

# **A New Paradigm for Protecting Autonomy and the Right to Legal Capacity**

By Michael Bach and Lana Kerzner

## **SUMMARY**

Prepared by Laurie Graham for ACCPC

This paper attempts to answer a question framed by the Law Commission of Ontario: “What principles and considerations should be applied when considering placing limitations on the ability of persons with disabilities to make their own choices?” In particular, the paper identifies persons with severe intellectual, cognitive or psychosocial disabilities as most at risk of being considered “not capable” of decision making by people caring for them.

Since these types of disabilities are known to impact cognitive skills important for decision-making (i.e., attention, planning, reasoning, flexible thinking, problem-solving, etc.), the authors concede that some manner of assistance may be required for some individuals who live with these types of disabilities. The authors contend, however, that the model currently used (that of ‘protective’ substitute decision-making and guardianship), unduly restricts the life choices of individuals who, contrary to misconceptions, may have the ability to, in a more inclusive understanding of capacity, understand or appreciate some aspects of decisions, and/or express some preferences which can provide a direction for their lives.

The current practice of removing a person’s authority over his or her own life choices (via a substitute decision maker) may be done in the potentially well-meaning interest of protection, efficiency of services, or charity; however, it does constitute “the removal of an individual’s legal personhood”, which may contribute to “stereotyping, objectification, negative attitudes and other forms of exclusion... which increase powerlessness and vulnerability to abuse, neglect and exploitation”.

The United Nations’ Convention on the Rights of Persons with Disabilities (CRPD), ratified by Canada in March 2010, recognizes the right to legal capacity of all persons regardless of disability, and the obligation of states to “ensure access to supports [which] individuals require”. Incorporating the CRPD into Canadian law requires a new understanding of what the rights to autonomy and legal capacity can look like for people with severe intellectual, cognitive and psychosocial disabilities. This understanding must consider the fine balance between the state’s duty to protect vulnerable individuals and its duty to promote and enable their rights. This article sets the framework for “a new legal paradigm for maximizing autonomy guided by the CRPD” and offers specific recommendations on how this paradigm could translate into practice.

After an introduction to terminology used in the paper, the authors summarize the principles of the CRPD as it pertains to legal capacity. They describe consumer advocacy efforts to change capacity laws in Canada over the last 20 years. The authors then explain the concepts of both ‘negative liberty’ (the right to be free of state intrusion- with a clear definition of who is and who is not deemed capable) and ‘positive liberty’

(the right to supports and accommodations from the state—a more relational view of capacity), which the authors believe can co-exist to both protect and promote autonomy. To conclude the first section of the paper, the authors describe Canada’s traditional and current capacity laws, tracing how traditional negative liberty definitions, which require a cognitively based “understand and appreciate” threshold of capacity, have been influenced more recently by positive liberty approaches. Specifically, the authors illustrate recent inroads in Canadian provincial law towards ‘supported decision making’ (encouraging people with disabilities to appoint people to help them make decisions), and ‘co-decision-making’ (a supporter for decision making is appointed by the court).

In the second section of the article, the authors attempt to redefine “what it means to be a person who exercises legal capacity”. They propose that ability to express intention or will and a ‘narrative coherence’ across a person’s life to interpret that intention or will can be considered a new ‘minimum threshold’ for human agency.

In other words: “to act in a way that at least one other person who has reasonable knowledge of an individual can reasonably ascribe to one’s actions, personal will and/or intentions, memory, coherence through time, and communicative abilities to that effect”

After a review of the ‘capabilities approach’ of Amartya Sen, and a critique of its application by Martha Nussbaum to the case of intellectual disability, the authors propose the concept of “decision-making capability”, which would involve a combination of the minimum threshold for human agency, decision-making supports, and accommodations, leading to an individual’s ability to make a self-determined decision. Types of decision-making supports are described, including life planning, independent advocacy, communicational, representational (supported decision-making), relationship building and administrative supports. The authors then propose three decision-making statuses to be recognized in Canadian law:

- 1) Legally independent status - has the ability, by him or herself or with assistance, to understand and appreciate the information relevant to, and the reasonably foreseeable consequences of, making a decision
- 2) Supported decision-making status - a support person is appointed by the person with a disability, or by an administrative tribunal or court. Due to a relationship with the person with a disability, the support person can interpret and carry out his or her will or intention, “consistent with the person’s identity” and respecting “the individual’s dignity of risk”. The support person would be obligated to consult with the person he or she is supporting and to make decisions based on that consultation.
- 3) Facilitated decision-making status- a facilitator is appointed by administrative tribunal or advanced planning document (i.e., power of attorney). Facilitated status would not “represent a statement or judgment about their cognitive status or abilities”, simply that they do not meet the criteria, above, of legal

independence, and do not have anyone in their life who know them well enough to interpret their will and/or intention.

The remainder of the article elaborates on their proposal, detailing how they would define accommodations, promote the use of these statuses through institutional and legislative frameworks, and monitor, advocate for, and safeguard their correct usage. A 'summary of proposals' section, starting on page 159, provides a clear outline of these details.

The authors conclude that while their concepts of supported and facilitated decision making statuses may appear to have commonalities with the current substitute decision making role, there is a fundamental difference. A person in facilitated decision making status, unlike the person considered 'incapable', retains legal capacity.

Facilitated status: "is not that a person does not have decision-making ability. Rather, it is that others are not able to discern a person's will and/or intention sufficient to assist its translation into decisions and decision-making transactions. People in a facilitated status are owed obligations by the State and other entities to continue to provide supports and accommodations to enable greater understanding of a person's will and/or intention, and thereby provide a basis for supported decision making, if not legal independence."

While there will always be a fine balance between supporting autonomy and safeguarding against risk, the authors propose that the CRPD treaty will be best honoured in Canadian law by moving away from the restrictive and paternalistic modes of substitute decision making, and towards a model informed by respect for the personhood of individuals with disabilities.