Paving the way to Full Realization of the CRPD's Rights to Legal Capacity and Supported Decision-Making: A Canadian Perspective

Lana Kerzner
Barrister and Solicitor

Prepared for

In From the Margins: New Foundations for Personhood and Legal Capacity in the 21st century

April, 2011

Table of Contents

Paving the way to Full Realization of the CRPD's Rights to Legal Capacity and Supported Decision-Making: A Canadian Perspective

Lana Kerzner[1]
April, 2011

I. INTRODUCTION

This paper was written in the context of Canada's ratification, just over a year ago, of the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD).[2] While ratification was viewed as a victory, it is bittersweet in that the disability community is asking questions as to what the real implications will be for the lives of people with disabilities. As Jim Derksen recently said, while the CRPD envisions a new world for people with disabilities, there is a gap between this vision and the lived experience of Canadians with disabilities.[3] And according to the Council of Canadians with Disabilities and the Canadian Association for Community Living, while the "…CRPD is a tool that helps communities and governments understand why and how the rights of people with disabilities haven't been realized and … provides a framework that articulates the conditions needed to make rights a reality, [t]here is significant work

[1] Lana Kerzner, Barrister and Solicitor, is a disability law lawyer in Ontario. This paper was written for a legal capacity symposium, "In From the Margins: New Foundations for Personhood and Legal Capacity in the 21st century," being held at the University of British Columbia in April, 2011. In writing this paper, I drew on two earlier papers I wrote: Lana Kerzner, "Embracing Supported Decision-Making: Foundations for a New Beginning" (March, 2009), written for the Canadian Association for Community Living and Michael Bach and Lana Kerzner, "A New Paradigm for Protecting Autonomy and the Right to Legal Capacity" (October, 2010), prepared for the Law Commission of Ontario.

[2] *Convention on the Rights of Persons with Disabilities*, G.A. Res. 61/106, 76th plen. Mtg., U.N. Doc A/Res/61/106 [adopted by consensus at the UN on Dec. 13, 2006] [CRPD]. Canada signed the CRPD on March 30, 2007 and ratified it on March 11, 2010. The CRPD came into force on May 3, 2008, online: UN Enable http://www.un.org/disabilities/CRPD/CRPDfull.shtml.

[3] Presentation by Jim Derksen given at a meeting of Canadian provincial and territorial ministers responsible for disability issues and human rights, March, 2011, online: http://www.ccdonline.ca/en/international/un/canada/jim-derksen-march2011.

to do in Canada to make the CRPD real and meaningful in the lives of Canadians with disabilities."[4]

This paper was written for a legal capacity symposium, "In From the Margins: New Foundations for Personhood and Legal Capacity in the 21st century," being held at the University of British Columbia in April, 2011. It therefore focuses specifically on the article of the CRPD that addresses legal capacity, Article 12. Article 12, "Equal Recognition before the Law", recognizes the following rights and obligations on the part of States Parties:

- the right to enjoy legal capacity on an equal basis with others;
- the obligation of governments to implement measures that provide access to support by those who need it to exercise their legal capacity; and
- the obligation of governments to ensure safeguards are in place to prevent abuse in relation to measures for the exercise of legal capacity

There has been much debate internationally about the meaning and implications of Article 12. Article 12 was a contentious issue in the entire drafting process of the Convention,[5] and its interpretation remains subject to debate.[6] At the heart of the

[4] Council of Canadians with Disabilities and Canadian Association for Community Living Working Paper, "UN Convention on the Rights of Persons with Disabilities: Making Domestic Implementation Real and Meaningful," February, 2011, online: http://www.ccdonline.ca/en/international/un/canada/making-domestic-implementation-real-and-meaningful-feb2011.

[5] "Promoting a Paradigm Shift – ERT talks with Gábor Gombos and Gerard Quinn about the UN Convention on the Rights of Persons with Disabilities and its Optional Protocol" , online: (2008) 2, The Equal Rights Trust, The Equal Rights Review at 83 and 85, online: http://www.equalrightstrust.org/ertdocumentbank/err_issue02%20reduced.pdf.

[6] Amita Dhanda, "Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?" (2007) *Syracuse Journal of International Law and Commerce*, Volume 34, Issue 2 at 455-56.

debate is its recognition of supported decision-making, questioning whether the more intrusive alternative of substitute decision-making is still legitimate under Article 12. The Canadian government, through its declaration and reservation in relation to the CRPD,[7] made clear its intention to maintain both substitute and supported decision-making in Canada's legal framework. In contrast, others are of the opinion that substitute decision-making is in conflict with the human rights principles enshrined in the Convention, making it an obsolete approach.[8]

Motivated by the current frustration of Canadians with disabilities in relation to the realization of the CRPD's promise, this paper explores Canada's legal obligations in relation to the CRPD to shed light on what Canadians can realistically hope for and expect. It examines Canada's current legislative framework for decision-making, providing the basis for an analysis of the extent to which Canada has complied with Article 12 and the road for law reform ahead. The descriptive analysis illustrates that there are many laws in Canada which embody various forms of supports. It is hoped that, at an international level, other countries who are seeking to comply with the CRPD can gain guidance and insight from the Canadian experience. Finally, this paper puts forth the argument that recognition of supports in decision-making flows naturally from, and is mandated by, the legal duty to accommodate found in both Canada's laws and the CRPD.

[7] The text of Canada's declaration and reservation to the CRPD is available online: http://www.un.org/disabilities/default.asp?id=475.

[8] David Webb, "A New Era in Disability Rights: A New Human Rights Charter Plus A New UN Convention", at 6, online: moodle.disabilityknowledge.org/file.php/16/12/David-Webb_New-Era.pdf.

II. THE CRPD AND ARTICLE 12

Article 12 is the section of the CRPD that specifically addresses the topics of legal capacity and decision-making. Before embarking on an analysis of Canada's laws in the context of the extent to which they comply with Article 12, it is necessary to first explore its broad implications for decision-making regimes. What are the implications of the predominance of substitute decision-making regimes?

The wording of Article 12 – 'Equal recognition before the law' - is reproduced in full, as follows:

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall 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. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Canada's ratification of the CRPD included a declaration and reservation, which is of particular relevance to Article 12. The wording of the declaration and reservation is as follows:

> Canada recognises that persons with disabilities are presumed to have legal capacity on an equal basis with others in all aspects of their lives. Canada declares its understanding that Article 12 permits supported and substitute decision-making arrangements in appropriate circumstances and in accordance with the law.
>
> To the extent Article 12 may be interpreted as requiring the elimination of all substitute decision-making arrangements, Canada reserves the right to continue their use 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.
>
> Canada interprets Article 33 (2) as accommodating the situation of federal states where the implementation of the CRPD will occur at more than one level of government and through a variety of mechanisms, including existing ones."[9]

It is clear from Canada's declaration and reservation, that there is an intention to maintain both substitute and supported decision-making in Canada's legal framework. However, what remains to be seen is how powerful the CRPD will be as a stimulus for reform. Will Canada's capacity laws be amended to fully incorporate supported decision-making?

Canada is not unique in its concerns regarding Article 12. For most states, Article 12 is said to cause the most problems in their internal process of ratification.[10] Article 12 was a contentious issue in the entire drafting process of the CRPD,[11] and its interpretation

[9] Online: United Nations Enable http://www.un.org/disabilities/default.asp?id=475.
[10] Interview of Gábor Gombos and Gerard Quinn by Jarlath Clifford on behalf of ERT, in "Promoting a Paradigm Shift – ERT talks with Gábor Gombos and Gerard Quinn about the UN CRPD on the Rights of Persons with Disabilities and its Optional Protocol" (2008) 2 The Equal Rights Trust, The Equal Rights Review at 85, online: The Equal Rights Trust http://www.equalrightstrust.org/ertdocumentbank/err_issue02%20reduced.pdf.
[11] Interview of Gábor Gombos and Gerard Quinn by Jarlath Clifford on behalf of ERT, in "Promoting a Paradigm Shift – ERT talks with Gábor Gombos and Gerard Quinn about the UN CRPD on the Rights of Persons with Disabilities and its Optional Protocol" (2008) 2 The Equal Rights Trust, The Equal Rights

remains subject to debate.[12] Canada interprets Article 12 as securing supported decision-making as a right while ensuring that availing oneself of supports does not undermine his/her full legal capacity. They have taken the position that, while not prohibiting substitute decision-making regimes,[13] Article 12 places particular emphasis on the importance of supported decision-making.[14] In contrast, others are of the opinion that substitute decision-making is in conflict with the human rights principles enshrined in the CRPD, making it an obsolete approach.[15]

The language of Article 12 represents a shift from the traditional dualistic model of capacity versus incapacity and is viewed as an equality-based approach to legal capacity.[16] It is recognized as a major breakthrough in view of the continuing predominance in many legal systems which are based on determinations of mental incapacity and on guardianship/substitute decision-making.[17] Inclusion Europe[18] has stated that one of the most important aspects of the CRPD for people with intellectual

---

Review at 83, 85, online: The Equal Rights Trust http://www.equalrightstrust.org/ertdocumentbank/err_issue02%20reduced.pdf.

[12] Amita Dhanda, "Legal Capacity in the Disability Rights CRPD: Stranglehold of the Past or Lodestar for the Future?" (2007) 34:2 Syracuse J. Int'l L. & Com. 429 at 455-456.

[13] Amita Dhanda, "Legal Capacity in the Disability Rights CRPD: Stranglehold of the Past or Lodestar for the Future?" (2007) 34:2 Syracuse J. Int'l L. & Com. 429 at 460-461.

[14] Amita Dhanda, "Legal Capacity in the Disability Rights CRPD: Stranglehold of the Past or Lodestar for the Future?" (2007) 34:2 Syracuse J. Int'l L. & Com. 429 at 455-456.

[15] David Webb, "A New Era in Disability Rights: A New Human Rights Charter Plus a New UN CRPD" in Gyorgy Konczei & Gabor Gombos, eds., *Knowledge Base for Dissemination of Advocacy, Policy and Scholarly Resources on the CRPD* (2008) at 6, online: Disability Knowledge http://moodle.disabilityknowledge.org/mod/resource/view.php?id=407.

[16] Tina Minkowitz, "The United Nations CRPD on the Rights of Persons with Disabilities and the Right to be Free from Nonconsensual Psychiatric Interventions" (2007) 34:2 Syracuse J. Int'l L. & Com. 405 at 408.

[17] Michael Bach, "Advancing Self-Determination of Persons with Intellectual Disabilities: Overview of the Supported Decision-Making Model and Legal Provisions in Canada," Inclusion Europe Include (2007) at 11, online: Inclusion Europe http://www.inclusion-Europe.org/documents/INCL1_WEB_mini.pdf.

[18] Inclusion Europe is a non-profit organization that campaigns for the rights and interests of people with intellectual disabilities and their families throughout Europe.

disabilities are its principles regarding legal capacity[19] and Quinn has opined that Article 12 "…is the absolute core of the CRPD!"[20] Without recognition of legal capacity, other guarantees in the CRPD become meaningless,[21] such as the guarantee of free and informed consent,[22] the right to marry,[23] and the right to political participation.[24]

Treaties are to be interpreted as a whole and individual parts must be interpreted in the overall context of the treaty.[25] Thus, Article 12 must be read and interpreted broadly to ensure consistency with the purpose of the CRPD, being "…to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."[26] It must also be interpreted consistent with other related and relevant articles, most notably, articles 3 and 5.

Article 3 of the CRPD gives important direction in relation to legal capacity, as it sets out general principles which include the following:

---

[19] Michael Bach, "Advancing Self-Determination of Persons with Intellectual Disabilities: Overview of the Supported Decision-Making Model and Legal Provisions in Canada," Inclusion Europe Include (2007) at 1, online: Inclusion Europe < http://www.inclusion-europe.org/documents/INCL1_WEB_mini.pdf>.
[20] Interview of Gábor Gombos and Gerard Quinn by Jarlath Clifford on behalf of ERT, in "Promoting a Paradigm Shift – ERT talks with Gábor Gombos and Gerard Quinn about the UN CRPD on the Rights of Persons with Disabilities and its Optional Protocol" (2008) 2 The Equal Rights Trust, The Equal Rights Review at 90, online: The Equal Rights Trust http://www.equalrightstrust.org/ertdocumentbank/err_issue02%20reduced.pdf.
[21] Amita Dhanda, "Legal Capacity in the Disability Rights CRPD: Stranglehold of the Past or Lodestar for the Future?" (2007) 34:2 Syracuse J. Int'l L. & Com. 429 at 461.
[22] CRPD, Article 25.
[23] CRPD, Article 23.
[24] CRPD, Article 29.
[25] Malcolm D. Evans, ed., International Law, 3rd ed. (Oxford University Press, 2010), Chapter 7.
[26] CRPD, Article 1. International Disability Alliance, "Legal Opinion on Article 12 of the CRPD" (21 June 2008) at 2,
online: International Disability Alliance http://www.internationaldisabilityalliance.org/representation/legal-capacity-working-group/.

- Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
- Full and effective participation and inclusion in society; and,
- Accessibility.

Regardless of the debate over the continuing existence of substitute decision-making, the CRPD embodies a right to enjoy legal capacity on an equal basis (Article 12(2)), this right being fundamental to basic equality and full participation. This reading of Article 12 is consistent with Article 3's requirement to respect autonomy, as well as its emphasis on inclusion and accessibility.

In addition, Article 5 of the CRPD, on "Equality and Non-Discrimination," has a direct bearing on how States Parties and public and private entities must support and interact with individuals with respect to enjoying and exercising their right to legal capacity. The following paragraphs of article 5 are particularly relevant:

> 2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
>
> 3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

Article 2 of the CRPD defines reasonable accommodation as follows:

> 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;

This means that States Parties, including Canada, must ensure that reasonable accommodation is provided to people with disabilities in the decision-making process. This demands two things of the Canadian government. It must ensure that all parties to

the decision-making processes accommodate the range of supports that a person requires to exercise his/her legal capacity, and must undertake its own activities to provide supports to people with disabilities and facilitate their access to supports.

III. CONCEPTS: Capacity and Supported Decision-Making

Two key concepts embodied in Article 12 are: "capacity" and "supported decision-making". It is therefore essential to briefly describe these concepts and some meanings which have been attributed to them.

What is 'Capacity' and 'Legal Capacity'?

The CRPD, in Article 12, uses the term 'legal capacity' but does not define it. While there appears to be a general understanding as to its meaning in the context of United Nations treaties, its meaning is somewhat foreign in Canadian laws. The terms "legal capacity" and "capacity", among others, are currently in use. The term 'legal capacity' has a particular meaning in the context of international Conventions and is contained in the *Convention on the Elimination of All forms of Discrimination against Women*[27] (CEDAW) as well as in the CRPD.[28] It is generally understood in these Conventions as

[27] Article 15 provides as follows: "States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals."

