

## LEGAL BENCH

## Powers of Attorney for Personal Care

## DO THEY ALWAYS APPLY?

Some of you may recall the case of a Toronto man who went into a coma after undergoing brain surgery. Three years later his attending physicians were of the opinion that he would never recover and assume a normal life and they wanted to withdraw life support and provide palliative care. His wife disagreed and did not consent to the withdrawal of life support. The matter was argued all the way to the Supreme Court of Canada.

There were many issues that came before the courts. For the purpose of this article only one issue will be discussed - what is the role of prior expressed wishes of an incapable person? An incapable person is a person who is unable to make a decision or to give consent to any matter regarding her personal care, which includes medical and health care.

## EXPRESSED WISHES

A Power of Attorney for Personal Care is the official document that may include expressed wishes of an individual on how she wants to be cared for. Before the *Substitute Decisions Act, 1992*, living wills were used by individuals to express their wishes on how they want to receive medical care towards the end of their lives. Since 1992, the concept of a living will has been incorporated in Powers of Attorney for Personal

Care and living wills do not have to be used.

A written memorandum may be included as part of a Power of Attorney for Personal Care to keep it current without making a new document. As an example, should you acquire a medical condition that was not present when the your existing Power of Attorney was made, you may express certain wishes

to your attorney for personal care with regard to your medical treatment for that particular medical condition.

So long as it is lawful for an attorney for personal care to follow the expressed wishes of an individual and so long as these prior expressed wishes apply to an individual's current circumstances, the Supreme Court of Canada said the attorney must follow these wishes insofar as it is possible and insofar as these wishes apply to the individual's current circumstances.

## KEEP PERSONAL CARE CONDITIONS CURRENT

The Court of Appeal in *Conway v. Jacques (2002)*, found that "prior expressed wishes are not to be applied mechanically or literally, without regard to relevant changes



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in circumstances." This statement means that, although individuals may have made prior expressed wishes in their Powers of Attorney for Personal Care, these prior expressed wishes may not always apply to the current circumstances. To apply, those prior expressed wishes must apply to an individual's present circumstances.

For example, if an individual has expressed a prior wish in her Power of Attorney for Personal Care not to prolong her life through life support or other mechanical means, and an attorney for personal care is faced with a decision whether or not to withdraw life support, that attorney must decide whether those prior expressed wishes apply in the individual's present circumstances.

A prior expressed wish does not have to cover every possible future development; that is simply not possible. However, it is useful to be clear and precise in setting out prior express wishes. Vague, imprecise, or unclear wishes may be held to be inapplicable if challenged.

It is also useful to update a Power of Attorney for Personal Care with a written memorandum if a new medical or health condition arises and relate this new condition

to a prior expressed wish in an existing Power of Attorney for Personal Care.

If an individual has not made a prior expressed wish in a Power of Attorney for Personal Care, or has not made such a wish known to an attorney for personal care - or a substitute decision maker - then their consent decision to a medical treatment for a patient, must be based upon the best interests of the patient, taking into consideration the factors listed in section 21 of the Ontario *Health Care Consent Act, 1996*.

These factors include the patient's values and beliefs, any expressed wishes regarding the treatment, and any medical implications of the treatment. The decision must be made objectively and in the best interests of the patient.

So, if you are an attorney for personal care or a substitute decision maker, the prior expressed wishes of a donor in a Power of Attorney for Personal Care may not always apply. You will have to relate it to the present circumstances for which you are asked to make a decision or to give consent to a treatment. If the prior express wish does not relate to a person's current circumstances. 🌿

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## CANCER CARE

## Nonsmokers and Lung Cancer – a Unique Disease?



**LAURA WEEKS**

Discussion of lung cancer immediately conjures up images of smoking and for many people the perception persists that lung cancer is a self-inflicted disease. We can interpret this situation as a huge success for the anti-smoking lobby, after all smoking is thought to be responsible for 80-90% of lung cancers. Indeed, that lobby should be congratulated for its success in reducing smoking. A 2013 report by the

Centre for Population Health Impact says that since 2011, 17% of Canadians over 15 years of age still smoke – about half the number that smoked 30 years ago.

## NONSMOKERS DIAGNOSED WITH LUNG CANCER

If 80-90% of lung cancers are related to cigarette smoking, then 10-20% of people diagnosed with lung cancer have never touched a cigarette. According to the Canadian Cancer Society, lung cancer is the leading cause of cancer death for both men and women and is currently the second most commonly diagnosed cancer in Canada. Of the approximately 25,000 new diagnoses every year, 12,000 are women; which means that every year about 1,200 – 2,400 nonsmoking women are diagnosed with lung cancer. A staggering number.

An unfortunate result of the narrow perception that lung cancer is always caused by smoking, or is a self-inflicted disease,

is that people living with a diagnosis of lung cancer are subject to immense stigma, which translates into a lack of support for this fatal disease. Research has demonstrated that people who are diagnosed with lung cancer experience more embarrassment than those with prostate cancer or breast cancer and these individuals tend to feel stigmatized whether they smoked or not.

Finally, some physicians and researchers are looking into the phenomenon of lung cancer in people who have never smoked. What they are finding is that lung cancer in nonsmokers could be a different disease altogether and that this is a disease that disproportionately affects women.

Most lung cancers that occur in women non-smokers are adenocarcinomas, meaning they grow in the outer regions of the lungs as opposed to near the airways. Because they grow in the outer regions, adenocarcinomas unfortunately often do not cause any noticeable symptoms – until the cancer has grown considerably. Symptoms that do occur include shortness of breath, fatigue, or perhaps bone pain due to the cancer spreading to other parts of the body. Preventing lung cancer in nonsmokers is therefore the best hope.

## RESEARCHING THE RISK FACTORS

Researchers have identified some risks that contribute to the development of lung cancer in nonsmokers; including exposure to second hand smoke, radon gas, cooking oil fumes, HPV infection, asbestos, and heavy metals. Some people might also have an inherited genetic susceptibility. There are large geographic variations in incidence rates of lung cancer in nonsmokers, which

account for the variation in exposure to these various risk factors. For example, prevalence is high in Asian women who are more frequently exposed to cooking oil fumes than their North American counterparts, due to the common practice of wok cooking.

In the Ottawa area, exposure to radon gas is particularly relevant. Radon exposure has been identified as the most common cause of lung cancer among nonsmokers and the second most common cause of lung cancer overall. Radon is a radioactive gas that is released when uranium breaks down. It is odorless, tasteless and invisible and levels are high in Ottawa, particularly in the outlying areas. While it is not an issue outdoors, where radon gas mixes with outside air reducing the concentration, exposure indoors it can be a problem. For example, radon gas can enter a house through any vent or crack and because it is not vented out, concentration levels can build up. The health risk becomes more serious as radon levels rise and exposure times increase. The solution here is to test for radon levels in your house. You can buy a kit at your local hardware store, or through Ottawa Public Health; or, you can hire a radon testing company.

A healthy lifestyle, implementing a prevention plan to reduce key exposures and recognizing the warning signs can be your key to maintaining good health. Some of the best things we all can do to help prevent cancer and other chronic diseases, is to eat healthy foods, avoid tobacco, maintain an appropriate body weight, and be physically active. 🌿

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