

LAW AMENDMENTS COMMITTEE

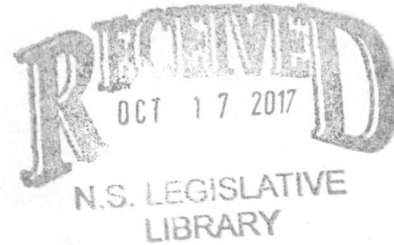
Red Chamber, Province House

Monday, October 16, 2017

9:00 a.m.

Bill #16 - Adult Capacity and Decision-making Act

- 9:00 a.m.
1. Professor Sheila Wildman
 2. Wendy Lill
Community Homes Action Group
 3. Charlie Macdonald
 4. Michael Bach, Managing Director
Institute for Research & Development on Inclusion in Society (IRIS)
- 10:00 a.m.
5. Brenda Webb
 6. Darrell Webb
 7. Dave Kent
People First Nova Scotia



Bill No. 29 - Marine Renewable-energy Act (amended)

- 10:45 a.m.
1. Jamie MacNeil

Bill #7 - Workers' Compensation Act (amended)

- 11:00 a.m.
1. Janet Hazelton, President
Nova Scotia Nurses' Union
 2. Jason MacLean, President
NSGEU
 3. Mary Lloyd
Larry Maloney
Pictou County Injured Workers Association
 4. Micah MacIsaac

12:00 noon

~~5. Judy Lewis~~ cancelled

6. Jim Cormier, Atlantic Director
Retail Council of Canada

7. Richard Biggar DIDN'T APPEAR

8. Debra Fortune

1:00 p.m.

9. Shaun Watters

10. Kevin Johnson

11. Rachel Barbour

12. Dean Tupper DIDN'T APPEAR

13. Terry Chapman

Bill No. 15 - Environment Act (amended)

2:00 p.m.

1. Stephen Thomas
Ecology Action Centre

2. Brian Gifford, Chair
Affordable Energy Coalition

3. Daniel Roscoe, P. Eng, Partner
Roswall Incorporated

4. Christine Saulnier, Nova Scotia Director
Canadian Centre for Policy Alternatives

Bill #7 - Workers' Compensation Act (amended) - continued

3:00 p.m.

14. Eunice Abaga

Bill No. 17 - Solemnization of Marriage Act (amended)

No representation

Bill No. 19 - An Act to Amend Various Consumer Protection Statutes

No representation

Bill No. 27 - Intimate Images and Cyber-protection Act

No representation

Bill No. 33 - Gas Distribution Act (amended)

No representation

A. Background – Why did Government Need to Replace the Incompetent Persons Act?

B. Process Problems and Mandatory Review

1. Weak consultative process failed to meet democratic and human rights requirements
2. Scan of the wider legal & political context – CRPD Committee Concluding Observations

C. Substance: A Few Steps Forward, But a More Fundamental Failure to do Justice to Persons with Disabilities in Nova Scotia

1. Least restriction on liberty
2. Accommodation of disability / supports for decision-making

D. Specific examples of areas of Bill 16 requiring reform

1. Preamble
2. Reference to, and then disappearance of, “support” in the Bill
3. Failure to adequately circumscribe the responsibilities of the representative
4. Failure to require mandatory training / refreshing of competency
5. Failure to institute mandatory reporting from representatives
6. Failure to ensure access to independent advocacy, state-funded counsel, and independent monitoring and review
7. Capacity-Building in Nova Scotia: The Act should create a *Supported Decision-Making Resource Centre*
8. The Act must not grandfather illegal orders under the unconstitutional *Incompetent Persons Act*
9. The start of something good: Protection against deprivation of legal capacity and deprivation of liberty (through attention to the role of supports) *beyond Bill 16*

RECOMMENDATION I

In view of developments in connection with the CRPD Committee's guidance to Canada, and more generally the fundamental importance, (acknowledged in Nova Scotia's new *Accessibility Act*), of ensuring that persons with disabilities are involved in the law and policy reform processes affecting them, government should **EITHER:**

- Seek a further extension of the suspended declaration from the court, or
- Add a provision requiring a mandatory review of the Act within a specified period, while committing to a robust and inclusive consultation process.

In light of the Article 12 of the CRPD, government should include in any requirement for mandatory review a **commitment to consult on and introduce a supported decision-making regime**.

RECOMMENDATION II

In the period of consultation and review noted above, government should carefully reconsider the list of matters to be prohibited or strictly restricted under the Act's contemplated conferral of decision-making powers.

RECOMMENDATION III

Nova Scotia should more adequately consult on and consider the specific legal implications of the imperative that the law relating to legal capacity must accommodate disability, as required by the CRPD and by basic principles of Canadian human rights law.

In particular, government must consult on and institute a regime in which capacity assessment, orders, and practices are centred in the duty to provide decision-making supports.

RECOMMENDATION IV: adopt the Kaiser Preamble.

RECOMMENDATION V: CLARIFY WHO OWES THE DUTY TO SUPPORT AND WHEN

The state:

The Act should make clear that *the state* owes a duty to provide supports to access the right to make decisions, as part of its obligations under domestic and international human rights law. This duty may be triggered for instance by assessments of capacity under the Act.

Capacity assessors:

As the Bill stands, there is no duty placed on *those assessing capacity* to explore how the person may be supported to demonstrate capacity to make the sorts of decisions placed into question (see ss.9-19).¹ As the CACL/ NSACL press release notes, there is moreover no requirement to provide evidence to a court that reasonable accommodations and alternatives have been exhausted (to the point, say, of undue hardship) prior to appointment of a representative. **In order to ensure that the Act conforms to the human rights norm of accommodation of disability, it should clearly provide that capacity assessors must explore and exhaust mechanisms for supporting legal capacity prior to a conclusion of incapacity.**

The representative, too, must explore and exhaust supports. This duty is partially recognized in the Act as it stands – although the duty should be underwritten by the state’s duty to facilitate provision of supports.

Service providers:

In addition, under human rights principles, *third party service providers* owe a duty to accommodate (and so to provide supports to equally access to the services in question) to the point-of undue hardship.

RECOMMENDATION VI:

-Maintain the duty in s.40 to comply with (rather than merely take into account) the adult’s current wishes.

-Revisit the standard for overriding current wishes.

RECOMMENDATION VII: Those given the authority to assess capacity should undergo standard training which reflects the human rights values and priorities of the new (amended) law.

RECOMMENDATION VIII: Institute a regime of mandatory reporting whereby representatives must update the Court and/or an agency responsible for monitoring orders and decisions under the Act.

RECOMMENDATION IX: Institute a regime of advocacy supports, including state-funded counsel and more informal provision of advice. Create an office (possibly a division of the Public Trustee) responsible for independent investigation of complaints and proactive oversight and monitoring of representatives’ compliance with the law. In addition, consider creating a tribunal responsible for hearing challenges under this and other NS laws relating to legal capacity and the duty to provide supports.

¹ S.18 states that “Where the assessor is of the opinion the person lacks capacity” in a specific area, the assessor should “indicate in the capacity assessment report what forms of support or assistance, if any, would help the person manage their needs without need for appointment of a representative.” However, there is no clear duty to explore, provide, or exhaust provision of supports at the point of assessment. Nor is there a duty on government to ensure that supports are available.

RECOMMENDATION X: Create (as part of the independent hub suggested above) a Decision Support Service or Supported Decision Making Resource Centre, responsible for research including continuing inter-jurisdictional scans of best practices relating to supported decision-making, as well as public education and investigation of complaints.

RECOMMENDATION XI: Remove s.73's grandfather clause and insert a requirement that government conduct a review of all existing orders and ensure discharge or transition to the new regime.

RECOMMENDATION XII: Reform of a broader suite of Nova Scotia laws relating to consent and (in)capacity (from the Personal Directives Act, to IPTA, to the Adult Protection Act) should be conjoined with reform of laws and policies relating to disability supports, in order to better coordinate respect for the liberty and equality rights of persons with intellectual, psychosocial, or cognitive disabilities -- as contemplated in the Roadmap.²

² *Choice Equality and Good Lives in Inclusive Communities, A Roadmap for Transforming the Nova Scotia Services to Persons with Disabilities Program* (Department of Community Services, August 29, 2013).

Wildeman – Law Amendments Committee Submission, Oct 16, 2017

A. Background – Why did Government Need to Replace the Incompetent Persons Act?

- The history of state-condoned human rights abuses of persons with disabilities in Nova Scotia – in particular, grave abuses of the rights of persons with intellectual or cognitive impairments – is a long and shameful one.
- The *Incompetent Persons Act*, antiquated legislation reaching back to the 19th century and beyond, was declared constitutionally invalid because of interference with the rights to **liberty and security of the person under s.7 of the Canadian Charter of Rights and Freedoms** (*Webb v Webb*, 2016 NSSC 180). The old standard of incapacity from infirmity of mind to manage one's own affairs was unconstitutionally broad and vague, and the all or nothing or plenary powers of a guardian were unconstitutionally broad.¹
- Because the Attorney General conceded the Act's unconstitutionality, the judge did not enter into a comprehensive analysis. In particular, there was no examination in *Webb* of the Act's failure to respect the right to **equality, or more specifically to accommodation of disability**. Yet this is a human right that, along with respect for liberty or autonomy, must inform any attempt to draft a human rights respecting approach to disability.
- **This government is to be congratulated for admitting** the old law's unconstitutionality, which was recognized over the years by many including the law reform commission of the province in 1993, while successive governments did nothing.
- This government did **what it had to** – there was no constitutional basis for the law and it admitted this rather than fight for its illegal continuance.
- Now the question is, **has government responded in a manner that respects human rights?**
- A related question is: **What other laws or suites of laws must government reform in order to respect the human rights of persons with intellectual or psychosocial disabilities, or cognitive impairments such as dementia, in this province?**

B. Process Problems and Mandatory Review

1. Weak consultative process failed to meet democratic and human rights requirements

¹ Formal invalidation was made on agreement of ss. 2(b) [definition of incompetent person], 3(3) [appointment of guardian], 3(4) [powers - full care and custody], 14 [process through which person petitions court to lift order], and 16 [apprehension of an 'incompetent person at large' on warrant of 2 JPs].

As my colleague Archie Kaiser points out in his submission, the UN *Convention on the Rights of Persons with Disabilities* (CRPD), ratified by Canada in 2010, requires that governments effect the **full and effective participation and inclusion of persons with disabilities in society** (article 3(c)). The CRPD further includes a **general obligation** to “closely consult with and actively involve persons with disabilities” in the implementation of the Convention (Art. 4(3)), and recognizes a **right** to participation in political and public life (art. 29)

Prof Kaiser notes that “the Department of Justice representatives have been respectful, patient and receptive to input from persons who attended the consultations” at which he was present; I echo that statement. However, intensive and responsive stakeholder consultations began too late, beginning in late summer, and were too time-pressured for stakeholders to adequately canvas the options and be heard.

I would add that too little was done **to locate persons directly affected by the Bill and to ensure their voices were heard**. Given that subjection to an overly intrusive and restrictive law may have prevented persons from understanding or asserting their rights as well as their ability to participate in consultations, this is not a process in which one can send out a general notice and expect those affected to show up. It would take more dedicated and sensitive efforts to reach out and enable the contributions of persons directly affected.

In sum: the consultation process leading up to these reforms amounted to too little consultation with those directly affected, too late.

2. Scan of the wider legal and political context– CRPD Committee Concluding Observations

Article 12 of the CRPD, titled “Equal Recognition Before the Law,” requires States Parties to “take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.” Moreover, Article 13, “Access to Justice,” requires that States Parties “ensure effective access to justice for persons with disabilities on an equal basis with others.”

The CRPD Committee, in its April 2017 concluding observations on Canada’s first report,² recommended that Canada “withdraw its declaration and reservation to article 12 of the Convention³ [in which, inter alia, Canada reserves the right to continued use of substitute decision making regimes] **and that it carry out a federal-provincial**

² See CRPD/C/CAN/CO/1 (8 May 2017) (observations adopted by the Committee April 12, 2017)

³ The reservation states that Canada “reserves the right to continue [the use of substitute decision making regimes] in appropriate circumstances and subject to appropriate and effective safeguards. With respect to Article 12 (4), Canada reserves the right not to subject all such measures to regular review by an independent authority, where such measures are already subject to review or appeal”

territorial process, in consultation with persons with disabilities, “to bring into line with the Convention legislation that allows for the deprivation of legal capacity of persons with disabilities.” The Committee has been very clear that it regards Canada’s reservation as inconsistent with the object or purpose of the CRPD.

I understand that the federal government has already initiated a process in response to the CRPD Committee, and that an initial F-P-T is to be held before this year is through.

This, in addition to the problems with the consultation process, suggests that government should either postpone passage of the Bill and revisit it in light of broader consultation and the imminent FPT process, OR should insert a mandatory review clause which, in addition to a commitment to inclusive consultation, will allow alignment of the law with international and domestic human rights norms.

I add that Canada has indicated its commitment to ratifying the Optional Protocol to the CRPD. Nova Scotia should keep in mind that this will enable individuals or groups to take complaints to the CRPD Committee where they have exhausted legal options in Canada.

RECOMMENDATION I

In view of the above-noted developments in connection with the CRPD Committee’s guidance to Canada, and more generally the fundamental importance, acknowledged in Nova Scotia’s new *Accessibility Act*, of ensuring that persons with disabilities are involved in the law and policy reform processes affecting them, government should **EITHER**:

- Seek a further extension of the suspended declaration from the court, or
- Add a provision requiring a mandatory review of the Act within a specified period, while committing to a robust and inclusive consultation process.

As described below, and in light of the Article 12 of the CRPD, government should include in any requirement for mandatory review **a commitment to consult on and introduce a supported decision-making regime.**

C. Substance: A Few Steps Forward, But a Failure to do Justice to Persons with Disabilities in Nova Scotia

1. Least restriction on liberty

- Bill 16 has been lauded by the Minister of Justice for some important steps forward. In particular, the Bill expressly builds in the principle of **Least Restrictive Means** of

support and intervention. The test for legal capacity is now decision-specific and orders are to be restricted to the extent or nature of the incapacity.

- Moreover, it is important to note the shift in decision-making responsibilities, away from a best interests model toward one in which compliance with prior capable wishes, or where those are unavailable, current wishes, is required. However, respect for current wishes is notably circumscribed by the words 'where it is reasonable to do so' – arguably allowing a return to paternalistic restrictions.⁴

- Despite these key advances, the terms of the Bill do not fully manifest the principle of least restriction. For instance, the Bill fails to prohibit or clearly and in determinate fashion to limit interventions such as use of seclusion or restraints.⁵

The federal government is now looking at restricting the issue of seclusion in prisons, particularly where prisoners have mental health conditions. This Act, like the federal correctional act, includes a general principle of least restriction -- but that is arguably not enough to ensure that deprivation of liberty is fully protected against. Moreover as NSACL argues, the Act's contemplating court-endorsed use of aversive stimuli does not sit well with the idea of respect for liberty and autonomy. We would like to have heard from government on how such a provision respects human rights.

RECOMMENDATION II

In the period of consultation and review noted above, government should carefully reconsider the list of matters to be prohibited or strictly restricted under the Act's contemplated conferral of decision-making powers.

2. Accommodation of disability / supports for decision-making

- The more comprehensive problem is that the model of incapacity adopted fails to fully or meaningfully build in the central and critical imperative of accommodation of disability through provision of decision-making supports.

- That is, the Bill fails to recognize or manifest recognition of the fact that **the flip side of the coin of respect for liberty, and of the principle of least restriction, is the duty to accommodate and so provide supports to enable equal access to the right to liberty and self-determination.** You can't have one without the other.

- I agree with my colleague Archie Kaiser who has argued that this Bill, while it makes tantalizing mention of supports, fails to fully endorse or lay a legal or practical

⁴ I discuss this point further on in my more specific review of terms of the Act, below.

⁵ Again, I discuss this further below.

foundation for the concept. It fails to clearly recognize the duty of government, as well as more specifically capacity assessors, service providers, and representatives once appointed, to ensure provision of supports for decision-making. This should include access to state-funded counsel where capacity is challenged.⁶

- The concept of supports for decision making is part of **a necessary human rights regarding shift from a model of suspension and displacement of legal authority to make decisions and determine one's life to a model of accommodation of disability.**

- In order to accommodate persons in wheelchairs in order to ensure access to public spaces, we need ramps. To accommodate persons who are deaf in accessing health care, we need deaf interpretation services. The central message you will be hearing from those who have come out today to speak for a human rights informed model of supported decision making is similarly, that in order to access the same rights as others to make decisions about our lives and have those decisions respected in law, government, (and also service providers regulated under the Human Rights Act), needs to ensure accessible decision-making supports, responsive to different types of disabilities and to cultural and linguistic diversity.

- I point you to a recent article on the theoretical underpinnings of the concept as well as related empirical research: "Future Directions in Supported Decision-Making"⁷ in a recent issue of the Disability Studies Quarterly.

- What kinds of supports are required? At a minimum, those proposed in the literature and assessed in a growing body of empirical studies include **communication supports**, availability of **assistants trained in enabling understanding of information in a way that speaks to a person's capabilities**, also simple things like giving more time **for understanding, and ensuring cultural or linguistic difference is taken into account in the decision-making process or any capacity assessment process**. Of key importance, as suggested by CACL, is "access to agents who can help arrange needed decision-

⁶ Ontario's *Substitute Decisions Act* states that

3. (1) If the capacity of a person who does not have legal representation is in issue in a proceeding under this Act,

(a) the court may direct that the Public Guardian and Trustee arrange for legal representation to be provided for the person; and

(b) the person shall be deemed to have capacity to retain and instruct counsel.

Under s.7 of the Charter, state-funded counsel is required for indigent parents in child apprehension cases in view of the grave threat to liberty and security of the person – arguably it is similarly required in a guardianship proceeding in which one's right to make one's own decisions is threatened. See *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46.

⁷ Anna Arstein-Kerslake et al, "Future Directions in Supported Decision-Making" (2017)37:1 Disability Studies Quarterly <http://dsq-sds.org/article/view/5070/4549>

making assistance including independent advocacy and rights advice.” Finally, state-funded counsel is a necessary complement to more substantive supports for decision making, to ensure that the duties under the Act to provide supports and to ensure least restrictions on liberty are complied with.

- Another critical mechanism, recognized in legislation in Canada and internationally, is the **supported decision making agreement**, which enables nomination of a decision-making supporter whose role it is to assist in ensuring legal capacity is maintained and exercised by the person concerned.⁸

RECOMMENDATION III

Nova Scotia should more adequately consult on and consider the specific legal implications of the imperative that the law relating to legal capacity must accommodate disability, as required by the CRPD and by basic principles of Canadian human rights law.

In particular, government must consult on and institute a regime in which capacity assessment, orders, and practices are centred in the duty to provide decision-making supports.

D. Specific examples of areas of the Bill requiring reform

In what follows I note specific elements of the Bill of particular concern, in line with the themes I have noted on i) insufficient protection against deprivation of liberty and ii) insufficient provision for state-provided supports for decision-making capacity.

1. Preamble

A preamble is intended to inform interpretation of legislation where the meaning is not otherwise clear. The current preamble makes mention of the least restrictive principle and the right to liberty and self-determination. But it unaccountably leaves out any mention of equality. This is surprising and concerning.

I endorse **Professor Kaiser’s proposed preamble**, which incorporates explicit commitments to equality and accommodation of disability, and moreover to the suite of interconnected fundamental human rights stated in the CRPD.

RECOMMENDATION IV: adopt the Kaiser Preamble.

⁸ The laws in BC (Representation Agreement Act, RSBC 1995 c.405), Alberta (under the *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2) and the Yukon (Decision-Making Support and Protection to Adults Act, SY 2003, c21) provide such regimes. The new Irish law, the *Assisted Decision Making (Capacity) Act 2015* does so as well.

2. Reference to, and then disappearance of, “support” in the Bill

Despite some promising gestures toward the concept of supports, capacity assessments, legal orders and representative decision-making under the Act are stuck in the old medical model of capacity as an internal feature of the individual rather than firmly reorienting capacity assessment to the central question of how persons with disabilities may be supported in exercising their capacities.

a. Section 3(c) **defines ‘capacity’** as capacity “with or without support”; however, the rest of the bill does not contemplate regularized provision of supports to persons subject to the law.

b. Section 3(s) **defines “support”** in a way that at first is arguably overly limiting (to supports “reasonably and practicably available” – this overly discounts the requirement stated as “undue hardship” in human rights law). Otherwise the list is tantalizing, and includes “peer support, communication and interpretive assistance, individual planning, coordination and referral for services and administrative assistance”. However, it problematically does NOT include independent advocacy (or assistance in obtaining such advocacy), nor a catch-all clause contemplating any other form of support or assistance necessary to assist the person in exercising control over their decisions, or in developing or regaining decision-making capabilities.

c. Moreover, it is not clear on whom the duty to provide supports lies.

RECOMMENDATION V: CLARIFY WHO OWES THE DUTY TO SUPPORT AND WHEN

The state:

The Act should make clear that *the state* owes a duty to provide supports to access the right to make decisions, as part of its obligations under domestic and international human rights law. This duty may be triggered for instance by assessments of capacity under the Act.

