

POSITION ON LEGAL CAPACITY



POSITION STATEMENT

Adults with intellectual disabilities must have their legal capacity – the right to make decisions about their own lives – recognized and supported. Adults with intellectual disabilities have the right to act legally independently and must be provided appropriate accommodation to exercise this right. Where required, adults with intellectual disabilities must be assured access, with appropriate safeguards, to needed supports. These supports must include representatives and support networks – people who are legally recognized to assist a person to make decisions and/or represent them in the decision-making process, based on their personal relationship, moral and ethical commitment to the individual’s well-being, and their best understanding of the person’s will and intention.

POLICY CONTEXT

People with intellectual disabilities are extremely vulnerable to having their legal capacity restricted or removed all together. Slightly more than half of people with intellectual disabilities report they make none or only some of the decisions about their everyday activities. Across the country there is uneven access and recognition of the use of supported decision making. In all places, reliance, formally or informally, on substitute decision making arrangements and guardianship remain far too commonplace. Article 12 of the UN Convention on the Rights of Persons with Disabilities recognizes that all persons with disabilities enjoy legal capacity on an equal basis with others; it also secures the right to use support to exercise legal capacity. Canada’s ratification included an interpretive declaration and conditional reservation saying that “Article 12 permits supported and substitute decision-making arrangements”, and that “Canada reserves the right to continue to use substitute decision-making arrangements in appropriate circumstances”.

DISCUSSION

Most adults enjoy the ‘legal capacity’ to make their own decisions, to enter agreements with others, and to be recognized and respected by others for this purpose. However, people with intellectual disabilities often have their legal capacity questioned by others and sometimes removed from them.

This can happen when an individual goes to make a personal decision, like where they want to live, health care decisions requiring informed consent and/or financial decisions. When this happens, a person can be required to have their legal capacity ‘tested’ and sometimes it is removed. In these cases, another person or agency is given the authority – as a ‘guardian,’ trustee, or other substitute decision maker – to make decisions on behalf of the individual.

As a result people have been denied having a voice in their own life; they have no power to make, control or even influence decisions about issues that are important to them. We believe that legal capacity is a fundamental right, regardless of perceived level of disability or support required to exercise it. No one should be excluded from the process of making decisions about their lives. People with significant support needs or those who do not communicate or express themselves in ways that are easily understood by others must have a continued presence in the decision-making process.

This ensures that, in most cases, their will will be discernable, and that must be respected. Our legislative frameworks must recognize and secure the moral and ethical commitments of others to ensure that the will of people with significant support needs is safeguarded and central to any decision-making process.

The problem with substitute decision-making is not only that it removes the legal capacity to act, but, that it does so often against the person's will and sometimes without their knowledge. This denies people a voice in their own lives and results in the social perception by others that the individual is not a full person, but rather an object to be managed by others. This denial of personhood, this objectification, marginalizes people with disabilities, making them more vulnerable to abuse by others.

In Canada, provincial/territorial governments regulate provisions related to legal capacity and substitute decision making. Reform is required in provincial/territorial laws and policies to assure the right of adults to act legally independently and access supports to exercise their legal capacity. At the federal level, there a number of provisions that regulate or affect legal capacity – for example, the Income Tax Act, the Canada Revenue Agency, the Registered Disability Savings Plan, and the Privacy Act. A number of these provisions require 'contractual competence' of adults in order to manage their affairs. None of these provisions include an explicit requirement to presume the legal capacity of the adult or to provide accommodations or supports in the related decision-making processes. Our concern is that the absence of such measures places at risk the full recognition of the legal capacity of adults with intellectual disabilities.

The CRPD, Canada's reservation on Article 12, and the uneven development of supported decision-making legislation across the country calls for ongoing study, dialogue and interpretation in order to achieve a consistent and up-to-date legal framework at all jurisdictional levels in this country. This framework must establish the validity of supported decision making and incorporate the human rights principles of accommodation and respect for differences among people.

INCLUSION CANADA'S CALL TO ACTION

1. The Federal and Provincial/Territorial Governments work together to develop the legislative/policy/program framework to ensure people have access to supports and reasonable accommodation they require to act legally independently; and recognize supported decision making arrangements.
2. The Federal Government should take leadership to protect the legal capacity of people with intellectual disabilities by:
 - a. Amending the Income Tax Act and other Federal legislation as needed to recognize formal and informal supported decision-making mechanisms.
 - b. Recognizing supported decision making as sufficient authorization to open a Registered Disability Savings Plan.
 - c. Working with disability community and the Canadian Bankers' Association to issue a progressive statement about legal capacity.