately, before this legislation could be brought into force, there was a downturn in the global economy that resulted in a fiscal climate in British Columbia that has required the deferral of implementation of the adult guardianship aspects of the 2007 legislation. Our commitment to the 2007 legislation was demonstrated in 2011 when we brought into effect the incapacity planning amendments.

You note that many of the recommendations could be implemented fully or in part by bringing into force sections of the *Adult Guardianship and Planning Statutes Amendment Act, 2007*.

The Ministry accepts recommendations 8, 12, 16 and 28. I will be taking all steps necessary to ensure that the sections of the *Adult Guardianship and Planning Statutes Amendment Act, 2007* which would implement those recommendations be proclaimed in the next few weeks, although for the reasons outlined below, they will not come into force immediately.

In addition the Ministry accepts recommendations 4, 5, 11, 14, 18, 20 and 22. As you will appreciate the implementation of these recommendations will require certain legislative changes. The government is committed to introducing the necessary changes to implement these recommendations in the next legislative session.

Ministry of
Justice

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In order to ensure an orderly introduction within a proper statutory framework, the effective date of coming into force of the sections of the *Adult Guardianship and Planning Statutes Amendment Act, 2007* necessary to implement recommendations 8, 12, 16 and 28 will be on a date that would allow their implementation concurrent with the coming into force of the legislative changes necessary to permit implementation of recommendations 4, 5, 8, 11, 12, 14, 18, 20, 22. All these changes will be brought into force by or before July 1, 2014.

The Ministry of Justice has fully accepted 11 of the 14 recommendations made to it in this report and is committed to implementing them by or before July 1, 2014.

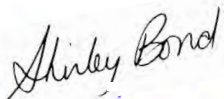
The Ministry is also committed to implementing recommendation 3. However, as this recommendation relates to a part of the *Adult Guardianship and Statutes Amendment Act, 2007* dealing with court ordered guardianship, the Ministry cannot at this time commit to a timeframe for implementation. In order to make progress towards this goal and as an interim measure in the near future I will be asking the Supreme Court Rules Revision Committee to develop a structure for *ex parte* application by the Public Guardian and Trustee for temporary guardianship under the *Patients Property Act* Rules of Court until the relevant section is proclaimed.

The Ministry of Justice will commence a review of recommendations 25 and 26 and will report publicly on the results within 18 months.

I would also like to address your finding that the Public Guardian and Trustee does not have authority to extend the period of seven days set out in section 19 (3) of the *Public Guardian and Trustee Act*. While we do not necessarily agree with your office's assessment as to the current state of the law, I will be taking steps to clarify the Public Guardian and Trustee's authority in this regard through bringing into force the 2007 amendments to this particular section in the next few weeks.

In closing, I would like to acknowledge the dedication of the Public Guardian and Trustee and the Health Authorities to protecting and serving vulnerable adults in the province. The effectiveness of these organizations in fulfilling their responsibilities, particularly under an outdated adult guardianship legislative framework, is recognized and appreciated.

Sincerely,



Shirley Bond
Minister of Justice
and Attorney General



954366

DEC 14 2012

Ms. Kim S. Carter
Ombudsperson
Province of British Columbia
947 Fort St
PO Box 9039 Stn Prov Govt
Victoria BC V8W 9A5

Dear Ms. Carter:

Thank you for your letter dated November 9, 2012, providing the Ministry of Health (the Ministry) with the opportunity to review the draft report with the working title, *No Longer Your Decision* (the Report). I am responding on behalf of the Honourable Dr. Margaret MacDiarmid, Minister of Health.

The Report provides a comprehensive analysis of the administrative processes used in British Columbia, under the *Patients Property Act* (the Act), that lead to the issuing of a certificate of incapability and the Public Guardian and Trustee being appointed to manage a person's financial and legal affairs. For vulnerable adults who find themselves in need of this type of protection, it is important that the process is fair and transparent.

As the report points out, accountability for the Act rests with the Ministry of Justice, while administration of the Act's provisions rests primarily with the Public Guardian and Trustee and health authorities. Directors of designated facilities under the *Mental Health Act* may sign a certificate stating that a patient is mentally incapable of managing his or her affairs based on a clinical assessment. The Ministry recognizes the critical role played by all of these parties in protecting vulnerable adults and commends the work of all involved who are challenged on a day to day basis with trying to strike the balance between respecting an individual's rights, while at the same time ensuring they are protected from abuse. The issuing of a certificate of incapability is the result of a process which begins with gaining a holistic perspective of an individual's clinical health status and needs through to a functional assessment that determines if the individual is incapable of managing their financial affairs. The certificate of incapability is pursued as a means of last resort.

... 2

- 2 -

The Ministry firmly believes in the principles of self-determination and autonomy for adults as well as the need for a comprehensive and integrated system of support and assistance for adults who need help in making decisions about their health, personal care, or financial matters, or who are abused or neglected. The Ministry will work collaboratively with our partners, the Ministry of Justice, the Public Guardian and Trustee, and health authorities to proceed with the recommendations, following a comprehensive evaluation of roles and responsibilities to determine the impact on resources and existing systems, including patient safety, fiscal implications, and time required for successful implementation. It is important to consult as necessary with experts in the field before setting a course for future actions.

With regard to the two recommendations directed specifically to the Ministry, I can assure you that we support a standard, coordinated approach to improving the quality and consistency of services delivered in this area through appropriate training of health authority staff who conduct functional assessments and/or issue certificates of incapability. Please see the attached table for our detailed response.

Sincerely,

A handwritten signature in black ink, appearing to read 'G. Whitmarsh', with a long horizontal flourish extending to the right.

Graham Whitmarsh
Deputy Minister

Attachment

Ministry of Health Response Table – Recommendations

Recommendation Number	Recommendation	Recommendation Accepted? <ul style="list-style-type: none"> • Yes • Possible yes (see comment) • No (see explanation) 	Comment/Explanation
9	The Ministry of Health, in consultation with the health authorities, develop a provincial training program that must be completed by health authority staff before conducting functional assessments and ensure this training is provided on an ongoing basis.	Yes	The Ministry of Health will work together with our partners in the health authorities, the Ministry of Justice and the Public Guardian and Trustee to review the current training, standards and guidelines to implement a consistent and competency based training approach to functional assessments for use within health authorities. Implementation of the recommendation will take into consideration work completed to date, the most effective format for training and how best to ensure a standard approach across many agencies. Our first step will be to review the respective roles and responsibilities of the agencies and professionals involved; this work will support our response to both recommendations directed to the Ministry.
15	The Ministry of Health, in consultation with the health authorities, develop a provincial training program that must be completed by health authority staff before issuing certificates of incapability and ensure this training is provided on an ongoing basis.	Yes	The Ministry of Health supports improved training to ensure consistency in the practice of issuing certificates of incapability. Implementation of the recommendation will require working together with our partners in the health authorities, the Ministry of Justice and the Public Guardian and Trustee as well as consultation with the relevant professional colleges. It will be important that any training efforts are aligned with responsibilities for setting professional standards and for managing administrative processes for issuing certificates of incapability. Additional important considerations include reviewing existing training modules, the most effective format for training and ongoing monitoring for consistent training and competency.



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www.trustee.bc.ca

December 7, 2012

Kim S. Carter
Ombudsperson
Province of British Columbia
947 Fort Street
PO Box 6039 Stn. Prov Govt
Victoria, BC V8W 9A5

Dear Ms. Carter:

Thank you for the opportunity to review and respond to the findings and recommendations of your report entitled *No Longer Your Decision: British Columbia's Process for Appointing the Public Guardian and Trustee to Manage the Financial Affairs of Incapable Adults*.

You have provided a detailed examination of the process for responding to allegations of financial abuse, neglect and self-neglect of vulnerable adults and the issuing of certificates of incapability. The thoroughness of your report is appreciated.

The certificate of incapability process is a key element in the protection of adults who are incapable of managing their own legal and financial affairs. This administrative process is an effective means of appointing a committee in urgent circumstances where time is of the essence in protecting an adult or their assets. The certificate is used where an adult has no family member or friend suitable and willing to act as their committee, and a public body is required to act in that role. Further, the certificate process is inexpensive compared to the alternative and directly benefits adults who may not have the financial resources to cover a costly and time-consuming court application for the appointment of a committee.

It is understood that the issuing of a certificate of incapability and the appointment of a committee has significant effects on the life of an adult. The Public Guardian and Trustee and the Health Authorities must strive to balance an adult's right to self-determination and autonomy with the need for protection from abuse, neglect and self-neglect. As partners in the certificate of incapability process, we face the challenge of striking a balance between autonomy and protection for each adult. The Public Guardian and Trustee and Health Authorities work together to ensure that a certificate of incapability is issued only as a last resort where no other effective options for assistance to an adult are available.

You have noted that the *Patients Property Act*, the legal underpinning for the certificate of incapability process, is silent with respect to procedural requirements and is otherwise outdated and lacking in procedural safeguards. We agree that the legislation is outdated. For more than a decade, the Public Guardian and Trustee has called on government to enact and bring into force new law to reflect the principles of modern adult guardianship and provide for procedural fairness in the certificate process.

As you are aware, the Public Guardian and Trustee, together with its service partners and stakeholders, has developed voluntary guidelines for persons involved in issuing certificates of incapability. The purpose of these guidelines is to encourage adherence to principles of least intrusiveness, fair process and best practice in the absence of procedural guidance in the *Patients Property Act*.

You have noted that bringing into force of the unproclaimed portions of the *Adult Guardianship and Planning Statutes Amendment Act, 2007* would address a number of the procedural fairness issues identified in your review. The Public Guardian and Trustee agrees with this observation, and we are committed to continued advocacy for proclamation of this much needed new law.

In the interim, the Public Guardian and Trustee will work collaboratively with the Health Authorities, the Ministry of Health and the Ministry of Justice to provide affordable, fair and effective processes which are not dependant on legislative amendment. Specifically, the Public Guardian and Trustee will work with the Health Authorities to enhance voluntary guidelines for issuing of certificates of incapability. The Public Guardian and Trustee will also develop notification processes designed to provide comprehensive information to vulnerable adults and their families about the certificate of incapability process, committee ship and our internal complaints process.

The detailed response of the Public Guardian and Trustee to the 7 recommendations directed to this office are set out in the attached chart.

Thank you for undertaking this important review of the certificate of incapability process.

Yours truly,



Catherine M. Romanko
Public Guardian and Trustee

CR:tvI

PUBLIC GUARDIAN AND TRUSTEE RESPONSE – RECOMMENDATIONS

#	Recommendation	Recommendation Accepted	Comment/Explanation
1	<p>The Public Guardian and Trustee provide written notice to all adults who are the subject of an investigation, at the start of the investigation, that includes</p> <ul style="list-style-type: none"> •the steps that will occur during the investigation, •the possible outcomes and their significance and •an explanation that an adult can seek legal advice or assistance. 	Yes	<p>The Public Guardian and Trustee agrees to provide more comprehensive information to adults whose affairs are the subject of an investigation about the investigation process, possible outcomes and the option for the adult to seek legal advice or assistance.</p> <p>In some cases where the adult or the adult’s assets are in situations of imminent risk, notification of an investigation and information about the process involved may place the adult or the adult’s assets in greater risk, particularly where the information is accessed by persons other than the vulnerable adult. Accordingly, the Public Guardian and Trustee will develop appropriate policy and procedures to address options for providing information to the adult at a time and in a manner to avoid increasing risk to the adult or the adult’s assets.</p>

PUBLIC GUARDIAN AND TRUSTEE RESPONSE – RECOMMENDATIONS

<p>2</p>	<p>The Public Guardian and Trustee discontinue the practice of extending the period of seven days set out in section 19(3) of the <i>Public Guardian and Trustee Act</i>.</p>	<p>No</p>	<p>The Public Guardian and Trustee respectfully disagrees with the Ombudsperson’s conclusion that the Public Guardian and Trustee has no authority to reissue a direction for placement of protective measures. The Public Guardian and Trustee has a legal opinion which concludes that if we cannot reissue the protective measures, the legislative scheme in section 19 of the <i>Public Guardian and Trustee Act</i> is absurd in its application and its protective purpose is defeated.</p> <p>The Public Guardian and Trustee suggests that at best, the law regarding the authority to reissue protective measures is unclear and would benefit from legislative amendment to achieve clarity. The Public Guardian and Trustee is unaware of any judicial pronouncement on this issue. Accordingly, the point of law appears to be undecided.</p> <p>The Public Guardian and Trustee agrees that the unproclaimed provisions of the <i>Adult Guardianship and Planning Statutes Amendment Act, 2007</i>, if brought into force, would give more flexibility to the use of emergency provisions. The relevant provisions of the 2007 Act, if proclaimed, would amend section 19 of the <i>Public Guardian and Trustee Act</i> to extend the time period for placement of protective measures from 7 days to a maximum of 90 days. Given the effectiveness of the protective measures in safeguarding the interests of vulnerable adults, the Public Guardian and Trustee will maintain its current practice until such time as the law is clarified. To do otherwise, would not be in the interests of the vulnerable adults we have a duty to protect.</p>
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PUBLIC GUARDIAN AND TRUSTEE RESPONSE – RECOMMENDATIONS