[28] *Convention on the Rights of Persons with Disabilities*, G.A. Res. 61/106, 76th plen. Mtg., U.N. Doc A/Res/61/106 [adopted by consensus at the UN on Dec. 13, 2006] [CRPD]. Canada signed the CRPD on March 30, 2007 and ratified it on March 11, 2010. The CRPD came into force on May 3, 2008, Article 12, online: UN Enable http://www.un.org/disabilities/CRPD/CRPDfull.shtml.

referring to people's capacity to have rights, and to have the capacity to act on those rights on an equal basis with others without discrimination on the basis of gender or disability. Legal capacity in this sense is a recognized status.

However, this term is not often found in Canadian law. The term 'capacity' is much more frequently used in Canadian legislation[29] and is commonly, but not always, defined to refer to an ability to understand information relevant to making a decision and an ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision. In this sense, 'capacity' refers to the cognitive requisites considered necessary for exercising one's right to legal capacity, and having it respected by others.

The term 'legal capacity' is not absent from Canadian legal discourse, and is used in the Law Society of Upper Canada's *Rules of Professional Conduct*[30] in relation to legal capacity to instruct counsel. It also appears in Ontario's *Human Rights Code*, which guarantees to every person having legal capacity a right to contract on equal terms without discrimination.[31]

The concept of legal capacity as used in the CRPD is significant because it represents a shift in the understanding that many members of the legal community have attributed to it. A common understanding of capacity law in Canada views it in relation to a person's cognitive functioning. For example, in relation to Ontario's *Substitute Decisions Act* (SDA), the Office of the Public Guardian and Trustee's "Guidelines for Conducting Assessments of Capacity" states the following:

---

[29] *Health Care Consent Act*, 1996, S.O. 1996, c. 2, s. 4(1); *Substitute Decisions Act*, 1992, S.O. 1992, c. 30, ss. 6, 45; *The Adult Guardianship and Co-decision-making Act*, S.S. 2000, c. A-5.3, s. 2(c).
[30] Law Society of Upper Canada, "Rules of Professional Conduct," Commentary to Rule 2.02(6) (April 2010) at 12, online: Law Society of Upper Canada <http://www.lsuc.on.ca/with.aspx?id=671>.
[31] *Human Rights Code*, R.S.O. 1990, c. H19, s.3.

> In its legislation, the Government of Ontario has codified the belief that mental capacity is, at its core, a cognitive function. The SDA operationally defines capacity as the ability to understand information relevant to making a decision and appreciate the reasonably foreseeable consequences of a decision or lack of decision. [32]

Thus, having the status of being considered capable is determined based on a person's own ability to understand information and assess consequences of making a decision. Capacity, in this sense, is attached to the attributes of a person. In contrast, legal capacity as it is used in the *Convention on the Elimination of All forms of Discrimination against Women* and the CRPD is a social and legal status accorded independent of a person's particular capabilities.

Across jurisdictions there are a wide variety of laws regulating legal capacity, and tests employed to determine requisite mental capacity. In fact, it has been stated that "[t]here are as many different operational definitions of mental (in)capacity as there are jurisdictions."[33]

What is Supported Decision-Making?

Article 12(3) of the CRPD specifically references supports as follows:

> States parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

What do "supports", and by extension, the concept of supported decision-making, mean in the context of the CRPD?

[32] Capacity Assessment Office, "Guidelines for Conducting Assessments of Capacity" (May 2005) at I.1, online: Ministry of the Attorney General of Ontario http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacity/2005-05/guide-0505.pdf.
[33] Capacity Assessment Office, "Guidelines for Conducting Assessments of Capacity" (May 2005) at II.1, online: Ministry of the Attorney General of Ontario http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacity/2005-05/guide-0505.pdf.

Supported decision-making is a mechanism for enhancing a person's ability to make his/her own decisions. Thus, an apparently incapable person may be able to make his/her own decisions with the help of others, and thus exercise his/her own legal capacity. In general, supported decision-making is a process of decision-making that is directed by an individual but engages people who respect and are committed to that individual's well-being. This approach allows individuals to maintain legal capacity and avoid having their right to control their decisions taken over by a substitute decision-maker. Supports may assist with making decisions as well as expressing those decisions.

A model which incorporates the reliance on supports in the decision-making process "…recognizes that noninterference with liberty and autonomy does not necessitate neglect."[34] Rather, it assists people with disabilities to make their own competent choices.

Supports may function to do the following:

- assist in formulating one's purposes, to explore the range of choices and to make a decision;
- engage in the decision-making process with other parties to make agreements that give effect to one's decision, where one's decisions requires this; and

[34] K. C. Glass, "Refining Definitions and Devising Instruments: Two Decades of Assessing Mental Competence" (1997) *International Journal of Law and Psychiatry*, Vol. 20, No. 1 at 30.

- act on the decisions that one has made, and meet one's obligations under any agreements made. [35]

There are various types of supports which can come within the ambit of Article 12(3). One of the most well known is a support network or support circle. Support circles bring key people in an individual's life (e.g. family members, friends or others who have developed a close relationship with the person) together to either support an individual to make decisions and/or to interpret and facilitate an individual's wants when decisions need to be made. The supporters understand a person's life history, unique communication forms and likes and dislikes. Providing and explaining information, helping an individual understand the consequences of making a decision and the use of assistive and augmentative communication devices are all types of supports. There is no one way to support people to make decisions. Everyone is different and will need different supports at different times.

In light of Canada's ratification of the CRPD, what are Canada's domestic legal obligations to implement its provisions? To what extent can Canadians with disabilities expect our laws to embrace the concepts and demands of Article 12? How much does Article 12 really provide the long awaited impetus for change to our capacity laws that many members of the disability community have been calling for for years?[36] The next section of the paper analyzes Canada's legal approach to United Nations

[35] Michael Bach and Lana Kerzner, "A new Paradigm for Protecting Autonomy and the Right to Legal Capacity", October, 2010 at 73, online: http://www.lco-cdo.org/en/disabilities-call-for-papers-bach-kerzner.

[36] At the founding conference of People First Canada, in 1991, the first resolution adopted by the membership was a call to end guardianship because of its violation of the right to self-determination. Michael Bach, "Advancing Self-Determination of Persons with Intellectual Disabilities: Overview of the Supported Decision-Making Model and Legal Provisions in Canada", online: (2007) Inclusion Europe, Include 1/2007 at 3, <http://www.inclusion-europe.org/documents/INCL1_WEB_mini.pdf>.

treaties/conventions to which we are a party, and does so with a particular focus on the implications for Article 12.

IV. CANADA'S LEGAL OBLIGATIONS UNDER THE CRPD: Domestic Law Implications of Ratification

The CRPD represents a decade of effort by governments and international agencies and institutions, and extensive investment by the disability rights community in Canada and internationally. There are several specialized United Nations sponsored human rights treaties[37] of which the CRPD is one.[38] But, it is the first comprehensive international human rights instrument to consolidate legal recognition of human rights for people with disabilities. It is understood to provide an authoritative interpretive lens to other international human rights instruments.

The CRPD is a treaty[39] which came into force on May 3, 2008. It was a historic event in that it is the first comprehensive international treaty to specifically protect the rights of the world's population of people with disabilities.[40] Its purpose is to "… promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms

[37] John Currie, Craig Forcese and Valerie Oosterveld, International Law: Doctrine, Practice, and Theory (Toronto: Irwin Law Inc., 2007) at 554. Others include the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC).

[38] Frequently Asked Questions on Economic, Social and Cultural Rights, Fact Sheet No. 33, Office of the United Nations High Commissioner for Human Rights, 2009, at 9, online: http://www.ohchr.org/Documents/Publications/FactSheet33en.pdf.

[39] The term "treaty" is used generically and many words have been used to describe a treaty, including "convention", Malcolm D. Evans, ed., International Law, 3rd ed. (Oxford University Press, 2010), Chapter 7. The law of treaties is codified in the *Vienna Convention on the Law of Treaties*, 23 May 1969, Can T.S. 1980 No. 37 (entered into force 27 January 1980). "Treaty" is defined in the *Vienna Convention* at Article 2, online: http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

[40] Arlene S. Kanter, "The Promise and Challenge of the United Nations CRPD on the Rights of Persons with Disabilities" (2006) 34 Syracuse J. Int'l L. & Com. 287 at 288.

by all persons with disabilities, and to promote respect for their inherent dignity."[41] It prohibits all discrimination on the basis of disability and requires that all appropriate steps be taken to ensure reasonable accommodation.[42] It also provides several rights for people with disabilities, including rights relating to employment, education, health services, transportation, access to justice, accessibility to the physical environment, and abuse.[43] The CRPD calls on participating governments to change their country's laws, as necessary, to comply with its terms.[44]

Canada signed the CRPD on March 31, 2007 and ratified it on March 11, 2010. What are the implications for Canada of ratifying the CRPD? This answer is not straightforward as it involves both international and domestic law and involves actions of Canada's federal government and each of its provinces and territories.

Once a country has ratified a convention, it is legally bound by the treaty as a matter of international law.[45] Thus, "ratification is the decision by which Canada declares itself bound by international law and assumes the obligation to do everything necessary to ensure respect for its obligations under a treaty."[46] More specifically, in relation to the CRPD, Article 4 requires that countries that ratify the CRPD undertake to adopt all

[41] Ad Hoc Committee on a Comprehensive and Integral International CRPD, *Final Report on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, Art. 1, Delivered to the General Assembly, U.N. Doc. A/61/611 (6 December2006).
[42] CRPD, Article 5.
[43] These are only some of the rights articulated in the CRPD. Reference should be made to the text of the CRPD relating to its scope and coverage. See also: 34 Syracuse J. Int'l L. & Com. 287 (2006-2007). This special issue of the Syracuse Law Journal contains articles discussing the significance of the CRPD and its implications.
[44] Arlene S. Kanter, "The Promise and Challenge of the United Nations CRPD on the Rights of Persons with Disabilities" (2006) 34 Syracuse J. Int'l L. & Com. 287 at 289.
[45] John Currie, Craig Forcese and Valerie Oosterveld, International Law: Doctrine, Practice, and Theory (Toronto: Irwin Law Inc., 2007) at 104.
[46] Armand d Mestral and Evan Fox-Decent, "Rethinking the Relationship Between International and Domestic Law" (2008) 53 McGill L.J. 573 at 593.

appropriate legislative, administrative and other measures for the implementation of the rights recognized in the CRPD, and to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against people with disabilities.[47]

While international law requires each state to respect and fulfill its international obligations, it does not prescribe how the law should be applied or enforced at the national level.[48] A broad and flexible approach to implementation is contained in the CRPD to take account of the particularities of each State in that State parties may use "all appropriate legislative, administrative and other measures"[49] to implement the CRPD.[50] Further, Canadian legislators retain full control over domestic law and can choose to ignore Canada's international obligations, even though doing so would result in breaching these international obligations.[51]

In Canada, before a treaty is ratified, government officials review existing legislation to determine whether amendments or new legislation are needed in order to comply. This process involves officials from the Department of Justice consulting with federal departments and agencies, the provinces and territories and non-governmental

[47] CRPD, Article 4.
[48] Armand d Mestral and Evan Fox-Decent, "Rethinking the Relationship Between International and Domestic Law" (2008) 53 McGill L.J. 573 at 582; Malcolm D. Evans, ed., International Law, 3rd ed. (Oxford University Press, 2010).
[49] CRPD, Article 4(1)(a).
[50] Silvia Lavagnoli, "The Convention on the Rights of Persons with Disabilities: Key legislative measures for its effective implementation", United Nations Office of the High Commissioner for Human Rights, at 9, online: http://www.unescap.org/sdd/issues/disability/crpd/files/Paper-I-OHCHR-20110121.pdf.
[51] Jutta Brunee and Stephen Troope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002) 40 Can. Y.B. Int'l Law 3 at 52; John Currie, Craig Forcese and Valerie Oosterveld, International Law: Doctrine, Practice, and Theory (Toronto: Irwin Law Inc., 2007) at 106.

organizations.[52] However, the fact that ratification followed extensive federal-provincial consultation as well as extensive reviews of federal and provincial legislation does not guarantee that our courts will consider the treaty implemented. This was arguably the case in the Supreme Court of Canada decision in *Baker* v. *Canada (Minister of Citizenship and Immigration)*[53] and Ontario Court of Appeal's decision in *Ahani* v. *Canada (A.G.)*.[54]

The CRPD does not automatically become binding within Canada's domestic legal system even after ratification.[55] This is so because there are two separate spheres of law recognized by some states, including Canada. One sphere is international law and one is domestic law.[56] Thus, treaty law is not binding in Canada as part of domestic law unless it is 'transformed'/'implemented' into domestic law.[57] Implementation refers to the steps a state takes to ensure its compliance with a treaty.[58]

There are several implementation methods used by Canada. Implementation may involve reproducing all or part of the treaty text within a statute, passing legislation to

---

[52] Laura Barnett, "Canada's Approach to the Treaty-Making Process", Parliamentary Information and Research Service, Library of Parliament (24 November 2008) at 6. Online: http://www2.parl.gc.ca/Content/LOP/ResearchPublications/prb0845-e.pdf.

[53] [1999] 2 S.C.R. 817.

[54] (2002), 58 O.R. (3d) 107 (C.A.). See also Armand d Mestral and Evan Fox-Decent, "Rethinking the Relationship Between International and Domestic Law" (2008) 53 McGill L.J. 573 at 623-624.

[55] John Currie, Craig Forcese and Valerie Oosterveld, International Law: Doctrine, Practice, and Theory (Toronto: Irwin Law Inc., 2007) at 104.

[56] John Currie, Craig Forcese and Valerie Oosterveld, International Law: Doctrine, Practice, and Theory (Toronto: Irwin Law Inc., 2007) at 104.

[57] John Currie, Craig Forcese and Valerie Oosterveld, International Law: Doctrine, Practice, and Theory (Toronto: Irwin Law Inc., 2007) at 104. This type of approach is referred to as a dualist approach. Some states take a monist view instead, in which international treaty law is considered automatically incorporated into domestic law. There is no requirement for implementing legislation. Jutta Brunee and Stephen Troope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002) 40 Can. Y.B. Int'l Law 3 at 51

[58] Armand d Mestral and Evan Fox-Decent, "Rethinking the Relationship Between International and Domestic Law" (2008) 53 McGill L.J. 573 at 588.

fulfill specific treaty commitments or amending existing legislation. It may also be said to occur as a result of already existing statutory or common law.[59] Adopting legislative measures as a means of implementation is a specific requirement of the CRPD.[60] And it has been said that "…the adoption of legislation is of paramount importance and in some cases indispensible to the implementation of the Convention."[61]

Implementation of the CRPD, and Article 12 in particular, in Canada is complicated by Canada's constitutional division of powers. Given that implementation often occurs legislatively, this raises another problem in the context of the CRPD and Article 12, in particular. In general, the power to legislate with respect to capacity issues, dealt with in Article 12, falls within provincial and territorial jurisdiction[62] as a result of the division of powers established under the *Constitution Act,* 1867.[63] While only the federal government can commit Canada to a treaty,[64] some matters dealt with in treaties, like legal capacity, fall within provincial jurisdiction so the federal government does not have the jurisdictional power to implement those aspects of the treaty. Thus,

---

[59] Jutta Brunee and Stephen Troope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002) 40 Can. Y.B. Int'l Law 3 at 23.

