

## ADULT GUARDIANSHIP TRIBUNAL: MINISTRY REVIEW

Dated: June 30, 2014

### BACKGROUND:

In the Report, “No Longer Your Decision: British Columbia’s Process for Appointing the Public Guardian and Trustee to Manage the Financial Affairs of Incapability Adults,” the Ombudsperson made the following finding:

“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.”

The Ombudsperson made the following corresponding recommendation:

**Recommendation 26:** “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 committed to reviewing this recommendation and to publicly report on the results of this review.

### PURPOSE:

To evaluate whether to establish a tribunal for a person who wishes to dispute the issuance of a certificate of incapability (a certificate) that results in the Public Guardian and Trustee (PGT) being appointed as the person’s Statutory Property Guardian (SPG).

### CONCLUSION:

Establishing an independent tribunal to hear disputes by persons for whom a certificate is issued is not recommended, given the changes being implemented to provide procedural safeguards and strengthen the decision-making process.

The new procedures to be applied to decisions regarding whether or not to issue a certificate will provide significant safeguards to protect the interests of affected persons. With those safeguards in place, the anticipated volume of disputes about findings of incapability is expected to be very low, based on the number of certificates issued annually (400-450) and the appeal statistics in other provinces. The court has the requisite expertise, existing processes and capacity to deal with these disputes. Court review of the issuance of certificates is consistent with resolution of other similar property guardianship issues.

To establish and maintain an independent tribunal, government will incur costs and the anticipated low caseload would not appear to justify those costs. To provide for tribunal review of the issuance of certificates may raise expectations for establishing a tribunal to review other matters of similar significant impact on individuals, such as consents to health care and other treatment decisions which, in B.C., are currently within the sole jurisdiction of the courts.

## **ANALYSIS:**

Evaluation of the need for and advisability of an appeal tribunal depends in large part on the goals, legislative framework and the processes to be applied, and the impact of the decisions on the person and the public. The characteristics of a tribunal in comparison to the courts, and the factors that indicate when a tribunal is advisable, need to be considered in the context of those factors. How review issues are addressed by other jurisdictions can also be of value in considering the options.

### ***The Process:***

*Overview of the process* – Guardianship of the property of a mentally incapable adult can be created in two ways: by order of the B.C. Supreme Court or by a statutory process. The statutory process involves the issuance of a certificate and is invoked to protect the financial interests of a person who is vulnerable due to incapability by placing the person's financial affairs under the supervision and control of the PGT. A certificate removes a person's ability to control their own finances, limiting the person's autonomy and independence. Guardianship is intended to be used when other less intrusive measures of support are unsuitable and, within that, statutory property guardianship is used only when private court guardianship is also unavailable. Ideally, a person will have appointed another person as a power of attorney to act for them, or a family member or trust company will apply to the courts for an order to act on the person's behalf, so that the statutory property guardianship framework does not need to be used.

*Current legislative framework* – The current legislative framework and practices for issuing certificates have been criticized by the Ombudsperson for a number of reasons, generally related to procedural fairness. Under the current law, there are no statutory provisions to protect the rights of the allegedly incapable adult. The process provides little opportunity for the person affected (or their families) to be informed of the process or the impact of a certificate being issued, to participate in the process, or to have the outcomes reviewed. Within the broader scheme, there are no legislative guidelines or criteria for making the decisions (although the PGT has established voluntary guidelines), so the decisions regarding issuance of a certificate may lack consistency in terms of what is considered and/or how it is evaluated. There is no opportunity for a review, except through a re-assessment, which suffers from the same lack of procedural fairness as the initial assessment, or by the courts.

*Proposed changes* – The Ombudsperson made a number of recommendations for changes to improve the SPG certificate process. The Ministry of Justice, the PGT, the

Ministry of Health and the health authorities have accepted most of the recommendations directed to them. Based on the recommendations that were accepted, substantial changes are being made, which will implement significant procedural protections.

