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## **A Summary of Canadian Legislation Concerning Advance Directives<sup>1</sup>**

A number of provinces (Alberta, British Columbia, Manitoba, Newfoundland, Nova Scotia, Ontario, Prince Edward Island, Quebec, Saskatchewan) and two territories (Yukon, North West Territories) have enacted advance directive legislation. New Brunswick and Nunavut, at the time of writing, have not yet enacted legislation concerning advance directives.

The legislative summary below provides a review of the advance directive legislation in Canada under the following categories:

- 1) type of advance directive recognized
- 2) who can make an advance directive
- 3) who can be a proxy
- 4) finding of incapacity
- 5) duties of health care providers
- 6) technical requirements
- 7) limits on powers of proxy
- 8) proxy's access to health information
- 9) joint proxies/resolving conflicts
- 10) revising/revoking an advance directive
- 11) protection from liability, and
- 12) reciprocity between jurisdictions.

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<sup>1</sup> An *advance directive* is a document in which directions are given by a competent individual concerning what and/or how decisions should be made in the event that at some time in the future the individual becomes incompetent to make health care decisions. There are two kinds of advance directives - - *instruction directives* (also known as living wills) and *proxy directives* (also known as durable powers of attorney for health care, health care directives, personal directives, representation agreements, mandates). An instruction directive sets out instructions about *what* and/or *how* health care decisions are to be made in the event that the individual becomes incompetent. A proxy directive sets out instructions about *who* is to make health care decisions in the event that the individual becomes incompetent.

## ***British Columbia***

### **Legislation**

*Health Care (Consent) and Care Facility (Admission) Act*, RSBC 1996, c.181 [c.i.f. (select provisions): Feb.28, 2000]

*Health Care Consent Regulation*, B.C. Reg. 20/00.

*Representation Agreement Act*, RSBC 1996, c.405 [c.i.f.(select provisions): Feb.28, 2000]

*Representation Agreement Regulation*, B.C. Reg. 199/01 [c.i.f.: Sept. 1, 2001]

*Adult Guardianship Statutes Amendment Act*, RSBC 1999, c.25 [c.i.f.: Sept.1, 2001]

### **Type of Advance Directive Recognized**

- *RA Act*:
  - Proxy (“representatives”)
  - no express recognition of instructional directives

see s.2: purpose of this Act

a) to allow adults to arrange in advance, how, when and by whom, decisions about their health care, personal care or financial affairs or about other matters will be made if they become incapable of making decisions independently

see s.9(1): in a RA, an adult may authorize a rep to:

b) give consent, in the circumstances specified in the RA, to specified kinds of health care, even though the adult is refusing consent at the time the health care is provided

c) refuse consent to specified kinds of health care, including life-support

d) give consent to specified kinds of health care, including those which, under s.34(2)(f) of the *HCCF Act*, a TSDM is prohibited from consenting to

e) accept a facility care proposal under the *HCCF Act* for the adult’s admission to any kind of care facility

- *HCCF Act*:

s. 12.1: a health care provider must not provide health care under s. 12 if the health care provider has reasonable grounds to believe that the person, while capable and after attaining 19 years of age, expressed an instruction or wish applicable to the circumstances to refuse consent of the health care.

**Thus, BC advance directive legislation provides for proxy directives (rep agreements) under *Representation Agreement Act*. Currently, there is no specific legislation providing for the making of an instructive directive, although such**

**directives must be respected in emergency health care situations under the *Health Care (Consent) and Care Facility (Admission) Act*.**

### **Who Can Make an Advance Directive?**

- *RA Act*, s.4: an adult (19 yrs) may make a RA unless s/he is incapable

### **Who Can Be Proxy?**

- *RA Act*:
  - s.5(1) a rep may be
    - a) another adult
    - b) Public Trustee
  - s.6 prescribes procedures for naming alternate reps

### **Finding of Incapacity**

- *RA Act*:
  - s.15(1): an RA becomes effective on the date it is registered unless the RA provides that it, or a provision of it, becomes effective later
    - a) when the rep receives an assessment report under s.5 of the *Adult Guardianship Act* indicating the adult is incapable
    - b) when an event occurs
  - s.15(2): if the RA provides that it is to become effective when an event occurs, the RA must specify how the event is to be confirmed and by whom
- *HCCF Act*:
  - s.7: when deciding whether an adult is incapable, a health care provider must base the decision on whether or not the adult demonstrates that s/he understands
    - a) the info given re: the proposed health care
    - b) the info applies to the situation of the adult for whom the health care is proposed

### **Duties of Healthcare Providers**

- *HCCF Act*:
  - s.5(2): a health care provider must not seek a decision about whether to give or refuse substitute consent to health care under ss.11, 14, or 15

unless s/he has made every reasonable effort to obtain a decision from the adult

- s.8: duty to communicate in appropriate manner  
When seeking an adult's consent to health care or deciding whether an adult is incapable, a health care provider
  - a) must communicate in a manner appropriate to the adult's skills & abilities, &
  - b) may allow the adult's spouse, or any relatives or friends, who accompany the adult and offer their assistance, to help the adult to understand or to demonstrate an understanding of the matters mentioned in s.7 (see column re: 'Finding of Incapacity')
- s.16(4): re: choosing a TSDM: a health care provider is not required to do more than make the effort that is reasonable in the circumstances to comply with this section.
- s.14(4): re: major health care\* on choosing a TSDM, a health care provider must:
  - a) inform the adult, spouse, relative or friend of the adult of:
    - (i) decision that the adult is incapable
    - (ii) name of the TSDM chosen
    - (iii) right to request a review w/in 72 hrs
  - b) give the adult written notice

"major health care" means: (a) major surgery, (b) any treatment requiring general anesthetic, (c) major diagnostic or investigative procedures, or (d) any health care designated by regulation as major health care
- s.14(7): the health care provider must not provide major health care until the review period passes w/out a review being requested OR a final decision is made on a review

## Technical Requirements

- *RA Act:*
  - s.13:
    - (1) an RA must be in writing
    - (1.1) an RA is executed when:
      - a) it is signed & witnessed in accordance w/ this section
      - b) all certificates required under this section & ss. 5, 6, 9 and 12 are completed
    - (2) must be signed by the adult & each rep & each alternate rep named in the RA

- (3) these persons need not be present together when they sign the RA and any one or more of them may sign it in counterpart
  - (3.01) subject to sub (3.02), the adult's signature must be witnessed by 2 witnesses each of whom must sign the RA
  - (3.02) no other witness is required if the adult's signature is witnessed by a person w/ whom the adult consulted under s.9(2) or 12(1)(c) and who completed a consultation certificate in the prescribed form
  - (3.03) The signature of a rep or alternate rep need not be witnessed
- s.13(4): may be signed on behalf of the maker if
    - (a) the adult is physically incapable of signing;
    - (b) the adult is present & directs that the RA be signed
    - (c) the person signing is an adult who is not named in the RA as a rep or alternate rep and is not a witness to the RA
      - (c.1) the signature of the person signing the RA is witnessed in accordance w/ sub (3.01) or (3.02) as though that signature were the adult's signature
      - (d) the person signing the RA and each witness completes a complete a certificate in the prescribed form.
  - s.13(5): none of the following may witness the signing of a RA by or on behalf of the adult:
    - a) anyone named as a rep or alternate rep
    - b) spouse, child or parent of anyone named in the RA as a rep or alternate rep
    - c) an employee or agent of a person named in the RA as a rep or alternate rep
    - d) anyone under 19 yrs old
    - e) anyone who does not understand the type of communication used by the adult who wants to be represented
    - (5.1) s.5(e) does not disqualify a person from witnessing a RA as long as that person receives interpretive assistance
    - (6) a witness must complete a certificate in the prescribed form.
  - s.9(2): a RA that authorizes a rep to do anything described in s.9(1) (includes provisions for health care decision-making) is invalid unless the adult consults with
    - a) a lawyer, or
    - b) anyone who belongs to a prescribed class of persons, and
    - c) the person who is consulted completes a consultation certificate
  - s.14(1) an RA must be registered by the registrar [NB: sub (3) lays out conditions under which an exception can be made to this provision (e.g. if the prompt exercise of authority is necessary to protect the adult's interests)]

### **Limits on Power of Proxy\*\*\***

\*\*\* Re: Challenging/Objecting to Selection or Actions of Proxies: *HCCF Act*: s.28(1)(b) ,which provides for requests for a review of a decision to choose a particular TSDM under s.16, is NOT IN EFFECT. Under section 28(1)(c) , which IS in effect, requests may be made for a review of a decision to give, refuse or revoke substitute consent to health care. Pursuant to s.29, the Health Care and Care Facility Review Board must conduct a hearing within 7 days after the Board receives the request. Under s.30(1) of the *RA Act*, any person may make an objection to the Public Trustee if there is a reason to believe that ... (h) a rep is (i) abusing or neglecting the adult; (ii) failing to follow instructions in the RA, (iii) incapable of acting as rep, or (iv) otherwise failing to comply with the RA or the duties of a rep; (i) a rep has given or proposes to give consent to health care that is not authorized by the RA, or (j) any criteria specified in the RA as grounds for objection have been met. Under s.30(2), an objection is made by (a) giving written notice of the objection to the Public Trustee, and (b) serving a copy of the notice on (i) the adult who has/wants to have a rep, and (ii) each person who is a rep, alternate rep, or monitor under the RA or proposed RA.