<p>6</p>	<p>When the Public Guardian and Trustee is investigating an adult's incapability, it inform the adult in writing that it has requested a medical assessment of the adult's incapability and</p> <ul style="list-style-type: none"> •the purpose of the medical assessment •that the adult can refuse to be assessed •that the adult can have a support person present •how the adult can obtain a copy of the medical assessment, and •how the adult can challenge the medical assessment or request a reassessment 	<p>Yes</p>	<p>The Public Guardian and Trustee agrees that our practice in providing notification to an adult that an incapability assessment has been requested and our practice of providing information to the adult about the assessment process could reasonably be enhanced.</p> <p>The Public Guardian and Trustee will consult with experts in the field of incapability assessments to determine the most effective and appropriate means of providing notification and process information to vulnerable adults.</p> <p>The current Practice Guidelines for Incapability Assessments which are relied on for assessments carried out under Part 3 of the <i>Adult Guardianship Act</i> (for purposes of applying for a court ordered support and assistance plan for an adult) may provide some guidance in developing best practice.</p> <p>In some circumstances, incapability assessments of a vulnerable adult are conducted prior to the adult being referred to the Public Guardian and Trustee. Such cases will not be affected by any change in our processes.</p>
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PUBLIC GUARDIAN AND TRUSTEE RESPONSE – RECOMMENDATIONS

7	<p>The Public Guardian and Trustee seek authority and support from the provincial government to cover the costs of the medical assessment conducted during investigation of financial incapability and stop recovering the costs from the adult's estate after it becomes committee.</p>	Partially Accepted	<p>The Public Guardian and Trustee respectfully disagrees with the finding of the Ombudsperson that the recovery of funds advanced by the Public Guardian and Trustee on behalf of an adult to cover the cost of medical assessments is unfair.</p> <p>The Public Guardian and Trustee is under no legal obligation to advance funds from our operating budget to cover the cost of incapability assessments. Further, the Public Guardian and Trustee is not funded by government to provide this service. Where the Public Guardian and Trustee advances funds to cover the cost of a medical assessment of an adult's incapability, we rely on the authority of section 23(4) of the <i>Public Guardian and Trustee Act</i> to recover the amounts advanced. Section 23(4) of the <i>Public Guardian and Trustee Act</i> provides that "the Public Guardian and Trustee may recover costs incurred and loans made in performing a duty or delivering services under this Act, another enactment or an agreement." Investigation of vulnerable adults by the Public Guardian and Trustee is carried out under section 17 of the <i>Public Guardian and Trustee Act</i>.</p> <p>Adults for whom committees are appointed by Court Order under the <i>Patients Property Act</i> are responsible for paying the cost of the two medical incapability assessments required to support the court application. The Public Guardian and Trustee questions whether there is a policy basis for having different rules concerning responsibility for the cost of a medical assessment of incapability for adults whose committee is appointed through an administrative process rather than by the Court. Nevertheless, the setting of public policy is a matter for government and the Public Guardian and Trustee agrees to bring this issue to government for consideration. In the interim, the Public Guardian and Trustee will continue its current practice.</p>
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PUBLIC GUARDIAN AND TRUSTEE RESPONSE – RECOMMENDATIONS

<p>23</p>	<p>The Public Guardian and Trustee ensure that it provides clear written notice to the adult and his or her family that it has been appointed as committee of the adult's estate and an explanation of what that means.</p>	<p>Yes</p>	<p>The Public Guardian and Trustee will develop a more comprehensive package of written material to provide to an adult and to family members who are involved with the adult when the Public Guardian and Trustee is appointed Committee of Estate. This material will outline the role that the Public Guardian and Trustee will play as Committee of Estate and how that may affect the adult and the adult's family.</p>
<p>24</p>	<p>The Public Guardian and Trustee inform adults about its internal complaint process when it becomes their committee of estate.</p>	<p>Yes</p>	<p>The Public Guardian and Trustee will provide information about our internal complaints process in the package of materials we provide to an adult and the adult's family when we are appointed Committee of Estate. The Public Guardian and Trustee will also ensure that information about the internal complaints process is readily accessible on our website.</p>

PUBLIC GUARDIAN AND TRUSTEE RESPONSE – RECOMMENDATIONS

27	When it becomes committee of estate, the Public Guardian and Trustee inform adults in writing that they can retain and instruct counsel to challenge a certificate of incapability.	Yes	The Public Guardian and Trustee will advise an adult that he or she may challenge a certificate of incapability and may seek legal advice. The Public Guardian and Trustee will acknowledge the right of the adult's legal counsel to speak for the adult in matters related to the adult's incapability or the issuance of a certificate of incapability.
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fraserhealth

Better health.
Best in health care.

December 6, 2012

Ms. Kim S. Carter
Ombudsperson
Province of British Columbia
947 Fort Street
PO Box 9039 Stn Prov Govt
Victoria, BC V8W 9A5

via email

Dear Ms. Carter:

Re: Report "No Longer Your Decision"

Thank you for the opportunity to review the draft report "No Longer Your Decision" (working title) and respond to the five recommendations (R10, R13, R17, R19, and R21) specific to Fraser Health. The attached is our final written response, which was created through consultation with our internal stakeholders as well as our partners in the Ministry of Health, Public Guardian and Trustee, Ministry of Justice and the other health authorities.

Fraser Health is supportive of the report and acknowledges the need for enhancing information provided to adults and their families throughout the certificate of incapability process. In our role as a designated agency under the Adult Guardianship Act we strive to balance the adults' autonomy with their safety. We appreciate the incorporation of our feedback in the revised Health Authority Recommendations – Clarifications and Revisions received on December 5, 2012 regarding the need for clinical discretion when assessors have concluded that providing information and notice to adults and their families may put the adult at risk of harm.

Fraser Health looks forward to collaborating with the other health authorities to develop standard practice guidelines and tools to adhere to the report recommendations. We will support our staff to participate in education and training, which will be provided in the future to ensure consistent practice.

Sincerely,

Dr. Nigel Murray
President and Chief Executive Officer

NJM/tls

Cc: Lois Dixon, Interim Vice President, Clinical Operations
Andy Libbiter, Interim Executive Director, Mental Health and Substance Use
Encl.

Fraser Health Authority
Office of the President and CEO

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Fraser Health Authority Response Table – Recommendations

Recommendation Number	Recommendation	Recommendation Accepted? • Yes • Possible yes (see comment) • No (see explanation)	Comment/Explanation <i>Please note that our response is based on the Clarifications and Revisions received from the Ombudsperson on December 5, 2012</i>
10	<p>Health authorities ensure that adults receive timely notice of, and adequate information about functional assessments. The information provided to adults should include</p> <ul style="list-style-type: none"> • the purpose of the assessment • that the adult can refuse to be assessed • that the adult can have a support person present • how the adult can obtain a copy of the assessment and • how the adult can challenge the assessment or request a reassessment 	Yes	<p>Fraser Health will work in partnership with the other health authorities to develop standard templates which will be used to notify adults in writing of all of the information recommended by the Ombudsperson.</p> <p>Fraser Health will collaborate with other health authorities to develop a standard guideline to guide staff on how to meet this requirement in situations where the adult is illiterate, does understand English, or requires an adaptive method of communication.</p>
13	The health authorities offer adults copies of their functional assessments.	Yes	<p>Fraser Health will provide adults with a copy of their functional assessments.</p> <p>Fraser Health will collaborate with other health authorities to develop a standard guideline to guide staff on how to meet this requirement in situations where the adult is illiterate, does understand English, or requires an adaptive method of communication, or there is a clinical indication that written or verbal notice of the functional assessment will lead to self-harm or harm by a third party.</p>
17	<p>When considering issuing a certificate of incapability, health authorities</p> <ul style="list-style-type: none"> • notify adults and families of the intent to issue a certificate of incapability, • confirm that adults and families have received the notice and • ensure that there is sufficient time for adults and families 	Yes	<p>Fraser Health will collaborate with other health authorities to develop a standard guideline to guide staff on how to notify adults and their families of the intent to issue a certificate of incapability.</p> <p>Fraser Health will develop an internal tracking system for notification to adults and families.</p> <p>Fraser Health will work with the other health authorities to develop</p>

Fraser Health Authority Response Table – Recommendations

	to respond to the notice.		minimum standards for the amount of time provided for adults and families to respond to the notice.
19	The health authorities provide the adult and his or her family with adequate reasons in writing for the decision to issue a certificate of incapability.	Yes	<p>Fraser Health will work with the other health authorities to develop a standard template which will be provided to the adult and his or her family explaining the reasons why a certificate of incapability is being issued by Fraser Health.</p> <p>Fraser Health will collaborate with other health authorities to develop a standard guideline to guide staff on how to meet this requirement in situations where the adult is illiterate, does understand English, or requires an adaptive method of communication, or there is a clinical indication that written or verbal notice of the functional assessment will lead to self-harm or harm by a third party.</p>
21	The health authorities inform the adult and his or her family of the decision to issue a certificate of incapability and provide them with copy of the certificate.	Yes	<p>Fraser Health will work with the other health authorities to develop a standard template to inform the adult and his or her family of the decision to issue a certificate of incapability and provide them with the copy of it.</p> <p>Fraser Health will collaborate with other health authorities to develop a standard guideline to guide staff on how to meet this requirement in situations where the adult is illiterate, does understand English, or requires an adaptive method of communication, or there is a clinical indication that written or verbal notice of the functional assessment will lead to self-harm or harm by a third party.</p>



Interior Health

Corporate Administration
 Interior Health Authority
 #220 – 1815 Kirschner Road
 Kelowna, B.C. V1Y 4N7
 Web: www.interiorhealth.ca

Dr. Robert Halpenny
President & Chief Executive Officer
 Phone: (250) 862-4205
 Facsimile: (250) 862-4201
 e-mail: robert.halpenny@interiorhealth.ca

December 7, 2012

Ms. Kim Carter
 Office of the Ombudsperson
 947 Fort Street
 PO Box 9039 Stn. Prov. Govt
 Victoria, BC V8W 9A5

Dear Ms. Carter:

Re: Ombudsperson Report – No Longer Your Decision

The Interior Health Authority (IHA) would sincerely like to thank you for the opportunity to review and respond to the findings and recommendations in your report “*No Longer Your Decision*”.

The legal scheme for the appointment of adult guardians in British Columbia presents very complex issues. The “certificate process” in the *Patients Property Act*, the subject of your review, highlights the important foundational principle of self-determination in our adult guardianship legislation. Your report and process of investigation on this matter is commendable in that you were able to capture the multifaceted aspects to the issues of procedural fairness involving the Ministry of Justice, Ministry of Health, Public Guardian and Trustee as well as the six regional health authorities. Additionally, your report has also drawn attention to the interrelatedness of protecting vulnerable adults from abuse and neglect under Part 3 of the *Adult Guardianship Act* and how this links to the certificate process when abuse, neglect or self-neglect are matters of concern.

In February 2012, Interior Health implemented ***Charting the Course: Interior Health’s Planning Principles and Considerations for Change***. It provides an overarching framework to use as a guide to make decisions on the planning and delivery of service. The development of this framework is based on internal and external consultation and is intended to support openness and transparency around how new services are developed or current services are changed. This document refers to principles as “the basic tenants or rules around which service planning decisions are made”. The recommendations in your report are without doubt principle-based and will align with our framework for change.

Your recommendations for Interior Health mirror the recommendations that have been made to all health authorities in British Columbia. As such Interior Health is committed to supporting a collaborative approach between the Health Authorities and Ministry of Health to ensure the actions we take are comprehensive, standardized, supported and result in

improved services across our province. Interior Health is also committed to working with the Public Guardian and Trustee and Ministry of Justice on the interrelated issues concerning the support, assistance or protection of vulnerable adults under Part 3 of the *Adult Guardianship Act*. Your report has provided an important lens to evaluate our current practice on the basis of the right to protection and autonomy as well as the principle of self-determination. Interior Health's response to your recommendations is included in the attachment to this letter. Please find attached as Appendix A, our response to the recommendations in your report that apply to all B.C. health authorities.

Interior Health would like to thank you for your comprehensive approach to investigating the need for improvements to procedural fairness in the issuance of "certificates of incapability" under the *Patients Property Act*. Interior Health acknowledges that this legal process and related practices has a serious impact on the lives of vulnerable adults. This report will guide us in our change process that will be informed by our collaborative work with the Ministry of Health other Health Authorities, our service partners, and our engagement with stakeholders.

