CAPACIDAD JURÍDICA Y DISCAPACIDAD

Proyecto a cargo de FUTUEX (Fundación Tutelar de Extremadura), Fundación Aequitas y Fundación Academia Europea de Yuste, en el marco del Congreso Permanente sobre Discapacidad y Derechos Humanos bajo la autoría de:

Rafael de Lorenzo García
Blanca Entrena Palomero
Almudena Castro-Girona Martínez
Miguel Ángel Cabra de Luna
José Javier Soto Ruiz (Dirección)

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Prólogo: Antonio Luengo Nieto

CUADERNO DE TRABAJO Nº9 CANADA

CAPACIDAD JURÍDICA Y DISCAPACIDAD

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(Un estudio de Derecho Privado Comparado a la luz de la Convención Internacional sobre los Derechos de las Personas con Discapacidad)

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Antonio Luengo Nieto
Fiscal Audiencia Provincial de Badajoz

PROTECCIÓN PENAL DE LA DISCAPACIDAD. PERSPECTIVA EN ESPAÑA.

La sala más visitada del Museo del Prado en Madrid está presidida por el cuadro de «Las Meninas», del genial Diego Rodríguez de Silva y Velázquez, en el que aparecen inmortalizados, en primer plano, dos discapacitados. Pero posiblemente el apresurado turista o el ciudadano visitante ocasional de la pinacoteca, en ese fugaz repaso y dentro de su visión superficial, no reparará ni dedicará el sosiego necesario para apreciar, en esa misma estancia, algunos de los mejores retratos que aquel genio nos proporcionó con su inteligente mirada. Así, escoltan a Mari Bárbola y a Nicolasito Pertusato toda una extensa galería de personajes, aparentemente grotescos o de escasa talla, a los que Velázquez supo plasmar con una dignidad y humanidad que no nos transmiten otros retratos de ilustres cortesanos. Bufones, locos o ena-

nos, alguno de los cuales, pese a su corta talla, llegaron a ocupar por su valía importantes cargos, como Don Diego de Acedo, El Primo. En los cientos de cuadros del Museo no encontré una mirada más penetrante, inteligente e inquisidora que la del enano y bufón Sebastián de Morra. Cuando el pintor afronta el cretinismo y oligofrenia de Francisco Lezcano, el Niño de Vallecas, o las limitaciones del bufón irónicamente conocido como Don Juan de Austria, lo hace con una visión apasionada y crítica. Esa delicadeza impregna también otros retratos de disminuidos como Juan Calabazas, Calabacillas, certero testimonio de aquella decadente realidad. Siglos después, puedo conmoverme con esos cuadros; poco me transmite, al cabo, la pose artificiosa, la ampulosidad y pretendida grandeza del Conde Duque de Olivares, por más que compartan la magistral técnica pictórica. No son personajes ni cuadros menores, en ellos aplicó Velázquez lo mejor de su arte. En esa sala, corazón del gran Museo, más allá de aquellas miradas apresuradas, se atesora otra genial mirada, no compasiva sino inteligente, crítica y plena de dignidad.

Hoy, los avatares de la vida me colocan a diario ante sonrisas y expresiones que comparten no pocos rasgos con aquéllas. Sin duda hemos alcanzado conquistas sociales, hemos progresado en nuestra concienciación sobre la discapa-

cidad. Acaso, tal vez, nos pretendemos moralmente superiores a aquellos cortesanos de una dinastía decadente que concluyó con un rey, Carlos II, limitado y contrahecho, pero fundamentalmente mal asesorado y acompañado. Criticamos, rechazamos, la bárbara moda cortesana de coleccionar personajes deformes, y contemplamos –en un páramo de autocrítica y autorregulación- cómo en pos de una mayor audiencia y del simple negocio, pueblan programas mediáticos personajes limitados; cómo se mezclan gratuitamente en reportajes y grabaciones, con deleznable crudeza, discapacidad y violencia. Y, sin embargo, hoy mantenemos el escarnio de nuestros renovados bufones en no pocos programas televisivos de entretenimiento, en desgraciadas y no infrecuentes filmaciones y grabaciones públicamente expuestas en plataformas informáticas. La dignidad de las víctimas, de nuestros nuevos bufones, sigue siendo la misma: ¿dónde queda a veces nuestra superioridad moral?

La respuesta a esas situaciones siempre debería venir propiciada desde nuestra educación y cultura. Pero ante los ataques más graves a la dignidad de estas personas (art. 10 de nuestra Constitución), aunque sea como ultima ratio, no debemos desechar la aplicación del Derecho Penal. A ello dedicaré estas modestas reflexiones, reiterando la idea de que la flexibilidad de

algunos conceptos y categorías penales bien podrían adecuadamente ser trasladadas al ámbito civil para superar la rigidez del concepto de incapacitación y de sus consecuencias legales. Igualmente, en tenues pinceladas, abundaré acerca de cómo resulta preciso adaptar la respuesta administrativa y penal en materia de protección de la discapacidad ante nuevos fenómenos sociológicos y ante nuevas formas de vulnerar el libre desarrollo de la personalidad de ese grupo de ciudadanos.

Parte nuestro vigente Código Penal español de una amplia definición penal de incapaz, (art. 25 C.P.) que se extiende a «toda persona, haya sido o no declarada su incapacitación, que padezca una enfermedad de carácter persistente que le impida gobernar su persona o bienes por sí misma». La no exigencia aquí del requisito legal de una previa incapacitación judicial, debe hacernos reflexionar -ante este adelantamiento de la barrera de protección penal-, si en el ámbito civil, antes y durante la sustanciación del procedimiento de incapacitación, no deberían ser legalmente contempladas nuevas figuras de protección de los intereses de esas personas. La nueva realidad social de las familias, la falta de iniciativa o el distanciamiento de los parientes, no deben ser óbice para una mayor intervención –no subordinada- de instituciones públicas y del propio Ministerio Fiscal, auténti-

ca magistratura de amparo, como lo es en materia de protección de menores en situación de desamparo (art. 3 E.O.M.F.).

Siendo diversas las situaciones de limitación de la capacidad jurídica, la rigidez de la actual declaración civil de incapacidad así como de la alternativa tutela-curatela, y del rigorismo de las consecuencias legales aparejadas a aquella declaración judicial, debieran ser debidamente matizadas. En este punto, nuevamente la dogmática penal aporta una escala más amplia y flexible, una graduación de situaciones cuando trata las limitaciones de la capacidad de la persona desde el punto de vista de la imputabilidad y el reproche penal de sus conductas delictivas. Hablamos así de eximentes completas, incompletas, de atenuantes simples y por analogía (arts. 20 y 21 C.P.) atenuantes que en virtud de arbitrio judicial (objeto de cierta desconfianza por el legislador civil) pueden ser incluso consideradas como cualificadas o muy cualificadas, con el corolario de una gama de penas gradualmente impuestas en función de aquellas diversas situaciones de imputabilidad.

Estas circunstancias modificativas de la responsabilidad penal, -que traen causa de un catálogo abierto de alteraciones de la percepción y enfermedades mentales o padecimientos psiquiátricos-, tienen como respuesta la aplicación de una variada panoplia de medidas de seguridad, en

aras del correcto tratamiento de las mismas (arts. 101 a 104 C.P.).Tales consecuencias legales son revisables -sin plazos ni complejos trámites- en función de la evolución del paciente y del seguimiento por el mismo del tratamiento impuesto. Este es un nuevo punto en el que debería acogerse civilmente, de forma más ágil y bajo criterio pericial, como aquí sucede, la posible revisión del alcance de las consecuencias de la incapacitación. Es reseñable que, en este caso, el legislador penal busca mayores garantías no a través de un nuevo procedimiento –que demoraría innecesariamente la efectividad de la nueva medida y la correcta aplicación de la misma-, sino mediante la acción combinada de dos órganos jurisdiccionales: el que impuso la medida (órgano sentenciador) y el Juzgado de Vigilancia Penitenciaria (órgano de seguimiento del cumplimiento).

En la parte general del Código Penal, también se prevé la suspensión de la ejecución de una pena privativa de libertad en algunos supuestos de incapacidad sobrevenida («por enfermedad muy grave con padecimientos incurables», art. 80.4 C.P.), sin sujeción a los requisitos generales del art. 81 C.P. Este precepto tiene su trasunto en el art. 60 del Reglamento Penitenciario.

Ciertamente, el Derecho Penal en su aplicación debe ser la ultima ratio, y como una suerte de Constitución en negativo debe regular sólo

aquellas conductas vedadas para preservar la convivencia ciudadana. Sin duda, el Derecho de la Discapacidad debe tender hoy no al proteccionismo sino a la integración. No es dable una huida a la incriminación sistemática de comportamientos, si median otras vías legales, pero no debemos por ello renunciar al ejercicio y aplicación de la legislación penal en un ámbito tan sensible como la protección de las personas con discapacidad. Una legislación penal que no debe incurrir en la complacencia de los logros obtenidos, debiendo afinar penas y ajustar conductas a la realidad social cambiante.

Y así, nuestro legislador penal ha tipificado delitos especiales o formas agravadas cuando la víctima sea un discapacitado. Tal sucede en relación con las lesiones, cuando el sujeto pasivo es un menor o un incapaz (art. 148 circunstancia 3ª C.P.), y en la denominada violencia doméstica cuando se ejerce contra los incapaces que convivieran con el agresor, más allá incluso de su familia directa (art. 153 C.P.).También introduce un procedimiento específico en caso de esterilización de incapaces (aquí sí, solamente de persona judicialmente incapacitada, con intervención de Juez, Fiscal y dos especialistas, art. 156 pfo 2º C.P., siguiendo la STC 215/1994, de 14 de julio). En delitos contra la libertad y la indemnidad sexual (pues muchas víctimas no tienen ese grado de discernimiento), se introducen figuras

agravadas en caso de abuso del transtorno mental de la víctima, entendiendo que en tal situación no cabe entender que preste consentimiento a esas prácticas (art. 181.2 C.P.), así como se contempla el supuesto también agravado de «víctima especialmente vulnerable por razón de edad, enfermedad o situación» (art. 180.1,3ª C.P.), forma agravada también recogida en el delito de acoso sexual (art. 184.3 C.P.).Dentro de las conductas de exhibicionismo y provocación sexual, se persiguen aquellos actos de exhibición obscena ante incapaces (art. 185 C.P.) y la difusión o venta de material pornográfico a incapaces (art. 186 C.P.).En cuanto a la punición de la prostitución referida a incapaces, la misma se contempla en el art. 187.1 C.P., en tanto que en el art. 189.1 se castiga la utilización de incapaces con fines o en espectáculos de exhibicionismo o pornográficos, tanto públicos como privados, contemplando el apartado 2 de dicho precepto la tenencia, incluso para uso propio, de material pornográfico en el que aparezcan incapaces, conducta agravada (apartados 3 y 4) si se ejerce violencia física o sexual sobre los mismos o se les somete a prácticas sexuales que perjudiquen la evolución o el desarrollo de la personalidad del incapaz. Se echa en falta, ante la gravedad de estas conductas, que no se haya contemplado un resultado agravado cuando concurran dos o más circunstancias de las allí

descritas (por ejemplo, procediendo a la preceptiva imposición de la pena en su mitad superior) En este capítulo, se mantiene con una pena censurable por su levedad en relación con el desvalor de esta conducta, (apartado 5) la omisión del deber de impedir la prosecución de la prostitución de incapaces o de ponerlo en conocimiento de la autoridad. Ello no obstante, se recoge la posibilidad de incluir en la condena, potestativamente y de forma razonada, la inhabilitación para el ejercicio de los derechos de patria potestad, tutela, curatela o guarda hasta un máximo de seis años (art. 192.2 C.P.), pena accesoria que no guarda relación o parangón con otros supuestos de incumplimiento de deberes familiares (v. gr. art. 226.2 C.P.) que resultan ser incluso más gravemente penados.