[60] CRPD, Article 4(1)(a) and (b).

[61] Silvia Lavagnoli, "The Convention on the Rights of Persons with Disabilities: Key legislative measures for its effective implementation", United Nations Office of the High Commissioner for Human Rights, at 13, online: http://www.unescap.org/sdd/issues/disability/crpd/files/Paper-I-OHCHR-20110121.pdf.

[62] Explanatory Memorandum on the United Nations Convention on the Rights of Persons with Disabilities, Tabled before the House of Commons, Parliament of Canada, December 2009, online: http://www.chrc-ccdp.ca/pdf/memorandum_ratification_note.pdf.

[63] *Constitution Act, 1867*, s. 92(13). Note that "Canada's federal and provincial and territorial governments have the power to make laws with respect to different aspects of Canadian life. The rules about which government can do what, flows from the Constitution, the interpretations placed on it over time by the Courts, and also by agreement of the governments, in certain circumstances" Phyllis Gordon, "Contributing to the Dialogue, A Federal Disability Act: Opportunities and Challenges" (October 2006) at 6, online: http://archdisabilitylaw.ca/?q=federal-disability-act-opportunities-and-challenges. This article also contains a chart that outlines which government has primary jurisdiction over what matters at 7.

[64] "[T]he executive branch (of the federal government) is the only branch of government with the authority to negotiate, sign and ratify international conventions and treaties." Laura Barnett, "Canada's Approach to the Treaty-Making Process", Parliamentary Information and Research Service, Library of Parliament (24 November 2008) at 2, Online: http://www2.parl.gc.ca/Content/LOP/ResearchPublications/prb0845-e.pdf.

provinces/territories, too, have an important role to play in domestic implementation. "[T]reaty implementation and compliance are an area of federal, provincial and territorial responsibility."[65] It is important to note that, at international law, states who have ratified a Convention cannot plead constitutional difficulties in mitigation of their treaty obligations.[66]

There does not appear to be an official federal government statement as to Canada's implementation of the CRPD, including Article 12. It is easy to see how some obligations, including the right to equality and non-discrimination, are seen to have been complied with at the time of ratification, by virtue the *Canadian Charter of Rights and Freedoms* as well as the federal and provincial/territorial human rights acts. However, based on the current state of provincial/territorial capacity legislation, despite ratification, Article 12 does not appear to be domestically implemented. This is illustrated in detail in the next section of the paper. By way of example, Article 12(3) requires states parties to take appropriate measures to provide access to supports in exercising legal capacity. A review of the capacity laws in the Canadian provinces and territories illustrates that few, if any, have actually implemented Article 12(3). While some provinces, for example, British Columbia, Yukon Territory and Alberta do contain legislation which incorporates 'supported decision-making', this is, in itself not sufficient to satisfy 12(3), which requires that the state take measures to provide access to supports. British Columbia and the Yukon allow for the creation of planning documents which recognize

[65] Laura Barnett, "Canada's Approach to the Treaty-Making Process", Parliamentary Information and Research Service, Library of Parliament (24 November 2008) at 10, Online: http://www2.parl.gc.ca/Content/LOP/ResearchPublications/prb0845-e.pdf.

[66] Armand d Mestral and Evan Fox-Decent, "Rethinking the Relationship Between International and Domestic Law" (2008) 53 McGill L.J. 573 at 600, based on the Vienna Convention on the Law of Treaties, Article 27.

supports. However, there is no provision for the state's role in making supports available or funding supports. Further, other provinces, such as Ontario and New Brunswick contain no or scant legal recognition of supports in decision-making altogether.

The incomplete and piecemeal implementation of Article 12(3) by Canadian provinces/territories is partly addressed by the concept of progressive realization, which allows states to comply with obligations over time rather than immediately. To understand the concept of progressive realization, one must step back and examine some basic concepts of international human rights law.

The major categories of human rights are: civil, political, economic, social and cultural.[67] These are sometimes divided into two categories of rights: one being civil and political and the other being economic, social and cultural. Civil and political rights include equality before the law and the right to life, while economic, social and cultural rights include the right to work, social assistance and education.[68] The division between these two categories of rights is a historic one[69] and the rights are now considered indivisible and equally important.[70]

[67] John Currie, Craig Forcese and Valerie Oosterveld, International Law: Doctrine, Practice, and Theory (Toronto: Irwin Law Inc., 2007) at 553.
[68] Office of the High Commissioner for Human Rights, "What are human rights?", online: http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx.
[69] Frequently Asked Questions on Economic, Social and Cultural Rights, Fact Sheet No. 33, Office of the United Nations High Commissioner for Human Rights, 2009, at 9, online: http://www.ohchr.org/Documents/Publications/FactSheet33en.pdf.
[70] John Currie, Craig Forcese and Valerie Oosterveld, International Law: Doctrine, Practice, and Theory (Toronto: Irwin Law Inc., 2007) at 558.

Civil and political rights have been viewed as requiring the state to simply refrain from interfering with individual freedoms. In contrast, economic, social and cultural rights have been seen to require high levels of financial and human investment on the part of states.[71] While these differences are not necessarily accurate,[72] they have resulted in states' obligations to observe treaty-based human rights which vary according to which of these categories the specific obligation falls within.[73]

States' obligations in relation to economic, social and cultural rights are said to be based on the concept of 'progressive realization'. Progressive realization is a general concept which requires states to take appropriate measures towards the full realization of economic, social and cultural rights to the maximum of their available resources. It recognizes that these rights can be achieved only over a period of time based on the resources available to each state.[74] Nonetheless, the obligation is immediate in the sense that appropriate and concrete steps must be taken within a reasonably short time towards the realization of these rights, even when there is a lack of resources.[75]

---

[71] Frequently Asked Questions on Economic, Social and Cultural Rights, Fact Sheet No. 33, Office of the United Nations High Commissioner for Human Rights, 2009, at 9, online: http://www.ohchr.org/Documents/Publications/FactSheet33en.pdf.

[72] Frequently Asked Questions on Economic, Social and Cultural Rights, Fact Sheet No. 33, Office of the United Nations High Commissioner for Human Rights, 2009, at 9, online: http://www.ohchr.org/Documents/Publications/FactSheet33en.pdf.

[73] John Currie, Craig Forcese and Valerie Oosterveld, International Law: Doctrine, Practice, and Theory (Toronto: Irwin Law Inc., 2007) at 559.

[74] Frequently Asked Questions on Economic, Social and Cultural Rights, Fact Sheet No. 33, Office of the United Nations High Commissioner for Human Rights, 2009, at 13, online: http://www.ohchr.org/Documents/Publications/FactSheet33en.pdf.

[75] Frequently Asked Questions on Economic, Social and Cultural Rights, Fact Sheet No. 33, Office of the United Nations High Commissioner for Human Rights, 2009, at 14 and 16, online: http://www.ohchr.org/Documents/Publications/FactSheet33en.pdf.; Don MacKay, "The United Nations Convention on the Rights of Persons with Disabilities", 34 Syracuse J. Int'l L. & Com. 323 at 330.

This obligation is expressed differently from treaty to treaty.[76] The progressive realization clause in the CRPD is contained in Article 4(2) and states as follows:

> With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.

The CRPD is a hybrid treaty in that some of the rights are civil and political and others are economic, social and cultural.[77] These rights are not separated out and the CRPD itself does not explicitly set out how the rights should be categorized. This may be because the categories are not in themselves clear and categorization is subject to individual interpretation.

Article 12 can be interpreted as one that incorporates both categories of rights. Some believe that Articles 12(1), relating to recognition as persons before the law and Article 12(2) being the right to legal capacity on an equal basis with others, are civil and political rights, while Article 12(3), relating to the provision of access to supports, is an economic, social and cultural right subject to progressive realization. Thus, the fact that provinces and territories do not yet have laws incorporating supported decision making may not be problematic as long as they are actively working towards this goal. In fact, there are law reform efforts in relation to the CRPD in both Newfoundland and Labrador and Prince Edward Island. These are described in more detail in section V below.

---

[76] Frequently Asked Questions on Economic, Social and Cultural Rights, Fact Sheet No. 33, Office of the United Nations High Commissioner for Human Rights, 2009, at 11, online: http://www.ohchr.org/Documents/Publications/FactSheet33en.pdf.

[77] Don MacKay, "The United Nations Convention on the Rights of Persons with Disabilities", 34 Syracuse J. Int'l L. & Com. 323 at 330.

An analysis of Canada's capacity legislation (see section V below) illustrates that not all components of Article 12 have been implemented at the present time. Therefore, the next question is: what is the effect in Canada of ratified treaties that are unimplemented vs. those that are implemented? The very existence of unimplemented treaties makes the precise legal effect of treaties in Canadian law uncertain.[78] The legal implications of implementation are also obfuscated by the fact that there is not always clarity about the extent to which a treaty has been implemented, or if it has been implemented altogether.[79]

The most often cited case in Canada on the domestic implications of an unimplemented treaty is *Baker v. Canada (Minister of Citizenship and Immigration).*[80] Baker considered the relevance of the *Convention on the Rights of the Child* to ministerial discretion concerning a deportation order. The Court viewed that Convention as not implemented in Canada.[81] The majority of the Court in *Baker* held that international treaties and conventions are not part of Canadian law unless they have been implemented.[82] Nonetheless, the Court concluded that "… the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and

[78] Armand d Mestral and Evan Fox-Decent, "Rethinking the Relationship Between International and Domestic Law" (2008) 53 McGill L.J. 573 at 617.
[79] Armand d Mestral and Evan Fox-Decent, "Rethinking the Relationship Between International and Domestic Law" (2008) 53 McGill L.J. 573 at 623.
[80] [1999] 2 S.C.R. 817.
[81] Although De Mestral and Fox-Decent argue that the Court in *Baker* mischaracterized the Convention as unimplemented. Armand d Mestral and Evan Fox-Decent, "Rethinking the Relationship Between International and Domestic Law" (2008) 53 McGill L.J. 573 at 623.
[82] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817at para 69.

judicial review."[83] Thus, until implemented, the CRPD has no direct application in Canadian law, but may help inform judicial decisions and legal analysis.

Of course, once the CRPD is implemented, assuming that this happens at some point in the future, it will have a much greater potential impact on Canadian laws, and ultimately will be a much more useful tool for Canadians with disabilities. This is because once a treaty is implemented, courts must adopt an interpretation of domestic legislation consistent with the obligations under the treaty.[84]

Regardless of the uncertainty about whether, and to what extent, the CRPD is implemented, there is an important lesson to be learned by advocates in the disability community who wish to use the CRPD to support their cause and advance their rights. This has been expressed by Professors de Mestrel and Fox-Decent as follows:

> Of immediate advantage to minorities in Canada would be the right to invoke ratified conventions protective of their interests more freely before the courts, …. It would also be to minorities' advantage to dispel the suggestion that conventions such as the ICCPR [International Covenant on Civil and Political Rights] are unimplemented.[85]

In summary, a critical review of capacity laws in Canada must be undertaken to determine what reforms are needed for full compliance with the rights set out in Article 12. Law reform activities must be ongoing until Canada can confidently declare that the CRPD has been fully implemented. Section V of the paper is intended to ground this

[83] *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817at para 70.
[84] Jutta Brunee and Stephen Troope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002) 40 Can. Y.B. Int'l Law 3 at 24 and 51.
[85] Armand d Mestral and Evan Fox-Decent, "Rethinking the Relationship Between International and Domestic Law" (2008) 53 McGill L.J. 573 at 627.

dialogue, as it describes Canada's capacity specific laws with specific reference to Article 12.

V. LEGISLATIVE APPROACHES TO SUPPORTED DECISION-MAKING IN CANADIAN PROVINCES AND TERRITORIES

Introduction

There is a trend in many jurisdictions in Canada of moving towards legal recognition of supported decision-making and the promotion of autonomy, finally extricating themselves from the archaic and paternalistic language of the need for care and charity. This is in accord with strong statements of the Supreme Court of Canada, where in *Starson* v. *Swayze,*[86] the Court stated that "[u]nwarranted findings of incapacity severely infringe upon a person's right to self-determination."[87] Nonetheless, this trend is far from complete in Canada if Article 12 of the CRPD is taken as the benchmark.

This section reviews selected pieces of Canadian capacity and decision-making legislation with a focus on those that, in some way, provide legal recognition for supports or supported decision-making. To give context to the discussion, this section begins with a brief discussion of Canadian decision-making legislation generally. However, full implementation of Article 12 requires a review of all legislation that touches upon capacity and decision-making, not just those which are exclusively devoted to the topic. Such a review was beyond the scope of this paper. It should be noted that additional laws in which capacity is addressed include mental health laws and adult protection laws, both of which exist in many Canadian jurisdictions.

[86] Starson v. Swayze, 2003 SCC 32, [2003] 1 S.C.R. 722.
[87] Starson v. Swayze, 2005 SCC 12, [2003] 1 S.C.R. 722 at 759.

Canadian Laws regarding Capacity

Legislation in Canada which addresses legal capacity most directly covers guardianship,[88] planning documents such as powers of attorney, consent to health care and admission to care facilities, and adult protection. These laws require that people be 'capable' to make decisions about their property and personal care, including health care and long-term care residency. Overlaying these are more specific laws: for example, entering into a contract,[89] making a will,[90] acting as a director of a corporation[91] and giving evidence in court[92] each require a person to have a requisite level of mental capacity to do so. There are several additional laws in which legal capacity is addressed but is not the primary subject-matter of the legislation. Rather, provisions are included in laws to cover off situations in which a person's incapacity would expose a gap in the legal framework or otherwise affect its functioning. For example, the Canada Pension Plan (CPP) contains a provision allowing for payments to be made to another person or agency when the Minister is satisfied that the CPP recipient is "incapable of managing his own affairs".[93]

Capacity and substitute decision-making laws most directly govern situations where a person's capacity is in issue. These laws are common to all jurisdictions in Canada. For example, Ontario's *Substitute Decisions Act*[94] focuses on substitute decision-making, which involves decisions being made by one person on behalf of another, who

[88] This can include both court-ordered and statutory guardianship.
[89] G.H.L. Fridman, The Law of Contract, 5th ed. (Toronto: Carswell, 2006) at 158; The Canadian Encyclopedic Digest, 4th ed., vol. 12 (Toronto: Carswell, 2010) at 727, para. 175.
[90] *Brydon v. Malamas*, [2008] B.C.J. No. 1179, 2008 BCSC 749 at paras. 47-50.
[91] *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 118(1).
[92] *Evidence Act*, R.S.O. 1990, c. E.23, s.18.
[93] *Canada Pension Plan Regulations,* C.R.C., c. 385, s. 55.
[94] *Substitute Decisions Act*, 1992, S.O. 1992, c. 30.

is usually determined to be incapable of making his/her own decisions. It usually takes one of two forms: guardianship, in which an order (often by a court) is made appointing a substitute decision-maker, and planning documents, in which a person chooses, in advance of incapacity, who he/she wishes to make decisions on his/her behalf.

