June 6, 2002

The Honourable Geoff Plant
Attorney General and Minister Responsible
for Treaty Negotiations
Province of British Columbia
Parliament Buildings
Victoria, B.C. V8B 1X4

Dear Attorney General:

The following is our response to the recommendations in the report on the Review of Enduring Powers of Attorney and Representation Agreements by A.J. McClean. This response reflects the consensus from public meetings held during and after the Review.

We would appreciate meeting with you to discuss these issues and the plans for amendments to the Power of Attorney Act and the Representation Agreement Act.

For further discussion on any aspects of this response, please contact Joanne Taylor, Executive Director of the Representation Agreement Resource Centre at phone 604-408-7417; fax 604-801-5506; e-mail jtaylor@rarc.ca

Sincerely,

Representation Agreement Resource Centre
Alzheimer Society of B.C.
BC Association for Community Living
BC Coalition of People with Disabilities
BC Government Retired Employees Association, New Westminster & District Branch
Council of Senior Citizen's Organizations

# RESPONSE TO THE MCCLEAN REVIEW

## Background

The Representation Agreement Resource Centre was founded by the organizations and individuals who took part in the Community Coalition for the Implementation of Adult Guardianship Legislation and the Project to Review Adult Guardianship. The Resource Centre is devoted to public education and information about the Representation Agreement and related legislation that enables personal planning and supported or substitute decision-making.

During the course of Professor McClean's review the Resource Centre organized a public forum and several smaller meetings to enable as broad a discussion of the issues as possible (see Appendix A, page 11, for a summary of these discussions). After Professor McClean's recommendations were made public, the Resource Centre facilitated a large meeting and a small group meeting to study the report and to develop, where possible, consensus based responses. This report reflects the consensus positions.

## The Policy Intent

The Representation Agreement and the Enduring Power of Attorney embody two ways to look at personal planning. The Representation Agreement takes the road of preserving self-determination to the greatest extent possible by laying out in the statute a pathway for ethical decision-making. The Enduring Power of Attorney, true to its origin as a commercial tool, considers the power of the tool and the delegation of authority as the vital components of substitute decision-making. The two tools differ as well in their execution, with the Representation Agreement offering more safeguards, and in response to breaches, with more mandated authority for intervention by the Office of the Public Guardian and Trustee in Part 5 of the Representation Agreement Act.

During the course of his review, we urged Professor McClean to consider streamlining the Representation Agreement to make it both easier to execute and, at the discretion of the grantor, as powerful a tool as the Enduring Power of Attorney. However the sticking point was the philosophy of self -determination, which Professor McClean accepted for health and personal care matters but rejected for financial and legal matters. As a consequence the marriage that he has proposed for the two tools is one of convenience of execution.

We are disappointed that the key recommendation to subsume Section 9 financial and legal powers into the Enduring Power of Attorney was accepted without the opportunity to subject it to public consultation. Such consultation would have offered more than one idea on how to incorporate the virtues of the

Enduring Power of Attorney into the framework of the Representation Agreement.

The philosophy of the Representation Agreement Act was one of the strongest points of consensus throughout the process of creating and implementing the legislation. Many other positions were frayed around the edges after 10 years, but the belief in self-determination and the duty to behave ethically has never waned. The Attorney General's immediate support for the key recommendation appears to accept completely that a small subsection of the Bar Association is wiser than a broad cross-section of citizens who thought about the issues for a decade.

So we are in the unenviable position of having to comment on a second best framework and to find ways in practice to make it work for all British Columbians.

The single most important response that we can make is to urge that there be no further erosion of the Representation Agreement Act. It has tempted each of us at some point over the last ten years to imagine what the adult guardianship laws might look like if we had the luxury and the mandate to draft them ourselves. Professor McClean voiced this thought himself during the course of his review. Each of us likes to imagine that we could do it better and certainly more efficiently. However there is no reason to believe that this would be the case.

We undertook in British Columbia, through three successive and ideologically different governments, to develop these laws through a collaborative and consensus based process. What we got was decidedly different from what might have emerged from a committee of the Bar, the halls of academe or the offices of the Ministry of the Attorney General. Opposition to the Representation Agreement Act has come from these quarters and much of it can be attributed to the fact that their traditional role in shaping laws was shared by laypeople who had as much influence as they did.

