

# ***PRESS RELEASE***

October 6, 1993

**The Law Reform Commission of Nova Scotia is pleased to announce the release of its latest Discussion Paper**

## **ADULT GUARDIANSHIP IN NOVA SCOTIA: Suggestions for Reform of the Incompetent Persons Act**

In this Discussion Paper the Law Reform Commission considers the law as it relates to adult guardianship in Nova Scotia. At present, a guardian may be legally appointed to make personal and financial decisions on behalf of an adult who is found by a court to be mentally "incompetent". The law most often used to have a guardians appointed for adults is called the *Incompetent Persons Act*.

According to the Executive Director:

"The *Incompetent Persons Act* of Nova Scotia is copied from an old English law and is basically in need of replacement for many reasons. It still uses the same language as when it was first adopted. This language, which describes people as "lunatics" and "incompetents" is offensive and inaccurate. Besides the offensive language, the Commission believes there are a number of other problems with this law including the fact that guardianship orders made under the *Incompetent Persons Act* usually give full powers for both personal and financial decisions to a guardian, even if the adult is only in need of one type of decision-making assistance."

The Discussion Paper suggests reform to the law based on a number of principles which the Commission believes are important to Nova Scotians. These principles are:

- *an adult's right to autonomy and self-determination*
- *a presumption of competence*
- *guardianship as a last resort*
- *a guardianship order should be the least restrictive one*
- *the wishes of the adult to be taken into account*

Most adults who need a guardian are able to make some decisions for themselves. The Commission believes that they should be encouraged to do so. Guardianship orders should be designed to reflect this. For example, the Commission believes that Guardianship orders should focus on the adult's abilities, allowing the person to participate in decision-making as fully as possible in as many areas of decision-making as possible.

This Discussion Paper suggests that if public response agrees with the need for adult guardianship orders, than a new law should be passed to include some the following points:

- The law should provide for the separate appointment of a "guardian of the estate" as well as a "guardian of the person". Also, the law should allow for **partial** guardianship orders.
- A guardian should only be appointed if it is in the best interests of the adult and only if the adult is in need of a guardian.
- The language used to refer to a person found to be in need of a guardian should not include the terms "incompetence" or "incapacity". The Commission seeks the views of the public on the language to be used.
- There should be some limits on what a guardian of the person can consent to on behalf of the adult. For example, a guardian should not be allowed to consent to non-therapeutic sterilization or involuntary admission to a psychiatric hospital.
- A person subject to a guardianship application should have the right to a hearing and should have an opportunity to hire a lawyer for independent legal advice.

The Law Reform Commission of Nova Scotia is an independent Commission whose work is funded by the Law Foundation of Nova Scotia and the provincial Department of Justice. The Commission is interested in receiving public response and comments on this Discussion Paper. A Summary of the Discussion Paper is attached to this press release. Copies of the Summary in French and Mik'maq are also available.

If anyone would like to have a copy of the Discussion Paper it is available free of charge from:

The Law Reform Commission of Nova Scotia  
1526 Dresden Row  
Halifax, Nova Scotia  
B3J 2K2  
Phone: 423-2633  
Fax: 423-0222.

The Discussion Paper can also be made available to people who provide us with a computer disc (WordPerfect 3.50). If you have queries or would like to arrange for a discussion regarding the Paper please call:

Anne Jackman, Legal Research Officer, or  
Dr. Moira L. McConnell, Executive Director

The Law Reform Commission of Nova Scotia was established by the Government of Nova Scotia under the *Law Reform Commission Act*, in February 1991.

The Commissioners are:

William Charles, Q.C., President  
Ronald Culley, Q.C.  
Justice John Davison  
Beverley Johnson, M.S.W.  
Dawna Ring, LL.B.

Dr. Moira McConnell is Executive Director to the Commission.

Anne Jackman, LL.B., is Legal Research Officer to the Commission. Katherine Carrigan, LL.B., is a legal research consultant for the project on adult guardianship.

The Commission offices are located at 8th Floor, Garrison Place, 1526 Dresden Row, Halifax, Nova Scotia, B3J 2K2. The telephone number is 423-2633 and the Fax Number is 423-0222.

The Law Reform Commission receives funding from the Government of Nova Scotia and the Law Foundation of Nova Scotia. The Commission gratefully acknowledges this financial support in carrying out its research projects.

**Canadian Cataloguing in Publication Data:**

Law Reform Commission of Nova Scotia Discussion Paper on Adult Guardianship in Nova Scotia, September, 1993

# WHAT DO YOU THINK?

The Law Reform Commission is very interested in knowing what you think about the issues raised in this Discussion Paper: *Adult Guardianship in Nova Scotia, Suggestions for Reform of the Incompetent Persons Act*.

If you would like to have any of the issues in this Paper explained more fully, please call 423-2633.

We have attempted, as much as possible, to describe the law and the problems with the present system in a way that can be understood by people who are not lawyers and who are not familiar with the legal system. Your criticism and comment will assist us in preparing a Final Report to the Minister of Justice on how the law dealing with adult guardianship in Nova Scotia can be reformed.

This Discussion Paper is not a Final Report and it does not represent the final views of the Commission. This Discussion Paper is designed to encourage discussion and public participation in the work of the Commission.

If you would like to comment on our suggestions you may:

- Send or fax a letter to the Commission at 423-0222;
- Telephone the Commission at 423-2633 and ask to speak to the Legal Research Officer; or
- Telephone or write to the Commission and arrange to speak with someone about your views.

In order for us to fully consider what you think about these issues before we prepare our Final Report, please contact us before **November 30, 1993**. You may write to us at the following address:

Adult Guardianship Project  
Law Reform Commission of Nova Scotia  
8th Floor, Garrison Place  
1526 Dresden Row  
Halifax, Nova Scotia  
B3J 2K2

Telephone: 423-2633  
Fax: 423-0222

# TABLE OF CONTENTS

	<i>Page</i>
English Summary .....	(i)
French Summary .....	(v)
Mi'kmaq Summary .....	(ix)
<b>I. Introduction .....</b>	<b>1</b>
What is adult guardianship? .....	1
Who may be in need of a guardian? .....	1
How does a guardianship relationship arise? .....	2
Terminology .....	2
Health care and decision-making .....	3
<b>II. The Law in Nova Scotia .....</b>	<b>6</b>
Introduction .....	6
The <i>Incompetent Persons Act</i> .....	6
The <i>Inebriates Guardianship Act</i> .....	8
Role of the Public Trustee .....	8
<b>III. Problems with the Present Law .....</b>	<b>10</b>
Introduction .....	10
Offensive language .....	10
"All-or-nothing" approach .....	10
Emphasis on property .....	11
Lack of monitoring of guardians .....	11
Paternalism - lack of respect and autonomy .....	11
<i>Charter</i> violations .....	11
<b>IV. Suggestions for Reform .....</b>	<b>13</b>
<b>V. Summary of Recommendations .....</b>	<b>32</b>

# Discussion Paper on ADULT GUARDIANSHIP IN NOVA SCOTIA: Suggestions for Reform of the *Incompetent Persons Act*

## SUMMARY

---

In this Discussion Paper the Law Reform Commission considers the law as it relates to adult guardianship in Nova Scotia. At present, a guardian may be legally appointed to make personal and financial decisions on behalf of an adult who is found by a court to be mentally "incompetent". The law most often used to have a guardians appointed for adults is called the *Incompetent Persons Act*.

The *Incompetent Persons Act* of Nova Scotia is copied from an old English law and it is in need of replacement for many reasons. It still uses the same language as when it was first adopted. This language, which describes people as "lunatics" and "incompetents" is offensive and inaccurate. Besides the offensive language, the Commission believes there are a number of other problems with this law including the fact that it does not distinguish between a guardian of the person and a guardian of the estate. Most provinces and territories in Canada allow for the appointment of a guardian of the person to make personal decisions on behalf of the adult, such as where to live, and a guardian of the estate to make financial decisions on behalf of the adult. Guardianship orders made under the *Incompetent Persons Act* usually give full powers for both personal and financial decisions to a guardian, even if the adult is only in need of one type of decision-making assistance.

In addition, the *Incompetent Persons Act* emphasizes protection of property and does not adequately deal with personal guardianship issues. For example, if there is no-one available to become guardian of the estate of the adult, a government agency called the Public Trustee may apply to act as guardian of the estate. If there is no-one available to become guardian of the person, however, there is no similar government assistance and these adults must do without formal personal decision-making assistance. The *Act* does not monitor how guardians are using their powers and most guardians have power to make **all** decisions on behalf of the adult. In other words, the law in Nova Scotia does not recognize the fact that people may be able to make their own decisions in some areas but not others.

The Commission has, in examining the *Incompetent Persons Act*, given careful consideration to the issue of whether there is even a need for any law which allows for the appointment of guardians for adults. On one hand, some people support the argument that guardianship should never be a legal option since it discriminates against people and takes away their right to choose for themselves. On the other hand, the Commission recognizes that some people may be unable to make decisions for themselves and would benefit from the assistance of a guardian, particularly in relation to legal matters. In light of this, the Commission suggests that there should be a law which allows for the appointment of a guardian for an adult who needs one. However, the Commission believes that the present law does not address all of the needs of people who may be in need of a guardian.

The Commission believes that the *Incompetent Persons Act* is no longer appropriate for Nova Scotians who may be in need of a guardian and it suggests that a new law be introduced to reflect the following fundamental principles:

- *an adult's right to autonomy and self-determination*

The law should recognize that people have the right to make their own decisions. Guardianship should not be imposed simply because a person makes a decision that other people do not understand or agree with.

- *a presumption of competence*

Everyone should be presumed to be competent to make their own decisions unless it is proved that they are not. This should be clearly stated in the law.

- *guardianship as a last resort*

In considering whether guardianship is appropriate, a court should be required to ask whether other less restrictive alternatives have been exhausted for the adult. Where an alternative exists which is less restrictive or has less impact on the person's freedom, this should be fully considered first. Guardianship should be used only as a last resort.

- *guardianship order should be the least restrictive one*

Most adults who need a guardian are able to make some decisions for themselves. The Commission believes that they should be encouraged to do so. Guardianship orders should be designed to reflect this. The guardianship order chosen should be the least restrictive one for the adult. The orders should focus on the adult's abilities, allowing the person to participate in decision-making as fully as possible in as many areas of decision-making as possible.

- *wishes of the adult to be taken into account*

Courts should actively inquire as to the wishes of a person who is the subject of a guardianship application. It would then be a matter for the judge to decide how much weight to give to the adult's wishes. This should be considered in light of the "capacity" of the adult. Any guardian appointed should also be required, as much as possible, to respect the wishes of the adult when making decisions on his or her behalf.

