

The *New* Adult Capacity & Decision-Making Act

History of Treatment of Disabled Persons in Canada

- People with disabilities have struggled for acceptance and equality for centuries.
- They have been discriminated against, mistreated, misunderstood, oppressed, and persecuted due to prejudice, intolerance and indifference.
- In 2012, a landmark Canadian Supreme Court ruling said that mentally disabled adults can give reliable court testimony.

New Approach to Legal Capacity

- **Legal capacity** is a human right for all persons
- Committee on the Rights of Persons with Disabilities definition:
“Legal capacity is the ability to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency)”, as distinct from mental capacity – the “decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors.”

UN Convention on the Rights of Persons with Disabilities

“nothing about us, without us”

- The purpose of the Convention is to promote, protect and ensure the full enjoyment of all human rights and fundamental freedoms by all persons with disabilities.
- Everyone is equal before and under the law. Everyone is entitled to the equal protection and benefit of the law without discrimination.
- All people with disabilities should “enjoy legal capacity on an equal basis with others in all aspects of life.” No one should be *excluded* from the process of making decisions about their lives.

Is the CRPD Law?

- Not clear....
- Was ratified by Canada in 2010 and requires that the government effect “the full and effective participation and inclusion of persons with disabilities in society” (Article 3(c))
- Its values will inform statutory interpretation and judicial review
- It will provide a normative foundation from which to reform Canadian mental health and disability law, policy and services

Old Law-

Incompetent Persons Act

- Legislation 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
- “incompetent person” defined as an adult “...incapable from infirmity of mind of managing the person’s own affairs...”
- Affidavit of two medical practitioners with supporting opinion that alleged incompetent person “is incapable of taking care of himself.”
- Guardian for all decisions

Webb v Webb

2016 NSCC 180

- IPA overbroad; offends s.7 Charter rights
- Rejected IPA “all or nothing approach”
- Spectrum of capacity
- Declared various sections of IPA invalid
- 12 months invalidity suspended (later extended)

Adult Capacity and Decision-Making Act

- Nova Scotia's new law to replace the *Incompetent Persons Act* came into effect on December 28, 2017
- If an adult is unable to make significant health, personal care or financial decisions on their own, a family member or other caring person can apply to the court to be appointed as the adult's **representative** decision-maker
- The *Incompetent Persons Act* allowed the court to appoint a guardian for an adult, whereas the new law allows the court to appoint a *representative(s)*

Find more information about
the *Adult Capacity and Decision-
making Act*, and about being a
representative decision-maker for an
adult

<https://novascotia.ca/just/pto/adult-capacity-decision.asp>

Purpose of the New Law (Section 2)

- Recognize that adults may not be able to make some decisions because of a learning disability, mental health problems, brain injury, or for other reasons
- Provide a fair and respectful way to protect the safety of those adults
- Promote the dignity, autonomy, independence, social inclusion, and freedom of decision-making of adults
- Make sure that the least restrictive and least intrusive supports and interventions are considered before this new law is used to help an adult.

Principles

- An adult is entitled to make his or her own decisions, unless the adult's incapacity to do so is clearly demonstrated;
- An adult is not incapable of making decisions merely because the adult makes or would make a decision that another adult would consider risky or unwise;
- An adult is entitled to communicate by any means that enables the adult to be understood & the means by which the adult communicates is not relevant to a determination of whether the adult has capacity;
- Where an adult does not have capacity to make a decision, the adult's autonomy must be preserved by ensuring that the least restrictive & least intrusive form of representative decision-making is provided that is likely to be effective to promote & protect the adult's well-being & interests in financial matters.

Representative

- **Representative** - A person with legal authority to act for and make substitute decisions on behalf of another adult. Only a judge can appoint a representative.
- The person for whom a representative is appointed is called an **adult in need of representation**.
- A representative may have legal responsibilities and duties related to one part, some or all aspects of the adult's finances, personal and health care. A representative may only make decisions the adult is unable to make themselves.

Capacity (Section 3(d))

- The ability, with or without support, to
 - understand the information relevant to making a decision; &
 - appreciate the reasonably foreseeable consequences of making a decision or not making a decision including the reasonably foreseeable consequences of the decision to be made.

Other Key Definitions (Section 3)

- adult
- assessor
- capacity assessment report
- financial matter
- gift
- representation order
- support
- well-being

The Convention on the Rights of Persons with Disabilities

- Article 12(2):
 - “States Parties shall recognize that **persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.**”
- Article 17:
 - “Every person with disabilities has **a right to respect** for his or her **physical and mental integrity** on an equal basis with others.”