Obviously one of the surest ways to claim back traditional powers is to say that the interlopers are not up to their task and that the experts should regain control of the field. The net effect of this review is to surrender to the expert point of view notwithstanding its biases and inherent conservatism. The name recognition argument for the Enduring Power of Attorney is a good case in point. The Enduring Power of Attorney should be retained, the Bar sub-committee has said, because the rest of the world does not know what a Representation Agreement is. Accepting this argument is tantamount to saying that change is bad because it exchanges the known for the unknown.

What is important now is to guard what we have left of the collective wisdom of the Representation Agreement Act. One of the ways to do this is to ensure that Representation Agreements override any written instructions like instructional advance directives or degrees of intervention documents. The Attorney General

should also guarantee that the Representation Agreement does not become a variant of the Enduring Power of Attorney or any other personal planning tool that might be conceived of in the offices of the Ministry.

We fully support Professor McClean's recommendation to retain Section 7 provisions of the Representation Agreement. Supported decision-making is a fact of life for many people. Finally there is a statute that recognizes this and enables people to have the legal authority to do what they do naturally. We are concerned that widespread acceptance of the groundbreaking Section 7 provisions may be weakened without the umbrella of the traditional Section 9 financial and legal powers. We urge the Attorney General to provide leadership, by reaffirming the value of Section 7 provisions to every British Columbian, as he did in his speech in the Legislature during the debate on the Adult Guardianship Amendments Act in 1999.

We also believe that if the marriage of convenience of execution is to be successful then there should be complete congruence between the execution procedures and requirements for the Enduring Power of Attorney and the Representation Agreement. It will be important to limit any public confusion and promote the one stop approach to making both documents by ensuring that the execution procedures are identical.

We are concerned that many of Professor McClean's recommendations will require, either explicitly or implicitly, that the Office of the Public Guardian and Trustee assume new responsibilities. One of the guiding principles in the reform of the adult guardianship laws, and in particular the creation of the Representation Agreement Act, has been to ensure that the role of the Public Guardian and Trustee and the Courts be a last resort. Each of the review's recommendations should be tested against this principle in order to affirm that the net effect of all of the recommendations is a limited and not an expanded role.

## Response to Specific Recommendations in the McClean Report

There are some specific recommendations that we believe require further consideration and alternative action.

- **No Erosion of Section 7 Powers – Recommendation # 27**

*The McClean Report recommends amending the RA Act to clarify that the scope of the power to "obtain legal services and instruct counsel" (RA Act Section 7 (1)(d) be confined to matters referred to in Sections 7 and 9.*

Just as other decision-making areas – financial, health care, personal care, – cover distinct and specific activities and authorities, so does obtaining legal

services and instructing counsel. It is an important safeguard for self-determination that a Representative is able to seek legal services or take legal action in their duties to assist or act on behalf of the individual. Access to justice is a basic right of all citizens.

The greatest concern of this power being subservient to the other powers is that it may push people to apply for committeeship or for the Public Guardian and Trustee to intervene in order to deal with a legal matter that is not 'specifically' mentioned under the other powers. This is especially true for the definition of routine management of financial affairs, which tries to provide parameters by listing specific activities. This definition was already amended once because re-directing the mail was not included and Canada Post wanted to see it 'on the list.' This raises concern for other matters too. For example, settling an ICBC claim may not be included in the definition of routine management of financial affairs, yet being able to 'instruct counsel' may provide that a Representative can undertake this task. Approval of a committeeship in order to settle an ICBC claim (no matter how small) will override all other financial and legal areas of a Representation Agreement. This is clearly contrary to common sense and to the intent of the legislation.

While some may argue that it is not relevant for a Representative under Section 7 to take legal action with respect to a matter involving real property – in fact this could have a significant effect on the individual's health and personal care. While dealing with real property is not permitted under the definition of routine management of financial affairs, this should not mean that an individual is denied legal representation. It may be that another authority – a joint property owner**,** an Attorney, the Public Guardian and Trustee etc. – is taking action contrary to the individual's wishes, values and well being.