Recognition of Supports and Supported Decision-Making

In what ways does legislation in Canada incorporate the concepts of supported decision-making? Does any legislation in Canada fully implement the CRPD? This is a challenging question. There has been much discussion about the recognition of supported decision making found in the CRPD but the wording of Article 12 does not give specific and clear direction to States Parties as to how to operationalize the right to exercise legal capacity on an equal basis, and as to the state's duty to provide access to supports to exercise legal capacity.

That said, in concrete terms, it appears that there are at least two methods to give effect to Article 12's requirements. These must both be present in a legal system to give full effect to Article 12. They are:

1. Legislative recognition of the status of supports, including the full range of supports as described in Part III above. This involves legislation which states that whenever a person chooses to use supports, any third party who interacts with that person must accept the role of the supports and co-operate such that the supporters/supports are included in the decision-making process to the extent chosen by the person.

2. Government duty to provide/arrange for the provision of supports to any person who so requires for decision-making.

Adopting legislation as a means of implementation is a specific requirement of the CRPD.[95] It is therefore essential to carefully analyze our legislation for two reasons. Firstly, to determine Canada's current level of compliance with the CRPD. Secondly, to search for examples of how supported decision making can advance from a conceptual idea to the clarity required for implementation.

There is no single piece of Canadian legislation, on its own, that meets all of the criteria in Article 12. However, if the aspects of supported decision making found in the various pieces of legislation were pieced together, one could create model legislation that might come close to meeting the requirements of Article 12.

Supports and supported decision-making are recognized in Canadian legislation by three broad methods:

1. Supporters legislatively granted legal recognition to assist with decision-making

    a.) Legislation which allows an individual to appoint support people to assist him/her with decision-making (e.g. British Columbia, Yukon Territory and Alberta)
    b.) Legislation which allows a court to appoint support people to assist an individual with decision-making (e.g. Saskatchewan, Alberta and Quebec)

2. Legislation which requires government to provide or arrange for the provision of supports where this would assist an individual to demonstrate his/her capacity to make decisions (e.g. Manitoba)

3. Legislative requirement not to appoint guardian or co-decision-maker if less restrictive alternatives exist, including supports (e.g. Ontario and Saskatchewan)

[95] CRPD, Article 4(1)(a) and (b).

The section below describes and illustrates the use of each of these approaches in Canada. The analysis below is of relevance not only in Canada but for all countries who have ratified the CRPD and who are in the process of determining how best to implement it. Legislative approaches in other countries should also be looked at to deepen and broaden the examples from which to choose. While it was beyond the scope of this paper to explore jurisdictions outside of Canada, Professor Surtees, of the University of Saskatchewan's College of Law, recently summarized the situation internationally by stating that "…countries including Norway, Denmark, Sweden, Germany, Japan and England and Wales have introduced or proposed some provision for supported or assisted decision making with respect to some types of decisions."[96]

Jurisprudence in Canada bolsters our legislative approaches and has most certainly moved in the direction of promoting autonomy and recognizing supported decision making. In relation to legal capacity, the Supreme Court of Canada has clearly and explicitly recognized the autonomy interest of people with disabilities in its statement that "[u]nwarranted findings of incapacity severely infringe upon a person's right to self-determination".[97] The Court also recently advanced the value to be placed in autonomous decision-making in relation to incapable people in *Nova Scotia (Minister of Health)* v. *J.J.*[98] With specific reference to supports, the Ontario Court (General

[96] Doug Surtees, "The Evolution of Co-Decision-Making in Saskatchewan", Saskatchewan Law Review, 2010, Volume 73 at 83-84.
[97] Starson v. Swayze, 2003 SCC 32 at 759, [2003] 1 S.C.R. 722.
[98] *Nova Scotia (Minister of Health) v. J.J.*, 2005 SCC 12, [2005] 1 S.C.R. 177.

Division) stated that "[i]t is to be remembered that mental capacity exists if the appellant is able to carry out her decisions with the help of others."[99]

Legislative Approaches to Supports/Supported Decision-Making in Canadian Provinces and Territories

Alberta

Decision-making laws in Alberta are governed by two main statutes: the *Adult Guardianship and Trusteeship Act*[100] and the *Personal Directives Act.*[101] The *Adult Guardianship and Trusteeship Act* is fairly recent, having come into force on October 30, 2009. Taken together, they provide legal mechanisms for individuals to appoint people to make decisions for them, appoint people to assist them to make decisions, as well as allowing a court to appoint a co-decision-maker, guardian or trustee. These options can be a seen as representing a spectrum of decision-making options. Some are planning tools which allow people to choose who will make decisions for them or assist them to do so. Others give the court the power to choose who will make decisions or assist people to do so. The various options are as follows:

Planning Tools:

[99] *Koch (Re)*, (1997) 33 O.R. (3d) 485 (Gen. Div.) at 521. Also see the following decisions, which recognize the role of supports: *Clark v. Clark*, (1983) 40 O.R. (2d) 383; *Kacan v. Ontario Public Service Employees Union*, 2010 HRTO 795, File No. 2008-00381-I at para. 22, and *Gray v. Ontario*, [2006] O.J. No. 266 at para. 47.
[100] *Adult Guardianship and Trusteeship Act*, S.A. 2008, c. A-4.2.
[101] *Personal Directives Act*, c. P-6.

- **Personal Directive**: a legal document that allows an individual to name a substitute decision maker if they no longer have capacity to make decisions. These can be made for only personal, non-financial matters.[102]
- **Enduring Power of Attorney**: a legal document that allows an individual to designate a person to make financial/property decisions on their behalf while they are incapable of making those decisions.[103]
- **Supported Decision Authorization**: a regulated form that allows an individual who possesses capacity to designate someone to help them make decisions for only personal matters.[104]

Court Appointments

- **Co-decision-making orders**: a court order in which the adult and co-decision-maker make decisions together. This is for situations where an adult may have an impaired ability to make decisions, but can do so with support. These orders can only be made for personal, non-financial matters.[105]
- **Guardianship orders**: a court order giving a guardian legal responsibility to make personal decisions for an adult who lacks capacity to do so.[106]
- **Trusteeship orders**: a court order giving a trustee legal responsibility to make financial decisions for an adult who lacks capacity to do so.[107]

Health Care Decision Making

[102] These are governed by the *Personal Directives Act*, c. P-6.
[103] These are governed by the *Powers of Attorney Act*, c. P-20.
[104] These are governed by the *Adult Guardianship and Trusteeship Act*, S.A. 2008, c. A-4.2, Part 2, Division 1.
[105] These are governed by the *Adult Guardianship and Trusteeship Act*, S.A. 2008, c. A-4.2, Part 2, Division 2.
[106] These are governed by the *Adult Guardianship and Trusteeship Act*, S.A. 2008, c. A-4.2, Part 2, Division 3.
[107] These are governed by the *Adult Guardianship and Trusteeship Act*, S.A. 2008, c. A-4.2, Part 2, Division 4.

- A relative can make a decision on behalf of an adult who lacks capacity in relation to time-sensitive substitute health care decisions. Where there is no guardian or personal directive, a health care provider may choose a relative based on a ranked list to make the decision.[108]

The stated principles in Alberta's *Adult Guardianship and Trusteeship Act* aim towards a more progressive and less intrusive approach to decision-making. Its stated principles include the preservation of autonomy and the presumption of capacity.[109]

While the Alberta laws do recognize forms of supported decision making, it is important to note that these do not cover all types of decisions. In particular, supported decision making authorizations and co-decision-making orders can only apply to personal, non-financial decisions. This limits the usefulness of the tools available to make decisions with legally recognized supports.

Further, there are several different methods for creating substitute and supported decision-making, each with different rules and terminology. This can make using them quite confusing for the general public, perhaps even more so for people who have intellectual disabilities. This factor may ultimately limit their use.

A notable feature of the personal directive, which is not often found in most jurisdictions in Canada, is that these can be officially registered. This allows authorized health care

[108] These are governed by the *Adult Guardianship and Trusteeship Act*, S.A. 2008, c. A-4.2, Part 3.
[109] *Adult Guardianship and Trusteeship Act*, S.A. 2008, c. A-4.2, s.2.

providers to confirm the existence of a personal directive and provides them with contact information for the substitute decision maker.[110]

British Columbia

Over the past twenty years British Columbia's capacity laws have been in limbo. Various reports have been issued recommending reform and a number of bills were proposed but never passed.[111] However, in September, 2011 a host of legislative changes will come into effect.[112] These are contained in the *Adult Guardianship and Planning Statutes Amendment Act,* 2007, whose purpose is to modernize British Columbia's capacity and adult guardianship laws. Only part of this Act will come into force, primarily relating to incapacity planning.[113]

This paper only reviews British Columbia's *Representation Agreement Act*[114] as it is this statutory tool that the disability community hails as having achieved some degree of success in incorporating the concept of supported decision-making. While the changes coming into effect later this year will include amendments to the *Representation Agreement* Act, none of these will change the substance of its supported decision-making component. It has been described as innovative legislation that achieves a

[110] *Personal Directives Act*, c.P-6, s. 7.2 and Personal Directives Regulation, Alberta Regulation 99/2008.
[111] B.C. Adult Abuse/Neglect Prevention Collaborative, "Vulnerable Adults and Capability Issues in BC – Provincial Strategy Document," January 2009 at 38, online: http://www.bcli.org/ccel/projects/vanguard#tabs-projects-2.
[112] Order of the Lieutenant Governor in Council, Order in Council No. 026, Approved and Ordered February 2, 2011.
[113] In 2007 the British Columbia Legislative Assembly passed Bill 29, the *Adult Guardianship and Planning Statutes Amendment Act*, 2007. Parts of Bill 29 will be brought into force on September 1, 2011. Many of these changes relate to incapacity planning. The parts of Bill 29 relating to guardianship reforms will not come into force at that time.
[114] *Representation Agreement Act*, R.S.B.C. 1996, c. 405.

delicate balance for enabling self-determination and providing safeguards.[115] A distinctive feature of the *Representation Agreement Act* is the extent to which disability organizations and seniors' groups played a role in its development.[116]

The purposes set out in the legislation are telling. The Act describes its purpose as the provision of a mechanism to:

- Allow adults to arrange in advance in relation to decisions if they become incapable of making them independently

- Avoid the need for the court to appoint substitute decision-makers when they are incapable of making decisions independently[117]

The legislation allows for the creation of personal planning tools called representation agreements. These are progressive in Canada in that, unlike most personal planning tools, representation agreements allow for assisted decision-making.[118] Two different types of representation agreements may be created, one of which provides for legal recognition of support people. They enable adults to appoint someone "to help the adult make decisions or to make decisions on behalf of the adult."[119] The types of decisions which can be covered by these agreements relate to personal care, routine management of financial affairs, certain health care and the obtaining of legal services.

---

[115] Representation Agreement Resource Centre & Nidus eRegistry, "BC's Representation Act for Assisted Decision-making: Is It Meeting A Need?", Handout produced for workshop at Canadian Conference on Elder Law (October, 2005).

[116] Representation Agreement Resource Centre & Nidus eRegistry, "BC's Representation Act for Assisted Decision-making: Is It Meeting A Need?", Handout produced for workshop at Canadian Conference on Elder Law (October, 2005). The handout describes the community's role in law reform and implementation.

[117] *Representation Agreement Act*, R.S.B.C. 1996, c. 405, s. 2.

[118] Representation Agreement Resource Centre & Nidus eRegistry, "BC's Representation Act for Assisted Decision-making: Is It Meeting A Need?, Handout produced for workshop at Canadian Conference on Elder Law (October, 2005) at 6.

[119] *Representation Agreement Act*, R.S.B.C. 1996, c. 405, s. 7(1).

These agreements cover routine decisions but exclude others, such as purchase/sale of real property or refusing life-supporting care.[120] By allowing an individual to create a document to **help** an adult make decisions, these can be seen as tools for supported decision-making. People who provide supports are thus granted some legitimacy vis a vis third parties, such as banks and medical professionals. These agreements are made pursuant to section 7 of the Act, and are sometimes referred to as section 7 agreements. Agreements granting a different range of authority can be made under s. 9 of the Act. These section 9 agreements do not allow for a role of supporters; the section refers to the representative being authorized to do certain things, but there is no mention of a role for helping in decision-making.[121]

The Act provides that an adult may make a representation agreement unless he/she is incapable of doing so.[122] However, there is a significant difference between section 7 and section 9 agreements in relation to what constitutes incapability to make these agreements. For section 7 agreements, the commonly used test of incapacity, involving the ability to understand information and appreciate consequences[123] is not used. The test of incapability in relation to section 9 agreements is more stringent, similar to the 'understand and appreciate' test.[124]

---

[120] *Representation Agreement Act*, R.S.B.C. 1996, c. 405, s. 7. The wording "life-supporting care" is changed slightly in the *Adult Guardianship and Planning Statutes Amendment Act*, s.45.
[121] *Representation Agreement Act*, R.S.B.C. 1996, c. 405, s. 9. The wording of section 9 is changed in the *Adult Guardianship and Planning Statutes Amendment Act*, s.45, but not in respect to the role of representatives.
[122] *Representation Agreement Act*, s.4.
[123] Michael Bach and Lana Kerzner, "A new Paradigm for Protecting Autonomy and the Right to Legal Capacity", October, 2010 at 47-48, online: http://www.lco-cdo.org/en/disabilities-call-for-papers-bach-kerzner.
[124] *Representation Agreement Act*, R.S.B.C. 1996, c. 405, s. 10. The current wording states that an adult cannot authorize a representative if he/she is incapable of understanding the nature of the authority and the effect of giving it to the representative. When the changes to the *Representation Agreement Act* come into force by virtue of the *Adult Guardianship and Planning Statutes Amendment Act* (in September, 2011), the wording will be

Instead, for section 7 agreements, a more flexible approach applies to deciding whether or not a person is incapable of making such an agreement. Four factors are set out which must be taken into account in making this decision. The factors include communicating a desire to have a representative assist in decision-making, demonstrating choice and an ability to express approval or disapproval of others, awareness of the role of the representative and a trusting relationship with the representative.[125] Additionally, the legislation specifies that a person is not deemed incapable for the purpose of creating a section 7 agreement because he/she may not have the capacity to enter into contracts or manage his/her personal or financial affairs.[126]

The manner in which capacity is addressed in relation to section 7 agreements is favoured by the disability community:

> These provisions are one area in law where interdependent personal relationships involving a person with a disability are recognized, and in a manner which promotes the legal right of self-determination of a person (by creating more flexible standards for competency to make a decision, and by acknowledging that the defining feature of the relationship is one of trust rather than simply caregiving or dependence).[127]

This test recognizes the shades of grey with respect to capacity and sets aside the notion of full vs. no capacity. It was designed to provide a flexible arrangement where a person could be assisted to make decisions, substitute decision-making being a last

---

changed so that an adult cannot authorize a representative if he/she is incapable of understanding the nature and consequences of the proposed agreement. *Adult Guardianship and Planning Statutes Amendment Act*, s.49.