Important Changes

- Preamble reflects the values in the *CRPD*
- WHEREAS:
 - “An adult is entitled to respect for the adult’s dignity and autonomy”;
 - “An adult is presumed to have capacity, unless the contrary is clearly stated”; and
 - “Any action taken or decision made under the authority granted to any person should be undertaken in the least restrictive and least intrusive manner, having regard to the adult’s rights, freedoms, dignity and autonomy.”

Important Changes

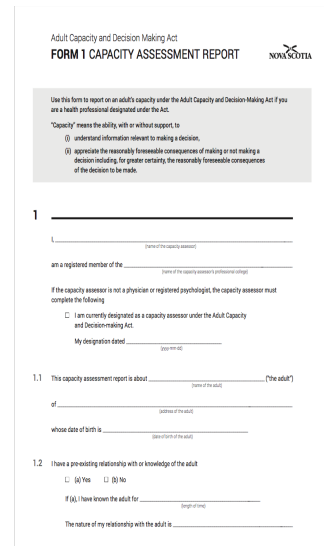
- “Least restrictive and least intrusive form of representative decision-making”
 - Recognizes that an adult may have capacity in some areas but not in others.
 - Requires representation order to be appropriately tailored to the extent of the incapacity.
 - Shift away from “all or nothing” model.
 - Focused on preserving the adult’s autonomy.

Important Changes

- Requires representatives and the court to consider the adult's wishes.
 - Prior wishes
 - Current wishes, “if it is reasonable to do so”
 - Respects adult's right to make his or her own decisions.
 - Represents shift away from “best interests” model but representative still required to always act in adult's best interests.

Role of Practitioners: Capacity Assessments

- To apply to be a representative, applicant must provide the court with a **Capacity Assessment Report**.
- Who can prepare a Capacity Assessment Report?
 - “Assessors” – s. 2 of Act
 - Medical Doctor or Registered Psychologist;
 - OR**
 - RN, NP, OT, Social Worker AFTER completing specific training.



Adult Capacity and Decision-Making Act
FORM 1 CAPACITY ASSESSMENT REPORT 

Use this form to report on an adult's capacity under the Adult Capacity and Decision-Making Act if you are a health professional designated under the Act.

"Capacity" means the ability, with or without support, to

- (i) understand information relevant to making a decision,
- (ii) appreciate the reasonably foreseeable consequences of making or not making a decision including, for greater certainty, the reasonably foreseeable consequences of the decision to be made.

1. _____
(name of the capacity assessor)

_____ (name of the capacity assessor's professional college)

_____ (name of the capacity assessor's professional college)

_____ (name of the capacity assessor's professional college)

If the capacity assessor is not a physician or registered psychologist, the capacity assessor must complete the following:

☐ I am currently designated as a capacity assessor under the Adult Capacity and Decision-Making Act.

My designation dated: _____ (year and date)

1.1 This capacity assessment report is about _____ (name of the adult) ("the adult")

of _____ (address of the adult)

whose date of birth is _____ (date of birth of the adult)

1.2 I have a pre-existing relationship with or knowledge of the adult

☐ (a) Yes ☐ (b) No

If (a), I have known the adult for _____ (length of time)

The nature of my relationship with the adult is _____

Financial Assistance for Capacity Assessments

- Capacity assessors often charge for their services.
 - Cost of conducting capacity assessment
 - Cost of completing Capacity Assessment Report
- Applicant may be eligible for financial assistance to help pay for some or all of the costs of a capacity assessment.
- Eligible applicants may be reimbursed:
 - Up to \$500 for assessment of **either** personal care **or** financial matters;
 - Up to \$700 for assessment of **both** personal care **and** financial matters.
- Contact Public Trustee Office

Financial Assistance Cont'd

- Representation Application may cost several thousands of dollars.
 - Barrier to access
- IWK Family Legal Health Program
- Legal Aid

Resources

- Legal Information Society of Nova Scotia
 - Plain language legal resources: <https://www.legalinfo.org>
<https://www.legalinfo.org/legal-information-topics/representative-decisionmaking>
 - Legal Information Line, Lawyer Referral Service (902-455-3135 or 1 800 665-9779)
- IWK Family Legal Health Program
 - 902-470-8065
 - 902-470-8076
 - Drop or by appointment contact Social Work) from 1-3 pm on 1st or 3rd Tuesday of month, IWK Social Work Office
- Nova Scotia Legal Aid
 - <https://www.nslegalaid.ca>
- Public Trustee Office
 - <https://novascotia.ca/just/pto/adult-capacity-decision.asp>

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Questions?

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