Most of those changes will be implemented under provisions of the *Adult Guardianship Act* (AGA) scheduled to be brought into force on December 1, 2014. Others will be by regulation. The proposed changes include:

- Only a qualified health care professional (QHCP) can make an assessment of the person's incapability. Regulations will be enacted setting out who, in addition to a medical practitioner, may be a QHCP so that assessments will be made only by persons qualified to do so. As well, the regulations will set out the standards to be applied when making an assessment, to ensure professional and objective evaluation based on consistent criteria. A medical examination will be a required component of the assessment, together with a functional evaluation.
- The affected person will be given notice of the assessment, its purpose, and their general right to have another person attend with them and the right to refuse to participate. If a person does refuse to participate, the QHCP can still make an assessment without their participation, but the person is entitled to all of the other procedural protections available to others.
- All persons will be entitled to receive a copy of the assessment report and can raise concerns with the assessment, and the results of the assessment, with the QHCP.
- If the QHCP's assessment is that the person is incapable, the report will be sent to the Health Authority Designate (HAD) who decides whether to issue a certificate.
  - The designated persons will be trained to conduct reviews of the QHCP reports and other additional information, and to consider and apply statutory criteria in the decision-making process of determining if a certificate should be issued.
  - The HAD will consult with the PGT with respect to the other statutory criteria (the need to make financial decisions, the need for and benefits of the protection of a SPG, if alternative means of protection are available, whether there is no Power of Attorney or if there is one, they are not complying with their statutory duties).
  - The person will be given notice if the HAD's preliminary review indicates a certificate will be issued, and will be given an opportunity to respond to that preliminary determination, before a decision is made.
  - Only if all criteria are met will a certificate be issued. The HAD will notify the person and their spouse or near relative and the PGT will also give notice of the appointment and its impacts, and of the the right to a second assessment or, if still dissatisfied, to apply to the court.
  - If requested by the person, a second assessment must be carried out by a QHCP, with the same rights and prescribed tests and standards as an initial assessment. If dissatisfied with the second assessment, the affected person may apply to the court for a review of the determination.

- The affected person is entitled to a reassessment every 12 months, or on the request of the SPG, if discharged from a mental health facility, or if the court orders.

These process changes will meet the natural justice requirements of the right to notice of and the opportunity to be heard in the decision-making process. Additionally, the requirements for qualified assessors and the application of standard, objective evaluation processes and criteria to be considered by skilled, trained decision-makers will strengthen the fairness and objectivity of the decisions being made. The right to a second assessment, with all of the procedural safeguards of an initial assessment, will provide an opportunity for review.

*Statistics* – The PGT undertakes about 1,600 preliminary investigations of capability and need for a certificate annually. The investigations result in approximately 400 to 450 certificates being issued by health authorities each year. Approximately 3,000 certificates are in force at any given time. The number of persons for whom a certificate is issued that dispute the certificate is not known, but reports are that they are few (not more than a handful a year although the lack of an easy to access remedy may depress the volume somewhat). Approximately 350 committee applications are made to the courts annually, which do not engage the SPG certificate process.

#### ***A Tribunal or the Court:***

*Features of a tribunal* – The distinguishing characteristics of a tribunal compared to the courts are set out in Appendix A. Those characteristics include limited statutory jurisdiction, appointments for a term of years, specialized (often non-legal) expertise, and specially designed procedures to meet various needs of the particular participants.

*The selection criteria* – The considerations associated with selecting a tribunal are set out in Appendix B. A tribunal is best suited to high volume, complex regulatory matters, requiring specialized expertise that the court cannot provide. A tribunal may also be advisable where the initial decisions are made quickly and without the opportunity to participate fully, or where no internal review is provided.

*Applying the selection criteria to the certificate process* – The advantages and disadvantages of a tribunal and the courts in the context of the certificate framework are described in Appendix C. The detailed front-end procedures to be implemented in the certificate decision-making process will provide substantial early procedural fairness and objective, professional decision-making. The opportunity to request a second assessment will give the affected persons a right of review.

In addition, the principles of proportionality and coherency need to be considered:

- *Proportionality* – Proportionality requires that the costs of a tribunal be weighed against demand and the need for review (whether procedural fairness requirements have provided adequate protection). Substantial costs are associated with establishing a tribunal: office space, technology and

administrative support, appointment and training of members, travel and hearing costs. The expected caseload must be at a level to justify incurring these costs. With the strong procedural fairness protections and the prescribed objective evaluations applicable at both the assessment and evaluation stages of the new certificate procedure, (and given other statistics from other provinces, see Appendix D), the caseload of potential disputes in B.C. is expected to be very low. An affected person will also have the opportunity for a second assessment which should provide an adequate opportunity to correct any errors of fact or in applying the evaluation criteria. If still dissatisfied, the person can make an application to the court.