There are a myriad of life situations that provide other examples – someone who falls on the sidewalk, a victim of abuse who may be part of class action suit etc. The purpose of Section 7 Representation Agreements is to provide support and assistance without stigmatizing people and without restricting and intruding on their personal affairs and human rights. There has been insufficient experience with Representation Agreements (by both the public and third parties) to provide any basis for limiting or defining the scope of Section 7 (1) (d).

*The McClean Report recommends deleting the power to make donations on behalf of the adult from the definition of "routine management of financial affairs" (RA Act Section 7 (1) (b)).*

McClean argues that the individual can already specify this power in an Enduring Power of Attorney and it should not be up to legislation to authorize gift-giving, including gifts to charity on another's behalf. However, in Section 7 of the RA Act, "routine management of financial affairs" is subject to the Regulation. While an individual may limit powers listed in the Regulation, it is unlikely an individual

could add activities not listed even if they are not specifically restricted. The inclusion, in the Regulation, of the authority to make donations on behalf of the adult was the consensus of a Consultation Group (financial institutions, lawyer's association, Law Society, community groups, government) sponsored by the PGT. The provision to make such donations is also subject to many caveats. It is our position that McClean's recommendation on this matter should not be accepted.

- **Make Execution Requirements Identical – Recommendation #26**

*The McClean Report recommends a number of changes to the RA Act to streamline execution procedures and make them similar to those of the EPA.*

One major difference remains between the execution procedures in the RA Act and for the EPA. Representatives are required to sign the Agreement but an Attorney is not required to sign the EPA. There is an important value in ensuring that someone named as an Attorney in an Enduring Power of Attorney acknowledges his or her appointment and duties by signing the EPA. It is conceivable that EPA's made to date may very well name someone as Attorney without their knowing. This could put both the individual and the Attorney in an awkward position and certainly places more burdens on the Attorney if they only discover their appointment when an individual becomes incapable.

Amending the Act to include this acknowledgement completes the intent of 'marrying' the execution procedures. Implementing identical procedures will make completion of planning documents simpler and less costly for citizens as well as subject to fewer errors.

An alternative approach to the Attorney signing the EPA is to prescribe a Certificate that would accompany the EPA.

There also appears to be an inconsistency with respect to the person signing on behalf of the individual. If a Certificate is required in the case of an RA, the same should be necessary for an EPA. All execution requirements should be double-checked to be sure that they are identical.

- **Implement made-in BC Triggering Event – Recommendation #10**

*McClean recommends amending the Power of Attorney Act to include provision for a triggering event.*

McClean proposes to describe "springing powers" for the EPA. In order to limit confusion and errors by the public and practitioners, it is vital that the same terminology be used for both the PA Act and the RA Act. Since this recommendation is an addition to the PA Act, it makes sense to use "triggering

event" which is a well-known feature and term of the Representation Agreement Act since 1992.

McClean suggests modeling the EPA provision on Alberta's Powers of Attorney Act. This is unnecessary and would create more work and confusion. Let's not re-invent the wheel. There is an excellent made-in-B.C. model for trigger events that was the consensus of the Public Guardian & Trustee's diverse Consultation Group that worked on a standard form for Representation Agreements.

Please see APPENDIX B, page 16, for the relevant wording and example from the process of developing a draft model form.

- **Resignation Requirements for an Attorney – Recommendation #21**

*McClean recommends amending the Power of Attorney Act to specify particular steps that an Attorney must take if resigning when the individual is incapable.*

It is onerous and an inefficient use of people's and the court's time to require an Attorney to obtain an official discharge from the court in the case where an individual is incapable and the Attorney wants to resign but has already acted. While the objective might be to protect the Attorney from liability and to preserve the 'instrument' (EPA) there are many other factors that suggest this is not a practical recommendation. How expensive and complicated will these procedures be (likely people will need to hire a lawyer) and who will pay the costs? Presumably the PGT's office may be asked to give some comment, which means additional cost to taxpayers. How easy will it be to access the court for this purpose? The bigger questions are: will this make people reluctant to take on the job in the first place and will people remain on the job even though they may not be able to properly carry out their duties? The effect of this recommendation may be that government will have to expand its role in managing people's personal and private affairs. Surely this is not the intent.