En cuanto a los delitos de descubrimiento y revelación de secretos, alude el art. 197.5 C.P. al caso de que los datos se refieran a un incapaz, modalidad agravada que encuentra una punición aún mayor si se realiza con fines lucrativos. Sin duda, nos encontramos aquí ante el núcleo duro de la «privacy», y ante nuevas formas de delincuencia (v. gr. cibercrimen) que pueden afectar al sensible ámbito de la intimidad de estas personas. En plausible iniciativa, el Anteproyecto de reforma del Código Penal extiende estas conductas delictivas incorporando el acceso indebido a datos contenidos en sistemas infor-

máticos, sin necesidad de apropiarse de ellos, ni de alterarlos o utilizarlos, sino el mero «voyeurismo» informático. Igualmente, regula con precisos perfiles las distintas modalidades de ataques a esos sistemas informáticos, en precepto específico (v.gr. sabotaje o destrucción de datos médicos o administrativos de estos colectivos), para dar cumplimiento a la Decisión Marco 2005/222/JAI.
En el más tradicional campo de los delitos contra las relaciones familiares, se protege también al discapacitado, así frente al quebrantamiento de los deberes de custodia y cuidados (arts. 223 y 619 C.P.) o ante casos de abandono (art. 229 C.P.) o de entrega de un incapaz a un tercero sin mediar consentimiento del representante legal (art. 231 C.P.), así como si fuere explotado o utilizado para la mendicidad (art. 232 C.P.)
Los anteriores delitos, enumerados sin afán de exhaustividad, han encontrado cumplido análisis y desarrollo jurisprudencial en numerosos pronunciamientos jurisdiccionales. Lamentablemente, se mantiene casi inédito el delito de discriminación de personas en la prestación de servicios y por razón de su minusvalía (arts. 511 y 512 C.P.), no porque nuestra concienciación, educación y cultura hayan impedido que se produzcan tales atropellos a los derechos de estos ciudadanos, sino posiblemente porque los casos planteados hayan sido reconducidos al ámbito de las faltas, en una práctica procesal que

no podemos compartir, pues bien distinto es discriminar que vejar livianamente (art. 620.2 C.P.). Resulta necesaria una más precisa elaboración e interpretación de estos preceptos, así como de los atinentes a la provocación de la discriminación o a la difusión de informaciones injuriosas relativas a personas con minusvalías (art. 510 C.P.), pues la experiencia nos demuestra que, en situaciones de crisis económica como en la que nos encontramos, resurgen grupos guiados por ideologías que, junto a ideas xenófobas y racistas, incluyen en su reprobable credo la consideración de los discapacitados como seres de inferior valor social.

Con todo, este amplio catálogo de delitos cedería su eventual protagonismo en no pocos supuestos si existiera una auténtica protección administrativa de la discapacidad. Sin perjuicio de reconocer los evidentes avances en ese ámbito, no debemos obviar que el nuevo régimen de infracciones y sanciones en materia de discapacidad precisa de un desarrollo que supere las meras declaraciones de principios y de buenas prácticas. Si en el ámbito laboral se contaba ya con una normativa específica desde el R.D. 5/2000 de 4 de agosto y la posterior Ley 62/2003, de 30 de diciembre, en el plano administrativo, la reciente Ley 49/2007, de 26 de diciembre, no parece haber tenido todavía un adecuado desarrollo en la legislación autonómica. Resulta preci-

so avanzar con prontitud en los denominados «ajustes razonables», y adecuar el ambiente físico y social a las necesidades específicas de las personas con discapacidad. Deben evitarse estas otras discriminaciones, no ya directas (como trato menos favorable en situaciones análogas) sino fundamentalmente las indirectas, más frecuentes (desventajas particulares por razón de su minusvalía o discapacidad). Las medidas recogidas en normativas específicas como el R.D. 366/2007, de 16 de marzo, y el R.D. 1494/2007, de 17 de noviembre, requieren una concreción presupuestaria. Es llamativo, por ejemplo, que el sistema arbitral establecido en el R.D. 1417/2006, de 1 de diciembre, que desarrolla el art. 17 de la fundamental Ley 51/2003 (LIONDAU),-al tiempo de redactar estas reflexiones- no haya sido desarrollado, constituyendo la Junta Arbitral Central y a través de la firma de convenios con las Comunidades Autónomas.

Comenzaba estas reflexiones aludiendo a nuestros nuevos bufones. Especialmente preocupante es la falta de una adecuada respuesta, tanto penal como administrativa, al nuevo fenómeno del escarnio y vejación de discapacitados a través de grabaciones incorporadas a plataformas informáticas. La ocasión del Anteproyecto de reforma del Código Penal debiera servir para incluir una tipificación expresa de este tipo de conductas dentro de los tratos degradantes del art. 173 C.P.,

más allá de lo actualmente establecido en los arts. 30 y 212 del mismo texto legal, de problemática aplicación. De otro modo, y si sólo se consideran esos ataques a la dignidad como injurias (de obra), resultará más difícil su adecuada persecución y reproche penal, subsistiendo aún hoy el requisito de procedibilidad del art. 215 C.P. (poco lógico, si se trata de amparar a menores o discapacitados, colectivos especialmente vulnerables, siendo así que son perseguibles de oficio las injurias si afectan a funcionarios públicos o autoridades).

Recientes sucesos denotan que debe reformarse la normativa de comercio electrónico y de protección de datos informáticos, en aras de exigir medidas de autorregulación a los proveedores de las plataformas informáticas en que se alojan esos videos infamantes. En la Ley 34/2002, de 11 de julio, de servicios de la sociedad de la información y de comercio electrónico (en lo esencial, transposición a nuestro ordenamiento de la Directiva 2000/31/CE), habría que implementar medidas tecnológicas que permitan depurar el acceso de determinados contenidos a las citadas plataformas y proveedores de servicios de alojamiento y almacenamiento de datos (arts. 16 y 17, webs-hostings o hebergement). Es una quimera poner en manos de los propios usuarios la tarea de «censurar» los videos inapropiados o que puedan infringir derechos de los discapacitados. La Ley Orgánica 15/1999, de 13 de diciembre, de Protección de Datos

de Carácter Personal debería recoger –así, en su art. 6- la consideración de que un disminuido psíquico o discapacitado, como los que ya han sido víctimas de estos comportamientos, puede no contar con capacidad para dar un consentimiento válido a esas grabaciones, así como medidas cautelares más rigurosas frente al medio o plataforma que permite su difusión. En este sentido, postergar la presunción de conocimiento del contenido ilícito de la grabación a un demorado pronunciamiento administrativo (art. 17), no hace sino extender el daño que generan estas conductas. Es exigible una mayor diligencia para suprimir o inutilizar por parte del proveedor del servicio el enlace correspondiente Ello no ha de implicar que, pragmáticamente, se opte por una responsabilidad penal objetiva (al modo del art. 30 C.P.), y se persiga al mero intermediario como autor. Sí cabría esa responsabilidad objetiva en el ámbito patrimonial, a falta de identificación del autor material de la grabación o con carácter solidario o subsidiario ante su probable insolvencia económica, afrontando los costes e indemnización por los males así causados .La responsabilidad penal del proveedor de servicios quedaría limitada a los supuestos de facilitación consciente de su plataforma de alojamiento de datos para insertar informaciones o grabaciones constitutivas de otra conducta delictiva independiente (ej, difusión de pornografía infantil o con discapacitados).

La falta de desarrollo reglamentario de la citada Ley 34/2002 produce una importante carencia de medios legales en la lucha contra la criminalidad en la red.

Mantengamos aquella mirada velazqueña, así protegeremos –desde la igualdad y la dignidad- a los colectivos de discapacitados. Así sabremos apreciar la belleza que también encierra lo imperfecto.

Badajoz, febrero de 2009.

Antonio Luengo Nieto

1)Breve descripción del sistema legal

A)Sistema de gobierno

Canadá es una monarquía parlamentaria con una larga trayectoria democrática. El Parlamento está presidido por la Corona Británica (actualmente la Reina Elizabeth II que es la jefa de Estado) y cuenta con una Cámara de los Comunes (*House of Commons*) y un Senado. El gobierno está presidido por un Primer Ministro y su Gabinete, quien ejerce las principales funciones ejecutivas. Canadá presenta una estructura de tipo federal que congrega diez provincias, y tres territorios autónomos.

B)Sistema legal

Canadá tiene una Constitución que define y delimita los poderes gubernamentales y al mismo tiempo, fija los principios fundamentales del ordenamiento jurídico del país. Antes de 1982, la Ley para la Britania Norteamericana (*British North America Act, 1867*) establecía la supremacía de dicha norma por sobre todo el derecho canadiense, hasta que la nueva Ley para Canadá de 1982 (*Canada Act, 1982)* estableció las bases constitucionales del derecho canadiense y, consecuentemente, el derecho británico dejó de aplicarse extensivamente al territorio de Canadá.

En Canadá existes dos sistemas legales, esto es, el sistema del derecho común (*common law*) y el derecho civil continental europeo. Este último se aplica en la provincia de Quebec, y el primero al resto de provincias y territorios.

El derecho civil de Quebec está codificado y su primera redacción de 1866 se basó en el Código Civil Francés de Napoleón. En 1991 se sancionó un nuevo Código Civil.

C)Disposiciones constitucionales

Schedule B. Constitution Act, 1982,

Enacted as Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11, which came into force on April 17, 1982.

Part I, *Canadian charter of rights and freedoms*

Equality Rights

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are

disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Canadian Human Rights Act

(…)

Purpose of act

2. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

R.S., 1985, c. H-6, s. 2; 1996, c. 14, s. 1; 1998, c. 9, s. 9.

2)Concepto de discapacidad y de persona con discapacidad

A diferencia de lo que ocurre con la mayoría de los Estados del mundo, Canadá no cuenta con una

ley general sobre discapacidad a nivel nacional, y a nivel regional sólo Ontario cuenta con una ley específica. Esto no impide que las personas con discapacidad no estén comprendidas por la protección legal de otros leyes marco, entre las que destaca, la Carta de Derechos Humanos.

Carta de Derechos Humanos de Canadá - *Canadian Human Rights Act (R.S., 1985, c. H-6)*

25. In this Act,
(…)
«disability»
«*déficience*»
«disability» means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug;

ONTARIO

Ley de Discapacidad de Ontario - *Ontarians with Disabilities Act, 2001*

Definitions 2. (1)
In this Act,
(…)
«disability» means,
(a) any degree of physical disability, infirmity,

malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,

(b) a condition of mental impairment or a developmental disability,

(c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,

(d) a mental disorder, or

(e) an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*; («handicap»)

VICTORIA, BRITISH COLUMBIA

Ley de Salud Mental - *Mental Health Act (RSBC 1996) Chapter 288*

Part 1 — Interpretation
Definitions
1 In this Act:
person with a mental disorder» means a person

who has a disorder of the mind that requires treatment and seriously impairs the person's ability

(a) to react appropriately to the person's environment, or

(b) to associate with others;

MANITOBA

Ley sobre Personas Vulnerables con Discapacidad Mental - *The Vulnerable Persons Living with a Mental Disability Act (1993)*

Part 1 Interpretation and administration

Definitions

1(1) In this act,

«capable» means mentally capable and «capacity» has a corresponding meaning; (« capable »)

(…)

«health care» means any care, service, treatment, or procedure to maintain, diagnose, treat or provide for a person's physical or mental health and includes anything done for a therapeutic, preventive, palliative, diagnostic, cosmetic or other health-related purpose; (« soins de santé »)

«health care directive» means a health care directive made in accordance with *The Health*

Care Directives Act; (« directives en matière de soins de santé »)

«incapable» means mentally incapable and «incapacity» has a corresponding meaning; (« incapable »)

(…)

«mental disability» means significantly impaired intellectual functioning existing concurrently with impaired adaptive behaviour and manifested prior to the age of 18 years, but excludes a mental disability due exclusively to a mental disorder as defined in section 1 of *The Mental Health Act*; (« déficience mentale »)

(…)

«vulnerable person» means an adult living with a mental disability who is in need of assistance to meet his or her basic needs with regard to personal care or management of his or her property. (« personne vulnérable »)

3) Régimen general de capacidad jurídica

QUEBEC

A) De las personas

Código Civil de Quebec - *Civil code of Québec (L.Q., 1991, c. 64)*

Persons (Title One - Enjoyment and Exercise of Civil Rights)

1. Every human being possesses juridical personality and has the full enjoyment of civil rights. 1991, c. 64, a. 1.

2. Every person has a patrimony.

The patrimony may be divided or appropriated to a purpose, but only to the extent provided by law.1991, c. 64, a. 2.

