



LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

Legal Capacity, Decision-making and Guardianship: Final Report

Backgrounder #6

New Roles for Professionals and Community Organizations

1. What Does the LCO's *Capacity, Decision-making and Guardianship: Final Report* Say About Professionals and Community Organizations As Substitute Decision-Makers?

Ontario's capacity, decision-making and guardianship laws are based on the assumption that the best substitute decision-maker is one with close emotional bonds and deep knowledge of the person.

The LCO heard that more and more individuals are "socially-isolated" and that families are smaller and more geographically scattered. The LCO also heard that there are increasing pressures on the Public Guardian and Trustee's role as substitute decision-maker and that pressure will increase with changing demographics.

The LCO's *Legal Capacity, Decision-making and Guardianship: Final Report* proposes reforms that investigate the use of professionals and community organizations as substitute decision-makers in limited circumstances. The LCO's recommendations would:

- Address the needs of socially-isolated individuals and others who need greater access to high-quality, accountable substitute decision-making;
- Provide individuals with greater choice while ensuring safeguards against abuse;
- Allow the Provincial Guardian and Trustee (PGT) to more effectively focus its role, and reduce risks of abuse.

2. What Did the LCO Learn?

Under current Ontario law, a substitute decision-maker must be identified if a person does not have the legal capacity to make a necessary decision or type of decision. The law assumes that the best substitute decision-maker is one with close emotional bonds and deep knowledge of the person. As a result, in the vast majority of cases the substitute decision-maker will be a member of the individual's family or a close friend. In a small number of cases, individuals have other substitute decision-makers, including professionals (such as a lawyer), an organization (such as a trust company) or the government, through the Public Guardian and Trustee.

The LCO learned that Ontario's approach is challenged as a result of shifting demographics and family structures. The LCO learned that more and more individuals are "socially-isolated" and that families are smaller and more geographically scattered. The LCO was also told that older persons may outlive their close family and friends. It was also pointed out that for many individuals the selection of a substitute decision-maker from among family members was not ideal. In these circumstances, many individuals increasingly find themselves with no one to act as their substitute decision-maker for personal care. This situation was sometimes described as a "personal care gap."

The LCO learned that there are increasing pressures on the Public Guardian and Trustee's role as substitute decision-maker and that pressure will continue to increase with changing demographics.

Finally, the LCO learned about innovative organizational structures in Ontario and other provinces in which professionals and community organizations stepped into the decision-making role. The LCO heard, however, about the serious risks of allowing unregulated service providers to move into these gaps to make decisions for vulnerable individuals in the absence of appropriate oversight.

3. The LCO's Recommendations

Chapter Nine of the LCO's *Final Report* includes recommendations that:

- The mandate of the PGT focus on providing its expert, trustworthy, professional substitute decision-making for those who do not have access to appropriate alternatives.
- Further research and consultation be conducted towards establishing a dedicated licensing and regulatory system for professional substitute decision-makers; and
- Further research and consultation be conducted towards allowing community agencies to provide substitute decision-making for day-to-day decisions.

More information about the LCO's *Capacity, Decision-Making and Guardianship: Final Report* is available at <http://www.lco-cdo.org/>.