The danger of tying the resignation procedures to the individual's incapability, and especially where procedures involve the PGT and the court, is that it also invites guardianship, which is meant to be a last resort.

*McClean recommends that if an Attorney has not acted and where the individual is incapable, that the Attorney be required to notify certain others.*

The list outlined by McClean is too limited. It does not include friends or other family members such as nieces and nephews. This ignores the reality for many seniors, especially single people and widowed spouses who have no children. It also ignores individual's choices and preferences. The wording should be much broader to capture 'anyone who is involved in the adult's life.' The notification to the PGT should be the last resort as it is not likely this Office will have funds to

conduct a search for family and friends, in which case guardianship may become inevitable.

- **Revisit When Authority 'Automatically' Ends – Recommendation #20**

*McClean recommends amending the PA Act to specify that authority be automatically terminated if the individual becomes bankrupt or if there is a marriage break down between the Individual and the Attorney. (This is already in the RA Act.)*

Becoming bankrupt or suffering marriage break down should not be reasons for 'automatic' ending of authority under an EPA or a RA. An individual may become bankrupt, without any involvement of the Attorney. For example, someone with a mental illness may dispose of their assets during an episode of illness. Becoming bankrupt is the very time when the individual needs the assistance of an Attorney or Representative. It may also be difficult to determine bankruptcy.

During 1993-1994, the Representation Agreement Task Group of the Community Coalition for the Implementation of Adult Guardianship Legislation undertook participatory action research with B.C. citizens. This research clearly identified that, despite a marriage break down; many people would want their Representative's authority to stand or to make that choice themselves. Although the RA Act was amended somewhat, this issue remains awkward with a default that potentially leaves the individual with no protection from guardianship. We recommend that there be no provision for 'automatic' ending due to marriage break down. Rather, people can write this into the document. Clearly, there is great variation in marriages and it is going to be difficult to even define a break down of a marriage that fits every situation. The real issue is whether the Attorney's or Representative's actions are in accordance with their duties and authorities. There are other ways to address any breaches of these.

This recommendation should not be implemented and the RA Act should be amended to delete these from the list of ways that the authority of a Representative is automatically terminated for both Sections 7 and 9 powers.

- **Objections and Investigations need Parameters – Recommendation #29 (4)**

*McClean recommends expanding the PGT's authority to investigate if there is a breach of duty by an Attorney or Representative that <u>may</u> be occurring or <u>may</u> take place.*

This recommendation could undermine an individual's choices and even make people hesitant to become Representatives or Attorneys. It is so broad and vague that it could easily be misused – for example where someone may not like or approve of the Representative's actions. It is important that any investigation

be based on matters related to a specific decision. This is necessary in order to be consistent with the principles of the RA Act and the policy intent outlined in McClean's report.

- **Amending the Patient's Property Act Isn't the Answer – Recommendations #22 & 31**

*McClean recommends in (1) and (2) giving the court the power to remove an Attorney or Representative and to appoint a new one when the court makes an order under Section 1(b) of the Patients Property Act.*

There are a number of questions and problems that arise from this recommendation. On what basis would the court appoint someone to act as a Representative or an Attorney? Would someone have to apply for such an appointment? This could be very costly and onerous. Presumably additional costs (and time) would be incurred by taxpayers if the OPGT has to evaluate the 'suitability' of a successor.

Also, because the RA Act is based on self-determination, it is inconsistent and contradictory to give the court or anyone else the power to appoint a Representative on behalf of an individual. The RA Act is different from the PA Act in two fundamental ways: 1) the relationship is the most important factor, not the instrument; and 2) the definition of capability recognizes the wide range of factors that determine and support decision-making ability.

What is really needed is a way for the court to 'get out of the way' so an individual can make a new Agreement with another member of their support network. Unfortunately, the Patient's Property Act puts the primary emphasis on declaring someone incapable without considering whether an individual needs assistance and whether they have friends or family available to support them.