3. Every person is the holder of personality rights, such as the right to life, the right to the inviolability and integrity of his person, and the right to the respect of his name, reputation and privacy.

These rights are inalienable. 1991, c. 64, a. 3.

4. Every person is fully able to exercise his civil rights.

In certain cases, the law provides for representation or assistance.1991, c. 64, a. 4.

(…)

8. No person may renounce the exercise of his civil rights, except to the extent consistent with public order. 1991, c. 64, a. 8

B) De la capacidad de las personas

Código Civil de Quebec - *Civil code of Québec (L.Q., 1991, c. 64)*

Title Four – Capacity of Persons

153. Full age or the age of majority is 18 years.

On attaining full age, a person ceases to be a

minor and has the full exercise of all his civil rights. 1991, c. 64, a. 153.

154. In no case may the capacity of a person of full age be limited except by express provision of law or by a judgment ordering the institution of protective supervision. 1991, c. 64, a. 154.

C) De los derechos de la personalidad

Código Civil de Quebec - ***Civil code of Québec (L.Q., 1991, c. 64)***

Ciertos Derechos de la Personalidad (Integridad Personal) - ***Certain Personality Rights – Integrity of the Person***

10. Every person is inviolable and is entitled to the integrity of his person.

Except in cases provided for by law, no one may interfere with his person without his free and enlightened consent. 1991, c. 64, a. 10.

Cuidados –Care

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

If the person concerned is incapable of giving or refusing his consent to care, a person authorized by law or by mandate given in anticipation

of his incapacity may do so in his place. 1991, c. 64, a. 11.

12. A person who gives his consent to or refuses care for another person is bound to act in the sole interest of that person, taking into account, as far as possible, any wishes the latter may have expressed.

If he gives his consent, he shall ensure that the care is beneficial notwithstanding the gravity and permanence of certain of its effects, that it is advisable in the circumstances and that the risks incurred are not disproportionate to the anticipated benefit. 1991, c. 64, a. 12.

13. Consent to medical care is not required in case of emergency if the life of the person is in danger or his integrity is threatened and his consent cannot be obtained in due time.

It is required, however, where the care is unusual or has become useless or where its consequences could be intolerable for the person. 1991, c. 64, a. 13.

14. Consent to care required by the state of health of a minor is given by the person having parental authority or by his tutor.

A minor 14 years of age or over, however, may give his consent alone to such care. If his state requires that he remain in a health or social services establishment for over 12 hours, the person having parental authority or tutor shall be informed of that fact. 1991, c. 64, a. 14.

15. Where it is ascertained that a person of full age is incapable of giving consent to care required by his or her state of health, consent is given by his or her mandatary, tutor or curator. If the person of full age is not so represented, consent is given by his or her married, civil union or de facto spouse or, if the person has no spouse or his or her spouse is prevented from giving consent, it is given by a close relative or a person who shows a special interest in the person of full age. 1991, c. 64, a. 15; 2002, c. 6, s. 1.

16. The authorization of the court is necessary where the person who may give consent to care required by the state of health of a minor or a person of full age who is incapable of giving his consent is prevented from doing so or, without justification, refuses to do so; it is also required where a person of full age who is incapable of giving his consent categorically refuses to receive care, except in the case of hygienic care or emergency.

The authorization of the court is necessary, furthermore, to cause a minor 14 years of age or over to undergo care he refuses, except in the case of emergency if his life is in danger or his integrity threatened, in which case the consent of the person having parental authority or the tutor is sufficient. 1991, c. 64, a. 16.

17. A minor 14 years of age or over may give his consent alone to care not required by the state

of his health; however, the consent of the person having parental authority or of the tutor is required if the care entails a serious risk for the health of the minor and may cause him grave and permanent effects. 1991, c. 64, a. 17.

18. Where the person is under 14 years of age or is incapable of giving his consent, consent to care not required by his state of health is given by the person having parental authority or the mandatary, tutor or curator; the authorization of the court is also necessary if the care entails a serious risk for health or if it might cause grave and permanent effects. 1991, c. 64, a. 18.

19. A person of full age who is capable of giving his consent may alienate a part of his body inter vivos, provided the risk incurred is not disproportionate to the benefit that may reasonably be anticipated.

A minor or a person of full age who is incapable of giving his consent may, with the consent of the person having parental authority, mandatary, tutor or curator and with the authorization of the court, alienate a part of his body only if that part is capable of regeneration and provided that no serious risk to his health results. 1991, c. 64, a. 19.

20. A person of full age who is capable of giving his consent may submit to an experiment provided that the risk incurred is not disproportionate to the benefit that can reasonably be anticipated. 1991, c. 64, a. 20.

21. A minor or a person of full age who is incapable of giving consent may not be submitted to an experiment if the experiment involves serious risk to his health or, where he understands the nature and consequences of the experiment, if he objects.

Moreover, a minor or a person of full age who is incapable of giving consent may be submitted to an experiment only if, where the person is the only subject of the experiment, it has the potential to produce benefit to the person's health or only if, in the case of an experiment on a group, it has the potential to produce results capable of conferring benefit to other persons in the same age category or having the same disease or handicap. Such an experiment must be part of a research project approved and monitored by an ethics committee. The competent ethics committees are formed by the Minister of Health and Social Services or designated by that Minister among existing research ethics committees; the composition and operating conditions of the committees are determined by the Minister and published in the Gazette officielle du Québec.

Consent to experimentation may be given, in the case of a minor, by the person having parental authority or the tutor and, in the case of a person of full age incapable of giving consent, by the mandatary, tutor or curator. Where a person of

full age suddenly becomes incapable of consent and the experiment, insofar as it must be undertaken promptly after the appearance of the condition giving rise to it, does not permit, for lack of time, the designation of a legal representative, consent may be given by the person authorized to consent to any care the person requires; it is incumbent upon the competent ethics committee to determine, when examining the research project, whether the experiment meets that condition.

Care considered by the ethics committee to be innovative care required by the state of health of the person concerned does not constitute an experiment. 1991, c. 64, a. 21; 1992, c. 57, s. 716; 1998, c. 32, a. 1.

22. A part of the body, whether an organ, tissue or other substance, removed from a person as part of the care he receives may, with his consent or that of the person qualified to give consent for him, be used for purposes of research. 1991, c. 64, a. 22.

23. When the court is called upon to rule on an application for authorization with respect to care or the alienation of a body part, it obtains the opinions of experts, of the person having parental authority, of the mandatary, of the tutor or the curator and of the tutorship council; it may also obtain the opinion of any person who shows a special interest in the person concerned by the application.

The court is also bound to obtain the opinion of the person concerned unless that is impossible, and to respect his refusal unless the care is required by his state of health. 1991, c. 64, a. 23; 1998, c. 32, s. 2.

24. Consent to care not required by a person's state of health, to the alienation of a part of a person's body, or to an experiment shall be given in writing.

It may be withdrawn at any time, even verbally. 1991, c. 64, a. 24.

25. The alienation by a person of a part or product of his body shall be gratuitous; it may not be repeated if it involves a risk to his health.

An experiment may not give rise to any financial reward other than the payment of an indemnity as compensation for the loss and inconvenience suffered. 1991, c. 64, a. 25.

Institucionalización y pericia pisquiátrica – Confinement in an institution and psychiatric assessment

26. No person may be confined in a health or social services institution for a psychiatric assessment or following a psychiatric assessment concluding that confinement is necessary without his consent or without authorization by law or the court.

Consent may be given by the person having

parental authority or, in the case of a person of full age unable to express his wishes, by his mandatary, tutor or curator. Such consent may be given by the representative only if the person concerned does not object. 1991, c. 64, a. 26; 1997, c. 75, s. 29.

27. Where the court has serious reasons to believe that a person is a danger to himself or to others owing to his mental state, it may, on the application of a physician or an interested person and notwithstanding the absence of consent, order that he be confined temporarily in a health or social services institution for a psychiatric assessment. The court may also, where appropriate, authorize any other medical examination that is necessary in the circumstances. The application, if refused, may not be submitted again except where different facts are alleged.

If the danger is grave and immediate, the person may be placed under preventive confinement, without the authorization of the court, as provided for in the Act respecting the protection of persons whose mental state presents a danger to themselves or to others. 1991, c. 64, a. 27; 1997, c. 75, s. 30.

28. Where the court orders that a person be placed under confinement for a psychiatric assessment, an examination must be carried out within 24 hours after the person is taken in charge by the institution or, if the person was

already under preventive confinement, within 24 hours of the court order.

If the physician who carries out the examination concludes that confinement in an institution is necessary, a second psychiatric examination must be carried out by another physician within 96 hours after the person is taken in charge by the institution or, if the person was already under preventive confinement, within 48 hours of the court order.

If a physician reaches the conclusion that confinement is not necessary, the person must be released. If both physicians reach the conclusion that confinement is necessary, the person may be kept under confinement without his consent or the authorization of the court for no longer than 48 hours. 1991, c. 64, a. 28; 1997, c. 75, s. 31.

29. A psychiatric examination report must deal in particular with the necessity of confining the person in an institution if he is a danger to himself or to others owing to his mental state, with the ability of the person who has undergone the examination to care for himself or to administer his property and, where applicable, with the advisability of instituting protective supervision of the person of full age.

The report must be filed with the court within seven days of the court order. It may not be disclosed, except to the parties, without the

authorization of the court. 1991, c. 64, a. 29; 1997, c. 75, s. 32.

30. Confinement in an institution following a psychiatric assessment may only be authorized by the court if both psychiatric reports conclude that confinement is necessary.

Even if that is the case, the court may not authorize confinement unless the court itself has serious reasons to believe that the person is dangerous and that the person's confinement is necessary, whatever evidence may be otherwise presented to the court and even in the absence of any contrary medical opinion. 1991, c. 64, a. 30; 1997, c. 75, s. 33; 2002, c. 19, s. 1.

30.1. A judgment authorizing confinement must also set the duration of confinement.

However, the person under confinement must be released as soon as confinement is no longer justified, even if the set period of confinement has not elapsed.

Any confinement required beyond the duration set by the judgment must be authorized by the court, in accordance with the provisions of article 30. 2002, c. 19, s. 1.

31. Every person confined in and receiving care in a health or social services establishment shall be informed by the establishment of the program of care established for him and of any important change in the program or in his living conditions.

If the person is under 14 years of age or is

incapable of giving his consent, the information is given to the person who is authorized to give consent to care on his behalf. 1991, c. 64, a. 31.

VICTORIA, BRITISH COLUMBIA

D) De la presunción de capacidad

Ley de Convenio de Representación - Representation Agreement Ac RSBC 1996] CHAPTER 405

Presumption of capability

3 (1) Until the contrary is demonstrated, every adult is presumed to be capable of

(a) making, changing or revoking a representation agreement, and

(b) making decisions about personal care, health care and legal matters and about the adult's financial affairs, business and assets.

(2) An adult's way of communicating with others is not grounds for deciding that he or she is incapable of understanding anything referred to in subsection (1).

Ley de Consentimiento en Tratamientos Sanitarios y de Admisión a Instituciones - *Health Care (Consent) and Care Facility (Admission) Act [RSBC 1996] CHAPTER 18*[1]

Presumption of capability

3 (1) Until the contrary is demonstrated, every adult is presumed to be capable of

(a) giving, refusing or revoking consent to health care, and

(b) deciding to apply for admission to a care facility, to accept a facility care proposal, or to move out of a care facility.

(2) An adult's way of communicating with others is not, by itself, grounds for deciding that he or she is incapable of understanding anything referred to in subsection (1).

(…)

Part 2 — Consent to Health Care

How incapability is determined

7 When deciding whether an adult is incapable of giving, refusing or revoking consent to health care, a health care provider must base the decision on whether or not the adult demonstrates that he or she understands

(a) the information given by the health care provider under section 6 (e), and

(b) that the information applies to the situation of the adult for whom the health care is proposed.