- *HCCF Act*:
  - s.18(1): a TSDM does not have authority to give consent to any type of health care prescribed in the regulations
  - (2) a TSDM has authority to refuse consent to health care necessary to preserve life, but only if there is substantial agreement among the health care providers that
    - a) the decision to refuse consent is medically appropriate
    - b) the person has made the decision in accordance w/ s.19(1)&(2)(a)
  - s.19(1): a TSDM must:
    - a) consult to the greatest extent possible w/ the adult
    - b) comply w/ any instructions or wishes the adult expressed while capable
  - s.19(2): if the adult's instructions or wishes are not known, the TSDM must decide
    - a) on the basis of the adult's known beliefs & values, or
    - b) in the adult's best interests, if his/her beliefs/values are not known
  - (3) [provides a list of what must be considered when deciding whether it is in adult's best interests to give/refuse consent]
- *RA Act*:
  - s.16(2): a rep must
    - a) consult, to the extent reasonable w/ the adult to determine current wishes,
    - b) comply w/ those wishes if it is reasonable to do so
  - s.16(2.1.)
    - [added by s.36(c) of the *AGSA Act*]: sub (2) does not apply if

a) a rep is acting w/in authority under s.9 (includes health care decisions)  
**and**

b) the RA provides that the rep need only comply with instructions / wishes expressed while capable

- s.16(3): if sub(2) applies but the adult's current wishes cannot be determined or it is not reasonable to comply, the rep must comply w/ any wishes expressed while capable \*\*

\*\* Under s.16(5) of the *RA Act*, on application by a representative, the court may exempt the representative from the duty under sub.(3) to comply with any instructions or wishes the adult expressed while s/he was capable.

## Proxy's Access to Health Information

- *HCCF Act*:
  - s.17(6): a TSDM has the right to all info to which the adult is entitled and that are necessary to make an informed decision
- *RA Act*:
  - s.18(1): a rep has a right to all info to which the adult is entitled and that relate to the rep's area of authority under the RA

## Joint Proxies and Resolving Conflict

- *HCCF Act*:
  - Joint proxies are not recognized
- *RA Act*:
  - s.5(2) an adult who names more than 1 rep in a RA may assign to each of them:
    - a) a specific area of authority, or
    - b) all or part of the same area of authority
  - s.5(3): if all or part of the same area of authority is assigned to 2 or more reps, they must act unanimously unless the RA provides otherwise

[NB: the above represents the provisions of *RA Act* s.5 as amended by s.28 & s.50 of the *AGSA Act*. The former s.5(2)(c) required the maker to specify a method for resolving disputes among reps]

- s.6(1) : an adult who makes an RA may name an **alternate rep**

## Revising and Revoking an Advance Directive

- *RA Act:*
  - s.27: an adult may change/revoke an RA if
    - a) capable
    - b) consults a lawyer (see s.9 (2))
    - c) any criteria for change/re-vocation in the RA are met
    - d) written notice of change/re-vocation is given to
      - each rep
      - each alternate rep
      - the monitor (if any), &
      - the registrar
  - s.29: a RA ends
    - d) if the rep is a spouse, on their divorce or termination of their marriage-like relationship
      - sub (1)(d) does not apply if
        - a) the RA provides that it does not end in the event of termination of marriage &
        - b) the adult consulted w/ a lawyer (see s.9(2)) about this provision and that person completed a consultation certificate

## **Protection from Liability**

- *HCCF Act:*
  - s.33(1): no action may be brought against a person for any act or omission in the performance of a duty or the exercise of a power or function under this Act if the person has acted in good faith and used reasonable care.
  - (2) a person who is a health care provider or the operator of a care facility is entitled to rely on the accuracy of the info given to that person to establish
    - a) someone's eligibility to be chosen as TSDM
    - b) someone's authority to give/refuse/ revoke consent to health care unless it is not reasonable to rely on that information
- *RA Act:*
  - s.23(1) a rep who complies w/ s.16 (acts honestly & in good faith, exercises due care/ diligence, & acts w/in the authority of the RA) is not liable for injury to or death of the adult
  - s.23(2) a rep who tries to the best of his/her ability to comply with s.16(2) to (4) is not liable if the rep acts in what s/he believes to be the adult's best interests

## **Reciprocity Agreement Between Jurisdictions**

- *RA Act:*

- s.41(1): a person may submit to the registrar an agreement, directive or power of attorney that
  - a) was made outside BC
  - b) provides for 1 or more other persons to make decisions about personal care, health care or financial or legal affairs &
  - c) meets the requirements in s.13 for a RA
  
- s.41(2) must submit a certificate of a BC lawyer (under s.9(2)(a))

## **Note re: Mental Health Decisions**

- *HCCF Act:*
  - s.2: This Act does not apply to (a) the admission of anyone to a Provincial mental health facility or psychiatric unit under ss.22 (involuntary admissions), 27 (emergency admissions with 1 medical certificate), 28 (emergency procedures), 29 (prisoners & youth containment centre inmates) or 30 (detention under the Criminal Code) of the *Mental Health Act*.
  
- *RA Act:*
  - s.11: An adult may **not** authorize a representative to **refuse consent** to (a) the adult's admission to a Provincial mental health facility or psychiatric unit under ss.22 (involuntary admissions), 28 (emergency procedures), 29 (prisoners & youth containment centre inmates), 30 (detention under Criminal Code) or 42 (transfer of involuntarily detained person from another province) of the *Mental Health Act*; (b) the provision of professional services, care or treatment under the *Mental Health Act* if the adult is detained in a designated facility under ss.22, 28, 29, 30 or 42 of that Act, or (c) the provision of professional services, care or treatment under the *Mental Health Act* if the adult is released on leave or transferred to an approved home under ss.37 or 38 of that Act.

## *Alberta*

### **Legislation**

*Personal Directives Act*, R.S.A. 2000, c.P-6  
*Personal Directives Regulation*, Alta. Reg. 26/98.

### **Type of Advance Directive Recognized**

- Instructional (referred to as “personal directives”)
- Proxy (referred to as “agent”: an agent means a person designated in a personal directive to make personal decisions on behalf of the maker)

Preamble;

...Albertans should be able to provide advance personal instructions re: their own personal matters while recognizing that such instructions cannot include instructions relating to aided suicide, euthanasia, or other instructions prohibited by law....

### **Who Can Make an Advance Directive?**

- s.3(1) any person who is at least 18 yrs of age and understands the nature/effect of an AD
- s.3(2): a person who is at least 18 yrs of age is presumed to understand the nature/ effect of an AD
- s.4: a dependent adult may not make an AD with regard to a matter over which the guardian has authority  
[a “dependent adult” means a person who is the subject of a guardianship order made under the *Dependent Adults Act*]

### **Who Can Be Proxy?**

- An agent must be 18 yrs old & have capacity (s.12(a) & (b))
- s.7(3) An AD may designate an agent
  - a) by naming the individual who is to act as agent
  - b) subject to the regulations, by naming an office or position the occupant of which is to act as agent

NB: regulations, s.2(1): for the purpose of s.7(3) of the Act, persons who are service providers to a maker may not be designated as agents by office or position

(2) persons referred to in sub (1) may only be designated as agents by name

## **Finding of Incapacity**

- s.9(2): a maker lacks capacity:
  - a) when the person(s) designated in the AD to determine capacity make, after consulting w/ an MD or psychologist, a written declaration to that effect, OR
  - b) if
    - (i) the AD does *not* designate a person to determine capacity, or
    - (ii) that person is unable/ unwilling to do so or cannot be contacted after every reasonable effort has been made, when 2\_service providers\*  
(at least one of whom is an MD or psychologist) make a written declaration of incapacity
- s.9(3): a MD or psychologist who has been consulted in the making of, or who makes, a determination of a maker's lack of capacity in accordance w/ sub (2) must keep a written record of the determination of lack of capacity and the name of any other person involved in making the determination.
- 9(4): when a determination of lack of capacity has been made, the person making the determination must provide a copy of the declaration to maker, maker's agent (if any) & any other person designated in the AD and must advise them
  - a) that such determination has been made
  - b) that the maker may make an application to the Court for a review

## **Duties of Healthcare Providers**

See '*Finding of Incapacity*' re:s.9(4)

- s.19(1): if a service provider\* intends to provide personal services to a maker who lacks capacity and an AD is in effect, the service provider must:
  - a) follow any clear instructions of the agent that are relevant, or
  - b) if no agent designated in the AD or if agent is unable/ unwilling to make decisions or cannot be contacted after every reasonable effort is made, follow any clear instructions in the AD

\* s.1(n) : "service provider" means a person who carries on a business or profession that provides or who is employed to provide a personal service to an individual and when providing the services requires a personal decision from the individual before providing the service.

- s.19(2): if no designated agent or agent is unable/ unwilling/ unavailable, service provider must make every reasonable effort to contact the maker's nearest relative \*\* for the purpose of informing the relative or other individual of the circumstances

\*\* s.1(i): “nearest relative” means, w/ respect to any person, the relative of that person first listed in the following subclauses, relatives of the whole blood being preferred to relatives of the same description of the half-blood and the elder or eldest of 2 or more relatives described in any subclause being preferred to the other of those relatives regardless of gender: (i) husband or wife; (ii) son or daughter; (iii) father or mother; (iv) brother or sister; (v) grandfather or grandmother; (vi) grandson or granddaughter, (vii) uncle or aunt; (viii) nephew or niece.