The Commission suggests that the following ideas should be also included in the new law:

- The law should provide for the separate appointment of a "guardian of the estate" as well as a "guardian of the person". Also, the law should allow **partial** guardianship orders. This means that guardians should be appointed to deal with specific areas where the person is in need of a guardian and to the extent of that need.
- A guardian should only be appointed if it is in the best interests of the adult and only if the adult is in need of a guardian. A court should be required to consider whether the adult is able to receive and evaluate information effectively and to make "reasoned" decisions. Only if they cannot do this will a guardian be appointed. Also, a person applying to become a guardian should be required to provide the court with a statement of intent or "plan" as to how a proposed guardian will provide support and assistance to a person in need of a guardian. Formal assessments of the adult's needs and abilities should be available to the court if there is not enough information about the appropriate guardian or if there are issues raised about the needs and abilities of the person who is believed to be in need of a guardian.
- The law should list the criteria which a court would use to evaluate whether someone is suitable to be a guardian, including:
  - \* whether the proposed person is an adult who consents to the appointment;
  - \* whether he or she will act in the best interests of the dependent adult and, as much as possible, respect the wishes of the adult when they are known; and
  - \* whether he or she will not be in a conflict of interest (for a reason other than the fact that he or she is a beneficiary or relative).
- The language used to refer to a person found to be in need of a guardian should not include the terms "incompetence" or "incapacity". The Commission seeks the views of the public on the language to be used.
- There should be some limits on what a guardian of the person can consent to on behalf of the adult. The personal guardian should not be able to consent to the following without the approval of the court:
  - consent to a procedure, the sole purpose of which is sterilization;
  - consent to an abortion authorized by law except where the continuation of the pregnancy would likely cause "danger to the life or health" of the dependent adult;
  - consent to the termination of the dependent adult's parental rights;
  - interference with the adult's exercise of religious practices, except to the extent that those practices threaten the dependent



adult's health or safety; or

- consent to the involuntary placement of the adult in a psychiatric facility.
- A person subject to a guardianship application should have the right to a hearing and should have an opportunity to hire a lawyer for independent legal advice. If there is not enough money in the adult's estate, a legal aid lawyer should be made available to the person. Also, an advocate should be required to visit the adult believed to be in need of a guardian to explain the nature of the application for guardianship to the person.

The Commission is seeking advice from the public on these suggestions and the other issues raised in this Paper.

# Document de réflexion sur la curatelle au majeur en Nouvelle-Écosse: suggestions concernant la réforme de la *Loi sur les personnes inaptes (Incompetent Persons Act)*

## SOMMAIRE<sup>1</sup>

---

Dans ce document de réflexion, la Commission de réforme du droit se penche sur le régime de protection légale des majeurs en Nouvelle-Écosse. Sous le régime actuel, le tribunal peut nommer un(e) curateur(trice) à la personne et aux biens d'un majeur qu'il considère "inapte". Les curateurs(trices) sont la plupart du temps nommés(ées) en vertu de la *Loi sur les personnes inaptes (Incompetent Persons Act)*.

La *Loi sur les personnes inaptes (Incompetent Persons Act)* s'inspirant d'une très vieille loi britannique a grand besoin d'être modifiée. Elle a été rédigée dans le même langage qu'à l'origine. Les mots tels "lunatics" et "incompetents"<sup>2</sup> utilisés par le législateur et servant à décrire les personnes sont inexacts et insultants. En plus du caractère inapproprié du langage utilisé, la Commission croit que l'étude de cette loi révèle un certain nombre d'autres problèmes, dont l'absence de distinction entre le(la) curateur(trice) à la personne et le(la) curateur(trice) aux biens. Dans la plupart des provinces et des territoires canadiens, un(e) curateur(trice) à la personne peut être nommé(ée) afin de prendre des décisions personnelles au majeur sous protection, telles son lieu de résidence. Un(e) curateur(trice) aux biens peut aussi être nommé(ée) afin de prendre les décisions financières concernant le majeur sous protection. L'ouverture d'une curatelle sous la *Loi sur les personnes inaptes (Incompetent Persons Act)* donne la pleine administration des biens du majeur sous protection, de même que de la personne du majeur, au curateur(trice) même si le majeur n'a besoin d'aide que pour un type d'administration seulement.

En outre, la *Loi sur les personnes inaptes (Incompetent Persons Act)* vise principalement la protection des biens du majeur et ne protège pas adéquatement la personne du majeur. Par exemple, s'il n'y a aucune personne disponible pour administrer les biens du majeur sous protection, une agence gouvernementale appelée le curateur public (Public Trustee) peut présenter une requête afin d'être nommée curateur(trice) aux biens. À l'opposé, s'il n'y a aucune personne disponible pour agir comme curateur(trice) à la personne du majeur, il n'existe aucun programme gouvernemental d'aide et ces majeurs nécessitant protection doivent prendre les décisions concernant leur personne sans aide. Cette loi ne prévoit aucun mécanisme de contrôle des décisions prises par le(la) curateur(trice) malgré le fait que cette personne possède la **pleine** administration des biens et de la personne du majeur. En d'autres termes, le régime de protection des majeurs en Nouvelle-Écosse, ne reconnaît pas le fait qu'un individu puisse prendre des décisions dans certains domaines alors que dans d'autres domaines il en est incapable.

---

<sup>1</sup> Traduit de l'anglais par Me Nathalie Bernard, LL.B (Université Laval), LL.M (Dalhousie University).

<sup>2</sup> "déments" et "inaptes".

Dans le cadre de l'étude de la *Loi sur les personnes inaptes (Incompetent Persons Act)*, la Commission s'est interrogée sur la question de la nécessité même d'un régime de protection des majeurs. D'un côté, certains soutiennent que l'option de la nomination légale d'un(e) curateur(trice) ne devrait pas être offerte puisqu'il s'agit d'une pratique discriminatoire et qui enlève au majeur le droit de prendre ses propres décisions. D'un autre côté, la Commission reconnaît que certains individus n'ont pas la capacité de prendre les décisions les concernant et tireraient bénéfice de l'aide d'un(e) curateur(trice), particulièrement en ce qui concerne les décisions ayant des conséquences légales. Conséquemment, la Commission considère nécessaire une loi permettant la nomination d'un(e) curateur(trice) pour les majeurs qui en ont besoin. Néanmoins, la Commission croît que la présente loi ne répond pas à tous les besoins de ces personnes.

La Commission croît que la *Loi sur les personnes inaptes (Incompetent Persons Act)* est désuète et ne répond plus aux besoins des Néo-Écossais nécessitant protection. La Commission recommande qu'une nouvelle loi respectant les principes fondamentaux énumérés ci-bas soit promulguée:

. *le droit d'un majeur à l'autonomie et à l'indépendance*

Le régime de protection des majeurs devrait tenir compte du fait qu'une personne a le droit de prendre ses propres décisions. La curatelle ne devrait pas être imposée simplement parce que d'autres personnes ne comprennent pas ou ne sont pas en accord avec les décisions prises par un majeur.

. *la capacité doit être présumée*

Toute personne doit être présumée capable de prendre ses propres décisions sauf s'il est prouvé qu'elle en est incapable. Ce principe devrait être clairement énoncé dans la loi.

. *la curatelle comme dernier recours*

Avant d'opter pour la curatelle, le tribunal devrait avoir l'obligation de déterminer si d'autres solutions moins drastiques existent. Lorsqu'il existe une solution qui brime moins la liberté du majeur, elle devrait être considérée dès le début. La curatelle ne devrait être utilisée que comme moyen de dernier recours.

. *la curatelle devrait brimer la liberté du majeur le moins possible*

La plupart des majeurs nécessitant un(e) curateur(trice) peuvent habituellement prendre certaines décisions les concernant. La Commission croyant qu'ils devraient être encouragés à le faire, la curatelle devrait promouvoir cette valeur. Le type de curatelle imposé devrait donc brimer le moins possible la liberté du majeur. L'accent devrait être mis sur les aptitudes du majeur lui permettant ainsi de participer le plus possible au processus décisionnel.

- *les désirs du majeur doivent être pris en considération*

Les tribunaux devraient s'efforcer de déterminer eux-mêmes les désirs et intérêts du majeur nécessitant protection. Le poids à attribuer aux désirs et intérêts du majeur demeure cependant à la discrétion du tribunal. Cette décision dépendra des aptitudes du majeur. L'obligation, de respecter autant que possible les désirs du majeur dans la prise de décision, devrait être imposée au curateur(trice) nommé(ée) par le tribunal.

La Commission recommande en outre que les suggestions qui suivent soient incluses dans la réforme de la *Loi sur les personnes inaptes (Incompetent Persons Act)*:

- Le régime de protection devrait permettre la nomination d'un(e) curateur(trice) aux biens de même que d'un(e) curateur(trice) à la personne. Une curatelle partielle devrait pouvoir être ordonnée ayant pour effet d'octroyer au curateur(trice) nommé(ée) le pouvoir de prendre des décisions que dans certains domaines et seulement si le majeur en est incapable.
- Un(e) curateur(trice) ne devrait être nommé(ée) que si cela est dans l'intérêt du majeur et seulement si le majeur en a besoin. Le tribunal devrait avoir l'obligation de déterminer si le majeur possède la capacité de comprendre l'information qui lui est transmise et de faire des choix éclairés. Un(e) curateur(trice) ne sera nommé(ée) que si le majeur en est incapable. De plus, la personne désirant être nommée curateur(trice) devrait avoir l'obligation de fournir au tribunal une déclaration de ses intentions ou un plan démontrant la façon dont elle entend aider et répondre aux besoins du majeur. Dans le cas où les informations concernant la personne désirant être nommée curateur(trice) sont insuffisantes ou dans le cas d'incertitude concernant la capacité et les besoins du majeur, le tribunal devrait pouvoir obtenir une évaluation professionnelle.
- La nouvelle loi devrait contenir une liste des facteurs à considérer lors de l'évaluation de la capacité d'une personne à être curateur(trice). Ces facteurs devraient comprendre ce qui suit:
  - \* la personne proposée consent-elle à sa nomination comme curateur(trice);
  - \* la personne proposée agira-t-elle dans l'intérêt du majeur en respectant, autant que possible les désirs du majeur;
  - \* la personne proposée se trouvera-t-elle en position de conflit d'intérêts (pour une raison autre que le fait qu'elle est héritière ou membre de la famille).
- Le langage utilisé pour décrire une personne nécessitant la protection d'un(e) curateur(trice) ne devrait pas inclure les mots "incompétence" ou "incapacité"<sup>3</sup>. La Commission invite le public à lui faire part de ses suggestions quant au langage à utiliser.