Sincerely,



Dr. Robert Halpenny
President & Chief Executive Officer

/vm

APPENDIX A: Interior Health Authority Response Table – Recommendations

Recommendation Number	Recommendation	Recommendation Accepted? • Yes • Possible yes (see comment) • No (see explanation)	Comment/Explanation
10	<p>Health authorities ensure that adults receive timely notice of, and adequate information about functional assessments. The information provided to adults should include</p> <ul style="list-style-type: none"> • the purpose of the assessment • that the adult can refuse to participate in the assessment • that the adult can have a support person present • how the adult can obtain a copy of the assessment and • how the adult can challenge the assessment or request a reassessment <p>In exceptional circumstances, when the health authorities have concluded on reasonable grounds that providing notice would put an adult at risk, notice is not required.</p>	<p>Yes</p>	<p>The Interior Health Authority (IHA) will review the current notice and information standards for functional assessments as well as our administrative processes to ensure these requirements have sufficient oversight for accountability. IHA will work collaboratively with the Ministry of Health, other health authorities, the Public Guardian and Trustee, the Ministry of Justice and others as required for the development of standardized, competency-based education materials and guidelines. An implementation plan will be sponsored, developed and endorsed by the appropriate IHA leaders in consideration of education priorities, budget cycles, risk and impact.</p>
13	<p>The health authorities offer adults copies of their functional assessments. If the adult wishes to receive a copy, any third party information should be removed from the copy provided to the adult.</p>	<p>Yes</p>	<p>The Interior Health Authority (IHA) will review current practice and processes to identify the appropriate administrative oversight for accountability. IHA will work collaboratively with other health authorities, the Ministry of Health, Ministry of Justice and the Public Guardian and Trustee to identify and develop the appropriate standard for a summary of assessment, policies, procedures, guidelines or other clinical decision support tools for use across the health authorities. An implementation plan will be sponsored, developed and endorsed by the appropriate IHA leaders.</p>
17	<p>When considering issuing a certificate of incapability, health authorities</p> <ul style="list-style-type: none"> • notify adults and families of the intent to issue a certificate of incapability. 	<p>Yes</p>	<p>The Interior Health Authority (IHA) will review the education and administrative requirements for all directors who sign certificates of incapability with the expectation that IHA will administratively embrace the principle of self-determination</p>

APPENDIX A: Interior Health Authority Response Table – Recommendations

	<ul style="list-style-type: none"> confirm that adults and families have received the notice and Ensure that there is sufficient time for adults and families to respond to the notice. <p>In exceptional circumstances, when the health authorities have concluded on reasonable grounds that providing notice would put an adult at risk, notice is not required.</p>		<p>and promote the rights of vulnerable adults throughout this process. IHA will review the current documentation processes and identify options to ensure accountability, consistency, coordination and transparency for these provisions. IHA will develop and implement a plan to standardize the documentation and communication processes. IHA will work collaboratively with the Ministry of Health, other health authorities, Ministry of Justice and the Public Guardian and Trustee to identify and develop the appropriate education materials, policies, procedures, guidelines or other clinical decision support tools for use across the health authorities. An implementation strategy and related plan will be sponsored, developed and endorsed by the appropriate IHA leaders.</p>
19	<p>The health authorities provide adults and families with adequate reasons in writing for the decision to issue a certificate of incapability.</p>	<p>Yes</p>	<p>The Interior Health Authority (IHA) will work collaboratively with the Ministry of Health, other health authorities, the Public Guardian and Trustee and the Ministry of Justice to review the current guidelines and develop and establish suitable standards to ensure consistency, fairness, transparency and accountability as well as a common understanding of the term “families”.</p>
21	<p>The health authorities inform adults and families of the decision to issue a certificate of incapability and offer to provide them with a copy of the certificate.</p>	<p>Yes</p>	<p>The Interior Health Authority (IHA) will work collaboratively with the Ministry of Health, other health authorities, the Public Guardian and Trustee and the Ministry of Justice to review the current guidelines, establish suitable standards and develop appropriate materials and related resources to provide the recommended information to adults and families about the outcome of the certificate. IHA will review the administrative requirements for communication of the decision to issue a certificate and develop an education implementation plan that will be sponsored, developed and endorsed by the appropriate IHA leaders.</p>



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December 7, 2012

Ms. Kim Carter
Ombudsperson, Province of British Columbia
947 Fort Street
P.O. Box 9039,
Stn. Prov. Govt.
Victoria, BC
V8W 9A5

Dear Ms. Carter:

Re: Draft Report - No Longer Your Decision

Thank you for providing Northern Health with the opportunity to respond to the recommendations outlined in the draft report, *No Longer Your Decision*. Northern Health has reviewed the five recommendations specific to Northern Health and our response to these recommendations is outlined in the attachment to this letter.

In collaboration with the Ministry of Health, Ministry of Justice, Public Guardian and Trustee of BC, and other British Columbia Health Authorities, Northern Health will implement the process and procedural changes necessary to improve the assessment and notification processes. Information about these procedures and guidelines will be made available on the Northern Health web site.

If further clarification is required, please contact Jim Campbell, Executive Lead, Mental Health and Addictions for Northern Health.

Yours sincerely,


Cathy Ulrich
President and
Chief Executive Officer

cc: Dr. Charles Jago, C.M., Board Chair
Suzanne Johnston - Vice President, Clinical Programs & Chief Nursing Officer
Jim Campbell - Executive Lead, Mental Health & Addictions
Dr. Candida Graham - Medical Lead, Mental Health & Addictions

Northern Health Authority Response Table – Recommendations

Recommendation Number	Recommendation	Recommendation Accepted? <ul style="list-style-type: none"> • Yes • Possible Yes (see comment) • No (see explanation) 	Comment/Explanation
10	<p><i>Clarification added to analysis on page 65</i></p> <p>In order to make these decisions in a meaningful way, it is necessary that the adult be informed of the assessment prior to it being initiated and that the adult be informed of its purpose and the significance of a finding of incapability.</p> <p>Health authority staff come into contact with adults in different situations and so in some circumstances an informal evaluation may begin before an actual decision is made to seek an assessment of an adult’s capability. In those situations notice needs to be given once a decision to move to an assessment is made.</p> <p>In situations where health authority staff, based on an evaluation of the information they have reviewed reasonably conclude that providing notice would put an adult at risk, notice should not be required. The conclusion and the reasons for it must, however, be clearly documented.</p>	YES	

Northern Health Authority Response Table – Recommendations

	<p>In order to make these decisions, the adult should also be made aware that he or she can refuse to participate in the assessment, but that in that case the assessment may still be conducted but would rely on collateral information.</p> <p>The adult should also be informed that the adult can invite a support person to be present and can seek legal advice. The assessor should have the ability in those cases where the assessor has reasonable grounds to believe that a particular person's presence would adversely affect the assessment to advise the adult that the person will not be permitted to act as a support person but that they may have a different support person or proceed without a support person. The decision not to allow a particular support person should be clearly documented.</p> <p>In addition, it would enhance the transparency and accountability of the process if the adult were told how to obtain a copy of the assessment and what options the adult has if he or she disagrees with the assessment or would like to request a reassessment or second assessment.</p> <p>Health authorities ensure that adults receive timely notice of, and adequate information about functional assessments. The information provided to adults should include:</p> <ul style="list-style-type: none">● the purpose of the assessment		
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Northern Health Authority Response Table – Recommendations

	<ul style="list-style-type: none"> • that the adult can refuse to participate in the assessment • that the adult can have a support person present • how the adult can obtain a copy of the assessment and • how the adult can challenge the assessment or request a reassessment <p>In exceptional circumstances, when the health authorities have concluded on reasonable grounds that providing notice would put an adult at risk, notice is not required.</p>		
<p>13</p>	<p><i>Clarification added to the analysis page 72</i></p> <p>The health authority assessment is a key piece of information that is used by directors along with other information to decide whether a certificate of incapability will be issued. Given the significance of the assessment, it is important that an adult be able to obtain a copy of it. Allowing an adult access to an assessment may help him or her understand why the health authority is considering issuing a certificate and would give the adult who wishes to oppose the issuing a certificate the information needed to challenge the determination.</p> <p>In the event that functional assessments include third party information, health authorities should remove any third party information.</p>	<p>YES</p>	

Northern Health Authority Response Table – Recommendations

<p>17</p>	<p>The health authorities offer adults copies of their functional assessments. If the adult wishes to receive a copy, any third party information should be removed from the copy provided to the adult.</p>		
<p><i>Clarification added to analysis on page 86</i></p> <p>Health authorities should work together to develop a consistent definition of who is included in the definition of families for the purpose of notification. The definition should be inclusive of various family structures and where appropriate friends who are involved in providing ongoing support to the adult but could establish reasonable limits on who and how many people need to be notified in any particular circumstance.</p> <p>In situations where health authority staff, based on an evaluation of the information they have reviewed, reasonably conclude that providing notice would put an adult at risk, notice should not be required. The conclusion and the reasons for it must, however, be clearly documented.</p> <p>When considering issuing a certificate of incapability, health authorities</p> <ul style="list-style-type: none"> • notify adults and families of the intent to issue a certificate of incapability, • confirm that adults and families have received the notice and 	<p>YES</p>		

Northern Health Authority Response Table – Recommendations

	<ul style="list-style-type: none"> ensure that there is sufficient time for adults and families to respond to the notice. <ul style="list-style-type: none"> In exceptional circumstances, when the health authorities have concluded on reasonable grounds that providing notice would put an adult at risk, notice is not required. 		
19	The health authorities provide adults and families with adequate reasons in writing for the decision to issue a certificate of incapability.	YES	Provincial guidelines be developed that specify reasons and criteria to be included in the notification.
21	The health authorities inform adults and families of the decision to issue a certificate of incapability and offer to provide them with a copy of the certificate.	YES	



G. (Wynne) Powell
CHAIR

Lynda Cranston
PRESIDENT AND CEO

December 12, 2012

Kim Carter
Ombudsperson
Province of British Columbia
947 Fort Street
PO Box 9039, Stn Prov Govt
Victoria BC V8W 9A5

Dear Ms. Carter:

Thank you for the opportunity to review the draft report with the working title, "*No Longer Your Decision*". I am pleased to see the Ombudsperson's Office focus their efforts in the area of seniors' care; and specifically their systemic investigation of the administrative processes under the *Patients Property Act* related to an adult's capability to manage his or her legal and financial affairs. We understand that the role of the Ombudsperson's Office is to make sure that the administrative practices and services of public agencies are fair, reasonable, appropriate and equitable. This investigation has demonstrated that the Provincial Health Services Authority (PHSA) consistently complies with all legislative requirements related to the *Patient's Property Act*. Many of the findings reference improvements health authorities can make in relation to administrative fairness. PHSA is committed to addressing these gaps immediately.

PHSA firmly supports the principles of self-determination and autonomy for all adults, as well as the need for a comprehensive and integrated system of support and assistance for those who need help in making decisions about their health, personal care, or financial matters, or for those who are abused or neglected.

Between 2002 and mid 2012, the PHSA provided mental health and substance use services for adults at the historic Riverview Hospital (RVH). Prior to its closure in July 2012, over that ten-year period, PHSA issued a total of 39 certificates of incapability to patients at RVH. Compared to the regional health authorities, this is a small number; in fact, during the two-year audit period for this report, PHSA issued only 0.7% of all certificates issued. Now that RVH has closed, PHSA will only issue certificates of incapability through its Forensic Psychiatric Services (FPS). Through FPS, the PHSA has issued only four of these certificates to adults in the past six years.


As your report points out, accountability for this Act rests with the Ministry of Justice, while administration of the Act's provisions rests primarily with the Public Guardian and Trustee (PGT) and health authorities. Once the clinical assessment and notification processes are complete, directors of designated facilities under the Mental Health Act may sign a certificate

stating that a patient is mentally incapable of managing his or her affairs. PHSA believes that all patients under its care are capable of making decisions in many areas; the issuing of this certificate, and the involvement of the PGT in a person's legal and financial affairs, is only pursued if there is demonstrated risk of harm or exploitation, and after all other avenues for support are exhausted.

PHSA is committed to working collaboratively with our partners, including the Ministries of Health and Justice, the regional health authorities, and the Public Guardian and Trustee, in a coordinated approach to improving services for patients and families dealing with issues of incapability. With respect to the five recommendations directed to the PHSA, we are moving forward with implementing all of these recommendations. As always, our over-arching goal is to improve the quality of care for our patients.

Please see the attached table for our detailed response.

Sincerely,



Lynda Cranston
President & CEO

Provincial Health Services Authority Response Table – Recommendations

Recommendation Number	Recommendation	Recommendation Accepted? • Yes • Possible yes (see comment) • No (see explanation)	Comment/Explanation
10	<p>Health authorities ensure that adults receive timely notice of, and adequate information about functional assessments. The information provided to adults should include</p> <ul style="list-style-type: none"> • the purpose of the assessment • that the adult can refuse to participate in the assessment • that the adult can have a support person present • how the adult can obtain a copy of the assessment and • how the adult can challenge the assessment or request a reassessment <p>In exceptional circumstances, when the health authorities have concluded on reasonable grounds that providing notice would put an adult at risk, notice is not required.</p>	Yes	<p>Now that Riverview Hospital has closed, the Forensic Psychiatric Hospital is the only service through which the PHSA currently issues certificates of incapability. FPH has issued only four of these certificates to patients in the past 6 years. Therefore, implementing these recommendations within this single site will be reasonably straightforward.</p> <p>A template will be developed for a “Notification of and information about a Functional Assessment” letter for the adult. The template will include each of these components, and will be tailored to each adult as required.</p>
13	<p>The health authorities offer adults copies of their functional assessments. If the adult wishes to receive a copy, any third party information should be removed from the copy provided to the adult.</p>	Yes	<p>This information will be included in the notification letter, described above.</p>
17	<p>When considering issuing a certificate of incapability, health authorities</p> <ul style="list-style-type: none"> • notify adults and families of the intent to issue a certificate of incapability, • confirm that adults and families have received the notice and • ensure that there is sufficient time for adults and families 	Yes	<p>The current practice is that once the assessment process is complete and if the adult has been deemed incapable of managing her or his legal and financial affairs, a notification letter is sent to the family and/or patient. A 2-week time frame is already provided for the response.</p> <p>This practice will be enhanced by a new Agency policy requiring the</p>

Provincial Health Services Authority Response Table – Recommendations

	to respond to the notice. In exceptional circumstances, when the health authorities have concluded on reasonable grounds that providing notice would put an adult at risk, notice is not required.		social worker confirms that the letter is received, and that they have sufficient time to respond to the notice.
19	The health authorities provide adults and families with adequate reasons in writing for the decision to issue a certificate of incapability.	Yes	The notification letter that is sent to families and the adult (as part of current practice), will be enhanced in order to respond to this recommendation. The reasons for issuing the certificate will include more details about the assessment process and its conclusions. This is current practice.
21	The health authorities inform adults and families of the decision to issue a certificate of incapability and offer to provide them with copy of the certificate.	Yes	



President & Chief Executive Officer
#1100, 601 West Broadway
Vancouver BC V5Z 4C2
Tel: 604-875-4721
Fax: 604-875-4750

December 7, 2012

Ms. Kim S. Carter
Ombudsperson
Province of British Columbia
947 Fort Street
PO Box 9039 Stn Prov Govt
Victoria BC V8W 9A5

Dear Ms. Carter:

Thank you for your letter of November 9, 2012 requesting our response on the recommendations set out in your report *No Longer Your Decision*, concerning the processes involved in statutory substitute decision making, as governed by the *Patients Property Act*.

