The Right to Legal Capacity and Supported Decision Making for All

A Preliminary Brief to
The Law Commission of Ontario in Response to:
Legal Capacity, Decision-Making and Guardianship,
Interim Report, October 2015

Submitted By:
THE COALITION ON ALTERNATIVES TO GUARDIANSHIP

People First of Ontario
People First of Canada
Community Living Ontario
Canadian Association for Community Living

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INTRODUCTION

The ‘Coalition on Alternatives to Guardianship' thanks the Law Commission of Ontario (“LCO”) for providing an extension to March 14th to submit its Full Brief. The Coalition is submitting this Preliminary Brief to facilitate the LCO’s work in assessing responses to its Interim Report. Given the depth of detail and analysis, both in the Expert Opinions upon which our Final Brief will rely, and our own Final Brief, we wanted to provide a Preliminary Brief to give the LCO sufficient time to consider our main points.

We very much appreciate the invitation of the LCO to provide feedback on the content of its Interim Report and the draft recommendations contained within it. This Preliminary Brief, along with the Full Brief that the Coalition will submit by March 14th, is intended to respond specifically to the recommendations in the Interim Report. It is intended to be a companion to the Brief submitted by the Coalition dated October, 2014, which contains detailed recommendations for a fulsome program of reform to ensure that the legal regime in Ontario respects, promotes and protects the right to legal capacity to act without discrimination on the basis of disability.

The ‘Coalition on Alternatives to Guardianship’ was created in the fall of 1992 by People First of Ontario, the Ontario Association for Community Living (now Community Living Ontario), People First of Canada, and the Canadian Association for Community Living. All four organizations have decided to formally re-launch our Coalition in order to ensure that any proposed reforms to Ontario’s legal capacity, decision-making and guardianship laws are compliant with Canada’s obligations pursuant to the Convention on the Rights of Persons with Disabilities (CRPD) and with the Canadian Charter of Rights and Freedoms (Charter), and in doing so, ensure that such laws ensure that persons with disabilities enjoy legal capacity on an equal basis with others, and that a range of ways are created in law for people to exercise legal capacity, including through legally-recognized forms of supported decision making.
This Preliminary Brief, and the forthcoming Final Brief, focus on the following Recommendations from the Interim Report:

**DRAFT RECOMMENDATION 3**: The current Ontario approach to legal capacity, based on a functional and cognitive approach, be retained.

**DRAFT RECOMMENDATION 19**: The Ontario Government enact legislation or amend the *Substitute Decisions Act, 1992* to enable individuals to enter into support authorizations with the following purposes and characteristics:

a) The purpose of the authorizations would be to enable persons who can make decisions with some help to appoint one or more persons to provide such assistance;
b) The test for legal capacity to enter into these authorizations would require the grantor to have the ability to understand and appreciate the nature of the agreement;
c) A standard and mandatory form should be created for these authorizations, to promote a minimum basis of universal understanding of these new instruments;
d) Through a support authorization, the individual would be able to receive assistance with day-to-day, basic routine decisions related to personal care and property;
e) Decisions made through such an appointment would be the decision of the supported person; however, a third party may refuse to recognize a decision or decisions as being that of the supported person if there are reasonable grounds to believe that there has been fraud, misrepresentation or undue influence by the supporter;
f) Support authorizations will only be valid if they include a monitor who is not a member of supported person’s family and who is not in a position of conflict of interest, with duties and powers as set out in Chapter VII;
g) The duties of persons appointed under such authorizations would include the following:
   i. maintaining the confidentiality of information received through the support authorization;
   ii. maintaining a personal relationship with the individual creating the authorization;
   iii. keeping records with regards to their role;
   iv. acting diligently, honestly and in good faith;
   v. engaging with trusted family and friends; and
vi. acting in accordance with the aim of supporting the individual to make their own decisions;

h) Persons appointed under such authorizations would have the following responsibilities:
   i. gather information on behalf of the individual or to assist the individual in doing so;
   ii. assist the individual in the decision-making process, including by providing relevant information and explanations;
   iii. assist with the communication of decisions; and
   iv. endeavour to ensure that the decision is implemented.

**DRAFT RECOMMENDATION 20**: The Ontario Government examine the practicalities of a statutory legal framework for network decision-making which would permit formally established networks of multiple individuals, including non-family members, to work collectively to facilitate decision-making for individuals who may not meet the test for legal capacity, with a view to developing and implementing such a legal framework if feasible.

The Coalition is gravely concerned about the implications for law reform contained in Recommendations 3, 19 and 20. We believe Recommendation 3, in particular, by retaining a functional and cognitive approach to legal capacity, fundamentally misunderstands the meaning of legal capacity as developed internationally through the CRPD, and interpretations that have been given to it subsequent to its coming into force. The LCO states that in carrying out its project it applied the principles and considerations identified in its Frameworks for the Law as it Affects Older Adults and Persons with Disabilities. The Frameworks focus on substantive equality for persons with disabilities and older adults, and the LCO states that the ultimate intent of the recommendations “… is to advance the substantive equality of these individuals. It also means that the analysis is rooted in the Framework principles, which are themselves derived from foundational laws, such as the Charter of Rights and Freedoms (Charter) and the Ontario Human Rights Code, and from International instruments such as the International Principles for Older Persons and the Convention on the Rights of Persons with Disabilities (CRPD).” We believe that Recommendation 3 is actually inconsistent with the Frameworks, in that maintaining a functional and cognitive approach to legal capacity, which

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2 Interim Report at p. 26 – 27.
disproportionately and adversely effects some people with disabilities, is contrary to the CRPD and inconsistent with Charter and human rights principles.

**EXPERT OPINIONS**

Given the Coalition’s concerns that Recommendation 3, read together with Recommendations 19 and 20, are inconsistent with international law, Canada’s obligations with respect to the CRPD, and Canada’s own domestic legal obligations regarding equality and non-discrimination, we sought expert legal opinions to inform us and the LCO. We wanted to ensure that, at this critical stage in the LCO’s process, it does not proceed without a comprehensive understanding of the implications the implementation of these recommendations will have in relation to commitments at international law, as well as exposure to potential *Charter* challenges.

We retained the following to experts to provide a comprehensive opinion: Dulcie McCallum, LL.B. and Professor Arlene S. Kanter. Their opinions are attached as Appendix ‘A’ and Appendix ‘B’, respectively. Each of these two experts was able to provide their opinions based on expertise in law, disability law and its intersection with international human rights law, as well as an in-depth knowledge of the history and negotiations leading up to the coming into force of the CRPD. Ms. McCallum, being a Canadian lawyer, grounded her opinion in the Canadian and Ontario legal context. Professor Kanter, Professor of Law at Syracuse University College of Law, based her legal opinion on her experience, expertise, and comparative legal research in disability law, international human rights law and the CRPD.

Dulcie McCallum’s and Professor Kanter’s resumes are each attached, in Appendix ‘C’. In summary, Dulcie McCallum prepared her expert opinion based on her knowledge and experience as a lawyer and a member of Canada’s official delegation to the UN Ad Hoc Committee mandated to develop the CRPD. She was invited to join the delegation because of her well-known expertise on the rights of persons with intellectual disabilities, particularly with respect to legal capacity. As a member of Canada’s delegation, she was intimately involved in the intense deliberations to develop the CRPD covering a span of four years. Ms. McCallum’s opinion is based in her broad-based legal career and depth of understanding of Canadian laws and legal institutions, having been co-counsel in *Re Eve*
(Supreme Court of Canada), former Ombudsman for the Province of British Columbia and former Access to Information and Privacy Commissioner for the Province of Nova Scotia. Professor Kanter has devoted her nearly four-decade long career to scholarship, teaching and advocacy in the area of international and comparative disability law and policy. She was invited to participate in the drafting of the CRPD in the UN and has worked with governments and civil society organizations in more than a dozen countries on implementation of the CRPD, including legislative reform related to Article 12. Her recent book, “The Development of Disability Rights under International Law: From Charity to Human Rights” (Routledge 2015) provides an in depth analysis of several articles of the CRPD.