---

<sup>3</sup> En anglais dans le texte original: "incompetence" or "incapacity".

- Des limites devraient être imposées quant aux décisions que le(la) curateur(trice) à la personne peut prendre au nom du majeur. Le(la) curateur(trice) à la personne ne devrait pas pouvoir prendre les décisions qui suivent sans le consentement du tribunal:
  - intervention médicale ayant pour seul but la stérilisation du majeur;
  - avortement légal, sauf si la poursuite de la grossesse risque de mettre la santé ou la vie du majeur en danger;
  - l'extinction des droits reliés au statut de parent du majeur;
  - ingérence dans les pratiques religieuses du majeur, sauf si ces pratiques menacent la santé ou la sécurité du majeur;
  - placement du majeur sans son consentement dans un institut psychiatrique.
- Le majeur faisant l'objet d'une requête en nomination d'un(e) curateur(trice) à la personne devrait avoir le droit d'être entendu et le droit de retenir les services d'un(e) avocat(e) ne représentant que ses intérêts. Si le majeur ne possède pas les moyens financiers de retenir les services d'un(e) avocat(e), il devrait pouvoir bénéficier des services de l'aide juridique. De plus, le majeur nécessitant protection devrait avoir le droit de se faire expliquer la nature de la requête en nomination d'un(e) curateur(trice) par un(e) conseiller(ère) légal(e).

La Commission invite le public à lui faire part de son opinion sur les suggestions qui ont été faites dans ce document et les questions qui ont été soulevées.

## **Ula wi'katikn wesku'tk ADULT GUARDIANSHIP wjit Nopa Sko'sia: Ta'n jiptuk tli-il-wi'kasiss Incompetent Persons Act.**

### **SUMMARY<sup>4</sup>**

Ula wi'katikniktuk Law Reform Kmisnaq wesku'tmi'tij teplutaqn ta'n teltek wjit Adult Guardianship ula Nopa Sko'sia. Ta'n teltek nike' nuji klo'teket telueket apoqnmuatl e'pilitl kiswa ji'nml ta'n mu tepi nsituoqnmlikul maliaptmuan wsulieweym kiswa me' piluey koqoey stage ta'n tele'lij. Teplutaqn ta'n maw-wekasik nuji klo'teket meknut wjit e'pilitl kiswa ji'nml teluisik Incompetent Persons Act.

Incompetent Persons Act ula Nopa Sko'sia wejiaq sa'qewey English Lawiktuk aq nuta'q pilu-wikasin kiskuk. Me' wijey telatuek aq amskwes kis-wikasikek. Ula klusuaqnn ta'n telui'taji mimajuinu' "elue'wiete'wk aq "eulaskma'tite'wk eul-wi'taji mimajuinu' aq mu tetpaqa'nukw. Mu pasik tl-na'nsitewey mu weji klu'lktnukw na teplutaqn. Kmisnaq telua'tijik me' atelk ta'n koqoey mu kelu'lktnukw we'kayiw nuji klo'teket mu teluenukw pasik mimajuinu'l maliaman kiswa elt wutmo'taqn ma'w stage nike' wmaqmikem aq wi'k. Suel msipra'vnsl aq teritori'l Kanata asite'tmi'tij mknuksilin nuji klo'tekelitl ta'n apoqnmuatl mimajuinu'l kisutmlin koqoey stage nike' ta'n tett wikitew aq ta'n tla'tutew wutmo'taqn aq wsulieweym. Nuji klo'teket ta'n iknmut mlkikno'ti wejiaq Incompetent Persons Actiktuk tepiaq kekkunk mlkikno'ti apoqnmuan e'pilitl kiswa ji'nml ta'n tla'tulital koqoey stage nike' ta'n tett wikilital aq ta'n tla'tulital wsulieweym tlia' pasik jiptueke'l newtunemi'k nuta't apoqnmuksin.

Me' ap, Incompetent Persons Act ta'n tel-wikasik me' ajite'tk apoqnmuen wutmo'taqniktuk toqo mu menaqa maliaptmukw ta'n tli tetapueiwaness mimajuinu. Stage nike' tlueness mu eimuksip wen ta'n kisi mknaness nuji klo'tmuan mimajuinu'l wutmo'taqn na kapmnt kekkunk e'jnsi teluisik Public Trustee aq jiptueke'l nekmow miamuj maliaptmuataqq. Katu mu i'mukw mimajuinu ta'n kisi mknaness nuji ankweiwan ktikl mimajuinu'l mu e'jnsi eyknukw kapmntiktuk ta'n apoqnmuas aq ma' keknu'e'nukw ta'n telutk koqoey tla'siss. Ula Act mu tepi jikeiwaqwi nuji klo'taqatiliji ta'n tel-wektu'tij mlkikno'timuow aq suel msit kelo'taqatite'wk tepiaq mlkikno'ti kekkunmi'tij kisutmnnew msit koqoey wjit mimajuinu'l. Na na nike' stage teluekel teplutaqn Nopa Sko'sia mu nemitukw ketloqo i'mu'tinew mimajuinu'k tepaskma'tijik eykl me' koqoe'l ta'n nkutukwayiw kisuttaqq aq eykl ta'n nuta'titew apoqnmasuti.

Kmisnaq ta'n kisi ankaptmi'tip Incompetent Persons Act mu kejitu'tikw nike' nuta'n na teltek teplutaqn ta'n asite'tk nuji klo'teket mknuksin. Eykik kisi ankaptmi'tij ta'n telua'tijik l'pa mu nuta'nukw mknuksin jel nuji klo'teket mita mu kis-tetpeiwayik mimajuinu'k ewekasik na teltek teplutaqn aq ejikla'taj kisutmn e'pit kiswa ji'nm ta'n ketui tla'teket. Eykik ap ktikik kmisn naspultijik ta'n kejitu'tij i'mlinew mimajuinu'k ta'n kjitmiw nuta'titl na't wenl ta'n apoqnmakutal kisutmlin koqoey ap me' koqoey teplutaqniktuk ela'tekemk a. Teli pkije'k na tel-

---

<sup>4</sup> Mi'kmaq translation provided by Bernie Francis, Sydney, Nova Scotia.

nmitu'tij kmisnaq telua'tijik nuta'q teplutaqn teluek mimajuinu iknmuksilin nuji klo'tekelitl ta'n etlite'tasik nuta'n. Kmisnaq etlite'tmi'tij mu wlten ta'n teplutaqn teltek kiskuk tetapui-malianan mimajuinu'l ta'n jiptuk nuta'tal nuji-klo'tekelitl.

Kmisnaq nika' etlite'tmi'tij Incompetent Persons Act mu klu'ltu wjit Nopa Sko'siaewaqa ta'n jiptuk nuta'tiss nuji klo'tekelitl aq telua'tijik piley teplutaqn nuta'n ta'n majulkwattal ula pemi-wikasikl:

\* mimajuinu koqqwaja'taqnmin ta'n teli alsumsit aq ta'n kitu' tl-pma'toq mimajuaqnm

Teplutaqn nuta'q ta'n tel-nmiaji mimajuinu' alsumsultinew aq kisutmnnew ta'n kitu' tle'k. Mu nuta'nukw wen li-ktmoqjenmuksin nuji klo'taqn teli pkije'k pasik kisutk na't koqoey ta'n ktikik mimajuinu'k mu nestmi'tikw kisna ketlamsitmi'tikw.

\* teli wsua'lut wen tepaskman

Miamuj msit wen tmk teli wsua'lut tepaskman kisutmn kitu' tle'k ta'n mna'q kisi pru'vewa'tasinukw mu tlian. Ula nuta'q menaqa tl-wikasin teplutaqniktuk.

\* nuji klo'taqn mawi wtejkewey elita'suatmik

Ta'n tujiw ankite'tasik ketloqo nuji klo'taqn nuta'n, kort nuta'tew pipanikesin me' koqoey ap piluey kisi wktnu'kwatasin ta'n tli-apoqnmuaness ula mimajuinu ta'n mu tel-mlki-oqpilkukw. I'k koqoey ta'n me' mu teliknanukw staqa nuji klo'taqn aq ta'n ma' tli-naqnukukw mimajuinu na tmk nekmowey aunaqa ankite'tten wekasin. Nuji klo'taqn pasik wekasitew mawi wtejkewey.

\* nuji klo'taqn ta'n kisutasik nuta'tew mawi mnaqnan

Suel msit e'pijik aq ji'nmuk ta'n nuta'titl nuji klo'tekelitl i'tital ta'n kissutmi'titl koqoe'l. Kmisnaq etlite'tmi'tij me' naji klu'ltiss ktmoqjenuj na tla'taqatinew. Nuji klo'taqn nuta'q na tl-wikasin. Nuji klo'taqn ta'n kisi mknasik nuta'tew mu mlki oqpilan mimajuinu'l. Miamuj ankaptasitew ta'n mimajuinu tetutaskmat kulaman kisi nesp'alaten elt nekm aq iknmuaten apoqnmattmn ta'n telutasik koqoey suel msit tami ela'tekemk.

\* miamuj ankaptasitew ta'n mimajuinu tel-puatk koqoey

Kortl miamuj mlki-pipanikesital ta'n mimajuinu'l tel-puatmlij tla'sin koqoey. Na weja'tekemk tett jaj iknmuaten ilutmn ta'n tetujiknaq mimajuinu puataqnm. Ta'n tetujiknaq na wjiatew ta'n teli kjiu't mimajuinu tetutaskmaj. Ta'n wen meknut nuji klo'teket mnuaqlaten ta'n teli kisi pkwatoq kpmite'tmuan ta'n teli puatmlij mimajuinu'l ta'n te's ketu' ilutmlij me' koqoey.

Kmisnaq menueke'tij ula pem wikasikl wiaq-wikasin piley teplutaqniktuk:

Teplutaqn nuta'tew tlten tepkisi mknüksin nuji klo'tekejik; newte'jit tlueketew nuji klo'tmuan mimajuinu'l wutmo'taqn stage nike' wi'k aq wmaqmikem tujiw ta'puewey tlueketew maliaman l'pa mimajuinu'l. Tujiw ap, teplutaqn nuta'tew asite'tmn pasik

pkedik nuji klo'teket maliaptmn. Ula na teluek nuji klo'teket maliaptmuan pasik keknu'e'kl ta'n mimajuinu tel-nuta'j.