- *Coherency* – Other similar issues related to capacity and management of financial property are routinely dealt with by the courts. To vest review jurisdiction over SPG certificates in a tribunal would not be coherent within that larger scheme. Further, it may lead to a demand that other matters with significant personal impacts that are currently heard by the courts (for example, mental health treatment and health care consents) be diverted to a tribunal.

## **OPTIONS:**

If an existing tribunal is to be utilized to consider disputes about issuance of certificates, the Mental Health Review Board (MHRB) may provide a good option. However, there will be costs associated with this, even with the low caseload anticipated as a result of the significant procedural safeguards to be implemented. In addition, further review of the implications including the need and scope of any legislative amendments would be required and the Ministry of Health is not currently considering amendments to the *Mental Health Act*.

The MHRB reviews whether persons committed or detained at a mental health facility should continue to be committed. Hearings are conducted by panels comprised of a medical practitioner, a lawyer, and a third member who is neither a medical practitioner nor a lawyer. Recent statistics indicate about 600 hearings annually. Hearings must be held within statutory time limits of either 14 or 28 days. Review panel hearings normally take place at the hospital or community facility where the patient is detained.

As an expert tribunal, with both medical and legal expertise, the MHRB has an appreciation of mental health issues and is used to acting within tight timelines.

Disadvantages/challenges to utilizing the MHRB may include:

- Criteria for incapability will be different from criteria for involuntary detentions. Care would need to be taken to avoid conflating the issue of capacity with involuntary detention for mental health issues for the affected persons, the HA designates, the MHRB and the public.
- The MHRB's capacity to take on additional work is unknown.
- The anticipated small caseload may not justify the expenditures that will be incurred to train members about the SPG Certificate process and to develop new rules for the new process.

- Expectations may be raised for other issues of significant personal impact to be brought within the jurisdiction of the MHRB, most notably the review of mental health treatment issues that are currently heard by the courts.
- Persons with disabilities other than mental illness (or their advocates) may object to having their capacity determined by a tribunal whose focus is mental illness. There could be concerns expressed by advocates for seniors, or people living with a developmental disability or acquired brain injury.

### **CHALLENGES, OUTSTANDING ISSUES, AND NEXT STEPS:**

Care will need to be taken to ensure that the front-end processes are as robust as proposed, and do in fact provide the requisite level of notice and an adequate opportunity to participate in the process, in order to allay the Ombudsperson's concerns about a lack of procedural fairness.

The HADs must be trained to ensure they follow the proper notification and preliminary evaluation processes, apply the right tests, make appropriate decisions based on the evidence presented to them, and issue adequate reasons for their decisions. The process cannot simply be, or be seen to be, one of "rubber-stamping" the assessment made by the QHCP.

Provision of a second assessment will need to be timely and to provide all of the safeguards of the initial decision-making process, especially in those circumstances where the person either refused to participate in or, due to concerns about danger to the person, was not notified of the initial decision-making process.

### **ATTACHMENTS:**

APPENDIX A – Options for a Review

APPENDIX B – Selection Criteria – Tribunal or Court

APPENDIX C – Applying the Criteria to the SPG Certificate Scheme

APPENDIX D – Other Jurisdictions

## APPENDIX A – OPTIONS FOR A REVIEW

Review options include a tribunal, the courts and an internal review. To assist, a brief overview of what a tribunal is, and how a tribunal compares to the other review options (courts and internal reviews) is set out below. In some situations, more than one type of review may be provided and, in some very limited situations, all three review options may be used.

### ***Tribunals:***

“Tribunals” encompass a broad range of entities. Not every tribunal will have the same attributes, but there are some general commonalities (with, of course, some exceptions to each of these). Generally a tribunal is an independent body, established by legislation, given specific powers and authorities to make “quasi-judicial” decisions (applying the law to findings of fact), in matters that have legally binding consequences for the parties affected. The tribunal is typically comprised of members appointed under the legislation for a term of years, generally with expertise in the area in which the decisions are made. A tribunal may be less formal than the courts in terms of its procedures, and is generally able to make decisions more quickly and at less cost than the courts. Government is removed from the decision-making process but retains responsibility for the effectiveness of the operations of the tribunal and its costs.

A tribunal is often used where there is an expected high caseload that would otherwise overwhelm the courts (for example, the Employment Assistance Appeals which hears over 800 appeals annually,) a high level of specialized expertise in the area (for example, the Environmental Assessment Appeal Board), or a complex regulatory or licensing scheme (for example, the Passenger Transportation Board).