In retaining and soliciting Professor Kanter and Ms. McCallum as experts, we took all steps to ensure that their opinions would be entirely independent in that they did not have access to our Brief nor did they seek input from Coalition members or each other regarding the substance of their opinions and conclusions. As is evident from the opinions, the Coalition posed specific questions to them and asked them to provide detailed and substantiated opinions in response.

In view of the length and depth of the expert opinions, below is a summary of some of their pivotal conclusions:

Professor Kanter:

- The analysis in the LCO Interim Report is contrary to the language and overall purpose of the CRPD by discriminating against people on the basis of their cognitive and functional ability; it runs counter to well established principles of international law by rejecting the CRPD Committee’s authoritative interpretation of Article 12.
- The LCO’s effort to limit the applicability to Article 12 to those who satisfy a cognitive or functional test is contrary to both the drafting history and language of Article 12.
- Contrary to the view of the LCO, Canada’s Declaration and Reservation on Article 12 does not provide a legitimate justification to continue the use of substituted decision-making.
- The LCO’s rejection of the CRPD Committee’s General Comment on Article 12 is inappropriate.
- The LCO’s position that the rights provided under Article 12 are subject to progressive realization is contrary to well established principles of international human rights law.
Dulcie McCallum, LL.B.:

- A cognitive/functional test treats legal capacity as a rebuttable presumption when it is not. It is a civil right enshrined in Article 12.
- A test for legal capacity that disproportionately and adversely affects individuals with mental disability [intellectual or psycho-social] will be found contrary to Article 12.
- The LCO may have misinterpreted the working inter-relationship between the distinct rights and component parts contained in Article 12.
- A cognitive/functional test used to deny a person’s legal capacity may be both direct and adverse effect discrimination contrary to s. 15(1) of the Charter. Any attempt to argue that a cognitive/functional test has an ameliorative effect that seeks to redress the prejudice and stereotyping that haunts people with a mental disability will have an uphill battle and, in her opinion, will be unsuccessful in claiming it is protected under s. 15(2) of the Charter.
- The LCO has failed to understand that there is no test for legal capacity and no presumption of capacity contained in Article 12 or anywhere in the CRPD. While it is open to a State Party to control its domestic legislative agenda, it may not do so in a manner that is explicitly contrary to rights guaranteed within an international instrument that has been ratified.
- Should the LCO’s Final Report not remove Draft Recommendation 3 and replace it with a new recommendation providing guidance to the Ontario government with respect to the appropriate way to proceed to be in compliance with Article 12 and sections 7 and 15 of the Charter, she is of the opinion that any reliance on a cognitive/functional test to legal capacity for people who have an intellectual disability, whether the test for legal capacity is found in legislation or in practice, will be constitutionally vulnerable under the Charter and in contravention of the CRPD.
- It is inappropriate for the LCO to flat out reject the guidance provided for in the General Comment.
- By restricting consideration of one potential form of supported decision-making [networks] in Draft Recommendation 20 to where the cognitive/functional test has removed legal capacity, the LCO has made a recommendation that is wholly inconsistent with what Article 12 requires.
POiNTS WHICH WIIIL BE ADDEDDRESSED IN THE COALITION’S FULL BRIEF

The Coalition’s recommendations are made with the understanding that the LCO’s project was intended to recommend changes to the current statutory frameworks for legal capacity, decision-making and guardianship. As we understand the LCO’s project, there is a presumption that some form of guardianship and substitute decision-making would remain a part of Ontario’s laws. As such, our recommendations are made in that context. While the two expert opinions each, in different ways, launch several critiques against the recommendations found in the Interim Report, we realize that the LCO is not prepared to recommend the kind of overhaul to capacity legislation that would be required by the CRPD and Canada’s international obligations, as opined by both experts. As such, we have attempted to confine our recommendations to those that fit within the confines of the LCO project and that at the same time will make progress towards equal enjoyment of legal capacity. We do believe that, even within the confines of the LCO’s current project, there is significant more scope for recommendations which are much more compliant with the CRPD and Canada’s human rights framework.

Below is a summary of the issues that will be addressed more fully in the Coalition’s Full Brief

1.) Range of Ways to Exercise Legal Capacity – Response to Interim Report’s Recommendations 19 and 20

The current Substitute Decisions Act (“SDA”) gives scant recognition to decision-making with supports, especially in relation to people with more significant disabilities. The Coalition was disappointed to see that the LCO’s recommendations in its Interim Report do little to move towards a full legal framework which recognizes the equal right to enjoy legal capacity, which includes, as one vehicle for doing so, legal recognition of supported decision-making. The only specific recommendations which relate to decision-making with supports are Recommendations 19 and 20. To take advantage of the support authorizations in Recommendation 19, one must meet the cognitive ‘understand and appreciate test’, similar to that of granting a power of attorney. Thus there is a significant portion of the disability community, and indeed those who rely most heavily on making decisions with supports, who would not be able to take advantage of this vehicle. As well, these
authorizations have only limited coverage as they would cover only routine decisions. Further, Recommendation 20 makes no concrete recommendation for reform, other than inviting the Ontario government to examine the practicalities of a statutory legal framework for network decision-making.

Full and equal recognition of legal capacity requires that everyone be able to control their decisions, irrespective of cognitive abilities. Given the wide variations in people and the manner in which they make decisions, the Coalition recommends that decision-making laws be enhanced to recognize additional ways to exercise legal capacity. As such, every Ontarian would be able to control their decisions, but would do so in different ways. This can be achieved in a manner that would provide greater protection against unnecessary guardianship, and at the same time ensure that safeguards are in place to protect people from abuse and neglect. However, there would still be a very limited and restricted opportunity for guardianship-type arrangements where none of the proposed ways of exercising legal capacity are achievable at a particular point in time.

The SDA, in its current form, can be seen as providing for certain ways to exercise legal capacity. The Coalition recommends augmenting these ways to be more fully inclusive of the diversity of the community and the ways in which people make decisions. The SDA now provides for adults to exercise legal capacity in three ways – through legal independence for those who meet the mental capacity test as provided for in the SDA; through creating a continuing power of attorney for property and through creating a power of attorney for personal care. The Recommendations the Coalition makes would add two more ways, through statutory provisions for appointing decision-making supporters, or having supporters apply for this purpose. In effect, all five ways of exercising legal capacity, as set out below, are ‘alternative courses of action’ to findings of incapacity and guardianship. They are not mutually exclusive, and across an adult’s lifespan most people will use different ways, or a combination of ways, depending on their needs at any particular phase in their lives.

The main addition to the SDA would be statutory provision for supported decision making arrangements. Such arrangements could be authorized in two ways. An individual could establish his/her own arrangement through a planning document appointing supporters for particular purposes. Or, for those with more significant intellectual, cognitive or psychosocial disabilities not able to appoint
a person to assist, his/her potential supporters could apply to be recognized as decision-making supporters. They would need to provide evidence of a trusting relationship with the individual based on personal knowledge and their commitment and ability to play the needed personal planning, communication assistance, interpretive and other support roles.

In summary, the reforms proposed by the Coalition would provide for an adult to exercise his/her legal capacity one of five main ways. These are depicted in a chart in Appendix ‘D’. These are:

- **Legal independence with supports and accommodations as needed** – defined by the ‘understand and appreciate’ test currently provided in the SDA, adapted to recognize that people may require decision-making supports and accommodations to meet what remains essentially a mental capacity test;
- **Continuing Power of Attorney for Property**
- **Power of Attorney for Personal Care**
- **Supported Decision-Making Arrangement by Appointment** – where an adult appoints a decision-making supporter or supporters to assist him/her in some or all areas of property and personal care decisions, and with a decision-making ability test for this appointment which merges components of the test of appointing a power of attorney for personal care and the components of the test for incapability to make a s. 7 representation agreement under British Columbia’s *Representation Agreement Act*.
- **Supported Decision-Making Arrangement by Application** - where a person may not be able to appoint decision-making supporters, but has the decision-making ability to act with intention, and in a manner which can be sufficiently interpreted by a person or persons in his/her life who apply to play the role of decision-making supporter(s) and who meet the criteria as will be set out in the legislation which creates these arrangements.
2.) Response to LCO’s Position in Interim Report relating to Progressive Realization of Article 12 of the CRPD

In the Interim Report, the LCO states that a “progressive realization” approach to reform in this area is appropriate.\(^3\) The Coalition, in its initial review of the Interim Report, had concerns that such an approach was not consistent with what is expected of Canada in terms of its obligations at international law. As such, the Coalition specifically sought expert opinions to address this point. Both Professor Kanter and Dulcie McCallum opined that the rights provided for under Article 12 of the CRPD are clearly not subject to progressive realization. Professor Kanter goes on to state that, “not only does this [the LCO’s] view challenge well established principles of international law, but it also contradicts the process of legislative reform.”\(^4\) On the basis of these opinions, the Coalition urges the LCO to re-evaluate its analysis of Canada’s obligations to realize Article 12, and to make recommendations for immediate law reform to be taken, rather than the narrow recognition of supported-decision making in Recommendation 19 paired with a recommendation that the Ontario Government undertake further examination of the practicalities of a statutory legal framework for network decision-making.