*(3) McClean also recommends that if a person is declared incapable under Section 1(a) of the Patient's Property Act, that any EPA or RA be suspended while the PGT becomes Committee. It is then at the discretion of the PGT whether the Committeeship continues.*

Given the lack of due process around the certification process and the consensus around the outdated philosophy of the Patient's Property Act, this is a perfect example where an EPA and RA should have precedence. Why penalize people for doing their personal planning? The onus should be on the PGT to prove there is a problem with the actions of an Attorney or Representative. They have the investigative powers to do this under the guardianship legislation. This will save the system and taxpayers, time and money.

## Additional Recommendations

We also recommend that the PA Act be amended in two additional ways:

- To allow the appointment of a Monitor in an EPA, if the individual chooses.

- To facilitate the appointment of an Alternate Attorney in an EPA.

## Houskeeping items:

We noticed some items that are referred to as recommendations in the text of the McClean Report, which did not appear in the itemized list of recommendations. This requires some clarification.

- Page 60 on the discussion of who can be a Witness for an EPA. McClean recommends that the spouse or dependent children of the donor not be witnesses. Is this a recommendation or a suggestion?

- Page 106 recommends clarifying in the PGT Act and the RA Act that the PGT may conduct an investigation only if he or she has reason to believe the adult is incapable. Is this incorporated in recommendation #29 (4)?

## APPENDIX A

Summary of discussions from a public forum and meetings with Professor McClean organized by RARC and held during the Review.

November 9, 2001

Prof. Albert McClean
C/o Fasken Martineau DuMoulin
Barristers and Solicitors
2100-1075 West Georgia Street
Vancouver BC V6E 3G2

Dear Professor McClean,

Thank you for participating in the Representation Agreement Resource Centre's Forum on October 23, 2001. It was an opportunity for you to meet some of the people who are working to provide the public education and to model the best practice for representation agreements. It also gave you a taste of some of the history of more than a decade's journey to reform British Columbia's adult guardianship laws.

As the moderator of the Forum I thought that I would offer you a brief summary of the key issues that were discussed during the course of the morning.

**An ethical decision-making framework**

Much of our discussion was focussed on a consideration of the representation agreement as the paper hub of an ethical decision making framework. This framework reconceptualizes capability in terms of the knowledge that we now have of the many intelligences and, in turn, posits that self-determination is possible even for those who might previously have been considered to be in need of guardianship. Decision-making itself is not seen as a discrete independent event but as an interdependent continuum that ranges from assistance or support to substitute decision-making.

The representative keeps the focus clearly on the individual desires, beliefs and values out of recognition of the fact that self determination is every person's reason for being and consequently the guiding principle of the statute. The representative is buttressed by a set of duties, the presence of others and the protocol for making and signing agreements, which exists in order to flesh out the ethical framework within which decision-making will occur.

The representation agreement differs in philosophy from the power of attorney because it codifies a best practice for decision-making that can instruct all of us when we take on the role of standing in the shoes of another. Making a representation agreement demands that people talk to one another, discuss beliefs and values, and try to know one another. It insists that we not take one another for granted even in long standing relationships. It asks that third parties be engaged as well in this ethical practice. For many people the framework created by the statute may only state the obvious of their own lives, for others it may come as a revelation. Some may need it as a strong defense when the going gets rough. For example, the scarcity of resources for health care may make the going rough for many people who are sick or frail, so a wise representative will hold on to the duty to represent the grantor's beliefs, values and wishes as a tool for advocacy.

**The balance between honouring people's choices and keeping them safe**

In asking whether or not the representation agreement has found the right balance between honouring freedom and ensuring protection, the answer during our Forum, as it has been during most of the law reform process, was equivocal: we don't know yet. Achieving this balance has been one of the primary objectives of the community's involvement in drafting and implementing these laws. As you can imagine, we have had to find consensus among points of view that range from the position that there should be no constraints at all on people's freedom in decision-making to the viewpoint that there must be as many tests as possible of the worthiness and actions of representatives.

Over the last two years of consultation led by the Office of the Public Guardian and Trustee, our emphasis has been to reduce or eliminate some of the front-end barriers that were conceived for the purposes of safety but were effectively acting as barriers to access. We need some period of time to assess whether we have found the balance with this last set of amendments. This is going to be one of the key questions when all of the statutes are evaluated after three years of operation. Certainly our commitment will be to monitor these provisions very carefully as we work in the field and to advocate for change if the balance is tipped too strongly in one direction or the other.