4) Régimen legal de incapacitación o limitación de la capacidad de obrar de las personas con discapacidad

QUEBEC

A) Intervención protectora de personas con mayoría de edad - Protective supervision of persons of full age

Código Civil de Quebec - *Civil code of Québec (L.Q., 1991, c. 64)*

Disposiciones generales - General provisions

256. Protective supervision of a person of full age is established in his interest and is intended to ensure the protection of his person, the administration of his patrimony and, generally, the exercise of his civil rights.

Any incapacity resulting from protective supervision is established solely in favour of the person under protection. 1991, c. 64, a. 256.

257. Every decision relating to the institution of protective supervision or concerning a protected person of full age shall be in his interest, respect his rights and safeguard his autonomy.

The person of full age shall, so far as possible and without delay, be informed of the decision. 1991, c. 64, a. 257.

258. A tutor or curator is appointed to represent, or an adviser to assist, a person of full age who is incapable of caring for himself or herself or of administering property by reason, in particular, of illness, deficiency or debility due to age which impairs the person's mental faculties or physical ability to express his or her will.

A tutor or an adviser may also be appointed to a prodigal who endangers the well-being of his or her married or civil union spouse or minor children. 1991, c. 64, a. 258; 2002, c. 6, s. 21.

259. In selecting the form of protective supervision, consideration is given to the degree of the person's incapacity to care for himself or administer his property. 1991, c. 64, a. 259.

260. The curator or the tutor to a protected person of full age is responsible for his custody and maintenance; he is also responsible for ensuring the moral and material well-being of the protected person, taking into account his condition, needs and faculties and the other aspects of his situation.

He may delegate the exercise of the custody and maintenance of the protected person of full age but, so far as possible, he and the delegated person shall maintain a personal relationship with the protected person, obtain his advice where necessary, and keep him informed of the decisions made in his regard. 1991, c. 64, a. 260; 2002, c. 19, s. 15.

261. The Public Curator does not exercise curatorship or tutorship to a protected person of full age unless he is appointed by the court to do so; he may also act by virtue of his office if the person of full age is no longer provided with a curator or tutor. 1991, c. 64, a. 261.

262. The Public Curator has the simple administration of the property of a protected

person of full age even when acting as curator. 1991, c. 64, a. 262.

263. The Public Curator does not have custody of the protected person of full age to whom he is appointed tutor or curator unless, where no other person can assume it, the court entrusts it to him. He is nevertheless, in all cases, responsible for protection of the person of full age.

The person to whom custody is entrusted, however, has the power of a tutor or curator to give consent to the care required by the state of health of the person of full age, except the care which the Public Curator elects to provide. 1991, c. 64, a. 263.

264. The Public Curator acting as tutor or curator to a protected person of full age may delegate the exercise of certain functions related to tutorship or curatorship to a person he designates after ascertaining, where the person of full age is being treated in a health or social services establishment, that the designated person is not an employee of the establishment and has no duties therewith. He may, however, where circumstances warrant, disregard this restriction if the employee of the establishment is the spouse or a close relative of the person of full age or if the function delegated is the management, according to the Public Curator's instructions, of the monthly personal expense allowance granted to the person.

He may authorize the delegate to consent to the care required by the state of health of the person of full age, except care which the Public Curator elects to provide. 1991, c. 64, a. 264; 1999, c. 30, s. 21.

265. At least once a year, the delegate renders account of the exercise of the custody to the Public Curator. The Public Curator may revoke the delegation if there is a conflict of interest between the delegate and the protected person of full age or for any other serious reason. 1991, c. 64, a. 265.

266. The rules pertaining to tutorship to minors apply, adapted as required, to tutorship and curatorship to persons of full age.

Thus, the spouse and descendants in the first degree of the person of full age shall be called to the meeting of relatives, persons connected by marriage or a civil union and friends along with the persons to be called to it pursuant to article 226. 1991, c. 64, a. 266; 1998, c. 51, s. 25; 2002, c. 6, s. 235.

267. Where the Public Curator requires the institution or review of protective supervision and shows that sufficient effort has been made to call the meeting of relatives, persons connected by marriage or a civil union and friends but that such effort has been in vain, the court may proceed without the meeting being held. 1991, c. 64, a. 267; 2002, c. 6, s. 235.

B) De la implementación de la intervención protectora - Institution of protective supervision

268. The institution of protective supervision is awarded by the court.

The court is not bound by the application and may decide on a form of protective supervision other than the form contemplated in the application. 1991, c. 64, a. 268.

269. The person of full age himself, his spouse, his close relatives and the persons connected to him by marriage or a civil union, any person showing a special interest in the person or any other interested person, including the mandatary designated by the person of full age or the Public Curator, may apply for the institution of protective supervision. 1991, c. 64, a. 269; 2002, c. 6, s. 235.

270. Where a person of full age receiving care or services from a health or social services establishment requires to be assisted or represented in the exercise of his civil rights by reason of his isolation, the foreseeable duration of his incapacity, the nature or state of his affairs or because no mandatary already designated by him gives him adequate assistance or representation, the executive director of the health or social services institution reports that fact to the Public Curator, transmits a copy of his report to the person of full age and informs a close relative of that person.

Such a report contains, in particular, the medical and psychosocial assessment prepared by the person who examined the person of full age; it deals with the nature and degree of the incapacity of the person of full age, the extent of his needs and the other circumstances of his situation and with the advisability of instituting protective supervision for him. It also sets out the names, if known, of the persons qualified to apply for the institution of protective supervision. 1991, c. 64, a. 270.

271. The institution of protective supervision of a person of full age may be applied for in the year preceding his attaining full age.

The judgment takes effect on the day the person attains full age. 1991, c. 64, a. 271.

272. During proceedings, the court may, even of its own motion, decide on the custody of the person of full age if it is clear that he is unable to care for himself and that custody is required to save him from serious harm.

Even before the proceedings, the Court may, if protective supervision is about to be instituted and it is necessary to act in order to save the person of full age from serious harm, designate the Public Curator or another person provisionally to ensure protection of the person of full age or to represent him in the exercise of his civil rights. 1991, c. 64, a. 272; 1999, c. 30, s. 22.

273. An act under which the person of full age has entrusted another person with the adminis-

tration of his property continues to produce its effects notwithstanding the proceedings unless it is revoked by the court for a serious reason.

If no mandate has been given by the person of full age or by the court under article 444, the rules provided in respect of the management of the business of another are observed and the Public Curator and any other person who is qualified to apply for the institution of protective supervision may, in an emergency or even before proceedings if an application for the institution of protective supervision is about to be made, perform the acts required to preserve the patrimony. 1991, c. 64, a. 273.

274. In cases where there is no mandate or management of the business of another or even before proceedings if an application for the institution of protective supervision is about to be made, the court may, if it is necessary to act in order to prevent serious harm, provisionally designate the Public Curator or another person either to perform a specific act or to administer the property of the person of full age within the limits of simple administration of the property of others. 1991, c. 64, a. 274.

275. During proceedings and thereafter, if the form of protective supervision is a tutorship, the dwelling of the protected person of full age and the furniture in it are kept at his disposal. The power to administer that property extends only to

agreements granting precarious enjoyment, which cease to have effect by operation of law upon the return of the protected person of full age.

Should it be necessary or in the best interest of the protected person of full age that his furniture or his rights in respect of a dwelling be disposed of, the act may be done only with the authorization of the tutorship council. Even in such a case, except for a compelling reason, souvenirs and other personal effects may not be disposed of and shall, so far as possible, be kept at the disposal of the person of full age by the health or social services establishment. 1991, c. 64, a. 275.

276. Where the court examines an application to institute protective supervision, it takes into consideration, in addition to the advice of the persons who may be called to form the tutorship council, the medical and psychosocial evidence, the wishes expressed by the person of full age in a mandate given in anticipation of his incapacity but which has not been homologated, and the degree of autonomy of the person in whose respect the institution of protective supervision is applied for.

The court shall give to the person of full age an opportunity to be heard, personally or through a representative where required by his state of health, on the merits of the application and, where applicable, on the form of protective supervision and as to the person who will represent or assist him. 1991, c. 64, a. 276.

277. A judgment concerning protective supervision may be reviewed at any time. 1991, c. 64, a. 277.

278. Unless the court fixes an earlier date, the protective supervision is reviewed every three years in the case of a tutorship or where an adviser has been appointed or every five years in the case of a curatorship.

The curator, tutor or adviser to the person of full age is bound to see to it that the person of full age is submitted to a medical and psychosocial assessment in due time. Where the person making the assessment becomes aware that the situation of the person of full age has so changed as to justify the termination or modification of protective supervision, he makes a report to the person of full age and to the person having applied for the assessment and files a copy of the report in the office of the court. 1991, c. 64, a. 278.

279. The executive director of the health or social services institution providing care or services to the person of full age shall, if the incapacity that justified protective supervision ceases, attest that fact in a report which he files in the office of the court. Such a report includes the medical and psychosocial assessment. 1991, c. 64, a. 279.

280. When a report on the review of protective supervision has been filed, the clerk notifies the persons qualified to intervene in the application

for protective supervision. If no objection is made within 30 days after the report is filed, protective supervision is modified or terminated without other formality. An attestation is drawn up by the clerk and transmitted without delay to the person of full age himself and to the Public Curator. 1991, c. 64, a. 280; 2002, c. 19, s. 15.

5) Instituciones de guarda y protección de las personas con discapacidad

QUEBEC

Código Civil de Quebec - *Civil code of Québec (L.Q., 1991, c. 64)*

A) De la curatela de personas con mayoría de edad - Curatorship to persons of full age

281. The court institutes curatorship to a person of full age if it is established that the incapacity of that person to care for himself and to administer his property is total and permanent and that he requires to be represented in the exercise of his civil rights.

The court then appoints a curator. 1991, c. 64, a. 281; 2002, c. 19, s. 15.

282. The curator has the full administration of the property of the protected person of full age,

except that he is bound, as the administrator entrusted with simple administration of the property of others, to make only investments that are presumed sound. The only rules which apply to his administration are the rules of administration of the property of others. 1991, c. 64, a. 282.

283. An act performed alone by a person of full age under curatorship may be declared null or the obligations resulting from it reduced, without any requirement to prove damage. 1991, c. 64, a. 283.

284. Acts performed before the curatorship may be annulled or the obligations resulting from them reduced on the mere proof that the incapacity was notorious or known to the other party at the time the acts were performed. 1991, c. 64, a. 284.

B) De la tutela de personas con mayoría de edad - Tutorship to Persons of Full age

285. The court institutes tutorship to a person of full age if it is established that the incapacity of that person to care for himself or to administer his property is partial or temporary and that he requires to be represented in the exercise of his civil rights.

The court then appoints a tutor to the person and to property, or a tutor either to the person or to property. 1991, c. 64, a. 285.

286. The tutor has the simple administration of the property of the person of full age incapable of administering his property. He exercises his administration in the same manner as the tutor to a minor, unless the court decides otherwise. 1991, c. 64, a. 286.

287. The rules pertaining to the exercise of the civil rights of a minor apply, adapted as required, to a person of full age under tutorship. 1991, c. 64, a. 287.

288. The court may, on the institution of the tutorship or subsequently, determine the degree of capacity of the person of full age under tutorship, taking into consideration the medical and psychosocial assessment and, as the case may be, the advice of the tutorship council or of the persons who may be called upon to form the tutorship council.

The court then indicates the acts which the person under tutorship may perform alone or with the assistance of the tutor, or which he may not perform unless he is represented. 1991, c. 64, a. 288.

289. The person of full age under tutorship retains the administration of the proceeds of his work, unless the court decides otherwise. 1991, c. 64, a. 289.

290. Acts performed before the tutorship may be annulled or the obligations resulting from them reduced on the mere proof that the incapacity was

notorious or known to the other party at the time the acts were performed. 1991, c. 64, a. 290.

C)De los asesores de personas con mayoría de edad - Advisers to Persons of full age

291. The court appoints an adviser to a person of full age who, although generally and habitually capable of caring for himself and of administering his property, requires, for certain acts or for a certain time, to be assisted or advised in the administration of his property. 1991, c. 64, a. 291.