3.) Additional Response to be Included in Full Brief, which will respond to Specific Concerns Expressed in Interim Report about Supported Decision-Making

The Coalition’s Full Brief, in addition to further elaborating on some of the issues set out above, will address the following matters, which the LCO raised as concerns in the Interim Report:

a) Replacement of the functional and cognitive approach to legal capacity
b) Legal Accountability and Responsibility for Decisions
c) Safeguards against Serious Adverse Effects and Abuse
d) Relevance of Supported Decision-Making for people with disabilities, beyond people with intellectual disabilities

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\(^3\) Interim Report at p.149.

\(^4\) Opinion of Professor Arlene Kanter at p. 15
Appendix 'A': Expert Opinion of Dulcie McCallum, LL.B
OPINION
Dulcie McCallum, LL.B.
Member of Canada’s Official Delegation to the UN Ad Hoc Committee [CRPD]
Co-counsel in SCC Re Eve and in BCSC Re Stephen Dawson
Former Ombudsman for the Province of BC
Former Nova Scotia Access and Privacy Commissioner
March 4, 2016

Question

The Coalition on Alternatives to Guardianship [“Coalition”] asked me to provide my opinion as to the answer to the following question:

Does Draft Recommendation 3 in the Interim Report of the Law Commission of Ontario [LCO] meet the legal requirements of Article 12 of the Convention on the Rights of Persons with Disabilities [“CRPD”]? In answering the question at issue, the content of the whole report will be reviewed, and, in particular, Draft Recommendation 20 will be considered.

Givens

1. My opinion has been requested by the Coalition to accompany their response to the Law Commission of Ontario’s, Legal Capacity, Decision-making and Guardianship: Interim Report (Toronto: October 2015).
2. The opinion was solicited based on my knowledge and experience as a member of Canada’s official delegation to the UN Ad Hoc Committee mandated to develop the CRPD. I was invited to join the delegation, in addition to Steven Estey who was the Council of Canadians with Disabilities’ representative, because of my well-known expertise on the rights of persons with intellectual disabilities, particularly with respect to legal capacity. As a member of Canada’s delegation, I was intimately involved in the intense deliberations to develop the CRPD covering a span of four years, for two or three weeks, twice per year.
3. While I am not at liberty to divulge the discussions within our delegation, I am able to share information about the lead role on Article 12 assigned to Canada by the Chair of the Ad Hoc Committee.
4. The opinion is about whether Draft Recommendation 3 meets a State Party’s obligation under Article 12 of the CRPD for persons with disabilities.
5. The opinion is restricted to one issue and is not a review of or comment on the LCO’s Interim Report in full except as it relates to the issues raised in Draft Recommendation 3.
6. The opinion is not intended to answer the question of how the law of Ontario could be changed to meet the legal requirements of Article 12 of the CRPD except as it relates to Draft Recommendation
3, which proposes that government retain the present cognitive/functional approach as the test for legal capacity.

The LCO proposes that the present approach in Ontario legislation with respect to legal capacity remain unchanged in Draft Recommendation 3, which reads as follows:

**DRAFT RECOMMENDATION 3:** The current Ontario approach to legal capacity, based on a functional and cognitive approach, be retained.

In its summary prior to proposing this draft recommendation, the LCO Interim Report states:

*Based on all of the above, the LCO recommends that Ontario retain an approach to legal capacity that is functional and cognitive. It is the view of the LCO that this approach, if properly implemented with appropriate attention to procedural protections and the provision of less restrictive alternatives, is best suited to minimizing unwarranted interference while appropriately allocating legal responsibility. It is unjust to allocate sole legal responsibility for a decision or action to an individual who could not understand the potential consequences of that decision. For there to be dignity in risk, the individual must have at least some understanding that a risk is in fact being taken.*

Ontario’s approach to the “understand and appreciate” test has been nuanced. Pains have been taken to calibrate the test to the contexts and nature of particular types of decisions. For example, the specific statutory components of the “understand and appreciate” test for creating a power of attorney for property management and for personal care, differ significantly, with the test to create a power of attorney for personal care being a very accessible one. The LCO believes that this approach is, despite its limitations, appropriate and effective: concerns regarding the implementation of this approach are dealt with throughout this Interim Report. [LCO Interim Report, at p. 70-71]

Cognitive/Functional Test for Legal Capacity: The LCO Discussion Paper: May 2014

It is important at the outset to review, in some detail, what the LCO has said about legal capacity and, specifically, in relation to the cognitive/functional approach. Beginning with its May 2014 Discussion Paper, the LCO lists the following as two of six aspects of the consistent approach to legal capacity embodied in the *Health Care Consent Act, the Substitute Decisions Act, and the Mental Health Act:*

1. **Presumption of capacity:** Individuals are presumed capable to make their own decisions, and others are entitled to rely on that presumption unless there are reasonable grounds for believing otherwise.

2. **Cognitive and decision specific approach to capacity:** The test for capacity to make a particular decision is not whether the individual will make a wise decision, or whether the individual has a particular disability that may affect memory, understanding or reasoning, but whether the individual has the ability to “understand and appreciate” the relevant information. As is discussed at more length in Part Two, Chapter I.B, it is not necessary for the individual to actually understand and appreciate the information, but only that they have the ability to do so. Further, capacity is understood not as a global quality, but as particular to specific types of decisions: an individual may have capacity for some types of decisions and not others. He or she may also have capacity at some times and not others. [LCO Discussion Paper, at p. 43] [Emphasis added]
At p. 49 of the Discussion Paper, the LCO relies on the following Stats Canada definition of developmental disability:

The incidence of developmental or intellectual disabilities is relatively small: Statistics Canada’s 2006 Participation and Activity Limitations Survey (PALS) found approximately 0.5 per cent of Canadians age 15 or older living with a developmental disability, defined as “Cognitive limitations due to an intellectual disability or developmental disorder such as Down’s syndrome, autism or an intellectual disability caused by a lack of oxygen at birth”. [Emphasis added]

The report continues on page 49:

Historically, the lives of persons with intellectual disabilities were limited by negative and limiting societal attitudes:

Society’s treatment of people with intellectual disabilities can be captured by the common terminologies that were used to describe them, including “imbeciles”, “idiots”, the “feeble minded” and “morons”. The medical community restricted its examination of people with intellectual disabilities to the “degree of idiocy” suffered by the individual. This language illustrates that people with intellectual disabilities were considered different than “normal” people, consequently it was acceptable to treat them differently. Such treatment was almost always accompanied by stereotypes about abilities (or lack thereof), and in particular, the assumption that people with disabilities were unable to lead independent lives. [Kerri Joffe (ARCH Disability Law Centre), Enforcing the Rights of People with Disabilities in Ontario’s Developmental Services System (Toronto: Law Commission of Ontario, June 2010), 13] [Emphasis added]

The LCO recognizes that persons with developmental disabilities “often have few opportunities to make decisions for themselves, which may limit the capacity for self-determination and lead to unnecessary dependency.” [LCO Discussion Paper, at p. 50]

The LCO reviews the terminology that is often associated with the concept of capacity:

“Legal Capacity”: In international documents, “legal capacity” has been treated as having two aspects: 1) the capacity to hold rights and obligations, and 2) the capacity to exercise those rights and obligations. Sometimes these two elements are referred to as “capacity to hold rights” and “capacity to act”. The first aspect may be considered as a “static element” that entitles individuals to recognition under the law as a bearer of specified rights and obligations, including a broad range of rights established in international treaties and domestic constitutional laws such as rights to equality, liberty, education, mobility, and so on. Historically, a number of groups, including women, have been excluded from the capacity to hold rights and obligations.