- s.21: continuing duty to determine capacity
- s.22: duty to notify agent if the service provider believes that a maker has regained capacity
- s.23: duty to verify  
If a person claims to be an agent w/ authority to provide a service provider with a personal decision, the service provider must satisfy himself (a) as to the identity of person who claims to be an agent and (b) as to the authority of the agent to make a decision

NB: there is no *express* provision which states a duty on the part of hc providers to inquire as to the existence of an AD

## Technical Requirements

- s.5(1)
  - a) in writing
  - b) dated
  - c) signed by maker [or another person on behalf of & under direction of maker] in presence of witness
  - d) signed by witness
- s.5(2) The following persons may not sign an AD on behalf of the maker: (a) a person designated in an AD as an agent; (b) the agent’s spouse
- s.5(3) the following persons may not witness the signing of an AD
  - a) agent
  - b) spouse of agent
  - c) spouse of maker
  - d) person who signs on behalf of maker
  - e) spouse of person who signs on behalf of maker

**NB:** under s.17, an agent has a duty to keep records of decisions made pursuant to the AD and to provide a copy of these records to the maker of the AD, the maker’s lawyer & any other agent who has decision-making authority with regard to a matter addressed in the record

## **Limits on Power of Proxy**

- s.13: An agent has a duty to consult the maker of the AD before making a decision pursuant to the AD
- s.15: unless expressly authorized under the AD, an agent has no authority to make decisions re:
  - a) psychosurgery
  - b) sterilization that is not medically necessary
  - c) removal of tissue from the maker's living body for implantation or medical ed/ research
  - d) participation in research if little or no potential benefit to the maker
- s.27(1): the Court may, on hearing an application under s.25 ...
  - c) based on instructions contained in an AD, vary, confirm or rescind a decision made by an agent
  - d) determine the authority of an agent
  - e) provide advice & directions
  - g) stay a decision of an agent
  - h) make any other order the Court considers appropriate that is not inconsistent with an AD

## **Proxy's Access to Health Information**

- s.30(1): an agent has the right to be provided with info/records respecting the maker that are relevant to the personal decision to be made or the determination of maker's capacity

## **Joint Proxies and Resolving Conflict**

- s.16(1): if more than one agent is authorized to act with regard to the same personal matter and the agents are unable to agree on who will communicate decisions, the agent designated first in the AD is authorized to communicate decisions
- s.16(2): if more than one person designated as agent and
  - a) each has same authority
  - b) do not agree on a decision
  - c) AD contains no directions for resolving the disagreement, the decision of the majority of agents prevails
- s.27(1): the Court may, on hearing an application under s.25 ...
  - f) make a decision where a majority cannot agree under s.16(2)

## **Revising and Revoking an Advance Directive**

- s.8(2): an AD is revoked:

- a) on occurrence of date/event specified in AD
  - b) by making of subsequent AD that contradicts an earlier AD
  - c) by making of any document that expresses intention to revoke
- s.8(3) a document that revokes an AD must meet the requirements of s.5 (see Technical Requirements)
  - s.8(4): by destroying the original AD w/ intent to revoke

### **Protection from Liability**

- s.28: No action lies against an (1) agent or (2) service provider for anything done or omitted to be done in good faith in acting in accordance with the Act (3) no action lies against an agent or service provider for anything done or omitted to be done in good faith in reliance on an AD if the maker of the AD has
  - a) changed or revoked the AD
  - b) revoked the authority of the agent w/out the knowledge of the agent or service provider, as the case may be.

### **Reciprocity Agreement Between Jurisdictions**

Not addressed.

## ***Saskatchewan***

### **Legislation**

*The Health Care Directives and Substitute Health Care Decision Makers Act*, S.S. 1997, c.H-0.001 [c.i.f.: Sept.1, 1997]

*The Health Care Directives and Substitute Health Care Decision Makers Regulations*, Sask. Reg. 01/98 [c.i.f.: Oct. 21, 1998]

### **Type of Advance Directive Recognized**

Instructional and Proxy

- “directive” means instructions given by a person pursuant to this Act that deal with the person’s health care decisions, with the appointment of a proxy or with both.

### **Who Can Make an Advance Directive?**

- s.3: any person 16 yrs of age or more who has the capacity to make a health care

### **Who Can Be Proxy?**

- s.11(1) a proxy must be an adult (18 yrs) and must have the capacity to make hc decisions
- s.11(2): a married person who is *not* an adult, may be a proxy for his/her spouse if s/he has capacity
- s.16: Where an incapable person requires treatment but has no guardian or has not appointed a proxy in an AD, the nearest relative may make the decision:
- s.15: the nearest relative is the person first described in the following clauses who is willing, available and has the capacity to make a healthcare decision:
  - a) spouse/cohabitee
  - b) adult child
  - c) parent
  - d) sibling
  - e) grandparent
  - f) adult grandchild
  - g) uncle/aunt
  - h) nephew/ niece

- s.15(3)(d): the health care decision of the elder or eldest of 2 or more relatives is preferred to the health care decision of the other or others of those relatives

**Note:** s.17(1) outlines special provisions re: substitute health care decision-making for members of religious orders. A hierarchy of ecclesiastical authority for members of religious orders to make health care decisions is set out in s. 3 of *The Health Care Directives and Substitute Health Care Decision Making Regulations*.

## **Finding of Incapacity**

No procedure described; no cross reference to other legislation

## **Duties of Healthcare Providers**

No express statements to this effect.

## **Technical Requirements**

- s.6(1):
  - in writing
  - dated
  - signed by
    - a) maker, or
    - b) at the direction and in presence of the maker by a person other than the proxy or the patient's spouse
- s.6(2): where an AD is signed pursuant to s.6(1)(b):
  - a) the maker shall *acknowledge* the signature in the presence of a witness (not the proxy or the patient's spouse), and
  - b) the witness shall sign the directive in the presence of the maker

## **Limits on Power of Proxy**

No provisions re: specific treatments/procedures to which substitute consent cannot be given.

- s.20(1): an interested person may apply to the Court of Queen's Bench for an order requesting the relief set out in subsection (2)
- s.20(2): where the court is satisfied that a proxy or nearest relative is not acting in good faith and in accordance w/ this Act, the court may:
  - a) suspend/terminate the appt of the proxy or the authority of the nearest relative and rescind any health care decision

- b) in the case of a proxy, substitute the court's health care decision for any health care decision made by the proxy, except where the directive appoints at least one other proxy who is willing, available and capable, and
- c) in the case of a nearest relative, appoint another person from the list set out in s.15(1)

## **Proxy's Access to Health Information**

- s.19: health care info may be disclosed to a proxy, nearest relative or personal guardian where it is necessary to enable that person to make an informed decision

NB: a personal guardian means a guardian appointed pursuant to the *Dependent Adults Act*

## **Joint Proxies and Resolving Conflict**

- s.13(1): if 2 or more proxies named in an AD & the AD does not indicate whether to act jointly or successively, they will act successively in the order in which they are named in the AD
- s.13(2):
  - a) unless the AD states otherwise, where 2 or more proxies are appointed to act jointly, the decision of the majority will prevail
  - b) if a proxy dies or is unwilling/ unavailable or incapable, the remainder makes the decision (majority prevails)
  - c) if a majority decision cannot be reached, the proxy named first in the AD shall make the decision

**Note:** \* s.21 applies where a personal guardian has been appointed on behalf of a person (under the *Dependent Adults Act*), and the person has also appointed a proxy. Pursuant to s.21(3), where the AD does not clearly anticipate and give directions relating to treatment for the specific circumstances that exist and a health care decision of the personal guardian is inconsistent with a health care decision of the proxy, the proxy's health care decision is preferred to the personal guardian's health care decision.

## **Revising and Revoking an Advance Directive**

- s.7(1): an AD may be revoked
  - a) orally
  - b) in writing
  - c) by destroying the AD
  - d) by making a new AD
- s.7(2): unless an AD states otherwise, an appt of a spouse as proxy is revoked if the marriage is terminated by divorce or nullification

## **Protection from Liability**

- s.22(1): no action lies against a health care provider acting in good faith and in accordance with the Act who provides/refrains from providing treatment
  - a) in accordance with an AD or a decision made by a proxy, nearest relative or guardian
  - b) contrary to an AD if the health care provider did not know it existed or thought it had been revoked
- s.22(2) no action lies against a proxy, nearest relative or guardian:
  - a) who acts in good faith
  - b) who fails to make a decision in accordance w/ a directive
- s.22(3) no action against a person acting in good faith who relies on an AD and is unaware that it
  - a) was not executed in accordance w/ this Act
  - b) had been revoked
  - c) was made by a person under 16 yrs of age or who did not have capacity

## **Reciprocity Agreement Between Jurisdictions**

- s.8: an AD made outside Saskatchewan that complies w/ the requirements of this Act will be deemed an AD made pursuant to this Act

## ***Manitoba***

### **Legislation**

*Health Care Directives Act*, C.C.S.M. 1992, c.H27 [c.i.f.: July 26, 1993]

**Note:** s.3: This Act is subject to the *Mental Health Act* and, where there is a conflict, the *Mental Health Act* prevails.