[125] *Representation Agreement Act*, R.S.B.C. 1996, c. 405, s. 8(2).

[126] *Representation Agreement Act*, R.S.B.C. 1996, c. 405, s. 8(1). By virtue of the *Adult Guardianship and Planning Statutes Amendment Act*, s.46, the language of this section will change slightly.

[127] Michael Bach, "Advancing Self-Determination of Persons with Intellectual Disabilities: Overview of the Supported Decision-Making Model and Legal Provisions in Canada", online: (2007) Inclusion Europe, Include 1/2007 at 4, <http://www.inclusion-europe.org/documents/INCL1_WEB_mini.pdf>.

resort. These agreements are said to give legal status, especially in dealing with third parties, to people who already are, de facto, providing assistance.[128] It is in this context that this section should be understood. Nonetheless, the section 7 "test of incapability" is said to leave the law in an uncertain state.[129] How are the factors to be weighed, for example? Do all four factors have to be met?

While not entrenched in legislation, an organization does exist in British Columbia which operates a centralized registry for representation agreements and enduring powers of attorney (www.nidus.ca). However, it is a non-profit, charitable organization. it is not legislatively created nor government funded.

Manitoba

The legislation which incorporates supported decision-making in Manitoba is *The Vulnerable Persons Living with a Mental Disability Act.*[130] The Act has been described as legislation that was designed to both empower and protect people with intellectual disabilities.[131] Its stated intention is to focus on the abilities and capacities of people with intellectual disabilities.[132] The legislation recognizes the role of support networks in assisting people with intellectual disabilities to exercise their decision-making rights, and

[128] A.J. McClean, Q.C., Review of Representation Agreements and Enduring Powers of Attorney, (15 February 2002) at 22, online: < http://www.ag.gov.bc.ca/public/McClean-Report.pdf>.
[129] A. J. McClean, Q.C., "Review of Representation Agreements and Enduring Powers of Attorney", February 15, 2002 at 22, online: < http://www.ag.gov.bc.ca/public/McClean-Report.pdf>.
[130] *The Vulnerable Persons Living with a Mental Disability Act*, C.C.S.M. c. V90.
[131] Allen Hansen, "Empowering and Protecting the Rights of Vulnerable Persons" (Paper presented to the Society for Disability Studies 14th Annual Conference, Winnipeg, 20-23 June 2001) online: <http://www.ee.umanitoba.ca/~kinsner/sds2001/proceed/ipapers.html>.
[132] Z.M. Lutfiyya et al, "Report on the Examination of the Implementation and Impact of The Vulnerable Persons Living with a Mental Disability Act (VPA)" September 2007 at 1, online:
< http://www.aclmb.ca/Justice/VPA_FinalReport.pdf>.

substitute decision-makers are considered last resorts. The legislation addresses situations of and protection from abuse and neglect.

The Act provides mechanisms for applications to be made to a Commissioner for the appointment of substitute decision makers for property and personal care. In this way, it is similar to guardianship applications. However, the applications are administrative rather than court processes. It also allows for the provision of support services to people with intellectual disabilities,[133] and provides for interventions in situations of abuse and neglect.[134] It is administered jointly through the Supported Living Program and the Vulnerable Persons Commissioner,[135] each of which who report to the Department of Family Services and Consumer Affairs.

However, it is marked by its limited coverage. It applies only to people with intellectual disabilities who are described as vulnerable persons.[136] A "vulnerable person" is defined in the Act as:

> "vulnerable person" means an adult living with a mental disability who is in need of assistance to meet his or her basic needs with regard to personal care or management of his or her property.[137]

Because the definition uses the term "mental disability", to understand the coverage of the Act, reference must be made to the legislated definition of "mental disability", which is as follows:

---

[133] *The Vulnerable Persons Living with a Mental Disability Act*, C.C.S.M. c. V90, Part 2.
[134] *The Vulnerable Persons Living with a Mental Disability Act*, C.C.S.M. c. V90, Part 3.
[135] The Vulnerable Persons' Commissioner is appointed under Part 4 (substitute decision making) of the *Vulnerable Persons Living with a Mental Disability Act* with a mandate to implement the substitute decision making provisions of the Act. Information on the Vulnerable Persons' Commissioner can be accessed online at: http://www.gov.mb.ca/fs/vpco/.
[136] Z. M. Lutfiyya, et al, "Report on the Examination of the Implementation and Impact of The Vulnerable Persons Living with a Mental Disability Act (VPA)" September 2007 at 1, online: < http://www.aclmb.ca/Justice/VPA_FinalReport.pdf>.
[137] *The Vulnerable Persons Living with a Mental Disability Act*, C.C.S.M. c. V90 at s. 1(1).

> "mental disability" means significantly impaired intellectual functioning existing concurrently with impaired adaptive behavior and manifested prior to the age of 18 years, but excludes a mental disability due exclusively to a mental disorder as defined in section 1 of the Mental health Act[138]

The coverage of this legislation excludes many people, including people with psycho-social disabilities and older adults, from being able to benefit from it. Professor Gordon's view is that the special focus of coverage reflects the lobbying efforts of the associations for community living.[139]

The language of the Act provides an important indication of the value it places on supported decision-making, self-determination and minimalist intrusion. This is illustrated in the strong wording of the preamble as follows:

> WHEREAS Manitobans recognize that vulnerable persons are presumed to have the capacity to make decisions affecting themselves, unless demonstrated otherwise;
>
> AND WHEREAS it is recognized that vulnerable persons should be encouraged to make their own decisions;
>
> AND WHEREAS it is recognized that the vulnerable person's support network should be encouraged to assist the vulnerable person in making decisions so as to enhance his or her independence and self-determination;
>
> AND WHEREAS it is recognized that any assistance with decision making that is provided to a vulnerable person should be provided in a manner which respects the privacy and dignity of the person and should be the least restrictive and least intrusive form of assistance that is appropriate in the circumstances;
>
> AND WHEREAS it is recognized that substitute decision making should be invoked only as a last resort when a vulnerable person needs decisions to be made and is unable to make these decisions by himself or herself or with the involvement of members of his or her support network;

[138] *The Vulnerable Persons Living with a Mental Disability Act*, C.C.S.M. c. V90 at s. 1(1).

[139] R. M. Gordon, "The Emergence of Assisted (Supported) Decision-Making in the Canadian Law of Adult Guardianship and Substitute Decision-Making" (2000) *International Journal of Law and Psychiatry*, Vol. 23, No. 1 at 67.

The emphasis on supports, as embodied in the preamble, manifests itself in two important ways. Firstly, the existence and role of a support network is an integral consideration in the granting of substitute decision making orders. A substitute decision maker shall be appointed only if, among other things, the person is incapable of personal care or managing property, as the case may be, by himself or herself or *with the involvement of a support network* [emphasis added].[140] This provision ensures that substitute decision-making is ordered only if the person is incapable despite the involvement of a support network. It guards against situations in which a support network would enable a person to avoid substitute decision making, which would not be the case if the test of capacity did not consider the role of support networks.

Secondly, if an application is made for the appointment of a substitute decision-maker, but the person does not have a support network, may make a request that steps be taken to involve a support network.[141] These steps would be taken by the Supported Living Program. This mechanism further enables people with intellectual disabilities to be guarded from the intrusion of unnecessary substitute decision makers. The assistance legislatively created to involve a support network may avoid the outcome whereby a person who lacks capacity without a support network would automatically be placed under substitute decision making.

There are some important limitations of the legislation's recognition of supported decision making. Firstly, the Act states that supported decision-making should be

[140] *The Vulnerable Persons Living with a Mental Disability Act*, C.C.S.M. c. V90, s. 53(1) and 88(1).
[141] *The Vulnerable Persons Living with a Mental Disability Act*, C.C.S.M. c. V90, s. 50(2) and 85(2).

respected and recognized.[142] However, the wording is unusual in that it employs the word "should" and thus is not a statutory duty.[143] Secondly, supported decision-making is defined in relation only to support networks and not to the broader range of supports on which people with disabilities may choose to rely.[144] The Act defines supported decision making as:

> …the process whereby a vulnerable person is enabled to make and communicate decisions with respect to personal care or his or her property and in which advice, support or assistance is provided to the vulnerable person by members of his or her support network.[145]

The Act also allows for government provision of support services generally,[146] and more specifically empowers the provision of support services to a vulnerable person who is or is likely to be abused or neglected.[147] However, support services are essentially undefined in the Act.[148] Based on a strict reading of the Act, it is unclear whether these services are intended to be disability-related supports or supports specifically related to decision-making. Nevertheless, the Manitoba Family Services and Consumer Affairs website describes available support services to include residential services, day

[142] *The Vulnerable Persons Living with a Mental Disability Act*, C.C.S.M. c. V90 at s.6(2).
[143] R. M. Gordon, "The Emergence of Assisted (Supported) Decision-Making in the Canadian Law of Adult Guardianship and Substitute Decision-Making" (2000) *International Journal of Law and Psychiatry*, Vol. 23, No. 1 at 68.
[144] *The Vulnerable Persons Living with a Mental Disability Act*, C.C.S.M. c. V90 at s. 6(1). Support network is defined in s. 1(1). See Part III above, for a description of other types of supports.
[145] *The Vulnerable Persons Living with a Mental Disability Act*, C.C.S.M. c. V90, s.6(2).
[146] *The Vulnerable Persons Living with a Mental Disability Act*, C.C.S.M. c. V90, Part 2.
[147] *The Vulnerable Persons Living with a Mental Disability Act*, C.C.S.M. c. V90, s. 25(a).
[148] S.1(1) of the *Vulnerable Persons Living with a Mental Disability Act*, C.C.S.M. c. V90 "defines" support services simply as "those services which may be provided for a vulnerable person under the section."

services and respite.[149] It is also unclear as to under what circumstances, other than abuse and neglect, they are to be provided.

What is interesting about Manitoba's scheme is that while it contains several procedural and administrative mechanisms to ensure access to and respect for the role of supports, support networks, in and of themselves are not legally recognized. That is, if a person avoids substitute decision-making because of the role of their support network, this does not guarantee that third parties will honour the role of the supporters. There is, in fact, no legal requirement for them to do so.

Based on the above analysis, it is not surprising that a review of the Act concluded that "…stakeholders agreed that the VPA has had an overall positive impact on the lives of individuals with intellectual disabilities but they also noted that there is much room for improvement."[150]

Ontario

Ontario's capacity legislation does not specifically recognize supports per se, but its wording, combined with jurisprudential interpretation, does provide for consideration of the role of supports. The most often cited provision is contained in the *Substitute Decisions Act*[151] and relates to court-ordered guardianship. The language (in ss. 22(3) and 55(2)) is as follows:

---

[149] http://www.gov.mb.ca/fs/pwd/supported_living.html.

[150] Z.M. Lutfiyya et al, "Report on the Examination of the Implementation and Impact of The Vulnerable Persons Living with a Mental Disability Act (VPA)" September 2007, Executive Summary, online: < http://www.aclmb.ca/Justice/VPA_FinalReport.pdf>.

[151] *Substitute Decisions Act*, 1992, S.O. 1992, c. 30.

> The court shall not appoint a guardian if it is satisfied that the need for decisions to be made will be met by an alternative course of action that,
>
> (a) does not require the court to find the person to be incapable
>
> And
>
> (b) is less restrictive of the person's decision-making rights than the appointment of a guardian.[152]

In *Gray v. Ontario*,[153] a case that addressed closures of institutions for people with "developmental disabilities" in Ontario, an issue arose as to whether there was a requirement to obtain consent of the resident or "his or her next of kin or substitute decision maker" to the community placement selected for him/her. Mr. Justice Hackland of the Ontario Divisional Court concluded what appeared to be obvious: the consent of the person with the disability or his/her substitute decision-maker is required to any choice of community residential placement.[154] In addressing this issue, he highlighted the above provision as being particularly significant in that the section contemplates that where alternatives to appointing a guardian (which requires a finding of incapacity) will allow for decisions to be made, this is preferred to a guardianship order.[155] He went on to interpret the above provision in relation to supported decision-making as follows:

> The Ministry's current process has not required the appointment of a guardian in support of the "supported decision making" process, which in many cases will be consistent with the words and the intention of section 55(2) of the Act. As argued by counsel for the Intervenor, Community Living Ontario, a process short of full or partial guardianship is preferable in many cases, as it best recognizes the

[152] The language is substantially the same for both court appointed guardians of the person and court appointed guardians of property. See *Substitute Decisions Act, 1992*, S.O. 1992, c. 30, s. 22(3) and s. 55(2).
[153] [2006] O.J. No. 266.
[154] [2006] O.J. No. 266 at para 33.
[155] [2006] O.J. No. 266 at para 47.

> autonomy and dignity of the individual and the inclusiveness of the decision-making process. [156]

There are additional provisions in the *Substitute Decisions Act* that recognize a role for "supportive family members and friends". Guardians and attorneys (named in a power of attorney) are required to foster regular personal contact and consult with supportive family members and friends.[157] However, decisions are still made by the guardian or attorney, as the case may be. Thus, while these provisions encourage involvement of family members and friends, the involvement specified by the legislation does not promote the individual's ability to make his/her own decisions. This is so despite s. 66(8) which requires guardians and attorneys of the person to foster the person's independence as far as possible.

Quebec[158]

Even though Quebec's legal system is different than in the rest of Canada, being a civil law rather than common law jurisdiction, their laws that address legal capacity overall, do so in a similar manner to other jurisdictions. That is, in Quebec, laws provide for the creation of court-appointed guardianships (referred to as curatorship and tutorship) as well as the creation of planning documents in anticipation of legal incapacity (referred to as mandates). There are separate provisions that address consent to care. The rules which govern these matters are contained in the *Civil Code* of Quebec.[159]

---

[156] [2006] O.J. No. 266 at para 47.

[157] These requirements exist in relation to guardians and attorneys for property as well as guardians and attorneys for personal care. See *Substitute Decisions Act*, *1992*, S.O. 1992, c. 30 ss. 32(4), 32(5), 66(6) and 66(7).

[158] I express my sincerest appreciation to (Maître) Daria Kapnik, B.C.L./LL.B., Litigator for the Public Curator of Québec, for her assistance and extensive and detailed edit of this section.

[159] *Civil Code of Quebec* (C.C.Q.), S.Q. 1991, c. 64.

The *Civil Code* dedicates a whole chapter (article 153 to 297) to issues related to legal capacity, which is associated with the "full exercise of all (of one's) civil rights," attained when one ceases to be a minor.[160] Only cases, which are expressly outlined by a "provision of law or by a judgment ordering the institution of protective supervision,"[161] can infringe on this fundamental and broad presumption of legal capacity.