In common law systems such as Canada’s, typically the status of legal capacity (the first element) is presumed, and the term “legal capacity” is reserved for the exercise of that capacity, that is, the second aspect identified above (the “capacity to act”). As the “static element” is not at issue in this project, unless otherwise specified, this Paper will use the term “legal capacity” as including both elements (what has sometimes been referred to as “full legal capacity”). The use of the term “legal capacity”, rather than simply referring to “capacity” (as is currently the usage in the SDA and HCCA) also serves to emphasize the socio-legal aspects of the concept.

“Mental Capacity”: The term “mental capacity” has sometimes been used in distinction to “legal capacity”. When used in this way, “legal capacity” refers to “full legal capacity” as described above, that is, the entitlement to hold and exercise certain legal rights and responsibilities, while “mental
“Capacity” is used as a descriptor of the mental or cognitive abilities that have been identified as prerequisites to the exercise of legal capacity.

“Competence”: The term “competence” or “mental competence” was used historically in Ontario, and remains in use in other jurisdictions. The term “competence” was explicitly rejected by Weisstub in his Report, in favour of the term “capacity”, in order to “minimize the unwanted and unintended intrusion of social stigma, and to more clearly focus attention on functional parameters and the abilities of the person in the context of the decision to be made”. The LCO will not use the term “competence” in referring to the Ontario system, but will do so as appropriate in discussing other jurisdictions that continue to employ the term. [LCO Discussion Paper, at p. 66-67]

Following this examination of terminology, the LCO summarizes the three existing approaches to capacity. It notes that a functional approach is relied upon in most guardianship legislation though admits that elements of the status and outcome approaches “continue to influence capacity assessment in practice.”

Status Approaches

A “status” approach to the concept of capacity identifies capacity with the presence or absence of particular conditions or disabilities. Under a “status” approach, the presence of a particular disability, such as, for example, dementia, schizophrenia or Downs Syndrome would be associated with a lack of legal capacity. A status approach underlay much of historical guardianship laws, with the status of being a “lunatic” or “idiot” resulting in the appointment of a guardian of some sort. Under this approach, capacity is essentially identical with a medical diagnosis and the identification of disability. This tends to be a pure all or nothing approach, is not specific to particular types of decisions, and is unhelpful in addressing conditions that are episodic or where abilities may fluctuate. Historically, status based approaches to capacity were common. Pure status approaches to capacity are less common today, although some jurisdictions retain a combined approach that includes a diagnosis of disability as part of a broader definition of incapacity. A status based approach was rejected in the Weisstub Report and Ontario’s legislative language does not support such an approach. It is difficult to see how a pure status based approach could be made consistent with the provisions of the Convention on the Rights of Persons with Disabilities (CRPD), as was briefly discussed in Part One, Chapter I. In practice, persistent attitudes about certain types of disabilities may lead to inappropriate presumptions of incapacity, and thus may influence the application of capacity assessments.

Outcome Approaches

“Outcome” approaches to capacity focus on whether the individual in question is making “good” decisions – that is, whether the decisions that the individual is making are within the bounds of what might be considered reasonable. This is an approach not the basis for modern capacity and guardianship regimes and it generally rejected as a legal approach, because of its inherent paternalism. However, on a practical level, there may be a tendency for family members or service providers to apply some version of an outcome test in assessing the capacity of an individual to make decisions, so that the application of the law may be affected by outcomes based mindsets, a concern that was raised by several stakeholders during the LCO’s initial consultations.

Functional and Cognitive Approaches

Contemporary approaches to capacity generally adopt some version of a “functional” or “cognitive” approach. The Queensland Law Reform Commission has described this approach as follows:

The functional approach is based on the cognitive (functional) ability to make a specific decision, including a specific type of decision, at the time the decision is to be made. It focuses on the
reasoning process involved in making decisions. This encapsulates the abilities to understand, retain and evaluate the information relevant to the decision (including its likely consequences) and to weigh that information in the balance to reach a decision.

This is the dominant approach in contemporary legal tests of capacity. As will be discussed below, Ontario’s legislation reflects a highly developed version of a cognitive functional approach to capacity. [LCO Discussion Report, at p. 67-69]

At that point in the Discussion Paper, the LCO raises a fourth possibility, the “will and intent” approach, but reserves discussion of it until the Human Rights Critique section, where it says:

Cognitive approaches to capacity were adopted, in part, as more closely adhering to human rights concepts, particularly in moving away from the stereotypical and medicalized assumptions that underlie the status approach, and what many felt was the excessive paternalism of an outcomes based approach. However, the functional and cognitive approach adopted in Ontario’s current legislation scheme is also the subject of human rights critiques, with some arguing that it is incompatible with the provisions of the CRPD, which was described in Part One, Chapter I.

Some have argued that any functional approach to capacity is incompatible with a disability rights lens, in that the right to make decisions should not be restricted on the basis of diversity in some capabilities associated with some types of disabilities, and that these types of distinctions are discriminatory.

Others argue that the type of cognitively based test for capacity adopted in Ontario disproportionately disadvantages persons with intellectual, language, cognitive and psychosocial disabilities, and is improperly based on medically defined cognitive abilities (and in this sense retains many of the problematic aspects of a status based approach). As noted above, the “understand and appreciate” test creates a threshold for who can and cannot make decisions for themselves based on cognitive abilities. Thus, although it is not a disability based test, it will have a disproportionate effect on individuals whose disability affects their cognitive abilities, such as persons with intellectual, mental health or neurological disabilities. Individuals without disabilities will certainly be affected, but the majority of those who are found to be unable to understand and appreciate the requisite information for a particular type of decision will be individuals with some type of disability that has recurrent or ongoing effects on their cognition. [LCO Discussion Paper, at p. 74] [Emphasis added]

Citing extensively from the work of Bach and Kerzner, the LCO acknowledges their position that relational interdependent decision-making on which everyone relies and that “a cognitive approach to capacity places the individual in isolation and ignores the network of supports and relationships that may support a strong decision-making process.”

Bach and Kerzner have argued that intention is the basis of human action and reflects human agency, and that the foundation for capacity to make decisions should lie, not in cognition, but in the ability of individuals to express intent or make evident their will in a way that can guide those who know them well. Will and intent can be communicated through behaviour as well as language. [LCO Discussion Paper, at p. 74-75] [Emphasis added]

The “will and intent” approach is based on looking to the individual to express their choices, preferences and trust. The LCO appears to recognize such a non-cognitive approach may have a less adverse impact:
Other potential approaches to capacity have been identified that would not simply make adjustments to the “understand and appreciate” test, but would move the test for capacity in a significantly new direction. These maintain the concept of capacity, but attempt to rework it in a way that broadens it to include persons with disabilities that may disproportionately affect their status under current laws relating to legal capacity and guardianship. [LCO Discussion Paper, at p. 76]

In the Discussion Paper, the LCO clearly lays out some of the criticism levied against the cognitive and functional approach to measuring capacity, when it says:

ит is further argued that cognitive and functional approaches do not take into account that we all tend to be interdependent, and to make decisions in consultation with and with support from others whom we trust and who are close to us. As Bach and Kerzner have stated, “We do not exercise our self-determination as isolated, individual selves, but rather ‘relationally’, interdependently and intersubjectively with others.” These relationships and supports towards autonomy, although important to us all, are particularly important to persons who have disabilities related to communication and understanding. Through these relationships and supports, it is argued, individuals who may not on their own be able to achieve a competent decision-making process can do so in cooperation with others. In this view, a cognitive approach to capacity places the individual in isolation and ignores the network of supports and relationships that may support a strong decision-making process.