### **Type of Advance Directive Recognized**

Instructional and Proxy:

- s.5: a directive may express the maker's health care decisions or may appoint a proxy to make health care decisions on the maker's behalf, or both.

### **Who Can Make an Advance Directive?**

- s.4(1): every person who has capacity to make health care decisions
- s.4(2): age of capacity = 16 yrs

### **Who Can Be Proxy?**

- s.12: a proxy must be apparently mentally competent and at least 18 years old

### **Finding of Incapacity**

No procedure described.

### **Duties of Healthcare Providers**

- s.21: No person is required to inquire into the existence of an AD or of a revocation of an AD.

**Note: No Presumption Arises from Lack of Directive** -- s.26: No inference or presumption shall arise by reason only that a person has not made or has revoked a directive.

### **Technical Requirements**

- s.8(1): AD must be in writing and dated

- s.8(2): must be signed by
  - a) maker, or
  - b) some other person at the direction and in presence of the maker
    - i) cannot be a proxy or patient's spouse
    - ii) the maker shall acknowledge the signature in presence of witness, who shall not be a proxy appointed in the AD or a proxy's spouse, and
    - iii) the witness shall sign the AD in the maker's presence

### **Limits on Power of Proxy**

- s.14: unless AD provides otherwise, a proxy cannot consent to:
  - a) med treatment for the primary purpose of research
  - b) sterilization that is not medically necessary
  - c) removal of tissue from the maker's body while living for:
    - i) transplantation to another person
    - ii) medical education or research
- s.17(1): when the court, on application is satisfied that a proxy is not acting in good faith, the court may, by order,
  - a) suspend/terminate the appointment and rescind any decision made by the proxy
  - b) except where the AD appoints at least one other proxy who can continue to act, substitute a decision of its own for any health care decision made by the proxy

### **Proxy's Access to Health Information**

- s.18: subject to any express limitation in the AD, a proxy has a right to all info necessary to make informed decisions

### **Joint Proxies and Resolving Conflict**

- s.15(1) if 2 or more proxies named in AD and does not indicate whether to act jointly or successively, they are deemed to be appointed to act successively in the order named in the AD
- s.15(2):
  - (a) where joint proxies, decision of majority is deemed the decision of all
  - (b) if one or more of them has died or is unwilling or, after reasonable inquiries, unavailable to make a health care decision, the remainder may make the decision and the decision of the majority of the remainder is deemed the decision of all
- s.15(3) if joint proxies disagree, the proxy first named in the AD may make the decision

### **Revising and Revoking an Advance Directive**

- s.9(1): AD may be revoked
  - a) by a later AD
  - b) by a later writing declaring an intention to revoke
  - c) by destruction (w/ intent to revoke) all original signed copies, either by the maker or by some other person in the presence and at the direction of the maker
  
- s.9(2) unless an AD expressly provides otherwise, if, after making an AD in which the maker's spouse is appointed as proxy, the maker's marriage is terminated by divorce or is found to be void or declared a nullity by a court in a proceeding to which the maker is a party, the appt of the spouse as proxy is revoked. Marriage

NB: s.13(3): if the proxy knows of wishes applicable to the circumstances that the maker expressed when the maker had capacity, and believes the maker would still act on them if capable, and if the wishes are more recent than the decisions expressed in a directive, the wishes must be followed.

### **Protection from Liability**

- s.19: no action lies against a proxy
  - a) by reason of having acted in good faith in accordance with the Act
  - b) for failing to make health care decisions on behalf of the maker
  
- s.22: no action lies against a person who administers/refrains from administering treatment by reason only that the person:
  - a) has acted in good faith/in accordance with an AD or a decision by a proxy
  - b) has acted contrary to an AD if the person did not of the existence of the AD

### **Reciprocity Agreement Between Jurisdictions**

- s.10: an AD made outside Manitoba that complies with requirements of this Act is deemed to be an AD under this Act

## ***Ontario***

### **Legislation**

*Health Care Consent Act*, S.O. 1996, c.2 [c.i.f.: March 28, 1997]

*Health Care Consent Regulations*, O. Reg. 104/96.

*Substitute Decisions Act*, S.O. 1992, c.30 as am. by 1994, c.27, ss.43(2) 62; 1996, c.2, ss.3-60; 1998, c.26, s.108.

*Substitute Decisions Regulations*, O. Reg. 460/05.

*Advocacy, Consent and Substitute Decisions Statute Law Amendment Act*, 1996, S.O. 1996, c.2. [c.i.f.: March 29, 1996]

**Note:** Interaction of *HCC Act* and the *SDA Act*: s.49(1) *SDA Act*: A provision in a power of attorney for personal care that confers authority to make a decision concerning the grantor's personal care is effective to authorize the attorney to make the decision if, (a) the *HCC Act* applies to the decision and that Act authorizes the attorney to make the decision; OR (b) the *HCC Act* does not apply to the decision and the attorney has reasonable grounds to believe that the grantor is incapable of making the decision, subject to any condition in the PofA that prevents the attorney from making the decision unless the fact that the grantor is incapable has been confirmed.

### **Type of Advance Directive Recognized**

*SD Act:*

Proxy

- s.46(1): a person may give a written power of attorney for personal care, authorizing the person(s) named as attorneys to make decisions concerning the grantor's personal care
- s.46(2): the power of attorney may contain instructions with regard to the decisions the attorney is authorized to make
- s.66(3)/s.67: if an attorney knows of a wish or instruction applicable to the circumstances that the incapable person expressed while capable, the attorney shall make the decision in accordance w/ the wish or instruction

*HCC Act:*

- s.5(1): a person may, while capable, express wishes with regard to treatment, admission to a care facility or a personal assistance service
- s.26: a health care provider shall not administer treatment under s. 25 [emergency] if the health care provider has reasonable grounds to believe that the person, while

capable and after attaining 16 years of age, expressed a wish applicable to the circumstances to refuse consent to treatment.

**Thus, Ontario advance directive legislation provides for proxy directives. Currently, there is no specific legislation providing for the making of an instructive directive, although such directives must be respected in emergency health care situations under the *Health Care Consent Act*.**

## **Who Can Make an Advance Directive?**

*SD Act:*

- s.43: must be at least 16 yrs old
  
- s.47(1): a person is capable of giving a power of attorney for personal care if the person
  - a) has the ability to understand whether the proposed attorney has a genuine concern for the person's welfare; and
  - b) appreciates that the person may need to have the proposed attorney make decisions for the person

*HCC Act:*

- s.26: must be at least 16 years old.

## **Who Can Be Proxy?**

*HCC Act:*

- s.33(1) a person who is 16 yrs old or older and who is incapable w/ respect to a proposed treatment may apply to the Board for appointment of a representative
  
- s.33(2): a person who is 16 yrs old or older may apply to the Board to be appointed as representative of a person who is incapable with regard to a proposed treatment, to give/refuse consent on his/her behalf.
  
- s.33(3): subsections (1) and (2) do not apply if the incapable person has a guardian or an attorney for personal care.

*SD Act:*

- s.46(2): the Public Trustee and Guardian may be a proxy (an attorney for personal care) if consent of the grantor is obtained in a power of attorney in writing before the power of attorney is executed.
  
- s.46(3): a person may not act as an attorney for personal care, unless the person is the grantor's spouse, partner or relative, if the person,
  - a) provides health care to the grantor for compensation
  - b) provides residential, social, training or support services to the grantor for compensation

## **Finding of Incapacity**

### *HCC Act:*

- s.13: if a plan or treatment is to be proposed for a person, one health practitioner may, on behalf of all health practitioners involved in the plan of treatment,
  - a) propose the plan
  - b) determine the person's capacity
  - c) obtain consent or refusal from
    - i) the person (if capable)
    - ii) the person's substitute decision-maker (if incapable)

### *SD Act:*

- s.51(1): the attorney under a power of attorney shall, on the request of and on behalf of the grantor, assist in arranging an assessment of the grantor's capacity by an assessor
- s.51(2): sub (1) does not require an attorney to assist in arranging an assessment if an assessment has been performed in the 6 mo. before the request
- s.78(1): an assessor shall not perform an assessment of a person's capacity if the person refuses to be assessed
- s.78(2): before performing an assessment of capacity, the assessor shall explain to the person:
  - a) the purpose of assessment
  - b) significance of the finding
  - c) the right to refuse assessment
- s.78(3): sub (1) & (2) do not apply if
  - a) the assessment was ordered by the court under s.79
  - b) a power of attorney for personal care contains a provision that authorizes the *use of force* to permit the assessment and the provision is effective under s.50(1)
- s.78(5): an assessor shall give the person written notice of findings

## **Duties of Healthcare Providers**

### *HCC Act:*

- s.10(1): a health care provider who proposes a treatment for a person shall not administer it, and shall take reasonable steps to ensure it is not administered unless,
  - a) s/he is of the opinion the person is capable and the person has given consent
  - b) s/he is of the opinion that the person is incapable w/ respect to the treatment, and the person's substitute decision-maker has given consent

- s.17: a health care provider shall, *in the circumstances and manner specified in the guidelines established by the health care provider's profession*, provide the persons found by the health care provider to be incapable such info about the consequences of the findings as is specified in the guidelines
- s.25(8): where emergency treatment is begun under sub (2) or (3), the health care provider shall ensure that reasonable efforts are made for the purpose of finding the substitute decision-maker

## Technical Requirements

### *HCC Act:*

- s.5(2): wishes may be expressed in a power of attorney, in a form prescribed by regulations, in any other written form, orally or in any other manner.