We appreciate the collaborative approach taken by your staff in working with our staff in Vancouver Coastal Health and Providence Health Care throughout your investigation. We look forward to ongoing collaborative efforts with our partners in the Office of the Public Guardian and Trustee, the Ministry of Health, the Ministry of Justice, and the other health authorities as we continue in our efforts to improve quality and fairness in this important area of our service to British Columbians.

We are supportive and in agreement in general with the recommendations as detailed in the accompanying table. As discussed among our staff teams and reflected in your report, we seek for the involved patients not only fairness, but also to take a patient-centred approach to ensure that they are not exposed to unwarranted distress or possibly financial or other harm through any actions or steps in this process.

Once again, thank you for the opportunity to participate in this important review.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "David", is positioned above the printed name of the President & Chief Executive Officer.

David N. Ostrow, MD, FRCPC
President & Chief Executive Officer

cc: Dr. Jeff Coleman, Vice President, Regional Programs & Service Integration



Promoting wellness. Ensuring care. Vancouver Coastal Health Authority

Vancouver Coastal Health Authority Response Table – Recommendations

Recommendation Number	Recommendation	Recommendation Accepted? <ul style="list-style-type: none"> • Yes • Possible yes (see comment) • No (see explanation) 	Comment/Explanation
10	<p>Health authorities ensure that adults receive timely notice of, and adequate information about functional assessment. The information provided to adults should include:</p> <ul style="list-style-type: none"> • the purpose of the assessment • that the adult can refuse to participate in the assessment, be assessed • that the adult can have a support person present • how the adult can obtain a copy of the assessment and • how the adult can challenge the assessment or request a reassessment <p>In exceptional circumstances, when the health authorities have concluded on reasonable grounds that providing notice would put an adult at risk, notice is not required.</p>	Yes	We agree with the recommendation and note further that we appreciate that you have acknowledged our concerns about the presence of a support person in certain circumstances, and request to have that reflected in the recommendation.
13	The health authorities offer adults copies of their functional assessments. If the adult wishes to receive a copy any third party information should be removed from the copy provided to the adult.	Yes	<p>We are in agreement with the intent of this recommendation, to offer to adults records containing information about their assessments.</p> <p>We caution that the term ‘functional assessment’ can be defined very narrowly by certain disciplines.</p>

Vancouver Coastal Health Authority Response Table – Recommendations

17	<p>When considering issuing a certificate of incapability, health authorities:</p> <ul style="list-style-type: none"> • notify adults and families of the intent to issue a certificate of incapability, • confirm that adults and families have received the notice and • ensure that there is sufficient time for adults and families to respond to the notice. <p>In exceptional circumstances, when the health authorities have concluded on reasonable grounds that providing notice would put an adult at risk, notice is not required.</p>	Yes	<p>We look forward to collaborating with our partners in development of provincial standards to address this recommendation, in the context of the analysis in the body of the report.</p>
19	<p>The health authorities provide adults with adequate reasons in writing for the decision to issue a certificate of incapability.</p>	Possible yes	<p>Giving explanation for the reasons to issue a certificate of incapability to the adult and their families has become a part of the standard operating procedure at both VCH and PHC.</p> <p>We believe that it would be appropriate to expand the recommendation to state that in exceptional circumstances notice may be given orally, or this step may be waived and the reasons documented.</p>
21	<p>The health authorities inform adults and families of the decision to issue a certificate of incapability and offer to provide them with a copy of the certificate.</p>	Yes	<p>We look forward to collaborating with our partners in development of provincial standards to address this recommendation.</p>



Excellent care - for everyone, everywhere, every time.

December 6, 2012

Ref # 13916

Kim Carter
Ombudsperson
Office of the Ombudsperson
947 Fort Street, 3rd Floor
Victoria BC V8W 9A5

Re: File #: 12-115002

Dear Ms. Carter:

Thank you for the opportunity to respond to your report "*No Longer Your Decision*". The Vancouver Island Health Authority (VIHA) considers this an important opportunity to improve the coordination and standardization of the certificate of incapability process within our Health Authority and across the province.

Your report provides a comprehensive analysis of the administrative processes used in British Columbia, that lead to the issuing of a certificate of incapability and the Public Guardian and Trustee (PGT) being appointed to manage a person's financial and legal affairs. For vulnerable adults who may have been the victims of abuse, neglect or self-neglect, and who find themselves in need of this type of protection, it is very important that these processes be both fair and transparent.

VIHA has collaborated with other Health Authorities, the PGT, the Ministry of Justice and the Ministry of Health to review the content, findings and recommendations contained in "*No Longer Your Decision*". Collaboration amongst the Health Authorities, the PGT and the Ministries of Justice and Health has guided our response to your recommendations. VIHA's response is limited to those findings and recommendations that apply specifically to our Health Authority.

We appreciated the opportunity to review the draft report and provide suggestions to clarify and strengthen the wording of the recommendations; we agree with the revisions made on December 4, 2012.

Our response to the VIHA specific recommendations is attached and we request that our submission be included as an appendix to the final report when it is released. We accept all of the VIHA specific recommendations.

.../2

Executive Office

Located at 2101 Richmond Avenue, Victoria, B.C., Canada V8R 4R7 • Tel: 250.370.8699 • Fax: 250.370.8750
Mailing address: 1952 Bay Street, Victoria, BC Canada V8R 1J8

- 2 -

VIHA is committed to working collaboratively with the Ministry of Health, the Ministry of Justice, the PGT and other Health Authorities to develop a standardized and coordinated approach to formal assessments of incapability under the *Patients Property Act*, which is also consistent with the principles and mandate of the *Adult Guardianship Act*. We agree that a consistent provincial direction is needed to meet these recommendations and VIHA is committed to working collaboratively to this end.

We thank you again for the opportunity to respond to your recommendations in regard to your systemic investigation into the certificate of incapability process.

Yours truly,



Dr. Brendan Carr
Acting President & Chief Executive Officer

Attach.

cc: Catherine Mackay, Executive Vice-President & Chief Operating Officer
Marguerite Rowe, Executive Director, Continuing Health Services
Lois Cosgrave, Director, Home & Community Care, End of Life
Dr. Richard Crowe, Executive Medical Director, Mental Health & Addiction Services

Vancouver Island Health Authority Response Table – Recommendations

Recommendation Number	Recommendation	Recommendation Accepted? <ul style="list-style-type: none"> • Yes • Possible yes (see comment) • No (see explanation) 	Comment/Explanation
10	Health authorities ensure that adults receive timely notice of, and adequate information about functional assessments. The information provided to adults should include <ul style="list-style-type: none"> • the purpose of the assessment • that the adult can refuse to be assessed • that the adult can have a support person present • how the adult can obtain a copy of the assessment and • how the adult can challenge the assessment or request a reassessment 	Yes	VIHA accepts this recommendation with the proposed revisions provided from your office on Dec. 04, 2012.
13	The health authorities offer adults copies of their functional assessments.	Yes	VIHA accepts this recommendation with the proposed revisions provided from your office on Dec. 04, 2012.
17	When considering issuing a certificate of incapability, health authorities <ul style="list-style-type: none"> • notify adults and families of the intent to issue a certificate of incapability, • confirm that adults and families have received the notice and • ensure that there is sufficient time for adults and families to respond to the notice. 	Yes	VIHA accepts this recommendation with the proposed revisions provided from your office on Dec. 04, 2012.
19	The health authorities provide the adult and his or her family with adequate reasons in writing for the decision to issue a certificate of incapability.	Yes	VIHA accepts this recommendation with the proposed revisions provided from your office on Dec. 04, 2012. As per our original recommended revisions, we feel the following exceptional clause should be added to this recommendation: <ul style="list-style-type: none"> • Proposed change: In exceptional circumstances, when the health authorities have

Vancouver Island Health Authority Response Table – Recommendations

			<p>concluded on reasonable grounds that providing the decision to issue a certificate of incapability in writing would put an adult at risk, this information will not be provided. The conclusion and the reasons for it must, however, be clearly documented.</p>
<p>21</p>	<p>The health authorities provide the adult and his or her family with adequate reasons in writing for the decision to issue a certificate of incapability.</p>	<p>Yes</p>	<p>VIHA accepts this recommendation with the proposed revisions provided from your office on Dec. 04, 2012. As per our original recommended revisions, we feel the following exceptional clause should be added to this recommendation:</p> <ul style="list-style-type: none"> <p>Proposed change:</p> <p>In exceptional circumstances, when the health authorities have concluded on reasonable grounds that providing the adult and his or her family with a copy of the certificate would put an adult at risk, a copy of the certificate will not be provided. The conclusion and the reasons for it must, however, be clearly documented.</p>



Personal planning documents can be registered with the Nidus Registry. The registry provides a centralized and secure place to keep a record of important information and plans in the event that an adult needs help managing finances or making health care decisions.

The Personal Planning Registry is operated by the Nidus Personal Planning Resource Centre, a non-profit, charitable organization in B.C. that was established in 1995.

APPENDICES

Appendix 1 Personal Planning Tools

Personal planning involves planning for decisions that will need to be made on an adult's behalf if he or she is no longer capable of making decisions. Planning is important because it strives to ensure that an adult's wishes will be followed when he or she is no longer able to make decisions.

Capable adults can use a variety of legal tools to name another person to make decisions on their behalf, should they later become incapable of doing so. Enduring powers of attorney and representation agreements are tools that can be used. An advance directive can be used as a tool to provide advance consent or refusal of consent to health care, without appointing a substitute decision-maker. While the focus of this report is on financial and legal decision making, this appendix describes all of the advance care planning tools that adults in British Columbia can use.

Enduring Power of Attorney

Enduring powers of attorney allow people to give instructions in anticipation of a future loss of capability. A power of attorney authorizes a person, called an attorney, to act for someone else in financial and legal matters. Importantly, a power of attorney does not confer the ability to make decisions about medical, health and personal care matters. An attorney may be given wide authority to manage all financial and legal matters, or he or she may be restricted to a specific set of tasks, such as managing bank accounts or selling assets.

A power of attorney, however, becomes invalid when the person who appointed the attorney is deemed incapable. To avoid this problem, it is necessary to designate an enduring power of attorney, which continues to be effective even after a person is deemed incapable. The *Power of Attorney Act* authorizes a person to make a "springing" power of attorney that only becomes effective when the adult becomes incapable.²⁰⁶ The powers exercised under either a regular or enduring power of attorney end when a committee is appointed by a court in accordance with the *Patients Property Act*. If a certificate of incapability is issued for the adult, the power of attorney is suspended pending a review by the Public Guardian and Trustee of British Columbia (PGT).²⁰⁷

²⁰⁶ *Power of Attorney Act*, R.S.B.C. 1996 c. 370, s. 14.

²⁰⁷ *Patients Property Act*, R.S.B.C. 1996, c. 349, s. 19.1. This section requires the Public Guardian and Trustee (PGT), after receiving a copy of the suspended power of attorney and any other relevant information, to determine whether it is "necessary and desirable" to continue to manage the adult's property under the Act. If the PGT determines that it will continue to do so, the power of attorney is terminated. If the PGT determines that it is not necessary and desirable for it to continue managing the adult's property, then the PGT's authority as committee is terminated.

Representation Agreements

An adult can use a representation agreement to appoint someone to make decisions about personal care, health care, and financial and legal matters if the adult becomes incapable of making those decisions.²⁰⁸ An adult can appoint any person who is 19 years or older, with the exception of a paid caregiver or an employee of a care facility where the adult lives. An adult can also appoint the Public Guardian and Trustee, a credit union or a trust company to make financial or legal decisions.²⁰⁹

Representation agreements can be made under section 7 and section 9 of the *Representation Agreement Act*. For both types of agreements, the representative must consult with the person who is the subject of the agreement as much as is reasonable in order to determine his or her wishes before making a decision on his or her behalf.