Tribunal members, appointed by government for a term of years, are viewed as less independent than the courts but with greater independence than government ministry employees.

### ***Courts:***

The courts provide the highest degree of decision-making independence, but their processes are typically very formal and prescribed, so that they can be costly to access and less timely in their decision-making. While the courts will always have an inherent jurisdiction to review government actions (judicial review), legislation may provide an express right for an application to the courts for review (and may set specific time limits and processes for exercising that right) in order to provide a more accessible and broader review than by judicial review.

The court currently hears other applications made by family members or other persons for the authority to make financial decisions for their relatives or others who are not capable of doing so themselves (“a committee order”). The Statutory Property Guardian (SPG) certificate framework applies when no family member is willing or able to make such an application to the court.

***Internal Review:***

Internal review schemes provide for the review of a decision by a person who operates within the scheme and who is not necessarily at arm's length from the initial decision maker (the degree of distance/independence from the original decision maker may vary). Internal reviews are usually quicker and less costly than a tribunal or the courts. The expertise of an internal decision reviewer may be higher than a tribunal or the courts, but the extent of actual and perceived independence is usually lower than that of a tribunal or the courts. A right to an internal review is set by legislation, and limits on the right of review and the processes used can also be set by legislation. The new SPG certificate framework will provide for an internal review by way of a second assessment.



## APPENDIX B – SELECTION CRITERIA – TRIBUNAL OR COURT

There is no one indicator of which review option is preferable. Rather, a matrix of factors needs to be considered and weighed. As the new Statutory Property Guardian certificate framework will provide for an internal review by way of a second assessment, the options discussed are a tribunal or the courts.

### ***Caseload Volume:***

Tribunals are often used when there is a high volume of appeals, and may be especially appropriate where the initial decisions are made quickly and may be prone to potential errors that can be easily corrected with better information being provided. Conversely, an expected low volume of cases may indicate the court is the better option, given the costs associated with establishing and maintaining a tribunal.

### ***Coherency:***

The form of review should be coherent with other related schemes, so that the persons affected, and the public, can see and understand how a review process fits with other similar schemes.

### ***Expertise:***

If the initial decision is one that entailed specialized expertise of the legislative scheme or of the subject matter (for example, regulatory or licensing schemes) then a tribunal may be better suited than the courts which have a more generalized legal expertise. If the courts have familiarity with the subject matter, then the courts may be better suited to conduct the review.

### ***Number of Parties:***

If there are a number of diverse parties, with diverse interests and perhaps diverse resources, then a tribunal can provide the best option for each party to have their views heard (for example, neighbourhood planning decisions or environmental assessments). The court's processes may get bogged down if too many parties, with diverse interests are involved. If there are only two parties, or very few parties, then the court processes may be sufficient to allow the divergent views to be expressed.

### ***Number and Diversity of Issues:***

If there is likely to be a number of issues and/or the issues are diverse, a tribunal may have the breadth of expertise required and the flexibility to deal with a broad range of issues.

### ***Public Interest in the Outcome:***

If there is a high degree of public interest in the outcome, a tribunal may provide an easier option for more people to participate in various ways. The court processes may make it difficult for various levels of participation, so the courts may not be the best option in these cases.

***Need for Privacy:***

A tribunal review may have more flexibility to protect sensitive private matters, but legislation can expressly grant the courts the right to keep information private, for example in adoption matters.

***Need for Independence:***

Some decisions have a greater direct impact on government's direct relationship with an affected party which may compel a higher level of independence between government and the decision maker. Tribunal members, appointed by government for limited statutory terms, are not viewed as independent from government as judges who are appointed for life.

***Need for Simplified Processes:***

The courts require parties follow court rules, which may be difficult to understand without a lawyer. Tribunals can usually set their rules to meet the needs of the parties, having consideration for the matters at issue.

***Accessibility:***

The nature and structure of a review scheme should reflect the needs of the persons who would use it. Accessibility encompasses how simple or complex the processes might be, the ease to how easy to navigate the process, and if legal or other assistance must be obtained. Tribunals may set more informal processes than the courts and are typically less costly for the parties.

***Timeliness:***

The need for a quick decision may indicate a tribunal is a better option.