Capacity assessors:

As the Bill stands, there is no duty placed on *those assessing capacity* to explore how the person may be supported to demonstrate capacity to make the sorts of decisions placed into question (see ss.9-19).⁹ As the CACL/ NSACL press release notes, there is moreover no requirement to provide evidence to a court that reasonable accommodations and

⁹ S.18 states that “Where the assessor is of the opinion the person lacks capacity” in a specific area, the assessor should “indicate in the capacity assessment report what forms of support or assistance, if any, would help the person manage their needs without need for appointment of a representative.” However, there is no clear duty to explore, provide, or exhaust provision of supports at the point of assessment. Nor is there a duty on government to ensure that supports are available.

alternatives have been exhausted (to the point, say, of undue hardship) prior to appointment of a representative. **In order to ensure that the Act conforms to the human rights norm of accommodation of disability, it should clearly provide that capacity assessors must explore and exhaust mechanisms for supporting legal capacity prior to a conclusion of incapacity.**

The representative, too, must explore and exhaust supports. This duty is partially recognized in the Act as it stands – although the duty should be underwritten by the state's duty to facilitate provision of supports.

Service providers:

In addition, under human rights principles, *third party service providers* owe a duty to accommodate (and so to provide supports to equally access to the services in question) to the point of undue hardship.

3. Responsibilities of the representative

- I agree with Prof. Kaiser regarding s.21(4)(b)(i): i.e., that the will and preference of the individual concerned should presumptively be determinative of whom the representative should be. Moreover, I agree that **mandated independent advocacy services** should be available to the affected adult at this point and indeed throughout the process (see below).

- On the responsibilities of representatives, I agree again with Prof. Kaiser that an important reform would be to stipulate **certain required considerations for the court, pertaining to the fundamental rights and freedoms of the individual**, before making an order. Moreover, as noted above, the Act should go further in expressly prohibiting certain interventions, and/or delimiting their scope.

- On the representative's responsibilities in relation to decision-making (in the areas of authority assigned), a few important advances in the law should be noted.

- First, rather than having authority to substitute a decision that the representative views as in the person's best interests, the Bill requires that the decision comply, in order of priority, with 1) prior capable wishes of relevance to the decision if any; 2) current wishes if compliance is reasonable (a caveat I'll come back to), 3) the person's values and beliefs; and if that does not decide it, 4) the person's well being (which builds in concern for maximizing social inclusion, autonomy and self-determination, as well as physical and mental health). (s.40)

This marks an important move toward putting the person – their will and preference -- at the centre of the decision-making process. In addition, the representative must explore options and inform the person of those options to ensure current wishes are informed. However, the caveat that those wishes must be respected only "where it is reasonable to do so" (s.40(1)(b)) potentially allows for or invites reinsertion of best-interests-based reasoning on paternalistic grounds. The language should better reflect the adult's right to decisions that pull against another's understanding of what is reasonable, and protect the

dignity of risk. CACL suggests that a threshold of permissible risks of harm be set at significant risk of serious harm. Professor Kaiser recommends inserting a need to return to the Court where there is a major departure from wishes, substantially affecting the adult's rights and interests (see Kaiser submission p.16).

RECOMMENDATION VI:

-Maintain the duty in s.40 to comply with (rather than merely take into account) the adult's current wishes.

-Revisit the standard for overriding current wishes.

4. Mandatory training / refreshing of competency

- There is no mandatory training or refreshing of assessment powers in the Bill. I agree with others who were consulted on the following recommendation:

RECOMMENDATION VII: Those given the authority to assess capacity should undergo standard training which reflects the human rights values and priorities of the new (amended) law.

5. Mandatory reporting

The Bill lacks provision for robust legal oversight of orders to ensure that the least restriction principle, the duty to explore and provide supports for decision-making, and other duties of decision-makers are being met.

Active monitoring of compliance with the law is essential given the vulnerability of those under such orders to abuses of the representative's authority.

Such oversight and accountability may be effected *partly* by introducing mandatory reporting requirements, (not currently contemplated, although representatives of the estate must keep accounts (s.50), and a court may order such reporting on a one-off basis (s.51(c)). It may otherwise be effected through **appointment of special investigators/monitors, perhaps accomplished by expanding the work of the Public Trustee's office, or otherwise by creating an independent hub or agency responsible for overseeing implementation of this and other laws relating to legal capacity and decision-making supports (see below).**

RECOMMENDATION VIII: Institute a regime of mandatory reporting whereby representatives must update the Court and/or an agency responsible for monitoring orders and decisions under the Act.

6. State-funded / arranged counsel and access to independent monitoring / review

While s.58(2) provides adults with an ability to apply to the Court for review of an order, and s.66 entitles the adult to retain and instruct counsel, there is no provision for state-funded counsel or other advocacy supports. While representatives have a duty to assist in

arranging reassessment of capacity, for instance (per s.42), adults must first obtain a court order to trigger this duty.

Adults whose legal capacity is called into question or who are under a representation order should have a right to independent advocacy / rights information services as well as state-funded counsel. This flows from legal precedent on the right to state funded counsel where liberty and/or security of the person is fundamentally threatened by state action.

Moreover, an independent agency vested with responsibility under the Act should be empowered to receive and investigate complaints. **That agency should make periodic efforts to reach out to persons represented as well as representatives and review recent reports (in accordance with mandatory periodic reporting, recommended above).**

In addition, in order to enable access to justice in this area involving the fundamental rights of persons highly vulnerable to others' power, government should consider creating a stand-alone tribunal equipped to hear challenges to orders and decisions under this and other Nova Scotia laws concerning legal capacity and the duty to provide supports.

RECOMMENDATION IX: Institute a regime of advocacy supports, including state-funded counsel and more informal provision of advice. Create an office (possibly a division of the Public Trustee) responsible for independent investigation of complaints and proactive oversight and monitoring of representatives' compliance with the law. In addition, consider creating a tribunal responsible for hearing challenges under this and other NS laws relating to legal capacity and the duty to provide supports.

7. Capacity-Building in Nova Scotia

Our province is not the only jurisdiction revisiting laws on legal capacity, and attempting to assess how we may incorporate the human rights principles that have come to dominate this area – in particular, the principle of accommodation of disability.

It is essential that government remain apprised of developments in this quickly-moving area of human rights law and practice. To that end, the Act should create (and government should properly resource) an **institutional hub for research and public education, in addition to (as suggested above) investigation of complaints under the new law.** The institution in question could be framed as a *supported decision making resource centre*, providing information to the public (including persons not under formal orders) seeking to enable the exercise of legal capacity.

This proposal is consistent with government's commitment to ensuring accessibility and inclusion to meet the needs of persons with disabilities. If accessibility and equality is

denied at the point of the right to make choices, then we have failed to meet the most basic expectations of human rights in the context of disability.

The new Irish law, the *Assisted Decision Making (Capacity) Act 2015*, establishes a Decision Support Service with clear functions which include building public awareness regarding the exercise of capacity by persons who require assistance in the exercise of their capacity. This office also has power to investigate complaints about decision-making representatives.

RECOMMENDATION X: Create (as part of the independent hub suggested above) a Decision Support Service or Supported Decision Making Resource Centre, responsible for research including continuing inter-jurisdictional scans of best practices relating to supported decision-making, as well as public education and investigation of complaints.

8. Grandfathering of orders under the old Incompetent Persons Act

It is unacceptable that s.73 of the Bill purports to translate plenary guardianship orders under the old, unconstitutional Act into new, liberty-respecting orders. The recent Irish law (*Assisted Decision Making (Capacity) Act 2015*) requires review of all existing guardianships to either discharge the adults affected (as occurred in Landon Webb's case) or to assist in the transition to the new regime. This is a clear requirement in order to ensure constitutionality of the new law. Financial and other assistance is required to ensure that the old orders (and practices under those orders) are no longer unconstitutional.

RECOMMENDATION XI: Remove s.73's grandfather clause and insert a requirement that government conduct a review of all existing orders and ensure discharge or transition to the new regime.

9. Protecting against deprivation of legal capacity and deprivation of liberty (through attention to the role of supports) beyond this new law

It is essential to link the work begun with this new law to a wider process aimed at protecting and vindicating the basic human rights of persons with disabilities in Nova Scotia. In particular, it is necessary to revisit a suite of Nova Scotia laws on consent and capacity, in light of the ways that the liberty-respecting requirement of least restriction on liberty links up to a duty to provide supports to enable equal enjoyment of putatively universal legal entitlements.

As has been pointed out by the Community Homes Action Group,¹⁰ Nova Scotia continues to experience a human rights crisis brought on by failure to create meaningful

¹⁰ See "Choice, Equality and Community Homes – NOW. A Report on The Adequacy of Residential Options for Persons with Developmental Disabilities and Autism Who Are Preparing to Move to the Community," Presented by Community Homes Action Group

alternatives to institutionalization or overstretched efforts to provide home-based care. The result is a profound restriction of the liberties and choices of persons with disabilities. Reform of laws based in consent and (in)capacity (from the Personal Directives Act, to IPTA, to the Adult Protection Act) should be conjoined with revisiting the laws and policies relating to disability supports, as contemplated in the Roadmap.¹¹

Ultimately, deprivation of liberty (including decision-making capacity) and failure to provide supports (including decision-making supports) are two sides of the same, human rights denying, coin.

RECOMMENDATION XII: Reform of a broader suite of Nova Scotia laws relating to consent and (in)capacity (from the Personal Directives Act, to IPTA, to the Adult Protection Act) should be conjoined with reform of laws and policies relating to disability supports, in order to better coordinate respect for the liberty and equality rights of persons with intellectual, psychosocial, or cognitive disabilities -- as contemplated in the Roadmap.¹²

(CHAG) to the Ministry of Community Services Standing Committee, Nova Scotia, October 4, 2016.

¹¹ *Choice Equality and Good Lives in Inclusive Communities, A Roadmap for Transforming the Nova Scotia Services to Persons with Disabilities Program* (Department of Community Services, August 29, 2013).

¹² *Ibid.*

TO: THE LAW AMENDMENTS COMMITTEE
RE: BILL 16, The Adult Capacity and Decision-Making Act

Monday, October 16, 2017

Presentation by: Wendy Lill

It is an honour to be here today to speak to your committee on Bill 16, The Adult Capacity and Decision-Making Act. It is an important bill and I believe the cornerstone of legislation guiding our treatment and care of persons with disabilities as well as those who may be experiencing limitations to their abilities at times in their lives.

I am here as a member of Community Homes Action Group, a group of concerned citizens, health care professionals, parents and advocates who have come together to draw attention to the crisis in residential options for persons with disabilities and to work with government to find solutions. I'm also here as the mother of a young adult with a developmental disability. I've been thinking about the issues of capacity and independence and quality of life for persons with disabilities for a long time. I've been asking the questions - how do we make sure the people we love and also the ones we don't love - or don't even know - are able to live independently and make choices and decisions on their own? How do we *accommodate* them? The goal is not to take over their decision making but to assist with it. The fact is it's often much easier and more efficient to just take charge of things, just get it done, make decisions for someone, instead of taking the time to really try to discern someone's wishes. It's a constant struggle to figure all this out. Are we controlling lives or enabling people to live to their potential? That is surely what the concept of human rights is all about. That is what Bill 16 must be about.

From 1997 to 2004, while the Member of Parliament for Dartmouth, I was on the Disabilities Sub-committee in the House of Commons. I had the opportunity to interact with many individuals and organizations from across the country working to strengthen federal legislation, programs and services for persons with disabilities. The duty to accommodate persons with disabilities was a central issue we addressed at the federal level. It was a red letter day in 2010, when the United Nations Convention on the Rights of Persons with Disabilities was ratified by Canada - with the full support of the Government of Nova Scotia - to ensure people have access to the supports and accommodations they need to enhance and exercise their decision-making capacity.

In 2013, I was co-chair the Nova Scotia Joint Community-Government Advisory Committee on Transforming the Services to Persons with Disabilities Program. We were "the Roadmap Committee." Our committee was mandated by the Minister of Community Services to develop a roadmap for transformation of the Nova Scotia Services to Persons with Disabilities Program - guided by the United Nations Convention on the Rights of Persons with Disabilities.

In our work, we found many people with significant intellectual, cognitive and mental health disabilities were being restricted in abilities to make decisions – *to a much greater degree than necessary*. Service provision in the disability and older adult sectors was/is often based on an assumption that because people need supports and care, others should make decisions on their behalf. As people age and their cognitive functioning declines, family, community member, and service providers often respond by restricting the scope of a person's decision making even further.

The Roadmap committee reported that Nova Scotia needed a much more robust legal framework for supported decision making that would provide individuals and families a means to enhance capacity to make decisions and thereby maximize opportunities for supported living.

We recommended legislative reform immediately - to ensure compliance with the UN CRPD on several pieces of legislation - in particular, reforms to the *Incompetent Persons Act* and the *Adult Protection Act*. And we recommended the establishment of a legal and regulatory framework for making supported decision-making arrangements.

That was 2013. It is now 2017. It has been extremely frustrating to see the sluggish pace of change on all of these important pieces of legislation. Fortunately, in 2016, the Nova Scotia Supreme struck down the *Incompetent Persons Act* calling on the government to address the human rights violations in the law - thereby kick starting the important change needed. Which brings us here today to Bill 16 – The Adult Capacity and Decision-making Act.

There are concerns about Bill 16 that need to be addressed before it becomes law. But I believe there exists the will and the expertise to bring that about.

I have read some of the excellent speeches in the Legislature after second reading of the bill. I've read the submissions and concerns presented by Professor Archie Kaiser, School of Law and Department of Psychiatry, Dalhousie University as well as the brief submitted by Nova Scotia Association of Community Living (NSACL) and Canadian Association of Community Living (CACL).

There are legal and human rights experts in this room today who will provide you with chapter and verse as to what areas of this legislation need work and I hope also, some clear recommendations on how to fix the bill. I will leave the heavy lifting to them.

But I would like to address a couple of things. I've heard the argument that this bill as it stands now is "a start." It's better than the last bill. It doesn't have to be perfect. We should just get the thing out the door and we'll smooth the edges later.

That's absolutely the wrong view. From our work on the Roadmap Committee we know there are several interrelated acts that guide the lives and welfare of persons with disabilities. It's like laying a foundation for a house. Each piece needs to fit together. You can't have a solid house if flaws exist in the foundation.

People and organizations I respect say the building blocks are flawed. If this Act is flawed, then the other acts also attached to it can't help also but be flawed and we will be building a structure which won't stand the test of time nor the strong and inevitable winds of a legal challenge in the future.

I've also heard the comment Bill 16 isn't really central to anything. That it won't really impact the lives of many Nova Scotians. In fact, the opposite is that case. I would say this Act is foundational for all of us in the future. For moms of 32 year old sons with disabilities, or 32 month old sons, to your mothers and fathers or spouses who may find themselves with diminished capacity at some point in their lives. We may all at some point in our lives be subjected to this law - and let's hope it's a good one. We need to get this right.

The Canadian Association of Community Living and its provincial branch - Nova Scotia Association of Community Living have stated Bill 16 neither meets the Court's challenge to clear up its human rights violations nor the requirement in the UN Convention on the Rights of Persons with Disabilities to ensure people have access to the supports and accommodations they need to enhance and exercise their decision-making capacity.

At present, Bill 16 is mute when it comes to the actual mechanisms by which supported decisions will take place - and what role and responsibility the state has to make that happen. Article 12.3 of the UN CRPD states "parties to the Convention have an obligation to ensure people have access to the supports they need to exercise their legal capacity." Bill 16 as it presently stands, recognizes no such obligation - the absence of which leaves such grandiose phrases as "promoting dignity, autonomy and freedom of decision making" empty indeed. So we need to correct this.

Before closing, I'd like to address one more refrain I've heard circulating about Bill 16 and that is "it's too late to do more now. The deadline placed by the Supreme Court can't be changed. The bill *must* be passed now."

To that I would simply say - if the Supreme Court is made aware that the drafters of the Bill need more time to work - in conjunction with legal and human rights representatives within the community to meet the stated goals set by the court, to correct the human rights violations within the act, why on earth would it not be willing to grant an extension? Why on earth would the court not accommodate this request?

There are areas of concern within the bill that need to be addressed before it becomes law. I urge people of good faith – from government and community – to come together quickly and effectively to make this happen on behalf of our citizens with disabilities.

Thank you for your attention and interest in creating quality legislation for the province of Nova Scotia.

end

Good Morning Everyone

Thank you for this opportunity to speak.

I am pleased to see the new Adult Capacity and Decision Making Act nearing Completion.

I think you have got some things right.

Allowing for alternative guardians / joint guardians.

A person can apply for guardianship before a person is 18

A representative can apply to the court for directions (sec. 61)

Although there are safeguards under the Act, it is very difficult for the person to navigate the legal system, there is a lack of support and assistance, and inadequate financial assistance to hire a lawyer. Other than the Act saying a person with disability has a right to a lawyer, it does little else.

Expecting parents as representatives to repeatedly go back to court puts "undo hardship" on the parents with costs making it unfair and an unequal playing field for those that cannot afford it.

The Law is assumptional in areas where it assumes parents have money for a lawyer, or to repeatedly return to court with a lawyer time and time again. Although the gov't has recognized this as an issue, not was changed.

If parents are made to go back to court all the time chasing the proverbial dog's tail, who can afford it? People can't afford it now!

Who will be doing the assessment for capacity? In Ontario, physio are trained for this. Occupational therapists, nurses etc. should all receive training for this.

Legislation comes into effect Dec. 28th that calls to representation plans. What happens after that, Dec. 29?

There needs to be education across systems - particularly for service providers who routinely ignore guardianship orders now.

7(1) Upon hearing the application, the court "may" make an order appointing a representative....

18(c) indicate in the capacity assessment report what forms of support or assistance, if any, would help the adult

The concern here is whether the adult, (the assessor) would actually know what's available for forms of assistance and support

4(a) an adult is entitled to make own decisions, unless the adult's incapacity to do so is clearly demonstrated

(b). An adult is not incapable of making a decision merely because the adult makes or would make a decision that another adult would consider risky or unwise

This has had a lot of conversation. As a parent, a young person's brain isn't fully developed until age 25. Our son's or daughter's are in the reproductive years. And they are at a higher risk than the general population to be manipulated, taken advantage of, and the world is a complicated place in which many are complex in. It does not sit well with me to have harm and hardship when there just needs to be common sense.

Some people might think risk taking or unwise decision making looks and sounds good. Some refer it to the "school of hard knocks" But as a society it is our responsibility and our obligation to protect those more vulnerable than ourselves.

5) Where the court ~~represents~~ ^{grants} the representative for an adult authority to act and make decisions respecting with whom the adult may associate, the representative may only exercise the authority to prevent the adult from associating with an individual if associating with the individual could seriously jeopardize the health and safety of the adult.

What is required to Prove this ??

34(2) The representative for an adult may not, on behalf of the adult,
(a) commence divorce proceedings ;

Are we going to discuss marriage ??

40(1) who will define reasonable in decision making?
and will representatives constantly be dragged to court because of th

3

46 (1) The BOND can be a big barrier for families seeking an order.
2(a) and section (3) and (4) Both being impacted and changed by
(b) RDSP'S and will be hurt by this!

51. Subject to the regulations, on its own motion or on the application of the Public Trustee or any other interested person, the court may at any time, order the representative to submit to the court, the Public trustee or any other person.

"any other interested person", again, a representative can be taken back to court because someone is meddling, doesn't understand, has their own agenda and the cost for the representative are enormous.

58 (1) A representative for an adult shall apply for review of the representat. order

Here again, a representative could be back in court again.

(2) An adult who is the subject of a representation order, the representative for the adult or any interested person may, in accordance with the regulations, apply to the court for review of the order.

Again, the representative could be facing court costs. The Act allows for an abuse of power by forcing parents to walk away.

Thank' you for listening and your time.

Brenda Webb

Good Morning Ladies and Gentlemen

I'm Darrell Webb.

And I have Learning Disabilities.

I had a chance to read over the new Act. I did my best to read it. I can't make head nor tail of it.

There are a lot of people with learning disabilities.

There are other parents like me who have the experience of needing a Adult Capacity and Decision Making.

How do you expect parents to navigate this process?

It's intimidating.

It's costs for a lawyer are ridiculous. No family who have had sick children and raised them could ever afford what your asking them to do.

The law wants them to make their own decisions, even if their not good choices or risk ones. Somebody should walk in our shoes for a while.

A parent wants their ²son or daughter to be safe.
My disabilities are hard to live with. I can't
imagine what it is like for someone who struggles
much more than me.

This law still needs some changes. No parent wants
to have a guardianship, it's because they've had to.
All parents want the best for their child.

Making parents go back to court isn't right. Making
them go back repeatedly is really wrong. Parents
don't consider it a burden, they consider it their
obligation to care for their child because they love
them.

A Law like this should be wrote much more
simpler because of the people your dealing with.
A representative will never be able to afford the
loops and loops that are in this new Act.

Persons with disabilities didn't ask to be born this way. It's
hard enough to live in this world, never mind with disabilities.
if you'd protect them from their actions, they could be harmed
~~or dead because of their actions~~

There are some individuals who are born with birth

injuries, lack of oxygen at birth, because of other mistakes and those people and their family live with that the rest of their lives.

People that are writing this Act don't know what it's like to go through life with a child or children with disabilities or illnesses. It's hard on marriages, financial difficult, and it's a life long commitment of concern and worry. And you'll have some of the greatest experiences of your life

Until you live the life, you couldn't possibly understand!

We live in a troubling world, many will not have the capacity to understand the consequences of their actions.