Nuji klo'teket pasik mknaten tlite'tasik mimajuinu maw-wli-apoqnmuaness aq ketloqo l'pa mimajuinu ksi-nuta'j nuji klo'tekelitl. Mnuaqasitew kortiktuk iloqaptmnew ketloqo mimajuinu nsitmn ta'n tela'sik koqoey aq nsituo'qniktuk wjian ta'n koqoey kisutk. Mu kis-tla'taqati'kw net na nuji klo'teket mknaten. Elt mimajuinu ta'n kelutk kisi nuji klo'tekewinuin nuta'tew kortiktuk ap pkisitun me' na't koqoey teluek ta'n tli-apoqnmuatl mimajuinu'l ta'n nuta'tl nuji klo'tekelitl. Miamuj kort iknmuaten wi'katikniktuk ansma ta'n koqoey mimajuinu nuta'j aq ta'n tetutaskmalij mu tepi kjijiaj nuji klo'teket kisna panutasik me' koqoey ta'n nuta'j kisna tetutaskmat mimajuinu ta'n etlite'tasit nuta'n nuji klo'tekelitl.

Teplutaqniktuk nuta'tew wikasin ta'n telamuksit mimajuinu klu'siss nuji klo'teken stage nike':

- \* mimajuinu ki's e'pitewit kisna ji'nmuut aq ta'n wel'te'tk mknüksin;
- \* ketloqo kis-tetapui maliaman mimajuinu'l aq teli kisi pkwatoq li apoqnmuan mimajuinu'l tel-puatmlj koqoey tla'sin;
- \* mu i'tnukw koqoey ta'n nekm tli-wji-kisituss (katu ma' wji-jiklteskuat wjit pasik ta'n tel-akuti'tij)

Klusuaqnn ewekasikl ta'n weskumatl mimajuinu'l ta'n nuta'tl nuji klo'tekelitl wiaqi-weketun " elue'wiet" kisna "mu tepaskman". Kmisnaq kwilutmi'tij apoqnmastu ta'n tlamu'kital klusuaqnn ewekasikl.

Nuta'ten kjijitasin ta'n nuji klo'teket mu a'sisa'sin ta'n tel-klusit wjit mimajuinu'l apoqnmuatl. Nuji klo'teket ta'n apoqnmuatl mimajuinu'l ma' wsko'tmukw mlkikno'ti kisutmn ula pem-wikasikl ke'sk mna'q kortiktuk elianukw:

- \* lukwaluksilin ta'n ma' kis-wnijanikw;
- \* kisutmn kisa'lüksilin n'talin ta'n teplutaqn we'kwi-asite'tk mu tlite'tasinukw wji-npmlin kisna wji-ksinukwalin a;
- \* kisutmuan apoqnmute'wl leken aq iapji-punajeiwan wnijink;
- \* lukwaqna'lan mimajuinu'l ta'n teli-ktlamsitasilij wталasutmaqnm aq katu tlite'lma j jiptuk wji-jile'lin kisna wji-ksinukwalin; aq
- \* kisi iknmatmn mimajuinu'l la'lüksilin a'spitl ta'n wn'jewi-ksnukutite'wk elo'luj.



Mimajuinu ta'n kwetnu'kwatk kisi msnmn nuji klo'tekewinuin iknmuksin tmk nutuksin tl-mnuekej aq kis-lulan lo'yral tl-mnuekej apoqnmakun. Mu tepi wsulieweimlikw mimajuinu'l ta'n apoqnuatl na tl'ten apoqnmakun li'kl eit lo'yral. Elt ktik ap mimajuinu nuta'ten mittukwalan na mimajuinu'l ta'n etlite'tasit nuta'n nuji klo'tekelitl aq kinua'tuan ta'n tlamu'ktitew apoqnmastu kitu' iknmuj.

Kmisnaq menueke'tiji mimajuinu'k apoqnmakunew ula pemutmi'tij aq ktikl me' ewikasikl ula wi'katikniktuk.

## Introduction

### ***What is adult guardianship?***

In the law a "guardian" is a word used to describe a person who has the control or custody of another individual and who has a legal duty to provide for that person. Most of our laws which discuss guardianship refer to parent-child relationships. Guardianship is also available for an adult who needs another person to legally make decisions on his or her behalf. An adult may need a guardian for very specific areas of decision-making, or may need a guardian for most or all aspects of daily living. An adult may need a guardian for financial matters only or for personal decisions, such as where to live. Under Nova Scotia law, most legal guardians are appointed by a court. A guardian may be an individual, such as a spouse, a relative or close friend; a company, such as a trust company; or a government agency, such as the Public Trustee.<sup>5</sup>

In Nova Scotia there are several laws which provide legal guardianship for adults but the law most often used is the *Incompetent Persons Act*.

### ***Who may be in need of a guardian?***

Those who may be thought to be in need of a guardian include many different types of people such as:

- a person with a mental "disability";
- a person who is mentally ill;
- a person with a severe physical "disability" such as a head injury;
- a person who has experienced a stroke, which may have resulted in a mental or physical "disability";
- a person who has a disease such as Alzheimer's; or
- a person who may be having diminished decision-making "capacity".

It is important to recognize that not although a person may fit into one of these categories, this does not mean that he or she is necessarily in need of a guardian. The needs of adults who are in need of guardians are quite varied as are their ability to make their own decisions. Guardianship and the need for support in decision-making has to be assessed for each person individually.

### ***How does a guardianship relationship arise?***

---

<sup>5</sup> The role of Nova Scotia's Public Trustee will be discussed in Part II of this Paper.

Adult guardianship relationships often evolve from informal arrangements within families. An example would be when an adult son assists his elderly father with personal care or financial matters as part of their ongoing relationship. If, however, the father's mental "capacity" is called into question, eg. due to Alzheimer's disease, a court order appointing the son as guardian may be needed to legally allow him to make decisions on behalf of his father.

Other times the need for a guardian may come about very quickly as a result, for example, of a severe head injury from an accident.

It is important to understand that there are many care-giving relationships which exist without legal recognition. The need for a legal guardian arises for many reasons which often include a third party such as a lawyer or a physician who requires "valid" consent and there is a belief that the adult is "incapable" of giving it.

## ***Terminology***

In this paper "adult guardianship" will be used to describe the law relating to how someone is appointed to substitute for another person's decision-making.

Unfortunately, the law in Nova Scotia which talks about adult guardianship still uses language such as "lunatic", "incompetent" and "idiot". We believe that such language is offensive and this Paper will attempt to avoid this type of language, even though it is still written in our laws. Adults who may be affected by adult guardianship laws vary from those who need very little assistance, such as a senior citizen who may need help in managing an estate, to those who require someone to make most decisions for them, such as a severely brain-injured person. For the purposes of consistency, however, we will be describing an adult who may be in need of either assisted or substituted decision-making as an "adult in need of a guardian".

We will also be making a distinction between two different types of guardians:

1. a "guardian of the estate" is a guardian who is appointed for financial matters;  
and
2. a "guardian of the person" is a guardian appointed for personal matters.

## ***Health care and decision-making***

There has recently been a great deal of interest and research in the area of promoting health

care and evaluating the decision-making process as it presently exists. Nova Scotia's Provincial Health Council, for example, has established goals for achieving health which include: supporting the efforts of individuals, families and communities to lead healthy lives; involving Nova Scotians in decisions affecting health; and ensuring that all Nova Scotians have the opportunity to achieve health.

Similarly, the Royal Commission on New Reproductive Technologies has adopted a number of guiding principles to be applied in health care decision-making where conflicts are likely to arise. These principles include: individual autonomy; equality; respect for human life; protection of the vulnerable; accountability; and balancing individual and collective interests. The Commission believes that these goals and principles are valid ones which should apply to any evaluation of Nova Scotia's mental health system including adult guardianship laws.

Canadian provinces and territories regulate their own laws which deal with mental health issues. These issues include things such as an adult's "capacity" to manage his or her own financial affairs or the procedures for placing people against their will in a mental health facility. These mental health laws are regulated and controlled by the provinces/territories and not by the federal government.

There are many different mental health laws in Nova Scotia which provide some form of guardianship. Some of these include the following:

**(i) adult protection**

The *Incompetent Persons Act* was not designed to deal with the problems of elder abuse or neglect. A different Nova Scotia law, called the *Adult Protection Act*, seeks to protect adults who are abused or neglected and who are either unwilling or unable to protect themselves. This *Act* gives the courts very broad powers to assist an adult who is thought to be in need of protection.

Although an order under the *Adult Protection Act* may eventually lead to a court application for appointment of a guardian under the *Incompetent Persons Act*, adult protection laws were not designed to provide guardianship for adults.

There are some people who believe that Nova Scotia's *Adult Protection Act* is in need of changes to provide more protection to the rights and freedoms of adults who are thought to be in need of protection. Others think that this law should be changed to protect against financial abuse of elderly people. Issues of abuse and neglect are not the same as those relating to guardianship, however, and the problems associated with the *Adult Protection Act* are not addressed in this Paper but a project is underway at the Dalhousie University Health Law

Institute examining this *Act*.

**(ii) adult guardianship orders under the *Indian Act***

Adult guardianship law affects Nova Scotia's Aboriginal communities differently from other residents of the province. Under a federal law called the *Indian Act*, the Minister of Indian and Northern Affairs Canada becomes the guardian of native adults who are ordinarily resident on a "reserve" and who have been declared mentally "incompetent".

Since the *Indian Act* is a federal law its effect on Nova Scotia's Aboriginal communities is not specifically dealt with in this Discussion Paper. Nor does the Paper address the larger philosophical question of whether or not the *Indian Act* treats all native people as adults who are unable to make their own decisions and manage their own property. The Commission is currently examining these and other issues involving care-giving practices in Nova Scotia's Aboriginal communities.

**(iii) commitment procedures under the *Hospitals Act***

There is a law in Nova Scotia called the *Hospitals Act* which says that if a person is found to be a danger to others or to herself or himself and is suffering from a mental disorder, the person may be placed in a psychiatric hospital assuming the person needs the services and refuses to consent to admission. Many people that the Commission has spoken with are concerned about how this type of action (called a "civil commitment") is dealt with by both police and health care workers in the province. Some people are concerned that the rights of people who are thought to be mentally ill are being violated by this type of law which deprives them of their freedom and liberty. Other people, however, are concerned that this law ignores a person's right to psychiatric treatment when he or she may not even realize the need for it.

The *Hospitals Act* is not dealt with in this Paper except as it relates to the Public Trustee and the *Incompetent Persons Act*.