A representation agreement made under section 7 may authorize the representative to make decisions about personal care, health care, routine management of financial affairs, and to obtain legal services and instruct counsel.²¹⁰ An adult can make a representation agreement under section 7 even if the adult is incapable of making a contract, managing his or her health care, personal care or legal matters, or undertaking the routine management of his or her financial affairs.²¹¹ Under a section 7 agreement, an adult can also authorize a representative to accept a facility care proposal but only if the facility is a family care home, a group home for the mentally handicapped, or a mental health boarding home. However, under a section 7 agreement, an adult cannot authorize a representative to make or help make a decision to refuse health care necessary to preserve life or to physically restrain the adult.²¹²

In a representation agreement made under section 9, an adult can authorize his or her representative to do anything that the representative considers necessary in relation to the personal care or health care of the adult, including deciding where the adult is to live and with whom, whether the adult should work, and whether the adult should participate in social, educational or other activities. A section 9 agreement can authorize a representative to consent to the use of restraints, to consent to treatment the person is refusing and to refuse life support. An adult may make a representation agreement under section 9 if the adult is capable of understanding the nature and consequences of the proposed agreement.²¹³

²⁰⁸ Only a section 7 representation agreement, as compared to a section 9 representation agreement, may be used to appoint a representative with authority to make decisions in respect of financial and legal matters and, in the case of financial matters, this authority is limited to the “routine management of the adult’s financial affairs.”

²⁰⁹ *Representation Agreement Act*, R.S.B.C. 1996, c. 405, s. 5. There is an exception to the prohibition on a paid caregiver or employee of a care facility acting as a representative, and that is if the caregiver or employee is a spouse, parent or child of the adult.

²¹⁰ Routine management of financial affairs includes payment of bills, receipt and deposit of pension and other income, purchases of food, accommodation and other services necessary for personal care, and the making of investments.

²¹¹ *Representation Agreement Act*, R.S.B.C. 1996, c. 405, s. 8.

²¹² *Representation Agreement Act* R.S.B.C. 1996, c. 405, s. 7. The representative acting under a section 7 representation agreement may not be authorized, despite the objection of the adult, to physically restrain, move or manage the adult, or authorize another person to do these things.

²¹³ *Representation Agreement Act*, R.S.B.C. 1996, c. 405, s. 9 and 10.

Advance Directives

The other main planning tool available to adults is an advance directive.²¹⁴ An advance directive is a set of written instructions that specifies the type of health care and treatment a person wants to receive – or not receive – if he or she later becomes incapable of making those decisions. To make a valid advance directive, an adult must be capable of understanding the nature and consequences of the directive.²¹⁵ Advance directives can be used to address end-of-life decisions and specific types of treatments.²¹⁶ Advance directives do not require that anyone be appointed to make decisions on the adult's behalf. Instead, a directive acts as a free-standing set of instructions to those who are providing care or treatment.

²¹⁴ Although advance directives have been in use for many years, statutory provisions establishing rules to govern their use were added to the *Health Care (Consent) and Care Facility (Admission) Act* in 2007 and came into force in September 2011.

²¹⁵ This includes the scope and effect of the health care instructions and the fact that the health care provider may treat the adult without choosing a temporary substitute decision-maker. *Health Care (Consent) and Care Facility (Admission) Act, Health Care (Consent) and Care Facility (Admission) Act*, R.S.B.C. 1996, c. 181, s. 19.1.

²¹⁶ In an advanced directive, an adult can give or refuse consent for any health care, unless the instruction is prohibited by law or it requires a person to refrain from doing something required by law. In an advanced directive, an adult may not consent to certain procedures set out in section 7 of the regulations to the *Health Care (Consent) and Care Facility (Admission) Act*, such as an abortion, electroconvulsive therapy and psychosurgery.

Appendix 2

Ombudsperson's Administrative Fairness Checklist²¹⁷

Information/Communication

1. Is the public information (booklets, pamphlets, brochures, statute, regulation, video tapes, etc.) about all the agency's programs sufficiently detailed, understandable and readily available for those affected?
2. Does the agency have an access to information policy with respect to information of public interest, which is not specifically protected by a duty of confidentiality? Are there reasonable procedures for responding promptly to public requests for such information?
3. During the initial contact, do individuals receive an adequate explanation of the role of the agency representative and the procedures to be followed as well as all relevant entitlements, benefits, eligibility criteria and other options, conditions and obligations?
4. Are all applications, releases, consents and other forms required by the agency written in plain language? Is the purpose of each form clear? Are individuals provided immediately with copies of all forms and statements they have signed?
5. Are all forms and personal letters from agency representatives written in plain language without unnecessary technical, legal or bureaucratic jargon? Is the purpose of each letter, and its relationship to other letters and conversations, clear? Where reference is made to a statute, is it described in an understandable way? If further action is to occur, are the timing and the responsibility for taking the next step explained? Is the writer identified?
6. Is all communication with citizens conducted in a courteous and respectful manner?

Physical Facilities/Accessibility of Service

7. Does the agency provide adequate telephone access (including access by toll-free numbers or collect long-distance calls) to meet the public's need for information about programs and case processing? Is the agency's telephone number printed on its stationery? Are telephone volume and message return time monitored to ensure that minimum standards of service delivery are met? Are ringing telephones always answered? Is there an answering machine outside office hours?
8. Are site inspections/visits conducted when appropriate and necessary for the proper completion of the administrative procedure involved? Are community service facilities distributed throughout the province and within regions to ensure optimum accessibility by the population to be served?
9. Do the current or planned physical facilities incorporate acceptable standards for accessibility by disabled persons, the health and safety of staff and visitors, privacy of communication and any other special need related to the purpose and function of the facility?

²¹⁷ BC Office of the Ombudsperson, *1990 Annual Report*, 15 < http://www.bcombudsperson.ca/images/resources/reports/Annual_Reports/Annual%20Report%20of%20the%20Ombudsman%20-%201990.pdf>.

Investigation/Decision Procedures

10. Are all parties who may be adversely affected by a decision or action of the agency (including an appeal or review of a decision) given adequate and timely notice of the investigation hearing process, the nature of the resulting decision or action and its possible implications?
11. Are the agency's powers and responsibilities to conduct direct investigations exercised in a consistent, thorough and fair manner having regard to the dignity and privacy of individuals affected? Are these individuals properly informed of such procedures at the appropriate times?
12. Do the agency's statutory/regulatory confidentiality provisions afford sufficient protection for the individuals affected while supporting the efficient delivery of services? Are the intentions of these provisions reflected in the agency's policies, procedures and practices? Are clients advised of these provisions and the reasons for them? Are the proper informed consents obtained when confidential information must be obtained from or shared with other agencies or individuals?
13. Are parties affected by a decision given an adequate opportunity to present evidence in support of their positions, including the opportunity to examine and comment on all of the evidence from other sources that may be considered in arriving at the decision?
14. Are decisions always based on all of the relevant information, excluding all irrelevant considerations?
15. Are there adequate procedures to deal with situations where individual decision-makers are subject to conflicting interests that may affect, or appear to affect, the making of an impartial decision? Where certain decisions cannot be impartial in the judicial sense because of the agency's mandate, positions or interests to be protected, are these factors explained to the parties at the outset?
16. Are decisions and actions made promptly? If not, are the parties given adequate explanations as to why delays may be expected?
17. Are the affected parties provided with adequate and appropriate reasons for the agency's decisions and actions? Are written reasons available on request?

Exercise of Power/Legal Framework

18. Are all the decisions and actions of the agency clearly authorized by, and consistent with, the governing statute and regulation? Are powers exercised for the intended purpose?
19. Does the agency meet all of its legal obligations to act, issue benefits, inform, collect, enforce? Is it provided with adequate resources to do so efficiently?
20. Is the delegation of discretionary and non-discretionary authority in the empowering legislation and regulations appropriate to the types of cases to be decided? Is the exercise of discretion properly structured by administrative policy and objective standards to ensure consistency while avoiding inappropriate inflexibility?
21. Are the existing statutory and regulatory powers, including the formal policies and procedures developed from them, sufficient to achieve the agency's mandate effectively and fairly?

22. Are the agency's legislation, regulation and policies consistent with the letter and intent of other legislation, federal and provincial, to which they are subject, including the Canadian Charter of Rights and Freedoms? Are they well integrated with complementary provisions of other statutes from the perspective of the individuals affected?

Appeal, Review and Complaint Procedures

23. Is there an appropriate and accessible (affordable, simple and prompt) appeal or review procedure for each decision and action that will directly affect an individual's interests?
24. Are individuals fully informed at the time decisions are made, or actions taken, of all available internal and external avenues of appeal, review and complaint?
25. Are the time limits for initiating an appeal or review reasonable? When individuals are advised of these time limits, is it clear which limits are imposed by law and which limits are imposed by administrative discretion or policy?
26. Are there clearly defined complaint procedures at all levels in the organization for considering and responding to individuals' concerns about policy, procedural and service quality issues? Are there procedures for actively inviting suggestions from the public for improvements in service?

Organizational/Management Issues

27. Do the labels assigned to roles, procedures and departments simply and clearly describe the function performed? Are labels and key procedural terms used consistently by representatives of the agency, and can their meanings be easily conveyed to the public?
28. Are there any procedures or roles that could be combined, separated or otherwise reorganized to achieve a higher quality of service/fairness for the public given the available resources?
29. Is the delegation of line authority appropriate, considering the level of employee expertise and the needs and expectations of the public?
30. Do criteria for the selection, deployment and evaluation of personnel take into account the skills, attitudes and aptitudes necessary to deal sensitively, fairly and effectively with the public?
31. Are personnel training programs and supervision adequate to meet performance expectations of management and the public? Are all front-line staff properly instructed regarding the importance of treating all individuals with respect and courtesy?
32. Would any policy or procedural adjustment in the agency's relationship with any other provincial government agency, non-governmental agency or professional group improve service quality and fairness to the public? Is the agency blamed for problems originating with other agencies?

Program Review and Planning

33. Are there appropriate mechanisms for the meaningful participation of affected individuals and groups in the planning of program initiatives and modifications?

34. Are there effective procedures for ensuring that appeal, review and complaint data are incorporated in the planning and review of the agency's programs and policies?

Appendix 3

British Columbia Adult Guardianship Law Reform

Chronology/Timelines for the Progress of Adult Guardianship Legislation in B.C. since 1992

Highlights

1992:

The Joint Working Committee on Adult Guardianship (comprised of both government and community representatives) released a draft of a report, “How can we help?” for consultation and, later in the year, released the final version, “How can we help? A new look at self-determination, interdependence, substitute decision making and guardianship in BC: a report providing recommendations for legislation and policy”.

1993:

Four statutes were introduced, and received Royal Assent on July 29, 1993:

- *Representation Agreement Act*
- *Health Care (Consent) and Care Facility (Admission) Act*
- *Adult Guardianship Act*
- *Public Guardian and Trustee Act*

1993–2000:

The Adult Guardianship Implementation Team was established in the Office of the Public Trustee to lead implementation of the legislation.

1996–1999:

In 1996, a review of the legislation was undertaken to recommend an appropriate schedule for proclamation and identify how to achieve the objectives of the legislation in a cost-effective way. The review was completed in July 1997 and after subsequent discussion with stakeholders legislative amendments were introduced to enable partial proclamation of the 1993 adult guardianship legislative package.

Adult Guardianship Statutes Amendment Act, 1999

http://leg.bc.ca/36th3rd/3rd_read/gov92-3.htm

June 1999, Attorney General Dosanjh announced that there would be partial proclamation of the legislation on February 28, 2000.

2000:

February 28, 2000, the following came into force:

- Health care consent aspects of the *Health Care (Consent) and Care Facility (Admission) Act* Part 3 (care facility admission), and other provisions, such as relating to prescribed advocacy organizations, did not come into force
- Most, but not all, of the *Representation Agreement Act* (e.g., provisions relating to a registry did not come into force)

- Virtually all of the *Public Guardian and Trustee Act*
- Most of Parts 1, 3, 4 of the *Adult Guardianship Act*, but Part 2 (adult guardianship) did not come into force.

The following regulations were enacted the same day: the Health Care Consent Regulation; the Representation Agreement Regulation; the Adult Guardianship (Abuse and Neglect) Regulation; the Designated Agencies Regulation; the Public Guardian and Trustee Regulation; and the Public Guardian and Trustee Fees Regulation.

In addition, the Adult Guardianship (Abuse and Neglect) Rules were enacted (court rules).

July 2000:

McCallum Report to the Public Guardian and Trustee re: Section 9 Representation Agreements with General Powers.

<http://www.trustee.bc.ca/pdfs/General/mccallum.pdf>

2001:

Amendments were made by the *Adult Guardianship Statutes Amendment Act, 2001*, which received Royal Assent March 29, 2001. Minor amendments were made to enhance the clarity, workability and focus of the adult guardianship package of statutes, particularly with respect to representation agreements. The amendments implemented the key recommendations of the McCallum report on representation agreements.

Adult Guardianship Statutes Amendment Act, 2001

http://www.leg.bc.ca/36th5th/3rd_read/gov06-3.htm

The *Adult Guardianship Statutes Amendment Act, 2001*, came into force in September, 2001.

2002:

February, 2002 – Professor A.J. McClean’s report, undertaken for the Attorney General, regarding representation agreements and enduring powers of attorney was completed.

Review of Representation Agreements and Enduring Powers of Attorney

<http://www.ag.gov.bc.ca/public/McClean-Report.pdf>

2003:

Minor amendments to the *Patients Property Act* and *Public Guardian and Trustee Act*. Amendments to the *Patients Property Act* included changes to streamline the PGT’s role in reviewing private committee accounts.

Bill 66, *Miscellaneous Statutes Amendment Act (No. 2), 2003*

Amendments to the *Health Care (Consent) and Care Facility (Admission) Act* dissolving the Health Care and Care Facility Review Board

Bill 90, *Miscellaneous Statutes Amendment Act (No. 3), 2003*

http://www.leg.bc.ca/37th4th/3rd_read/gov90-3.htm

2004:

The Care Facility Admission Working Group concluded a report which was provided to the Ministry of Health.