### *SDA Act:*

- s.46(8): the power of attorney need not be in any particular form
- s.48(1): a power of attorney shall be executed in the presence of 2 witnesses
- s.10(2): the following shall not be witnesses
  - the attorney/attorney's spouse or partner
  - grantor's spouse or partner
  - grantor's child
  - a person who has a guardian
  - a person less than 18 yrs old...

## Limits on Power of Proxy

### *HCC Act:*

- s.6: This Act does not affect the law relating to giving/ refusing consent on another person's behalf to:
  - a) research procedures
  - b) sterilization that is not medically necessary
  - c) removal of tissue for transplantation in another person's body
- s.33(8): the Board may, on any person's application, terminate an appointment made under s.33 if,
  - a) the incapable person or the rep requests the termination of the appt
  - b) the rep is no longer capable
  - c) the appt is no longer in the incapable person's best interests; or
  - d) the incapable person has a guardian who has authority to consent to the treatments for which the appt was made, or an attorney for personal care conferring that authority

- s.37(1): if consent to a treatment is given or refused on an incapable person's behalf by his/her substitute decision-maker, and if the health care practitioner who proposed the treatment is of the opinion that the substitute decision-maker did not comply w/ s.21 (re: principles for giving/refusing consent), the health care practitioner may apply to the Board for a determination

## **Proxy's Access to Health Information**

*HCC Act:*

- s.22: a substitute decision-maker is entitled to receive all info required for an informed consent

## **Joint Proxies and Resolving Conflict**

*HCC Act:*

- s.20(6): if 2 or more persons described in s.20(1) and who meet the requirements of sub (2) disagree, and if their claims rank ahead of all others, the Public Guardian & Trustee will make the decision in their stead

*SD Act:*

- s.46(4): if the power of attorney names two or more persons as attorneys, they shall act jointly, unless the power of attorney provides otherwise

## **Revising and Revoking an Advance Directive**

*HCC Act:*

- 5(3): later wishes expressed while capable prevail over earlier wishes [under s.5(2), wishes may be expressed in a power of attorney, in any other written form, orally or in any other manner

*SD Act:*

- s.47(3): a person is capable of revoking a power of attorney for personal care if s/he is capable of giving one
- s.66(3) :A later wish or instruction expressed while capable prevails over an earlier wish or instruction
- s.53(1) a power of attorney for personal care is terminated,
  - a) when the attorney dies, becomes incapable or resigns, unless,
    - (i) another attorney is authorized to act
    - (ii) the power provides for the substitution of another person who is able & willing
  - b) when the court appoints a guardian for the grantor under s.55
  - c) when the grantor executes a new power of attorney unless the grantor provides there shall be multiple power of attorney for personal care;

d) when the power of attorney is revoked

- s.53(2): a revocation of a power of attorney for personal care shall be in writing and executed in the same way as a power of attorney for personal care

## **Protection from Liability**

*HCC Act:*

Re: treatment

- s.29(1)(2)(3): health care providers will not be held liable for administering/ withholding/ withdrawing treatment with a consent that the health care provider believes, on reasonable grounds and in good faith, to be sufficient for the purpose of this Act
- s.30: a person who gives/refuses consent on another person's behalf, acting in good faith and in accordance w/ this Act, is not liable

Re: Admission to care facility

- s.48: protects health care providers from liability for authorizing the admission of a person to a care facility with a consent s/he believes on reasonable grounds and in good faith to be sufficient for the purpose of this Act
- s.49: protects the substitute decision-maker

## **Reciprocity Agreement Between Jurisdictions**

*SD Act:*

- s.85(1): as regards the manner & formalities of executing a continuing power of attorney, the power of attorney is valid if at the time of its execution it complied w/ the internal law of the place where,
  - a) it was executed
  - b) the grantor was then domiciled; or
  - c) the grantor then had her/his habitual residence

## *Quebec*

### **Legislation**

*Civil Code of Quebec*, S.Q. 1991, c.64. art.11-25 (Integrity of the Person – Care), art. 153 (Capacity), art.256-297 (Protective Supervision of Persons of Full Age), art. 2130-2185 (Mandate (i.e. power of attorney))

### **Type of Advance Directive Recognized**

#### Proxy

- Art.11: No person may be made to undergo care of any kind of nature, whether for examination, specimen taking, removal of tissue, treatment or any other act, except with his consent.

If the person concerned is incapable of giving/refusing consent to care, a person authorized by law or by mandate given in anticipation of his capacity may do so in his place.

- Art. 12: a person who gives consent to or refuses care for another person is bound to act in the sole interest of that person, taking into account, as far as possible, any wishes the latter may have expressed.
- Art.2130: MANDATE:  
Mandate is a contract by which a person, the mandator, empowers another person, the mandatary, to represent him in the performance of a juridical act w/ a 3<sup>rd</sup> person, and the mandatary, by his acceptance, binds himself to exercise the power → called the power of attorney.
- Art.2131: The object of the mandate may also be the performance of acts intended to ensure the personal protection of the mandator, the administration of his patrimony as well as his moral & physical well-being, should he become incapable of taking care of himself or administering his property.

### **Who Can Make an Advance Directive?**

- Art. 153: Full age or the age of majority is 18 years.

### **Who Can Be Proxy?**

- Art.15: Where it is ascertained that a person of full age is incapable of giving his consent to care required by his state of health, consent is given by his mandatary,

tutor or curator. If the person of full age is not so represented, consent is given by his spouse or, if he has no spouse or his spouse is prevented from giving consent, it is given by a close relative or a person who shows a special interest in the person of full age.

## **Finding of Incapacity**

Not addressed.

## **Duties of Healthcare Providers**

Not addressed.

## **Technical Requirements**

- Art.2135: a mandate expressed in general terms confers the power to perform acts of simple administration only. The power to perform other acts is conferred only by express mandate.
- Art.2166: a mandate given by a person of full age in anticipation of his incapacity to take care of himself or to administer his property is made by a notarial act *en minute* or in the presence of witnesses.

The performance of the mandate is subordinate to the occurrence of the incapacity and to homologation by the court, at the request of the mandatary designated in the act.

- Art.2167. The mandator, in the presence of 2 witnesses who have no interest in the act and who are in a position to ascertain whether he is capable of acting, declares the nature of the act but need not disclose its contents. The mandator signs the act at the end or, if he has already signed it, recognizes his signature; he may also have a 3<sup>rd</sup> person sign the writing for him in his presence and according to his instructions. The witnesses sign the mandate forthwith in the presence of the mandator.
- Art.2169: where the mandate is not such as to fully ensure the care of the person..., protective supervision may be instituted to complete it; the mandatary then proceeds to carry out the mandate and makes a report, on application and at least once each year, to the tutor or curator.

## **Limits on Power of Proxy**

- Art.19: A minor or a person of full age who is incapable of giving his consent may, with the consent of the person having parental authority, mandatary, tutor or curator

and with the authorization of the court, alienate a part of his body only if that part is capable of regeneration and provided that no serious risk to his health results.

- Art.21: A minor or person of full age who is incapable of giving consent may not be submitted to an experiment if the experiment involves serious risk to health or, where he understands the nature & consequences of the experiment, if he objects. → An incapable person can only be submitted to an experiment if:
  - the person is the only subject in the experiment
  - has potential to produce benefit to person's health OR only if, in the case of a group experiment, it has the potential to produce results capable of conferring benefit to other persons in same age category/same disease or handicap
  - experiment must be part of a research project approved & monitored by an ethics committee formed by the Minister of Health & Social Services

NB: Art.21: Care considered by the ethics committee to be innovative care required by the state of health of the person concerned does not constitute an experiment

- NB: Art.22: A part of the body, whether an organ, tissue or other substance, removed from a person as part of the care he receives may, w/ his consent or that of the person qualified to give consent for him, be used for the purposes of research.
- Art.24: Consent to care not required by a person's state of health, to the alienation of a part of a person's body, or to an experiment shall be given in writing. It may be withdrawn any time, even verbally.

NB: Articles 26 to 31 address Confinement in an Institution and Psychiatric Assessment.

Art.26: consent may be given by an incapable person's mandatary, tutor or curator.

- Art.2177: Where the mandator is incapable, any interested person, including the Public Curator, may, if the mandate is not faithfully performed or for any other serious reason, apply to the court for the revocation of the mandate, the rendering of an account by the mandatary and the institution of protective supervision in respect of the mandator.

## **Proxy's Access to Health Information**

Not addressed.

## **Joint Proxies and Resolving Conflict**

- Art. 2144: where several mandataries are appointed in respect of the same business, the mandate has effect only if it is accepted by all of them. The mandataries shall act jointly for all acts contemplated in the mandate, unless otherwise stipulated.

## **Revising and Revoking an Advance Directive**

### *Termination of mandate*

- Art.2175: in addition to the causes of extinction common to obligations, revocation of the mandate by the mandator, renunciation by the mandatary, the extinction of power conferred on the mandatary or the death of one of the parties terminates the mandate.