The Civil Code provides a comprehensive mechanism for the establishment and supervision of protective regimes, and under the first paragraph of its article 258, goes on to specify that:

> A tutor or curator is appointed to represent, or an adviser to assist, a person of full age who is incapable of caring for himself or herself or of administering property by reason, in particular, of illness, deficiency or debility due to age which impairs the person's mental faculties or physical ability to express his or her will.

Legal incapacity is established by a special report emanating from a health establishment, whereby a doctor and a social or community worker pronounce themselves on the existence, degree and duration of incapacity.[162] When incapacity and the need for opening of a regime of protective supervision are declared, any interested party can apply for the opening of a regime, or, for the homologation[163] of a mandate given by the person in anticipation of their incapacity.

[160] *Civil Code of Quebec* (C.C.Q.), S.Q. 1991, c. 6 , Article 153.
[161] *Civil Code of Quebec* (C.C.Q.), S.Q. 1991, c. 64, Article 154.
[162] *Civil Code of Quebec* (C.C.Q.), S.Q. 1991, c. 64, Article 270.
[163] Homologation is a court procedure which officially puts a mandate into effect.

The choice of the form of protective supervision depends on the degree of one's incapacity to care for oneself and to administer property,[164] and can either take a form of curatorship, where the incapacity is total and for a permanent duration[165], of tutorship, whereby the incapacity is partial in nature or temporary in duration[166], or of advisorship. In the latter case, the form of protective supervision is least intrusive; it only applies to a person who is "generally and habitually capable of caring for himself and of administering his property," and *only* pertains to the administration of their property. [167] Unlike with tutors and curators, advisors do not legally replace a person's decision-making power, which in a way promotes one's autonomy, since there still remains a degree of control over the freedom to make decisions. However, it is not his/her choice as to whether or not to have an adviser. Rather, an adviser is imposed on him/her by the decision of a court for the purposes of being be assisted or advised in certain acts or for a certain time,[168] whereby, as it is outlined in the article 293, it is the court that decides and indicates the acts for which the adviser's assistance is and is not required.

Legal representatives are subjected to the rules of administration, contained in the chapter entitled "Administration of the property of others." (articles 1299 to 1376 of the *Civil Code)*. Their administration is verified by an entity referred to as a "tutorship council,"[169] whose members are court appointed to ensure that the representative is

[164] *Civil Code of Quebec* (C.C.Q.), S.Q. 1991, c. 64, Article 259.
[165] *Civil Code of Quebec* (C.C.Q.), S.Q. 1991, c. 64, Article 281.
[166] *Civil Code of Quebec* (C.C.Q.), S.Q. 1991, c. 64, Article 285.
[167] *Civil Code of Quebec* (C.C.Q.), S.Q. 1991, c. 64, Article 291.
[168] *Civil Code of Quebec* (C.C.Q.), S.Q. 1991, c. 64, Article 291.
[169] *Civil Code of Quebec* (C.C.Q.), S.Q. 1991, c. 64, Articles 222-239 cover Tutorship Councils. By virtue of Article 266, the Articles in relation to Tutorship Councils of minors apply, adapted as required, to tutorship and curatorship of persons of full age.

acting in the represented person's best interests and fulfill their obligations towards them. In fact, certain acts may not be undertaken without the express authorization from the Council, for example, when the legal representative has to transact or prosecute an appeal.[170] The Council is composed of a maximum of three persons, chosen at the meeting of a group of relatives and/or friends of the represented person, and subsequently designated by the court in a judgment.[171] The Council both serves as a safeguard mechanism and provides an opportunity for the involvement of people close to the represented individual. While this is not supported decision-making, in that it is a mechanism which forms part of the guardianship-type process, it does provide a role for people who are close to the individual.

Parallel to the system of regimes of protective supervision, Quebec utilizes planning tools, or mandates in anticipation of one's incapacity. Homologation of a mandate serves as an alternative to opening of a legal regime, and subsequent administration of a legal representative, a "mandator," is governed by a series of rules (articles of 2130 to 2185 of the *Civil Code)*, resembling those pertaining to the "Administration of the property of others," previously mentioned. Moreover, the Public Curator does not oversee the administration of mandators, nor is there another entity supervising it.

Quebec does have a system which allows for registration of planning tools. Insofar as the registration formalities go, there are essentially two types of Quebec mandates. "Notarized mandates," which are registered with the Chambre des notaries (http://www.cdnq.org) and "mandates before witnesses," which can be registered with the

[170] *Civil Code of Quebec* (C.C.Q.), S.Q. 1991, c. 64, Articles 212 and 266.
[171] *Civil Code of Quebec* (C.C.Q.), S.Q. 1991, c. 64, Articles 222 and following.

provincial Bar's "Registre des mandats", or more frequently, which are simply held privately until the time of their homologation.

Saskatchewan

Saskatchewan's *Adult Guardianship and Co-decision-making Act*[172] is an illustration of Canadian legislation that recognizes the role of supports, but only in the context of guardianship-type court appointments. Supports are, thus, imposed by court order, rather than chosen by the individual him/herself. Nevertheless, Professor Surtees, of the University of Saskatchewan's College of Law, describes this legislation as providing "… the court with a new tool with which to demonstrate its belief in, and respect for self-determination".[173]

The legislation sets out procedures for the appointment of:

- a personal or property guardian for people who are determined to be incapable of either managing their personal affairs or finances. The guardian's role is to make substitute decisions for the adult.
- a personal or property co-decision-maker for people for whom it is determined that they need assistance in making decisions. The co-decision-maker's role is to assist the adult in making decisions, which are jointly made.
- temporary personal or property guardians for emergency situations

[172] *The Adult Guardianship and Co-decision-making Act*, S.S. 2000, c. A-5.3.
[173] Doug Surtees, "Adult Guardianship in Saskatchewan: The Move to Co-Decision-Making" [unpublished] at 14.

The Act allows for some flexibility for promoting autonomy to the greatest extent possible in that a less intrusive co-decision-making order may be issued for some types of decisions, leaving only a set of decisions to be covered by a guardianship order.[174]

It specifies the following principles which, among others, shall be used in interpreting and administering the Act:

- Adults are entitled to be presumed to have capacity, unless the contrary is demonstrated[175]

- Adults are entitled to choose the manner in which they live and to accept or refuse support, assistance or protection, as long as they do not harm themselves or others and have the capacity to make decisions about those matters[176]

- Adults are entitled to receive the most effective, but the least restrictive and intrusive, form of support, assistance or protection, when they are unable to care for themselves or their estates[177]

- Adults who have difficulty communicating because of physical or mental disabilities are entitled to communicate by any means that enables them to be understood[178]

[174] Doug Surtees, "The Evolution of Co-Decision-Making in Saskatchewan" Saskatchewan Law Review, Volume 73(1), 2010 75 at 87.
[175] *The Adult Guardianship and Co-decision-making Act*, S.S. 2000, c. A-5.3, s. 3(b).
[176] *The Adult Guardianship and Co-decision-making Act*, S.S. 2000, c. A-5.3, s. 3(c).
[177] *The Adult Guardianship and Co-decision-making Act*, S.S. 2000, c. A-5.3, s. 3(d).
[178] *The Adult Guardianship and Co-decision-making Act*, S.S. 2000, c. A-5.3, s. 3(e).

The legislation sets out procedures for the court appointment of either guardians for adults who are incapable, or co-decision-makers for adults who need assistance in making decisions, but who do not require guardians. It is the court's determination as to whether a guardian or co-decision-maker is appointed. The court, too, decides who these people will be. The court will only appoint a guardian for a person whose capacity is impaired to the extent that the adult is unable to make reasonable decisions.[179] The court will only appoint a co-decision-maker for a person whose capacity is impaired to the extent that the adult requires assistance in decision-making in order to make reasonable decisions.[180] The appointment of a guardian or co-decision-maker depends upon an assessment of capacity,[181] capacity being defined by the traditional test.[182]

It is incumbent on the court to consider the role of supports in making its determinations. In its determination of whether to make a guardianship or co-decision-making order, the court must consider the resources available to assist the adult in making decisions, including less intrusive forms of support or assistance in decision-making.[183] Importantly, the court may not make a guardianship or co-decision-making order unless

[179] *The Adult Guardianship and Co-decision-making Act*, S.S. 2000, c. A-5.3, s. 14(1)(b) in relation to personal decisions and 40(1)(b) in relation to property decisions.
[180] *The Adult Guardianship and Co-decision-making Act*, S.S. 2000, c. A-5.3, s. 14(1)(a) in relation to personal decisions and 40(1)(a) in relation to property decisions.
[181] *The Adult Guardianship and Co-decision-making Act*, S.S. 2000, c. A-5.3, s. 12(1) and 38(1).
[182] The definition of capacity is in section 2(c) and is as follows:

> "capacity" means the ability:
> (i) to understand information relevant to making a decision; and
> (ii) to appreciate the reasonably foreseeable consequences of making or not making a decision

[183] *The Adult Guardianship and Co-decision-making Act*, S.S. 2000, c. A-5.3, s. 13(1) in relation to personal decisions and 39(1) in relation to property decisions.

alternative ways to assist the adult in making decisions, "…including less intrusive forms of support or assistance in decision-making, have been tried or carefully considered."[184] While the court, in determining whether to order a guardian or co-decision-maker must consider less intrusive forms of support or assistance in decision-making,[185] this is only one of several factors to be considered.

The authority of the guardian is to make substitute decisions for the adult.[186] However, the authority of the co-decision-maker is to advise the adult and share with the adult the authority to make decisions.[187] This means that the person does not maintain his/her right to make his/her own decisions. As well, it can be argued that a co-decision-makers role of "advising" is somewhat more intrusive than that of merely supporting. Even so, the co-decision-maker must acquiesce in a decision made by the adult provided that a reasonable person could have made the decision and the decision is not likely to result in harm or loss.[188] Finally, guardians and co-decision-makers must encourage the adult to act independently and minimize their own interference in the life of the adult.[189]

Saskatchewan's is a hybrid scheme in that it does contain provisions which allow for the appointment of supports in the form of co-decision-makers as a less intrusive alternative to guardianship. However, the co-decision-maker is imposed on the person and

[184] *The Adult Guardianship and Co-decision-making Act*, S.S. 2000, c. A-5.3s. 14(2) in relation to personal decisions and 40(2) in relation to property decisions.
[185] *The Adult Guardianship and Co-decision-making Act*, S.S. 2000, c. A-5.3, s. 13(1)(c) and 39(1)(c).
[186] *The Adult Guardianship and Co-decision-making Act*, S.S. 2000, c. A-5.3, s.18 in relation to personal decisions and s. 43 in relation to property decisions.
[187] *The Adult Guardianship and Co-decision-making Act*, S.S. 2000, c. A-5.3, s.17 in relation to personal decisions and s. 42 in relation to property decisions.
[188] *The Adult Guardianship and Co-decision-making Act*, S.S. 2000, c. A-5.3, s. 17(2) and 42(2).
[189] *The Adult Guardianship and Co-decision-making Act*, S.S. 2000, c. A-5.3, s. 25 and 50.

decisions are made jointly, not independently. The scheme does not go far enough in respecting the autonomy of the person with the disability. Thus, the term "co-decision-making" must be distinguished from "supported decision-making" in that the scheme, while allowing for a role to be played by supports, does not recognize supported decision-making in the way it is articulated by the community living movement.

Yukon Territory

The *Decision Making, Support and Protection to Adults Act*[190] of the Yukon is described as "…nearly a complete code on supported decision-making in the province."[191] It provides for a variety of approaches to decision-making. This includes not only supported decision-making agreements, but also representation agreements, substitute decision-making for health care decisions and guardianship.[192] This is an attractive feature in that it recognizes the spectrum of situations which may necessitate differing arrangements. This section of the paper focuses on the supported decision-making component of the legislation. However, it must be clarified that the term "representation agreement" found in the Yukon legislation differs from that in British Columbia's *Representation Agreement Act*. The Yukon's representation agreement authorizes a representative to make substitute decisions[193] whereas the British Columbia representative can act as a substitute or a supporter. In this respect, Yukon's approach

[190] S.Y. 2003, c. 21

[191] British Columbia Law Institute Canadian Centre for Elder Law Studies, "Law Reform Report on Abuse and Neglect and Capacity Issues in Canada: Canadian Legislation and Juristic Literature" (April 2007) [unpublished] at 104.

[192] A summary chart of decision-making and planning tools in the Yukon can be found online: http://www.hss.gov.yk.ca/downloads/decision_making_tools.pdf.

[193] These decisions are limited to certain types, which include routine financial management and some personal matters. These are set out in the regulations, O.I.C. 2005/78-Adult Protection and Decision-Making Regulation.

is superior to that in British Columbia as it avoids any confusion as to the supporter's role and the intent and effect of the agreement.

Supported decision-making agreements are covered in the *Adult Protection and Decision Making Act*, which is Schedule A to the *Decision Making, Support and Protection to Adults Act*. The purpose of supported decision-making agreements is to give legal status to those who provide support "…to be with the adult and participate in discussions with others when the adult is making decisions or attempting to obtain information."[194] The scope of supported decision making agreements is significant, in that they can cover both financial and personal decisions. Thus, they appear to have a broader coverage than similar such agreements in British Columbia and Alberta, which cover a more limited range of decisions.[195]

The legislation describes the supporters as "associates". Supported decision-making agreements formalize a support relationship where an adult authorizes a support person to help make decisions. But, the agreement cannot give the associate authority to make substitute decisions.

A feature of the legislation that is effective at clarifying the several distinct roles to be played by the associate decision-maker is statutory language as follows:

> 5(1) Except as a supported decision-making agreement otherwise provides, the responsibilities of the associate decision-maker are

[194] Decision Making, Support and Protection to Adults Act, Schedule A, Adult Protection and Decision-Making Act, s.4(b).

[195] British Columbia's representation agreements, pursuant to s.7 of the *Representation Agreement Act*, may deal with decisions relating to personal care, routine management of financial affairs and certain health care decisions. Alberta's supported decision making authorization may only cover decisions for personal matters, pursuant to the *Adult Guardianship and Trusteeship Act*, s. 3.

(a) to assist the adult to make and express a decision;

(b) to assist the adult to obtain relevant information;

(c) to advise the adult by explaining relevant information and considerations;

(d) to ascertain the wishes and decisions of the adult and assist the adult to communicate them; and

(e) to endeavour to ensure that the adult's decision is implemented.

There appears to be a requirement to have a certain level of capacity to enter into a supported decision-making agreement as there is a requirement that the adult entering into the agreement understand the nature and effect of it.[196]

The other recognition of the role of supports, similar to other Canadian jurisdictions, prevents the court from appointing of a guardian unless "forms of available support and assistance less intrusive than guardianship have been tried or carefully considered."[197]

Activities in Provinces where Supported Decision-Making Legislation is not in Force

Newfoundland and Labrador

While Newfoundland and Labrador does not have legislation which incorporates supported decision-making, there is hope and promise for the future. Discussions are taking place between the community living movement and the provincial government

[196] Decision Making, Support and Protection to Adults Act, Schedule A, Adult Protection and Decision-Making Act, s. 6.
[197] Decision Making, Support and Protection to Adults Act, Schedule A, Adult Protection and Decision-Making Act, s.32(1)(c).

regarding changes necessitated by Article 12. A conference in June, 2011 in St. John's, Newfoundland, on legal capacity and supported decision-making, is expected to move the discussion forward for pathways to law reform. Sponsored by the provincial ministries of Justice, Human Resources, Labour and Employment, and Health and Community Services, and hosted by the Newfoundland and Labrador Association for Community Living, it will bring together representatives from the disability community, older adults and the provincial government.