As well, it is argued that a cognitive approach does not sufficiently value other attributes that people employ to make decisions, such as preferences, emotions and intuition. Bach and Kerzner have argued that intention is the basis of human action and reflects human agency, and that the foundation for capacity to make decisions should lie, not in cognition, but in the ability of individuals to express intent or make evident their will in a way that can guide those who know them well. Will and intent can be communicated through behaviour as well as language. [LCO Discussion Paper, at p.74-75] [Emphasis added]

The LCO, at p. 182, references the Koch (Re) decision, an Ontario case involving the Health Care Consent Act, where the Court found the person capable of managing her own affairs. The Court is highly critical of the “formidable” mechanisms of the legislation and details some of the problems. With respect to the question of capacity, the Court said:

In some instances the appellant should have been probed to determine the thought process by which she arrived at an answer or statement. Until her thought process is known, it is neither fair nor reasonable to impugn the appellant’s mental capacity.

… It is to be remembered that mental capacity exists if the appellant is able to carry out her decisions with the help of others. The appellant’s apartment was located in a building that was operated under the auspices of the March Of Dimes and, as such, she had access to a number of services and supports that allowed her to function in that environment. [Koch (Re), 1997 Can LII 12138 (ONSC), at para. 9 and 20] [Emphasis added]

Cognitive/Functional Test for Legal Capacity: The LCO Interim Report: October 2015

Turning now to what the LCO has said about a test for legal capacity in its Interim Report, in which Draft Recommendation 3 is found. In its Glossary of Terms, the LCO defines substitute and supported decision-making as follows:
Substitute decision-making: while there are variances across jurisdictions, in general substitute decision-making allows for the appointment, where there has been a finding of incapacity, of another individual to make necessary decisions on behalf of another. In Ontario, this includes individuals appointed through a power of attorney, through the hierarchical list under the Health Care Consent Act, as representatives by the Consent and Capacity Board, or as guardians under the Substitute Decisions Act.

Supported decision-making: Supported decision-making refers to a range of concepts and models of decision-making proposed as an alternative to the current dominant approach of substitute decision-making. There are a wide range of approaches to supported decision-making, but in general, it involves mechanisms that do not require a finding of legal incapacity, and that enable the appointment of persons to provide assistance with decision-making, rather than to make a decision on behalf of another person. [LCO Interim Report, at p. xxix] [Emphasis added]

The LCO outlines the fundamental elements to Ontario’s approach to legal capacity as follows:

1. Legislative presumption of capacity: the Health Care Consent Act, 1996 (HCCA) makes explicit a presumption of capacity for decisions within its ambit: this presumption prevails unless the health practitioner has “reasonable grounds” to believe the person is legally incapable with respect to the decision to be made. The Substitute Decisions Act (SDA) sets out a presumption of capacity to contract, though not for other areas falling within the scope of that legislation. The Ministry of the Attorney General Guidelines for Conducting Assessments of Capacity which bind designated Capacity Assessors conducting Capacity Assessments under the SDA emphasize that when Capacity Assessors assess legal capacity, “in every case there is a presumption of capacity and there should be reasonable grounds that prompt the request for a formal capacity assessment”.

2. Functional and cognitive basis for assessment of capacity: basing the assessment of decisional capacity on the specific functional requirements of that particular decision, rather than on the assessment of an individual’s abilities in the abstract, the individual’s status or the probable outcome of the individual’s choice.

3. The “ability to understand and appreciate” test: tests for capacity are based on the individual’s ability to understand the particular information relevant to that decision, and to appreciate the consequences of making that decision: it is the ability that is most important, rather than the actual understanding or appreciation. While this subtle difference can be difficult to apply in practice, it allows for more individuals to meet the test, as the [sic] must only display the potential for understanding and appreciation, rather than actual understanding and appreciation: for example, while communication barriers might thwart actual understanding, they would not impair the ability to understand.

4. Domain or decision-specific capacity: avoiding a global approach to capacity, so that determinations of capacity are restricted to the assessment of capacity to make a specific decision or type of decision. The SDA and HCCA provide specific tests of capacity for property management, personal care, creation of powers of attorney for property and for personal care, consent to treatment, personal assistance services provided in a long-term care home and admission to long-term care.

5. Time limited determinations of capacity: since capacity may vary or fluctuate overtime, the validity of any one determination of incapacity is limited to the period during which, on clinical assessment, no significant change in capacity is likely to occur. [LCO Interim Report, at p. 56-57]

In fulfilling its mandate is to provide guidance in the reform of the law to provide justice for all Ontarians, the LCO identifies its responsibility, in part, as follows:
The LCO’s review of Ontario’s statutory regime for legal capacity, decision-making and guardianship has raised many challenging issues, for which there are no straightforward solutions. The onus on us is to make every effort to ensure that these laws are effective and fair, and that they respect and promote the substantive equality of older persons and persons with disabilities. [LCO Interim Report, at p. 2] [Emphasis added]

The LCO articulates a commitment to law reform that adopts a principled approach:

The principles should be considered in the design of the law and of the policies and practices through which it is implemented. The law as designed should at minimum not be in direct contradiction of the principles and the law should protect against interference with the attainment of the principles by individuals. Ideally, the law promotes the fulfillment of the principles for individuals directly affected. [LCO Interim Report, at p. 46] [Emphasis added]

At p. 26, the LCO stresses the importance of achieving substantive equality when it states:

[The ultimate intent of the recommendations is to advance the substantive equality of these individuals. It also means that the analysis is rooted in the Framework principles, which are themselves derived from foundational laws, such as the Charter of Rights and Freedoms and the Ontario Human Rights Code, and from international instruments such as the International Principles for Older Persons and the Convention on the Rights of Persons with Disabilities [CRPD].] [Emphasis added]

The Framework, referred to throughout the Interim Report, was introduced by the LCO in September 2012. The introduction to the Framework reads:

This Framework is based on the legal foundations of the Charter of Rights and Freedoms (Charter), the Ontario Human Rights Code (Code), the Accessibility for Ontarians with Disabilities Act (AODA) and international documents which have been ratified by Canada, such as the United Nations Convention on the Rights of Persons with Disabilities (CRPD). It also draws on key policy documents such as the federal government’s In Unison: Advancing the Rights of Persons with Disabilities. It therefore has its roots in the legal obligations and policy commitments that bind governments. It does not replace any of these documents, but is intended to build on these foundations and provide the basis for the further development of the law as it affects persons with disabilities. The LCO recognizes that this is an evolving area of the law, and this project is not intended as a final word on the subject but as a contribution to ongoing research, analysis and debate. [Emphasis added]

The LCO appears committed [‘appears’ is used here as the recommendation is still a draft] to what it refers to as Ontario’s nuanced approach to legal capacity based on a cognitive/functional approach. Nuanced because it is domain and time specific and attempts to highlight the importance of self-determination by avoiding unnecessary interventions, even if the choice made may involve risk [LCO, at p. 14 and 22]. The LCO at the same time understands that many consider it to have a negative impact on persons with disabilities. In this regard, the LCO quotes from a submission by ARCH Disability Law Centre:

Due to the manner in which guardianships are created, and the broad-reaching nature of guardians’ power and obligations, guardianships have the potential to significantly impact the rights of persons with disabilities who have capacity issues. These are fundamental human rights,
including the right to legal capacity, the right to self-determination, and the right to substantive equality [LCO Interim Report, Footnote 27] [Emphasis added]

In applying the Framework to the groups affected, the LCO looks at the lived experience of those affected. At p. 32, the LCO Interim Report reads:

*However, it is clear that some persons will be more likely to be found legally incapable under one or the other of these statutes. Persons with developmental, intellectual, neurological, mental health or cognitive disabilities are both more likely to be found legally incapable to make specific decisions within the definitions of these statutes, and to be informally assumed to be incapable and therefore subject to assessments and other provisions of the statutes.* [Emphasis added]

After pointing out some of the affected groups’ different perspectives, the LCO acknowledges the commonality of the results for the persons most likely to fall under the law:

*However, it is also important to emphasize what is widely shared among groups directly affected by these laws: concerns regarding social isolation, stigmatization and marginalization, and a profound desire for inclusion, freedom from abuse and mistreatment, and for respect for them as individuals and for their values and aspirations.* [LCO Interim Report, at p. 34] [Emphasis added]

The LCO acknowledges that while not intentional, a test that measures abilities to render a person legally incapable may be stigmatizing in its result:

*[T]he current legislation codifies a presumption of capacity to contract, and for matters falling within the HCCA. It also takes an approach to the concept of legal capacity which is based, not on age or a particular medical diagnosis, but on the abilities of the individual to carry out the task in question – that is the making of a particular decision or type of decision – in a specific context. These approaches were intended to guard against the unwarranted removal of rights based on assumptions and biases. In practice, of course, because we live in a society where older adults and persons with disabilities are commonly the subject of negative assumptions, these assumptions may also affect the implementation of the legal capacity, decision-making and guardianship law.* [Emphasis added]

The LCO appears to appreciate the additional implications of having a threshold test for legal capacity when it writes:

*The principle of fostering autonomy and independence is very clearly linked to issues of legal capacity and decision-making, to the extent that legal capacity has sometimes been conceptualized as “the effective threshold of autonomy, dividing the autonomous, on the one hand, from the non-autonomous, on the other, on the basis of an individual’s ability to engage in the process of rational (and therefore autonomous) thought”. In practical terms, a determination of incapacity may legitimate unwanted intervention in the life of an individual who has been so identified.* [LCO Interim Report, at p. 37]

In what appears to be a rationale for having a test to remove legal capacity, the LCO devotes a great deal of attention to the principles of security or safety. This appears premised on the idea that removing a
person’s right to exercise their legal capacity will protect them as a vulnerable person. The fact that people with disabilities experience abuse at a higher percentage than non-disabled people is well understood.

Because persons with impaired decision-making abilities may be especially vulnerable to manipulation or pressure, concerns about abuse and how this may undermine self-determination are particularly important in legal capacity and decision-making laws. [LCO Interim Report, at p. 40]

There is therefore reality to the often identified tension in this area between autonomy and security: legal capacity and decision-making law is often invoked to prevent or address abuse or exploitation, or to prevent an individual from taking or continuing on a course of action that will pose extreme risks or negative consequences for safety or wellbeing. [LCO Interim Report, at p. 41]

Curiously the lived experience for people with disabilities being at greater risk has been known and documented while institutions and guardianship were the norm. Clearly people subjected to these ‘protections’ were anything but protected from abuse and neglect. [See Need to Know report on systemic abuse at Woodlands School http://www.inclusionbc.org/sites/default/files/The_Need_to_Know.pdf]

Risk was a factor given deep consideration by States Parties during the deliberations. But there was one compelling and convincing argument advanced during the Ad Hoc deliberations that enabled States Parties to look at legal capacity in a new way. This persuasive argument was that substitute decision-making worked against the goals of inclusion, autonomy and respect while increasing a person’s vulnerability because with the disenfranchisement that followed the removal of legal capacity meant they were considered persona non grata, less than fully human, whose inclusion could easily be dismissed, their choices discredited and discarded. This could only result in stigmatization, caused by the super-imposed legal incapacity, continuing unabated. Supported decision-making, on the other hand, puts the individual at the centre of the decision-making process ensuring their right to legal capacity remains intact and their right to supports to make their will and preferences known, respected, thereby diminishing risk.

The LCO does refer to the fact that guardianship may not address the issue of risk:

As part of the context that shapes this dynamic between autonomy and safety or security, it is helpful to keep in mind that, given the pressures on resources and supports available for individuals who are low-income or marginalized, the choices available to the individual may be, practically speaking, already very restricted. A lack of supports may place an individual in a condition of dependency on the abuser. Intervention, including imposition of a guardianship, may not be able to resolve the fundamental issues that are creating a vulnerability to abuse or exploitation. [LCO Interim Report, at p. 42] [Emphasis added]

On p. 128, the LCO states that its recommended approach means an ‘all or nothing’ situation for those affected:

Cognitive capacity threshold: As is outlined in Chapter IV, the threshold for legal capacity is based on the individual’s ability to “understand and appreciate” the information relevant to a particular decision. While legal capacity may evolve or fluctuate, and while it is specific to particular decisions or types of
decisions (that is, it is not “plenary”), it is an all-or-nothing quality. A person either has legal capacity to make a particular decision or does not. Where an individual does not have legal capacity to make a particular decision or type of decision, a surrogate (the “substitute decision-maker” or SDM) will make the decision on behalf of that person, taking with it related responsibilities. [Emphasis added]

The confusion swirling around who assesses legal capacity or mental capacity, shortfalls in procedural safeguards after being found legally incapable, who is responsible for providing rights advice after the fact, to name a few, covers many pages of the Interim Report but are all topics beyond this opinion. Enough to say the LCO concedes the shortfalls with the status quo.

It was evident throughout the LCO’s research and consultations that there are many shortfalls in Ontario’s legal capacity and decision-making laws arising from implementation issues. Provisions intended to protect the ability of individuals to make choices for themselves to the degree possible may not be fully or appropriately put into practice for a variety of reasons, including lack of awareness or misunderstanding of the legislation, gaps in supports and processes for ensuring access to the law, and shortfalls in remedies and enforcement. [LCO Interim Report, at p. 129; See also (Koch (Re)]

The LCO considers the areas of concern as being one primarily associated with implementation of its proposed legal capacity approach rather than a question of whether the test that is at the core of the approach itself requires further consideration and study, particularly with respect to whether it has the effect of acting as an insurmountable barrier that could be contrary to human rights legislation, the Charter of Rights and Freedoms [“Charter”] and the CRPD.

The ‘all or nothing’ impact of the cognitive/functional approach for people who are labelled intellectually or developmentally disabled is admitted to by the LCO when it states:

While the number of Ontarians under guardianship is relatively small, guardianship it is often the only formal option for those persons with intellectual or developmental disabilities who cannot independently make major decisions: unlike persons who develop disabilities affecting decision-making abilities later in life or whose disability is episodic, they may never at any point in their lives be able to meet the test for legal capacity required for them to appoint a POA for property (if they have any) or for personal care. [LCO Interim Report, at p. 138] [Emphasis added]

Below is a discussion of the General Comment issued by the Committee on the Rights of Persons with Disabilities [“Committee”] in 2014. Prior to doing so, here is the approach taken by the LCO in the Interim Report in response to the Committee’s General Comment.

The LCO canvasses the content of the General Comment from the oversight Committee, which it points out is neither binding nor a position it is obliged to follow. After doing so, the LCO goes on to narrow in on the issue:

A consideration of approaches to legal capacity must grapple with the question of whether Ontario’s approach is fundamentally incompatible with the principle of autonomy: this is the position underlying the General Comment.
The debates regarding the concept of legal capacity explicitly draw on the principle of fostering autonomy and independence, with critiques of current practices and proponents of the approach set out in the General Comment pointing to shortfalls in the promotion and protection of autonomy in systems such as Ontario’s. Those who criticize the current legislation without wishing to abandon substitute decision-making see the shortfalls as issues of implementation; proponents of the model put forward in the General Comment see the concepts of legal capacity and substitute decision-making as fundamentally inconsistent with the principle of autonomy. [LOC Interim Report, at p. 62] [Emphasis added]

The LCO specifically rejects the General Comment when it states:

Chapter IV considered the approach proposed in the General Comment, in which all individuals retain at all times legal capacity to make decisions. As noted above, one of the consequences of such an approach is that substitute decision-making is never permissible: rather, individuals with impaired decision-making abilities must be able to freely seek and receive supports to make decisions for themselves. The LCO has not adopted this approach to legal capacity. Rather, the LCO has recommended the retention of Ontario’s current functional and cognitive approach, together with an emphasis on an accommodation approach to legal capacity, such that if an individual can meet the test for legal capacity with appropriate accommodations, that person should be considered to have legal capacity. This has implications for the LCO’s approach to the concept of supported decision-making, in that it treats supported decision-making as a less restrictive alternative to substitute decision-making, rather than a complete replacement for substitute decision-making. [LCO Interim Report, at p. 133] [Emphasis added]

The LCO indicates in the Interim Report that it will not be making recommendations for reform with respect to the common law of capacity and consent [Interim Report, at p. 5]. It does, however, reference the work done by the BC Law Institute [“Institute”]. There is some utility in briefly commenting on what those working on the issue of common-law legal capacity are considering. In its Report on Common-Law Tests of Capacity, the Institute explains the factors behind it undertaking a project to study the reform of the common law tests of capacity, including the fact some of the tests are “obscure and confusing.” Pointing to some of the social trends such as an aging population in Canada and advancements in the understanding of the brain, the Institute’s report includes reference to Article 12. At p. 22, the Institute’s report reads:

Third, Canada has recently ratified (in 2010) the UN Convention on the Rights of Persons with Disabilities. Article 12 of the convention affirms the right of “persons with disabilities [to] enjoy legal capacity on an equal basis with others” and calls for parties to the convention to “take appropriate measures” to ensure proper support and access in exercising that right. This potentially opens up a rich area of ideas for reform, though some explanation is required as to the significance of article 12 and its application to common-law tests of capacity.