**(iv) advance directives (alternatives to guardianship)**

There are two laws in Nova Scotia which allow people to "plan" for their own possible "incapacity". The *Power of Attorney Act* says that adults may appoint another person to make financial decisions on their behalf. The power is given while the person is "competent" to give it. If the adult becomes "incapacitated", the person designated to make the decisions (called the "attorney") continues to manage the finances and estate of the adult. This document is referred to as an "enduring power of attorney". One of the limits to

this law is that it does not allow a person to appoint an attorney for a future time such as when the person becomes "incapacitated". Once the power is granted, the effect is immediate.

Another Nova Scotia law, called the *Medical Consent Act*, allows adults to appoint someone to make health care decisions on their behalf should they later become "incapacitated". The adult may give instructions but it is up to the person selected to make the final decision.

One of the ways in which many adults may avoid guardianship is through the use of these and other types of planned decision-making. Other methods, such as the use of "living wills" may also be available. The Commission will be studying alternatives to guardianship as a separate issue in the Fall of 1993.

## II. The Law in Nova Scotia

### ***Introduction***

This part of the Paper will provide some background information on the existing law of adult guardianship in Nova Scotia. It is a brief overview, though, since we are primarily concerned with exploring reforms to the present system.

Most Canadian laws were "inherited" from the laws of England. In the area of adult guardianship, Canadian provinces and territories adopted a version of the existing English law and, depending on when the province or territory entered into Confederation, either the *Imperial Lunacy Act*, or an older law was adopted. This is true of Nova Scotia and the law as it is contained in Nova Scotia's *Incompetent Persons Act* remains the same as it did when it was first adopted in the late 1700's.

### ***The Incompetent Persons Act***

#### **(i) Procedure for Appointment**

The relatives or friends of an adult may bring an application to court to have a guardian appointed for an adult in Nova Scotia. Also, a committee of the social services district where the person lives may start the process. Often, the municipal unit which houses an elderly person will ask the Public Trustee to bring an application under the *Act* to allow the municipality to make financial arrangements for the adult's housing and personal needs.

The *Incompetent Persons Act* still uses the archaic language of "insane person" or "lunatic" which it defines as "a person, not an infant, who is incapable from infirmity of the mind of managing his own affairs".

The law requires two things to be proven:

- (1) that the person has a mental "infirmity"; and
- (2) that as a result of the "infirmity" the person is "incapable" of managing his or her affairs.

This means that people will not be found to be "incompetent" simply because they are "incapable of managing their affairs". There must also be evidence of a mental "infirmity".

The procedure for the appointment of a guardian involves two steps. The first involves an application to the court seeking the appointment of a guardian. This is done without Notice to the adult who is thought to be in need of a guardian . The application is supported by

sworn or affirmed statements (called "affidavits") of two medical doctors. These affidavits together with other documents are sent to the Supreme Court with a request for a hearing.

Once the court has granted a hearing, the second step involves service of the Notice of the court hearing as well as the affidavits upon the adult and upon any person who may have the adult in his/her charge. At the court hearing, if no-one opposes the application and if the documents are in order the judge will sign the order. In practice, applications are rarely opposed and when questions arise they usually relate to who should be appointed guardian and not whether a guardian should be appointed.

Most guardianship applications are granted based upon the medical affidavits without oral evidence from either medical practitioners or from the adult thought to be in need of a guardian.

If a person is found to be "incapable of taking care of himself" the court will appoint a guardian of the person **and** of the estate. The *Act* does not allow the separate appointment of an estate guardian and a personal guardian. In practice, though, the court will separately appoint estate guardians and personal guardians even though the law does not make such distinctions. In many cases, the same person is appointed to be both estate guardian and personal guardian for the adult.

A person who is appointed guardian under the *Act* has the "care and custody of the insane person and the management of the insane person's estate until legally discharged". The guardian is obliged to give a bond with sureties with conditions as set out by the court but private trust companies and the Public Trustee are not required to give bonds. There are no enforcement mechanisms to see if a guardian is complying with an order or to ensure that the person is still in need of a guardian.

## **(ii) The effect of an order under the *Act***

An order made under the *Incompetent Persons Act* severely restricts the rights of the person who is the subject of the order. Most guardianship orders restrict the following rights:

- the right to deal with her or his property;
- the right to vote in an election;
- the right to be a juror;
- the right to consent to or refuse medical treatment;
- the right to start a civil action or to defend one; and
- the right to marry or divorce.



## ***The Inebriates Guardianship Act***

This is another Nova Scotia law which allows for the appointment of a guardian for an adult. This law deals with the legal declaration that a person is "incapable" of managing his or her own affairs because of "habitual drunkenness". An order under this Act has the same effect as an appointment of a guardian under the *Incompetent Persons Act*.

## ***Role of the Public Trustee***

The Public Trustee is a government office which was established in Nova Scotia in 1973 under the *Public Trustee Act*. The Public Trustee has many roles one of which relates to adult guardianship. The Public Trustee becomes involved with adult guardianship in the following ways:

### **(i) as court-appointed guardian of the estate under the *Incompetent Persons Act***

When no-one else is available to become the guardian of an estate, the Public Trustee may apply to be appointed. In many instances, this type of guardianship service is requested by a municipality seeking help in collecting expenses for an elderly person in a home for special care. The Public Trustee's Office is not, however, designed to provide personal guardianship services and the Public Trustee will not act as guardian of the person.

One of the difficulties which arises as a result of this lack of personal guardianship services from the Public Trustee's Office is that there is often no-one appointed as the guardian of the person, even when the Public Trustee is appointed as guardian of the estate.

### **(ii) as guardian under the *Hospitals Act* and the *Adult Protection Act***

Under the *Hospitals Act*, a hospital may notify the Public Trustee to assume management of the estate of a patient who has no guardian and is "incapable" of administering his or her own estate.

Similarly, the *Adult Protection Act* authorizes the Public Trustee to assume immediate management of the estate of an adult "in need of protection".

Many of the cases which are referred to the Public Trustee under these laws eventually

require the services of a full time guardian and the Public Trustee may apply to be appointed guardian of the estate under the *Incompetent Persons Act*.

**(iii) medical consent to treatment under the *Hospitals Act***

The Public Trustee may also be called upon to consent to treatment of a mentally "incapacitated" hospital patient. Under the *Hospitals Act*, if the hospital is unable to get consent from a patient and if the patient's spouse or next of kin are not available or refuse consent to a treatment, the Public Trustee may consent to the treatment.

### **III. Problems with the Present Law**

#### ***Introduction***

It is difficult to describe all of the criticisms of adult guardianship laws. The following are some of the most serious criticisms of our law as it affects adults in need of guardians:

#### ***Offensive language***

With its origins in 19th century English law, the *Incompetent Persons Act* still contains offensive language such as "idiot", "lunatic" and "incompetent". The language used in our laws to describe adults in need of guardians is significant because public attitudes towards people in need of guardians may be negatively affected by unnecessary and hurtful labelling. Language is a powerful tool and it can stigmatize the people who are the subject of the labelling. It is also difficult for family members who are attempting to help if they are required to have the person labelled an "incompetent". In addition, the words do not accurately describe a person's abilities.

Although many people argue that all language will eventually become stigmatizing, there are less offensive ways to describe adults who are in need of guardianship services.

#### ***All-or-nothing approach***

As mentioned above, the *Incompetent Persons Act* does not allow for the separate appointment of a guardian of the person and a guardian of the estate. Additionally, there are usually no limits to the guardianship order so that most guardians have full powers to make most, if not all, decisions for the adult.

Additionally, the assessment of "competency" under our law is also an all-or-nothing evaluation. People are labelled as "competent" or "incompetent", without recognizing that people may be "competent" in some decision-making areas and not in others. As well, people may be "incompetent" only some of the time. There are, of course, some examples of people who are totally unable to decide, such as a person in a permanent coma, but this is quite rare and most decision-making limitations are partial. In view of the principles of autonomy, respect and equality, this all-or-nothing approach is no longer appropriate.

## ***Emphasis on property***

The focus of the *Incompetent Persons Act* is protection of the property of the person. This historical emphasis on property is due, in part, to the belief that a guardian would instinctively know what to do for the adult. The *Act* does not say anything about what a guardian of the person should do or what the responsibilities should be.

The Commission believes that guardianship of the person is just as important as guardianship of the estate and the law should include the responsibilities of guardians of the person.

## ***Lack of monitoring of guardians***

Currently, there is no monitoring of guardians in Nova Scotia. When a guardian is appointed there is usually no requirement for reporting back to the court (except for estate guardians who usually have to report within six months). Even when the court requires a reporting, there is no way for the judge to know whether it has been completed on time or at all. There is also no way for the court to know when a guardian is not acting in the best interests of the adult.

## ***Paternalism: lack of respect and autonomy***

The concept of "paternalism" is at the heart of guardianship law in provinces such as Nova Scotia, which continue to rely on the language and procedures of the 19th century English law. Paternalism is drawn from an ancient English doctrine called "*parens patriae*" which gave the courts the right to interfere with children and "incompetents" for their own protection. This lack of respect for a person's autonomy is not in keeping with current values. Extensive intervention in the lives of people in need of guardians may not be in their best interests.

## ***Charter violations***

Under the Canadian *Charter of Rights and Freedoms*, an adult has "the right to life, liberty and security of the person". The appointment of a guardian results in the loss of fundamental rights and freedoms, particularly the right to liberty. This means that the *Charter* gives people the right to the least restrictive alternative when there may be a denial of their freedoms, such as when a guardianship application occurs. Also, adults should have the right to "procedural fairness" before having a guardian appointed. The

inadequacy of procedural safeguards is an area of concern with the *Incompetent Persons Act* and the way in which the law is applied. An adult may have difficulty opposing a guardianship application, because the proceedings are often complex, intimidating and expensive.

Hearings themselves may also be lacking in terms of procedural fairness. The adult is usually not present or represented by a lawyer. Medical evidence is often accepted without question, and medical practitioners are also absent from court. Once a guardian has been appointed, the adult will have difficulty challenging the order by way of appeal or by seeking to revoke the guardianship order. Where a person no longer has control over his or her affairs, he or she may also lose the right to start a legal action and the "ability" to instruct and pay for a lawyer.

The *Charter* requires some basic procedural safeguards which should include the following:

- a fair and impartial hearing during which the person is entitled to full legal rights including the right to be notified of an application and hearing;
- the right to be represented at the hearing;
- the right to be heard at the hearing;
- the right to an interpreter;
- the right to call, examine and cross-examine witnesses;
- the right to review documents that are submitted to the court;
- the right to secure an adjournment of proceedings;
- the right to be informed of the outcome and the reasons for a decision; and
- the right to an appeal.

Many of these safeguards are available under the *Incompetent Persons Act* but it is extremely difficult for a person subject to a guardianship application to make use of them for a number of reasons such as lack of knowledge about the legal system, a lack of support and assistance, as well as an inadequacy of financial assistance to hire a lawyer.