### *Revoking of mandate*

- Art.2176: The mandatary may revoke the mandate and compel the mandator to return to him the power of attorney in order to make a notation therein of the termination of the mandate. The mandatary has a right to require the mandator to furnish him with a duplicate of the power of attorney containing such notation. where the power of attorney is made by notarial act *en minute*, the mandator makes the notation on a copy and may give notice of termination of the mandate to the depository of the document who, on being notified, is bound to note it on the document and on every copy of it which he issues.
- Art.2180: the appointment of a new mandatary by the mandator for the same business is equivalent to revocation of the first mandatary from the day the first mandatary was notified of the new appointment.

## **Protection from Liability**

Not addressed.

## **Reciprocity Agreement Between Jurisdictions**

Not addressed.

## *New Brunswick*

### **Legislation**

There is no legislation regarding advance directives.

## ***Nova Scotia***

### **Legislation**

*Medical Consent Act*, R.S.N.S. 1989, c.279

### **Type of Advance Directive Recognized**

Proxy [called a “guardian” pursuant to the *Hospitals Act*]

### **Who Can Make an Advance Directive?**

- s.2: a person who is of the age of majority and capable of giving consent to medical treatment

### **Who Can Be Proxy?**

- s.3(1): a person of the age of majority

### **Finding of Incapacity**

Not addressed.

### **Duties of Healthcare Providers**

Not addressed.

### **Technical Requirements**

- s.3(2): authorization must:
  - be in writing
  - be signed by the maker
  - witnessed by a person who is not the proxy or the proxy’s spouse

### **Limits on Power of Proxy**

Not addressed.

### **Proxy’s Access to Health Information**

Not addressed.

### **Joint Proxies and Resolving Conflict**

Not addressed.

### **Revising and Revoking an Advance Directive**

- s.5: an authorization given pursuant to this Act terminates where
  - a) it is revoked by the person giving it
  - b) a court appoints a guardian who has authority to give consent respecting medical treatment
  - c) a judge makes an order revoking authorization

### **Protection from Liability**

Not addressed.

### **Reciprocity Agreement Between Jurisdictions**

Not addressed.

## ***Prince Edward Island***

### **Legislation**

*Consent to Treatment and Health Care Directives Act*, S.P.E.I. 1996, c.10 [c.i.f.: July 1, 2000]

*Consent to Treatment and Health Care Directives Regulations*, P.E.I. Reg. E.C. 356/00.

#### **Note:**

These regulations specify the assessment tool used in determining capacity, who may reassess capacity, prescribe forms for finding incapacity, and provide an optional form for agreement to act as a substitute decision maker.

### **Type of Advance Directive Recognized**

Instructional and Proxy

- s.1(e): “directive” means a document made in accordance w/ this Act ... in which the maker sets out decisions or wishes or instructions respecting treatment, or appoints a proxy, or both.

### **Who Can Make an Advance Directive?**

- s.3(1)(b): Every person is presumed to be capable of making a health care directive until the contrary is demonstrated

### **Who Can Be Proxy?**

- s.11(1) [in descending order of priority]:
  - a) proxy
  - b) guardian
  - c) spouse
  - d) child or parent
  - e) sibling
  - f) trusted friend
  - g) relative
- s.11(3) must be:
  - a) 16 yrs
  - b) capable
  - c) knowledge of patient’s circumstances and in recent contact
- s.11(6): public guardian is the decision-maker of last resort

## **Finding of Incapacity**

- s.10: health practitioner shall apply such criteria and follow such standards as may be prescribed
- s.7(2): in determining a patient's capacity, a health practitioner shall, where considered necessary, inform the patient of the right to assistance and take into account such assistance as may be provided by an associate
- s.91(1) where a health practitioner is of the opinion that a patient is not capable, the patient may request a reassessment by a psychiatrist (or other practitioner) and the patient will be informed of the right to make this request

## **Duties of Healthcare Providers**

- s.11(2): must make reasonable inquiry with regard to existence of persons named in s.11(1)
- s.23: must make reasonable inquiry with regard to existence of AD

## **Technical Requirements**

- s.20(1): maker of AD must be 16 yrs old
- s.21(1): in writing and dated
- s.21(2): signed by:
  - a) maker
  - b) by other witness who is not the proxy or spouse of proxy
- s.21(3): proxy must agree in writing prior to the maker's incapacity

## **Limits on Power of Proxy**

- s.12:
  - a) subject to express authority given in a directive, cannot consent to research procedure (unless likely to be beneficial to patient)
  - b) sterilization
  - c) abortion -- except where life/health is endangered
  - d) electric shock
- s.16: if there is an emergency, refusal of treatment by proxy may be overridden by health care provider if proxy did not comply with principles of s.13 →

- s.13(a) if the person knows the patient has made an AD that contains instructions relevant to the circumstances, they must be followed (subject to clause (c))
- s.13(b): if the person does not know of any such instructions, s/he shall act in accordance with any wishes applicable to the circumstances that s/he knows the patient expressed, orally or in writing, when capable, and believes the patients would still act on if capable
- s.13(c): if the person knows of, and there is evidence satisfactory to the person and the health care practitioner of, wishes applicable to the circumstances that the patient expressed, orally or in writing, when capable, and believes the patient would still act on them if capable and if the wishes are demonstrably more recent than the instructions contained in an AD, the wishes must be followed;
- s.13(d): if the person does not know of any such instructions/wishes or if it is impossible to comply w/ them, s/eh shall act in the patient's best interests;
- s.13(e): so far as is practicable, the person shall attempt to involve the patient in consideration of the decision
  
- s.27(1): re: review of misconduct  
Any interested person who considers that a proxy is not acting in good faith may file a complaint w/ such public official as may be empowered w/ the duty of public guardianship or as may be designated by the Minister
- s.27(2): upon receipt of a complaint, the person referred to in sub (1) shall conduct an investigation and endeavour to resolve the matter
- s.27(3): failing resolution, the person referred to in sub(1) may apply to the court and the court may order
  - a) suspend or terminate the appt of the proxy and rescind a decision made by the proxy
  - b) if the AD does not appoint another proxy who can continue to act, substitute its own decision in place of the rescinded decision.

**Note:**

s.28: unless an AD provides otherwise, a decision made by a proxy on behalf of a maker shall, subject o s.27, have priority over a decision made by a court or by any other person, including a guardian

## **Proxy's Access to Health Information**

s.14: proxy & associate entitled to all info required to make informed consent

## **Joint Proxies and Resolving Conflict**

- s.11(6): if no person described in any of the clauses of sub (1) [see column *Who Can be Proxy*] is available, capable with regard to treatment, and willing to assume responsibility, or if there is disagreement among persons of the same class, such public official as may be empowered w/ the duty of public guardianship or as may be designated by the Minister may make a decision

## **Revising and Revoking an Advance Directive**

- s.25(1): so long as maker has capacity, directive may be revoked by
  - a) later AD
  - b) later writing declaring intention to revoke the AD
  - c) destruction, (w/ intent to revoke) all original copies of AD by the maker or by someone else in the presence and at the direction of the maker
- s.25(2): appointment of spouse as proxy is revoked upon divorce / nullification

## **Protection from Liability**

- s.18: health care provider protected from liability where there is:
  - a) apparently valid consent
  - b) apparently valid refusal
  - c) emergency treatment (s.17)
- s.19: proxy protected from liability when acting in good faith
- s.30(1): No action lies against a health care provider if
  - (a) acts in good faith in accordance with AD or decision made by proxy
  - (b) acted contrary to AD if
    - (i) the existence of the AD was not known; or
    - (ii) not realistically possible to comply
- s.30(2) presumption of validity of AD
- s.30(3): no action lies against proxy
  - (a) if acting in good faith;
  - (b) for failing to make decisions on behalf of maker

## **Reciprocity Agreement Between Jurisdictions**

- s.34(1) extra-provincial directives recognized if
  - (a) meets requirements of Part III of Act
  - (b) meets requirements of legislation in jurisdiction where the AD was made or where the maker was habitually resident

## ***Newfoundland and Labrador***

### **Legislation**

*Advance Health Care Directives and the Appointment of Substitute Decision Makers Act*, S.N. 1995, c.A-4.1. [c.i.f. July 1, 1995]

### **Type of Advance Directive Recognized**

Instructional and Proxy (referred to as a ‘substitute decision-maker’)

- s.2(a): In this Act “advance health care directive” means a document in which a maker sets out that maker’s instructions or the maker’s general principles regarding his or her health care treatment or in which a maker appoints a substitute decision-maker or both.

