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Canada's comments on Prel. Doc. no 6

In Canada's view, *Prel. Doc. no 6* does not present a full and accurate legal analysis of whether advance directives fall within the scope of the Convention and, if so, whether they are "powers of representation" under Article 15. *Prel. Doc. no 6* lacks neutrality and nuance. It puts forwards a teleological interpretation of the Convention that seems to be focused on a desired outcome and it draws conclusions that are not supported, in our view, by the text of the Convention, the Explanatory Report or the proceedings of the diplomatic session. Canada therefore suggests that, to assist the Special Commission in its upcoming discussions, *Prel. Doc. no 6* should be substantially revised.

Advance directives are not powers of representation under Article 15

Canada does not agree with the main proposition put forward in *Prel. Doc. no 6*, that "advance directives are covered by Articles 15 and 16 because in one way or another, they may be or are being acted upon in accordance with the applicable law" (proposed C&R no 5).

In Canada's view, advance directives are not "powers of representation" under Article 15 of the Convention. They are rather decisions, instructions or wishes made by the adult when they had capacity concerning issues that may arise in the event of their incapacity. They do not confer on another person the power to act on behalf of the adult; on the contrary, they allow the decisions/instructions/wishes of the adult to stand alone as if the adult had the capacity to make them at the moment when they need to be acted upon. In our view, the fact that an advance directive is being "acted upon" does not transform it into a power of representation. For example a "do not resuscitate order" is a decision made in advance of incapacity that is addressed directly at the health professionals. It does not involve any act of "representation" of the adult; health professionals are not "representatives" of their patients.

However, an adult granting powers of representation may also include instructions addressed to their designated representative regarding health care matters, for example. This is the only context in which such instructions or "advanced directives" are explicitly referred to in the Explanatory Report: "One often finds in [powers of representation] the **instruction given to the person mandated** to refuse any persistent course of treatment in the event of incurable illness". Such advance directives, rather than conferring powers to act to the representative, define or limit this power. We understand them as being part of the "extent" of the powers of representation and as such, they are taken into account by Article 15. Advance directives can also be taken into consideration by competent authorities under Article 16, in determining whether the powers of representation were exercised in a manner sufficient to guarantee the protection of the person or property of the adult.

The definition of "power of representation" under Article 15

Prel. Doc. no 6 proposes the following definition of "power of representation": "a document (unilateral act or agreement) which enables the adult to plan, in advance, how they want to be supported in the exercise of their legal capacity and autonomy when such adult is not in a position to protect their interests".

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In our view, this definition confuses the reason – motivation for giving a power of representation - and what is a power of representation. In addition, this definition is incomplete and too general. It gives no meaning to the terms “power” and “representation”. It describes a very general action of advance planning in case of incapacity without reflecting the actual operational content of a power of representation. A person planning how they want to be supported may decide to grant powers of representation, to draft advance directives or to do both. So while the underlying motivation may be the same, this does not mean that an advance directive is a power of representation; they remain two distinct legal concepts.

The text and internal logic of Articles 15, 16 and 38 of the Convention imply that, through a power of representation, a person is entrusted with responsibility for acting on behalf of an adult with a view to protect them. These provisions cannot apply to advance directives on their own.

- With regards to Article 15, the Explanatory Report states that: “This Article envisages the situation in which the adult himself or herself organises in advance his or her protection for the time when he or she will not be in a position to protect his or her own interests. **He or she does this by conferring on a person of his or her choice,** by a voluntary act which may be an agreement concluded with this person or a unilateral act, **powers of representation.**” (para. 95, our emphasis). The Explanatory Report also often refers to powers of representation as “mandate” or “mandate in case of incapacity”.
- Article 16 allows an authority to withdraw or modify powers of representation when they **are not exercised** in a manner sufficient to guarantee the protection of the person or property of the adult. Regarding Article 16, the Explanatory Report explains that, to withdraw or modify powers of representation, a competent authority needs first “to find that the exercise of these powers **by the person mandated** is poor or inadequate” (para. 108).
- Article 38 provides that “The authorities of the Contracting State where [...] a power of representation [was] confirmed may deliver **to the person entrusted with protection of the adult's person or property,** on request, a certificate indicating **the capacity in which that person is entitled to act and the powers conferred**”.