## APPENDIX C – APPLYING THE CRITERIA TO THE STATUTORY PROPERTY GUARDIAN CERTIFICATE SCHEME

The new Statutory Property Guardian (SPG) certificate framework will incorporate significant “front end” safeguards to protect the rights and interests of the affected persons. The affected persons will be given notice before an assessment of capability is undertaken, and assessments will be made by a qualified person, applying standard criteria and tests, and will include a recent medical opinion. The person can raise concerns about the assessment with the person conducting it. A copy of the assessment report will be made available. Additionally, before a decision is made to issue a certificate, the person will be given notice and a reasonable opportunity to respond. The decision whether to issue a certificate will be made by trained, designated persons, applying statutory criteria. Once a decision is made, the person will be entitled to a review by way of a second assessment. The second assessment will provide an opportunity for the person to provide any information that may have been missed and to correct any information that was in error or incomplete in the initial assessment. As such, an effective internal review is provided, so that the criteria set out in Appendix B are considered only to compare the desirability and need for of a tribunal with a statutory right of application to the courts, based on the features of the new framework.

### ***Caseload:***

The number of SPG certificates currently issued annually is small – between 400 and 450 (or about 25 per cent of the 1,600 investigations). The new framework is not intended or expected to increase the number of certificates issued. Instead, the new framework will provide a more robust process whether to issue a certificate (which could, but may not necessarily, result in a reduction in the number of certificates issued). The number of certificates for which a further review would be sought should be a small percentage of the number issued, given the procedural and substantive safeguards that are to be put in place, including the right of a second assessment.

In Ontario, about 2,000 certificates are issued annually. Of these, about 225 (12 per cent) are appealed to a tribunal (which also hears a wide variety of other matters). Of those, about 200 are under the *Mental Health Act* (where the person’s consent to an assessment is not required) and about 50 per cent of the 200 *Mental Health Act* applications are tied to other applications dealing with other mental health issues such as treatment and involuntary detention.

In Manitoba, certificates issued by a mental health facility are reviewed by a tribunal (which also hears treatment and detention issues) – of the approximately 75 hearings in total annually, less than five were solely about the ability to manage property. Of the SPG certificates issued for persons not in a mental health facility, the decision-making process requires notice and the opportunity to make written submissions, and an experienced decision-maker. Review is restricted to the courts, with less than five

applications annually. (See Appendix D for a discussion of the Ontario and Manitoba models.)

A B.C. tribunal, the Health Care Consent Board, established to consider health care treatment orders was disbanded due to the low volume of appeals, and that jurisdiction was returned to the courts.

Based on this criteria, the costs to establish and maintain a tribunal for the anticipated very small caseload do not support that option.

(Note: With respect to the Mental Health Review Board (MHRB), the high caseload volume, combined with the need to attend at the facility for hearings and the timeliness in relation to involuntary detention are all thought to be the criteria that supported a tribunal instead of the courts.)

***Coherency:***

The process for the review should be coherent with other related schemes.

Applications for a person to manage another person's finances due to incapacity are typically made to the courts. About 350 such applications are made annually. These applications are a traditional function of the courts, and the rules and processes for these applications are well developed and known. The courts have expertise in dealing with the medical evidence to support these applications and the factors to be considered when exercising their discretion.

Where a tribunal has been used in other provinces, the tribunal typically has multiple functions under the mental health legislation (detention and treatment) and, in the case of Ontario, other legislation related to health care treatment decisions. In B.C., the MHRB is limited in its jurisdiction to involuntary admission issues. A B.C. tribunal, the Health Care Consent Board, established to consider health care treatment orders was disbanded due to low volume and that jurisdiction was returned to the courts.

***Expertise:***

The SPG certificate scheme is not complicated. The legislation is straightforward. The subject matter does require expertise in evaluating medical and other health care assessments, and an appreciation for the impact on persons as a result of loss of financial autonomy. The courts already have this expertise, which is exercised in the committee process. The MHRB has some similar, but different expertise.

Based on this criteria, the courts' expertise should be recognized and utilized. A small number of cases to a tribunal would not allow the tribunal to develop and maintain sufficient expertise.

***Number of Parties and the Number of Issues:***

Only a very limited number of parties will be involved in the SPG certificate reviews: the person affected (and perhaps his or her family members) and the health authority that issued the certificate. (The Ombudsperson's concern is about the rights of the person

subject to the order. If a person acting under a Power of Attorney takes issue with being replaced as a result of a certificate, that person can take their dispute to the court, like any other committee matter.)

With only two parties, the court processes can easily deal with the divergent views to be expressed.

