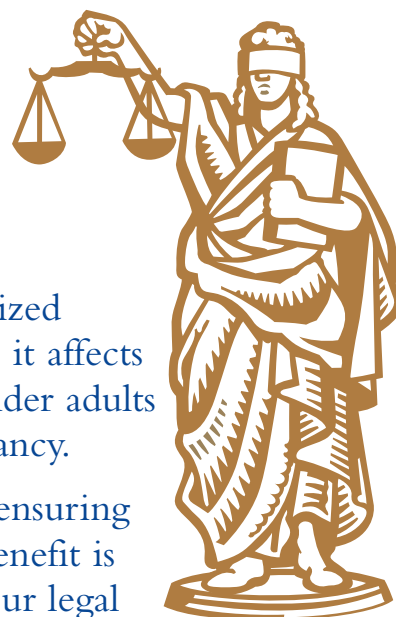




Seniors and the Law



Do you know the difference between a power of attorney and an advance health care directive? Do you have a valid will? If you became ill or had an accident and were unable to make decisions about your treatment or care, would you trust someone else to make decisions for you? These are among the many legal issues facing seniors today.

It's crucial to know something about these questions, because the law – and the way it's interpreted and applied – can have significant implications for your financial situation, your health care, your independence and your quality of life.

Under the *Canadian Charter of Rights and Freedoms*, seniors are entitled to the “equal protection and equal benefit of the law”. While the growing population of seniors is having an increasing impact on Canadian law and legal practice, ‘Elder

law’ – the specialized practice of law as it affects the interests of older adults – is still in its infancy.

The first step in ensuring protection and benefit is understanding your legal rights and obligations. This issue of *Expression* describes the main aspects of the law that seniors, their families and service providers should know about. It also presents a glossary of legal terms (in colour in the text), offers a list of resources, and suggests avenues of enquiry to find help with legal problems and make sure your wishes and rights are respected.

Reg MacDonald
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NACA

The National Advisory Council on Aging consists of up to 18 members from all parts of Canada and all walks of life. The members bring to Council a variety of experiences and expertise to advise the federal Minister of Health, his/her colleagues and the public on the situation of seniors and the measures needed to respond to the aging of the Canadian population. Current NACA members are:

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■ Making the law work for you

Discovering your legal options and taking action is like insuring your house against fire – you hope you never have to make a claim, but if you do, you want to make sure your interests and assets are protected. Knowing what your rights are, drawing up a will and preparing for most eventualities are the prudent senior's insurance against future disappointments or disputes. And as with insurance, it's always better to have arrangements in place before a problem occurs.

To understand why it's important to know about the law¹ and how it affects you, consider these situations:

- You're living in a seniors' residence or nursing home and you're unhappy with the care and services you're receiving. What are your options?
- Your children think you're no longer competent to handle your own affairs or live in your own home. You disagree. What can you do?
- You've been having some health problems and therefore agreed to share the management of your finances with a relative. Now you think the relative is using the money for his own benefit. Can anything be done?

These scenarios illustrate the kinds of legal issues that can arise for older adults. But often, people don't know what to do, for a variety of reasons:

- They don't know or aren't sure about their rights in their relations with family, professionals and governments or they're uncomfortable with the legal system;
- They're worried about the consequences or ill at ease in denouncing abuse or claiming their rights;

¹ **Note:** This issue of *Expression* contains general information about issues related to seniors and the law. Each person's situation is different, the law is complex, and laws can change. If you have a specific legal problem or issue to explore, contact your community legal clinic or a lawyer.



- They don't know where to find legal information, or existing sources may not be senior-friendly (voice mail and touch-tone systems, for instance).
- They lack financial resources to pay for a lawyer, yet may not know of or qualify for legal aid.

■ Age discrimination

The law itself may discriminate on the basis of age. Rules forcing a person to stop working at a specific age, for instance, judge a person's contribution solely on the basis of age, not their competence or ability. Yet courts have found mandatory retirement 'justifiable', despite the fact that people are living longer and in better health, making them more capable than ever of holding a job well past age 65.