292. The adviser does not have the administration of the property of the protected person of full age. He shall, however, intervene in the acts for which he is bound to give him assistance. 1991, c. 64, a. 292.

293. The court, on the institution of the advisership or subsequently, indicates the acts for which the adviser's assistance is required, and those for which it is not required.

If the court gives no indication, the protected person of full age shall be assisted by his adviser for every act beyond the capacity of a minor who has been granted simple emancipation. 1991, c. 64, a. 293.

294. Acts performed alone by a person of full age for which the intervention of his adviser was required may be annulled or the obligations

resulting from them reduced only if the person of full age suffers prejudice therefrom. 1991, c. 64, a. 294.

D)De la finalización de la intervención protectora - End of Protective Supervision

295. Protective supervision ceases by a judgment of release or by the death of the protected person of full age.

Protective supervision also ceases upon the expiry of the prescribed period for contesting the report attesting the cessation of the incapacity. 1991, c. 64, a. 295.

296. A protected person of full age may at any time after the release of protective supervision and, where applicable, after the rendering of account by the tutor or curator, confirm any act otherwise null. 1991, c. 64, a. 296.

297. A vacancy in the office of curator, tutor or adviser does not terminate protective supervision.

The tutorship council shall, on the occurrence of a vacancy, initiate the appointment of a new curator or tutor; any interested person may also initiate such an appointment, as well as that of a new adviser. 1991, c. 64, a. 297.

E)De las normas de aplicación supletoria a la tutela y curatela de personas con mayoría de edad

266. The rules pertaining to tutorship to minors apply, adapted as required, to tutorship and curatorship to persons of full age.

(…)

Tutela - Tutorship

177. Tutorship is established in the interest of the minor; it is intended to ensure the protection of his person, the administration of his patrimony and, generally, to secure the exercise of his civil rights. 1991, c. 64, a. 177.

178. Tutorship to minors is legal or dative.

Tutorship resulting from the law is legal; tutorship conferred by the father and mother or by the court is dative. 1991, c. 64, a. 178.

179. Tutorship is a personal office open to every natural person capable of fully exercising his civil rights who is able to assume the office. 1991, c. 64, a. 179.

180. No person may be compelled to accept a dative tutorship except, failing any other person, the director of youth protection or, for tutorship to property, the Public Curator. 1991, c. 64, a. 180.

181. Tutorship does not pass to the heirs of the tutor; they are simply responsible for his administration. If they are of full age, they are bound to continue his administration until a new tutor is appointed. 1991, c. 64, a. 181.

182. Tutorship exercised by the director of youth protection or the Public Curator is attached to the office. 1991, c. 64, a. 182.

183. Fathers and mothers, the director of youth protection or the person recommended by him as tutor exercise tutorship gratuitously.

However, a father and mother may receive such remuneration as may be fixed by the court, on the advice of the tutorship council, for the administration of the property of their child where that is one of their principal occupations. 1991, c. 64, a. 183.

184. A dative tutor may receive such remuneration as is fixed by the court on the advice of the tutorship council or by the father or mother by whom he is appointed, or by the liquidator of their succession if so authorized. The expenses of the tutorship and the revenue from the property to be administered are taken into account. 1991, c. 64, a. 184.

185. Except where divided, tutorship extends to the person and property of the minor. 1991, c. 64, a. 185.

186. Where tutorship extends to the person of the minor and is exercised by a person other than the father or mother, the tutor acts as the person having parental authority, unless the court decides otherwise. 1991, c. 64, a. 186.

187. In no case may more than one tutor to the person be appointed, but several tutors to property may be appointed. 1991, c. 64, a. 187.

188. The tutor to property is responsible for the administration of the property of the minor, but the tutor to the person represents the minor in judicial proceedings regarding that property.

Where several tutors to property are appointed, each of them is accountable for the management of the property entrusted to him. 1991, c. 64, a. 188.

189. A legal person may act as tutor to property, if so authorized by law. 1991, c. 64, a. 189.

190. Whenever a minor has any interest to discuss judicially with his tutor, a tutor ad hoc is appointed to him. 1991, c. 64, a. 190.

191. Tutorship is based at the domicile of the minor.

If a tutorship is exercised by the director of youth protection or by the Public Curator, the tutorship is based at the place where that person holds office. 1991, c. 64, a. 191.

Tutela legal - Legal tutorship

192. In addition to having the rights and duties connected with parental authority, the father and mother, if of full age or emancipated, are, of right, tutors to their minor child for the purposes of representing him in the exercise of his civil rights and administering his patrimony.

The father and mother are also tutors to their child conceived but yet unborn and are responsible

for acting on his behalf in all cases where his patrimonial interests require it. 1991, c. 64, a. 192.

193. The father and mother exercise tutorship together unless one parent is deceased or prevented from expressing his wishes or from doing so in due time. 1991, c. 64, a. 193.

194. Either parent may give the other the mandate to represent him in the performance of acts pertaining to the exercise of tutorship.

The mandate is presumed with regard to third persons in good faith. 1991, c. 64, a. 194.

195. Where the custody of a child is decided by judgment, the tutorship continues to be exercised by the father and mother, unless the court, for grave reasons, decides otherwise. 1991, c. 64, a. 195.

196. In case of disagreement relating to the exercise of the tutorship between the father and mother, either of them may refer the dispute to the court.

The court decides in the interest of the minor after fostering the conciliation of the parties and, if need be, obtaining the opinion of the tutorship council. 1991, c. 64, a. 196.

197. Deprivation of parental authority entails loss of tutorship; withdrawal of certain attributes of parental authority or of the exercise of such attributes entails loss of tutorship only if so decided by the court. 1991, c. 64, a. 197.

198. A father or mother deprived of tutorship as a result of having been deprived of parental

authority or having had the exercise of certain attributes of parental authority withdrawn may, even after dative tutorship is instituted, be reinstated as tutor once he or she again has full exercise of parental authority. 1991, c. 64, a. 198.

199. Where the court declares the father and mother of a minor deprived of parental authority without appointing another tutor, the director of youth protection having jurisdiction in the child's place of residence becomes by virtue of his office legal tutor to the child unless the child is already provided with a tutor other than his father and mother.

The director of youth protection is also, until the order of placement, legal tutor to a child he has caused to be declared eligible for adoption or in whose respect he has received a general consent to adoption, except where the court has appointed another tutor. 1991, c. 64, a. 199.

Tutela Dativa - Dative Tutorship

200. A father or mother may appoint a tutor to his or her minor child by will, by a mandate given in anticipation of the mandator's incapacity or by filing a declaration to that effect with the Public Curator. 1991, c. 64, a. 200; 1998, c. 51, s. 22.

201. The right to appoint a tutor belongs exclusively to the last surviving parent or to the

last parent who is able to exercise tutorship, as the case may be, if that parent has retained legal tutorship to the day of his death.

Where both parents die simultaneously or lose the ability to exercise tutorship during the same event, each having designated a different person as tutor, and both persons accept the office, the court decides which person will hold it. 1991, c. 64, a. 201; 1998, c. 51, s. 23.

202. Unless the designation is contested, the tutor appointed by the father or mother assumes office upon accepting it.

If the person does not refuse the office within 30 days after being informed of his appointment, he is presumed to have accepted. 1991, c. 64, a. 202; 1998, c. 51, s. 24.

203. Whether the tutor appointed by the father or mother accepts or refuses the office, he shall notify the liquidator of the succession and the Public Curator. 1991, c. 64, a. 203.

204. Where the person appointed by either parent refuses tutorship, he shall without delay notify his refusal to the replacement, if any, designated by the parent.

The person may, however, retract his refusal before the replacement accepts the office or an application to institute tutorship is made to the court. 1991, c. 64, a. 204.

205. Tutorship is conferred by the court where it is expedient to appoint a tutor or a replacement,

to appoint a tutor ad hoc or a tutor to property or where the designation of a tutor appointed by the father and mother is contested.

Tutorship is conferred on the advice of the tutorship council, unless it is applied for by the director of youth protection. 1991, c. 64, a. 205.

206. The minor, the father or mother and close relatives of the minor and persons connected by marriage or a civil union to the minor or any other interested person, including the Public Curator, may apply to the court and, if necessary, propose a suitable person who is willing to accept the tutorship. 1991, c. 64, a. 206; 2002, c. 6, s. 235.

207. The director of youth protection or the person recommended as tutor by him may also apply for the institution of tutorship to an orphan who is a minor and who has no tutor, or to a child whose father and mother both fail, in fact, to assume his care, maintenance or education, or to a child who in all likelihood would be in danger if he returned to his father and mother. 1991, c. 64, a. 207.

Administración de la tutela - Administration of Tutors

208. In respect of the property of the minor, the tutor acts as an administrator entrusted with simple administration. 1991, c. 64, a. 208.

209. Fathers and mothers are not required in the administration of the property of their minor child to make an inventory of the property, to furnish a security as a guarantee of their administration, to render an annual account of management or to obtain any advice or authorization from the tutorship council or the court unless the property is worth more than $25 000 or it is ordered by the court on the application of an interested person. 1991, c. 64, a. 209.

210. All property given or bequeathed to a minor on condition that it be administered by a third person is withdrawn from the administration of the tutor.

If the act does not indicate the particular mode of administration of the property, the person administering it has the rights and obligations of a tutor to property. 1991, c. 64, a. 210.

211. A tutor may accept alone any gift in favour of his pupil. He may not accept any gift with a charge, however, without obtaining the authorization of the tutorship council. 1991, c. 64, a. 211.

212. A tutor may not transact or prosecute an appeal without the authorization of the tutorship council. 1991, c. 64, a. 212.

213. The tutor, before contracting a substantial loan in relation to the patrimony of the minor, offering property as security, alienating an important piece of family property, an immovable or

an enterprise, or demanding the definitive partition of immovables held by the minor in undivided co-ownership, shall obtain the authorization of the tutorship council or, if the property or security is worth more than $25 000, of the court, which seeks the advice of the tutorship council.

The tutorship council or the court does not allow the loan to be contracted, or property to be alienated by onerous title or offered as security, except where that is necessary to ensure the education and maintenance of the minor, to pay his debts or to maintain the property in good order or safeguard its value. The authorization then indicates the amount and terms and conditions of the loan, the property that may be alienated or offered as security, and sets forth the conditions under which it may be done. 1991, c. 64, a. 213; 2002, c. 19, s. 15.

214. No tutor may, before obtaining an expert's appraisal, alienate property worth more than $25 000, except in the case of securities quoted and traded on a recognized stock exchange according to the provisions respecting presumed sound investments. A copy of the appraisal is attached to the annual management account.

Juridical acts which are related according to their nature, their object or the time they are performed constitute one and the same act. 1991, c. 64, a. 214.

215. A tutor acting alone may enter into an agreement to continue in indivision, but in that case the minor, once of full age, may terminate the agreement within one year, regardless of its term.

Any agreement authorized by the tutorship council and by the court is binding on the minor once of full age. 1991, c. 64, a. 215.

216. The clerk of the court gives notice without delay to the tutorship council and to the Public Curator of any judgment relating to the interests of the patrimony of a minor and of any transaction effected pursuant to an action to which the tutor is a party in that quality. 1991, c. 64, a. 216.

217. Where the property is worth more than $25 000, the liquidator of a succession which devolves or is bequeathed to a minor and the donor of property if the donee is a minor, and, in any case, any person who pays an indemnity for the benefit of a minor, shall declare that fact to the Public Curator and state the value of the property. 1991, c. 64, a. 217.

218. A tutor sets aside from the property under his administration all sums necessary to pay the expenses of the tutorship, in particular, to provide for the exercise of the civil rights of the minor and the administration of his patrimony. He also does so where, to ensure the minor's maintenance and education, it is nece-

ssary to make up for the support owed by the father and mother. 1991, c. 64, a. 218.

219. The tutor to the person agrees with the tutor to property as to the amounts he requires each year to pay the expenses of the tutorship.

If the tutors do not agree on the amounts or their payment, the tutorship council or, failing that, the court decides. 1991, c. 64, a. 219.