***Number and Diversity of Issues:***

The only issues will be the person's capability and the processes and assessment relied on to arrive at that conclusion. The issues will be focused and the court's processes may deal with this reasonably.

***Public Interest in the Outcome:***

The public has no direct interest in the outcome of a particular person's capacity. The public does not need to be (nor should it be) consulted. The public interest to have an effective system to protect vulnerable people can be satisfied by effective reporting mechanisms.

***Need for Privacy:***

There will be a high need for privacy of the persons. While privacy can be protected at either the tribunal or the courts, by legislation, at present similar matters in the nature of committee applications are heard by the courts without any privacy protection being considered necessary.

***Need for Independence:***

Government has no direct interest in the outcome of any particular case. The need for independence between government and the decision maker is low. Either a tribunal or the courts may satisfy this criterion.

***Need for Simplified Processes:***

The court's formal rules may make it difficult for some persons to access the courts. A tribunal is typically easier to access without a lawyer or the associated costs. However, without a defined stakeholder community, a tribunal would need to take great care in developing its rules and practices to ensure they meet the users' needs. Additionally, a lack of volume may mean the tribunal would not have an opportunity to develop and test the effectiveness of its practices.

***Accessibility:***

The new SPG certificate framework will provide significant opportunities for affected persons to have notice of and input into the initial decision-making process, and a second assessment and evaluation will be available to them. This will, in part, address some of the access issues. Further, the Public Guardian and Trustee will be advising persons for whom a certificate is issued that they may retain legal counsel and access their own funds to do that. The costs of going to court will, however, remain a challenge to these users.

***Timeliness:***

While the person may experience a loss of autonomy while awaiting a second assessment or a court application, the SPG certificate will protect the person's assets so that the need to provide a review on an urgent basis is somewhat diminished. In the interim, the person will be able to access the Public Guardian and Trustee dispute resolution processes. A tribunal with only a very small caseload may have difficulty in maintaining a readily available panel and timely processes.

## APPENDIX D – OTHER JURISDICTIONS

### **Ontario:**

Ontario utilizes a tribunal to review Statutory Property Guardian (SPG) certificates – the Consent and Capacity Board (CCB). The CCB has multiple jurisdictions, with key areas of activity being the adjudication of matters of capacity, consent, civil committal and substitute decision-making. These include:

- Under the *Health Care Consent Act*, reviews of capacity to consent to treatment, admission to a care facility or personal assistance service; the appointment of a representative to make decisions for an incapable person with respect to treatment, admission to a care facility or a personal assistance service; requests to amend or terminate the appointment of a representative; reviews of a decision to admit an incapable person to a hospital, psychiatric facility, nursing home or home for the aged for the purpose of treatment; requests from a substitute decision maker for directions regarding wishes; requests from a substitute decision maker for authority to depart from prior capable wishes, and the review of a substitute decision maker's compliance with the rules for substitute decision making.
- Under the *Mental Health Act* (MHA), reviews of involuntary status (civil committal), community treatment orders, whether a young person (aged 12 to 15) requires observation, care and treatment in a psychiatric facility, and findings of incapacity to manage property.
- Under the *Personal Health Information Protection Act*, reviews of findings of incapacity to consent to the collection, use or disclosure of personal health information, the appointment of a representative for a person incapable of consenting to the collection, use or disclosure of personal health information, review of a substitute decision maker's compliance with the rules for substitute decision making.
- Under the *Substitute Decisions Act*, reviews of statutory guardianship for property.
- Under the *Mandatory Blood Testing Act*, the CCB may order a person to provide a blood sample for analysis.

Over 80 per cent of applications to the CCB involve a review of a person's involuntary status in a psychiatric facility under the MHA, or a review under the *Health Care Consent Act* of a person's capacity to consent to or refuse treatment. Two hundred thirty-six (236) applications were made to the CCB in 2012/2013 dealing with the management of property, comprising about 5 per cent of the CCB's annual caseload.

The *Substitute Decisions Act* (SDA) process applies to SPG certificates issued under both that Act and the *Mental Health Act* (MHA). About 1,938 SPG certificates were issued to the Public Guardian and Trustee (PGT) in 2012/2013. The SDA provides for:

- If a person is admitted to a mental health facility, under the MHA the attending physician must complete an assessment – the patient's consent is not required. On a certificate being issued under the MHA, the PGT becomes the SPG. The person and a rights advisor are then notified, the rights advisor explains the certificate and may assist in a review by the CCB under s. 20.2 SDA. Also under

MHA, a certificate must be reviewed before discharge. If the certificate is to be continued, the person has a right to review by CCB.