Some laws appear neutral (apply to everyone) but in fact are much more likely to affect seniors than other adults. Older adults, for example, are more likely than other groups to be subject to a **guardianship** or **adult protection** order and to have their mental competence questioned through application of these laws². This often can be because of real changes such as declining health, or because of ageism or stereotypes about older people.

In short, the law – and this includes not just legislation, but also people who deal with

legal matters, such as police, lawyers, courts, health and social services professionals – typically are not used to thinking about legal issues in the context of seniors' experiences and are not aware of the great diversity among seniors. Thus, they may either (a) treat older adults the same as all other adults, even where there are significant and relevant differences; or (b) put older adults in a separate category based solely on age – regardless of whether age is relevant in a particular situation.

■ Barriers in the legal system

The legal system itself can present obstacles to older Canadians:

- Participants in the legal system – lawyers and judges – may not be skilled in dealing with older clients. They may not understand older clients' specific experiences, values, priorities and needs. They may not distinguish clearly enough between the older person's interests and those of family members or others participating in the older person's decisions.
- In some cases, an older adult is incapable of making decisions. To date, however, the legal and medical professions have had little guidance about how to determine whether a person is mentally incapable and what to do once this determination is made.

² Most of the information in this issue providing an overview of the Canadian situation with respect to seniors and the law is drawn from: *Older adults' personal relationships and the law in Canada – Legal, psychosocial and ethical aspects* by Marie Beaulieu and Charmaine Spencer (Ottawa: Law Commission of Canada, 1999).



- Participating in the adversary environment of a court proceeding can feel intimidating and traumatic. Legal proceedings – whether inside or outside a courtroom – can often be complex, lengthy, draining and confusing.
- Buildings and courtrooms often aren't designed for easy access and physical comfort

Much can be gained through law reform, legal education, judicial training and systemic changes. In the meantime, individuals, their families and care providers are dealing with the law every day – so it makes sense to familiarize yourself with the laws that can affect you as you grow older.

■ The basics

Like all other adults, seniors may have a variety of legal concerns, ranging from property taxes to family law. According to Judith Wahl, executive director of Toronto's **Advocacy Centre for the Elderly**, seniors frequently seek the Centre's help in resolving difficulties with tenancy agreements or with service contracts in retirement homes.

Two other areas of the law have particular relevance for seniors. These are:

- Laws for protecting and preserving your income and assets: laws on wills and estates, power of attorney, guardianship, and adult protection

- Laws on health, especially your capacity to make decisions about your care and to consent to treatment.

Both categories contain provisions for what is known as 'substitute decision making' – that is, arrangements for how decisions will be made on your behalf when you become incapacitated by accident, illness or changes in your mental abilities. Basically, you choose someone to make decisions for you. If you haven't made a choice, the law will pick someone for you.

When it comes to wills and estates, it's fairly easy to state a general rule, although the specifics depend on your circumstances and where you live:

- Everyone needs a valid will to determine how their property will be dealt with after death and everyone should appoint an **executor** to make sure the wishes expressed in the will are carried out. **Verbal directives** are rarely effective. Once you've made your will, you should review it and your other estate plans regularly to make sure they still reflect your current wishes and circumstances.



You don't necessarily need a lawyer (or in Quebec a notary) to draw up a will if your estate is simple. But having a lawyer draft a simple will is not overly expensive and may



prevent misunderstandings later. Or you may have access to a community legal clinic (some are run by professionals on a volunteer basis). More complex estates always require a lawyer or notary to avoid problems and expenses later.

■ Substitute decisions

In some cases of serious illness or changing mental abilities, an individual's capacity to make decisions may become significantly reduced. Then a substitute decision maker needs to be involved. The substitute can be a family member or other person designated by the individual, someone appointed by a court, or in some circumstances, a government agency.