220. The minor manages the proceeds of his work and any allowances paid to him to meet his ordinary and usual needs.

Where the revenues of the minor are considerable or where justified by the circumstances, the court, after obtaining the advice of the tutor and, where applicable, the tutorship council, may fix the amounts that remain under the management of the minor. It takes into account the age and power of discernment of the minor, the general conditions of his maintenance and education and his obligations of support and those of his parents. 1991, c. 64, a. 220.

221. A director of youth protection exercising a tutorship or the person he recommends to exercise it shall obtain the authorization of the court where the law requires the tutor to obtain the advice or authorization of the tutorship council before acting.

Where the property is worth more than $25 000, however, or, at all events, where the court so orders, tutorship to property is conferred

on the Public Curator, who has from that time the rights and obligations of a dative tutor, subject to the provisions of law. 1991, c. 64, a. 221.

Consejo Tutelar - Tutorship Council

Fines y establecimiento del consejo - Role and establishment of the council

222. The role of the tutorship council is to supervise the tutorship. The tutorship council is composed of three persons designated by a meeting of relatives, persons connected by marriage or a civil union and friends or, if the court so decides, of only one person. 1991, c. 64, a. 222; 2002, c. 6, s. 235.

223. A tutorship council is established both in the case of dative tutorship and in that of legal tutorship, although, in the latter case, only where the father and mother are required, in respect of the administration of the property of the minor, to make an inventory, to furnish security or to render an annual account of management.

No council is established where the tutorship is exercised by the director of youth protection, a person he has recommended as tutor, or the Public Curator. 1991, c. 64, a. 223.

224. Any interested person may initiate the establishment of a tutorship council by applying either to a notary or to the court of the place

where the minor has his domicile or residence for the calling of a meeting of relatives, persons connected by marriage or a civil union and friends.

The court examining an application for the appointment or replacement of a tutor or tutorship council may do likewise, even of its own motion. 1991, c. 64, a. 224; 2002, c. 6, s. 235.

225. The tutor appointed by the father or mother of a minor or the father and mother, as the case may be, shall initiate the establishment of the tutorship council.

The father and mother may, at their option, convene a meeting of relatives, persons connected by marriage or a civil union and friends or make an application to the court for the establishment of a tutorship council composed of only one person designated by the court. 1991, c. 64, a. 225; 2002, c. 6, s. 235.

226. The father and mother of the minor and, if they have a known residence in Québec, his other ascendants and his brothers and sisters of full age shall be called to the meeting of relatives, persons connected by marriage or a civil union and friends called to establish a tutorship council.

The other relatives, persons connected by marriage or a civil union and friends of the minor may be called to the meeting provided they are of full age.

Not fewer than five persons shall attend the meeting and, as far as possible, the maternal

and paternal lines shall be represented. 1991, c. 64, a. 226; 2002, c. 6, s. 235.

227. Persons who shall be called are always entitled to present themselves at the first meeting and give their opinion even if they were not called. 1991, c. 64, a. 227.

228. The meeting appoints the three members of the council and designates two alternates, giving consideration so far as possible to representation of the maternal and paternal lines.

It also appoints a secretary, who may or may not be a member of the council, responsible for taking and keeping the minutes of the deliberations; it fixes the remuneration of the secretary, where applicable.

The tutor may not be a member of the tutorship council. 1991, c. 64, a. 228.

229. Vacancies are filled by the council by selecting a designated alternate in the line where the vacancy occurred. If there is no alternate, the council selects a relative or a person connected by marriage or a civil union in the same line or, if none, a relative or a person connected by marriage or a civil union in the other line or a friend. 1991, c. 64, a. 229; 2002, c. 6, s. 235.

230. The tutorship council is bound to invite the tutor to each of its meetings to hear his opinion; the minor may be invited. 1991, c. 64, a. 230.

231. The court may, on application or of its own motion, rule that the tutorship council will

be composed of only one person designated by it where, owing to the dispersal or indifference of the family members or their inability, for serious reasons, to attend, or to the personal or family situation of the minor, it would be inadvisable to establish a council composed of three persons.

The court may in such a case designate a person who shows a special interest in the minor or, failing that, the director of youth protection or the Public Curator, if he is not already the tutor.

The court may exempt the person making the application from first calling a meeting of relatives, persons connected by marriage or a civil union and friends if it is shown that sufficient effort has been made to call the meeting, but that such effort has been in vain. 1991, c. 64, a. 231; 2002, c. 6, s. 235.

232. Excepting the director of youth protection and the Public Curator, no person may be compelled to accept membership in the council; a person who has agreed to become a member may be released at any time provided it is not done at an inopportune moment.

Membership of a tutorship council is a personal charge that entails no remuneration. 1991, c. 64, a. 232.

Derechos y obligaciones del consejo — Rights and obligations of the council

233. The tutorship council gives advice and makes decisions in every case provided for by law.

Moreover, where the rules of administration of the property of others provide that the beneficiary shall or may give his consent to an act, obtain advice or be consulted, the council acts on behalf of the minor who is the beneficiary. 1991, c. 64, a. 233.

234. The council, where composed of three persons, meets at least once a year; deliberations are not valid unless a majority of its members attend the meeting or unless all the members can express themselves by a means which allows all of them to communicate directly with each other.

The decisions and advice of the council are taken or given by majority vote; each member shall give reasons. 1991, c. 64, a. 234.

235. Whenever a minor has any interest to discuss judicially with his tutor, the council causes a tutor ad hoc to be appointed to him. 1991, c. 64, a. 235.

236. The council ascertains that the tutor makes an inventory of the property of the minor and that he furnishes and maintains a security.

The council receives the annual management account from the tutor and is entitled to examine all documents and vouchers attached to the account and obtain a copy of them. 1991, c. 64, a. 236.

237. Any interested person may, for a grave reason, apply to the court within 10 days to have a decision of the council reviewed or for authorization to initiate the establishment of a new council. 1991, c. 64, a. 237.

238. The tutor may demand the convening of the council or, if it cannot be convened, apply to the court for authorization to act alone. 1991, c. 64, a. 238.

239. The council is responsible for seeing that the records of the tutorship are preserved and for transmitting them to the minor or his heirs at the end of the tutorship. 1991, c. 64, a. 239.

Control de la tutela - Supervision of Tutorships

Inventario — Inventory

240. Within 60 days of the institution of the tutorship, the tutor shall make an inventory of the property to be administered. He shall do the same in respect of property devolved to the minor after the tutorship is instituted.

A copy of the inventory is transmitted to the Public Curator and to the tutorship council. 1991, c. 64, a. 240.

241. A tutor who continues the administration of another tutor after the rendering of account is exempt from making an inventory. 1991, c. 64, a. 241.

Seguridad — Security

242. The tutor is bound, if the value of the property to be administered exceeds $25 000, to take out liability insurance or furnish other security to guarantee the performance of his obligations. The kind and object of the security and the time granted to furnish it are determined by the tutorship council.

The tutorship is liable for the costs of the security. 1991, c. 64, a. 242.

243. The tutor shall without delay furnish proof of the security to the tutorship council and to the Public Curator.

The tutor shall maintain the security or another of sufficient value for the duration of his office and furnish proof of it every year. 1991, c. 64, a. 243.

244. A legal person exercising tutorship to property is exempt from furnishing security. 1991, c. 64, a. 244.

245. Where it is advisable to release the security, the tutorship council or the minor, once he attains full age, may do so and, at the cost of the tutorship, apply for cancellation of the registration, if any. Notice of the cancellation is given to the Public Curator. 1991, c. 64, a. 245.

Informes y cuentas — Reports and accounts

246. The tutor sends the annual account of his management to the minor 14 years of age or over, to the tutorship council and to the Public Curator.

The tutor to property renders an annual account to the tutor to the person. 1991, c. 64, a. 246.

247. At the end of his administration, the tutor shall give a final account to the minor who has come of age; he shall also give an account to the tutor who replaces him and to the minor 14 years of age or over or, where applicable, to the liquidator of the succession of the minor. He shall send a copy of his final account to the tutorship council and to the Public Curator. 1991, c. 64, a. 247.

248. Every agreement between the tutor and the minor who has come of age relating to the administration or the account is null unless it is preceded by a detailed rendering of account and the delivery of the related vouchers. 1991, c. 64, a. 248.

249. The Public Curator examines the annual accounts of management and the final account of the tutor. He also ascertains that the security is maintained.

He may require any document and any explanation concerning the accounts and, where provided for by law, require that they be audited. 1991, c. 64, a. 249.

Remoción del tutor y finalización de la tutela - Replacement of Tutor and end of Tutorship

250. A dative tutor may, for a serious reason, apply to the court to be relieved of his duties, provided his application is not made at an inopportune moment and notice of it has been given to the tutorship council. 1991, c. 64, a. 250.

251. The tutorship council or, in case of emergency, one of its members shall apply for the replacement of a tutor who is unable to perform his duties or neglects his obligations. A tutor to the person shall act in the same manner with regard to a tutor to property.

Any interested person, including the Public Curator, may also, for the reasons set forth in the first paragraph, apply for the replacement of the tutor. 1991, c. 64, a. 251.

252. Where tutorship is exercised by the director of youth protection, by a person he recommends as tutor or by the Public Curator, any interested person may apply for his replacement without having to justify it for any reason other than the interest of the minor. 1991, c. 64, a. 252.

253. During the proceedings, the tutor continues to exercise his duties unless the court decides otherwise and appoints a provisional administrator responsible for the simple administration of the property of the minor. 1991, c. 64, a. 253.

254. Every judgment terminating the duties of a tutor contains the reasons for replacing him and designates the new tutor. 1991, c. 64, a. 254.

255. Tutorship ends when the minor attains full age, obtains full emancipation or dies.

The office of a tutor ceases at the end of the tutorship, when the tutor is replaced or on his death. 1991, c. 64, a. 255.

VICTORIA, BRITISH COLUMBIA

F) De la tutela de adultos en condiciones de vulnerabilidad

Ley de Tutela de Adultos – ***Adult Guardianship Act (1996)***

Part 1 — Introductory Provisions

Definitions

1 In this Act:

«abuse» means the deliberate mistreatment of an adult that causes the adult

(a) physical, mental or emotional harm, or

(b) damage to or loss of assets,

and includes intimidation, humiliation, physical assault, sexual assault, overmedication, withholding needed medication, censoring mail, invasion or denial of privacy or denial of access to visitors;

«adult» means anyone who has reached 19 years of age and, for all purposes incidental to

an application under section 6 (2), includes a person who has reached 18 years of age;

«care facility» has the same meaning as in the *Health Care (Consent) and Care Facility (Admission) Act;*

«representation agreement» means an agreement made under the *Representation Agreement Act;*

«representative» means a person authorized by a representation agreement to make decisions on behalf of another;

«self-neglect» means any failure of an adult to take care of himself or herself that causes, or is reasonably likely to cause within a short period of time, serious physical or mental harm or substantial damage to or loss of assets, and includes

(a) living in grossly unsanitary conditions,

(b) suffering from an untreated illness, disease or injury,

(c) suffering from malnutrition to such an extent that, without intervention, the adult's physical or mental health is likely to be severely impaired,

(d) creating a hazardous situation that will likely cause serious physical harm to the adult or others or cause substantial damage to or loss of assets, and

(e) suffering from an illness, disease or injury that results in the adult dealing with his or her assets in a manner that is likely to cause substantial damage to or loss of the assets;

Guiding principles

2 This Act is to be administered and interpreted in accordance with the following principles:

(a) all adults are entitled to live in the manner they wish and to accept or refuse support, assistance or protection as long as they do not harm others and they are capable of making decisions about those matters;

(b) all adults should receive the most effective, but the least restrictive and intrusive, form of support, assistance or protection when they are unable to care for themselves or their assets;

(c) the court should not be asked to appoint, and should not appoint, decision makers or guardians unless alternatives, such as the provision of support and assistance, have been tried or carefully considered.

Presumption of capability

3 (1) Until the contrary is demonstrated, every adult is presumed to be capable of making decisions about personal care, health care, legal matters or about the adult's financial affairs, business or assets.

(2) An adult's way of communicating with others is not grounds for deciding that he or she is incapable of making decisions about anything referred to in subsection (1).