### **Who Can Make an Advance Directive?**

- s.3(1): a person who is competent

### **Who Can Be Proxy?**

- s.3(2): must be 19 yrs of age

If no proxy is named in an AD, the first named person of the following list shall act as decision maker:

- a) spouse
- b) child
- c) parent
- d) sibling
- e) grandchild
- f) grandparent
- g) uncle/aunt
- h) nephew/  
niece
- i) relative
- j) health care provider who is responsible for the proposed care

NB: s.10(4): a statutory proxy must have been in contact during preceding 12 months → however, may apply to court to shorten or waive the 12 month requirement (s.10(5))

### **Finding of Incapacity**

- s.15(1): where a maker's doctor finds the maker is incompetent, the doctor shall make a statement in the medical record specifying the nature/extent of incompetency and the facts upon which the finding is made
- s.15(2): doctor must notify the maker of the finding and of the right to contest it
- s.15(3): where contested, there shall be an evaluation by a 2<sup>nd</sup> doctor chosen by the maker
- s.15(4): a finding of competence by a 2<sup>nd</sup> doctor prevails over the 1<sup>st</sup> doctor's finding
- s.15(5): where the finding is confirmed by the 2<sup>nd</sup> doctor, the maker shall be informed
- s.15(6): a maker or interested party may contest a confirmation of incompetence by applying to court w/in 30 days

### **Duties of Healthcare Providers**

- s.9(1)(a): the health care provider shall make a reasonable attempt to determine whether the patient has a proxy who is available [exception in cases of emergency (s.9(2))]
- s.18(1): a maker of an AD shall communicate its contents to a health care professional
- s.18(2): where the maker was incompetent upon admission to a facility or is being treated outside the facility, *the health care professional providing treatment is required at all times to ensure that s/he makes reasonable inquiry as to the existence of an AD **and** of the appointment of a substitute decision-maker*

### **Technical Requirements**

- s.3(3): the proxy must indicate in writing his/her acceptance of the appointment
- s.6(1): an AD must
  - be in writing
  - witnessed by at least 2 independent persons
  - signed by the maker
- s.6(2): may be signed by another person on behalf of maker where
  - a) the signatory is not the proxy
  - b) the maker acknowledges the signature in the presence of 2 witnesses (not the proxy or the patient's spouse)
  - c) the witnesses attest & subscribe the AD in the maker's presence

- s.17: an AD shall be included in the maker's medical record
- s.18: where the maker of an AD is competent, s/he shall communicate its contents to a health care provider

### **Limits on Power of Proxy**

- s.5(3): unless authorized in the AD, a proxy cannot consent to:
  - a) medical treatment for the primary purpose of research
  - b) sterilization that is not medically necessary
  - c) removal of tissue from the maker's body (while living) for transplantation or research
- s.13: where the court on application of an interested party is satisfied that a proxy is acting in bad faith or contrary to the known instructions/wishes of the maker, it may, on application, by order, suspend or terminate the appt in which case it may also rescind a hc decision made by the proxy and, where the AD does not appoint more than 1 proxy, the court shall substitute its own decision in place of the rescinded decision or appoint another proxy in accordance w/ s.10

### **Proxy's Access to Health Information**

- s.22: a proxy has the right of access to all info necessary to make informed decisions

### **Joint Proxies and Resolving Conflict**

- s.11 [re: statutory proxies]
- s.11(1): where more than 1 person is qualified to act as proxy, the decision of the majority prevails and in the absence of a majority decision, the proxy becomes the next available person or category of persons listed in s.10(1)
- s.11(2): where more than 1 person qualified, the persons shall designate 1 person to communicate decisions to the hc providers
- s.11(3): where proxies fail to designate a person under sub(2), the proxy becomes the next available person or category of persons listed in s.10(1)

### **Revising and Revoking an Advance Directive**

- s.8(1): AD may be revoked by
  - a) a later AD
  - b) a later writing, signed by the maker, declaring intention to revoke

c) the destroying of the AD by the maker or some other person in the presence and by the direction of the maker and w/ the intent to revoke

- s.8(2): unless the AD expressly provides otherwise, where a spouse is named proxy, the appointment will be revoked upon divorce or nullification of marriage

### **Protection from Liability**

- s.19(1): no action lies against a proxy by reason only of having acted in good faith in accordance w/ the Act
- s.19(2): where a health care provider makes a *reasonable attempt* to find the proxy, s/he is not liable for failing to find the correct proxy
- s.19(3): no action lies against a health care provider who administers/refrains from administering care if acting in good faith

### **Reciprocity Agreement Between Jurisdictions**

Not addressed.

## ***Yukon***

### **Legislation**

*Care Consent Act*, S.Y. 2003, c. 21, Sched. B

### **Type of Advance Directive Recognized**

Proxy

- s.29: A directive may contain information and wishes respecting the giving or refusing of substitute consent to care on behalf of the maker.
- s.21(2): a health care provider shall not provide health care under subsection (1) [emergency] if the health care provider has reasonable grounds to believe that the person, while capable and after attaining 16 years of age, expressed a wish applicable to the circumstances to refuse consent to the health care.

**Thus, Yukon advance directive legislation provides for proxy directives. Currently, there is no specific legislation providing for the making of an instructive directive, although such directives must be respected in emergency health care situations.**

### **Who Can Make an Advance Directive?**

- s.27(1): any person who is at least 16 yrs of age and is able to understand the nature/effect of the directive

### **Who Can Be Proxy?**

- s.32(1): A proxy must (s.12(2)):
  - (a) have capacity;
  - (b) be 19 yrs of age or older, unless they are the maker's parent or spouse;
  - (c) have been in contact with the maker during the preceding 12 months;
  - (d) not have a conflict with the maker that raises a reasonable doubt whether they will comply with their duties;
  - (e) not be prevented from doing so by an order of court;
  - (f) be available; and
  - (g) be willing to comply with their duties.
- s.32(2): The Public Guardian and Trustee may not act as a proxy.
- s.32(3): A directive may name more than one proxy and give each different authority.

- s.32(4): A directive may provide for an alternate to act in the place of a proxy in such circumstances as may be specified in the directive.

## **Finding of Incapacity**

- s.6(1): a person's incapability to give or refuse consent to care shall be determined by the care provider\* proposing to provide the care.

**Note:** \*s.1: “care provider” means (a) with respect to health care, the health care provider; (b) with respect to admission to live in a care facility, a person given responsibility by the Minister or under the regulations for arranging for the admission of persons to live in the care facility; and (c) with respect to a personal assistance service, a person given responsibility by the Minister or under the regulations for arranging for the provision of the personal assistance service.

## **Duties of Healthcare Providers**

- s.7: When seeking a person's consent to care or deciding whether a person is incapable of giving or refusing consent, a care provider
  - (a) must communicate with the person in a manner appropriate to the person's skills and abilities; and
  - (b) may allow the person's spouse or any relatives or friends, who accompany the person and offer their assistance, to help the person to understand or to demonstrate an understanding of the matters mentioned in subsection 6(2).
- s.10: A care provider must not seek a substitute decision about care unless they have made every reasonable effort to obtain a decision from the care recipient.

## **Technical Requirements**

- s.28(1): A directive is not valid unless it is
  - (a) in writing;
  - (b) dated;
  - (c) signed by the maker in the presence of two witnesses who are 19 years of age or older, neither of whom is a proxy appointed in the directive or a proxy's spouse;
  - (d) signed by the witnesses in the presence of the maker and each other; and
  - (e) signed at any time by the proxy or proxies appointed in the directive.
- s.28(2): Where the maker is unable to sign the directive, it may be signed at the direction and in the presence of the maker by a person other than
  - (a) a proxy appointed in the directive; or
  - (b) a proxy's spouse.
- s.28(3): Where a directive is signed by another person pursuant to subsection (2), the maker shall acknowledge the signature in the presence of the witnesses.

## **Limits on Power of Proxy**

- s.16: A proxy does not have authority to give consent to
  - (a) the provision of health care to a person for the purposes of sterilization for non-therapeutic reasons; or
  - (b) any type of care excluded by the regulations, unless expressly authorized under the AD.

## **Proxy's Access to Health Information**

- s.15(1): A proxy has the same right to all the information necessary to make an informed decision as the care recipient.

## **Joint Proxies and Resolving Conflict**

- s.12(8): Where there is more than one proxy for a care recipient, consent to the care may be given or refused by any one of them unless the directive provides otherwise.

## **Revising and Revoking an Advance Directive**

- s.33(2): A directive is revoked by
  - (a) the making of a later directive by the maker;
  - (b) the making of a later writing by the maker declaring an intention to revoke the directive; or
  - (c) the destruction, with intent to revoke, of all original executed copies of the directive either by the maker or by some other person in the presence and at the direction of the maker.

## **Protection from Liability**

- s.64: No action may be brought or continued against a person for any act or omission in the performance of a duty or the exercise of a power or function under this Act if the person has acted in good faith and used reasonable care.

## **Reciprocity Agreement Between Jurisdictions**

- s.34: A directive made outside Yukon that complies with the requirements of this Act is deemed to be a directive made pursuant to this Act.

## ***Northwest Territories***

### **Legislation**

*Personal Directives Act*, S.N.W.T. 2005, c. 16 [c.i.f.: Jan.1, 2006]

### **Type of Advance Directive Recognized**

- Instructional (referred to as “personal directive”)
- Proxy (referred to as “agent”: an agent means a person designated in a personal directive and authorized to make personal decisions on behalf of the director)
- s.5(1): a director may provide for any of the following in his or her personal directive:
  - (a) information about the director's values, beliefs and wishes;
  - (b) instructions on the making of personal decisions for the director at any future time when he or she lacks capacity;
  - (c) the designation of one or more agents and their authority to make personal decisions on behalf of the director in the future if he or she lacks capacity to make those decisions; ...