## IV. Suggestions for Reform

### 1. Is adult guardianship necessary?

#### (i) guardianship as restrictive

This is a necessary starting point for any discussion of adult guardianship. Some people, such as a group representing mentally "disabled" adults called *People First*, believe that any form of adult guardianship is unacceptable. In their opinion guardianship should never be a legal option since it discriminates against people and it is a legal tool which takes away the freedoms of people who have done nothing wrong. These people argue that fixing up old guardianship laws to make them more *Charter*-proof leads the public to believe that guardianship is acceptable. Many different mental health consumers agree with this approach and believe that other models which do not include any type of guardianship or substitute decision-making should be explored which do not take away a person's right to decide.

#### (ii) guardianship as enabling

Other people, however, see adult guardianship as a "necessary evil" which should be used only as a last resort and only if other less restrictive ways of assisting an adult have been exhausted. This approach accepts that there are some people who will need someone else to make all of their decisions for them but that the law as it presently exists should limit the powers of guardians and provide more safeguards for adults subject to guardianship application. Support also comes from an international law document called the United Nations *Declaration on the Rights of the Mentally Retarded* which states that everyone has the **right** to a guardian, if the need is there.

It is difficult to know which view is correct but on balance the Commission believes that adult guardianship is necessary for some people.

**The Commission suggests:**

**that there should be a Nova Scotia law which allows for the appointment of a guardian for an adult who needs one.**

## 2. Are Nova Scotia's adult guardianship laws in need of reform?

### (i) The *Incompetent Persons Act*

Assuming that adult guardianship is a good idea, how might reform of the present law take place? There have been many criticisms of the *Incompetent Persons Act* including: offensive language; its "all-or-nothing" approach; the emphasis on property; its lack of procedural fairness; and *Charter* violations. The Commission is of the view that the law is in need of substantial reform to make it reflect the values of respect, equality and autonomy. Rather than change the *Act*, the Commission believes the law should be replaced with a new one.

**The Commission suggests:**

**the law in Nova Scotia as it relates to adult guardianship is in need of reform. The *Incompetent Persons Act* should be repealed and replaced with a new adult guardianship law.**

### (ii) the *Inebriates Guardianship Act*

Most of the criticisms of the *Incompetent Persons Act* apply to this law as well in light of its language, the lack of procedural safeguards and paternalism. The law is also unnecessary because an adult alcoholic who is in need of protection from, for example, neglect would be more appropriately dealt with under the *Adult Protection Act*. Alternatively, if the person had deteriorated to the extent that a guardian is needed, then adult guardianship legislation would apply.

**The Commission suggests:**

**the *Inebriates Guardianship Act* should be repealed.**

## 3. If a new law is necessary, what guiding principles should apply?

The Commission believes that autonomy, respect and equality are important in reform of mental health laws. In the context of adult guardianship, where there is a concern about striking a balance between enabling adults to decide for themselves and restricting some of the areas where they are in need of guardianship assistance, the following principles should be the foundation for any new adult guardianship law:

- the adult's right to autonomy and self-determination;
- a presumption of competence;
- guardianship as a last resort;
- guardianship order should be the least restrictive one; and
- wishes of the adult to be taken into account.

**(i) the adult's right to autonomy and self-determination**

The law should recognize that people have the right to make their own decisions, that is, to self-determination. We all have an interest, for a number of reasons, in making our own decisions about our lives. When we are no longer legally able to do so the effect can be tremendous. The impact of no longer being able to control and enjoy one's property, for example, may be psychologically devastating for some people.

The right to autonomy and self-determination should allow us to make our own decisions. It should also allow us to make decisions that others may think are "wrong". Guardianship should not be imposed simply because a person makes a decision that other people do not understand or agree with.

**The Commission suggests:**

**the law should recognize an adult's right to autonomy and self-determination.**

**(ii) a presumption of competence**

Everyone should be presumed to be competent to make their own decisions unless it is proved that they are not. This should be clearly stated in the law. This means that any person who is bringing a guardianship application should be required to show that the adult cannot make his or her own decisions.



**The Commission suggests:**

**the law should presume that people are competent to make their own decisions.**

**(iii) guardianship as a last resort**

In considering whether or not guardianship is appropriate, a court should be required to ask whether other less restrictive options have been exhausted for the adult. Where a less restrictive alternative exists, this should be developed first. This is an important guiding principle because even a partial, time-limited guardianship order will have a dramatic impact on the adult's life. The reality is that people will tend to scrutinize all of the adult's decisions since "the law" has already decided that help is needed in some areas of decision-making.

There are many practical issues which arise from the adoption of this principle of guardianship as a last resort which include: How can a court know when another less restrictive option is workable? Should the person bringing the application be required to show that less restrictive options have been tried? If the court decides a less restrictive option is available, should it be able to review the matter later to see if it is working? Who should seek this type of review?

**The Commission suggests:**

**adult guardianship should only be used as a last resort.**

**(iv) guardianship order should be the least restrictive one**

Most adults who need a guardian are able to make some legal decisions for themselves. We believe that they should be encouraged to do so. "Competency" is not a global concept and people often have areas of their lives where assistance is not needed. Guardianship orders should be designed to reflect this and guardianship orders should be personalized and should be the least restrictive one for the individual. The orders should focus on the adult's abilities, allowing the person to participate in decision-making as fully as possible in as many areas of decision-making as possible.

**The Commission suggests:**

**a guardianship order should be the least restrictive one possible in the circumstances.**

**(v) wishes of the adult to be taken into account**

Courts should actively inquire as to the wishes of a person who is the subject of a guardianship application. It would then be a matter for the judge to decide how much weight to give to the wishes given the "capacity" of the adult.

Any guardian appointed should also be required to, as much as possible, respect the wishes of the adult when making decisions on his or her behalf. An issue which arises from this is whether the guardian should be required to decide as if he or she was that person. In such situations, only when the adults previous wishes are not known should the guardian be required to act in a manner which is in the best interests of the adult.

A couple of examples may help illustrate this issue: *Example 1* - Elaine has been found to be in need of a personal guardian for decisions relating to medical consent. She has religious beliefs which do not permit the use of blood products for medical procedures. Should her guardian be required to decide as she would have decided with respect to the issue of a blood transfusion even though the guardian may believe it is not in her "best interests" to do so? *Example 2* - For every year for the past 20 years, Mario has donated \$1,000 to his local volunteer fire department's annual fund raiser. He has told family and friends that he wishes to continue this tradition for as long as he lives. A court has decided that he needs a guardian for his financial affairs, should the guardian continue to make the donation since these are Mario's wishes even though it may not be in the "best interests" of his estate?

Although the Commission is of the opinion that an adult's wishes should be considered we are looking for public input on the following related issues: Should a guardian do what is in the adult's best interests or decide as the adult would have decided? Should a guardian be required to abide by legal prior declarations only, such as an enduring power of attorney? Should the guardian be required to abide by any prior declaration **made in writing**? Or, should the guardian have to abide by the wishes, however expressed? Are there circumstances where pre-expressed wishes should be over-ruled? When? Who should decide?

**The Commission suggests:**

**the court should be required to inquire as to the wishes of the adult. A guardian should, as much as possible, respect the wishes of the adult when they are known.**

**4. Should the law allow for the separate appointment of a "guardian of the estate" and a "guardian of the person"?**

Under the *Incompetent Persons Act* if a person is found to be "incapable of taking care of himself" the court will appoint a guardian of the person **and** the estate. According to the wording of the legislation itself, the court cannot appoint an estate guardian without appointing a personal guardian, and vice versa. But the fact is that courts are appointing guardians of estates and of the person separately. The Commission believes that this is appropriate since this type of flexibility is important to deal with people adults who are in need of guardians individually.

**The Commission suggests:**

**the law should provide for the separate appointment of a "guardian of the estate" and a "guardian of the person".**

**5. Should the legislation allow for "partial" guardianship orders?**

In Nova Scotia, a guardian has full powers unless they are limited by the court. Much of the reform in the law of adult guardianship in recent years, however, has moved away from the idea of full guardianship to one where an adult's powers are removed only as are proven necessary.

We believe that guardianship orders should be limited and that courts should no longer automatically grant full powers to guardians. This is consistent with the principles of autonomy and self-determination. The powers of both estate guardians and personal guardians should be limited to any combination of powers which would be outlined in the law. The powers would be held as long as they are necessary. The court should be required to grant only the powers and authority that is necessary for the guardian to assist the adult.

**The Commission suggests:**

**adult guardianship law should allow partial guardianship orders.**

## **6. What test should the court require to be proven before a person is found to be in need of a guardian?**

In some provinces the court has different "tests" that it applies for the appointment of estate guardians and guardians of the person. They may require one set of criteria for the appointment of a guardian of the person and another set for a guardian of the estate. The Commission is of the opinion that the criteria should be the same for both types of guardians. The criteria should require that the adult is in need of a guardian and that the appointment be in the best interests of the adult.

Some provinces also require that a person be able to make reasonable decisions. Ontario, for example, has a new law which requires that a person be able to "appreciate the reasonably foreseeable consequences of a decision or lack of decision." The Commission believes that this is a very strict approach since most of us make decisions without foreseeing their consequences.

The Commission is concerned with the use of the word "reasonable" because it requires the court to decide: what is a "reasonable" decision? People should be allowed to make unreasonable decisions without being subject to guardianship orders. The Commission prefers a test which would require that the adult be able to receive and evaluate information and be able to make "reasoned" decisions. When the person cannot do this, a guardian will be appointed.

**The Commission suggests:**

**a guardian should only be appointed if it is in the best interests of the adult and only if the adult is in need of a guardian. The adult should also be able to receive and evaluate information effectively and to make "reasoned" decisions. Only if they cannot do this will a guardian be appointed.**

## 7. What standard of proof should be required by the law?

A "standard of proof" refers to what has to be proven in court before an order will be made by a judge. In a criminal case, for example, proof "beyond a reasonable doubt" is needed to prove guilt. In most non-criminal (civil) court cases, however, the law requires proof "on the balance of probabilities". In simplest terms, this means "more likely than not" it occurred. Under the *Incompetent Persons Act* this civil burden is required.

Some people suggest that a higher standard, such as "clear and convincing evidence" may better underline the seriousness of a guardianship application and assist in ensuring that more complete evidence is presented to the court. A majority of the Commission agrees with this view. A standard of "clear and convincing" would be less difficult to prove than "beyond a reasonable doubt" but more difficult than "on the balance of probabilities."