This Bill will remain in place for a very long time. So you need to take everything into consideration because it effects people's daily lives, everyday.

Thank you for letting me speak today.

Darrell Webb



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**Law Amendments
1672 Hollis St
October 16, 2017**

Re: Bill 16 -Adult Capacity and Decision Making

My name is Dave Kent and I am the President of People First Nova Scotia. Our organization supports individuals who have been labelled with an intellectual disability to find their voice, speak for themselves and promote equality for all people who have been labelled with an intellectual disability.

We believe in the Canadian Charter of Rights, Human Rights and the United Nations Convention on the Rights on Persons with Disabilities. We spoke out when Landin Webb challenged the old Nova Scotia Incompetency Act. We were encouraged when the courts found that act to be unconstitutional and the Nova Scotia government agreed. People First Nova Scotia was pleased to be asked to be involved in talks on the new act.

We were disappointed in the new bill "Adult Capacity and Decision Making Act". The main problem with this bill is that it puts in place a substitute decision maker for a person instead of a supportive decision maker. Article 12 of the United Nations Convention on the Rights of Persons with Disabilities states that "proper measures shall be taken to provide access by persons with disabilities to the support they may require in exercising their legal capacity". This bill does not put any measures in place to provide support to the person to exercise their legal capacity. This bill does not protect the Nova Scotian individual with intellectual disabilities basic rights. This is not what we were promised in the NS Government document, the "Roadmap".

I outlined these concerns in my letter in early September to the Department of Justice, in response to a brief chance to review the draft law. People First of Canada's position paper on Legal Capacity was also sent. I have provided copies of these documents.

Another problem with this new law is that all current guardian orders will stay in place. This means none of the individuals who were under guardianship will be reviewed.

A Member of

PEOPLE
FIRST
OF CANADA



PERSONNES
D'ABORD
DU CANADA

SPEAKING FOR OURSELVES

There could be another dozen Landin Webbs out there who would still be having their basic rights violated. No one is protecting these persons' rights.

There is no method to support adults who have had an application made, or their families, or professionals involved in the process. There is no supervision after a representative has been appointed. This means there is no way to ensure the rights of the individual are protected. We are concerned about the confusing process of capacity assessment, the tool to do it and training for those completing the work. It is scary that in this act a representative can get permission from the court to give consent for the adult to go through disturbing treatments that represent a violation of the adults' human rights.

There is no reference of the United Nations Convention on the Rights of Persons with Disabilities in the Act. Canada was one of the first countries to ratify this international law and this is something that can make every Canadian proud. This new law should directly reflect international law and it should be identified right in the act.

People First Nova Scotia is offering their assistance in aligning the current draft legislature to meet the acceptable current standards to protect and promote the legal capacity of people with intellectual disabilities.

Thank you.

Dave Kent
President
People First Nova Scotia



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Department of Justice

c/o Catherine Berliner

response to re: *The Adult Capacity and Decision-Making Act*

September 2017

People First Nova Scotia is a provincial non-profit organization that is controlled and directed by people labelled with intellectual disabilities.

We believe that all people, regardless of disability, have the basic right to make their own decisions and choices. The decisions and choices made by a person with an intellectual disability need to be respected and protected. If a person has a support network or decision-making team, this needs to be honoured in terms of the authority to act on behalf of the person.

In Nova Scotia, people who are labelled with intellectual disabilities are among those who will be most affected by the new *Act Respecting Representative Decision-Making*. People First NS is disappointed and concerned that the current Draft Act does not protect and promote the legal capacity of people with intellectual disabilities.

"Citizens with intellectual disabilities deserve to live in their communities with supports they need and have their voice and their choices heard. The Nova Scotia government should include this support in the new draft law."

Dave Kent, President - PFNS

We don't think the Draft Act uses a good, inclusive definition of the term 'capacity.' We think they should use the definition in the UNCRPD. The Draft Act also does not legally recognize supported decision making. This concerns us very much. We understand that some people may not be able to make decisions on their own. But we think they should have a right to their supported decision-making network. We believe people should be able to appoint their own support person.

A Member of

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SPEAKING FOR OURSELVES

"Supported Decision making is legally recognized in some of our provinces and territories already. It is also recognized internationally and in the United Nations Convention on the Rights of Persons with Disabilities as the accepted method for ensuring citizens with intellectual disabilities are provided rights equal to their fellow citizens. It is time to stop treating Nova Scotians with intellectual disabilities as second-class citizens."

Cindy Carruthers - Executive Director, PFNS

Furthermore, this is not what we were promised in the *Roadmap to Transformation – Choice, Equality and Good Lives in Inclusive Communities*. The recommendations in that document around equal recognition of legal capacity and supported decision making are not showing in this Draft Act.

People First Nova Scotia supports the People First Canada position statement on "Legal Capacity". A copy of this statement is attached. We also support Canadian Association of Community Living's brief on the "Statutory Framework for the Right to Legal Capacity and Supported Decision Making".

Narrow definitions, guardianship, and appointed decision making take away people's right to control decisions about their lives. It takes away their power over their own lives.

This is not acceptable. This is not inclusive. This is not citizenship.

People First Nova Scotia is offering their assistance in aligning the current draft legislature to meet the acceptable current standards to protect and promote the legal capacity of people with intellectual disabilities.

Thank you.

Dave Kent
Board President

Cindy Carruthers
Executive Director

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People First of Canada Position – Legal Capacity (Nothing about us without us)

People First of Canada (PFC) believes that all people, regardless of disability, have legal capacity. People have the right to make their own decisions and choices. The decisions and choices made by a person with an intellectual disability need to be honoured in terms of legal capacity and the authority to act. If a person has a support network or decision-making team, this needs to be honoured in terms of legal capacity and the authority to act on behalf of the person.

Issue and Context

Legal capacity is the foundation upon which we act – when we make decisions or enter into agreements, we do so based on our legal capacity as a person and a citizen. Most people are assumed to be competent but this is not always true for people with intellectual disabilities. Unfortunately and historically, persons with intellectual disabilities have had the opposite experience with legal capacity – they have been deemed incompetent unless it has been proven otherwise. Disability should never be used as a benchmark for competence.

Persons with intellectual disabilities are at risk to have their legal capacity removed. Many provinces and territories still have outdated legislation and policies that present people with intellectual disabilities as lacking legal capacity. Other systems and institutions of life – such as banks, insurance companies, and housing corporations – make judgments about people's capacity because of their disability. These policies and practices need to change to reflect that all citizens' are competent, unless it has been deemed otherwise.

Actions Needed

People First of Canada recommends that governments:

- Ensure that all citizens with intellectual disabilities have their legal capacity and basic right of law as a person, (Article 12, 23, 29 UNCRPD)
- Ensure that persons with intellectual disabilities do not have their capacity jeopardized because of their disability and/or diagnosis,
- Educate Canadians about the status of legal capacity for people with intellectual disabilities,
- Promote changes in legislature across Canada to reflect the competence of all citizens, regardless of disability,
- Promote changes in institutes beyond government so that policies reflect the assumption of legal capacity.

**Protecting Autonomy
and the Right to Security and Liberty of the Person for All**

**Submission to the Law Amendments Committee on Bill 16 – *Adult Capacity and
Decision making Act***

Submitted by
Nova Scotia Association for Community Living and
Canadian Association for Community Living
with IRIS – Institute for Research and Development on Inclusion and Society

October 16, 2017

Introduction

The Nova Scotia Association for Community Living (NSACL) and the Canadian Association for Community Living (CACL), with the technical assistance of IRIS – Institute for Research and Development on Inclusion and Society (IRIS) are dedicated to advancing the full citizenship, human rights and inclusion of persons with intellectual disabilities. Bill 16 as it stands would work to fundamentally harm the autonomy, security of the person and liberty rights of individuals and as such needs substantial revision. Our key concerns with the Bill are as follows:

- The proposed act, like its predecessor, is not in compliance with the Canadian *Charter of Rights and Freedoms*, nor UN *Convention on the Rights of Persons with Disabilities*. Nor does it fulfill the commitments the Government of Nova Scotia made in 2014 to advancing the right to legal capacity, which were widely supported by the community, in *Choice, Equality and Good Lives in Inclusive Communities: A Roadmap to Transforming the Nova Scotia Services to Persons with Disabilities Program*.
- The vagueness and unsuitability of the definition of “capacity” as it stands could be arbitrarily applied to deny people the right to legal capacity and autonomy.
- It violates fundamental human rights to have timely access to the supports and accommodations needed to enhance and exercise their decision-making capabilities.
- Due process is lacking for those who would be ‘grandfathered’ into new guardianship/representation orders, simply because their rights are currently restricted under the *Incompetent Persons Act*, which the Nova Scotia Supreme Court has already said violates the *Charter*.
- Powers the court affords the representative eliminates the adult’s right to make the most basic decisions (i.e. section 10(1); 27(4); 40(1 b)).
- No organized structure or process or legal recognition for arranging the supports for making decisions, that the legislation itself recognizes is needed.
- Lack of oversight and monitoring of representatives/guardians
- The fact that a representative can obtain permission from the court to consent for the adult to undergo invasive procedures/treatments that represent a violation of the adult’s human rights (section 34(2d & e).

We organize our recommendations to address these concerns into seven main areas:

1. Address Non-Compliance with the *Charter* and the UN *Convention on the Rights of Persons with Disabilities*
2. Definition of Capacity
3. Duty to Accommodate in Decision making
4. Legal Recognition and Provision for Making Supported Decision-Making Arrangements
5. Proactive Measures for Alternative Courses of Action
6. Prohibition on Measures that Could Harm Mental and Physical Integrity
7. Adequate Time and Process for Ensuring Regulations and Legislation are *Charter* and CRPD compliant

1. Address Non-Compliance with the *Charter* and the UN *Convention on the Rights of Persons with Disabilities*

In *Webb*, the Nova Scotia Supreme Court clearly stated the requirements that must be met under Section 7 of the *Canadian Charter of Rights and Freedoms* for legislation regulating legal capacity. At paragraph 19 of that decision, the Court states:

... A law that provides that someone else is entitled to make all decisions for another clearly infringes the liberty and security of the person. Section 7 of the *Charter* permits interference with liberty and security only where the law does not violate principles of fundamental justice. Laws that do that cannot be arbitrary or overbroad, and cannot have consequences that are grossly disproportionate to their object.

Paragraphs 20-22 of the *Webb* decisions go on to state, in summary, that

- The object of the Incompetent Persons Act is to protect people who are incapable “from infirmity of mind” from managing their own affairs.
- Under the terms of the *Incompetent Persons Act* that protection is provided by the appointment of a guardian, which the Court found “is a rational and reasonable way to help that person”.
- However, and critically important, the Court found that that measure is “overbroad”.
- Every person with “infirmity of mind” is not incapable of managing their own affairs to the same extent. There is a spectrum of adult “infirmity of mind” that would warrant guardianship in respect of some matters, but not in respect of others. Competency is not an all or nothing thing.
- The Incompetent Persons Act takes an all or nothing approach. It allows for no nuance. It does not allow a court to tailor a guardianship order so that a person subject to that order can retain the ability to make decisions in respect of those areas in which they are capable.

Bill 16 now before the Nova Scotia Legislature makes significant headway in addressing the ways in which Bill 16 violated s. 7 *Charter* rights:

- The statutory objects in Section 2 are expanded beyond the objects of the *Incompetent Persons Act* to also promise to “promote the dignity, autonomy, independence, social inclusion and freedom of decision-making” of these individuals, and to “ensure that the least restrictive and least intrusive supports and interventions are considered before an application is made or a representation order is granted” under the Act. As such, the bar for justifying the interference in section 7 *Charter* rights is arguably higher.
- Section 3.1(a) begins to recognize in the definition of capacity the ‘nuance’ in understanding what it means to be capable, that the Court called for in its decision in *Webb*, by providing that a person may meet the test of capacity “with or without support”.

- Section 5.1 (c) sets a very high bar for the appointment of a guardian through a representation order by requiring that the court must be satisfied that any less intrusive and less restrictive measures available have been considered and would not likely be, or have been implemented and have not been, effective to protect and promote the adult's well-being and interests in financial matters.

In these ways, Bill 16 has got it right:

- It promises to promote the autonomy, independence, dignity, social inclusion and freedom of decision making of those who may lack capacity on their own to make their own decisions.
- It promises to make sure that the least restrictive supports and interventions are considered before imposing guardianship through a representation order
- It promises that in considering whether a person's impairments leave them incapable of exercising power over their own lives, that capacity will, for the first time in Nova Scotia, be recognized as a quantity that includes decision-making support. This is a breakthrough in recognizing equality rights of Nova Scotians with intellectual and other disabilities.
- It promises that the court can only impose guardianship through a representation order if it is satisfied that *in fact* less restrictive measures have been considered and were not available.

These are ground-breaking promises for people with intellectual and other disabilities, who for so long in this province have had their basic autonomy rights abused under the law, and who because of provincial policy and program measures have been left without the very supports they need to make and have power over their own personal, health care and financial decisions. This, the very hallmark of a free and democratic society, has been denied this group.

We applaud the government for making these promises to the people of Nova Scotia.

The problem is that the legislation as currently designed does not provide the measures that would make it possible to fulfill these promises. If implemented as drafted, the legislation sets up for failure people with intellectual and other disabilities, their families, the community support agencies and government disability support programs dedicated to advancing autonomy and inclusion for people with disabilities.

What is the main reason the bill fails to deliver on its promises? While it recognizes how essential decision-making support is to the exercise of capacity, to exercising autonomy, being included having freedom over decision making, it does not put into place the measures that would embed legal recognition of, and access to, supports that are essential.

We believe, that with some key amendments to this legislation this gap could be addressed. Without these support measures built into the legislation, however, the current provisions for finding people incapable are, by definition, arbitrary. They are overbroad and grossly

disproportionate to the objective to balance right to protection in the interests of one's life with the requirement to ensure autonomy and freedom in decision making. Without additional measures, there is simply no effective way to balance and guard against the interference in liberty that guardianship causes.

In addition to the violations of the *Charter*, the Bill also directly violates Article 12 of the UN *Convention on the Rights of Persons with Disabilities* by failing to ensure access to the supports persons with disabilities may require to exercise their right to legal capacity on an equal basis with others.

To address the imbalance in rights protections in the current draft, and to guard against non-compliance with the *Charter* and the CRPD we recommend the following changes to the draft Bill.

2. Definition of Capacity

The bill recognizes that supports can enable a person to become capable in decision making. However, it must be more clearly recognized and specified. As currently drafted it is vague and could be applied in arbitrary ways to deny a person's right to legal capacity, especially for those with more significant intellectual, cognitive and psychosocial disabilities. There is a significant body of research that shows the types of supports required:

- Personal planning – to envision the future and plan for needed decisions
- Independent rights advice and advocacy
- Personal relationship building – to assist in developing a network of decision-making supporters.
- Interpretive and translation provided by a support network for people with more significant disabilities

We recommend that the definition:

- Recognize that the understanding of the information relevant to the decision to be made and the appreciation of the reasonably foreseeable consequences of such decision or lack of such decision, may rest either,
 - (a) within the adult herself or himself, and with decision-making supports and accommodations as needed for this purpose; or alternatively,
 - (b) within the understanding, appreciation and fiduciary duty of the person(s) duly appointed to support the adult in exercising his or her legal capacity.

The Canadian Association for Community Living has drafted language for this purpose, in the draft model statute provided in Appendix B, section 3.

3. Duty to Accommodate in Decision making

The law must recognize a duty on other parties to accommodate a person in the decision-making process. This is needed to prevent non-discrimination based on disability, in the context of longstanding legal, bio-medical, and social assumptions that persons with intellectual, cognitive and psychosocial disabilities are unable to exercise capacity. The law should also require the Minister to develop guidelines for this purpose as part of the regulatory process.

4. Legal Recognition and Provision for Making Supported Decision-Making Arrangements

The legislation provides no 'second to last resort' to guardianship, and thus fails to meet the test for *Charter* compliance laid out by the Court in *Webb*. There is now a large body of evidence that supported decision making works. It has been implemented in other parts of Canada and around the world. It involves the appointment of decision making supporters to assist a person who, because of their impairment means they are unable to translate their will and preferences into specific decisions. To ensure full inclusion in this measure, the legislation should provide:

- a) That a person can make this appointment on their own – an example of which is in the BC Representation Act, and also in the provisions for appointing powers of attorney for personal care in the Ontario legislation; or,
- b) That decision-making supporters can apply to the Court or to the Public Trustee to be appointed in this capacity, where a person is unable to make this appointment on their own.
- c) Safeguards would be needed, including: specified duties of decision-making supporters; a complaints system where supporters are not fulfilling duties; and provision for appointing monitors where support arrangements may be weak. Examples of these safeguards are in the BC Representation Agreement Act.

Draft provisions for all these purposes are in the CACL draft statute in Appendix A, in Parts 3, 4, 5 and 10.

5. Proactive Measures for Alternative Courses of Action

If the legislation is to deliver on the promise for making sure that the least restrictive supports and interventions are considered, then a process for exploring and arranging these supports is required. We recommend three main components to this process:

- a) Empower the Minister of Community Services to designate community agencies to provide the planning and facilitation support individuals may require for establishing and maintaining a personal support network to assist in decision making. This is already the mandate of many existing community services providers in Nova Scotia. Decision-making support need not be a paid service. Family and community

members are already playing this role. However, they do not have legal recognition or a place to go to get back up support as needed for this purpose.

b) Require that as part of the capacity assessment process, that capacity assessors examine alternatives to a representation order. While the objects of the legislation promise that an individual's needs for support will be addressed, and alternatives must be considered in assessing their capacity, there is no requirement that this be considered in capacity assessment. Specifically:

- Assessment of alternatives and evidence of the exploration of alternatives to support a person's decision-making capacity should be required as part of capacity assessments under section 19(1).
- Development of guidelines for this purpose should be mandated as required under section 71 (1) (f) related to regulations.
- The Court should be required to consider evidence of alternative courses of action prior to making a representation order, and be required to impose strict time lines on the representative for developing alternative courses of action to enable decision-making supports to be developed sufficient to foster a person's decision-making capability.

6. Prohibition on Measures that Could Harm Mental and Physical Integrity

Provisions for the court to authorize a representative/guardian to consent for the adult to undergo aversive conditioning and invasive procedures/treatments including the removal of tissue and participation in research that is of no benefit to the person, represents a profound violation of the adult's human rights (section 34(2d & e), and must be removed.

7. Adequate Time and Process to Ensure Regulations and Legislation are *Charter* and CRPD compliant

We suggest that the changes needed to make the legislation *Charter* and *CRPD* compliant cannot be done within the time frame the government currently has. We urge that the government go back to the Court to ask for additional time to ensure that the legislation can be made *Charter*-compliant as per the Court's requirement.

Moreover, and in this regard, the draft consigns essential protections for human rights and for the machinery of supports for decision making and other fundamental matters to regulatory development. These are measures that should instead be addressed in the statute itself, and this is another reason for requesting additional time.

Given the importance of regulatory development of this legislation to balancing fundamental rights of Nova Scotians to have their autonomy protected, and their right to life protected in situations of vulnerability, the statute should incorporate an obligation for fulsome public consultation in development of regulations.

Law Amendments Committee
Meeting of October 16, 2017

Bill No. 16 – Adult Capacity and
Decision-making Act

Submission by
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Apology for Being Unable to Attend The Law Amendments Committee Meeting of October 16, 2017

I am sorry that I am unable to attend.

I have had a commitment for an out-of-province engagement for several months, which could not be rescheduled on such short notice. For that matter, the time available for the preparation of input to the Committee is extremely brief for such complex legislation.

These are my submissions in lieu of being able to present at the Committee.

Setting the Stage for Bill No. 16:

The Lived Reality of Persons with Disabilities in Canada

- “the history of disabled persons in Canada is largely one of **exclusion and marginalization**...excluded from the labour force, denied access to opportunities for social interaction and advancement, subject to invidious **stereotyping and relegated to institutions**” (Eldridge, SCC)
- “One in seven Canadians aged 15 years or older reported a disability” in 2012 (Stats. Can., “A profile of persons with disabilities...2012”)
- **There is no competition among persons who have different disabilities.** A broad definition of disability demands the recognition that **people often experience concurrent disabilities.**
 - “three out of four adults with disabilities reported more than one type of disability” (Statistics Canada, “A profile of persons with disabilities...2012”)
- “**chronic poverty is an everyday reality for people**” with disabilities (CMHA, March 26, 2015)
 - Persons with disabilities “remain more likely to be living in poverty across the working years” (CCD, Dec. 2, 2014)
- Poverty is associated with **lesser or non-participation in the labour force and inadequate benefits** in terms of income, housing, education and employment supports.

