

Inclusion Canada's Revised Legal Capacity Position Statement



POSITION STATEMENT

All persons have a right to self-determination and autonomy irrespective of disability. All adults are presumed to have capacity and are entitled to the decision-making support necessary to exercise capacity. Decisions made interdependently with family, friends and trusted others chosen by the individual will be recognized and legally validated.

All people, including people with an intellectual disability, have a right to enjoy and exercise legal capacity – or the right to make personal life, health care, and financial decisions – on an equal basis with others, without discrimination based on disability.

All persons have a will, and this will is capable of being interpreted to form the basis for competent decision-making. People are entitled to the support and services necessary for full participation and equality. The provision of such supports will lessen the need for legal intervention in decision-making.

People's decision-making rights should not be infringed by liability and other interests of third parties. Third-party interests do not provide a valid justification for removing a person's decision-making rights.

Third-parties, however, must be able to rely on the validity of decisions made through supported decision making arrangements. They are considered the decisions of the adult and will be binding on the adult with a disability unless the third-party is aware the support person is acting improperly. This must be recognized in legislation.

People 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 in making decisions and/or represent them in the decision-making process. Such support must be based on a supporter's relationship of personal knowledge, trust, and commitment to the individual's well-being. The supporter must respect and act upon their best interpretation of the person's will and preferences.

Guardianship

Imposed guardianship arrangements must be abolished everywhere in Canada. An individual who is denied the right to exercise their legal capacity loses the opportunity to make or be involved in decisions that affect their life. In many provinces, a person who is denied the right to exercise their legal capacity will have a substitute decision-maker appointed to make decisions for them. **While substitute decision-making may be necessary for decision specific, time-limited exceptional circumstances (such as when decision making supporters are not available), many potential negative impacts can occur when individuals lose the right to make their own decisions.**

These are:

- **Loss of Rights:** Once a substitute decision-making arrangement is in place, individuals lose the right to make their own decisions. The substitute decision-maker needs to act in the "best interest" of the individual, but they do not necessarily need to consider the individual's will and preferences.

- **Misuse of Power:** Once substitute decision-making arrangements are created, there is usually minimal monitoring or oversight of the decisions made by the substitute decision-maker, even if those decisions result in misuse of power or even abuse. Substitute decision-making powers may be misused without intent simply due to the complexity of the law or misunderstanding between the parties.
- **Barriers to Challenging Substitute Decision-Making Appointments:** Once a substitute decision-making appointment is put in place by a court it is difficult to challenge or revoke. The only effective recourse is through the court system, and this is costly and intimidating.
- **Negative Impacts on Physical and Mental Health:** Research indicates that substitute decision-making mechanisms can have negative impacts on the individual for whom the decisions are being made including:
 - diminished functional ability, health and well-being;
 - social isolation;
 - loss of self-esteem and feelings of hopelessness and incompetency;
 - feelings of being demeaned and socially stigmatized; and
 - financial abuse, overbroad application of substitute decision-making powers, physical abuse and neglect, restriction on voting rights, and restricting people on enjoying their sexuality and sexual identity.⁽¹⁾

POLICY CONTEXT

People with intellectual disabilities are extremely vulnerable to having their legal capacity restricted or removed altogether. 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 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 *United Nations Convention on the Rights of Persons with Disabilities (CRPD)* recognizes that all persons with disabilities enjoy legal capacity on an equal basis with others; it also secures the right to access and use support that may be required to exercise legal capacity.

Canada's ratification of the *CRPD* included an interpretive declaration and conditional reservation saying that "Article 12 permits supported and substitute decision-making arrangements" and "Canada reserves the right to continue to use substitute decision-making arrangements in appropriate circumstances".

On April 3 and 4, 2017, Canada appeared before the United Nations Committee on the Rights of Persons with Disabilities (the Committee) to review its initial report on the Convention on the Rights of Persons with Disabilities (CRPD). The Committee issued its concluding observations for Canada on May 8, 2017, recommending that:

in consultation with organizations of persons with disabilities and other service providers, [the Government of Canada] take leadership in collaborating with provinces and territories to create a consistent framework for recognizing legal capacity and to enable access to the support needed to exercise legal capacity. It also recommends that the State party take steps to remove exclusionary provisions from federal statutes and to introduce provisions for supported decision-making in the Bank Act, the Income Tax Act and other statutes as appropriate.