**The Commission suggests:**

**the law should require clear and convincing evidence for guardianship applications.**

## 8. How should the court decide who to appoint as guardian?

### (i) a statement of intent or "plan"

Ontario is the only province which requires that a plan be submitted to a court by someone applying to become a guardian but it is only needed for estate guardianship. Some people suggest, however, that all applications for guardianship should be accompanied by a "plan" which outlines the major steps in decision-making which the person intends to use if appointed as a guardian. In this way the court will have a better idea how the powers transferred are intended to be used.

This type of guardianship plan could serve at least three functions:

- (1) to evaluate the suitability of a proposed guardian;
- (2) to clarify the guardian's duties and the court's expectations; and
- (3) to serve as a yardstick against which to measure a guardian's conduct.<sup>6</sup>

---

<sup>6</sup> R. Gordon & S. Verdun-Jones, *Adult Guardianship Law In Canada* (Carswell: Toronto, 1992) at 3-54.

The Commission is of the view that a plan or statement of intent would be helpful to a court in a guardianship application.

**The Commission suggests:**

**the law should require that the court be provided with a statement of intent or plan as to how a proposed guardian will provide support and assistance to an adult in need of a guardian.**

**(ii) suitability criteria**

The *Incompetent Persons Act* does not give any guidance to the court as to who would be the best guardian or what the desired characteristics of a guardian should be. Our Supreme Court has, however, stated that in selecting a guardian the primary concern is the interests of the adult over and above those of the family or kin.<sup>7</sup>

Most other provinces and territories also lack suitability guidelines with the exception of Alberta and Saskatchewan where the laws set out the criteria a person must satisfy before being appointed. In Alberta, for example, the court must be satisfied (1) that the proposed person is an adult who consents to the appointment; (2) that he or she will act in the best interests of the dependent adult; (3) that he or she will not be in a conflict of interest (for a reason other than the fact that he or she is a beneficiary or relative); (4) that the person is a resident of the province and (5) is a suitable person able to act.

Most of these factors seem sensible although the Commission is concerned with any residency requirement since Nova Scotia is a fairly small province. For example, a person in need of a guardian may live in Amherst with a son in Moncton who is willing to act as a guardian. In such a situation the son should not be prevented from becoming a guardian solely on the basis of his New Brunswick residency. Additionally, the Commission prefers an approach where the criteria are preferences for the choice of guardian and are not strict requirements. Again, this allows the court some flexibility to individualize the guardianship orders.

The Commission also believes that a court should consider a proposed guardian's religious, cultural, racial and ethnic background when determining suitability.

---

<sup>7</sup> *Re Barnhill* (1970), 3 N.S.R. (2d) 488.

**The Commission suggests:**

**the law should list criteria which a court would use to evaluate a proposed guardian including:**

- \* **that the proposed person is an adult who consents to the appointment;**
- \* **that he or she will act in the best interests of the dependent adult and, as much as possible, respect the wishes of the adult when they are known;**
- \* **that he or she will not be in a conflict of interest (for a reason other than the fact that he or she is a beneficiary or relative); and**
  - \* **is a suitable person able to act.**

**There should not be a residency requirement for guardians, although in many cases residency may be preferable.**

**(iii) formal assessments**

Not all applications for guardianship will require a formal assessment of the person's "capacity". If, for example, the adult is in a coma with no decision-making abilities, the evidence of medical practitioners should be enough to satisfy the court. Most guardianship applications are not this clear, however, and a court should have the option of requiring formal assessments.

An assessment should occur after a court has determined that it is necessary. These assessments should be multi-disciplinary, personalized and comprehensive. We must attempt to ensure that assessments are sensitive to the language, religion, gender and cultural differences among people in Nova Scotia and they should involve, as much as possible, family and close friends of the adult. The assessments should not focus on a person's cognitive abilities (such as I.Q.) but on the decisions to be made and the ability to understand what is required.

It must also be recognized that at present, the procedures and standards for determining "competency" are uncertain and controversial.

Given this, a number of additional issues need to be addressed and we would like your opinion on the following questions: Who should conduct the assessments? Would it be appropriate for a government social worker to conduct a home study as part of a formal assessment? What should happen if the person **refuses** to undergo an assessment?

**The Commission suggests:**

**formal assessments should be available to the court if there is insufficient information about the appropriate guardian or if there are issues raised about the needs and abilities of the person who is the subject of the application.**

**(iv) opinion of the adult**

The Commission is of the view that the law should require the court to inquire as to the adult's wishes for the choice of his or her guardian. Even though most adult guardianship laws in Canada do not require this, consideration of the adult's wishes in regard to the appointment is frequently recognized by the courts. For example, in a case called *Re West*<sup>8</sup>, the court indicated that the adult's wishes regarding the person to be appointed committee of his estate should be respected. The man suffered from a stroke and Alzheimer's disease and did not want his wife appointed committee of his estate but preferred a long-time business associate, who he felt could better manage his business interests.

The Commission believes that whenever possible the court should ask the adult who he or she would like appointed as guardian.

**The Commission suggests:**

**a court should inquire as to the wishes of the person who is the subject of the application whenever this is possible.**

**9. What language should be used to describe an adult found by the court to be in need of a guardian?**

As mentioned, the language of guardianship law can be disturbing to relatives and friends of people who are in need of guardians as well as to the adults themselves. Individuals who might be willing to proceed with an application for guardianship may refuse where it is necessary to obtain a declaration that the adult is a "lunatic" or mentally "incompetent".

---

<sup>8</sup> (1978), 20 N.B.R. (2d) 686 (C.A.), at 709.



The Commission wishes to avoid offensive language. It is seeking public input into which of the following terms is preferable: (1) dependent adult; (2) vulnerable adult; (3) adult in need of a guardian; (4) adult in need of a substitute decision maker. Are there other terms which are less offensive?

**The Commission suggests:**

**the language used to refer to a person found to be in need of a guardian should not include the terms "incompetence" or "incapacity". The Commission seeks advice on the language to be used.**

## **10. Should the powers of guardians of the person be limited?**

Under the *Incompetent Persons Act* when someone is appointed a guardian of the person he or she has the power and authority to make all personal decisions for the person except where another law does not allow it. The Commission is of the opinion that there should be limitations on what a personal guardian can consent to without the court's approval. The types of decisions which a personal guardian should be prevented from making are:

- consent to a procedure, the sole purpose of which is sterilization;
- consent to an abortion authorized by law except where the continuation of the pregnancy would likely cause "danger to the life or health" of the dependent adult;
- consent to the termination of the dependent adult's parental rights;
- interference with the adult's exercise of religious practices, except to the extent that those practices threaten the dependent adult's health or safety; or
- consent to the involuntary placement of the adult in a psychiatric facility;

The Commission is looking for your input on whether or not you think there are some decisions that even a court should **not** be allowed to make?

**The Commission suggests:**

**there should be limitations on what a personal guardian can consent to without the court's approval. The personal guardian should not be able to consent to the following:**

- **consent to a procedure, the sole purpose of which is sterilization;**
- **consent to an abortion authorized by law except where the continuation of the pregnancy would likely cause "danger to the life or health" of the dependent adult;**
- **consent to the termination of the dependent adult's parental rights;**
- **interference with the adult's exercise of religious practices, except to the extent that those practices threaten the dependent adult's health or safety; or**
- **consent to the involuntary placement of the adult in a psychiatric facility;**

**11. Should a finding that an adult is in need of a guardian be automatically reviewable?**

In some provinces an application to end a guardianship order cannot be made before one year has passed, unless the court permits otherwise. Other provinces say that an application can be made at any time. The situation is quite different in Alberta, Saskatchewan and Quebec which call for an automatic review by the court.

In Nova Scotia, an application to review the order may be brought at any time but there is no automatic review. The Commission believes that reviews of guardianship orders should be automatic and should occur on a regular basis, at least every five years. A guardianship order should also be reviewable any time upon application. A practical issue which arises is: What should be required for such a review?

**The Commission suggests:**

**the court should indicate an appropriate time for periodic review of guardianship orders with a requirement that a review occur at least every five years. An order should also be reviewable at any time on application.**

## **12. How can the law provide procedural safeguards?**

### **(i) right to a hearing**

Since a guardianship order can take away almost every right a person has, it is extremely important that the law provide strict procedural safeguards. The Commission is of the opinion that one of the most important of these is the right to a hearing.

**The Commission suggests:**

**a person subject to a guardianship application should have the right to a hearing.**

### **(ii) right to a lawyer**

Very few guardianship applications in Nova Scotia are opposed because the process is usually time-consuming, complex, costly and requires a lawyer's involvement.

If a person is charged with a criminal offence, he or she has the right to a lawyer. Since a guardianship application can result in the most serious loss of freedoms, the Commission believes that a person who is the subject of a guardianship application should also have the right to a lawyer. If a person does not have enough money, a government sponsored or legal aid lawyer should be available to provide legal advice to the person.

**The Commission suggests:**

**a person subject to a guardianship application should have an opportunity to hire a lawyer for independent legal advice and if there is not enough money in the estate, a government sponsored or legal aid lawyer should be made available to the person.**

**(iii) the right to receive Notice**

The right to a lawyer would be meaningless unless it is available at the earliest possible stage. Under the *Incompetent Persons Act*, Notice is given to the person who is the subject of the application 14 days in advance of the court hearing. At that point, however, all of the affidavit evidence in support of the application is already before the court.

Some people feel that Notice should be given much earlier, such as 30 days prior to the **first** court appearance. The Commission, however, feels that this does not go far enough and that it is necessary for an advocate to go to the adult who is the subject of the application to explain matters to the person.

Some of the issues which arise from this suggestion include the following: Are there any times when the person who is the subject of the application should **not** receive Notice of the application? Should the advocate be an employee of a government department or should it be from a community based system? If community based, should these advocates receive money for their services?

**The Commission suggests:**

**an advocate should be required to visit the person who is the subject of the application to explain matters to the person.**

**(iv) Notice to others**

The *Incompetent Persons Act* requires that Notice also be given to " the person who is to be subject of the guardianship application or to those "having charge of him", not less than fourteen days before the hearing date.

The Commission is of the view that the law should also say that Notice should be given to any person with an interest in the application which would include the nearest relatives of

the person (which the law should define), the administrator of a facility where the adult may be residing and any other person residing with the adult in private accommodations. The concern with respect to any person living in private accommodations is that same sex couples may not receive Notice if it is only required for relatives or spouses. If a new Office of the Public Guardian/Trustee is established this Office should also receive Notice.<sup>9</sup> If the person subject to the guardianship application has executed an enduring power of attorney under Nova Scotia's *Powers of Attorney Act* or a medical consent designation under Nova Scotia's *Medical Consent Act*, these individuals should receive Notice too. It would also be useful to have Notice given to any persons named in a testamentary document (for example, a will) if these are known.