Intellectual Disabilities: Definitions

- Defined as **life-long conditions** that present before the age of 18 years that are characterized by **limitations in intellectual functioning and adaptive behavior** (Bielska et al., “Using National Surveys ...”, PHAC)
- “term used to refer to the **challenges** that some people face in **learning and often communication** ...”
 - “usually present” from birth or early age” (CACL, “Definitions and Terminology”)

Intellectual Disabilities: Definitions

- “a significantly **reduced ability to understand** new or complex information and to **learn and apply** new skills (impaired intelligence). This results in a **reduced ability to cope** independently (impaired social functioning), and begins before adulthood, with a lasting effect on development.” (WHO, Europe)

Intellectual Disabilities: Incidence

- “no solid statistics, only rough estimates, on the global prevalence”
 - “Canadian estimate varies from 0.7% to 2.5%” (L’Arche, “Intellectual Disability by the Numbers”)
- “About 2% of the Canadian population have an intellectual disability.”
 - about 900000 people, with 30,000 living in institutions (in 2001) (CACL, Definitions and Terminology)
- “affect up to 3% of the population” (Bielska)

Dual Diagnosis: Persons with Intellectual Disabilities and Mental Health Conditions

- 38% of adults with **intellectual disabilities** known to developmental service agencies “have either a **psychiatric condition and/or a behaviour problem**”; “**much higher than that observed in the Canadian population**” (Philip Burge et al)
- “population of people with intellectual disabilities who have co-morbid psychiatric or behavioural conditions ranges from 14%-64%” depending on population and criteria (Bielska)
- “individuals with developmental disabilities are **three to four times more likely to develop emotional, behavioural and psychiatric difficulties ...**” (CMHA, Ont.)
- Both persons with intellectual disabilities and those with mental health problems experience a higher prevalence of **physical health problems, stigma and discrimination, social exclusion and impoverishment, and lower life expectancy**
 - **Stigma and discrimination** make people’s difficulties worse, impeding recovery, heightening “**social isolation, poor housing, unemployment and poverty.**” (Mental Health Foundation, 2017)

Recognizing Prejudice

Stigma: “a negative stereotype”; “discrimination is the behaviour” (CMHA, Ontario)

- “Stigma is principally a **psychological and social phenomenon ...**
 - A **social process** that aims to **exclude, reject, shame and devalue** groups of people on the basis of a particular characteristic” (Livingston, “Mental and Illness-Related Structural Stigma”, MHCC)

Sanism (or Ableism or Disablism)

- a *form of prejudice*, like racism or homophobia
- “based predominantly upon stereotype, myth, superstition, and deindividualization” (Perlin, 1999)
- “**may be conscious or unconscious, and may be embedded in institutions, systems or the broader culture of a society**” (LCO, “Advancing Equality...”, 2012, 3)

Emerging Perspectives on Disability: the New Dominance of the Social or Disability Model

- Canada is **moving from** seeing disability exclusively using a **medical model**, wherein disability has been seen as a health problem, where the **individual needs to be fixed or cured, viewed as a tragedy, to be pitied.**
- **Disability** is no longer being viewed as an individual pathology, but rather the **result of the interaction between people who have impairments and an environment that is filled with physical, attitudinal, communication and social barriers:**
- There has been a **global move towards the social or disability model**, represented by the *Convention on the Rights of Persons with Disabilities (CRPD)*: Canada has embraced this “important shift toward a human dignity approach to admissibility and away from a charity and medical model approach.” (Government of Canada, on the ratification of the *Convention*, March 11, 2010)
- This paradigm shift demands that persons with disability are **no longer viewed as “‘objects’ of charity, medical treatment and social protection; rather as ‘subjects’ with rights** who are capable of claiming those rights in making decisions for their lives based on their free and informed consent as well as being active members of society” (UN Enable)

MEDICAL MODEL	SOCIAL MODEL
<ol style="list-style-type: none"> 1. Disability is a deficiency or abnormality. 2. Being disabled is negative. 3. Disability resides in the individual. 4. The remedy for disability-related problems is cure or normalization of the individual 5. The agent of remedy is the professional. 	<ol style="list-style-type: none"> 1. Disability is a difference. 2. Being disabled, in itself, is neutral. 3. Disability derives from interaction between the individual and society 4. The remedy for disability related problems are a change in the interaction between the individual and society. 5. The agent of remedy can be the individual, an advocate, or anyone who affects the arrangements between the individual and society. (Carol Gill, Institute of Disability Research)

The Significance of the *Convention on the Rights of Persons with Disabilities (CRPD)*

- The CRPD reflects a **new world consensus** on the nature of disability and how people with disabilities should be treated in society, adopting the disability or social model
- The CRPD **links protections of individual rights and broader entitlements to positive rights**, such as the right to: live in the community; health; work; an adequate standard of living; participation in political, public and cultural rights.

Why is the *CRPD* significant?

- No prior treaty specifically dealt with the rights of people with disabilities
- 160 signatories to and 164 ratifications of the *Convention* (as of May 2016)
- 92 signatories to and 89 ratifications of the *Optional Protocol*
 - **Canada signed the *Convention* on March 3, 2007 and ratified it on March 11, 2010; Canada has not yet signed the Protocol although it now appears ready to do so**

General Principles (Article 3)

The Moral Compass of the Convention

- a) Respect for **inherent dignity, individual autonomy** including the freedom to make one's own choices, and **independence** of persons
- b) **Non-discrimination**
- c) Full and effective **participation** and inclusion in society
- d) **Respect for difference and acceptance** of persons with disabilities as part of human diversity and humanity
- e) **Equality of opportunity**
- f) **Accessibility**
- g) **Equality between men and women**
- h) Respect for the **evolving capacities of children** with disabilities and respect for the right of children with disabilities to preserve their identities

General Principles:

3(b) Non-discrimination

- **Fundamental principle of international human rights law**
- **Includes direct and indirect discrimination**
- *reasonable accommodation* must be made for persons with disabilities
- *reasonable accommodation*: 'necessary and appropriate modification and **adjustments not imposing a disproportionate or undue burden**, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms' (Article 2)
 - Concept also **applies more broadly to "economic, social and cultural rights"**, wherein "each State Party undertakes to take measures to the maximum of its available resources" (Article 4(2))

General Principles:

3(c) Participation and Inclusion

- Participation is important to correctly identify specific needs, and to empower the individual
- **Full and effective participation and inclusion in society is recognized in the Convention as:**
 - A **general principle** (article 3(c))
 - A **general obligation** (article 4), including the obligation of States parties to “closely consult with and actively involve persons with disabilities” in the implementation of the *Convention* (Art. 4(3))
 - A **right** (e.g. articles 29, the right to participation in political and public life and 30, the right to participation in cultural life, recreation, leisure and sport)

A Note on the Consultation Obligations Regarding Bill No. 16

- Article 4(3) of the *CRPD* requires close consultation and active involvement of persons with disabilities and their representative organizations
- The Department of Justice representatives have always been respectful, patient and receptive to input from persons who attended the consultations in which I participated
- The consultation process started out at too slow a pace, compared to its last two months, from about August 1 to September 30, 2017
 - This period was too intense and pressured.
- The Department of Justice representatives seemed to be labouring under constraints that did not permit either the possibility of applying for a further extension from the Supreme Court of Nova Scotia or the thorough infusion of supportive decision-making in the Bill.
- The Government of Nova Scotia should conduct a “consultation audit” to see what lessons must be learned from the processes used regarding the *Accessibility Act* and *Bill No. 16*.

General Principles:

3(f) Accessibility

- **Important as a means to empowerment and inclusion**
- Both a **general principle and a stand-alone article** (article 9)
- Access must be ensured to:
 - **Justice** (article 13)
 - **Living independently** and being included in the community (article 19)
 - Information and **communication services** (article 21)
 - **Education** (article 24)
 - **Health** (article 25)
 - **Habilitation** and rehabilitation (article 26)
 - **Work and employment** (article 27) - human resource policies and practices
 - **Adequate standard of living** and social protection (article 28)

- **Participation** in political and social life (article 29)
- Participation in **cultural life, recreation, leisure and sport** (article 30)

Is the CRPD Law?

- *The Precise Legal Effects of the Convention Are Uncertain*, but:
 - “could *strengthen and support legal arguments* advanced for clients with disabilities” (ARCH, *Providing Legal Services to People with Disabilities*, 2008, 10)
 - Provides a **strong normative base** for the need to transform Canadian mental health and disability law, policy and services
 - Must be adverted to by legislators, courts, officials in the administration of justice as a source of law and policy in considering issues affecting people with disabilities
 - **Tension between:**
 - **dualist assumptions:** distinct domestic and international legal systems requiring transformation by Canadian law
 - **monist aspirations** towards convergence: duty to ensure domestic law is shaped by and conforms with international law

If the C.R.P.D. Is An Unimplemented Treaty, How Does It Affect Domestic Law?

- Becomes part of Canadian law at least when implemented by statute
 - although in any case **its values may inform “statutory interpretation and judicial review”** (*Baker*, S.C.C., 1999, para. 69)
- Some cases suggest there is a **presumption of conformity that requires legislation to be interpreted, where possible, in a manner consistent** with international law (*Shreiber* 2002 (50); *Canadian Foundation for Children* 2004 (31); *Mugesera* 2005 (82); *Merck Frosst* 2012 (117); *Thibodeau* 2014 (113))

Hape 2007

- “well-established principle of statutory interpretation that **legislation will be presumed to conform to international law...**
- courts will **strive to avoid** constructions of domestic law pursuant to which the state would be in **violation** of its international obligations, **unless the wording of the statute clearly compels the result.**” (*Hape*, 2007 (53))
- legislatures are “**presumed to act in compliance** with Canada’s obligations” and “**to comply with the values and principles** of customary and conventional international law” (*ibid.*)

If the C.R.P.D. Is An Unimplemented Treaty, How Does It Affect Domestic Law?

- International law is **one of many available sources of interpretative assistance**
 - The cases appear to be **leaning in the direction of the presumption of conformity of legislation with international human rights law and international human rights law having to be brought to bear as an interpretative guide**
 - **Assuming the legislation does not directly contravene the treaty**
 - ❖ **An oddity**, given the more generous and inclusive SCC stance on treaties and the *Charter* and the *Vienna Convention on the Law of Treaties*
 - ❖ **Canada would be in a very awkward position** were a court (or legislature) to determine that **domestic law openly flouts international human rights law**

Unimplemented Treaties and the Charter

- Some cases suggest the *Charter* “**should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents** which Canada has ratified.” (*Slaight Communications*, SCC, 1989, approving *Ref. Re Public Service*, SCR, at 1056):
 - “Canada’s international human rights obligations should **inform not only the interpretation of the content of the rights** guaranteed by the *Charter* but **also the interpretation of what can constitute pressing and substantial s. 1 objectives...**” (*Slaight*, 1056-7)
- See also:
 - ***Divito* 2013 (22):**
 - “Canada’s international **obligations** and relevant **principles** of international law are also **instructive** in defining the (*Charter* s. 6(1)) right...”
 - ***Kazemi* 2014 (150):**
 - “...*Charter* will often be understood to provide **protection at least as great as that afforded by similar provisions in international human rights documents...**”
 - “principally...**an interpretative tool...**delineating the breadth and scope of *Charter* rights.”
 - “International Conventions may also assist in **establishing ...recognition of new principles of fundamental justice.**”
 - ❖ **But** not all commitments in international agreements amount to principles of fundamental justice.”
 - “very diverse”; “ever changing”
 - Cannot equate all international human rights “protections or commitments” with principles of fundamental justice
 - Cannot permit destruction of “Canada’s dualist system of reception of international law” and cast aside “parliamentary supremacy and democracy”
- Some cases might seem to ignore the presumption that *Charter* protections start with the minimum level provided by international human rights law:

- possibly reducing international law to being merely informative, of a comparable status to other aids, rather than imposing positive interpretative obligations
- Given the breadth and generosity of the rights guaranteed by the *CRPD*, it would seem that the *Convention ought to bolster the Charter's prohibition of discrimination on the basis of mental or physical disability*
- **And the *Convention* may also infuse the interpretation of other *Charter* sections, such as ss. 7, 10(a) and (b), 12 and 24(1)**

The Duty to Scrutinize Legislation

- Some basic and overriding principles of international law must be kept in mind
 - The Vienna Convention on the Law of Treaties:
 - A State must “**refrain from acts which could defeat the object and purpose of a treaty**” (Art. 18(a))
 - “Every treaty in force is binding upon the parties to it and must be **performed in good faith**”. (Art. 26)
 - “**A treaty shall be interpreted in good faith...**” (Art. 31(11)) (See *Thibodeau* 2014 (35))
- A **failure to scrutinize** conventional mental health and disability legislation using the lens of the *CRPD* would **arguably not be in good faith**.
- **See also Canada's adoptive obligations under Art. 4 of the *CRPD***
 - “adopt all appropriate...measures for the implementation” (1)(a)
 - “modify or abolish existing laws...that constitute discrimination” (1)(b)

The Optional Protocol to the *CRPD*

- Canada appears finally to be ready to ratify the Optional Protocol.
- This enables “individuals or groups of individuals...who claim to be victims of a violation “to send communications to the Committee on the Rights of Persons with Disabilities.” (Article 1)
- Obviously, many of the legal and social problems which people with disabilities experience could be the subject of such communications.
- Nova Scotia should be mindful of the heightened scrutiny to which it and the rest of the country will be subject after the ratification of the Optional Protocol.

United Nations, Committee on the Rights of Persons with Disabilities, 2017: A Critique of Canada's *CRPD* Performance

- “**Concluding observations on the initial report of Canada,**” April 12, 2017
- 7: “The Committee is **concerned** about [Canada's] upheld reservation to Article 12..., **preserving substitute decision-making practices.**”
 - 8: “**recommends that [Canada] withdraw its declaration and reservations**”
- 9: “The Committee notes with **concern**:

(a) “That the provisions of the Convention are **yet to be appropriately incorporated** in legislation and policies...”

UN Committee Concerns (continued)

- **9: (b) The uneven application of the Convention and the Committee’s jurisprudence by the judiciary and law enforcement officials...”**
- 10: The Committee recommends...
 - (d) Raise awareness and develop **capacity building programmes among the judiciary and law enforcement officials about the Convention as a legally enforceable human rights instrument, the human rights model of disability, its principles and the jurisprudence of the Committee...**

Comments on Bill 16

The Preamble and purpose (s. 2) sections have some positive elements, but they should be strengthened.

A **preamble** recites “the circumstances and considerations that gave rise to the need for the legislation or the ‘mischief’ the legislation is designed to cure” and is “an important source of legislative values and assumptions.” (*Sullivan on the Construction of Statutes, Sixth Edition*, 2014).

An explicit **statement of purpose** by the Legislature is authoritative, setting out what “the legislation is meant to implement or the objectives that is meant to achieve,” establishing “a general framework within which administrative and legislative powers are conferred to achieve particular goals or to give effect to particular policies.” (Sullivan)

The addition of specific references to the *CRPD* and the *Charter* would clarify the intentions of the Legislature and would provide concrete evidence that this Act was meant to promote and protect fundamental human and constitutional rights.

I have drafted a possible version of a Preamble and a purpose section which was already incorporated in part in this Bill, but which should be considered for further adoption. This is attached.

Two Major Deficiencies: Depriving Adults of the Protections under International Human Rights Law

Article 12 of the *CRPD*, "Equal recognition before the law" requires Canada and Nova Scotia to "take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity."

Article 13 of the *CRPD*, "Access to justice," requires that States Parties "shall ensure effective access to justice for persons with disabilities on an equal basis with others."

The proposed Act appears to be unmindful of the obligation to provide supports for adults who may be subject to the law that is required by the *CRPD*.

Moreover, in order to ensure effective access to justice, the legislation says nothing about providing advice to a prospective subject with regard to his or her rights and the provision of true advocacy services for persons subject to the legislation.

Specific Sections Bill 16

Definitions, s. 3

(b) assessor

The Government is well aware of the complexities of specifying categories of persons entitled to do assessments and the many issues that may surround these procedures. Extensive regulation making authority is established in section 60 (1)(e) of the draft legislation. These will obviously have to track the spirit and letter of the legislation very closely. Parts of these anticipated regulations should be moved to the statute because they are so important. In my opinion, regardless of membership in any profession, no one should be permitted to become an

assessor unless he or she undertakes a standard training program, enrolment in which should be encouraged by offering an honorarium.

(c) capacity

Curiously, this section mentions “with or without support,” whereas most of the rest of the legislation does not seem to contemplate the regularized provision of supports for persons who are subject to the law.

(s) support

This definition of support is obviously very limiting: “as may be reasonably and practically available.” Although it offers a few examples, this mention of support is otherwise isolated and lacking any other consistent context. Moreover, there is no mention of any duty by the state to provide any supports.

s. 4: “interpreted and administered in accordance with the following principles”

This section could more useful, were it placed in the context of Preamble and Purpose sections, as noted above.

The list is underinclusive. A comprehensive review of the *CRPD* and *Charter* case law suggests some worthwhile extensions. For example, article 3 of the *CRPD* suggests the need for references to: “Non-discrimination” and “Respect for difference” and “Equality of opportunity” and gender equality. Similarly, the *Act* should make reference to the need to provide freedom

from inhuman or degrading practices (Article 15) and from “Exploitation, violence and abuse” (Article 16).

Sections 5–8: “Application for Representation Order.”

This is one of many places where it would be appropriate to include a further reference to the least restrictive and least intrusive principle. For example, section 5(2) should refer to the necessity of other measures having been contemplated and/or tried, before making the application.

In the same section, the list of preconditions refers to the requirement of “a capacity assessment report,” when this may not have been able to be obtained in the circumstances. The situations when this lack of a report might be tolerable should be noted in the *Act*, not merely the regulations.

Section 7(1) uses the balance of probabilities standard. Commensurate with the importance of such applications, the standard of proof should be elevated to clear and convincing, or something else more than the mere civil standard. At least there is a reference in section 7(1)(c) to “less intrusive and less restrictive measures,” but there is no specific requirement that the court consider the ameliorative effects of the provision of supports on the adult’s decision making capacity either there or in section 7(2).

Section 8 refers to circumstances involving “immediate danger,” and treads in part upon the situations contemplated in the *Adult Protection Act*, which is, unfortunately, not being addressed simultaneously. One wonders whether the new statute might be chosen over the *Adult Protection Act* in some cases. Neither statute provides sufficient procedural protections.

Sections 9-20: Capacity Assessment

Section 10(2) would provide the Court with the authority to “direct an adult...to undergo the capacity assessment.” Given the broad protections of the principle against self-incrimination and the general right to silence. I am not sure of the Court’s authority to make such an order.

Section 18(c) is a positive provision as it requires the assessor to identify “what forms of assistance would help...without the need for representative.” If this section were supplemented by a **statutory obligation to provide supports**, it would have a far greater impact.

Sections 21–26: “Appointment of Representative”

Although section 21(4)(b)(i) does refer to considering “The views and wishes of the adult,” it does not clarify that these views and wishes should be considered preminent. Moreover, this is one of many areas of the legislation where, if the individual does not have an advocate, his or her wishes may not be put adequately before the court. Indeed, without proper rights advice and advocacy services, the adult may not be making an informed and voluntary choice in expressing his or her apparent views and wishes.

Section 23(b), contemplating two or more representatives and the effect of the inability of one to act, automatically assigns “the remaining representatives” the authority to act. This would not seem to be suitable in some circumstances where there had been, for example, a previous division of authority between well-being and financial issues.

Sections 27–49: “Authority and Duty of Representative”

Section 27(2) says that “The Court *may* grant...only such authority” whereas this section should be mandatory rather than permissive, thereby insuring the restrictiveness of the grant of authority by the court.

Section 27 would be strengthened, in terms of protecting the adult’s dignity and autonomy, if a full list of required factors for the court to consider was included. Section 27(2)(d), with its reference to “the least restrictive and intrusive” criterion is appropriate. On the other hand, a legislative demand to address, for example the freedoms referred to in articles 14 to 24 of the *CRPD* would be helpful: Liberty and security of the person; freedom from inhuman treatment; freedom from exploitation, violence and abuse; integrity of the person; liberty of movement; living independently and in the community; personal mobility; freedom of expression; respect for privacy; respect for home and the family.

Particularly in the absence of a requirement of advocacy services for the adult, the ability of the Court, under section 27(4)(g) to permit the representative to determine “whether to “commence...any proceeding” is alarming, because it might effectively strip the adult of his or her entitlement to independent legal advice and representation, which would be essential if the adult wanted to challenge any order made in respect of him or her.

In sections 27(2)(d) and 27(3), there are other references to assistance and support which is laudable, but which is weakened by the lack of a thoroughgoing *requirement* under the *Act* to ensure that support or assistance is available at every juncture.

Without a court order, section 34 restricts the representative from making certain decisions. Additional explicit prohibitions should be included here. Examples might include

prolonged seclusion, segregation and physical or chemical restraints. Even with a court order, such activities concerning the adult should be extremely restricted or impermissible. Obviously, the limited availability of a court apparently being able to order an “aversive stimulus” (s. 34(1)(d)) should fall under this same type of list.

Section 39(1) would be invigorated were it to require the maximization of the “adult’s well-being and interests in financial matters,” rather than their mere protection and promotion.

Section 40 provides for circumstances where the representative can, while making a decision within his or her authority, diverge from the instructions the adult gave when he or she had capacity and the adult’s wishes and beliefs. An additional protection of the adult’s dignity and autonomy would include the need to return to Court in any instance where there is a major departure, substantially affecting the adult’s rights and interests.

It could be argued that the notion of a bond should be extended beyond what is covered under section 46, to extend to possible civil liability for abuse or betrayal of the representative’s obligations to the adult’s needs and freedoms in the non-financial sphere.

Sections 50–54: Reporting by Representative

Section 50 requires the maintenance of accounts “in accordance with the regulations.” A parallel obligation should be created in all instances for well-being, including, personal and health care issues, as is noted in section 51(c), albeit there on a discretionary basis.