Family involvement in an older person's decisions about health care (or for that matter housing or finances) has the potential to be positive and helpful, negative and intrusive or somewhere in between. Family members (working alone or in conjunction with professionals) can help support and enhance the older person's autonomy or in less positive situations, they can become paternalistic or coercive and inappropriately override what the parent wants. Many older people welcome the sharing of decision-making while others prefer to "go it alone". Naming a substitute decision maker and giving clear directives is the best way to deal with eventual situations and help reduce feelings of tension or guilt that might otherwise trouble the family ("Is this what Dad would have wanted"?).

Where to get legal advice

- Ask trusted family members or friends to recommend a lawyer or notary.
- Most provinces have a lawyer referral service, available through a toll-free number or the Internet. The provincial law society or bar association may offer this service. Ask for lawyers or notaries specializing in the area of concern to you – wills and estates, family law, substitute decisions.
- Your provincial seniors' society may have a legal referral service, as the Manitoba Society of Seniors does. Seniors' clubs and organizations like the Royal Canadian Legion are another possible source of referrals.
- If cost is an issue, your provincial legal aid plan may be able to help.
- If you live close to a university with a law school, a student legal aid clinic may be available.

TIPS

Laws on substitute decision making vary considerably from province to province, they're complex, and they're often difficult to interpret and apply. To make your plans, you'll need advice from a lawyer or notary practising in your province or territory.

■ Discovering your options

The law gives you options for choosing your substitute decision maker. In a written document or documents, you state your wishes, how you would like them carried out, and who should act on your behalf if you are unable to make decisions yourself.



The document could be a **power of attorney**, a **written directive** or an **advance health care directive**.

Which document you prepare depends on where you live. For example, Ontario law specifies three types of power of attorney – one for personal care (including health care) and two different powers of attorney for property (your money, your home, and anything else you own).

Choosing a substitute decision maker can be an effective way to have your personal wishes respected. It's important to choose someone you trust and to let him or her know clearly what you want and don't want. If you have not designated a substitute decision maker, or if the arrangements you've made don't work out for some reason, two additional kinds of laws may come into play: **adult protection** and **guardianship**.

■ Concerns raised

Each option for substitute decisions raises potential concerns. With power of attorney, for instance, there is a potential for financial abuse, someone misusing the funds, or making decisions contrary to an individual's wishes or interests.

With advance health directives, one concern is that seniors are being asked to sign them immediately on entering a long-term care facility – without necessarily knowing or understanding all the implications.



Guardianship laws raise questions about how incapacity is determined, whether seniors have the benefit of due process in these determinations, and whether they are fully informed about the implications of the law – their loss of liberty and free choice.

Adult protection laws also raise concerns about personal autonomy. They are intended for any 'vulnerable' adult but those most affected are seniors. The right to make unwise decisions or take risks, for example, appears to be tolerated more readily in younger adults than in seniors. These laws have also been criticized for failing to observe the right to due process, failing to meet the real needs of vulnerable seniors, and exacerbating situations the law was intended to remedy.

■ Balancing autonomy and protection

The law reflects social values and attitudes. Canadian values, as expressed in the *Canadian Charter of Rights and Freedoms* and in provincial human rights law, include non-discrimination, fairness, and the right to due process. We value freedom of personal choices and self-determination, but we also believe in compassion and the social value of protecting those we see as vulnerable to harm or less able to take care of themselves.

When the goal is to prevent harm, there is always a question of how much the law



should intrude on our choices and relationships in the name of protection. At what point does a law intended to protect us become one that erodes our personal autonomy – including our ability to make what others might consider bad decisions?

■ Taking responsibility

For most seniors, the legal issues of aging boil down to a central question: “How can I make sure that my wishes about health, finances and personal care – whether expressed by me or by someone I trust – are *heard* and *respected*?” This is the most important reason to learn about legal rights and responsibilities and how to use the law.

Dealing with legal issues can be challenging. Finding the legal help you need may also be difficult, but this is the surest way to avoid problems later. A general introduction like this one can't hope to cover everyone's particular situation and legal requirements. But the issues and strategies explored may help you start taking the steps you need to make sure your legal bases are covered and your choices recognized and respected. ■



Glossary

Advance health care directives: precise directives about the treatment and care you desire for any serious illness or accident (it's sometimes called a living will).