The regulation of legal capacity varies from province to province for persons with intellectual disabilities, whether in their living situation, a healthcare context, at the bank, or so many places where it's questioned.

Legal Capacity and Mental Capacity

The concept of legal capacity (the right to decide), identified in Article 12 of the *CRPD*, is often directly linked with the concept of mental capacity (the ability to make decisions independently). This link has been the foundation of substitute decision-making laws, and has directed court decisions around substitute decision and guardianship applications for many years. However, these concepts are separate and distinct, legal capacity relates to the rights of an individual, and mental capacity is about an individual's ability to make decisions and often is related to meeting a certain threshold, which is often the 'understand and appreciate test.'

The *CRPD* recognizes that these two concepts are fundamentally different. Exercising one's legal capacity has a lot to do with how an individual is supported to make decisions. To recognize and enjoy legal capacity, we have to find other means by which people can meet the test of mental capacity in decision making. This is where access to accommodations, support, and supported decision-making is critical. Accommodations, support and supported decision-making create a framework around the individual that allows them to meet the mental capacity test.

The test for mental capacity is not being changed with these elements in place. Supports are adjusted to meet mental capacity tests through an interdependent decision-making process. The requirement for legally valid decisions is not changed. How the condition is met is changing. It needs to be recognized that there are many ways that individuals can meet the requirement with the involvement of supporters and under different types of accommodations. In essence, it is how people recognize legally valid and binding decisions that individuals can make through various processes. Individuals must have the right to exercise their legal capacity in two ways:

- Independently - where the person demonstrates that with the appropriate supports and accommodations, they have the capacity to understand information and appreciate consequences of a particular decision, and thus decide on their own; or
- Interdependently – where, together, the person with recognized decision-making supporters has the capacity to understand information and appreciate the consequences of a particular decision, guided by the principle of the 'best interpretation of the person's will and preferences in the circumstances.'

Within the interdependent and supported decision making process, adults may choose to appoint their own supporters, or alternatively when this is not possible, trusted individuals may apply to an appropriate authority to become decision-making supporters.

Twenty-three percent (23%) of Canadians identify as having a disability. As our population continues to age, people will increasingly face questions about their ability to make decisions about themselves and to assert their autonomy. Disability is not a movement in decline - at some point in the near future, it may play a role in any or all of our lives.

Safeguards

Article 12 provides that measures related to the exercise of legal capacity provide effective and appropriate safeguards to prevent abuse. Within supported decision-making arrangements, safeguards may include the appointment of monitors or other measures such as limitations on the types of decisions that can be made and/or higher thresholds to validate certain types of decisions.

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

This can happen when an individual makes 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 lives; they have no power to make, control, or even influence decisions about important issues. We believe that legal capacity is a fundamental right, regardless of the perceived level of disability or support required to exercise it. No one should be *excluded* from 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 discernible, and that must be respected. Our legislative frameworks must ensure that the right to decide is also recognized and supported for people with significant support needs.

The problem with substitute decision-making is not only that it removes the right to decide, 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 largely 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 or interdependently and to access the supports required to exercise their legal capacity.

Many provisions regulate or affect legal capacity at the federal level – 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 the ‘contractual competence’ of adults in order to manage their affairs. None of these provisions include an explicit requirement to presume the legal capacity of a person 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 persons with intellectual disabilities.

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

We are over a decade past Canada’s ratification of the *CRPD*. Collectively, provinces and territories have not yet reformed their laws to address the requirements of *CRPD Article 12* in recognition of the right to the exercise of legal capacity. Nor has the Government of Canada taken the leadership called for by the UN Committee or taken steps to remove the reservation on Article 12. This lack of action on the part of governments sends a message that people with intellectual disabilities cannot count on equal respect and recognition.