Experts in the field see article 12 as heralding a major shift in the law. Instead of focussing on mental capacity, and devising tests to assess mental capacity, article 12 characterizes capacity as a right and calls for laws that support the exercise of that right. This raises the question whether the existing tests of capacity should be dramatically scaled back and replaced or augmented with a system that allows for supportive decision-making. For understandable reasons, most of the analysis of article 12 to date has been directed at what its implementation will mean for adult guardianship. But some early commentary on and court decisions applying article 12 have concluded that its reach extend to common-law tests of capacity and related common-law doctrines. [Refers to Nicholson v Knaggs, [2009] VSC 64;
Even those tasked with taking on the enormity of the question of legal capacity in the common law recognize the necessity, given Article 12 of the CRPD, to dramatically scale back the existing tests of capacity. This is stark contrast to the LCO that appears to stubbornly resist addressing head on exactly what Article 12 obliges States Parties to put in place. A reference to Draft Recommendation 20 makes the point. It reads:

**DRAFT RECOMMENDATION 20:** The Ontario Government examine the practicalities of a statutory legal framework for network decision-making which would permit formally established networks of multiple individuals, including non-family members, to work collectively to facilitate decision-making for individuals who may not meet the test for legal capacity, with a view to developing and implementing such a legal framework if feasible.

Draft Recommendation 20 is confusing at best. It appears to suggest that one of the models of supported decision-making, networks, would only be available to assist a person who may not meet the test for legal capacity. It remains unclear if this is to enhance and enable exercise of legal capacity or to downgrade it to a process by which decisions are made without the individual’s right to legal capacity remaining intact.

Having provided this overview of the Discussion Paper and Interim Report, suffice to say at this point that the LCO has, in my opinion, erred, details of which can be found in the Conclusions below. It is concerning that the LCO documents the inherent problems with a cognitive/functional test yet seem reluctant to thoroughly examine what reliance on any such test means given the obligations in Article 12 of the CRPD.

**BACKGROUND DISCUSSION AND LEGAL ANALYSIS: CRPD**

Turning now to the question, the subject of this opinion, as to whether a cognitive/functional test for legal capacity is contrary to Article 12 of the CRPD. Legal capacity is the subject of Article 12 of the CRPD dealing with equal recognition before the law and reads as follows:

*Equal recognition before the law*

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.

At the UN, Canada was designated the lead State Party on Article 12 by the Chair of the Ad Hoc Committee, New Zealand’s Ambassador to the UN, Don MacKay.

Meanwhile, article 12 (equal recognition before the law) was “facilitated by the Canadian delegation and secures a progressive approach to legal capacity and, for the first time in international law, recognizes the right to use support to exercise one’s legal capacity - a made-in-Canada solution; [Walker, Julian, The United Nations Convention on the Rights of Persons with Disabilities: An Overview (2013), at p. 4]

The assigned lead on any particular Article is not responsible for drafting its content but rather is considered the ‘go-to’ country who then is responsible to spearhead the issues, encourage discussion and engage all States Parties in a focussed and thoughtful way. Through side-bar presentations, drafts of the article, collaboration and negotiation, States Parties and civil society, primarily through the IDC, had the opportunity to detail their concerns and priorities. This was the way in which Article 12 was developed.

Negotiations on the CRPD began in 2001 finalizing on December 13, 2006, when it was adopted by the UN General Assembly. “It was the first new comprehensive human rights treaty in 16 years, and the first of the 21st century.” [Ambassador MacKay, The Convention on the Rights of Persons with Disabilities: A Benchmark for Action”, www.RIGLOBAL.org, at p. 1] Canada signed the CRPD when it was first opened for signature [a first for Canada] on March 30, 2007. There was then a three year delay before ratification took place, largely to give its federation partners, the provinces and territories, time to prepare for implementation, particularly for those rights entitled to immediate realization.

Despite its leadership role in leading the collaborative work with other State Parties and civil society on the text and contributing its knowledge of substantive equality under the Charter of Rights and Freedoms, Canada filed a Declaration and Reservation with respect to Article 12. Canada’s Declaration and Reservation [“Reservation”] reads 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 Convention will occur at more than one level of government and through a variety of mechanisms, including existing ones.

This was an unexpected and disappointing departure from Canada’s respected role in championing the language in Article 12 that solidified the right to legal capacity on an equal basis with others and the right to supports in exercising legal capacity, by choice, to make decisions. The Reservation, as it stands, does, however, make three things clear:

1. Canada recognizes persons with disabilities have legal capacity on an equal basis with other in all aspects of their lives, albeit mischaracterizes this as a presumption.
2. Canada did not make any declaration or reservation with respect to any test, measure or approach to legal capacity.
3. Canada understands that Article 12 permits supported and substitute decision-making.
4. Canada reserves the right to use substitute decision-making in appropriate circumstances subject to appropriate and effective safeguards.

Canada has filed its First Report to the Committee on the Rights of Persons with Disabilities [“Committee”]. The federal portion of the report has a section entitled “Articles 5-7 and 12: Equality, non-discrimination and equal recognition before the law” and at para. 33-35 of the report, Canada said the following:

33. Canada strongly supports the equal recognition of persons with disabilities as persons before the law. As with other members of society, a determination of incapacity should only be based on evidence of the individual’s actual decision-making ability, rather than on the existence of a disability. Anyone who requires support in exercising their legal capacity should have access to the support required to do so, subject to appropriate regulation and safeguards.
34. Canada’s interpretative declaration and reservations in relation to Article 12 set out Canada’s understanding of its obligations under the article. All P/Ts have in place laws related to substitute and/or supported decision-making with safeguards to protect against abuse. Examples are outlined below:

- In Alberta, under the Personal Directives Act, individuals may choose a representative to make personal, non-financial decisions on their behalf. The Adult Guardianship and Trusteeship Act provides options and safeguards to protect vulnerable adults who require support in making decisions.
- In Manitoba, the Vulnerable Persons Living with a Mental Disability Act supports and regulates both supported and substitute decision-making for adults with a mental disability.
- In Nunavut, the Guardianship and Trusteeship Act recognizes the legal capacity of adults to make decisions about their personal care, health care, and financial matters. While court-appointed guardianships may be ordered under the Guardianship and Trusteeship Act, the Department of Health and Social Services offers services to help protect individuals with a mental or physical disability who require support in making decisions.
- In the Yukon, the Adult Protection and Decision-Making Act provides supported decision-making agreements, representation agreements, court-appointed guardianship and protection for adults who may be abused or neglected and unable to seek their own help. The Capability and Consent Board reviews matters under the Mental Health Act and the Care Consent Act, such as decisions as to whether a person is capable of consenting to health care, to admission to a care facility or to receiving personal assistance services.

35. Representation agreements are both a supported and substitute decision-making option by which an adult may appoint another person to make decisions on their behalf in respect of personal and
health care matters, and the routine management of an adult's financial affairs. For example, the Government of British Columbia amended the Representation Agreement Act to increase accessibility to representation agreements while maintaining related safeguards, such as requiring a monitor to be appointed in certain circumstances.

Ontario’s section of the report makes no reference to Article 12. The Committee has not yet issued its Observations to Canada in response to its First Report.

Throughout its four years of development work, the Ad Hoc Committee, Chairs Luis Gallegos and Don MacKay and, ultimately, all States Parties recognized that the CRPD represented a major paradigm shift.