(…)

Part 3 — Support and Assistance for Abused and Neglected Adults

Purpose of this Part

44 The purpose of this Part is to provide for support and assistance for adults who are abused or neglected and who are unable to seek support and assistance because of

(a) physical restraint,

(b) a physical handicap that limits their ability to seek help, or

(c) an illness, disease, injury or other condition that affects their ability to make decisions about the abuse or neglect.

Definition

44.1 In this Part, «guardian» includes a committee under the *Patients Property Act.*

Application of this Part

45 (1) This Part applies whether an adult is abused or neglected in a public place, in the adult's home, a relative's home, a care facility or any other place except a correctional centre.

(2) This Part does not

(a) override the rights in section 4 of the *Health Care (Consent) and Care Facility (Admission) Act,* or

(b) prevent an adult's representative, decision maker or guardian from refusing health care for the adult in accordance with wishes the adult expressed while capable, even if the refusal will result in the adult's death.

G)De la autotutela

Ley de Convenio de Representación - Representation Agreement Ac RSBC 1996] CHAPTER 405

Purpose of this Act

2 The purpose of this Act is to provide a mechanism

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

(b) to avoid the need for the court to appoint someone to help adults make decisions, or someone to make decisions for adults, when they are incapable of making decisions independently.

Presumption of capability

3 (1) Until the contrary is demonstrated, every adult is presumed to be capable of

(a) making, changing or revoking a representation agreement, and

(b) making decisions about personal care, health care and legal matters and about the adult's financial affairs, business and assets.

(2) An adult's way of communicating with others is not grounds for deciding that he or she is incapable of understanding anything referred to in subsection (1).

Part 2 — Parties, Terms, Formalities and Registration

Who can make an agreement

4 An adult may make a representation agreement unless he or she is incapable of doing so.

Representatives

5 (1) An adult who makes a representation agreement may name as his or her representative one or more of the following:

(a) another adult;

(b) the Public Guardian and Trustee;

(c) a credit union or trust company as long as the credit union's or trust company's area of authority under the representation agreement does not include health care or personal care.

(2) An adult who names more than one representative in a representation agreement may assign to each of them

(a) a different area of authority, or

(b) all or part of the same area of authority.

(3) If all or part of the same area of authority is assigned under subsection (2) (b) to 2 or more representatives, they must act unanimously in exercising that authority unless the representation agreement provides otherwise.

(4) A representation agreement is invalid unless each representative completes a certificate in the prescribed form.

Alternate representatives

6 (1) An adult who makes a representation agreement may name as an alternate representative any person who qualifies under section 5 (1).

(2) Section 5 (2) to (4) applies to an alternate representative.

(3) If an alternate representative is named, the following must be specified in the agreement:

(a) the circumstances in which the alternate representative is authorized to act in place of the representative, including, for example, if the representative is unwilling to act, dies or is for any other reason unable to act;

(b) any conditions subject to which the alternate representative is authorized to act in place of the representative, including, for example, conditions about the appointment of a monitor.

(4) When acting in place of a representative, the alternate representative is the representative for the purposes of this Act and any other Act.

(5) *[Not in force — see Supplement]*

Test of incapability for standard provisions

8 (1) An adult may make a representation agreement consisting of one or more of the standard provisions authorized by section 7 even though the adult is incapable of

(a) making a contract, or

(b) managing his or her health care, personal care, legal matters, financial affairs, business or assets.

(2) In deciding whether an adult is incapable of making a representation agreement consisting of one or more of the standard provisions authorized by section 7, or of changing or revoking any

of those provisions, all relevant factors must be considered, for example:

(a) whether the adult communicates a desire to have a representative make, help make, or stop making decisions;

(b) whether the adult demonstrates choices and preferences and can express feelings of approval or disapproval of others;

(c) whether the adult is aware that making the representation agreement or changing or revoking any of the provisions means that the representative may make, or stop making, decisions or choices that affect the adult;

(d) whether the adult has a relationship with the representative that is characterized by trust.

Other provisions

9 (1) In a representation agreement, an adult may also authorize his or her representative to do any or all of the following:

(a) physically restrain, move or manage the adult, or have the adult physically restrained, moved or managed, when necessary and despite the objections of the adult;

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

(c) refuse consent to specified kinds of health care, including life-supporting care or treatment;

(d) give consent to specified kinds of health care,

including one or more of the kinds of health care prescribed under section 34 (2) (f) of the *Health Care (Consent) and Care Facility (Admission) Act;*

(e) accept a facility care proposal under the *Health Care (Consent) and Care Facility (Admission) Act* for the adult's admission to any kind of care facility;

(f) make arrangements for the temporary care, education and financial support of

(i) the adult's minor children, and

(ii) any other persons who are cared for or supported by the adult;

(g) do, on the adult's behalf, any thing that can be done by an attorney acting under a power of attorney and that is not mentioned in paragraphs (a) to (f) or in section 7 (1).

(h) and (i) [Repealed 2001-2-30.]

(2) A provision in a representation agreement that authorizes a representative to do anything described in subsection (1) is invalid unless

(a) the adult authorizing the representative consults with one of the following about the provision:

(i) a member of the Law Society of British Columbia;

(ii) anyone who belongs to a prescribed class of persons, and

(b) the person who is consulted completes a consultation certificate in the prescribed form.

Duration and exercise of authority

9.1 Any authority given to a representative under section 7 or 9

(a) is not terminated solely because the adult subsequently becomes incapable of making a representation agreement giving that authority to a representative,

(b) is subject to any conditions or restrictions placed on that authority in the representation agreement, and

(c) must be exercised in accordance with this Act.

Test of incapability for other provisions

10 An adult may authorize a representative to do any or all of the things referred to in section 9 unless the adult is incapable of understanding the nature of the authority and the effect of giving it to the representative.

Mental health decisions

11 Despite sections 7 (1) (c) and 9 (1) (c), an adult may not authorize a representative to refuse consent to

(a) the adult's admission to a designated facility under section 22, 28, 29, 30 or 42 of the *Mental Health Act*,

(b) the provision of professional services, care or treatment under the *Mental Health Act* if the adult is detained in a designated facility under section 22, 28, 29, 30 or 42 of that Act, or

(c) the provision of professional services, care or treatment under the *Mental Health Act* if the

adult is released on leave or transferred to an approved home under section 37 or 38 of that Act.

When agreements become effective

15 (1) A representation agreement becomes effective on the date it is executed unless the agreement provides that it, or a provision of it, becomes effective later

(a) *[Not in force — see Supplement]*

(b) when an event occurs.

(2) If the representation agreement provides that it, or a provision of it, is to become effective when an event occurs, the agreement must specify how the event is to be confirmed and by whom.

(3) *[Not in force — see Supplement]*

Part 4 — Changing, Revoking or Ending Agreements

Changing or revoking agreements

27 (1) An adult who has a representative may change or revoke the representation agreement at any time if

(a) the adult is capable of making the agreement,

(b) in the case of a change, an amendment to the agreement is executed in accordance with the procedures for executing a representation agreement,

(c) any criteria for change or revocation that are set out in the agreement are met, and

(d) in the case of a revocation, written notice of the revocation is given to

(i) each representative,

(ii) each alternate representative, and

(iii) the monitor, if any.

(2) *[Not in force — see Supplement]*

(3) [Not in force. Repealed 2001-2-50.]

(3.1) The revocation of a representation agreement becomes effective

(a) as soon as written notice has been given to all persons entitled to notice under subsection (1) (d), or

(b) on a later date specified in the written notice.

(4) [Not in force. Repealed 2001-2-50.]

When agreements come to an end

29 (1) A representation agreement ends as follows:

(a) on the death of the adult who made the agreement;

(b) *[Not in force — see Supplement]*

(c) on the court cancelling the agreement under section 32 (1);

(d) if the adult who made the agreement and the adult's representative are spouses, on the termination of their marriage or marriage-like relationship;

(e) on the representative becoming incapable;

(f) on the resignation or death of the representative;

(g) on the effective date of the revocation of the agreement under section 27;

(h) as provided in section 19 of the *Patients*

Property Act.

(1.1) Subsection (1) (d) does not apply if

(a) the representation agreement provides that it does not end in the event of the termination of the marriage or marriage-like relationship, as the case may be, and

(b) the adult consulted with a person referred to in section 9 (2) (a) (i) or (ii) about the provision referred to in paragraph (a) of this subsection and that person completed a consultation certificate in the prescribed form.

(1.2) For the purposes of subsections (1) (d) and (1.1), a marriage is terminated when an agreement, judgment or order referred to in section 56 of the *Family Relations Act* is first made in respect of the marriage.

(2) Subsection (1) (d) to (f) does not apply if

(a) more than one representative is named in the representation agreement and the agreement provides that the remaining representative or representatives may continue to act, or

(b) an alternate representative is named in the agreement and is willing and able to act as representative.

(3) *[Not in force — see Supplement]*

Part 5 — Objections, Investigations and Assistance

Objecting to agreements, changes or revocations

30 (1) Any person may make an objection to the Public Guardian and Trustee if there is a reason to believe that

(a) an adult is, or was at the time, incapable of making, changing or revoking a representation agreement,

(b) fraud, undue pressure or some other form of abuse or neglect is being or was used to induce an adult to make, change or revoke a representation agreement,

(c) the making, use or revocation of a representation agreement or a change to a representation agreement is clearly inconsistent with the current wishes, values, beliefs or best interests of the adult who made, revoked or changed the agreement,

(d) there is an error in a representation agreement or an error was made in executing, witnessing or registering the agreement,

(e) anything improper has occurred in the making, use or revocation of a representation agreement,

(f) *[Not in force — see Supplement]*

(g) a representative is not qualified under section 5 (1),

(h) a representative is

(i) abusing or neglecting the adult for whom the representative is acting,

(ii) failing to follow the instructions in the representation agreement,

(iii) incapable of acting as representative, or

(iv) otherwise failing to comply with the representation agreement or the duties of a representative,

(i) a representative has given or proposes to give consent to health care that is not authorized by the representation agreement, or

(j) any criteria specified in the representation agreement as grounds for objection have been met.

(2) *[Not in force — see Supplement]*

(3) On receiving notice of an objection, the Public Guardian and Trustee must promptly review the objection and may do one or more of the following:

(a) conduct an investigation to determine the validity of the objection and then advise the objector of the outcome;

(b) to (d) *[Not in force — see Supplement]*

(e) apply to the court for an order confirming a change to, or the revocation of, a representation agreement, or for an order cancelling all or part of a representation agreement;

(e.1) apply to the court for an order that a representation agreement is not invalid solely because of a defect in the execution of the agreement;

(f) recommend that someone else apply to the court for an order referred to in paragraph (d), (e) or (e.1);

(g) make a report under section 46 of the *Adult Guardianship Act;*

(g.1) appoint a monitor;

(g.2) authorize that a monitor appointed under

paragraph (g.1) be remunerated, out of the adult's assets, for acting as a monitor in relation to authority given to a representative under section 7 (1) (a), (b) or (d) or 9 (1) (g) and set the amount or rate of the remuneration;

(h) take any other action that the Public Guardian and Trustee considers necessary.

6) Capacidad jurídica de las personas con discapacidad para la realización de actos jurídicos

A) De la capacidad en materia contractual

QUEBEC

Código Civil de Quebec - *Civil code of Québec (L.Q., 1991, c. 64)*

Contracts

Nature and Certain Classes of Contracts

1378. A contract is an agreement of wills by which one or several persons obligate themselves to one or several other persons to perform a prestation.

Contracts may be divided into contracts of adhesion and contracts by mutual agreement, synallagmatic and unilateral contracts, onerous and gratuitous contracts, commutative and

aleatory contracts, and contracts of instantaneous performance or of successive performance; they may also be consumer contracts. 1991, c. 64, a. 1378.

Formation of Contracts

§ 1. — Conditions of formation of contracts I. — General provision

1385. A contract is formed by the sole exchange of consents between persons having capacity to contract, unless, in addition, the law requires a particular form to be respected as a necessary condition of its formation, or unless the parties require the contract to take the form of a solemn agreement.

It is also of the essence of a contract that it has a cause and an object. 1991, c. 64, a. 1385.