**The role of the monitor**

I think that it is fair to say that the view of the monitor's role is evolving as we have more experience with representation agreements. During the drafting of the Act the idea of the monitor was seen as primarily enabling good communication between the representatives and the grantor and with third parties. The experience with the Court of the Enduring Power of Attorney in England indicated that more than 80% of problems encountered there resulted from poor communication so the monitor was adopted as a way to reduce the need for Public Trustee or Court intervention in issues of inter-personal communication.

During the implementation of the Representation Agreement Act the role of the monitor shifted in favour of seeing it more as monitoring than enabling and the monitor became,

in terms of Section 7 agreements, a kind of financial watchdog. This view was relaxed somewhat in the last set of amendments with the obligatory monitor's role being reduced again. As you probably noted from the discussion at our Forum, some people have changed their own minds about the most effective role for the monitor. The statute enables this fluidity by not being so prescriptive that the monitor becomes either enabler or watchdog. Instead how the monitor behaves will be a function of the relationship between the representative and the grantor or the nature of the instructions that are given in agreements.

**A positive test of capability in Section 8**

Our discussion provided you with a strong history of the conception of capability that is embedded in the Act. You might be interested to know that during the drafting of the Act community representatives argued for an overarching preamble that would outline the many facets of capability (essentially a brief synthesis of Al Etmanski's presentation). This argument was overruled by the drafters for reasons that remain obscure but I often think that such a preamble might have been the best way to give guidance to everyone about how the Act envisions capability as opposed to incapability.

Essentially, the Act sets up this vision in a number of ways. The common law presumption of capability is the starting point. The statement that communication is not a factor in capability is the next step and then the provision that people can be capable of making a representation agreement even if they cannot manage their personal, health, legal or financial affairs provides another piece of this somewhat oblique definition of capability. The test of incapability in Section 8 sums up by giving examples of some of the ways of knowing.

The desire to avoid a front-end test comes from the knowledge that there is no valid test. As I pointed out at the Forum, the interdisciplinary Committee on Incapability Assessment that met for over three years under the auspices of the Public Trustee, decided that there is no reliable test for incapability instead only a process that with enough time and consultation may indicate incapability. If the community vision had won out there would not be two kinds of representation agreements. The Section 7 and Section 9 agreements are the result of a compromise between the vision expressed during our forum by Al Etmanski and the traditional view of the understanding the nature and effect (UNE) advocates.

**The duties of a representative**

The duties of a representative flow in large part from this vision of capability. Decision-making is an interdependent activity. As Barbara Lindsay's presentation emphasized assisted decision-making is not just for people with developmental disabilities. It is in fact for everyone, because it " recognizes the way in which most adults function in their everyday lives" (*Robert Gordon, **The Emergence of Assisted (Supported) Decision-Making in the Canadian Law of Adult Guardianship and Substitute Decision-Making**, International Journal of Law and Psychiatry, Vol.23, No.1, p.65).*

The principle of self-determination linked with the vision of capability (this is what the Roeher Institute has called the rights and recognition approach) prescribes the Section 16 duties to look to the adult first. It was agreed in the last round of amendments that adults could draft out of this duty if desired. The assumption is that those who draft out are satisfied that their representative will implicitly behave in this way. Essentially, the duties of a representative are ethical responsibilities and as such they are as onerous as the character of a representative dictates. We do have concerns however that the recently enacted regulations on financial record keeping for representatives are too onerous and they may deter people from taking on the role of representative.

**The importance of one tool**

One of the major reasons for the creation of the representation agreement, as Hugh McLellan outlined in his brief history of the Future Planning Group, was to enable a holistic approach to planning. Many participants emphasized during our Forum the importance of incorporating health, personal, legal and financial decision-making under one law. It is not surprising that people feel this way when you consider that a health or personal care decision often has financial implications and that financial status increasingly threatens to determine the level and quality of continuing care.