There has been some development, peripherally in relation to legal capacity, by the provincial government's introduction of a new Adult Protection Act,[198] in March, 2011. It addresses protection for adults exposed to abuse and neglect, and will need to be assessed for its compliance with Article 12.

Prince Edward Island

There is currently no legislation in force in PEI devoted specifically to supported decision-making. However, PEI is noted for being one of the first jurisdictions in Canada to propose laws that recognize supported decision-making.[199] The *Supported Decision Making and Adult Guardianship Act*[200] received Royal Assent in May, 1997 but has never been proclaimed in force. This Act was the result of an extensive community-based consultation process and found support from disability community groups. Unfortunately, its progress appears to have stopped due to a lack of political will and

[198] *Adult Protection Act* , fourth session, 46th General Assembly, 60 Elizabeth II 2011, online: http://www.assembly.nl.ca/business/bills/bill1101.htm.
[199] Sandi MacKinnon, "Who Decides: A Review and Public Consultation on Decision Making in P.E.I." (December, 1995) [unpublished] at i.
[200] *Supported Decision Making and Adult Guardianship Act*, 1997, c. 49.

government action.[201] Nonetheless, there is renewed hope given the PEI government's statement in its November, 2009 throne speech, that "…action will be taken over the coming year to ensure that Prince Edward Island is in compliance with the United Nations Convention on the Rights of Persons with Disabilities."[202] Over the past 18 months the Supported Decision Making Coalition of PEI has been organized. It is composed of 9 disability and seniors community organizations. The Coalition is dialoguing with the PEI government in an effort to move the supported decision-making agenda forward.

Comparison and Summary of Canadian Legislative Approaches

Comparing legislative approaches in Canada leads to the conclusion that while recognition of supports has taken hold in some jurisdictions, there are significant limitations which inhibit a fulsome recognition of supported decision-making as envisioned by many in the disability community, and as articulated in Article 12.

Legislative recognition of supports, most often gives support people legal recognition vis a vis third parties, most notably by use of planning tools such as representation agreements in British Columbia and supported decision making agreements in the Yukon Territory. However, these are of no use to the many people who have no supports in their lives. A complete supported decision making scheme also requires that the government assume responsibility for providing supports and assisting in the development of support networks. Manitoba's *Vulnerable Persons Living with a Mental Disability Act* goes some way to doing so. However, Manitoba's legislation is flawed in

[201] Information obtained from the PEI Association for Community Living.
[202] Speech From the Throne, One Island, Working Together, November 12, 2009, online: http://www.assembly.pe.ca/speech/2009/index.php.

that it provides no legal recognition for the supporters. Manitoba's legislation contains another limitation, which is somewhat unique. Its application excludes the vast majority of the population by only applying to people with intellectual disabilities.

The planning tools which recognize supporters, created in Alberta's and British Columbia's legislation, do not cover all types of decisions. For example, in Alberta, a supported decision authorization only applies to personal matters. This begs the question as to why there is no legal recognition for supported decision-making in relation to financial matters. What happens in Alberta when a person wants to open a bank account with the assistance of members of their support circle? These people have no legal recognition.

While Saskatchewan and Quebec recognize a role for supporters in a co-decision making scheme, the option of choosing one's own supports, most consistent with the concept of supported decision making, is absent. With co-decision-making the supporter is not chosen by the person whose capacity is in issue. Rather, the supporter is appointed by a court, and it is the court that decides that a supporter is necessary to assist with decision-making. While it is a less intrusive alternative to substitute decision-making, full choice is not respected: supports are not chosen, but imposed by courts. It does not as fully respect autonomy as planning documents do, such as the British Columbia representation agreement.

In summary, this section is illustrates that there are a variety of potential legislative approaches to recognizing supports. It also illustrates that no province or territory has completely abandoned substitute decision-making options. The number of provinces

that do not embody any recognition of supports or do so only minimally, such as New Brunswick, Ontario and Prince Edward Island, is troubling given Canada's ratification of the CRPD. However, the advantage of this is that with no recognition of supported decision making in place, there is a clean slate and an opportunity to create a comprehensive scheme based on the lessons learned from experiences in other jurisdictions. Even those jurisdictions that do legislatively recognize supports, may not do so in a manner which fully implements the requirements of Article 12 of the CRPD. It is only when this happens that Canada can be said to meet its obligations at international law in relation to Article 12. As discussed above, the Canadian government and each of the provinces and territories have an important role to play in implementation, one of which is to conduct a thorough review of capacity legislation in Canada to ensure compliance with Article 12.

As illustrated above, given that Canada's capacity-specific laws do not, for the most part, recognize a role for governments and third parties in relation to supported decision-making, other sources that establish these legal duties must be explored. These exist in the duty to accommodate found both in Canada's laws and the CRPD, and are discussed in the next section.

VI. SUPPORT OBLIGATIONS AND THE DUTY TO ACCOMMODATE: CANADIAN LAWS AND THE CRPD

A fundamental aspect of supported decision-making involves the role of third parties who interact with the decision-maker. This includes private parties, such as medical

professionals and banks, as well as government entities. Effective use of supports in making decisions requires that these other parties respect the supports and fully include them in the decision-making process. However, the legislative approaches described above, for the most part, focus on the decision-maker's right to use supports, and not on the nature or content of the role played by others who are part of the transaction. This does not fully recognize the fact that there are, in fact, two broad classes of parties implicitly and explicitly identified as players in decision making based on the language of the CRPD. First, States Parties have an obligation to take "appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity" (Article 12(3)). Second, States Parties have an obligation to "take all appropriate steps to ensure that reasonable accommodation is provided" (Article 5(3)). Arguably, these obligations also implicate third parties to decision-making processes. How do these obligations of both States Parties and other third parties intersect in a particular decision-making process to maximize exercise of legal capacity? What is the positive duty of the state? What is the duty of third parties?

This section considers how Canadian laws, and the CRPD, address duties of all players in the decision-making process. This section puts forth the argument that third parties and government have a legal obligation to take positive steps to facilitate the use of supports. It also articulates the nature and extent of this duty.

This section of the paper firstly describes the legal duty to accommodate in Canadian law and its application to decision-making. Secondly, it articulates the extent of the

legal duty, the extent to which it provides for a legal foundation for supports, and some limits to the duty to accommodate in relation to supports.

What Does Accommodation in Decision Making Mean?

People plan their lives on the basis that they have a right to live as they choose. In contrast, an individual who has been found to be legally incapable does not have the freedom to make his/her personal choices; decisions are imposed by others. Reasonable accommodation is required to avoid such differential treatment. It maximizes a person's right to prove his/her ability to make capable decisions, demonstrate his/her capacity to others and thus exercise legal capacity on an equal basis with others.

Accommodation can be relevant whenever an individual interacts with a third party. An individual with an intellectual disability may not, at the outset, understand the content of the information exchange between him/herself and the third party. For example, he/she may not understand the attendant risks of a medical procedure, the implications of opening a bank account or the meaning of a power of attorney. There are a broad range of accommodations that may be required to enable a person to understand information sufficiently to make these kinds of decisions, including:

- informal assistance from family and friends;
- plain language assistance, assisted/adaptive communication and visual aids
- supported decision-making representatives/networks; and,

- interpreters (sign and spoken language) and intervenors (for people who are deaf-blind).

An ability to make a decision is not black and white.[203] It can be enhanced by accommodations in that they facilitate individuals with disabilities to be able to exercise their right to make decisions as do others. Where the *Canadian Charter of Rights and Freedoms*[204] *(Charter)* or human rights laws apply, and accommodation is a legal requirement, providing accommodation for the decision-making process too, is a legal requirement.

Canadian Laws of Accommodation: the *Canadian Charter of Rights and Freedoms* and Human Rights Laws

Analysis of Canadian laws point to the existence of a duty to accommodate in maximizing legal capacity. This emanates from the duty to accommodate found both in Canada's human rights laws and jurisprudential interpretation in the context of discrimination in s.15,[205] the equality rights provision, of the *Charter.* The promotion and protection of human rights and fundamental freedoms, along with the prohibition against discrimination and the duty to accommodate, which feature so prominently in

---

[203] Interview of Gábor Gombos and Gerard Quinn by Jarlath Clifford on behalf of ERT, in "Promoting a Paradigm Shift – ERT talks with Gábor Gombos and Gerard Quinn about the UN CRPD on the Rights of Persons with Disabilities and its Optional Protocol" (2008) 2 The Equal Rights Trust, The Equal Rights Review at 85, online: The Equal Rights Trust http://www.equalrightstrust.org/ertdocumentbank/err_issue02%20reduced.pdf.

[204] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B of the *Canada Act* (1982) (U.K.), 1982, c. 11.

[205] The text of s.15(1) of the *Canadian Charter of Rights and Freedoms* is as follows:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Canadian law, are central tenets of the CRPD as well. The right to equality and non-discrimination is recognized in Article 5 of the CRPD, which establishes that States Parties have an obligation to ensure the provision of reasonable accommodation.

Both the *Canadian Charter of Rights and Freedoms* and human rights legislation protect equality rights and inherently, place on service providers and the government, a duty to accommodate. While these duties are not exactly the same, "… there is considerable cross-fertilization between statutory human rights cases and equality cases decided under the *Charter*."[206] However, they each apply in different contexts: while human rights legislation applies to both private and public actors,[207] the *Charter* only applies in the public sphere.[208]

The federal government and each Canadian province and territory have their own human rights laws which exist to protect individuals from discrimination and promote equality. These have pre-eminent importance in Canada's legal framework, and are described as fundamental laws which are "quasi-constitutional" in nature.[209] These human rights statutes apply to several areas of activity, including the provision of services, such as those of lawyers, banks and health professionals.

The duty to accommodate in relation to the provision of services is explicitly recognized in most human rights statutes in Canada. Importantly, Supreme Court of Canada

[206] *British Columbia (Ministry of Education) v. Moore*, 2010 BCCA 478 at para. 40, Rowles J.A., dissenting. Madam Justice Rowles' dissenting judgment engages is a careful analysis of the approaches to discrimination in human rights statutes as well as the *Charter* and how these intersect.
[207] Raj Anand & Tiffany Tsun, "The Role of Human Rights Statutes in Advancing Equality" (2009) 25 N.J.C.L. 161.
[208] S. 32(1) of the *Canadian Charter of Rights and Freedoms* provides that the *Charter* applies to "the Parliament and government of Canada" and to "the legislature and government of each province."
[209] R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008) at 387.

commentary on the duty to accommodate is relevant across jurisdictions. Therefore, while the duty to accommodate may not have the same precise meaning in each Canadian jurisdiction, the provision of services throughout Canada should be undertaken giving full effect to supports as an accommodation, in accordance with the applicable human rights legislation and jurisprudence.

Additionally, the *Charter* applies specifically to government activity and to legislation. The Supreme Court of Canada has interpreted the *Charter* to include a duty to make reasonable accommodation up to the point of undue hardship.[210] This positive duty on the state to provide accommodation to address differences,[211] has been affirmed by the Supreme Court in relation to disability.[212] In Justice McIntyre's words, "the accommodation of differences … is the essence of true equality."[213] More specifically, "recent *Charter* jurisprudence has affirmed the proposition that the government may owe a positive duty to ameliorate pre-existing disadvantage."[214] In relation to the *Charter's* equality provision (s.15(1)), the Supreme Court has stated:

> Section 15(1) ensures that governments may not, intentionally or **through a failure of appropriate accommodation**, stigmatize the underlying physical or mental impairment, or attribute functional limitations to the individual that the underlying physical or mental impairment does not entail …[215] [emphasis added]

---

[210] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 79; Robert J. Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 4th ed. (Toronto: Irwin Law, 2009) at 346.
[211] Ena Chadha & C. Tess Sheldon, "Promoting Equality: Economic and Social Rights for Persons with Disabilities under Section 15" (2004) 16 N.J.C.L. 27.
[212] Ena Chadha & C. Tess Sheldon, "Promoting Equality: Economic and Social Rights for Persons with Disabilities under Section 15" (2004) 16 N.J.C.L. 27; Robert J. Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 4th ed. (Toronto: Irwin Law, 2009) at 348.
[213] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 169.
[214] Ena Chadha & C. Tess Sheldon, "Promoting Equality: Economic and Social Rights for Persons with Disabilities under Section 15" (2004) 16 N.J.C.L. 27.
[215] *Granovsky v. Canada (Minister of Employment and Immigration),* 2000 SCC 28 at para. 39, [2000] 1 S.C.R. 703.

Thus, the duty to accommodate is always a multi-party process, and in relation to decision-making, involves the person with the disability, third parties and the government. The third party with whom the interaction takes place owes the person with the disability a duty to reasonably accommodate them in the decision-making process. This may involve the simple act of respecting the supports as provided by the person. Or, it may require positive action on the part of the third party to provide those supports requested by the person. What follows is a description of what the duty to accommodate entails and how this applies to the decision-making process.

Implementation of the Duty to Accommodate in Decision-Making: Basic Principles

Given that there exists a right to accommodation in the decision making process, what guides the accommodation process? What are the principles that must be followed when accommodating someone to make a decision? This section describes the nature and extent of the duty to accommodate in Canadian law, to provide a deeper understanding of its relevance to decision making.

The concept of accommodation describes a legal duty to take positive action to accommodate the unique needs of people with disabilities. More specifically, "'Accommodation' refers to what is required in the circumstances to avoid discrimination."[216] Its goal is to avoid exclusion by ensuring the fullest possible

[216] *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights),* [1999] 3 S.C.R. 868 at para 22.

participation in society.[217] This duty to accommodate in Canadian law, however, is not unlimited in that accommodations are only required to the point of *undue hardship*. The Supreme Court of Canada in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.,*[218] in relation to people with disabilities, elaborated on the duty to accommodate to the point of undue hardship, as follows:

> The concept of reasonable accommodation recognizes the right of persons with disabilities to the same access as those without disabilities, and imposes a duty on others to do whatever is reasonably possible to accommodate this right. The discriminatory barrier must be removed unless there is a bona fide justification for its retention, which is proven by establishing that accommodation imposes undue hardship on the service provider.[219]

The duty to accommodate requires that accommodations be individualized. This principle has been articulated by the Supreme Court of Canada in *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur.*[220] The Supreme Court has recognized that accommodation is a highly individualized process that must be responsive to individual needs and must be implemented on an individualized basis.[221] For example, accommodating a person with an intellectual disability may involve recognition and inclusion of support people. In contrast, accommodating an individual with an acquired brain injury may involve allowing more time to process information.