Sections 58–67: Proceedings in Relation to Representation Order

Section 58(2) provides for an adult being able to “apply to the Court for review of the order.” This is one of many areas within the act where the lack of mandatory independent advocacy services for the adult puts him or her in a very vulnerable position.

Section 66 discusses the entitlement of the adult “to retain and instruct counsel” and “to be heard by the Court in the matter most appropriate to the adult’s circumstances,” which again **fails to impose a state duty to provide counsel** for such an adult in all circumstances.

Sections 62 and 63 authorize applications for review and appeals by interested persons. It is most concerning that there is a lack of an overall oversight for the class of persons subject to the *Act*, by an independent body. As it stands, scrutiny is through the courts in individual cases only.

The *Protection of Persons in Care Act* provides for the opportunity for citizens or a mandatory obligation for service providers to report abuse. It would be reassuring for the whole category of persons subject to orders under the new legislation if there were regular scrutiny by an independent standards compliance authority, the ability to make a complaint by anyone and the duty to do so by service providers.

General

The immunity granted under section 68 is arguably too extensive.

The offence provision under section 70 should be expanded to contemplate liability for other contraventions. For example, offences could be created surrounding the wilful or negligent failure to abide by the terms of in order with respect of the well-being or financial affairs of an adult.

The regulation making authority under section 71 is too broad. Some provisions should be reallocated to the substantive part of the legislation, thereby permitting greater legislative and public scrutiny. For example, this could include crucial issues with regard to: capacity assessment and assessors s. 71(1)(f); prescribing things that the representative for an adult is not permitted to do on behalf of the adult” (s.60(1)(k)); respecting the obligation of the representative to inform the adults and encourage his or her participation in decision-making (s. 60(1)(m)); reports of “abuse or misuse of representation orders” (s. 60(1)(z)); the “recognition of orders made under the former *Incompetent Persons Act*” (s. 60(1)(za).

Transition and Consequential Amendments: The Unacceptability of Permitting the Survival of Orders under the Unconstitutional *Incompetent Persons Act*

It is very troubling that section 73 permits their survival of orders “under the former *Incompetent Persons Act*” as if they were made under the new legislation. This is completely illogical, given the unacceptable standards of the old *Act*. It leaves a significant number of vulnerable individuals being subject to all of the risks of unjustifiable intrusions or abuse permitted under the former legislation, with no mandatory scrutiny, which suggests an abandonment of responsibility. It would be reasonable, if the Committee is persuaded that all *Incompetent Persons Act* orders should be declared null and void, to provide some type of financial support in any required new application under the *Act*.

APPENDIX: A Draft by H.A. Kaiser

An Act Respecting Representative Decision-making

Preamble

WHEREAS under the United Nations *Convention on the Rights of Persons with Disabilities*, Nova Scotia recognizes that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life;

AND WHEREAS, Nova Scotia must take appropriate measures to provide access by persons with disabilities to the supports they may require in exercising their legal capacity;

AND WHEREAS Nova Scotia accepts that, absent such guarantees and supports, persons with disabilities are vulnerable to unwarranted infringements upon their inherent dignity, individual autonomy, independence and social inclusion;

AND WHEREAS Nova Scotia intends to facilitate the full and effective participation in society of persons with disabilities on an equal basis with others;

AND WHEREAS Nova Scotia is convinced that its obligations under the *Convention on the Rights of Persons with Disabilities* are meant to complement the rights and freedoms under the *Charter of Rights and Freedoms* and the *Nova Scotia Human Rights Act*;

THEREFORE, be it enacted by the Governor and Assembly as follows:

1. This *Act* may be cited as the *Adult Capacity and Decision-making Act*.

2. The purpose of this *Act* is to:

- (a) Recognize that people may experience impairments of their decision-making capacity;
- (b) Provide a fair and respectful legal framework for protecting the safety and security of persons who have decision-making impairments and who thereby may be vulnerable;
- (c) Promote the dignity, autonomy, freedom of decision-making, independence and social inclusion of adults who may be subject to this legislation;
- (d) To provide the least restrictive and least intrusive supports and interventions when they are proven to be necessary, while offering the maximum level of support for the adult's well-being;
- (e) Ensure that any supports and interventions required for vulnerable adults are closely monitored to protect their rights and dignity, both as individuals and as members of a vulnerable group.

a statutory framework for the right to legal capacity and supported decision making

For Application in Provincial/Territorial Jurisdictions in Canada

Appendix A -

**Protecting Autonomy and the Right to Security
and Liberty of the Person for All**

Submission to Law Amendments Committee

by NSACL, CACL and IRIS

October 2017

PREPARED BY:

**The Working Group on Legal Capacity
and Supported Decision Making**

Canadian Association for Community Living

February 2014



**Canadian Association
for Community Living**

**Association canadienne pour
l'intégration communautaire**

Diversity includes. On se ressemble.

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Introduction

The right to equal recognition before the law, and its attendant right to legal capacity without discrimination on the basis of disability, is recognized in Article 12 of the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD), ratified by Canada in 2010. The inclusion of Article 12 in the CRPD is a major achievement. It makes clear that people with disabilities have the right to control decisions about their lives with whatever kinds of support they require to do so, and that States Parties are obliged to establish the arrangements to make this possible. This includes enabling a person with significantly challenging disabilities to exercise control over decisions through the assistance of support persons who, in their relationship of personal knowledge and trust with the person, commit to interpreting and acting on that person's preferences and will as the basis of decision making with others.

For governments to fulfil these obligations requires what many have referred to as a 'paradigm shift' in the usual approaches to protecting and promoting the right to legal capacity. Adults can no longer be required to demonstrate that they can meet certain tests of mental capacity in order to have their rights to legal capacity equally respected and protected. In recognizing this right and the supports needed to exercise it, the CRPD is consistent with the equality rights protections of the Canadian *Charter of Rights and Freedoms*.

Recognizing this obligation of governments under international law, the Canadian Association for Community Living (CACL) has taken another step with this report in our twenty year effort to secure recognition for people with intellectual and other disabilities of the right to supports in exercising legal capacity; or, what we referred to in our 1991 Task Force Report on 'Alternatives to Guardianship' as 'supported decision making.'

For people with intellectual, cognitive or psychosocial disabilities in particular, Article 12 is essential to self-determination and equality, fundamental calls of the disability rights movement. The legacy of centuries of confinement and exclusion based on the idea of 'mental incapacity,' is that people with intellectual, cognitive or psychosocial disabilities are often considered to have a lesser moral and legal status than other human beings. The result has been laws, policies and practices in every sector of society that deny equality on the basis of disability – whether this be through guardianship, denial of the right to vote (still the case in some countries), the right to make one's own health care decisions, the right to make decisions about where one will live, and with whom, and how one's money and other property will be managed.

In acknowledging that people can exercise their legal capacity in different ways, and with a range of supports, Article 12 provides new ground on which people with disabilities can retain and rebuild their self-determination. We understand Article 12 as a kind of ‘ramp’ of accessibility for adults who have long been denied the right to equal recognition before the law and to the process of controlling decisions that affect their lives.

While many strategies are needed to fully implement Article 12, there is no doubt that substantial law reform is required. Moreover, no single piece of legislation currently exists in Canada or elsewhere that pulls together all the pieces needed to ensure a right to legal capacity. These include the supports to exercise this right, as Article 12 requires, and the roles and duties of government, other parties in the decision-making process, support networks, and community agencies.

This report presents a statutory framework for guiding implementation of Article 12. CACL recognizes that provincial/territorial jurisdictions have the constitutional authority to legislate with respect to civil and property rights, under which legal capacity has been regulated in the Canadian context. Recognizing that the process of law reform is jurisdiction-specific, and is best designed and managed in a productive dialogue between civil society, governments and legislators, CACL has undertaken the development of this report to contribute to and assist in the necessary law reform processes to give Article 12 full effect. On its behalf, the CACL Working Group on Legal Capacity and Supported Decision Making and its advisors undertook three steps in preparing the framework presented in this report:

- Identified ‘starting points’ – key assumptions and challenges that need to be addressed in law reform;
- Identified ‘essential elements’ of a statutory framework to promote and protect the right to legal capacity and access to needed supports for this purpose;
- Prepared a ‘sample statutory text’ as an example of how these elements could be drafted into a statute.

In presenting and circulating this report, CACL does not propose the sample text as exact statutory language, and recognizes that the concepts related to legal capacity and supports for decision making evolve over time. However, we also recognize that outlining the specifics of how the right to exercise legal capacity and the obligation of governments to ensure access to supports to do so could be implemented is a necessary step in the reform process. The sample text presented in this report was developed in the spirit of assisting governments, civil

society and legislators to engage in the law reform process to ensure compliance of the framework of civil and property rights with the UN CRPD.

Section I of this report identifies the starting points and key challenges to be addressed in legislative reform for promoting and protecting the right to legal capacity and ensuring access to needed supports to maximize control over the decisions affecting an adult's life. Section II outlines essential elements of a statutory framework to fulfil this purpose. In Section III, a sample statutory text is presented as a resource for those engaged in law reform.

I. Starting Points for a Statutory Framework to Promote and Protect the Right to Legal Capacity

In designing this statutory framework, the Working Group and Advisory Group have been guided by the CRPD to inform our starting points and assumptions:

- People exercise their legal capacity in different ways, and may need a variety of supports to do so, as recognized in Article 12. These supports can take different forms including communication aids and devices, or personal supports like a supporter or support network to assist in making decisions.
- Most people use informal support in making personal decisions. We draw on the support of family and friends in managing decision making with financial institutions or doctors, for example. While we all make decisions as adults interdependently, we have a right to make decisions and enter agreements by ourselves, as long as we appreciate and understand the nature and consequences of the decision.
- However, some people are not recognized as fully capable to make decisions by third parties with whom they are seeking to establish formal contracts or agreements, precisely because they need others to assist them. In order to prevent substitute decision making from being imposed, their supporters need some recognition as duly appointed to participate in the decision-making process – not as substitute decision makers, but as supporters. Legislation is needed that guides how such appointments are to be made, and how the role of supporters is to be safeguarded and regulated.
- For some people who cannot communicate in ways that most others understand, decision-making supporters may be required to interpret personal preferences as the basis for direction in decision making. Their preferences and will, as understood by those closest to them, is the basis on which they will exercise their full legal capacity.
- Some people will not be able to make decisions all by themselves, but Article 12 makes clear that their full legal capacity cannot be denied on this basis. One challenge is to figure out how to protect against some people being required to use decision-making supports and assistance, just because others – like a doctor, or financial institution want to protect their contractual liability.

- Creating inclusive and accommodating decision-making processes has largely not been recognized as a public policy issue. Individuals, supporters, health care, social service and financial institutions, and governments themselves will need assistance in figuring out how to enable people in different situations to be supported and accommodated in making decisions.
- Many people will make planning arrangements, through an advance directive or Power of Attorney, which gives authority to another person to make decisions for them, if they become unable to for whatever reason. Such arrangements respect a person's self-determination, because they are deciding what should happen in their future. However, safeguards are needed to ensure that those appointed do not abuse or exploit the person, and that appropriate responses are made when this happens.
- There is likely a small group of people with significantly challenging disabilities, who may remain confined to institutional settings, who do not have family or friends, who are not able to communicate in ways that any other person understands, and who do not have any prior planning arrangements about what decisions they would like made. This could be because of the nature of their lifelong disability, and the exclusion they have experienced, or because of injury or illness which leaves it difficult or impossible for others to communicate with the person. Some way of stepping in to make needed decisions is required in these situations. This type of decision making should be distinguished from 'supported' decision making. While the decisions should be made for the sole benefit of the person, the adult is being represented by another person who is effectively making decisions – what we call in the statutory framework presented below 'representative' decision making. At the same time, investments should be made to ensure that the person is supported to develop relationships with others whom they trust, so that they can be supported to make their own decisions in the future.
- Government has an essential role to play in protecting adults who are abused, victimized or exploited by those around them. However, adult protection systems need to be designed in ways that assure protection and intervention when needed, but do not over-ride the rights of adults to make their own, sometimes risky decisions. At the same time, inputs are needed to assist adults in situations of neglect and abuse to regain their self-determination through supportive relationships with others or any other means as soon as possible.
- Given the range of supported decision-making arrangements that people will have in place, especially with the aging of the population, governments

must create new authorities to help people develop and manage these arrangements. In addition, authority is needed to adjudicate among parties where there are disputes about decision making processes.

- As well, governments must play a role in funding community agencies to assist people in creating decision-making arrangements that enable them to act on their right to legal capacity. Moreover, governments have a role to provide specific decision-making supports when there is a demonstrated need, and to promote broader public awareness about the right to legal capacity.

II. Essential Elements of a Statutory Framework for Promoting and Protecting the Right to Legal Capacity

Based on these starting points, we have identified what we consider to be essential elements in a statutory framework. In outlining these elements, we recognize that the supportive relationships which make self-determination possible for any of us cannot be legislated. That said, we also recognize that Article 12 obliges governments to ensure that people have access to a range of supports needed to make decisions, and that sometimes supports can include assistance in developing relationships of trust and understanding with others who can assist an adult in exercising control over decisions affecting his or her life.

The essential elements we identify in this section are those ‘building blocks’ for promoting and protecting the right to legal capacity that governments are responsible for putting into place. The building blocks must be designed in ways that shape how others play their roles as well. Legal capacity is lived in everyday life, in the many transactions and agreements we all make. The right to ‘Living independently and being included in the community’ recognized in Article 19 of the CRPD, for example, relies on people being able to enter these agreements – whether to rent an apartment, open a bank account, get married, or direct their health care and disability supports. Many of the other rights recognized in the CRPD also rely for their full realization on people with disabilities being able, and supported as necessary, to make decisions in their lives. This means that doctors, bankers, service agencies, support networks, family and community members all have responsibilities to promote and enable decision-making processes that are inclusive, supportive and accommodating of people with disabilities.

The challenge for law reform is to craft legislation that: makes clear the duties and responsibilities of all these actors; recognizes the systematic powerlessness and exclusion of many people in decision-making about their lives; and creates the right balance of rights, responsibilities and liabilities to enable people to lead and live good lives in the community, and to pursue their own life paths.

PREAMBLE

Given that a statutory framework must institute a paradigm shift in *appreciating and understanding* the law of legal capacity, a ‘preamble’ is needed to provide the necessary background and rationale for legislation. It should reference the

long-standing exclusion of people with disabilities from enjoying and exercising the right to legal capacity, how guardianship has undermined that right, the presumption that adults can exercise this right legally independently, the different ways in which people communicate and express their decisions, will or preferences, and the continuum of supports that adults may require to exercise their legal capacity.

INTERPRETATION

A statutory framework should lay out broad guidelines for interpretation, as well as key definitions, the purpose and principles which affirm the right to legal capacity and supports in decision making.

Reference to both human rights legislation which affirms the right to equality without discrimination and the UN *Convention on the Rights of Persons with Disabilities* (CRPD) should be identified as primary guidance for interpreting the statute.

DEFINITIONS

A statutory framework should define concepts and terms in ways that are compliant and consistent with the CRPD. As well, concepts related to decision-making supports, the different ways in which people communicate and make decisions, and the duty to accommodate in decision making should be defined in legislation.

PURPOSE AND PRINCIPLES

The right to equal recognition before the law, to the exercise and enjoyment of legal capacity and to supports for this purpose requires a clear statement of purpose outlining government obligations. Clear principles are needed to guide the many actors – adults, supporters, third parties to decision-making processes, government and community agencies – in ensuring that decision-making processes are fully inclusive, accommodating and supportive of all adults. Such principles should recognize that people may exercise their legal capacity in different ways, and ensure that people with disabilities are in no way restricted as a result of the types of supports they may require. At the same time, principles should make clear that supports cannot be imposed on people against their wishes, and that people should be presumed to be able to make their decisions legally independently – that is that they are able to understand and appreciate the nature and consequences of a decision on their own, with support and accommodations as needed.

ACCESS TO SUPPORT TO EXERCISE LEGAL CAPACITY

Article 12 makes clear that governments have an obligation to provide access to supports people may require to exercise their legal capacity. Legislation should take its guidance from Article 12.3 in particular in this regard, and provide for community-based delivery of supports which should include:

- Individual planning, service coordination and referral;
- Independent advocacy;
- Communication and interpretive assistance;
- Facilitating a supported decision making arrangement;
- Peer support
- Relationship-building assistance;
- Administrative assistance;
- Any other support or accommodation considered necessary to assist the adult in exercising control over his or her decisions, or to provide the adult with the conditions needed to develop or regain decision-making capabilities and to exercise his or her right to legal capacity;

The primary support some adults may require in decision making is another person who can provide individual planning support, brokerage or advocacy as requested by the adult, and the legislation should provide for a supports based on the Swedish system of a 'personal ombuds'. The personal ombuds is directly accountable to and directed by the adult, but provides advice and assistance to him or her as needed. This approach to support has largely been developed by people with psychosocial disabilities and their organizations, and in the Canadian context also draws upon the long-standing tradition of 'citizen advocacy'.

DUTY TO ACCOMMODATE IN DECISION-MAKING PROCESSES

The duty to accommodate adults in decision-making processes should be clearly defined and required under legislation. This would ensure that financial institutions, health care providers and other third parties to any decision meet their legal obligations to provide accommodations consistent with human rights laws, the *Charter of Rights and Freedoms* and the CRPD.

ESTABLISHING SUPPORTED DECISION MAKING ARRANGEMENTS

Legislation should provide at least two ways for adults to establish formalized supported decision-making arrangements, which involve an adult having access to other people to assist in decision making and be recognized in their role by third parties:

- An adult should be able to appoint a decision-making supporter or supporters and make an agreement with them to assist in decision-making for certain decisions or types of decisions.
- In situations where adults may not be able to clearly designate supporters to assist, their family or friends should be able to apply to become decision-making supporters where there is a demonstrated trusting relationship with the adult. The role of decision-making supporters in this case is to be guided by their best understanding of the adult's will or preferences over time, and to apply this understanding to executing particular decisions. In this way, the adult maintains control over decisions affecting his or her life. In such situations, individuals should be able to make application to a designated authority to be appointed for this purpose.

ESTABLISHING REPRESENTATIVE DECISION-MAKING ARRANGEMENTS

'Representative decision-making arrangements' should also be provided for which would involve appointment of a representative to make decisions on behalf of a person. Two main options should be provided:

- Where an adult appoints others through a prior Planning Document like an advance directive, Power of Attorney or Ulysses Agreement;
- Where a designated authority makes an appointment for a time-limited and very specific purpose, in those relatively few situations where there is no prior planning document and it is not possible to establish a supported decision-making arrangement. This would only be because an adult is not able to communicate in ways that any other person understands and the adult has no trusting relationships with others who can apply to be appointed as decision-making supporters.

MONITORS

Given that some people are at higher risk of neglect and abuse by others because of the nature of their disability, isolation, or other factors, some provision should be in place to enable 'monitors' of supported decision-making and representative decision-making arrangements to be appointed. An appointment should be made only on request by an adult or supporter or representative or where there are reasonable grounds to indicate that this safeguard is required to ensure the decision-making process with and around the adult maintains integrity in accordance with the purpose and principles of the legislation. A monitor would be independent and act to ensure supporters and representatives are fulfilling their statutory obligations.

DUTIES, POWERS AND LIABILITY OF DECISION-MAKING SUPPORTERS, REPRESENTATIVES, PERSONAL OMBUDS AND MONITORS

A statutory framework should clearly define the duties and responsibilities of decision-making supporter, representatives, personal ombuds and monitors, and the limits of their authority, including to:

- Act diligently, honestly and in good faith;
- Act for the sole benefit of the adult;
- Be guided by the values, beliefs, wishes, and cultural, spiritual and religious norms and traditions that an adult holds;
- Commit, to the greatest extent possible, to creating and maintaining a trusting relationship with the adult, and to establishing relationships with others who are involved with the adult with the purpose of enhancing the representative's personal knowledge and understanding of the adult;
- Commit to liaising with community resources to assist the adult in establishing a wider network of trusting and committed personal relationships;
- Involve supportive family members and friends, as indicated by the adult's will or preferences; and
- Act in accordance with all applicable legislation.

The legislation should protect decision-making supporters, representatives, personal ombuds and monitors from any financial or other liability provided they fulfil their duties in good faith.

PROCEDURES AND RULES GOVERNING THE CONTENT AND USE OF DECISION-MAKING ARRANGEMENTS

Matters to be included in supported and representative decision-making agreements should be set out in a statutory framework, along with the rules for making wills, the status of adults who are in a state of unconsciousness, and protection of third parties who enter contracts or agreements through supported decision-making processes.

RENEWING, CHANGING, REVOKING OR ENDING SUPPORTED OR REPRESENTATIVE DECISION-MAKING ARRANGEMENTS

A statutory framework should lay out the conditions and procedures under which decision-making arrangements could be renewed, modified or terminated, and by which decision-making supporters, representatives, personal ombuds or monitors may resign from their role in these arrangements.