- For non-MHA certificates, a person may request an assessment (of another person) and advise that other factors are met, the assessor advises the person of the purpose of the assessment and their right to refuse. The assessor completes the assessment, considers the other factors, and may issue the certificate to the PGT as SPG. The PGT gives notice to person and that the person can apply to CCB for review of incapability.
- A SPG is required to help a client arrange to get reassessed if they wish. A positive reassessment of capability automatically ends the SPG.
- A person can apply to PGT to substitute another SPG, and PGT can issue that certificate. If the PGT refuses to substitute the other person, reasons given and if there is still dispute, PGT applies to court.
- A CCB review may be requested every six months.
- Of the 236 applications to the CCB in 2012/2013 dealing with the management of property, 38 applications were under the *Substitute Decisions Act* and 198 applications were under the *Mental Health Act* of which approximately 100 were tied to other MHA applications. How many of these were repeat requests is not known.
- This means that of the total SPG certificates issued, about 12 per cent requested reviews: about 2 per cent of those reviews (38) were of certificates issued under the SDA where patient consent is required for an assessment, and about 10 per cent (198) were certificates pursuant to the MHA where patient consent is not required.

#### **Analysis:**

- The CCB has multiple jurisdictions. The number of SPG Certificates appealed to represents only 5 per cent of its work. Of those appeals, 80 per cent were for certificates issued under the MHA where the person does not have the right to refuse the assessment.
- Most of the other matters over which the CCB has jurisdiction are, in B.C., left to the courts. The exception is involuntary detention, which the MHRB has jurisdiction over.
- The front-end process to issue a certificate does not appear to be as rigorous as that to be implemented in BC. For example, the certificate is issued by the person making the assessment.

#### **Manitoba:**

Manitoba utilizes a tribunal review for orders made respecting persons in mental health facilities, and the courts for all others.

- In facility – the admitting physician makes a determination of capability (and other factors – e.g. decisions need to be made), the medical director reviews and issues the certificate. The person has a right to review by the Mental Health Review Board (MHRB) (which also has jurisdiction for detention and treatment decisions). That board's decisions may be appealed to court. The Ministry



understands that the MHRB typically gets no applications solely about property management with fewer than five applications about detention or treatment also including property management issues. If a certificate is to be continued after detention in the facility, then the process described below applies.

- Not in a facility: (“Committee without a court order”) A physician on examination (includes on a discharge from mental health facility) determines if the person is incapable (and other factors, e.g. decisions need to be made) and issues a certificate, sending it to the provincial Director of Psychiatry who gives notice to person and others of the intent to issue, the effect of the order and the right to make a written objection/wishes. The Director considers the person’s best interests. If a certificate is issued, the person (or other person with leave) must apply to court to cancel or appoint another person within 30 days. (The Ministry understands that generally fewer than five court applications are made per year).

(Note: Manitoba has a different process for persons with capacity issues as a result of impairment that manifested before 18 years old (developmental disorders)). Families are very involved, with a designated commissioner overseeing the process, with community-based panels to assist in making recommendations. Appeals are to the court, with perhaps one to three per year, typically by the family, not the person. The issues on appeal are not typically around if an individual is incapable, but more likely to be who should be the substitute decision maker.)

***Analysis:***

As in Ontario, Manitoba uses a dual system of issuing and reviewing an SPG certificate, differentiating between those issues in a mental health facility and those not in a facility. The in-facility certificates appear to be issued with few procedural safeguards. For these certificates, the MHRB, which has jurisdiction respecting detention and treatment issues may hear and decide these matters. For the not-in-facility certificates, the front-end process provides for an assessment by a physician, notice and an opportunity to make submissions, and for the decisions to be made by a designated person, who presumably applies the same evaluation criteria in all cases. For these certificates, the right of review is by appeal to the courts.

The B.C. process will treat all persons similarly, whether in a facility or not. The processes for all persons will require notice and the opportunity to participate at all stages of the process. Only qualified persons may make an assessment (which will include a medical opinion), applying prescribed criteria, which will be assessed by trained and skilled decision-makers who will give notice and the opportunity to make submissions. The opportunity for a second assessment will be a substantial additional safeguard. With these safeguards, the right to apply to the court for a review should be sufficient protection.