II. — Consent

(…)

Qualities and defects of consent

1398. Consent may be given only by a person who, at the time of manifesting such consent, either expressly or tacitly, is capable of binding himself. 1991, c. 64, a. 1398.

III. — Capacity to contract

1409. The rules relating to the capacity to contract are laid down principally in the Book on Persons. 1991, c. 64, a. 1409.

B) De la capacidad para celebrar matrimonio

QUEBEC

Código Civil de Quebec - *Civil code of Québec (L.Q., 1991, c. 64)*

Marriage

365. Marriage shall be contracted openly, in the presence of two witnesses, before a competent officiant. 1991, c. 64, a. 365; 2002, c. 6, s. 22.

373. Before solemnizing a marriage, the officiant ascertains the identity of the intended spouses, compliance with the conditions for the formation of the marriage and observance of the formalities prescribed by law. More particularly, the officiant ascertains that the intended spouses are free from any previous bond of marriage or civil union, except in the case of a civil union between the same spouses, and, in the case of minors, that the person having parental authority or, if applicable, the tutor has consented to the marriage. 1991, c. 64, a. 373; 2002, c. 6, s. 24; 2004, c. 23, s. 6.

Civil Union

521.1. A civil union is a commitment by two persons 18 years of age or over who express their free and enlightened consent to live together and to uphold the rights and obligations that derive from that status.

A civil union may only be contracted between persons who are free from any previous bond of marriage or civil union and who in relation to each other are neither an ascendant or a descendant, nor a brother or a sister. 2002, c. 6, s. 27.

521.2. A civil union must be contracted openly before an officiant competent to solemnize marriages and in the presence of two witnesses.

MANITOBA

Ley de Matrimonio - *C.C.S.M. C. M50. The Marriage Act*

Where party to marriage is under 18

Where a party to an intended marriage is under the age of 18 years, no person knowing or having been informed of the age of that party shall issue a marriage licence for the marriage, publish banns in respect of the marriage, grant dispensation of the publication of banns in respect of the marriage, or solemnize the marriage, unless

(a) the party is a widowed spouse or divorced; or

(b) if the party is over the age of 16 years and if custody of the party has not been granted to an agency or the Director of Child and Family Services, or some other person, pursuant to an order of a court of competent jurisdiction, consent to the marriage of the party is given

(i) by the parents of the party, if living, or

(ii) if a parent of the party is dead, by the surviving parent, or

(iii) if the parents of the party are living separate and apart, by the parent with whom the party is living, or

(iv) if one parent of the party has had a committee appointed for him or her under The Mental Health Act or, in the opinion of the attending physician, is incapable of giving consent, by the other parent of the party, or

(v) if both parents of the party are dead or are prevented from giving consent to the marriage for any of the reasons mentioned in sub-clause (iv), by the guardian of the party; or

(c) if the party is over the age of 16 years and custody of the party has been granted to an agency or to the Director of Child and Family Services consent to the marriage of the party is given by the Director of Child and Family Services; or

(d) consent to the marriage is given by a judge of the Family Court.

Certificate of mental capacity

Notwithstanding that a committee has been appointed under *The Mental Health Act* for a party to an intended marriage, a psychiatrist may certify in writing that the party has the capacity to understand the nature of the contract of marriage and the duties and responsibilities which it creates.

BRITISH COLUMBIA,

Ley de Matrimonio – *Marriage Act [RSBC 1996] chapter*

Civil marriage

20 A marriage may be contracted before and solemnized by a marriage commissioner under a licence under this Act and on payment of the prescribed fee if

(a) the marriage is contracted in a public manner in the presence of the marriage commissioner and 2 or more witnesses,

(b) each of the parties to the marriage in the presence of the marriage commissioner and the witnesses declares, «I solemnly declare that I do not know of any lawful impediment why I, A.B., may not be joined in matrimony to C.D.», and

(c) each of the parties to the marriage says to the other, «I call on those present to witness that I, A.B., take C.D. to be my lawful wedded wife (or husband)».

Consent required to marriage of person under 19 years of age

28 (1) Except as provided in subsections (2) to (4), a marriage of a person, not being a widower or widow, who is a minor must not be solemnized, and a licence must not be issued, unless consent in writing to the marriage is first given

(a) by both parents of that person if both are living and are joint guardians, or by the parent having sole guardianship if they are not joint guardians or by the surviving parent if one of them is dead,

(b) if both parents are dead, or if neither parent is a guardian, by a lawfully appointed guardian of that person, or

(c) if both parents are dead, and there is no lawfully appointed guardian, by the Public Guardian and Trustee or the Supreme Court.

(2) If a person whose consent under this section is required to a marriage is outside British Columbia, or unreasonably or from undue motives refuses or withholds consent to the marriage, or if his or her location is unknown and the court is satisfied that the location has not been found after a diligent search, the person in respect of whose marriage consent is required may apply by petition to the Supreme Court for a declaration under this section.

(3) The court must hear the petition in a summary manner, and if the marriage proposed appears on cause shown to be proper,

(a) the court must declare it to be proper, and

(b) the declaration is as effectual for all purposes as if the person whose consent is required had consented to the marriage.

(4) If a person whose consent is required under this section is a mentally disordered person, the

Public Guardian and Trustee may consent to the marriage, if the proposed marriage appears to be proper.

(5) Before a licence is issued authorizing the solemnization of the marriage, the consent required by subsection (1) or the declaration of a court under subsections (2) and (3) must be filed

(a) with the issuer of marriage licences, or

(b) if the marriage is to be solemnized by a religious representative after publication of banns, with the religious representative.

(6) A marriage of a minor must not be solemnized, and a licence must not be issued, unless a certificate of birth or other satisfactory proof of age has been produced

(a) to the issuer of marriage licences, or,

(b) if the marriage is to be solemnized after the publication of banns, to the religious representative.

Marriage of person under 16 years of age

29 (1) Except as provided in subsections (2) and (3), a marriage of any person under 16 years of age must not be solemnized, and a licence must not be issued.

(2) If, on application to the Supreme Court, a marriage is shown to be expedient and in the interests of the parties, the court may, in its discretion, make an order authorizing the solemnization of and the issuing of a licence for the marriage of any person under 16 years of age.

(3) An order made under this section is subject to the observance of section 28, and must be filed in a manner similar to that provided in section 28 (5) in respect of a consent or declaration.

C) De la capacidad para actuar los procedimientos judiciales

QUEBEC
Código de Procedimientos Civil de Quebec – *Code of Civil Procedure, Quebec*

Representation and hearing of a minor or an incapable person of full age

394.1. Where, in a proceeding, the court ascertains that the interest of a minor or of a person of full age it considers incapable is at stake and that it is necessary for the safeguard of his interest that the minor or incapable person of full age be represented, it may, even of its own motion, adjourn the hearing of the application until an attorney is appointed to represent him.

The court may also make any order necessary to ensure such representation, in particular, rule on the fees payable to the attorney and determine who will be responsible for their payment. 1992, c. 57, s. 264.

394.2. To ensure proper representation of a minor or incapable person of full age, the court must, even of its own motion, in all cases where

the interest of the minor or incapable person of full age is opposed to the interest of his legal representative, appoint a tutor or curator ad hoc. 1992, c. 57, s. 264.

394.3. Where the court hears a minor or a person of full age it considers incapable, he may be accompanied by a person capable of assisting or reassuring him. 1992, c. 57, s. 264.

394.4. Where the interest of a minor or incapable person of full age requires it, the court may, after advising the parties, examine him out of the presence of the parties.

The deposition is taken down in stenography or recorded, unless waived by the parties. The minutes of the deposition, a transcript of the stenographer's notes or a copy of the recording is sent to the parties on request. 1992, c. 57, s. 264.

394.5. Where the interest of a minor or of a person of full age it considers incapable requires it, the court may, after so advising all the parties, hear him where he resides or is confined, or in any other place the court considers appropriate. 1992, c. 57, s. 264.

7) Legislaciones notariales

VICTORIA, BRITISH COLUMBIA

Ley de Notarios – *Notaries Act [RSBC 1996] CHAPTER 334*

Application for enrollment

5 (1) A Canadian citizen or permanent resident of Canada may, on payment of the prescribed fee, apply to the court under the Rules of Court for enrollment as a member.

(2) An application for enrollment as a member must be filed in the Vancouver registry and heard at Vancouver.

(3) At least 30 days before the hearing of an application for enrollment as a member a copy of the application must be served on the secretary of the society and on the executive director of the Law Society of British Columbia.

(4) At least 30 days before the hearing of an application for enrollment as a member, a notice of the application and the date of the hearing must be published in a manner determined by the society.

(5) A person may oppose the application at the hearing, if the person serves notice of the person's opposition on the applicant and files a copy of the notice with the registrar.

Enrollment

6 (1) If the court is satisfied that an applicant is a fit person for enrollment as a member, it may order that the applicant be examined in the duties of a notary public and, if found qualified on the examination, be enrolled as a member.

(2) [Repealed 2008-39-59.]

(…)

Custodianship of member's property

43 (1) The court may, on application by the society either without notice to anyone or on notice that the court requires, or, if the court has made an order under section 38, without such an application, appoint a person to be custodian of the property of a member and to manage, to arrange for the conduct of or to wind up the notarial practice of the member if

(…)

(d) because of physical or mental illness or for any other reason, the member is unable to practise as a notary public,

Principios sobre conducta ética y profesional – *Principles for ethical and professional conduct (Last Amended 05/10/2007)*

4. Competence, Quality of Service and Relationship to Clients

4-P1 Every Member should competently perform the services that the Member undertakes on the clients' behalf.

Guidelines

(…)

4-G3 Lack of Capacity – Members should be cautious about accepting instructions from or on behalf of clients whose capacity appears to be limited, whether because of age, mental disability or for some other reason.

8) Legislación y jurisprudencia en material de discapacidad

A nivel nacional:

Canadian Charter of Rights and Freedoms, Constitution Act, 1982

Canadian Human Rights Act (R.S., 1985, c. H-6)

Canada Transportation Act (1996, c. 10)

A nivel regional

Ontarians with Disabilities Act, 2001

The Vulnerable Persons Living with a Mental Disability Act (1993) Manitoba

Mentally Disabled Persons' Estates Act, R.S.N.L. 1990, c. M-10 (Newfoundland and Labrador)

Jurisprudencia (selección)

Ontario Human Rights Commission et al. v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536 (known as «O'Malley»)

Bhinder v. Canadian National Railways, [1985] 2 S.C.R. 561.

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143

The Canadian Council of Churches v. Her Majesty the Queen and the Minister of Employment and Immigration, [1992] 1 S.C.R. 236

Weatherall v. Canada (A.G.), [1993] 2 S.C.R. 872

Rodriguez v. B.C. (A.G.), [1993] 3 S.C.R. 519

Battlefords and District Co-operative Ltd. v. Gibbs, [1996] 3 S.C.R. 566

Brant County Board of Education v. Eaton, [1997] 1 S.C.R. 241

Eldridge v. B. C. (A.G.), [1997] 3 S.C.R. 624

Grismer v. British Columbia Council of Human Rights, [1999] 3 S.C.R. 868

Granovsky v. Minister of Employment and Immigration, [2000] 1 S.C.R. 703

Lovelace v. Chiefs of Ontario, [2000] 1 S.C.R. 950 (relationship between s.15(1) and s.15(2) of the Charter);

R. v. Latimer, [2001] 1 S.C.R. 3, 2001 SCC 1

Auton (Guardian ad litem of) v. British Columbia (Attorney General), [2004] 3 S.C.R. 657, 2004 SCC 78

Newfoundland (Treasury Board) v. N.A.P.E., [2004] 3 S.C.R. 381

VIA Rail Canada Inc. v. Canada (Canadian Transportation Agency), [2006] S.C.C.A. No. 219 (under reserve); [2005] 4 F.C.R. 473.

Buchanan v. Canada, 2002 FCA 231

Miller v. Canada, 2002 FCA 370

Chesters v. Canada (Minister of Citizenship and Immigration), [2003] 1 F.C. 361

Wignall v. Canada (Department of National Revenue (Taxation)), [2004] 1 F.C.R. 679

McKay-Panos v. Air Canada, [2006] 4 F.C.R. 3

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