During the six year implementation period of the legislation, there were no concerns expressed about the value of this key feature, instead thinking was directed at the best ways to ensure privacy in dealings with third parties and how representatives with different areas of responsibility could effectively work together. Many good ideas have been put forward to deal with these challenges. It has only been in the last year that the holistic approach has been challenged as the Wills Estates and Trusts Subsection of the Bar Association has attempted to define the enduring power of attorney as the only tool for financial and legal matters and the representation agreement as the tool for health and personal care. Their strategic initiative has been portrayed as a demonstration of the public will and an expression of professional duty. However the effect has been to call into question what has been the point of deepest agreement for the thousands of people who have been involved in this law reform process. There is no doubt that any amendments, policies or procedures that serve to segment the representation agreement to one or two areas of responsibility or make it difficult for people to plan for all decision making using one tool will undermine a decade of law reform. It will also create a serious conflict between two tools operating under different philosophies. We already experience this with the continuation of the Patients Property Act.

**Giving the representation agreement a chance**

Our forum ended with some passionate arguments about the need to give representation agreements a chance. It is fair to say that after twelve years of discussion about representation agreements there are no issues that have been left undisclosed. We may have reached the point where the statute has been studied for so long that a form of what anthropologists call involution might be occurring. In other words, the details of the

statute become the world. However we know that the real world lies in the practice of making and using representation agreements and it is urgent that we have an opportunity to realize this.

The last two years have been characterized by active resistance from some members of the legal profession. Lawyers in private practice have been told to discourage people who are ready to make agreements or rejected their requests for certificates of consultation. Their campaign has created confusion and complication for the public and has undermined the ability of the majority of lawyers to obtain reliable practical information about how to make agreements. As a consequence there are only a handful of lawyers in the Greater Vancouver area who have made Representation Agreements a part of their practice. The last set of amendments introduced notaries public as legal consultants and this may help to fill the backlog of public need that the Wills Estates and Trusts Sub-section's campaign has created.

We are convinced that lawyers will gradually learn to accept and perhaps even admire representation agreements when they understand how well the statute conforms to how their clients view the world. The representation agreement is not a lawyer's conception of the world and that makes it especially challenging for the profession to accept. However it is important to point out that the Canadian Bar Association supported the legislation in 1993 when it was passed unanimously by the BC Legislature.

We believe that the only way to bring about the clarity and the practice that we so urgently need is to proceed on course and repeal the enduring power of attorney in September 2002. As long as the enduring power of attorney remains, the Bar Association will feel compelled to defend it rather than to engage in helping people to make representation agreements.

I hope that you will find this summary to be a useful addition to your own notes. I know that all of the participants at our October 23rd Forum deeply appreciated the time and attention that you gave to every speaker. I welcome the opportunity to meet with you again and to respond to any follow-up questions.

Sincerely,

Christine Gordon

c.c. The Board of Directors of the Representation Agreement Resource Centre

Participants at the October 23, 2001 Forum

## APPENDIX B

Following is wording with respect to "Trigger Events" from process of producing draft model forms for Representation Agreements. This approach was the consensus of the Consultation Group on Representation Agreement Amendments and Regulations sponsored by the Public Guardian and Trustee.

### Wording in the Agreement:

DATE AGREEMENT BECOMES EFFECTIVE

This agreement becomes effective when:

(Strike out A or B)

A. it has been signed, witnessed and all certificates required are completed (the "Execution Date");

B. on such date after the Execution Date that:

_____

*(insert name of person confirming the triggering event)*

(completes the Triggering Event Confirmation Statement attached to this Agreement, confirming that the adult is incapable of making decisions independently about legal or financial affairs and requires assistance from the Representative(s) appointed in this Agreement (the "Triggering Event").

### Wording of Triggering Event Confirmation Statement:

TRIGGERING EVENT CONFIRMATION STATEMENT

I/we, _____

_____

am/are the Person(s) named to confirm the "Triggering Event" described in the Representation Agreement dated _____ between the Adult,

*(insert date Agreement was signed by the Adult)*

_____ and, the named Representative(s).

*(insert name of Adult)*

By signing this statement I/we confirm that the "Triggering Event" provided for in this Representation Agreement has occurred.

Signature: _____ Date: _____

Signature: _____ Date: _____