---

[217] New Brunswick Human Rights Commission, "Guidelines on Accommodating Students with a Disability" (15 October 2007) at 9, online: New Brunswick Human Rights Commission <http://www.gnb.ca/hrc-cdp/e/g/Guideline-Accommodating-Students-Disability-New-Brunswick.pdf>.
[218] *Council of Canadians with Disabilities v. VIA Rail Canada Inc.,* 2007 SCC 15, [2007] 1 S.C.R. 650.
[219] *Council of Canadians with Disabilities v. VIA Rail Canada Inc*., 2007 SCC 15 at para. 121, [2007] 1 S.C.R. 650.
[220] *Nova Scotia (Workers' Compensation Board) v. Martin*; *Nova Scotia (Workers' Compensation Board)* v. *Laseur*, [2003] 2 S.C.R. 504, 2003 SCC 54.
[221] *Nova Scotia (Workers' Compensation Board)* v. *Martin*; *Nova Scotia (Workers' Compensation Board)* v. *Laseur*, 2003 SCC 54 at para. 81, [2003] 2 S.C.R. 504.

The process of accommodation has been recognized to be one that is a joint obligation. The person asking for accommodations, as well as those responsible for providing them, must co-operate in the accommodation process.[222] Thus, a person with a disability, or his/her supporters, have a duty to advise third parties of the intention to rely on support persons for assistance in the decision-making process, and to advise on how they wish this to be done.

Positive steps must be taken at the outset of a transaction between parties, one of whom has a disability and is therefore owed a duty of accommodation, to ensure that people whose decision-making abilities are in question are given the opportunity to access the supports they need to demonstrate their decision-making capability. In this regard, according to the Supreme Court,

> The principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field.[223]

It may be impractical, and in fact discriminatory, not to provide/allow for the provision of supports at the beginning of a transaction, given the impact on the subsequent decision-making process for failing to do so. It is important to consider the situation where a person with a disability is not given the opportunity of supports and accommodations at the *beginning* of a decision-making transaction. For example, a person with an intellectual disability may go to a physician with a medical issue and not actually understand the nature and consequences of choosing a surgical intervention over a

[222] Ontario Human Rights Commission, "Policy and Guidelines on Disability and the Duty to Accommodate" (2000 as revised in 2009) at 18, online: Ontario Human Rights Commission <http://www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2/pdf>.
[223] *Eldridge v. British Columbia (Attorney General),* [1997] 3 S.C.R. 624 at para.78.

non-surgical one. If the physician does not take the pro-active responsibility to inquire whether the person requires decision-making supports at the outset, the person may not avail him or herself of such supports and choose an option that the physician recommends, without full understanding of the consequences. If the surgery option is decided upon, it may have life-long consequences that the individual did not wish and that could have been avoided had the decision been more in keeping with the individual's actual wishes. Nonetheless, at this point, there is no monetary or other remedy that could reverse the non-pecuniary damage caused by the surgical intervention which was inconsistent with the decision the individual would have made with supports.

A duty to proactively inquire into the need for decision-making supports helps to avoid such outcomes. In addition, given that it may not always be apparent that decision-making ability is an issue, and that decision-making ability changes over time, there must be an ongoing duty to take positive steps to provide supports at any time where there are reasonable grounds to believe that supports may be necessary.

Significance of Government Role in Providing Decision Making Supports

While private parties and the government each owe a duty to accommodate in the decision-making process, the role of government is particularly crucial. Legal recognition of the role of supports is essential to a supported decision-making model, but without more, has its limitations. What happens to people who have no supports in

their lives? How do they take advantage of supported decision-making? What does Article 12 mean to them, if anything?

Many people may not have supports in their lives, without which the right to make decisions with supports is empty. In this regard, Michelle Browning, who recently undertook a study of supported decision making in Canada and England, observed the following:

> Although supported decision making agreements and representation agreements have existed in Yukon for over five years it appears that there has been limited use of these tools. Stakeholders suggested this is primarily because the people who would benefit from these agreements do not have close trusting relationships with people capable of being a representative or associate. This issue was of concern in a number of jurisdictions but was demonstrated most starkly in the remote environment of Whitehorse, Yukon.[224]

Therefore, it is essential that governments dedicate funding to activities of providing supports and assisting individuals, particularly those who are isolated, to develop support networks. However, the government can only be compelled to do so to the extent that it owes a legal duty in this regard.

Is there a Legal Duty upon the Government to Provide Disability Related Supports?

Supreme Court of Canada jurisprudence has delved into the circumstances under which governments can be compelled to provide services in a non-discriminatory fashion in the context of s.15 of the *Charter*. These decisions are of particular relevance, therefore, in the context of legal duties to accommodate decision-making processes.

[224] Michelle Browning, Report to Investigate New Models of Guardianship and the Emerging Practice of Supported Decision Making, Winston Churchill Memorial Trust of Australia, 2010, at 29, online: http://www.churchilltrust.com.au/site_media/fellows/Browning_Michelle_2010.pdf.

Does the government have a duty to provide decision making supports? If so, under what circumstances?

Meryl Zisman Gary, Cara Wilkie and David Baker recently wrote a paper devoted to the exploration of a legal right to disability supports in Canada.[225] They conclude that equality cases under s. 15 of the *Charter* point to significant obstacles to enforcing a right to support, where these involve positive government obligations.[226] They conclude that the greatest success is achieved where the claim to a disability-related support involves a gap in an existing program. In contrast, little success has been achieved where imposing a free-standing, positive obligation on government is the desired outcome.[227] They base these conclusions on several court decisions, *Eldridge* v. *British Columbia (Attorney General),*[228] and *Auton (Guardian ad litem of)* v. *British Columbia (Attorney General),*[229] are two of which that illustrate their conclusion.

In *Eldridge* v. *British Columbia (Attorney General),*[230] the Supreme Court of Canada compelled the equal provision of medical benefits. In this case the Court found that medical benefits were provided in a discriminatory fashion in that there was a failure to provide sign language interpreters for Deaf patients. The Court held that this failure

[225] Meryl Zisman Gary, Cara Wilkie and David Baker, "The Law as it affects People with Disabilities: A Case Study Paper on the Rights to Supports", prepared for the Law Commission of Ontario, July 15, 2010, online: http://www.lco-cdo.org/en/disabilities-call-for-papers-bakerlaw.
[226] Meryl Zisman Gary, Cara Wilkie and David Baker, "The Law as it affects People with Disabilities: A Case Study Paper on the Rights to Supports", prepared for the Law Commission of Ontario, July 15, 2010, at 14, online: http://www.lco-cdo.org/en/disabilities-call-for-papers-bakerlaw.
[227] Meryl Zisman Gary, Cara Wilkie and David Baker, "The Law as it affects People with Disabilities: A Case Study Paper on the Rights to Supports", prepared for the Law Commission of Ontario, July 15, 2010, at 21, online: http://www.lco-cdo.org/en/disabilities-call-for-papers-bakerlaw.
[228] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.
[229] *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 S.C.R. 657..
[230] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.

violated s.15(1) of the *Charter* and that the appellants, who are Deaf, were not accommodated to the point of undue hardship.[231] Mr. Justice La Forest stated that the Supreme Court "…has repeatedly held that once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner;"[232] and that "[i]n many circumstances, this will require governments to take positive action, for example by extending the scope of a benefit to a previously excluded class of persons".[233]

However, it is important to note that in the Canadian context access to a benefit that the law has not conferred has been treated differently by the Supreme Court with respect to the extent of the state's obligation to provide supports. The parents of autistic children, in *Auton (Guardian ad litem of)* v. *British Columbia (Attorney General),*[234] alleged that the Province's failure to provide an emerging form of therapy constituted discrimination under s.15 of the *Charter*. Madam Chief Justice McLachlin distinguished this factual situation from that in *Eldridge*. She held that s.15 did not compel the government to provide such therapy because s.15's application was limited to ensuring that benefits already provided be conferred in a non-discriminatory manner. Madam Chief Justice McLachlin stated that while the goal of s.15(1) is to combat discrimination and ameliorate the position of disadvantaged groups, "[i]t's specific promise, however, is

[231] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at paras. 80, 94.
[232] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 73.
[233] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 73.
[234] *Auton (Guardian ad litem of) v*. *British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 S.C.R. 657.

confined to benefits and burdens 'of the law'."[235] Because British Columbia's law did not provide the benefit that was being sought, s.15(1) was not violated.[236]

In summary, the current state of the law may be interpreted to be that States are not obliged to provide decision-making supports unless these would make an inaccessible government benefit, which already exists, accessible. This could create a difficult hurdle to claims seeking to compel government to provide decision making supports.

Limits on Duties to Accommodate and Provide Supports

Both the CRPD and Canadian laws illustrate that the duty to accommodate and provide supports is not unlimited. Firstly, the duty to accommodate in Canadian law extends only until the point of undue hardship. But does access to needed supports stop at the point that non-governmental third parties experience undue hardship in accommodating a person in the decision-making process? The CRPD requires governments to take positive action to provide supports for people with disabilities in the decision-making process. In this regard, Article 12 (3) of the CRPD states:

> States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

It can be argued that all levels of government have a shared responsibility to assume duties in relation to the provision of such supports. The extent and nature of this duty may well extend beyond the duty to provide reasonable accommodation, as described above in relation to Canadian human rights laws and *Charter* jurisprudence.

---

[235] *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78 at para. 27, [2004] 3 S.C.R. 657.
[236] *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78 at para. 47, [2004] 3 S.C.R. 657.

Conceptually, while the duty to accommodate and governments' duty to provide support overlap somewhat, they do differ in that governments' duty to provide support may extend beyond the limits of undue hardship where a government's role is relevant.

While governments' duty to provide supports may be interpreted to extend beyond that of non-governmental third parties, it is not an unlimited duty. While the CRPD articulates a positive State duty to provide supports. Article 12(3) 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." This, too, does not provide an unlimited right to government provision of decision making supports as the requirement is modified by the words, "appropriate measures." Further, given the principle of treaty interpretation that individual sections of treaties are to be interpreted in their overall context,[237] Article 12(3) should be interpreted within the context of the CRPD as a whole, including Article 5(3) which requires states to take only "appropriate steps" to ensure reasonable accommodation. Thus, individuals' right to supports to exercise legal capacity does not impose an unlimited duty on the state, based on both Canadian laws and the CRPD.

The duty to accommodate embodied in the *Charter* and human rights legislation provides an argument that there is a duty to accommodate the decision-making process such that each person may exercise his/her legal capacity on an equal basis with others. However, the limits on the rights to government-provided supports such as articulated in *Auton*, along with the limitation imposed by the undue hardship standard and the modifying language in Article 12(3), illustrate the ways in which the legal right to

[237] Malcolm D. Evans, ed., International Law, 3rd ed. (Oxford University Press, 2010).

support accommodations in Canadian law is limited. But, it is unclear as to whether the limits imposed by Canadian laws are the same as those imposed by Article 12(3). To the extent that they are more restrictive of the right to supports, it may be that Canada's current laws do not extend far enough to meet the full obligation to provide access to support in exercising legal capacity that is required of Article 12(3).

VII. CONCLUSION

The CRPD is a comprehensive international human rights treaty which gives recognition to a broad range of fundamental rights for people with disabilities. Canada's ratification of the CRPD was a celebratory time for Canadians with disabilities. This was going to be the jumpstart to the realization of their dreams for equality and inclusion. While it is impossible to rank or compare the importance of the various provisions in the CRPD, the negotiations leading up to its coming into force made clear the significance of issues of legal capacity.

Article 12 articulates the right to enjoy legal capacity on an equal basis with others. It also requires States Parties to take measures to provide access to supports for exercising legal capacity. Does this mean that supported decision-making must replace the predominant regimes in many jurisdictions that recognize substitute decision-making almost exclusively? Even if Article 12 can be interpreted to provide for both forms of decision-making, as has been made clear by the Canadian government, how should these look when they are transformed into law? While there is some degree of consensus on what substitute decision-making is and how it can be reflected in laws given its already existing widespread use, supported decision-making regimes are much

newer and less common. There is thus relatively little experience in transforming the concepts of this regime into concrete laws that are workable for all players: people with disabilities, lawyers, governments, and all members of the public. A further challenge results from the fact that Article 12 is drafted in general terms. There is no clear guidance on how regimes which recognize supports and supported decision-making were intended to look.

Ratification of the CRPD was one step in Canada's success story. It followed Canada's lead internationally, in that some jurisdictions already had laws which recognized supports before the CRPD even came into force. For example, documents which allow people to appoint someone to help them to make decisions were already legally recognized in British Columbia and the Yukon Territory. Manitoba had laws which provide a role for government provision of supports. Saskatchewan and Quebec's laws allow a court to appoint a person to assist with decision-making. Other Canadian jurisdictions are in the process of law reform efforts to recognize supported decision-making, such as Newfoundland and Labrador, and Prince Edward Island. And there are others, such as Ontario and New Brunswick, that do not appear to have begun the process of recognizing supports.

While some Canadian jurisdictions have gone well down the path of illustrating how the concept of supported decision-making can be reduced to legislation, it does not appear that any one of them completely complies with the dictates of Article 12. There is very little recognition of government duties to provide access to supports for decision-making, notwithstanding Article 12(3). The laws that do exist often limit themselves in

unacceptable ways, such as only to some types of decisions, or one segment of the population.

Canada's *Charter of Rights and Freedoms* and its human rights laws, which protect against discrimination, provide people with disabilities the right to be accommodated. While there has been little analysis of its applicability to the decision-making context, this paper argues that the duties to accommodate can ground an entitlement to recognition of supports in decision-making. This would apply to private third parties and governments. The duties are not without limits, and differ depending on the circumstances and parties involved. Nonetheless, they bolster the rights to supports found in Canada's existing capacity and decision-making legislation.

Where does this state of affairs leave us? Is this just the beginning, or the end of the road? Can Canadians realistically expect its government's ratification of the CRPD to bring still more positive change – change that will further enhance their autonomy and right to make their own decisions with whatever supports they choose to access? Even though the CRPD has been ratified, it is not binding within Canada's domestic legal system unless it has been 'implemented'. That Canada's capacity and decision-making laws do not align with the language and intention of Article 12, illustrates that full implementation has not yet occurred. Paradoxically, at Canadian law, while the CRPD is relevant for its interpretive value, it is not binding.

Canadians, however, can expect our federal and provincial/territorial governments to continue efforts to further implement Article 12, especially in view of the fact that at least some of its rights, such as Article 12(3), can be said to be subject to progressive

realization. The CRPD itself allows these rights to be recognized over time, rather than immediately, even by countries that have ratified.

Canada's laws and experience, while not fully compliant with Article 12, do provide some guidance to other countries for how to make supported decision-making a reality. It is hoped that Canada will continue to take the lead. People with disabilities should no longer have to face the kinds of restrictions to making their own decisions and following their own life paths that they have in the past.