Spring: Consultations by the Ministry of Attorney General, including public consultation, on the PGT's publication "Court and Statutory Guardianship: A Discussion Paper", and the McClean Report (enduring powers of attorney and representation agreements). In addition to the matters outlined in the PGT's report, the Ministry of Attorney General also sought input on two additional reforms to adult guardianship, "both designed to provide additional flexibility in meeting the needs of incapable adults" – allowing alternate guardians, and mediation.

2005:

PGT releases a revised version of the report – "Court and Statutory Guardianship: The *Patients Property Act* and the *Adult Guardianship Act* (Part 2) – An Updated Discussion Paper on Modernizing the Legal Framework"

http://www.trustee.bc.ca/pdfs/General/Modernizing_Guardianship_2005.pdf

2006:

April 27, 2006 – Government introduced the *Adult Guardianship and Personal Planning Statutes Amendment Act, 2006*

http://www.leg.bc.ca/38th2nd/1st_read/gov32-1.htm

May 10, 2006 – Government announced that Bill 32 would not proceed in the Spring 2006 legislative session to allow further review and consultation relating to the advance directive provisions.

Fall, 2006 – Public consultation on the advance directive provisions of Bill 32 (*Adult Guardianship and Personal Planning Statutes Amendment Act, 2006*)

<http://www.ag.gov.bc.ca/legislation/advanced-directive/index.htm>

2007:

Bill 26, *Health Statutes Amendment Act* (including revised care facility admission legislation), received Royal Assent May 31, 2007

http://www.leg.bc.ca/38th3rd/3rd_read/gov26-3.htm

Bill 29, *Adult Guardianship and Planning Statutes Amendment Act*, received Royal Assent November 22, 2007

http://www.leg.bc.ca/38th3rd/3rd_read/gov29-3.htm

2008:

Fall/Winter 2008 – The Ministry engaged in public consultations on draft regulations under the *Adult Guardianship and Planning Statutes Amendment Act, 2007*

<http://www.ag.gov.bc.ca/legislation/adult-guardianship/regulations.htm>

In committee debates on October 21, 2009, relating to amendments to the 2007 legislation, the minister noted that government was not in a position to proceed with proclamation of the adult guardianship provisions because government was not in a position to provide financing at that time.

2008 – 2011:

Minor and/or technical amendments made in various miscellaneous statutes to the *Adult Guardianship and Planning Statutes Amendment Act, 2007*, including amendments made by the *Miscellaneous Statutes Amendment Act, 2009*, to enable partial implementation of the *Adult Guardianship and Planning Statutes Amendment Act, 2007*.

Bill 13, *Miscellaneous Statutes Amendment Act, 2009*

http://www.leg.bc.ca/39th1st/3rd_read/gov13-3.htm

2011:

June 30, 2011 – PGT transmits its 2020 Vision to the Attorney General – http://www.trustee.bc.ca/pdfs/General/2020_20Vision.pdf. The report recommends that Parts 2 and 2.1 of the *Adult Guardianship Act* and Part 3 of the *Health Care (Consent) and Care Facility (Admission) Act* come into force between 2012 and 2014. The report also recommends that reforms beyond those two major changes be the subject of a discussion paper to be issued between 2018 and 2020. The 2020 Vision is released to the public on July 22, 2011.

September 1, 2011 – The incapacity planning-related provisions (and other provisions not related to guardianship) of the *Adult Guardianship and Planning Statutes Amendment Act, 2007*, came into force. Amendments made to the Representation Agreement Regulation and Health Care Consent Regulation, and a new Power of Attorney Regulation, were also enacted.

Source: [Ministry of Justice](#)

Appendix 4

Part 2, *Adult Guardianship Act* (1993)

The *Adult Guardianship Act* received royal assent on July 29, 1993.²¹⁸ However, much of the Act, including the section that outlined the court process for appointing a guardian or decision-maker, never came into force. The Act was amended on November 22, 2007, when Bill 29, *Adult Guardianship and Planning Statutes Amendment Act*, 2007 received royal assent.²¹⁹ However, as with the previous Act, the legislation surrounding the court process never came into force. As a result, the *Patients Property Act*, which Parts 2 and 2.1 of the *Adult Guardianship Act* was intended to repeal, still governs the incapability process.²²⁰

Under Part 2 of the *Adult Guardianship Act* (1993), a person could notify the Public Guardian and Trustee of British Columbia (PGT) if he or she believed that an adult needed assistance in making decisions about his or her financial affairs. The PGT would then conduct a preliminary inquiry, and if the PGT believed that the adult might require assistance, the PGT could request that a designated agency conduct a review to determine whether the adult needed to make financial decisions and whether a court-appointed guardian or decision-maker was necessary. At this point, the designated agency would also consider alternative options, such as personal support and other support services (s. 4).

If the designated agency's review confirmed that the adult needed to make financial decisions and that alternative options were not available, the PGT could request an assessment by the designated agency. The purpose of the assessment would be to determine whether the adult was incapable of making financial decisions and whether a decision-maker or a guardian should be appointed.

The designated agency could only proceed with a review or an assessment if the adult or his or her representative agreed. If the adult or his or her representative did not agree, the PGT could apply for a court order to proceed with either a review or an assessment.

Once a review or assessment was completed, the designated agency would be required to prepare a report detailing the types of decisions the adult was incapable of making, the degree of the adult's incapability, the names of any eligible decision-makers and/or guardians, and the adult's wishes (s. 5). The designated agency would be required to give a copy of the report to the adult, the PGT and any person eligible and willing to be a decision-maker or guardian for the adult.

If the court was satisfied that the adult needed to make decisions about his or her financial affairs, was incapable of making those decisions without support and assistance, and would benefit from the support and assistance of a decision-maker or guardian, the court could appoint one of three types of decision-maker:

- an associate decision-maker to support and assist the adult in making decisions
- a substitute decision-maker to make decisions on the adult's behalf
- a guardian to make decisions on the adult's behalf and to care for, assist and protect the adult (s. 6, 10)

²¹⁸ Bill 49, *Adult Guardianship Act*, 2nd Sess, 35th Parl, British Columbia, 1993, <<http://www.leg.bc.ca/hansard/35th2nd/h0729pm.htm>>.

²¹⁹ Bill 29, *Adult Guardianship and Planning Statutes Amendment Act*, 3rd Sess, 38th Parl, British Columbia 2007, <http://www.leg.bc.ca/hansard/hansindx/38th3rd/bills_prog.htm>.

²²⁰ *Patients Property Act*, R.S.B.C. 1996, c. 349.

The court could appoint the PGT or any person who was at least 19 years old, who did not have a conflict of interest with the adult, who agreed to comply with the duties of a decision-maker or guardian, and who was not paid for providing health care services to the adult (s. 7). Any person who wished to become a decision-maker or guardian for the adult was required to file an application with the court, along with a needs report, an assessment report, a PGT report, a support and assistance plan, and any representation agreements made by the adult. The application and accompanying reports would have to be served on the adult within 72 hours of filing the application. Finally, the court could choose to appoint a monitor to ensure that the guardian or decision-maker was fulfilling his or her duties to the adult (s. 12).

In certain cases, the court process described above could be temporarily avoided through an application for a temporary guardian. Any person could apply to the court for an order appointing a temporary guardian of an adult's financial affairs if there was reason to believe that the adult was incapable of making decisions about his or her financial decisions and that an order was necessary to protect the adult's finances. In these cases, the PGT would have to be notified of the application, and if the application was successful, the temporary guardian would have 21 days to do anything necessary to preserve and protect the adult's financial affairs (s. 13).

Once the court had appointed a decision-maker or guardian, there were a number of ways that the guardianship over the adult's affairs could end.

One option was a review by the court of the order appointing the decision-maker or guardian. The decision-maker or guardian was required to apply for a review of the order appointing him or her as guardian if:

- the adult's needs, circumstances or ability to make decisions had changed significantly since the order was made, and
- a change or cancellation of the order appeared to be in the best interests of the adult

If the decision-maker or guardian failed to request a review, the PGT or any other individual could request a review. If the request was for the guardian's powers to be reduced or for the order to be cancelled, the court could cancel or change the order without a hearing, as long as no one had filed a notice of objection under section 37(6). If an objection to the review was filed, the PGT would first have to request a capability assessment report from the designated agency and file it with the court.

In addition, a decision-maker or guardian could be removed or replaced if an application was made to the court and the court was satisfied that the decision-maker or guardian:

- was no longer acting as decision-maker or guardian
- had not complied with the duties of a decision-maker or guardian, or
- was, for any other reason, no longer a suitable decision-maker or guardian

If a replacement or removal application was submitted, the current decision-maker or guardian, as well as the potential replacement decision-maker or guardian, would be notified. In making its decision, the court could direct the PGT to conduct a review or assessment under sections 4(2) and (3).

Powers

The power given to decision-makers and guardians under the *Adult Guardianship Act* (1993) were limited by a general requirement that any authority given:

- was necessary for making, or assisting in making decisions about the adult's personal care, health care or legal matters or the adult's financial affairs, business or assets
- would result in the most effective, but the least restrictive and intrusive, form of assistance and support for the adult, and
- in the case of a guardian, was needed for providing the care, assistance and protection necessary to meet the adult's needs (s. 15)

In addition to these general rules, the legislation set out specific requirements regarding the content of orders appointing associate decision-makers, substitute decision-makers and guardians.

Orders appointing an associate decision-maker and a substitute decision-maker were required to specify the types of decisions for which the decision-maker must provide assistance and support, the period of time and end date of the period during which the decision-maker could assist the adult, and a date for review of the order within three years of the appointment (s. 16).

Orders appointing a guardian were required to specify the types of decisions the guardian must make for the adult and a date for review of the order within six years of the appointment (s. 18).

The legislation also listed specific examples (which were not exhaustive) of orders the court could make, including providing routine management of the adult's financial affairs by paying bills, receiving and depositing pension and other incomes, and carrying on business for the adult (s. 19).

The power to manage financial affairs, business or assets was quite broad and allowed a substitute decision-maker or guardian to do anything on the adult's behalf that the adult could do, as long as the guardian did not exceed the power given by the court and complied with the specific duties set out in sections 28 and 29.

Duties

Sections 28 and 29 required a decision-maker or guardian to act honestly and in good faith; to exercise care, diligence and skill; to act within the authority granted; to act in accordance with the support and assistance plan; and to comply with the adult's wishes, instructions and beliefs wherever possible.

A substitute decision-maker or guardian who had control over financial affairs was also required to keep accounting records and be able to produce them at the request of the adult, the adult's monitor or the Public Guardian and Trustee. There was also a duty to keep information about the adult's financial affairs confidential (s.32).

Appendix 5

Public Guardian and Trustee's Recommendations for Improvement of Court and Statutory Processes ²²¹

Recommendations for Improvement of Court Guardianship Process

- Notice of court guardianship applications must be served on the adult.
- Notice of court guardianship applications must be served on a near adult relative of the adult unless the court orders that such relative not be served and/or that other relatives or other persons be served.
- A guardian not be appointed unless the court is satisfied that in addition to the adult not being capable of making decisions there are, in fact, reasonably foreseeable decisions that need to be made by a guardian.
- Expressly permit the court to not appoint a guardian if it is satisfied that a less restrictive alternative would meet the adult's needs. Permit termination of an existing guardianship on the same grounds.
- Plenary authority be retained for property decisions. The court be permitted to restrict the authority.
- The scope of personal guardianship be clarified as applying to decisions related to general areas such as health care, shelter, participation in activities and safety. A personal guardian with full authority should not be appointed for all areas of decision-making unless the court is satisfied that the adult is incapable in all such areas.
- Persons who provide remunerated personal and health care services to an adult be ineligible to be appointed (or to continue to act) as guardian (except in the case of family members or others expressly authorized by the court in extraordinary circumstances).
- That the court be required to consider any views expressed by the adult regarding the identity of their guardian. Nomination of guardians be retained but the formality requirements be eliminated.
- Applicants for court or statutory guardianship be required to prepare a property or a personal guardianship plan with such plan to form part of the application. The sufficiency and appropriateness of the plan is to be considered in determining whether or not to appoint the applicant as guardian. Guardians be required to keep plans up to date.
- Mediation regarding guardianship applications be provided for in the Act. Mediation be permitted regarding the choice of guardian and the guardianship plan subject to final determination by the court. Mediation not be permitted regarding the determination of capacity or the advice to the court by the Public Guardian and Trustee regarding private applicants.
- No express provision for alternate guardians be made. Rather the Act provide for the appointment of multiple guardians with authority to act alone or together, statutory termination of a guardian's authority on various specified events and permit an expedited application to appoint a replacement guardian.

²²¹ Public Guardian and Trustee of British Columbia. *Court and Statutory Guardianship: The Patients Property Act and the Adult Guardianship Act (Part 2): Updated Discussion Paper on Modernizing the Legal Framework*, October 2005.