A FIXED POINT OF RESPONSIBILITY WITHIN GOVERNMENT TO PROTECT AND PROMOTE THE RIGHT TO LEGAL CAPACITY

It is clear that enabling the paradigm shift that Article 12 obliges, requires that governments play a proactive role in promoting and protecting the right to legal capacity. Legislation must, therefore, define a fixed point of responsibility within government responsible for assisting people to develop decision-making arrangements and for authorizing appointments of decision-making supporters or representatives in those relatively few situations where the latter may be required. Such an office might merge its functions with, or be complementary to, an existing office. In any event, it would be mandated to promote and protect the right to legal capacity and to assist individuals as well as third parties to decisions – like financial institutions, health care providers, etc. – to meet their obligations to support and accommodate adults in decision-making processes. As well, an office of this nature could respond to questions or concerns about decision-making arrangements that are established under the legislation, and where abuse or neglect was suspected could work with the Adult Protection authority to investigate and address the concerns. Given its purpose to ensure the exercise of a fundamental human right, its authority should ensure independence of government, reporting to the legislature.

DISPUTES RESOLUTION TRIBUNAL

Protecting and promoting the right to legal capacity will undoubtedly give rise to a number of disputes – for example, about whether a person is getting the supports or accommodations they require, or if there is difference of opinion about whether a person can fully understand and appreciate the consequences of a decision on their own, or if decision-making supporters disagree about what a person's will or preferences are, or how they apply in the making of a particular decision. The expertise in questions of legal capacity which are germane to a growing group of adults, third parties, financial institutions, health care providers, and the legal profession justifies a dedicated board or tribunal which is of competent, independent and impartial authority. If a government has already established a board or tribunal with a similar mandate, these functions could be added to it.

RESPONDING TO ABUSE AND NEGLECT

The fixed point of responsibility within government to promote and protect the right to legal capacity must be distinct from and independent of the provincial/territorial adult protection authority, but act in concert with it as required. All abuse and neglect complaints received from any source must continue to be referred to the adult protection authority. However, the statutory

framework should provide that the adult protection authority has the obligation to involve the fixed point of responsibility in managing the investigation and outcome where matters of legal capacity and decision-making arrangements are a key factor. The role of the fixed point of responsibility should be to ensure the adult's right to legal capacity is enhanced to the greatest extent possible by assisting the adult protection authority to develop needed support relationships and arrange for support to exercise legal capacity as needed. The fixed point of responsibility should balance the government's duty to intervene and protect, with the obligation to enhance the supports required to assist a person in regaining their self-determination through appropriate supported or representative decision-making arrangements.

DESIGNATED COMMUNITY AGENCIES

In many communities, a number of generic or specialized community-based agencies already exist to provide disability-related supports. Some of these could be mandated under the statutory framework to assist people in creating the personal networks and providing other kinds of decision-making supports that people may need to exercise their legal capacity. New agencies, dedicated solely to this purpose, might also be required, depending on the community. As well, such agencies could assist in public promotion about the right to legal capacity, and could be resource centres to assist community members, financial institutions, and others develop their capacity to accommodate and support people in exercising their legal capacity.

III. A Sample Statutory Text

The following sample text puts into draft statutory language the essential elements of a statutory framework for promoting and protecting the right to legal capacity and decision-making supports presented in the preceding section. This is not exact language, and other statutory and regulatory provisions would be needed for full implementation. We present this sample text as a guide and a resource to assist civil society, governments and legislators in their own process of law reform in their respective jurisdictions. For the purposes of this sample text, we have named the fixed point of responsibility in government as the ‘Legal Capacity and Support Office’ and the disputes resolution tribunal as the ‘Legal Capacity Tribunal.’

Legal Capacity and Supported Decision Making Act

PREAMBLE

WHEREAS the rights to life, liberty and security are recognized as fundamental rights which can be fully realized only in the context of social and economic inclusion where all persons are recognized and equally valued as participating members of society; and where all adults are enabled to enjoy and exercise their right to legal capacity to make their own decisions with supports;

AND WHEREAS Canada has signed and ratified the United Nations *Convention on the Rights of Persons with Disabilities*, of which Article 12 recognizes that “States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law”; and requires that “States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life” and that “States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity”;

AND WHEREAS the fulfillment of these obligations may be seriously threatened by a person’s lack of access to supports and services to exercise these rights, and by failure of parties to accommodate adults with disabilities in decision-making processes;

AND RECOGNIZING that many persons are restricted in exercising or denied their right to legal capacity on the basis of their disability, perceived incapacity, historic disadvantage and negative stereotypes;

AND WHEREAS, despite prevailing assumptions of the beneficence of guardianship, the detrimental consequences of the added label of “incapable” on persons whose disability is of cognitive origin serve only to further diminish and even destroy the image and status of such persons as citizens of equal value in Canada’s diverse and inclusive society, and do so from the early age of majority;

AND RECOGNIZING that some adults only exercise their legal capacity in decision-making processes by virtue of the involvement of decision-making supporters who have reasonably interpreted the adult’s will and preferences on the basis of the adult’s form of communication;

AND RECOGNIZING that some adults, as a result of their particular intellectual, psychological, or sensory characteristics are able to communicate their will and preferences in ways that one or more other persons are able to reasonably interpret and apply in a specific decision-making situation, based on their personal knowledge of the adult;

AND WHEREAS it is recognized that where an adult requires a supporter(s) or representative(s) to assist him or her in decision making, including by reasonably interpreting and applying the adult’s will and preferences in a specific decision-making situation in order for the adult to exercise his or her legal capacity; the supporter(s) or representative(s) should be expected and encouraged to enhance the adult’s self-determination;

AND WHEREAS it is recognized that any support that is provided to an adult to exercise his or her legal capacity should be provided in a manner which respects the privacy and dignity of the adult and should be the least restrictive and least intrusive form of assistance that is appropriate in the circumstances;

AND WHEREAS the Lieutenant Governor in Council, in taking measures to promote and protect these rights, is subject to the *Canadian Charter of Rights and Freedoms*, the [Provincial/Territorial] *Human Rights Act*, and must have regard to the *International Covenant on Civil and Political Rights* and to the *United Nations Convention on the Rights of Persons with Disabilities* particularly with respect to those fundamental rights that are not to be limited or abridged;

NOW THEREFORE, Be it enacted by the Lieutenant-Governor and House of Assembly in Legislative Session convened, as follows:

PART 1 – INTERPRETATION AND APPLICATION

Short Title

1. This Act may be cited as the Legal Capacity and Supported Decision Making Act.

Interpretation

2. In interpreting and applying the legislation, regard shall be had to the principles expressed in the United Nations Convention on the Rights of Persons with Disabilities, and all other international human rights instruments to which Canada is signatory. The legislation is to be construed and applied in a manner that ensures that decisions or actions taken pursuant to the Act are consistent with the *Canadian Charter of Rights and Freedoms*, including its principles of equality and freedom from discrimination, and its right to life, liberty and security of the person;

Definitions

3. In this Act,

“accommodation” in a decision-making process means the provision of necessary and appropriate supports, support to exercise legal capacity, modifications and adjustments to ensure to persons with disabilities or communication difficulties enjoy and exercise their legal capacity on an equal basis with others, and applies to all parties in the decision-making process to the full extent as parties are legally obligated pursuant to the letter and spirit of human rights laws, the *Canadian Charter of Rights and Freedoms*, and the United Nations *Convention On The Rights Of Persons With Disabilities*;

“adult” means a person of the age of majority in whose name a decision is made, and for the purposes of this statute ‘adult’ may include minors, who in the context, are authorized by law as capable of making certain decisions pursuant to s. 4;

“best interpretation” means the interpretation an adult’s will and preferences that seems most reasonably justified in the circumstances, and for which decision-making supporters can provide a reasonable account of how this interpretation was arrived at;

“capacity” means:

- (1) that the understanding of the information relevant to the decision to be made and the appreciation of the reasonably foreseeable

consequences of such decision or lack of such decision, may rest either,

- (a) within the adult herself or himself, and with decision-making supports and accommodations as needed; or alternatively,
 - (b) within the understanding, appreciation and fiduciary duty of the person(s) duly appointed to support the adult in exercising his or her legal capacity; and
- (2) Where capacity falls within the purview of paragraph (1)(b) there shall be a requirement that the decision be,
- (a) made solely to and for the benefit of the adult; and
 - (b) guided by a support person(s)' best understanding and appreciation of the adult's preferences or will and how these are to be applied to a specific decision(s) where,
 - i. "best understanding and appreciation" means interpreting the adult's behaviour and/or communication in a present or previous situations as the expression of the adult's will or preferences and being able to provide a reasonable account of how this interpretation was arrived at;
 - ii. "applied to the specific decision(s)" means applying this interpretation to a specific decision-making situation as the basis for making a decision that will be understood by all parties as the decision of the adult;
 - iii. an adult's "preference" means an adult's greater liking for one alternative or another over others which can be, or has been, demonstrated by words or behaviour or both; and
 - iv. an adult's "will" means a general desire of the adult for a state of his or her affairs or being, which can be demonstrated by words or behaviour or both.

"Commissioner" means the person appointed as Commissioner of the Legal Capacity and Support Office;

"decisions" include, but are not limited to, personal care, health care, and property decisions;

"decision-making facilitator" means an adult who is able to act legally independently, whose role is created by a facilitated decision-making agreement pursuant to sections 15 and 16 and meets the conditions and duties of a decision-making facilitator pursuant to section 21;

“decision-making representative” means an adult who is able to act legally independently, represents the adult in decision making pursuant to sections 14 and meets the conditions and duties of a decision-making representative pursuant to section 20;

“decision-making supporter” means an adult who is able to act legally independently, whose role is created by a supported decision-making agreement pursuant to sections 11 or 12 and meets the conditions and duties of a decision-making supporter pursuant to section 17;

“designated agency” or “designated agencies” means an public or non-profit agency or agencies established, mandated, contracted and/or approved by the Minister to deliver services pursuant to section 8;

“facilitated decision-making arrangement” means an arrangement made pursuant to sections 15 and 16 of this Act;

“legal capacity” means the power and status to fully enjoy ordinary legal rights, and the right to act upon all such rights which includes engaging in a particular undertaking or transaction, to maintain a particular status or relationship with another individual and more in general to create, modify or extinguish legal relationships.

“legally independently” refers to an adult who exercises his or her legal capacity to make decisions without any legally recognized decision-making supporters or representatives, on the basis that he or she understands the information relevant to the decision to be made and the appreciation of the reasonably foreseeable consequences of such decision or lack of such decision, and who may do so with decision-making supports and accommodations as needed;

“Minister” means the Minister of _____ ;

“Office” means the Legal Capacity and Support Office;

“peer support” as defined by the regulations;

“personal ombud” means a person engaged by a designated agency to provide any form of support to exercise legal capacity;

“preference(s)” means an adult’s greater liking for one alternative or another over others which can be, or has been, demonstrated by words or behaviour or both;

“qualified person” as prescribed in the regulations;

“representative decision making arrangement” means an arrangement made pursuant to section 14 of this Act;

“signed” means

- (1) the usual signature of the adult, which may include any mark typically made by that person, or
- (2) a signature stamp, or
- (3) a signature on behalf of the adult if:
 - (a) the adult is physically incapable of signing,
 - (b) the adult is present, and
 - (c) the document to be signed on his or her behalf by another adult is witnessed by an adult (the witness) who makes a statement, which may be in a prescribed form, affirming his or her belief that that the signature is representative of the will and preferences of the adult in this circumstance;
- (4) a signature in any other form, electronic or otherwise, that may be necessary in exercising the duty to accommodate the adult;

“sole benefit of the adult” means the following factors are the basis upon which a decision is facilitated for an adult where a decision-making facilitator does not have sufficient information to arrive at a best interpretation of an adult’s will and preferences in the circumstances:

- (a) Whether making or not making the decision is likely to,
 - i. improve the adult’s condition or well-being,
 - ii. prevent the adult’s condition or well-being from deteriorating, or
 - iii. reduce the extent to which, or the rate at which, the adult’s condition or well-being is likely to deteriorate.
- (b) Whether the benefit the adult is expected to obtain from the proposed decision outweighs the risk of harm to him or her.
- (c) Whether another decision that would result in less restrictive or less intrusive measures for the adult would be as beneficial as the proposed decision.

“support to exercise legal capacity” means supports provided by designated agencies, decision-making supporters, decision-making representatives, a personal ombud or other people or entities and includes:

- (a) individual planning, service coordination and referral;
- (b) independent advocacy;
- (c) communication and interpretive assistance;
- (d) facilitating a supported decision making arrangement;
- (e) peer support;

- (f) relationship-building assistance;
- (g) administrative assistance;
- (h) any other support or accommodation considered necessary to assist the adult in exercising control over his or her decisions, or to provide the adult with the conditions needed to develop or regain decision-making capabilities and to exercise his or her right to legal capacity;
- (i) any other good or service as may be prescribed by the regulations.

“supported decision-making arrangement” means an agreement or other arrangement made pursuant to sections 12 or 13 of this Act;

“third party” means any person involved in a decision-making process, other than the adult, decision-making supporter, or decision-making representative;

“Tribunal” means the Legal Capacity Tribunal;

“will”, when used to refer to an adult’s will means a general desire of the adult for a state of his or her affairs or being, which can be demonstrated by words or behaviour or both, and expressed contemporaneously or through time;

Application

4. This Act applies to:
- (1) All persons of the age of majority, hereafter identified as ‘adults’, without discrimination, and with respect to all areas of personal decision making; and
 - (2) Minors who are authorized by law as capable of making certain decisions.

Purpose

5. The purpose of this Act is to ensure that the Government of [Province/Territory] and entities it regulates with respect to the exercise of legal capacity, fully comply with the obligations and spirit of the United Nations *Convention on the Rights of Persons with Disabilities* by ensuring that:
- (a) adults have access to supports and accommodations they require to exercise their right to legal capacity, and in ways that maximize their self-determination and autonomy;
 - (b) adults who communicate their will and preferences in ways that only one or a small number of persons who have personal

- knowledge of the adult are able to reasonably interpret and apply in a particular decision-making situation, are not denied their right to legal capacity;
- (c) third parties fulfil their duties to accommodate the needs of an adult in decision-making processes;
 - (d) third parties in a decision-making process can rely on decisions that are made through a supported decision making process;
 - (e) disputes related to provision of supports and accommodations to exercise legal capacity are resolved through fair and just processes;
 - (f) adults and their family members can make effective plans for their future;
 - (g) an adult's decisions are safeguarded in accordance with international human rights law and such safeguards ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body and are proportional to the degree to which such measures affect the person's rights and interests;
 - (h) steps are taken to enhance public awareness and understanding of the right to legal capacity without discrimination on the basis of disability and of the legal duties relating to supports and accommodations.

Principles

6. The guiding principles of this *Act* are:

- (a) Adults have a right to direct decisions affecting their live;
- (b) Adults naturally make or direct their decisions interdependently, meaning they draw on information, support and assistance from other;
- (c) Adults, with or without support, are presumed to be able to make decisions about their lives legally independently;
- (d) Adults are entitled to communicate by any means that enables them to be understood, and an adult's way of communicating with others is not grounds for deciding that he or she is incapable of understanding or appreciating anything related to making decisions;

- (e) An adult may exercise his or her legal capacity with supports for this purpose, or through legal representatives chosen by the adult to make some or all decisions on his or her behalf;
- (f) Adults may exercise their legal capacity legally independently with supports and accommodations as they choose;
- (g) An adult's use of supports to exercise legal capacity cannot be used as a reason to require an adult to have a decision-making supporter or representative appointed;
- (h) An adult with a disability enjoys a right to accommodation in decision-making processes, and other parties to the decision-making process are legally obligated to accommodate the adult to the full extent pursuant to the letter and spirit of human rights laws, the *Canadian Charter of Rights and Freedoms*, and the United Nations *Convention On The Rights Of Persons With Disabilities*;
- (i) All parties to decision making processes have the obligation to ensure the most autonomy-enhancing decision-making arrangement and supports are in place;
- (j) Adults who exercise legal capacity are responsible for their decisions, and liability for the outcome of their decisions does not extend to their personal ombud, or decision-making supporters, representatives or facilitators provided that the latter have met their legislated duties.

PART 2 – ACCESS TO SUPPORT TO EXERCISE LEGAL CAPACITY INCLUDING A PERSONAL OMBUD

- 7.** The Minister shall take appropriate measures to provide supports to:
 - (1) adults who may require such support in exercising their legal capacity;
 - (2) decision-making supporters, representatives, facilitators and personal ombuds who may require such support to assist adults in exercising their legal capacity.
- 8.** In meeting the obligations pursuant to section 7, the Minister shall make provision for delivery of community-based services to ensure that:
 - (1) adults can access:
 - (a) as they may require, support to exercise legal capacity;
 - (b) the assistance of a personal ombud;
 - (c) assistance in developing supported decision-making or representative decision-making arrangements;
 - (2) decision-making supporters, representatives, facilitators and personal ombuds receive support they may require in supporting adults in exercising their legal capacity.
- 9.** In order to make provision for services pursuant to section 8, the Minister shall within one year of the coming into force of this Act, develop a plan, policy framework, arrangements and funding mechanisms for the establishment of designated agencies to deliver to adults supports to exercise legal capacity.
- 10.** The plan and policy framework made pursuant to section 9 shall be developed through active participation and engagement of people with disabilities and their representative organizations and community service providers, and shall:
 - (1) Define eligibility criteria for services pursuant to section 8;
 - (2) Provide for the Minister to:
 - (a) accept applications for funding and/or delivery of supports to exercise legal capacity on behalf of eligible adults, from:
 - i. the adult, a decision-making supporter, representative or facilitator acting on his or her behalf;
 - ii. a designated community agency;
 - iii. a court-appointed substitute decision maker of an adult;
 - iv. the Office; or
 - v. the Adult Protection Authority;
 - (b) within a period prescribed in the regulations, to authorize the provision of supports to exercise legal capacity through a designated agency, or by other means, unless:

- i. the Minister is of the opinion that the adult can independently make decisions without such supports, or does not otherwise require them, or that some alternative type of support would be sufficient;
 - ii. the Minister has clear and convincing evidence that the adult's legal capacity would not be enhanced by the provision of such supports.
- (c) ensure he or she is advised of any unmet need for services pursuant to section 8;
- (d) take any action necessary to ensure that services are being delivered pursuant to this Act and prescribed regulations;
- (e) develop capacity of agencies and any other person to deliver to adults supports to exercise legal capacity;
- (3) Provide for designated agencies to:
 - (a) deliver services as approved, funded and authorized by the Minister;
 - (b) arrange for personal ombuds persons to be available to assist adults in exercising their legal capacity;
 - (c) advise the Minister of unmet needs for services;
- (4) Provide for the Office to have the capacity and resources it requires to fulfill its functions consistent with this Act; and
- (5) Provide for any other matters as identified through the consultation and planning process which are relevant to ensuring adults have access to the community-based supports required to exercise and enjoy their legal capacity on an equal basis with others, and to enabling designated agencies to fulfill this mandate.

PART 3 – DUTY TO ACCOMMODATE IN DECISION-MAKING PROCESSES

11. The duty to accommodate applies to all parties in the decision-making process to the full extent as parties are legally obligated pursuant to the letter and spirit of human rights laws, the *Canadian Charter of Rights and Freedoms*, and the United Nations *Convention On The Rights Of Persons With Disabilities*, and to this end:
- (1) The Minister shall develop and issue guidelines in relation to the duty to accommodate in decision-making processes;
 - (2) In developing and issuing guidelines pursuant to section 10(1) the Minister shall invite the [relevant] Human Rights Commission to participate in the development and issuance of guidelines, and shall ensure that civil society organizations, in particular of those representing people with disabilities and older adults are fully involved and participate in their development;
 - (3) Members of the public, and any public or private entity, may seek assistance from the Office about their duties to accommodate in decision-making processes;
 - (4) Any adult, decision-making supporter or representative, personal ombud or monitor under a supported or representative decision-making arrangement may seek advice and assistance from the Office where they suspect a third party is not meeting their duty to accommodate pursuant to Part 3.

PART 4 — ESTABLISHING SUPPORTED DECISION-MAKING, REPRESENTATIVE OR FACILITATED DECISION-MAKING ARRANGEMENTS

Establishing a supported decision-making arrangement through an adult's appointment of decision-making supporters

12.

- (1) A valid supported decision making arrangement may be established by agreement between the adult and the decision-making supporter(s) where:
 - (a) the adult demonstrates his or her desire for the decision-making supporter to provide support to exercise his or her legal capacity;
 - (b) the supporter(s) has a proven, trusting relationship with the adult;
 - (c) the supporter(s) is committed to the adult's well-being; and
 - (d) the supporter (s) is able to communicate with the adult and reasonably interpret his or her will and preferences for others.
- (2) Such an agreement shall:
 - (a) be in writing;
 - (b) be signed by the adult and decision-making supporters, and witnessed by two adults who are not involved in the arrangement;
 - (c) be notarized by a notary public;
 - (d) include a statement signed by the supporters stating that they have read and understand the agreement, understand that they are not to act as substitute decision makers for the adult to whom they are providing support to exercise legal capacity, and fully understand their roles and responsibilities pursuant to section 18;
 - (e) adhere to the requirements of Part 6.
- (3) Under this section, an adult may establish different agreements with different decision-making supporters to provide support to exercise legal capacity with respect to different decisions or types of decisions the adult wishes to make, or appoint different decision-making supporters to assist with different decisions or types of decisions covered by an agreement.

Establishing a supported decision-making arrangement through application to be appointed as decision-making supporters

13.

