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## **Inter-Provincial Recognition of Substitute Decision-Making Documents: Personal Directives**

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**Report Commented On:** Alberta Law Reform Institute, [\*Inter-Provincial Recognition of Substitute Decision-Making Documents: Personal Directives, Final Report 113\*](#)

A little over a year ago, I wrote a [post](#) about the Alberta Law Reform Institute's (ALRI) project on the inter-provincial recognition of substitute decision-making documents. This was an implementation project, which means that it looked at whether sample, uniform legislation already researched and drafted by the Uniform Law Conference of Canada (ULCC) was suitable for enactment in Alberta.

At the time of that post, ALRI [recommended](#) that the ULCC's uniform legislation should be implemented in Alberta, with some minor amendments. We also sought feedback on our preliminary recommendations for reform. Unfortunately, the consultation results did not support our preliminary recommendations and, as a result, ALRI is not in a position to make any final proposals. Instead, [Final Report 113](#) summarizes the project's consultation process and results, and highlights any policy alternatives or additional issues that may deserve further exploration and analysis.

### **What is the Problem?**

An individual may use a substitute decision-making document to authorize another person to act on his or her behalf. Enduring powers of attorney are generally used to authorize another person to act on the individual's behalf with respect to property, financial, or legal matters, while personal directives are generally used for health care and personal matters.

A valid substitute decision-making document must comply with the formal requirements of the jurisdiction where it is created. However, these formal requirements differ from province to province. This means that a substitute decision-making document cannot automatically be used in a jurisdiction other than the one where it was made. This creates problems for individuals who own assets or spend significant time in more than one jurisdiction.

For example, imagine a woman who lives in Ontario and has substitute decision-making documents drafted in accordance with Ontario law. She owns property in Alberta and travels here frequently. On one of her visits to Alberta, she is involved in a car accident and loses mental capacity. Under what circumstances can her Ontario documents be used to deal with her Alberta property or to assist with her medical decisions while she is incapacitated in Alberta? This is the situation that statutory recognition rules are meant to address.

While most Canadian provinces and territories have statutory rules governing recognition, those rules vary from place to place. Even within Alberta, the recognition rules differ depending on which type of document is being recognized. For example, under the *Powers of Attorney Act*, [RSA 2000, c P-20](#), an out-of-province enduring power of attorney will be recognized as valid in Alberta if, according to the law of the place where it was created, it complies with all the necessary formalities, and it survives the mental incapacity of the donor (*Powers of Attorney Act*, s 2(5)). In contrast, the *Personal Directives Act*, [RSA 2000, c P-6](#), stipulates that an out-of-province personal directive will be recognized as valid in Alberta only if it complies with the formal requirements of Alberta's legislation (*Personal Directives Act*, s 7.3).

In those provinces that do not have statutory recognition rules, a court application based on conflict of laws rules may have to be made to compel recognition of the substitute decision-making document. If recognition is refused and the individual has already lost capacity, the only option for dealing with his or her affairs is to make a court application for the appointment of a guardian or trustee.

One way to avoid these types of problems is to have multiple substitute decision-making documents drafted in accordance with the formalities of every jurisdiction where an individual owns property or intends to reside or relocate. However, the time and expense required to put in place multiple substitute decision-making documents, for both property and health care, will add up quickly and make this solution impractical for many. Moreover, in cases where an individual moves from one jurisdiction to another after losing capacity, drafting a new substitute decision-making document that conforms to the requirements of the new jurisdiction is not even an option.

### **What is the Uniform Solution?**

The ULCC is a national organization that attempts to harmonize Canadian law in areas of provincial and territorial jurisdiction. In the context of this project, it recognized that uniform recognition provisions would go a long way towards alleviating the jurisdictional issues described above. As a result, in August 2016, the ULCC adopted the [Uniform Interjurisdictional Recognition of Substitute Decision-Making Documents Act](#) (Uniform Act) as suitable for implementation across Canada.

The Uniform Act is the result of a joint project between the ULCC and its American counterpart, the Uniform Law Commission. It proposes a three-part approach to recognition. First, it recognizes the validity of substitute decision-making documents created under the law of another jurisdiction. Second, it proposes two options for the choice of law rule. Third, it supplements the existing framework in most jurisdictions by providing rules governing acceptance, refusal, and good faith reliance.

### **Should the Uniform Solution be Implemented in Alberta?**

ALRI decided to review the Uniform Act in order to determine whether it is suitable for implementation in Alberta. After publishing a report for discussion, ALRI conducted a broad

consultation with multiple legal, government, and health care stakeholders. For example, ALRI counsel gave presentations to lawyers' groups, conducted roundtable discussions with healthcare stakeholders, published online surveys, and disseminated information about the project through social media and traditional media outlets. These consultation activities focused on the provisions of the Uniform Act and whether they are preferable to Alberta's current recognition scheme. Unfortunately, the consultation results did not support implementation of the Uniform Act in Alberta.

## **Consultation Trends**

The consultation feedback that ALRI received suggests that, while there is theoretical support for a harmonized scheme governing the recognition of substitute decision-making documents, there is little support for the Uniform Act itself. Consultation participants found the Uniform Act confusing and unnecessarily complicated, and were concerned that it imposes unreasonable expectations on third parties (that is, those who are asked to accept substitute decision-making documents that were prepared outside of Alberta).

Further, many of the healthcare stakeholders consulted indicated that Alberta's current recognition scheme works fairly well in practice and that they have not been in a position where they had to reject an out-of-province document. In other words, the issues may not be as problematic as originally thought.

The response rate during consultation was also very low, with almost no engagement from the financial sector. Thus, any consultation feedback that ALRI did receive was limited and can only be applied to personal directives.

Finally, new issues came up during consultation that have not had the benefit of widespread consultation. During certain consultation events, the individuals in attendance brainstormed policy alternatives that they believe would improve the current recognition system. However, those alternatives did not form a part of ALRI's formal consultation process or receive feedback from stakeholders outside of the meetings where the brainstorming took place. As a result, ALRI cannot formally recommend these policy alternatives.

## **Policy Alternatives**

Some of the policy alternatives brainstormed during the consultation events included the following:

- Only the law of Alberta should be used to determine the validity of a non-Alberta substitute decision-making document.
- Alberta should create a standard form to accompany non-Alberta documents which, if presented, would justify recognition and use of the document in Alberta.
- Alberta should allow a substitute decision-making document to authorize medical assistance in dying.

These alternatives are described in detail in Final Report 113. However, because they did not form a part of ALRI’s formal consultation or, with respect to the last alternative, because they are outside the scope of a project dealing with the narrow topic of recognition, ALRI cannot use these alternatives as the basis for any final recommendations.

## Conclusion

This was a unique project for ALRI; we have not yet been in a position where an entire project is completed and does not result in any final recommendations. However, that does not mean this project should be classified as a failure. In particular, ALRI was able to engage with some key healthcare stakeholders and received meaningful feedback from those groups. Final Report 113 is meant to capture and record that feedback so that it can provide a starting point if the recognition of substitute decision-making documents is studied in the future.

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