Recommendations for Improvement of Statutory Guardianship Process

- That no Certificate of Incapability be issued unless an assessment has been performed that indicates that the adult is not capable of managing his or her property.
- The assessor provide notice to the adult that they are the subject of an assessment.
- Assessments of incapability to manage property shall be subject to publicly available standards of assessment that are mandatory. These standards should be established by the Attorney General or Lieutenant Governor in Council following consultation with applicable members of the community and those with expertise in assessments.
- Statutory guardianship assessment on collateral information be permitted only in limited circumstances. Resulting guardianship be limited to 90 days and the authority of the guardian be limited to preservative powers rather than full guardianship powers. Renewals be permitted only where a complete assessment has not been feasible during the 90 days.
- Assessors not conduct an assessment where they have reason to believe statutory guardianship is not required. For example, where an assessor is aware of a valid Enduring Power of Attorney being administered in accordance with the duties of an attorney an assessment should not be performed. If an assessor finds that an adult is incapable and requires a guardian, notice be given to the Public Guardian and Trustee of the finding. The Public Guardian and Trustee would be required to promptly determine whether there are less restrictive alternatives to the issuance of a Certificate of Incapability and promptly advise the assessor of whether they have an objection to the issuance of a Certificate of Incapability. Where the Public Guardian and Trustee advises that they do not object to the issuance of a certificate, the certificate may be issued by the official designated by the health authority.
- Private individuals be entitled to apply to replace the Public Guardian and Trustee as statutory guardian. These applications shall be directed to the Public Guardian and Trustee who may, if appropriate, transfer the statutory guardianship to the private individual. If such transfer is not accepted by the Public Guardian and Trustee, the applicant may still apply to the court for a court appointed guardianship.
- A statutory guardian of property shall assist in arranging reassessment of an individual under statutory guardianship if so requested by the adult and if the immediately prior assessment was performed more than twelve months previously.
- Adults under statutory guardianship be entitled to have their capability reassessed upon the occurrence of any of the following:
 - release from institutional or residential care (regardless of whether they are being fully discharged)
 - discharge from residential care, or
 - completion of extended leave under the *Mental Health Act*.
- The Public Guardian and Trustee be permitted to terminate a statutory guardianship on broad criteria including where there are other informal supports available in respect of the adult. Consultation with supportive family and friends take place before termination of the statutory guardianship.

Appendix 6

Bill 29, *Adult Guardianship and Planning Statutes Amendment Act, 2007*

If implemented, Bill 29, *Adult Guardianship and Planning Statutes Amendment Act, 2007* would revise the two systems, statutory and court-based, of adult guardianship in British Columbia. Part 2 outlines the process through which the courts appoint a guardian, while Part 2.1 outlines how a statutory property guardian may be appointed.²²²

Court Appointed Guardians

Under Part 2 of Bill 29, in order to have the courts appoint a property guardian, an application must be submitted to the court, containing two assessment reports completed by a qualified health care provider, a guardianship plan and any known existing power of attorney, enduring power of attorney or representation agreements. The adult who is the subject of the application must be notified and served with the application at least 30 days prior to the hearing date (s. 5).

Before the actual court hearing, if there is any dispute surrounding the need for a guardian, who the proposed guardian is or the adequacy of the guardianship plan, the parties may participate in mediation.

In order for the court to appoint a property guardian, there must be a finding that the adult needs to make decisions about his or her finances, is incapable of doing so and will benefit from the assistance of a guardian, and that no alternatives are available (s. 8). The court may appoint the Public Guardian and Trustee of British Columbia (PGT) or anyone else who agrees to fulfill the duties of a property guardian (s. 10).

Where there is reason to believe that the adult is incapable of making financial decisions and there is an urgent need to protect the adult's finances, the PGT may apply to be appointed as a temporary property guardian without serving notice or providing a medical assessment. If the court is satisfied that these conditions are met, the PGT will be appointed temporary property guardian for up to 90 days (s. 11).

The court may authorize a property guardian to manage all of the adult's financial affairs as long as it is in the adult's best interests, in good faith and in accordance with the guardianship plan (s. 17, 19, 21).

Once a guardian has been appointed, there are a number of ways in which an order for guardianship can be reviewed or replaced. The guardian must apply to the court for a review of the guardianship appointment if he or she is no longer willing or able to act as guardian, if the adult's needs or circumstances change significantly or if the court orders a review. The PGT or any other person may also apply to the court for review if the adult's guardian fails to do (s. 25). The PGT may also conduct an investigation and request a review if it would be in the adult's best interests (s. 30). Finally, the adult may request a review of an order appointing his or her guardian. Regardless of who requests the review, the guardian must be notified of the review and will have 30 days to file an objection notice.

²²² Bill 29, *Adult Guardianship and Planning Statutes Amendment Act*, 3rd Sess, 38th Parl, British Columbia 2007, <http://www.leg.bc.ca/hansard/hansindx/38th3rd/bills_prog.htm>.

Upon receiving an application for review, the court may proceed without a hearing, unless an objection notice is filed, in which case a hearing must be held. If the adult's capability is at issue, two assessment reports must be produced (s. 26). After reviewing the order, the court may continue a guardian's appointment, vary the guardian's powers or duties, appoint additional guardians, or remove the guardian and appoint a different guardian.

The authority of the guardian will end, without review, if the guardian becomes incapable, passes away, is removed by court order, becomes bankrupt or is convicted of an offence against the adult (s. 27).

Statutory Property Guardians

Part 2.1 of Bill 29 provides a process for appointing a property guardian without a court order. This type of guardian is called a "statutory property guardian." Any person who believes that an adult may be incapable of managing his or her own financial affairs can request that an assessment of the adult be conducted. The adult must be told why he or she is being assessed, and he or she has the right to refuse assessment.

If an assessment is completed, it is provided to a health authority designate for a determination of incapability. The designate must be satisfied that:

- the adult needs to make financial decisions
- the adult is incapable of making those decisions
- the adult needs, and will benefit from, a statutory property guardian
- the adult's needs cannot be met through alternatives to guardianship, and
- the adult has not granted an enduring power of attorney, or if the adult has done so, the attorney is not complying with his or her duties

If these conditions are met, the health authority designate may issue a certificate of incapability. The certificate is then sent to the PGT, and the PGT can choose to accept the certificate and become the adult's statutory property guardian, or reject the certificate and leave the adult without a guardian.

If the PGT becomes the adult's statutory property guardian, any existing power of attorney is suspended until the PGT terminates it or the adult no longer has a statutory property guardian. Any enduring power of attorney or representation agreement is terminated if the PGT considers it to be in the best interests of the adult and provides notice to the attorney or representative.

As the adult's statutory property guardian, the PGT has all of the powers that a court could grant a property guardian, including the power to do anything the adult could do with respect to his or her financial affairs if the adult were capable. The PGT also has a list of duties, including the duty to act honestly and in the adult's best interests, and "to the extent reasonable, foster the independence of the adult and encourage the adult's involvement in any decision-making" (s. 19(1)(e)).

The PGT must notify the adult and the adult's spouse or near relative when it becomes the adult's statutory property guardian, and inform the adult that he or she has the right to request a second assessment within 30 days of receiving the PGT's notice. If the second assessment also determines the adult to be incapable, the adult can apply to the court for a review of the determination, which the court can either confirm or reject. The adult also has the right to a reassessment if his or her statutory

property guardian informs the health authority that one should occur, or if the adult requests one and has not been reassessed within the preceding 12 months. The court can also order a reassessment.

Bill 29 also provides the option for a person to replace the PGT as an adult's statutory property guardian. The person can apply to the PGT with a plan detailing how he or she intends to perform the duties of a statutory property guardian. If the PGT considers the applicant suitable and the plan appropriate, the PGT may grant the application. If it chooses to do so, it must inform the adult. If it chooses not to do so, the person can still apply to the court to become the adult's property guardian.

Once the person is appointed, he or she has all of the powers of a property guardian, except for those that must be granted by the court (see "Guardians' Powers, Duties and Prohibitions" in this appendix), as well as the duties listed above. The authority of the person can end under several circumstances. If the PGT rescinds the grant of authority, or if the person granted authority dies, resigns, goes bankrupt, is convicted of certain offences or becomes incapable, the authority reverts to the PGT.

The authority of any statutory public guardian, including the PGT, can also end under several circumstances. First, if the adult is assessed and determined to be capable, the PGT's authority will end. Similarly, if the PGT is satisfied that the adult no longer needs a guardian and notifies the adult of this, its authority will end. The court can also terminate the PGT's authority or appoint a property guardian to replace the PGT by court order.

Guardians' Powers, Duties and Prohibitions

Bill 29 contains general powers for all guardians, as well as specific powers that depend upon the type of guardianship granted to the guardian. In general, a guardian only has powers that are granted by law or the court. The guardian is allowed to hire a qualified person to assist him or her in the performance of guardianship duties. He or she also has the same right as the adult to information and records about the adult if the information or records relate to the incapability of the adult or an area of authority granted to the guardian.

For property guardians, the court may authorize the guardian to do anything the adult could do with respect to financial affairs if the adult were capable. The guardian may permit the adult to hold, manage or control any part of the adult's property and is not liable for loss or damage to the property based on this decision. The guardian may delegate investment responsibility to a qualified investment specialist in accordance with the law, and may change a beneficiary designation with the approval of the court, so long as the designation was not in a will, which the guardian cannot change.

The guardian can also make a gift or loan from the adult's property with permission of the court. For this to occur, the guardian must ensure that:

- the adult will have enough property remaining to satisfy his or her needs
- the adult made similar gifts or loans when capable, and
- the value is lower than a limit prescribed by law

The property guardian is also the only person who can act for the adult in legal proceedings unless the court orders otherwise. However, the guardian cannot begin divorce proceedings on the adult's behalf.

The duties of guardians can also be divided into general and specific categories, depending on the type of guardianship granted to the guardian. General duties include the duty to:

- act honestly and in good faith
- exercise the care, diligence and skill of a reasonably prudent person
- act within the authority granted by the court and law
- act within the guardianship plan, to the extent reasonable
- foster the independence of the adult and encourage the adult's involvement in any decision-making that affects the adult, to the extent reasonable (s. 19)

In addition, guardians have a duty not to disclose information or records received as guardian unless they relate to the guardian's duties, or unless the information is being provided to the PGT or court. Guardians must also keep records as required, and if the guardian is not the PGT, he or she must report to the PGT on any substantial change in the adult's life or on any matters specified by the PGT.

Property guardians have specific duties, including a fiduciary duty to the adult. This means that the guardian must act in the best interests of the adult, taking into account any instructions or wishes expressed in an enduring power of attorney, as well as the adult's known beliefs and values. The guardian must also give priority to meeting the personal care and health needs of the adult.

The guardian should not dispose of property that the guardian knows is subject to a gift in the adult's will, and to the extent reasonable, the guardian should keep the adult's personal possessions at the adult's disposal. The guardian may, however, sell the adult's property, if necessary, to comply with the guardian's duties.

Guardians are prohibited from making or changing a will for the adult for whom they are acting.

Appendix 7

Differences between the *Adult Guardianship Act (1993)* and *Bill 29, Adult Guardianship and Planning Statutes Amendment Act, 2007*

1993 Act	2007 Act
Would have eliminated statutory property guardianship. Court would have been the only method of appointment.	Retains statutory property guardianship, but with statutory administrative fairness protections.
<p>In addition to the court appointment of a guardian, also provided for the court appointment of an associate decision maker or substitute decision maker.</p> <p>Associate decision maker - to support and assist the adult in making decisions.</p> <p>Substitute decision maker - to make decisions on the adult's behalf.</p> <p>Guardian - to make decisions on the adult's behalf and to care for, assist and protect the adult.</p>	Provides for the appointment of a guardian, but limits powers given to guardians to individual requirements.
Provided for a "multi-tiered" review of the circumstances and decision-making needs of the adult prior to the appointment of a decision maker – that is, consideration by the PGT, a designated agency, and the court.	In the case of the court appointment of a guardian, an application is made directly to the court. (Although, the Act does require the PGT to receive notice of the court application, and the PGT has an opportunity to attend the hearing, and the court is required to consider any comments submitted by the PGT.)
No requirement for mediation.	Provides for mediation of certain matters prior to a hearing for the court appointment of a guardian.
The application to court must be accompanied by a needs report and an assessment report, completed by a designated agency, a report of the PGT, and a support and assistance plan prepared by each person proposed in the application as a decision maker or guardian.	The application to court must be accompanied by two assessment reports (completed by a qualified health care provider), and a plan for the adult's guardianship. The court must also consider any written or oral comments submitted to the court by the PGT.
Provided specific authority for the appointment of a monitor by the court (to ensure the decision maker or guardian complies with his/her duties).	Does not specifically provide for the appointment of a monitor. (However, does provide authority for the court to limit the scope of, or put conditions on the exercise of the authority of a guardian, or make any other provision in the best interests of the adult.)