Adult protection: a variety of dispositions (vary from province to province) for governmental provision of services (or arrangement for their provision) and legal authority to act on behalf of a client (when an individual's capacity to make decisions becomes significantly reduced or in cases of abuse, neglect or self neglect).

Executor: person named in a will to carry out the provisions of the will.

Guardianship: a formal arrangement under provincial law, usually made by a court, designating someone to take care of your affairs and make decisions for you because you can't do so yourself. Processes for appointing guardians vary by province, as do the rules about how guardians must behave and what kinds of decisions they can make.

Power of attorney ('mandate' in Quebec): written document formally allowing a person you name to make decisions on your behalf. You do not give up the power to make your own decisions, you are simply sharing it, as long as you are mentally capable. Depending on where you live, you can assign your power of attorney for personal care (including health care), property, or both. While written directives explain your wishes, a power of attorney is a legal tool authorizing others to make decisions about you on your behalf.

Spoken or Verbal directives: conversations with family members, close friends, health care staff about how you want your property disposed of or about the kind and extent of care you want. Since these conversations are seldom documented, they are open to challenge if disagreements arise.

Written directives: sets out your wishes about health care and the name of the person who is to make decisions about your care if you can't. If you haven't specified someone, some provinces give preference to your spouse, children, parents, siblings and other blood relatives, even if someone else knows you much better or is more familiar with your wishes. Written directives take several forms (the exact definitions and rules for them vary according to where you live).



For more information...

Canadians Pensioners Concerned. *My Plans for Me: Educational Information Package on Advance Health Care Directives in Canada* (1997). Available in English or French at a cost of \$15 for seniors and non profit organizations and \$25 for others, plus postage and handling. To order, phone 902-455-7684 or e-mail: j.mcniven@ns.sympatico.ca

The **Advocacy Centre for the Elderly** is Canada's only organization specializing in legal issues affecting older adults, especially access to justice. The Centre has produced a publication *Elder Abuse, the hidden crime* and a 20-minute video *The Issues Behind Signing a Power of Attorney* (available at 2 Carlton Street, Suite 701, Toronto, Ontario, M5B 1J3; 416-598-2656); www.advocacycentreelderly.org

Access to Justice Network, an internet site sponsored by Justice Canada, the University of Alberta and the University of Montréal. Search by subject and province – for example, if you live in Saskatchewan and want to know about wills, entering those two search terms gives you publications, links and other resources. The 'Directories' page helps you find the legal education organization in your area or a community legal clinic; www.acjnet.org

Publications of the **Public Legal Education Society of Nova Scotia**; www.chebucto.ns.ca

PLEA – Saskatchewan's Public Legal Education Association – has pamphlets called *Older Adults and the Law* and *Answers to your questions and concerns about lawyers*; www.plea.org

Community Legal Education Ontario – offers a list of legal resources and community legal clinics across the province: (416) 408-4420; www.cleo.on.ca

The People's Law School has a publication called *Writing your will for B.C. residents*; www.publiclegaled.bc.ca

For a list of Alberta organizations providing legal advice, consult the **Legal Services Directory**; www.extension.ualberta.ca/plena/lsd/lsd-org.htm



Reg MacDonald is a National Advisory Council on Aging member from New Brunswick who has a long experience serving his fellow Canadians. An electrician by trade, he was first elected to the Legislative Assembly of New Brunswick in 1979.

Over the years, he was active on a number of legislative committees and served as Party Whip and Deputy Speaker. In 1998, he became New Brunswick's first Minister of State for Seniors, working with seniors' groups and on their behalf to raise awareness on the needs and issues of seniors. Mr. MacDonald continues to work for seniors through his contribution to NACA, a Citizens Advisory Committee and his Parish Council. He has also served on the local recreational council, School Board and professional association.