- (1) A valid supported decision-making arrangement may be made by Application in a prescribed form to the Office by one or more individuals who wish to be appointed as decision-making supporter(s);
 - (a) does not have another decision-making arrangement in place;
- (2) An application made pursuant to section 13 must include information providing evidence that applicants have:
 - (a) a proven trusting relationship with the adult;
 - (b) the ability to understand the adult's form of communication and reasonably interpret their will and preferences and apply that interpretation to specific decision-making situations;
 - (c) a commitment to the adult's well-being and to supporting them in decision making on basis of their reasonable interpretation of the adult's will and preferences, and to acting on that interpretation;
- (3) An application shall be in a form determined by the Office and outline the terms of the supported decision-making arrangement, including:
 - (a) areas of decision making in which supporters will provide support and how decisions will be made;
 - (b) whether, and in what circumstances, support to exercise legal capacity will be provided jointly and severally, or jointly;
 - (c) when, or under what circumstances, the arrangement takes effect, is to be updated and renewed, and can be terminated;
 - (d) any other terms identified by the adult or applicants;
- (4) An application shall include signed statements by each applicant seeking to be appointed as a decision-making supporter, and by any other individual in support of the application. These statements shall address the matters set out in subsection (2);
- (5) An application must include names and contact information of three individuals who are not the applicants and who, taken together, have knowledge about whether the applicant(s) satisfy all the criteria in subsection (2), and can provide references in respect of the application;
- (6) More than one application may be made to be a decision-making supporter for the same adult, provided that each application is to provide support to exercise legal capacity with respect to different decisions or types of decisions (for example, some supporters who are not to be named as beneficiaries in an adult's will may apply to

provide support to the adult for the purpose of making the adult's will pursuant to section 29);

- (7) The Office shall not approve an application under this section unless:
 - (a) it is satisfied that the adult does not object to the arrangement;
 - (b) it is satisfied that no other valid supported decision-making arrangement is already in place for the adult with respect to the decisions or types of decisions that are to fall under the agreement;
 - (c) that the adult is not able to act legally independently with supports to exercise legal capacity and is not able to make an appointment pursuant to section 12;
 - (d) the individual(s) applying to be decision-making supporter(s) consults with one of the following about the making of such a statement,
 - i. a member of Law Society of [Province/Territory];
 - ii. anyone who belongs to a prescribed class of persons; and
 - (e) the person who is consulted completes a consultation certificate in the prescribed form;
- (8) Prior to approval of any proposed arrangement under section 13:
 - (a) The applicant or the Office shall serve notice on all of the following persons who are known, by ordinary mail sent to the person's last known address:
 - i. the adult;
 - ii. the spouse or partner of the adult;
 - iii. the adult's children who are at least 16 years old
 - iv. the adult's parents;
 - v. the adult's siblings who have attained the age of 16;
 - vi. agencies or individuals providing support services to the adult; and
 - vii. persons who have legal authority over the adult under other statutory provisions;
 - (b) Such notice shall indicate that any person may provide the Office with information relevant to the application;
 - (c) Prior to considering and application, the Office shall wait 15 days from the time notices are sent, or an abridged amount of time if the matter requiring a supported decision-making arrangement is of an urgent nature;
- (9) The Office shall establish a timely review process of applications, including:

- (a) Making in-person with the adult and the applicants in a convenient and familiar environment and with some or all of the individuals providing references;
 - (b) Review of the information contained in the written materials;
 - (c) Provision for an expedited review process depending on the urgency of the situation.
- (10) As a result of the review process, the Office may:
 - (a) Approve the application as submitted;
 - (b) Suggest amendments necessary for its approval; or
 - (c) Deny the application;
- (11) Where the application is denied applicants may appeal a decision by the Office, to the Tribunal.

Establishing a representative decision making arrangement

This section could consolidate provisions for Powers of Attorney, advance directives and other advance planning tools authorized under other statutes.

14.

A valid Representative Decision Making Arrangement can be established to authorize a decision-making representative of an adult to make any or all decisions on behalf of the adult, through a Planning Document which:

- (1) is authorized by an adult who
 - (a) with support to exercise legal capacity and accommodations as may be required, understands and appreciates the nature and consequences of making such an arrangement; including
 - (b) an adult with a supported decision making arrangement;
- (2) identifies the triggering event(s), upon which the adult authorizes an individual to make decisions for the adult in areas identified in the document; and
- (3) identifies decisions or types of decisions to be made by the individual and any guidelines for decision making.
- (4) Where an adult seeks to establish a representative decision-making arrangement pursuant to section 1(b), application must be made to the Tribunal to authorize the arrangement.
- (5) In considering an application pursuant to subsection (4), the Tribunal must be satisfied that the adult is expressing his or her will and preferences to establish such an arrangement and has demonstrated at least some appreciation and understanding, by him or herself, of the nature and consequences of the decision.

Establishing a facilitated decision-making arrangement

15.

- (1) A valid Facilitated Decision-Making Arrangement can be established to authorize a decision-making facilitator to facilitate the making of specific decisions on behalf of the adult through an appointment by the Tribunal on application from the Office or any person, where:
 - (a) the adult is not able to act legally independently even with supports to exercise legal capacity;
 - (b) a valid supported or representative decision-making arrangement is not already in place for the adult which would cover the decision(s) to be made in the circumstance;
 - (c) no decision-making supporters are available to seek appointment for a supported decision-making arrangement pursuant to section 13, or have been approved as such by the Office;
 - (d) there is no person willing or able to act as a decision-making supporter who can understand the adult's will and preferences; or
 - (e) the adult requires a decision or decisions to be made, and appointment of the facilitator is reasonable in the circumstances;
 - (f) the Office or designated agencies have made all reasonable efforts in the circumstances to support an adult to exercise his or her legal capacity, including through the support of a personal ombud where that would be feasible; and
 - (g) the Office presents evidence to the Tribunal that the criteria in subsections (a)-(f) have been met.
- (2) If the application is made by any person, the Office shall be named as a party to the proceeding for the purpose of providing evidence as to whether subsections (d) and (e) are met.

16. Where appointments are made pursuant to section 15:

- (1) The Tribunal shall,
 - (a) be satisfied that at the time of the application the criteria under section 15 are met;
 - (b) acquire any additional evidence as it may deem necessary from a qualified person, as defined in regulations to this Act, that the adult meets the criteria in section 15;
 - (c) appoint a decision-making facilitator to facilitate the making of needed decisions in the immediate and short term;
 - (d) review any facilitated decision-making arrangement established under this section, within a period of one year, to determine if it

- is still required, or if it can be replaced by any other arrangement that better maximizes the adult's autonomy;
- (e) specify a time-limited period for which facilitation will be authorized, and for which particular decision, decisions or types of decisions, and any parameters or limitations on the authority of the facilitator;
 - (f) take into account, in authorizing a person to act as a facilitator,
 - i. the nature and closeness of the relationship of the adult to the person to be appointed as a facilitator;
 - ii. the proximity of the person to be appointed as a facilitator to the adult; and
 - iii. any known wishes of the adult regarding who he/she would choose as a facilitator; and
 - iv. the ability of the person to meet their duties as a facilitator.
- (2) The Tribunal may issue an order
- (a) To the facilitator setting out the terms for the facilitator's duties including:
 - i. decisions to be covered
 - ii. the process for decision making, including any other parties to be included in the process
 - iii. the parameters for decision making, including any exclusions of particular options based on the adult's religion, gender, or any other factor the Tribunal considers relevant
 - iv. any other matters as determined by the Tribunal;
 - (b) to the Office to
 - i. identify any support to exercise legal capacity the adult may require and arrange for or apply to the Minister to authorize such support pursuant to any arrangements in accordance with section 8;
 - ii. take reasonable steps to ensure development of longer-term decision-making relationships for the adult;
 - iii. ensure the decision-making facilitator has access to education to promote decision making assistance that optimizes an adult's opportunity to direct decision making;
 - iv. as soon as reasonably possible to take steps to establish a supported decision-making arrangement, if it is determined that this would most maximize the person's decision-making autonomy; or

- v. act as facilitator of last resort, where no other person is available who meets the criteria of subsection (1)(f) and where all other criteria for appointing a facilitator have been met;
- (3) At any time after the appointment of the Office as facilitator of last resort, a person can apply to the Tribunal to become a decision-making supporter pursuant to section 12.

Appointment of monitors

17. Persons, who are not decision-making supporters, representatives or facilitators or in a conflict of interest, may be appointed to monitor a supported, representative or facilitated decision-making arrangement made pursuant to sections 12, 13, 14 or 15 and 16 and to fulfil the duties specified in section 21. In order to maximize the adult's autonomy, the Office or Tribunal may not require appointment of monitors for arrangements with a personal ombud.
- (1) Monitors may be appointed:
 - (a) by the Office on request by an adult, a decision-making supporter, representative or other interested person;
 - (b) by the Office to replace a monitor named in a supported, representative or facilitated decision-making arrangement if the named monitor is unsuitable or is no longer able to act, or has ceased to act, as monitor; or
 - (c) by the Tribunal, pursuant to subsection 42(1);
 - (2) To be named as a monitor in a supported, representative or facilitated decision-making agreement, the proposed monitor must:
 - (a) be able to act legally independently;
 - (b) be willing and able to perform the duties and to exercise the powers of a monitor as defined in sections 22 and 23;
 - (c) complete a monitor's certificate in the prescribed form.

PART 5 — DUTIES, POWERS AND LIABILITY OF DECISION-MAKING SUPPORTERS AND REPRESENTATIVES, PERSONAL OMBUD AND MONITORS

Duties of decision-making supporters

18. Subject to all applicable legislation, decision-making supporters appointed under this Act have the duty to:

- (a) Act diligently, honestly and in good faith, and in accordance the principles of this Act set out in section 6;
- (b) Be guided by the will and preferences of the adult;
- (c) Be guided by the values, beliefs, wishes, and cultural, spiritual and religious norms and traditions that an adult holds;
- (d) Despite ss. (b) and (c), act in a manner which respects the adult's dignity of risk, without placing him or her in grave and imminent risk of a situation of serious adverse effects or without failing to address a situation of serious adverse effects;
- (e) Invest in and maintain a personal relationship of trust and connection with the adult;
- (f) Act in accordance with all laws and legislation;
- (g) Act in accordance with any relevant agreements or Tribunal orders;
- (h) Keep personal information about the adult, and his/her affairs, confidential;
- (i) Keep records in relation to all aspects of their role;
- (j) Treat the adult in all respects as a party to the agreement;
- (k) Involve supportive family members and friends, as indicated by the adult's will and preferences;
- (l) Be accountable solely to the adult and not to health care, social services or any other authority or person;

Duties of personal ombud

19. Subject to all applicable legislation, a personal ombud has the duty to:

- (a) Act diligently, honestly and in good faith, and in accordance the principles of this Act set out in section 6;
- (b) Be guided by the will and preferences of the adult;
- (c) Be guided by the values, beliefs, wishes, and cultural, spiritual and religious norms and traditions that an adult holds;
- (d) Despite ss. (b) and (c), act in a manner which respects the adult's dignity of risk, without placing him or her in grave and imminent

- risk of a situation of serious adverse effects or without failing to address a situation of serious adverse effects;
- (e) Invest in and maintain a personal relationship of trust and connection with the person;
 - (f) Act in accordance with all laws and legislation;
 - (g) Act in accordance with any relevant agreements or Tribunal orders;
 - (h) Keep personal information about the adult, and his/her affairs, confidential;
 - (i) Involve supportive family members and friends, as indicated by the adult's will and preferences;
 - (j) Be accountable solely to the adult and not to health care, social services or any other authority or person.

Duties of decision-making representatives

20. Subject to all applicable legislation, decision-making representatives appointed under this *Act* have the duty to:

- (a) Act diligently, honestly and in good faith, and in accordance the principles of this Act set out in section 6, and in particular with any directions provided by the adult prior to the decision-making arrangement being established;
- (b) Be guided by the will and preferences of the adult as expressed under the arrangement;
- (c) Be guided by the values, beliefs, wishes, and cultural, spiritual and religious norms and traditions that an adult has held, and holds;
- (d) Despite ss. (b) and (c), act in a manner which respects the adult's dignity of risk, without placing him or her in grave and imminent risk of a situation of serious adverse effects or without failing to address a situation of serious adverse effects;
- (e) Commit, to the greatest extent possible, to creating and maintaining a trusting relationship with the adult, and to establishing relationships with others who are involved with the person with the purpose of enhancing the representative's personal knowledge and understanding of the adult;
- (f) Commit to liaising with community resources to assist the adult in establishing a wider network of trusting and committed personal relationships
- (g) Act in accordance with any relevant agreements or Tribunal orders;

- (h) Keep personal information about the adult, and his/her affairs, confidential;
- (i) Keep records in relation to all aspects of their role;
- (j) Involve supportive family members and friends, as indicated by the adult's will and preferences;
- (k) Be accountable solely to the adult and not to health care, social services or any other authority or person;

Duties of Decision-Making Facilitators

21. Subject to all applicable legislation, decision-making facilitators appointed under this *Act* have the duty to:

- (a) Act diligently, honestly and in good faith, and in accordance the principles of this Act set out in section 6;
- (b) Take reasonable efforts to learn about the values, beliefs, wishes, and cultural, spiritual and religious norms and traditions that an adult holds;
- (c) Be guided in facilitating decision making by the facilitator's best interpretation of a person's will and preferences as previously and currently expressed to the greatest extent that these can be determined, and where these cannot be determined in the circumstances, be guided by what is reasonably determined to be a decision for the sole benefit of the adult;
- (d) Despite ss. (b) and (c), act in a manner which respects the adult's dignity of risk, without placing him or her in grave and imminent risk of a situation of serious adverse effects or without failing to address a situation of serious adverse effects;
- (e) Commit, to the greatest extent possible, to creating and maintaining a trusting relationship with the adult, and to establishing relationships with others who are involved with the person with the purpose of enhancing the representative's personal knowledge and understanding of the adult;
- (f) Commit to liaising with community resources to assist the adult in establishing a wider network of trusting and committed personal relationships
- (g) Act in accordance with any relevant agreements or Tribunal orders;
- (h) Keep personal information about the adult, and his/her affairs, confidential;
- (i) Keep records in relation to all aspects of their role;

- (j) Involve supportive family members and friends, as indicated by the adult's will and preferences;
- (k) Be accountable solely to the adult and not to health care, social services or any other authority or person;

Duties of monitors

22. Subject to all applicable legislation, monitors appointed under the provisions of this *Act* have a duty to:

- (a) Act diligently, honestly and in good faith, and in accordance the principles of this Act set out in section 6;
 - (b) Respect the roles and relationships of decision-making supporters or representatives with respect to the adult they are supporting or representing in decision making;
 - (c) Abide by the values, beliefs, wishes, and cultural, spiritual and religious norms and traditions that an adult holds;
 - (d) In fulfilling the monitoring role specified for them under any particular supported decision making or representative decision making arrangement, carry out their activities with full respect for the duties of decision-making supporters or representatives under that arrangement;
 - (e) Act in accordance with any relevant agreements or Administrative Tribunal orders;
 - (f) Keep personal information about the adult, and his/her affairs, confidential;
 - (g) Keep records in relation to all aspects of their role;
 - (h) Exercise the care, diligence and skill of a reasonably prudent person;
 - (i) Be accountable solely to the adult and not to health care, social services or any other authority or person;
 - (j) Fulfil any other duties as mandated by the Office;
- (2) If after taking steps under section 22 the monitor still has reason to believe the supporter or representative is not complying with their duties and reasonable requests of the monitor, the monitor shall:
- (a) notify the adult, the decision-making supporter or representative and all other decision-making supporters or representatives of the monitor's reason(s) for the belief;
 - (b) promptly inform the Office of his or her concerns pursuant to section 43.

Powers of monitors

- 23.** A monitor named by or appointed for an adult has the following powers must make reasonable efforts to determine whether a decision-making supporter or representative of the adult is complying with their duties, and has the following powers for this purpose:
- (1) At any reasonable time, the monitor may visit and speak with the adult.
 - (2) Anyone having custody or control of the adult shall not hinder the monitor from visiting or speaking with the adult.
 - (3) If the monitor has reason to believe that a decision-making supporter or representative is not complying with their duties, the monitor may require the decision-making supporter or representative to:
 - (a) produce accounts and other records required to be kept under this Act, and
 - (b) report to the monitor on the matters specified by the monitor;

Rights of decision-making supporters, representatives and facilitators to information

- 24.** Notwithstanding any provisions of privacy legislation,
- (1) A decision-making supporter, representative or facilitator of an adult has the right to all information and documents to which the adult is entitled and that relate to the supporter's or representative's area of authority under the relevant agreement or arrangement;
 - (2) A person who has custody or control of any information or document referred to in subsection (1) shall, at the supporter(s)'s, representative(s)'s or facilitator's request, disclose that information to the decision-making supporter or representative and produce that document for inspection and copying by them;
 - (3) This section is subject to any restriction in the supported, representative or facilitated decision-making agreement, but the section overrides:
 - (a) any claim of confidentiality or privilege, except a claim based on solicitor-client privilege; and
 - (b) any restriction in an enactment or the common law about the disclosure or confidentiality of information, except a restriction made pursuant to section 51 (1) of the *Canada Evidence Act*;
 - (4) The provisions of this section do not apply to personal ombud;

Liability of decision-making supporters and representatives, and personal ombud

25. A decision-making supporter, representative, facilitator or personal ombud is not liable for injury to or death of the adult or for financial damage or loss to the adult if the decision-making supporter or representative or personal ombud complies with their legislated duties as specified in this Act.

Liability of monitors

26. A monitor is not liable for any act or failure to act of a decision-making supporter or representative if the monitor acts in accordance with their legislated duties as specified in this Act.

PART 6 – PROCEDURES AND RULES GOVERNING THE CONTENT AND USE OF DECISION-MAKING ARRANGEMENTS

Contents of supported decision-making agreements

27.

- (1) A supported decision-making agreement made pursuant to sections 12 or 13 shall include:
 - (a) a description of the nature of the adult's difficulty in making or communicating decisions on their own, and the unique ways they express their will and preferences;
 - (b) the name of at least one decision-making supporter;
 - (c) a description of the types of decisions in respect of which the decision-making supporter is authorized to assist; and
 - (d) a description of the types of decisions, if any, in respect of which the decision-making supporter is not authorized to assist; and
- (2) Such an agreement may:
 - (a) designate more than one decision-making supporter;
 - (b) authorize each to assist with respect to different types of decisions; and
 - (c) provide for an alternate to act in the place of a decision-making supporter in such circumstances as may be specified in the agreement; and
- (3) Where more than one decision-making supporter is designated to assist with respect to the same type of decision, the agreement shall indicate whether they are to act jointly, or jointly and severally; or where it does not so indicate, the decision-making supporters shall be deemed to be designated to act jointly.

Decisions which may fundamentally affect personal integrity or human dignity for adults with a supported or facilitated decision-making arrangement

28.

- (1) Where decisions which may fundamentally affect the adult's personal integrity or human dignity are being considered for adults in a supported or facilitated decision-making arrangement, including:
 - (a) sterilization that is not medically necessary to protect the adult's health;
 - (b) removal of tissue from the adult's living body:
 - i. for implantation in the body of another living person pursuant to the (relevant Human Tissue and Organ Donation) Act; or

- ii. for medical education or research purposes;
- (c) participation by the adult in research or experimental activities, if the participation offers little or no potential benefit to the adult;
- (d) despite any objection of the adult, to restrain, move or manage the adult and authorize another person to do these things, if necessary to provide personal care or health care to the adult;
- (e) decisions which are likely to place the adult in grave and imminent risk of a situation of serious adverse effects; or
- (f) any other matter prescribed in the regulations;
- (2) decision-making supporters or facilitators or the adult must apply to the Tribunal for review and authorization of the decision prior to its execution;
- (3) In approving any such applications, the Tribunal must be satisfied that:
 - (a) the adult is expressing his or her will and preferences specific to that decision and has demonstrated at least some appreciation and understanding, by him or herself, of the nature and consequences of the decision;
 - (b) where there appears conflict between the adult's contemporaneously expressed preferences, and a decision-making supporter's or facilitator's assessment of the adult's previously expressed longer-term will, that:
 - i. the adult's expressed preferences cohere with a reasonable understanding of the adult's longer-term will, and reasonably correspond to the current context; and
 - ii. the decision-making supporters or facilitator have provided reasonable evidence that the adult's previously expressed longer-term will would require not abiding by the adult's contemporaneously expressed preferences.
 - (c) in the case of an application for the purposes of subsection 1(d), the decision would be for the sole the benefit of the adult.
- (4) Where the Tribunal makes an order pursuant to subsection (3) that conflicts with the adult's contemporaneously expressed preferences, such an order shall not be deemed to be a decision of the adult.

Making and revising a will within a supported decision making arrangement

- 29.** An adult who requires a supported decision-making arrangement may make a will through an arrangement, established under sections 12 or 13, with decision-making supporters who are not named as beneficiaries in the will,

or whose immediate family members (spouse, children, etc.) are not named as beneficiaries.

Making and revising a will within a facilitated decision making arrangement

30. An adult who is in a facilitated decision-making arrangement may not make a will while in that status.

Adults with a supported decision-making agreement who are in a state of unconsciousness

31. Supported decision-making arrangements established prior to an adult being in a state of unconsciousness shall continue to apply to decisions taken during the state of unconsciousness that are covered under the supported decision-making agreement, and provided that decision-making supporters continue to meet their obligations and duties under this Act.