In our view, if the term “powers of representation” were meant to include advance directives, the text of the Convention would have been more explicit to this effect, there would have been discussions on this issue during the negotiations of the Convention and the Explanatory Report would reflect this. The distinctions between advance directives and enduring powers of attorneys/mandates in case of incapacity were not raised or discussed during the negotiations, nor were the specific practical details linked to the cross-border use of advance directives and none of these considerations are reflected in the text of the Convention or the Explanatory Report.

Are advance directives included within the scope of the Convention?

Prel. Doc. no 6 also discusses the question of whether advance directives fall within the scope of the Convention, although the distinction between this question and whether advance directives are “powers of representation” under Articles 15 and 16 is not always clearly made in the text.

The proposed Conclusion and Recommendation no 3 of *Prel. Doc. no 6* states that: “As a general rule, if they are consistent with Article 3 and not excluded by Article 4, advance directives, as well as (continuing)

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powers of attorney, fall within the scope of the 2000 Convention”. In support of this statement, para. 18 of *Prel. Doc. no 6* draws a parallel with the following Conclusion and Recommendation from the Seventh Special Commission on the 1980 and 1996 Conventions in 2017: “The Special Commission recalls that private agreements between parents on parental responsibility (i.e., parental agreements) do fall under the scope of the Convention through the application of the rules on applicable law, if consistent with Article 3 and not excluded by Article 4 [...]”.

The proposed Conclusion and Recommendation no 3 is flawed, in our view, because it focuses only on Articles 3 and 4 and fails to consider that the main point in the 2017 Conclusion and Recommendation is that agreements on parental responsibility fall under the scope of the 1996 Convention through the application of the applicable law rule at Article 16(2). The applicable law rule in Article 16(2) of the 1996 Convention specifically refers “to the attribution or extinction of parental responsibility by an agreement”; there is no equivalent applicable law rule for “advance directives” in the 2000 Convention, as the applicable law rule under Article 15, in our view, applies only to “powers of representation”.

That said, in Canada’s view, it would be possible to conclude that advance directives fall in the general material scope of the Convention when: they concern the protection of an adult who, by reason of an impairment or insufficiency of their personal faculties, is not in a position to protect their interests (Article 1) and they do not cover a matter excluded under Article 4. However, the effect of having advance directives within the general scope of the Convention when there is no applicable law rule for them is unclear. We note that *Prel. Doc. no 6* does not clarify what is the purpose or consequences of making this determination.

Interpretation of the Convention

Prel. Doc. no 6 asserts that the most broad, permissive and liberal interpretation of the Convention in general, and of Articles 15 and 16 in particular, would necessarily improve legal certainty and predictability and allow the most effective fulfilment of the object of the Convention. Canada questions the legal basis for this assertion, especially given that in order to qualify “advance directives” as “powers of representation” under the Convention, one would have to disregard the ordinary meaning of these terms and of the provisions of Articles 15, 16 and 38 of the treaty. This would be contrary to basic principles of interpretation. Also, in our view, promoting the most broad, permissive and liberal interpretation of the Convention generally would increase legal uncertainty rather than limiting it because it would render both the scope of the Convention and the scope, meaning and extent of the various rules unpredictable.

Article 38 Certificate

Prel. Doc. no 6 proposes the following Conclusion and Recommendation no 4: “An advance directive which has been confirmed may be the subject of a certificate under Article 38 to be delivered to the person entrusted with the protection of the person or property of the adult”.

In Canada’s view, this proposed Conclusion and Recommendation confuses concepts. An advance directive on its own would not be “confirmed”; Article 38 refers to the confirmation of a power of representation. Moreover, the advance directive on its own would not be “the subject of a certificate”. The purpose of the certificate is to indicate the capacity in which the person entrusted with the protection of the adult’s person or property is entitled to act and the powers conferred. An advance directive could be mentioned in a certificate if it affects the extent of the powers conferred to the representative.