### **Who Can Make an Advance Directive?**

- s.4: A person (1) who is 19 yrs of age or older and (2) who understands the nature/effect of a personal directive.
- s.4(3): A person who is 19 yrs of age or older is presumed to understand the nature/effect of a personal directive.
- s.4(4): A person who is the subject of a guardianship order under the *Guardianship and Trusteeship Act* may not make a personal directive with respect to a matter that is a subject of that order.

### **Who Can Be Proxy?**

- s.13(1): An agent must be a person who is at least 19 yrs old who has capacity

### **Finding of Incapacity**

- s.9(2): the director is determined to lack capacity when two persons, each of whom is either a medical practitioner or a psychologist, jointly or separately assess the director's condition and make a written and dated declaration that the director lacks capacity.

- s.9(3): When a determination of lack of capacity has been made under subsection (2), each medical practitioner or psychologist making an assessment and declaration must provide a copy of the declaration to
  - (a) the director;
  - (b) any agent;
  - (c) if reasonably known, an authorized representative\*; and
  - (d) subject to any contrary instructions in the personal directive and if reasonably known, the nearest relative\*\*.

**Note:**

\*s.1: “authorized representative” means an attorney authorized to act for the director under the *Powers of Attorney Act* or a guardian or trustee for the director under the *Guardianship and Trusteeship Act*.

\*\*s.1: “nearest relative” means, with respect to a director, the adult (19 yrs of age or older) relative of the director, other than an agent, who is living, has capacity and is both the first mentioned in the following list and the eldest of two or more relatives of the same category: (a) spouse, (b) child, (c) parent, (d) brother or sister, (e) grandparent, (f) grandchild, (g) aunt or uncle, (h) nephew or niece.

**Duties of Healthcare Providers**

- s.19(1): duty of inquiry  
 Before providing a personal service to a person who appears to lack capacity to make a personal decision, a service provider\*\*\* shall make a reasonable effort to
  - (a) determine whether the person has made a personal directive;
  - (b) obtain a copy of the personal directive; and
  - (c) determine whether the personal directive is in effect.

**Note:** \*\*\*s.1: “service provider” means a person who carries on a business or profession that provides, or who is employed to provide, a personal service to an individual, if the service requires a significant personal decision from the individual before it is provided.

- s.19(2): duty to verify  
 Before providing a personal service to a person at the direction of another person who claims to be an agent authorized to make a personal decision with respect to the provision of that personal service, the service provider shall make a reasonable effort to determine
  - (a) the identity of the person who claims to be an agent; and
  - (b) that the person has authority to make the personal decision.
- s.21(1): A service provider shall make best efforts to
  - (a) follow an agent's instructions that are relevant to the personal service to be provided; or
  - (b) follow any instructions in the personal directive that are relevant to the personal service to be provided, if
    - (i) the directive does not designate an agent in respect of the relevant personal

matters, or

(ii) the designated agent is unable or unwilling to make a personal decision or cannot be contacted after reasonable efforts have been made.

- s.21(2): A service provider shall make reasonable efforts to contact any authorized representative and subject to any contrary instructions in the personal directive, the nearest relative, for the purpose of informing them of the circumstances, if
  - (a) an agent has not been designated under the personal directive in respect of the relevant personal matters, and the directive does not contain relevant instructions for the service provider to follow; or
  - (b) an agent has been designated under the personal directive in respect of the relevant personal matters, but cannot be contacted after the service provider has made reasonable efforts to do so.
- s.22(1): continuing duty to consider capacity  
A service provider shall, before providing a personal service, make a reasonable effort to determine if the director continues to lack capacity, notwithstanding that he or she is aware that a determination has been made that the director lacks capacity.
- s.22(2): duty to notify  
A service provider who believes that the director has regained capacity to make a personal decision shall, before acting on the director's personal decision, give notice of that belief to any agent who has been designated in respect of the relevant personal matters.

## **Technical Requirements**

- s.6(1): A personal directive must contain
  - (a) the director's full name and signature;
  - (b) the full name and signature of any person designated as an agent;
  - (c) a declaration by any person designated as an agent that he or she is eligible to be an agent and that he or she is aware of and accepts the instructions in the directive and the duties of an agent under the Act;
  - (d) the name and signature of a witness to the signature of the director; and
  - (e) the name and signature of a witness to the signature of an agent.
- s.6(2): The director and agent must each
  - (a) sign and date the personal directive in the presence of a witness; or
  - (b) acknowledge his or her signature in the presence of a witness.
- s.6(3): The witness must sign the personal directive in the presence of the director or agent whose signature is being witnessed.
- s.6(4): If the director is unable to read or sign a personal directive,
  - (a) the directive must be signed at the director's request by another person on behalf of the director;

(b) that other person must sign the directive in the presence of both the director and a witness or the director must acknowledge the signature in the presence of a witness; and

(c) the witness must sign the directive in the presence of the director.

- s.6(5): An agent or his or her spouse may not sign a personal directive on behalf of the director under subsection (4).
- s.6(6): The following persons may not witness the director's signature to a personal directive:
  - (a) an agent;
  - (b) the spouse of an agent;
  - (c) the spouse of the director;
  - (d) a person who signs the directive on behalf of the director under subsection (4);
  - (e) the spouse of a person who signs the directive on behalf of the director under subsection (4).

### **Limits on Power of Proxy**

- s.15(1): Before making a personal decision in accordance with a personal directive, an agent
  - (a) shall make his or her best efforts to consult with the director about the decision; and
  - (b) may, subject to any contrary instructions in the directive, consult with any other person whose advice would assist the agent in making the decision.
- s. 13(2): Unless the personal directive expressly provides otherwise, an agent shall not make a decision authorizing
  - (a) sterilization that is not medically necessary for the protection of the health of the director;
  - (b) the removal of tissue from the director's living body for transplantation to another person or for the purpose of medical education or medical research;
  - (c) psychosurgery;
  - (d) participation by the director in medical research or experimental activities, unless there is a reasonable likelihood of benefit to the director; or
  - (e) any other prescribed health care.
- s.26(1): the Supreme Court may, on an application under section 25 ...
  - (c) review an agent's decision under a personal directive and vary, confirm or rescind all or part of that decision, after considering any instructions contained in the personal directive;
  - (d) determine the authority of an agent;
  - (e) provide advice and directions in relation to a personal directive;
  - (f) stay a decision of an agent;
  - (g) make an order in relation to a personal directive or a decision made under this Act or a personal directive; and

(h) make any other order that the Supreme Court considers appropriate that is not inconsistent with a personal directive.

### **Proxy's Access to Health Information**

- s.29(1): Subject to any limitation set out in a personal directive, an agent...has the right to be provided with the information and records respecting the director that are relevant to the personal decision to be made on behalf of the director or to the determination of the director's capacity.

### **Joint Proxies and Resolving Conflict**

- s.16(1): Subject to subsection (3) and the provisions of the personal directive, if two or more agents are appointed to act jointly,
  - (a) a decision of the majority, if there are three or more agents, is deemed to be a decision of them all; and
  - (b) if one of the agents dies, resigns, has a loss of capacity, or is unwilling to or, after reasonable inquiries, is not available to make a decision, the remaining agents may make the decision and the decision of the majority of those remaining is deemed to be the decision of them all.
- s.16(2): Unless otherwise provided in the personal directive, if two or more agents appointed to act jointly disagree about the making of a decision and are unable to make a majority decision, the agent first named in the directive may make the decision.
- s.16(3): If a decision is made by a majority under subsection (1) or by an agent under subsection (2), an agent who is under a duty to act under this Act is not liable for the consequences of the decision if he or she
  - (a) does not at the time of the decision vote for or consent to the decision; and
  - (b) provides a written objection to the decision to each of the other joint agents as soon as is reasonably possible after becoming aware of the decision.

### **Revising and Revoking an Advance Directive**

- s.8(2): A personal directive is revoked, in whole or in part as the case may be,
  - (a) on the date or occurrence of an event identified in the personal directive as triggering the revocation of all or part of the directive;
  - (b) on the making of a subsequent personal directive that contradicts the earlier directive, to the extent of the contradiction; or
  - (c) on the making of any document, including a subsequent personal directive, that expresses an intention to revoke all or part of the earlier directive.
- s.8(3): A document referred to in paragraph (2)(b) or (c) that revokes a personal directive must meet the applicable requirements of s. 6 (see Technical Requirements).

## **Protection from Liability**

- s.27: No action lies against an (1) agent or (4) service provider for anything done or omitted to be done in good faith while carrying out his or her authority under a personal directive, if it was done or omitted to be done in accordance with this Act.
- s.27(5): No action lies against an agent or service provider for anything done or omitted to be done in good faith in reliance on a personal directive, if
  - (a) the director changes or revokes the directive or revokes the authority of the agent; and
  - (b) the change or revocation is done without the knowledge of the agent or service provider, as the case may be.

## **Reciprocity Agreement Between Jurisdictions**

- s.3(2): A personal directive made in another jurisdiction has the same effect as if it were made in accordance with this Act if
  - (a) a lawyer entitled to practice law in that jurisdiction has certified in writing that the directive meets the requirements relating to the formalities of execution for personal directives under the legislation of that jurisdiction; or
  - (b) the directive would have met the applicable requirements of s. 6 (see Technical Requirements) had it been made in the Northwest Territories.

## *Nunavut*

### **Legislation**

No legislation currently exists regarding advance directives.