**The Commission suggests:**

**Notice should be given to the following:**

- \* **nearest relatives of the person;**
- \* **Office of the Public Guardian/Trustee;**
- \* **the administrator of a facility where the adult may be residing;**
- \* **anyone appointed under an enduring power of attorney or a medical consent designation;**
- \* **any other person residing with the adult in private accommodations;**
- \* **any persons named in a testamentary document, if known;**  
**and**
- \* **any other person with an interest in the application**

### **13. What role should a government office play?**

#### **(i) monitoring guardians**

As we mentioned, Nova Scotia does not have a system in place for monitoring estate guardians. Neither the courts nor the Public Trustee's Office attempt to ensure that estate guardians account for the estate which they handle. Similarly, personal guardians are not monitored or reviewed by the court or a government office.

The Commission is of the view that this lack of monitoring is a serious flaw in the present system and one which must be addressed by any new law. The most appropriate office for the monitoring of estate guardians is the Office of the Public Trustee. There is also need,

---

<sup>9</sup> The suggestion for the creation of a new Office of Public Guardian/Trustee is discussed below.

however, for monitoring personal guardians, and the Commission believes that a new Office of the Public Guardian is needed, in combination with the Public Trustee for the purpose of monitoring personal guardians.

Some of the additional issues for your consideration include: Are there ways to offset the cost of monitoring? Should the new Office charge fees for monitoring estates? Should there be a penalty for guardians who are disobeying the court order? What about guardianship orders which were made before a new law is in place, should these be monitored too? Should there be a complaint procedure set up for abuse of a guardian's powers?

**The Commission suggests:**

**the most appropriate Office for the monitoring of estate guardians is the Office of the Public Trustee. Since there is also a need for monitoring personal guardians, a new Office of the Public Guardian should be established, in combination with the Public Trustee for the purpose of monitoring personal guardians.**

**(ii) as guardian of the person**

There is clearly a gap in services available to Nova Scotians due to the lack of availability of government-sponsored personal guardianship. If there is no-one available to act as a guardian of the estate, the Public Trustee may consent to act. If there is no-one available to become guardian of the person, however, there is no government service available to act as safety net for these people. The Public Trustee's Office is not designed to provide personal guardianship services (it has no social workers or investigators) and except for consents to medical treatment under the *Hospitals Act*, the Public Trustee will decline to act as guardian of the person.

The Commission is of the opinion that there is a need for a government Office to provide personal guardianship services to those who have no-one to act as a personal guardian. This Office could also provide advice and information on adult guardianship to the general public and to professionals such as physicians and lawyers. Although it is preferable to have a friend or family member act as personal guardian there needs to be a public safety net available for people who have no-one to act as personal guardian. A new government Office should be set up to provide these services. The Commission believes this could be merged with the Public Trustee.

**The Commission suggests:**

**the most appropriate body to provide personal guardianship services to those in need is a new Office of the Public Guardian.**

## **14. How should the law replace or remove guardians?**

### **(i) replacement**

There may be a time when there is a need to replace a guardian. This usually occurs on the death of the guardian or when the person is unable to continue decision-making. The Commission believes that the replacement of a guardian may be aided in two ways: (1) by the appointment of a co-guardian; and (2) by the appointment of an alternate guardian. Our law is silent on this issue but it would appear to be available to the court to appoint more than one guardian, without express statutory authority to do so.

Appointment of an alternate and co-guardians should be expressly provided for in the law and these appointments should also be subject to the same suitability criteria under the law. By having an alternate guardian appointed, the alternate could automatically assume responsibilities on death of the guardian or, where authorized, in his or her temporary absence.

**The Commission suggests:**

**the legislation should specifically allow for co-guardianship orders as well as for the appointment of alternate guardians.**

### **(ii) removal**

In Nova Scotia, the court can remove a guardian and appoint a replacement if any one of several circumstances arises: where the guardian leaves the province; becomes "incapable of discharging his trust"; is "evidently unsuitable" to continue to be a guardian; or is "wasting the property" of the person under guardianship.

Other provinces, such as Alberta and Saskatchewan, have very specific provisions for the removal or discharge of a guardian. The court must be satisfied that:

- 1) the dependent adult is no longer in need of a guardian;
- 2) the guardian is unable or unwilling to continue to act;
- 3) the guardian refuses to act or to continue to act;

- 4) the guardian has failed to act as guardian or act in accordance with a guardianship order;
- 5) the guardian has acted in an improper manner or in a way that has endangered the well-being of the dependent adult;
- 6) the guardian is no longer a suitable person to act as guardian, or
- 7) the guardian is no longer a resident of the jurisdiction.

The Commission is of the opinion that the law should specifically state when a guardian will be removed or discharged of his or her duties. Some of the issues arising from this are: Who should be able to apply to court for the removal of a guardian? Should the Public Guardian/Trustee be able to replace or discharge a guardian without a court application? Who should receive Notice of an application for removal or replacement of a guardian? Should a penalty be imposed for people who fail to meet their guardianship obligations?

**The Commission suggests:**

**the discharge of a guardian should take place on application and a court should be satisfied that:**

- 1) the dependent adult is no longer in need of a guardian;
- 2) the guardian is unable or unwilling to continue to act;
- 3) the guardian refuses to act or to continue to act;
- 4) the guardian has failed to act as guardian or act in accordance with a guardianship order;
- 5) the guardian has acted in an improper manner or in a way that has endangered the well-being of the dependent adult; or
- 6) the guardian is no longer a suitable person to act as guardian,

**Residency should not, however, be cause for discharge.**



## V. Summary of Suggestions

1. There should be a Nova Scotia law which allows for the appointment of a guardian for an adult who needs one. **[Page 14]**
2. The law in Nova Scotia as it relates to adult guardianship is in need of reform. The *Incompetent Persons Act* should be repealed and replaced with a new adult guardianship law. **[Page 14]**
3. The *Inebriates Guardianship Act* should be repealed. **[Page 15]**
4. The law should recognize an adult's right to autonomy and self-determination. **[Page 15]**
5. The law should presume that people are competent to make their own decisions. **[Page 16]**
6. Adult guardianship should be used only as a last resort. **[Page 16]**
7. A guardianship order should be the least restrictive one possible in the circumstances. **[Page 17]**
8. The court should be required to inquire as to the wishes of the adult. A guardian should, as much as possible, respect the wishes of the adult when they are known. **[Page 18]**
9. The law should provide for the separate appointment of a "guardian of the estate" and a "guardian of the person". **[Page 18]**
10. Adult guardianship law should allow partial guardianship orders. **[Page 19]**
11. A guardian should only be appointed if it is in the best interests of the adult and only if the adult is in need of a guardian. The adult should also be able to receive and evaluate information effectively and to make "reasoned" decisions. Only if they cannot do this will a guardian be appointed. **[Page 19]**
12. The law should require clear and convincing evidence for guardianship applications. **[Page 20]**
13. Adult guardianship law should require that the court be provided with a statement of intent or "plan" as to how a proposed guardian will provide support and assistance to an adult in need of a guardian. **[Page 21]**

14. The law should list criteria which a court would use to evaluate a proposed guardian including:
- \* that the proposed person is an adult who consents to the appointment;
  - \* that he or she will act in the best interests of the dependent adult and, as much as possible, respect the wishes of the adult when they are known;
  - \* that he or she will not be in a conflict of interest (for a reason other than the fact that he or she is a beneficiary or relative); and
  - \* is a suitable person able to act.

There should not be a residency requirement for guardians, although in many cases residency may be preferable. **[Page 22]**

15. Formal assessments should be available to the court if there is insufficient information about the appropriate guardian or if there are issues raised about the needs and abilities of the person who is the subject of the application. **[Page 23]**
16. A court should inquire as to the wishes of the person who is the subject of the application whenever this is possible. **[Page 23]**
17. The language used to refer to a person found to be in need of a guardian should not include the terms "incompetence" or "incapacity". The Commission seeks advice on the language to be used. **[Page 24]**
18. There should be limitations on what a personal guardian can consent to without the court's approval. The personal guardian should not be able to consent to the following:
- consent to a procedure, the sole purpose of which is sterilization;
  - consent to an abortion authorized by law except where the continuation of the pregnancy would likely cause "danger to the life or health" of the dependent adult;
  - consent to the termination of the dependent adult's parental rights;
  - interference with the adult's exercise of religious practices, except to the extent that those practices threaten the dependent adult's health or safety; or
  - consent to the involuntary placement of the adult in a psychiatric facility. **[Page 25]**

19. The court should indicate an appropriate time for periodic review of guardianship orders with a requirement that a review occur at least every five years. An order should also be reviewable at any time on application. **[Page 26]**
20. A person subject to a guardianship application should have the right to a hearing. **[Page 26]**
21. A person subject to a guardianship application should have an opportunity to hire a lawyer for independent legal advice and if there is not enough money in the estate, a government sponsored or legal aid lawyer should be made available to the person. **[Page 27]**
22. An advocate should be required to visit the person who is the subject of the application to explain matters to the person. **[Page 27]**
23. Notice of a guardianship application should be given to the following:
  - \* nearest relatives of the person;
  - \* Office of the Public Guardian/Trustee;
  - \* the administrator of a facility where the adult may be residing;
  - \* anyone appointed under an enduring power of attorney or a medical consent designation;
  - \* any other person residing with the adult in private accommodations;
  - \* any persons named in a testamentary document, if known; and
  - \* any other person with an interest in the application. **[Page 28]**
24. The most appropriate Office for the monitoring of estate guardians is the Office of the Public Trustee. Since there is also a need for monitoring personal guardians, a new Office of the Public Guardian should be established, in combination with the Public Trustee for the purpose of monitoring personal guardians. **[Page 29]**
25. The most appropriate body to provide personal guardianship services to those in need is a new Office of the Public Guardian Trustee. **[Page 30]**
26. The legislation should specifically allow for co-guardianship orders as well as for the appointment of alternate guardians. **[Page 30]**
27. The discharge of a guardian should take place on application and a court should be satisfied that:
  - 1) the dependent adult is no longer in need of a guardian;
  - 2) the guardian is unable or unwilling to continue to act;
  - 3) the guardian refuses to act or to continue to act;
  - 4) the guardian has failed to act as guardian or act in accordance with a guardianship order;
  - 5) the guardian has acted in an improper manner or in a way

- 6) that has endangered the well-being of the dependent adult; or  
the guardian is no longer a suitable person to act as guardian,

Residency should not, however, be the cause for discharge. **[Page 31]**