Canada's *Accessible Canada Act* came into force in July 2019. The Act's preamble makes specific reference to Canada's commitments as a State Party to the *CRPD*, and the Act's principles recognize that:

- (a) all persons must be treated with dignity regardless of their disabilities;*
- (b) all persons must have the same opportunity to make for themselves the lives that they are able and wish to have regardless of their disabilities;*
- (c) all persons must have barrier-free access to full and equal participation in society, regardless of their disabilities;*
- (d) all persons must have meaningful options and be free to make their own choices, with support if they desire, regardless of their disabilities;***
- (e) laws, policies, programs, services and structures must take into account the disabilities of persons, the different ways that persons interact with their environments and the multiple and intersecting forms of marginalization and discrimination faced by persons;*
- (f) persons with disabilities must be involved in the development and design of laws, policies, programs, services and structures; and*
- (g) the development and revision of accessibility standards and the making of regulations must be done with the objective of achieving the highest level of accessibility for persons with disabilities. (2)*

These principles provide a critical statement of accessibility and its national significance. Given the precise correlation between a barrier-free Canada and the exercise of legal capacity, it is time for action. It's time for the Government of Canada to begin to recognize the principles of the ACA through the following 'Calls to Action':

INCLUSION CANADA'S CALL TO ACTION

1. Federal and Provincial/Territorial governments that require people to independently meet the cognitive test of capacity violate the equality rights of people who may need to exercise their right to make decisions interdependently. Governments must recognize that people can exercise legal capacity independently or interdependently. They must work together to develop the legislative/policy/program framework to ensure people have access to support and reasonable accommodation they require to act legally independently or interdependently through supported decision making arrangements.
2. Canada has signed and ratified the *CRPD*. The Supreme Court of Canada has cited the important role of international human rights law as a critical influence on interpreting the scope of domestic legislation such as the *Canadian Charter of Rights and Freedoms*. Canada has been called upon by the UN Committee on the Rights of Persons with Disabilities to take leadership in collaborating with provinces and territories to create a consistent framework for recognizing legal capacity and enabling access to the support needed to exercise legal capacity. This initiative is to be done in consultation with organizations of persons with disabilities and other service providers.

Accessible Canada Act principles mandate the Government of Canada to take leadership and protect the right to exercise legal capacity. Section 6(d) of the Act contains an explicit statutory recognition of the right to exercise legal capacity. The Government of Canada now must take an active role in building supported decision making and legal capacity mechanisms within the Government's own architecture, building out Federal accessible legislation, pushing the agenda as the model to provincial and territorial governments who continue to lag on the issue.

The Federal Government must take leadership to protect the legal capacity of people with intellectual disabilities by:

- Amending the *Income Tax Act*, the *Bank Act* and other Federal legislation to recognize formal and informal supported decision-making mechanisms.
- Recognizing supported decision-making as sufficient authorization to open and manage a Registered Disability Savings Plan.
- Immediately establish a public education and awareness campaign that brings light to legal capacity issues and their national significance. This campaign must encourage fulsome engagement and development from collaborative partnerships to identify and address barriers to the right to legal capacity across Canada. This must include a review of barriers that exist in all forms of law and policy both nationally and at the provincial/territorial level.
- Calling for Federal/Provincial funded community initiatives around legal capacity, initiatives that build on the depth of legal capacity research and work of the last decade.
- Working with its provincial and territorial partners to take the necessary steps to lift Canada's current reservation under the *CRPD* Article 12 as soon as possible.
- Providing financial support for implementing a supported decision-making infrastructure that may be required across the country. This could include either direct financial support or support to provinces and territories to properly implement and execute supported decision-making regimes.

1. Pooran, Brendon, Stephanie Dickson, and Saquiba Rahman. "Guardianship as a Last Resort." <https://pooranlaw.com/media/Guardianship-as-a-Last-Resort-PooranLaw-February-2021.pdf>

2. Accessible Canada Act, SC 2019, c 10, s 6

3. Accessible Canada Act, SC 2019, c 10, s 6(d): all persons must have meaningful options and be free to make their own choices, with support if they desire, regardless of their disability.