Contents of representative decision-making agreements

32. In a representative decision-making agreement made pursuant to section 14, an adult may authorize his or her representative to:
- (1) do anything that the representative considers necessary in relation to the property, personal care or health care of the adult; or
 - (2) do one or more things in relation to the property, personal care or health care of the adult, including any of the following:
 - (a) decide where the adult is to live and with whom, including whether the adult should live in a care facility;
 - (b) routine management of the adult's financial affairs;
 - (c) the making of investments;
 - (d) obtaining legal services for the adult and instructing counsel to commence proceedings, except divorce proceedings, or to continue, compromise, defend or settle any legal proceedings on the adult's behalf;
 - (e) decide whether the adult should participate in any educational, social, vocational or other activity;
 - (f) decide whether the adult should have contact or associate with another person;
 - (g) decide whether the adult should apply for any licence, permit, approval or other authorization required by law for the performance of an activity;
 - (h) make day-to-day decisions on behalf of the adult, including decisions about the diet or dress of the adult;

- (i) give or refuse consent to health care for the adult, including giving or refusing consent, in the circumstances specified in the agreement, to specified kinds of health care, even though the adult refuses to give consent at the time the health care is provided;
- (3) Unless expressly provided for in a representative agreement made pursuant to sections 14, a representative shall not:
 - (a) give or refuse consent on the adult's behalf to any type of health care;
 - (b) make arrangements for the temporary care and education of the adult's minor children, or any other persons who are cared for or supported by the adult; or
 - (c) interfere with the adult's religious practices;
- (4) If a representative is authorized under a representative decision-making agreement to give or refuse consent to health care for the adult, the representative may give or refuse consent to health care necessary to preserve life.

Decisions which may fundamentally affect personal integrity and human dignity for adults with a representative decision-making agreement

- 33.** Representatives shall not make any decisions that fundamentally affect personal integrity and human dignity of the adult unless authorized in a representative decision-making agreement made by the adult, and in particular, with clear instructions that enable the representative(s) to make decisions for the adult in the following matters:
- (a) sterilization that is not medically necessary to protect the adult's health;
 - (b) removal of tissue from the adult's living body:
 - i. for implantation in the body of another living person pursuant to the (relevant Human Tissue and Organ Donation) Act; or
 - ii. for medical education or research purposes;
 - (c) psychiatric treatments which fundamentally affect the mental or physical integrity of the adult (for example, ECT);
 - (d) participation by the adult in research or experimental activities, if the participation offers little or no potential benefit to the adult;
 - (e) despite any objection of the adult, restrain, move or manage the adult and authorize another person to do these things, if necessary to provide personal care or health care to the adult; or
 - (f) any other matter prescribed in the regulations;

34. A provision in a representative decision-making agreement that authorizes a representative to do anything described in section 33 is invalid unless the adult authorizing the representative consults with one of the following about the provision:
- (1) a member of the Law Society; or
 - (2) anyone who belongs to a prescribed class of persons; and
 - (3) the person who is consulted completes a consultation certificate in the prescribed form;

Making and revising a will within a representative decision-making arrangement

35. No adult with a representative decision-making arrangement in place that covers property shall be able to make a will as long as this arrangement is activated.

Health care decisions

The provisions in this section may have implications for existing Mental Health, Health Care Directives or Health Care Consent legislation.

36.

- (1) Except as otherwise provided for under provisions for emergency health care treatment, a health care provider shall not administer any treatment, including treatments for mental health purposes without free and informed consent:
 - (a) of an adult acting legally independently, with supports and accommodations as required;
 - (b) as communicated through a supported decision-making arrangement where an adult has such an arrangement in place; or
 - (c) of an adult's representative as appointed under a representative decision-making arrangement authorized pursuant to this Act, and which covers the health care decision(s) in the circumstances.
- (2) Where an adult has a supported, representative or facilitated decision-making arrangement in place that covers a health care treatment decision, the terms of that arrangement shall apply to health care decision making, even where the adult has been admitted to a psychiatric facility for assessment and/or treatment.
- (3) A health care provider may raise concerns about a health care decision made through a supported, representative or facilitated decision-making agreement by applying to the Tribunal for an order with respect to the decision.

- (4) In making an order pursuant to an application made under s. 36(3), the Tribunal shall assess:
 - (a) whether the decision is consistent with the terms of any existing supported, representative or facilitated decision-making arrangement; and
 - (b) whether acting upon the terms of such agreement would seriously endanger the physical or mental health or safety of that person or another person.
- (5) Where an adult does not have a supported, representative or facilitated decision-making arrangement in place which covers a health care treatment offered by a health care provider, and the provider believes that the adult is not able to make the treatment decision legally independently, the health care provider is obligated, pursuant to legal duties to accommodate in the decision-making process in Part 3, to maximize the adult's ability to make the health care decision legally independently;
- (6) If the health care provider has accommodated the adult in accordance with all legal requirements that attach to the duty to accommodate and continues to believe that the adult is not able to make a decision legally independently in relation to the treatment, the health care provider shall refer the adult to the Office;
- (7) Upon referral from a health care provider pursuant to subsection (6) , the Office may:
 - (a) assist the adult to establish a supported, representative or facilitated decision-making arrangement pursuant to sections 12, 13, 14 or 15 and 16;
 - (b) on the adult's behalf, make arrangements with a designated agency to provide supports to the adult to assist him or her to exercise legal capacity, or apply to the Minister for funding for supports for this purpose; or
 - (c) apply to the Tribunal for an order related to:
 - i. whether the health care provider is meeting its duty to accommodate in the decision-making process;
 - ii. whether the adult can act legally independently; or
 - iii. any other matter the Office considers appropriate in the circumstances;
- (8) In the event that a health professional recommends a psychiatric treatment for an adult in a supported, representative or facilitated arrangement that may fundamentally affect the adult's physical or mental integrity as defined in the regulations, and as provided for in

- the relevant mental health legislation, application must be made to the Tribunal to authorize the decision.
- (9) In considering any applications pursuant to subsection (8), the Tribunal must be satisfied that the adult is expressing his or her will and preferences specific to that decision and has demonstrated at least some appreciation and understanding, by him or herself, of the nature and consequences of the decision.
 - (10) At any time, the adult, or an agent on his or her behalf, may apply to the Tribunal for an order with respect to:
 - (a) his or her legal capacity to make health care decisions;
 - (b) whether a health treatment decision is inconsistent with the duties of a decision-making supporter or representative;
 - (c) whether any restrictions on the adult are justified; or
 - (d) whether a less restrictive, community-based alternative should be ordered;
 - (11) Where the Tribunal issues an order pursuant to subsection (8)(d) it shall refer the matter to the Office to make referrals to designated agencies and applications to the Minister as required to give effect to the order.
 - (12) Any decision or order made pursuant to section 35 must be guided by the adult's right to have the least restrictive, community-based alternative considered.

Validity of decisions made

37. A decision made or communicated through a supported, representative or facilitated decision-making arrangement made pursuant to sections 12, 13, 14 or 15 and 16 shall:
- (1) be recognized for the purposes of any provision of law as the decision of the adult
 - (a) subject to the laws regarding fraud, misrepresentation, and undue influence; and
 - (b) provided that the decision-making supporter(s), representative(s) and facilitator complies with duties as prescribed in this Act and as may be prescribed in regulations;
 - (2) be binding on the adult, even after the decision-making supporter or representative no longer has authority under the arrangement.

Effect of failing to consult a decision-making supporter, representative or facilitator

38. Where there is evidence that a legal relationship that is either legally binding or has legal implications has been entered into by the adult which could bring harm to the adult's interests, an adult or the adult's decision-making supporter, representative, or facilitator may apply to the Tribunal to have the relationship declared void where:
- (a) the subject matter of the legal relationship with the third party is within the areas of decision-making covered under the supported, representative or facilitated decision-making arrangement; and
 - (b) the adult entered into the legal relationship with the third party without consulting the decision-making supporter, representative or facilitator.

Protection of third parties in decision-making processes

- 39.
- (1) Prior to entering into a relationship that is either legally binding or has legal implications, third parties shall be entitled to be provided with an original or notarial copy of a decision-making agreement upon which the adult is relying.
 - (2) Third parties shall be entitled to rely upon the exercise of a supported, representative or facilitated decision making arrangement entered into under this Act as evidence of a valid decision.

Registration of agreements

40. Adults and decision-making supporters and representatives may register their supported decision making or representative agreements on a voluntary basis, in a registration system as established by the Office.
41. Facilitated decision-making arrangements authorized by the Tribunal shall be registered in a registration system as established by the Office.

PART 7 — RENEWING, AMENDING, REVOKING OR TERMINATING SUPPORTED OR REPRESENTATIVE DECISION-MAKING ARRANGEMENTS

42.

- (1) A supported, representative or facilitated decision-making arrangement may be amended or revoked at any time where:
 - (a) an amendment to such an arrangement and associated agreement is made in accordance with the procedures for its establishment;
 - (b) in the case of an arrangement established under section 13, an adult applies to the Office for an amendment to or termination of the arrangement to which the adult is subject;
 - (c) in the case of an adult who wishes to revoke an arrangement with a personal ombud, an adult indicates their wish to end the arrangement;
 - (d) any criteria for revoking or terminating that are set out in the agreement are met; and
 - (e) in the case of a revocation of an arrangement under subsections (2) or (3), written notice of the revocation is given to:
 - i. each personal ombud, decision-making supporter, representative or alternate, or facilitator; and
 - ii. the monitor, if any;
- (2) A supported, representative or facilitated decision-making arrangement or arrangement made with a personal ombud is terminated:
 - (a) on the death of the adult who made the arrangement;
 - (b) on the effective date of the revocation of the arrangement; or
 - (c) on the Tribunal cancelling the arrangement pursuant to an application made by the Office;
- (3) Unless other decision-making supporters, representatives facilitators or personal ombuds are named in an arrangement, any such arrangement will also terminate:
 - (a) if the adult who made the arrangement and the adult's decision-making supporter, representative, facilitator or personal ombud are spouses, on the termination of their marriage; or
 - (b) on the resignation or death of the decision-making supporter, representative, facilitator or personal ombud.

Resignation of decision-making supporters, representatives, facilitators or personal ombud

43.

- (1) A decision-making supporter, representative, facilitator or personal ombud,
 - (a) shall resign if he or she is unable or unwilling to comply with his or her roles and responsibilities as defined in this Act; and
 - (b) may resign from their role in an arrangement for any other reason.
- (2) A decision-making supporter's, representative's, facilitator's or personal ombud's resignation becomes effective when written notice is given to the adult, each decision-making supporter, representative, facilitator or personal ombud, or monitor, as the case may be, and where the Office is a party to the agreement written notice must be given to the Office.

Orders of the Tribunal

44.

- (1) On application by the adult, a decision-making supporter, representative, facilitator or personal ombud or the Office, the Tribunal may make an order:
 - (a) renewing, confirming a change to, or revoking a supported, representative, facilitated decision-making arrangement or cancelling all or part of such an arrangement;
 - (b) appointing a monitor under any arrangement established pursuant to sections 12, 13, 14 or 15 and 16, provided there is a bona fide need;
- (2) When making an order pursuant to subsection (1), the Tribunal shall consider the current wishes, instructions, values and beliefs of the adult who is the subject of the arrangement;
- (3) The Tribunal may not make an order that overrides the adult's will and preferences,
 - (a) unless it would be inconsistent with another provision of the Act to do so; and
 - (b) the Tribunal gives reasons for making the order.

PART 8 — RECEIVING AND RESPONDING TO OBJECTIONS AND CONCERNS REGARDING DECISION-MAKING ARRANGEMENTS

- 45.** Any person may register a concern, or make an objection to the Office if there is a reason to believe that one or more of the following has occurred in relation to an adult who is in a supported or representative decision-making arrangement or a relationship with a personal ombud:
- (1) as a result of an adult's supported, representative or facilitated decision-making arrangement or a relationship with a personal ombud, the adult's interests are being compromised;
 - (2) fraud, undue influence or some other form of abuse or neglect is being or was used
 - (a) in the context of a supported or representative decision-making arrangement or relationship with a personal ombud;
 - (b) by a decision-making supporter or representative induce an adult to make, change or revoke a supported decision-making or representative agreement;
 - (3) the making, use or revocation of an agreement or a change to a supported, representative or facilitated decision-making agreement is clearly inconsistent with the current wishes, values, or beliefs of the adult for whom the agreement was made;
 - (4) There is an error in a decision-making agreement or an error was made in executing, witnessing or registering the agreement;
 - (5) anything improper has occurred in the making, use or revocation of a decision-making arrangement;
 - (6) a decision-making supporter, representative or personal ombud is not qualified to serve in their role;
 - (7) a decision-making supporter, representative or facilitator is,
 - (a) failing to follow the instructions in the respective decision-making agreement;
 - (b) incapable of acting as decision-making supporter, representative or facilitator; or
 - (c) otherwise failing to comply with the respective agreement or the duties of a decision-making supporter, representative or facilitator;
 - (8) a decision-making supporter, representative or facilitator has given or proposes to make or participate in a health care decision that is not authorized by the respective decision-making agreement;
 - (9) any criteria specified in a decision-making agreement as grounds for termination of a supporter, representative or facilitated have been met;

- (10) a decision-making supporter, representative or facilitator does not resign in accordance with their obligation to do so pursuant to section 43(1)(a);
 - (11) an adult does not require a decision-making arrangement as provided for under this Act in order to exercise his or her legal capacity;
 - (12) a designated agency has failed to meet its responsibilities pursuant to Part 2.
- 46.** On receiving notice of a concern or objection pursuant to section 45, the Office shall promptly review the concern or objection and may do one or more of the following:
- (1) conduct an investigation to determine the validity of the objection and then advise the objector of the outcome;
 - (2) pursuant to section 8, offer services to the adult, and/or his or her supporters or representatives to address any concerns about the integrity of the supported or representative decision-making arrangement;
 - (3) pursuant to section 8, arrange for services to be provided to an adult, and/or his or her decision-making supporters or representatives either through the Office, a designated agency or by application to the Minister for this purpose;
 - (4) apply to the Tribunal for an order,
 - (a) confirming a change to, or the revocation of a decision-making agreement, including a change in supporters, representatives or facilitators cancelling all or part of an agreement;
 - (b) appointing a monitor of an arrangement made pursuant to this Act and specifying associated duties and powers; or
 - (c) for any other action the Office considers necessary;
- 47.** Where a person registers a concern with the Office that an adult who is in a supported, representative or facilitated decision-making arrangement or relationship with a personal ombud, or in a situation of, or at substantial risk of being in a situation of, serious adverse effects, the Office shall give notice to the Provincial Director of Adults in Need of Protective Intervention;
- 48.** Where the Office receives from any person a concern or complaint about a situation related to an adult in a facilitated decision-making arrangement, the Office shall,
- (1) refer the person, as appropriate in the circumstances
 - (a) to the Tribunal; or
 - (b) Provincial Director of Adults in Need of Protective Intervention;
 - (2) initiate proceedings before the Tribunal in accordance with this Act.

- 49.** Where the Office receives notice of concerns with respect to a designated agency pursuant to section 45(12), it shall report such concerns to the Minister.

PART 9 – RESPONDING TO SITUATIONS OF SERIOUS ADVERSE EFFECTS

50. An adult is in a situation of serious adverse effects as a result of his or her actions or those of others, if the adult:
- (1) Experiences loss of a significant part of a person's property, or a person's failure to provide necessities of life for himself or herself or for dependants; or
 - (2) Experiences serious illness or injury, *and* deprivation of liberty or personal security; or
 - (3) Has threatened or attempted or is threatening or attempting to cause physical and/or psychological harm to himself or herself; or
 - (4) Has behaved or is behaving violently towards another person or has caused or is causing another person to fear physical and/or psychological harm from him or her;
51. This section could replace the section(s) of emergency intervention or adult abuse/protection provisions contained in other legislation, which set out under what circumstances intervention is currently triggered.
- An adult in need of protective intervention means an adult who:
- (1) is in a situation of serious adverse effects; and
 - (2) is unable to act legally independently in the circumstances.
52. This section could amend the relevant provisions for intervention
- When the adult protection authority receives notice that an adult is in need of protective intervention it shall undertake jointly with the Office any investigations or remedies required to:
- (1) determine whether the adult has, or is in need of, supports to exercise his or legal capacity, or has a personal ombud or a supported, representative or facilitated decision-making arrangement as provided for under this Act;
 - (2) as a result of an investigation pursuant to subsection (1), take any necessary steps to establish, change or terminate a decision-making arrangement made pursuant to this Act;
 - (3) facilitate whatever processes are provided for under this Act to ensure that the least intrusive and most autonomy-enhancing support arrangement is put into place that maximizes the adult's enjoyment of the equal right to legal capacity and to live independently in the community;

- (4) facilitate access to any health care services the adult may require to ameliorate the situation of serious adverse effects, in a manner consistent with the principles pursuant to section 6.
- 53. Where, as a result of the investigation, the Authority and the Office find that the adult is legally independent the Office offers to the adult any steps available pursuant to Part 2 of this Act.
- 54. To the best of its ability the Office shall consult with the adult concerned and any other person the adult wishes to have involved, as part of any investigations or remedies it seeks or establishes under this Act.

PART 10 – COMPLAINTS AND APPEALS

55.

- (1) The Tribunal shall establish a process for reviewing complaints made to it by a person about matters, including:
 - (a) A decision by the Office regarding,
 - i. application for a supported decision-making, facilitated or representative decision-making arrangement; or
 - ii. appointment of monitors for arrangements pursuant to sections 12, 13, 14 or 15 and 16;
 - (b) A decision by the Office or Adult Protection Authority regarding the investigation and/or response to a situation of serious adverse effects;
 - (c) Denial by a designated agency or other third party of accommodations or supports needed to exercise legal capacity;
 - (d) Any disputes arising out of the duty to accommodate set out in this Act;
 - (e) That the Minister has not fulfilled his/her obligations to provide supports an adult requires to exercise his or her legal capacity pursuant to section 8; and
 - (f) Any other matter that falls under the provisions of this Act or its regulations.
- (2) In issuing any orders under this Act, the Tribunal shall be guided by the principle of establishing the most autonomy-enhancing, community-based support arrangement possible.

PART 11 – LEGAL CAPACITY AND SUPPORT OFFICE

This part establishes the Office, Governance, Authorities and mandates.

PART 12 – PUBLIC AWARENESS AND COMMUNITY CAPACITY BUILDING

Public Education About the Right to Legal Capacity

56. The Minister

- (1) shall issue guidelines and undertake public education activities to increase awareness among the legal profession, service providers and the general public about the following:
 - (a) the rights and obligations in this Act and its regulations;
 - (b) the reality that supported and representative decision making are fully and equally valid ways of exercising legal capacity, and as alternatives to guardianship;
 - (c) the different types of legally valid methods of making decisions including through the assistance decision-making supporters, representatives, facilitators and personal ombud;
 - (d) the support to exercise legal capacity provided by the Minister;
 - (e) designated agencies and their roles;
 - (f) the duty to accommodate in the context of decision making; and
 - (g) any other matters related to the purpose of this Act;
- (2) may contract designated agencies for this purpose;
- (3) shall engage disability community and seniors' community representatives in the development of guidelines and delivery of public education pursuant to subsection (1).

PART 13 – LEGAL CAPACITY TRIBUNAL

This part establishes the Tribunal, appointment of Tribunal members, proceedings and application process.

PART 14 – LEGAL SUPPORT

This part provides for provision of independent legal support services to advise on applications and proceedings provided for under this Act. It may be incorporated into existing legal support provisions, for example under the ‘Human Rights Legal Support Centre’ provided for in the *Ontario Human Rights Code*.

PART 15 - REGULATIONS

This part provides for the making of Regulations under the Act, and should provide that before the Minister makes a regulation under this Act, he or she shall be obligated to engage the disability and seniors community in development of regulations, and provide a public notice and comment procedure on those matters which are left to the regulations.

PART 16 - REVIEW

This part provides for terms of the review of the Act, and should include that:

- within four years after this Act comes into force, and for every three years after that, the Lieutenant Governor in Council shall, after consultation with the Minister, appoint a person who shall undertake a comprehensive review of the effectiveness of this Act and the regulations and report on his or her findings to the Minister;
- a person undertaking a review under this section shall consult with the public and, in particular, with persons with disabilities;
- a report may include recommendations for improving the effectiveness of this Act and the regulations; and
- the Minister shall submit the report to the Lieutenant Governor in Council and shall cause the report to be laid before the Assembly if it is in session or, if not, at the next session.

Conclusion

Article 12 holds immense promise to end the harm and exclusion that guardianship and substitute decision making have often caused in the lives of people with intellectual, cognitive and psychosocial disabilities. Designed to protect people, these laws have too often undermined self-determination, on which rests the possibility for inclusion, participation and equality in society.

The statutory framework outlined in this document starts with the core assumptions of the CRPD about the right to equality and governments' obligation to provide support and accommodation to people with disabilities in exercising their legal capacity. We have sought to identify the core elements that are needed for governments to fulfil their obligations under Article 12, and that would be practical in people's lives and communities.

We invite others to draw upon this framework and sample statutory text in their efforts to advance law reform, and changes in policy and practice in their particular jurisdictions. We look forward to continuing our work with civil society and governments in Canada and internationally on how to enable all people to be fully recognized as equal and contributing citizens, able to enjoy and exercise their right to legal capacity and equal recognition under the law.

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