1993 Act	2007 Act
Specifically provided that, in making an order, the court may give only the authority that is necessary to make, or assist in making, decisions about the adult's personal care, health care or legal matters of the adult's financial affairs, business or assets; will result in the most effective, but the least restrictive and intrusive, form of assistance and support of the adult; and, in the case of a guardian, is required to provide the care, assistance and protection necessary to meet the adult's needs.	Provides that the court may make an order only if satisfied that the needs of the adult would not be sufficiently met by alternative means of assistance. (In addition to the other requirements, also contained in the 1993 Act, that the court be satisfied that the adult needs to make decisions, is incapable of making those decisions, and the adult would need and benefit from a guardian.)
Any person may apply to court for an order appointing a temporary guardian for financial matters in emergency situations.	The PGT may apply to court for an order appointing the PGT as temporary property guardian for adult in urgent circumstances.
Provided for automatic review of decision making orders within 3 years (as set out in the court order). An order for the appointment of a guardian would have to be reviewed within a 6-year period.	Does not provide for automatic reviews, but provides that a review must take place in the following circumstances: <ul style="list-style-type: none"> if required by the court order appointing the guardian; if the adult's needs, circumstances or ability to make decisions has changed significantly since the order was made (also in the 1993 Act); the guardian is no longer able or willing to act as the adult's guardian; application by the PGT, if the PGT believes it to be in the best interests of the adult (the 1993 Act also requires the decision maker or guardian to apply for a review if a change or cancellation of the order appears to be in the best interests of the adult); application by the adult or person acting on behalf of the adult, but no more than once in every 12-month period or another period as the court directs (also in the 1993 Act, except a "substantial reason" for applying for the review was required, and there was no time restriction).

Source: Ministry of Justice





GLOSSARY

abuse

The deliberate mistreatment of an adult that causes the adult (a) physical, mental or emotional harm, or (b) damage or loss in respect of the adult's financial affairs, and includes intimidation, humiliation, physical assault, sexual assault, overmedication, withholding needed medication, censoring mail, invasion or denial of privacy or denial of access to visitors.²²³

advance directive

A set of written instructions that specifies the type of health treatment a person wishes to receive, or not to receive, if he or she later becomes incapable of making his or her own decisions. An instruction in an advance directive can neither be prohibited by law, nor can it ask for a refusal of treatment that is required by law. In order for an advance directive to be valid the adult making the directive must be capable, at the time the directive is written, of understanding the nature and consequences of the written instructions. In contrast with a representation agreement, an advance directive does not require that someone is appointed to make decisions on the adult's behalf: the directive itself is a set of instructions given by the adult to those who are providing care or treatment.

assessor

A health authority staff person who assesses an adult for the purpose of determining the adult's care and support needs. For the purpose of this report, an assessor is a health authority staff person who assesses whether an adult is incapable of managing his or her financial and legal affairs. This type of assessment is referred to in this report as a functional assessment. Assessors are not required by legislation to have specific qualifications or training. Assessors are typically social workers, nurses, psychologists or occupational therapists.

certificate of capability

Under the *Patients Property Act*, a certificate signed by a director declaring that an adult is no longer incapable of managing his or her own affairs.²²⁴ A certificate of capability has the effect of ending a committee of estate's guardianship of the adult's financial and legal affairs.

certificate of incapability

Under the *Patients Property Act*, a certificate is signed by a director declaring that an adult is incapable of managing his or her own affairs because of mental infirmity arising from disease, age or otherwise.²²⁵ A certificate of incapability results in the appointment of the Public Guardian and Trustee as the adult's committee of estate.

committee of estate

Under the *Patients Property Act*, a person who makes financial and legal decisions for an adult who has been determined by the court or by a director to be incapable of managing his or her financial and legal affairs. The court can appoint any person to be a committee of the estate. In addition to a family member or close friend, a committee of estate can be a trust company or the Public Guardian and Trustee. Under Parts 2 and 2.1 of the *Adult Guardianship Act*, which are not in force, a committee of estate would be called a property guardian. (Pronounced *kaw-mit-TEE*.)

²²³ *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, s. 1

²²⁴ *Patients Property Act*, R.S.B.C. c. 349, s. 11(d).

²²⁵ *Patients Property Act*, R.S.B.C. c. 349, s. 11(d).

committee of person

Under the *Patients Property Act*, a person who makes the personal care and health care decisions for an adult who has been determined by the court to be incapable of managing himself or herself. This type of guardianship can only be appointed by the court. (Pronounced *kaw-mit-TEE*.)

Community Living BC (CLBC)

A provincial Crown agency mandated under the *Community Living Authority Act* to deliver supports and services to adults with developmental disabilities and their families. CLBC is a designated agency under the *Adult Guardianship Act*.

designated agency

Defined in the *Adult Guardianship Act* as a public body, organization or person selected by the Public Guardian and Trustee to provide support and assistance to neglected and abused adults. The *Designated Agencies Regulation* lists the regional health authorities, Community Living BC and Providence Health Care as designated agencies.

director

Under the *Mental Health Act*, a person appointed by a health authority to be in charge of a designated facility, and including a person authorized by a director to exercise a power or carry out a duty conferred or imposed on the director under the Act or the *Patients Property Act*.²²⁶ Under the *Patients Property Act*, a director, whether appointed by a health authority or delegated by another director, has the authority to issue a certificate of incapability and a certificate of capability.

director's checklist

A document developed by the Public Guardian and Trustee to assist directors who sign certificates of incapability to follow the procedural fairness steps in the PGT Guidelines.

enduring power of attorney

A legal document that authorizes another person, called an attorney, to manage an adult's financial and legal affairs. Unlike a regular power of attorney, an enduring power of attorney still provides legal authority if an adult is deemed incapable. Its authority is suspended under section 19.1 of the *Patients Property Act* if the Public Guardian and Trustee becomes committee of estate through a certificate of incapability, and it may be terminated if the PGT determines that it is necessary or desirable for the PGT to manage the adult's financial and legal affairs.

financial affairs

Defined under section 1 of the *Adult Guardianship Act* as "including an adult's business and property, and the conduct of the adult's legal affairs."

functional assessment

An assessment conducted or coordinated by the health authority for the purpose of determining whether an adult is incapable of managing his or her financial affairs. A functional assessment typically involves an assessment of the adult's ability to make decisions about his or her finances and to carry out these decisions. The functional assessment results in an opinion from the assessor regarding whether the adult is capable of managing his or her affairs. The functional assessment is often conducted using the Functional and Decision Making Assessment Form which is an appendix to the PGT Guidelines.

²²⁶ *Mental Health Act*, R.S.B.C. 1996 c. 288, s. 1.

guardian

A person appointed to make decisions on behalf of an incapable adult. Under the *Patients Property Act*, guardians are referred to as committees (pronounced kaw-mit-TEES) and can be a committee of an adult's estate, person or both. Bill 29, the *Adult Guardianship and Planning Statutes Amendment Act, 2007*, which would repeal the *Patients Property Act* but has not been brought into force, would establish two types of guardians. A personal guardian would make decisions regarding an adult's personal care and health care. A property guardian would make decisions about an adult's financial affairs.²²⁷ A property guardian appointed through a certificate of incapability, rather than by the court, would be called a statutory property guardian.

Incapacity Assessments Regulation

The Regulation that was drafted to accompany Parts 2 and 2.1 of the *Adult Guardianship Act*, which are not in force. Among other things, the *Incapacity Assessments Regulation* would establish standards and procedures for the assessment of an adult's financial incapability and the issuing of a certificate of incapability.

litigation guardian

An adult who initiates, commences or defends litigation on behalf of an incapable adult or a minor. Also known as a guardian *ad litem*. In addition to managing an adult's financial affairs, a committee of estate is also the adult's litigation guardian. When a certificate of incapability is issued, the Public Guardian and Trustee becomes the adult's litigation guardian.

medical assessment

An assessment conducted by a physician for the purpose of providing an opinion regarding an adult's incapability to manage his or her financial and legal affairs. The medical assessment is typically conducted using the Physician Preliminary Opinion of Incapability form, which is an appendix to the PGT Guidelines. Unlike a functional assessment, the medical assessment focuses on the adult's medical or psychiatric diagnosis and how this appears to be affecting the adult's ability to manage his or her affairs.

neglect

Any failure to provide necessary care, assistance, guidance or attention to an adult that causes, or is reasonably likely to cause within a short period of time, the adult serious physical, mental or emotional harm or substantial damage or loss in respect of the adult's financial affairs, and includes self-neglect.²²⁸

patient

Under the *Patients Property Act*, a patient is:

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

²²⁷ Bill 29, *Adult Guardianship and Planning Statutes Amendment Act*, 3rd Sess, 38th Parl, British Columbia, 2007, s. 1.

²²⁸ *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, s. 1.

Patients Property Act

The Act that establishes procedures to appoint a guardian (“committee”) on behalf of an incapable adult. It authorizes the issuing of a certificate of incapability for an adult who is incapable of managing his or her affairs. It also authorizes the court to appoint a committee of estate and/or person. The Act has been in force since 1979.

PGT Guidelines

A document developed by the Public Guardian and Trustee, formally known as the Guidelines for Issuing a Certificate of Incapability Under the *Patients Property Act*. These non-binding guidelines were originally created in 1993 and were updated in 2011 in consultation with the Incapability Assessment Regulation and Guidelines Working Group.²²⁹

power of attorney

A legal document through which an adult authorizes another person, called an attorney, to make financial and legal decisions on the adult’s behalf. It is used to delegate financial and legal decisions, and its authority can be general or specific. A power of attorney will automatically end if the person appointing the attorney is determined to be incapable, though an enduring power of attorney survives this determination. Powers of attorney are governed by the *Power of Attorney Act*.

private committee

The term used when someone other than the Public Guardian and Trustee is appointed by the courts under the *Patients Property Act* to manage the financial, business and legal affairs (committee of estate) and/or the personal care and health decisions (committee of person) of an incapable adult. While the PGT can become a committee by court appointment or by a director signing a certificate of incapability, a private committee appointment can only be made by a court. (Pronounced kaw-mit-TEE).

protective measures

Steps taken by the Public Guardian and Trustee under section 19 of the *Public Guardian and Trustee Act* when the financial affairs, business or assets of an adult who is apparently abused or neglected are in need of immediate protection. In these cases the PGT is authorized to:

- (a) instruct any institution where the adult has an account that no funds are to be withdrawn from or paid out of that account until further notice
- (b) direct any source of income for the adult to send the income to the PGT or to a person named by the PGT
 - (i) to be held in trust for the adult
 - (ii) to be used to protect or maintain the health or safety of the adult
- (c) halt any disposition of real or personal property belonging to the younger person or adult
- (d) take any other step that is necessary to protect the financial affairs, business or assets of the adult and that it reasonable in the circumstances

Protective measures can remain in effect for seven days or a shorter period set by the PGT.²³⁰

²²⁹ The Incapability Assessment Regulation and Guidelines Working Group includes representatives from health authorities, the College of Physicians and Surgeons and other health care professional organizations.

²³⁰ *Public Guardian and Trustee Act*, R.S.B.C. 1996, c. 383, s. 19.

Public Guardian and Trustee (PGT)

An office established by the *Public Guardian and Trustee Act*. The PGT is mandated to protect the legal and financial interests of children and youth under the age of 19, to administer the estates of missing and deceased persons, and to protect the legal, financial and personal care interests of incapable adults.²³¹ In dealing with incapable adults, the PGT is authorized to investigate concerns about adults who are unable to manage their financial and legal affairs and to assume responsibility for an adult's legal and financial affairs if a certificate of incapability is issued.

representation agreement

The *Representation Agreement Act* allows an adult to appoint a representative to handle their financial, legal, personal care and health care decisions. A representation agreement permits a representative to make decisions on behalf of a person who has been determined to be incapable. A representative cannot be a person who is paid to provide personal care or health care or someone who is an employee of a facility through which the person receives personal care or health care, unless that person is the adult's child, parent or spouse. Additionally, section 19.1 of the *Patients Property Act* suspends any provision in a representation agreement that addresses property when a certificate of incapability is issued for an adult. The provisions may be terminated if the Public Guardian and Trustee determines that it will manage the adult's financial and legal decisions.

self-neglect

Any failure of an adult to take care of himself or herself that causes, or is reasonably likely to cause within a short period of time, serious physical or mental harm or substantial damage or loss in respect of the adult's financial affairs. Includes:

- (a) living in grossly unsanitary conditions
- (b) suffering from an untreated illness, disease or injury
- (c) suffering from malnutrition to such an extent that, without intervention, the adult's physical or mental health is likely to be severely impaired
- (d) creating a hazardous situation that will likely cause serious physical harm to the adult or others or cause substantial damage or loss of property
- (e) suffering from an illness, disease or injury that results in the adult dealing with his or her financial affairs in a manner that is likely to cause substantial damage or loss in respect of those financial affairs.²³²

substitute decision-maker

A person who has been appointed to make decisions on the behalf of an adult. A substitute decision-maker can be appointed to make decisions regarding medical care, property or personal care. A power of attorney, enduring power of attorney, representation agreement and committee ship are all tools used to appoint substitute decision-makers.

summary of assessment

A summary prepared by health authorities to explain why the director has issued or intends to issue a certificate of incapability. The PGT Guidelines advise health authorities, at their own discretion, to provide a summary of assessment to adults and their family members when the director intends to issue a certificate of incapability.

²³¹ Public Guardian and Trustee, Service Delivery Plan: April 1 2011-March 1 2014, May 2011, 7.

²³² *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, s. 1.

temporary guardian

Under Part 2 of the *Adult Guardianship Act*, which requires the proclamation of Bill 29, the *Adult Guardianship and Planning Statutes Amendment Act, 2007*, to bring it into force, the Public Guardian and Trustee would be able apply to the court to be appointed as a temporary guardian. The PGT would be able to make this application when there is reason to believe that an adult is incapable of making decisions about his or her affairs, and temporary guardianship is urgently needed to protect the adult's financial affairs from damage or loss. As temporary guardian, the PGT would have authority to do anything that a statutory property guardian could do except replace itself as statutory guardian. A temporary guardian's authority would last for 90 days.





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