What, then, does the Convention do? In essence it elaborates in considerable detail the rights of persons with disabilities under international law and sets out a code of implementation for governments. It is a practically focussed convention, because it was so closely informed by the experiences of persons with disabilities worldwide…

It marks a “paradigm shift” from thinking about disability as a social welfare matter to dealing with it as a human rights issue, which acknowledges that societal barriers and prejudices are themselves disabling. [Ambassador MacKay, at p. 3]

The language of the text of the CRPD reflects that substantive shift for persons with disabilities: abandoning a medical model of disability to a human rights model. During the proceedings at the Ad Hoc Committee, civil societies’ interventions paid a great deal of attention to legal capacity, clearly appreciating its importance to the whole of the CRPD.

Consequently the social and legal history which has prompted the introduction of this article has not been acknowledged. It has not been recognized that disability has been long equated with incompetence. This equation has not just been confined to social prejudice but has in fact passed into the law. Legal incorporation has been both at the normative level and at the level of practice. It is the incorporation at the level of practice which explains why my visually impaired friend – colleague is prevented from opening a bank account. And the normative induction prevents persons with psychosocial disability to conclude contracts. …

Guardianship is unacceptable because it is premised on the incapacity of persons with disability. It is a device by which whilst the life affairs of persons with disability are managed our rights to growth and development are thwarted.

Legal Capacity has been constructed in ignorance of the disability experience. It is a protection which has been mechanically extended to persons with disability without asking us as to what it does to our lives and the quality of our living. It is on the basis of our lived experience that we are demanding that this Convention should accord recognition to us as persons before the law with full legal capacity. Any principle whereby we are denied the capacity to act would be no more than a legitimization of subsisting discriminatory laws. [Equal Recognition As A Person Before the Law, Plenary address on Legal Capacity by Amita Dhanda on behalf of International Disability Caucus] [Emphasis added]

The role of civil society at the UN was unprecedented. Near the outset of the meetings, Canada intervened to impress upon the Ad Hoc Committee in a strong and clear way the importance of States Parties engaging in a meaningful way with civil society. The contribution made by civil society from throughout the world made an impressive footprint on the CRPD. Canada’s delegation, in fulfilling its lead
role with respect to Article 12, took the duty to actively consult with persons with disabilities and their representative groups throughout the development of the CRPD very seriously.

Civil society was organized at the UN as the International Disability Caucus ("IDC"), the origins of which it describes as follows:

The International Disability Alliance (IDA) was established in 1999 as a network of global and, since 2007, regional organisations of persons with disabilities (DPOs) and their families. The aim of the Alliance is to promote the effective and full implementation of the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD) worldwide, as well as compliance with the CRPD within the UN system, through the active and coordinated involvement of representative organisations of persons with disabilities at the national, regional and international levels.

With member organisations around the world, IDA represents the estimated one billion people worldwide living with a disability. This is the world’s largest – and most frequently overlooked – minority group. IDA, with its unique composition as a network of the foremost international disability rights organisations, is the most authoritative representative voice of persons with disabilities and acknowledged as such by the United Nations system both in New York and Geneva.

IDA was instrumental in establishing the International Disability Caucus (IDC), the network of global, regional and national organisations of persons with disabilities and allied non-governmental organisations (NGOs), which was to become a key player in the negotiation of the CRPD. [www.internationaldisabilityalliance.org]

The IDC addressed the issue of a presumption on the first page of its “Nothing About Us, Without Us” handout at the UN on Legal Capacity:

Legal capacity is fundamental to a person’s self-determination. We all make choices in our everyday life: what we eat, what we wear, which radio station we listen to and we choose our friends and relationships.

If a person does not have legal capacity – including the right to exercise this legal capacity – then a “presumption of incapacity” flows all over an individual’s life; not just on issues of medical treatment and contract or financial decisions but all choices of a person are determined by “someone else.” [Legal Capacity, at p. 1] [Emphasis in original]

The significant legacy of the civil society contribution to the historic negotiations at the UN is reflected in the text of the CRPD: the importance of continuing to listen to civil society during the implementation phase of the CRPD is confirmed in Article 4(3) and Article 33(3), which read as follows:

4(3). In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.

33(3) Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.
This is an important point to make given that the LCO appears to be under some misconception that the right to support in Article 12 is a community living ‘concept.’ The LCO stated in its Interim Report:

*Because the concept of supported decision-making has deep roots in the community living movement and in the experiences of individuals with intellectual disabilities and their families, persons connected with the intellectual disability community were by far the most likely to be conversant with the concept of supported decision-making.* [LCO Interim Report, at p. 135; See also p. 163]

Consideration of all that civil society said during the development of the CRPD, what States Parties agreed to in the final text, and what civil society and experts have had to say since, with respect to the global recognition of the paradigm shift embodied in Article 12, should dispel any misunderstanding on the part of the LCO.

The International Disability Alliance ["IDA"], since the completion of the CRPD, has continued to propose actions for States Parties to give full realization to Article 12. In its submission to the Day of General Discussion of the Committee on the Rights of Persons with Disabilities, which included a call for the elimination of "competence" as a test, the IDA said the following:

*Article 12.2: Recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life*

1. Repeal laws providing for declarations of incapacity or interdiction and/or designating a guardian or representative to exercise legal capacity on another person's behalf.

2. Repeal mental health laws providing for involuntary treatment and involuntary confinement, and ensure that the practice of involuntary treatment and involuntary confinement is discontinued.

3. Repeal any other laws providing for the involuntary imposition of a substitute decision-maker or administrator, involuntary protective mechanisms or coercive treatments, on the basis of disability or the "best interests" of an adult person.

*4. Eliminate the requirement of "competence" as an element of valid consent or other legal acts, and establish standards for consent and other legal acts, that do not depend on the absence of a disability.* [Emphasis added]

In its contribution to the Office of the UN High Commissioner for Human Rights thematic study on the CRPD, the IDA called for the *repeal* of all conflicting laws:

*Laws restricting the exercise of legal capacity based on a test of decision-making abilities, whether generally or in specific areas such as financial rights and obligations (e.g. disposing of property, entering into a contract, opening a bank account), family rights and obligations (e.g. marriage and parenting), voting or expressing a political or party preference (e.g. in an election, plebiscite or referendum), and decision-making in health and medical context or in relation to housing or services (e.g. whether to undergo a particular treatment or enter a hospital, rehabilitation center or institution). See also Articles 14, 19, 23, 25(d), 26, 29. [Emphasis added]*

This submission goes to the heart of any test for legal capacity that is based on decision-making abilities. It also highlights the 'octopus effect' of Article 12 as it reaches out and impacts on all other rights.
Respect for Article 12 is the only way in which the other rights provided for throughout the CRPD can be respected. In its guarantee of equal recognition before the law, Article 12 is talking about the law generally, but also specifically the law of all the rights embodied in the Articles throughout the whole of the CRPD. As Gerald Quinn put it with respect to any reservation filed regarding Article 12:

\[\textit{I think the revolution of ideas, moving from object to subject, is best encapsulated in Article 12. To me, that is non-negotiable. To me, any reservation to Article 12 by a State attempting to punch holes in the fabric of the Convention should be declared incompatible with the object and purpose of the Convention. So, this is pivotal to everything else that arises. This centers the person; it gets the person outside of the gilded cage and enables them to make decisions for themselves. It also wraps a system of services around that to enable this to occur. [Gerard Quinn, “An Ideas Paper” (Paper presented to the European Foundation Centre Consortium on Human Rights and Disability, Seminar on Legal Capacity, Brussels, 4 June 2009)]}\]

The octopus or tentacle reach of Article 12 is, for present purposes, of particular import with respect to Article 9. When the two Articles are read in conjunction, it is clears up what Ambassador MacKay refers to as a ‘grey’ area with respect to implementation. In other words, States Parties in meeting their obligations under Article 12, are given some of the ‘how to’ guidance in Article 9, which reads:

1. To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to all persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, \textit{to information and communications, including information and communications technologies and systems} … [Emphasis added]

In 2008, the IDA released a legal opinion on the guarantee of universal legal capacity contained in Article 12. The IDA emphasized the need to rely on the purpose outlined in Article 1 in interpreting Article 12: “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities.” The decision not to include disability in the definition section in Article 2 was intentional and a topic of much discussion, which was resolved on the basis that it would be impossible to draft an all-inclusive definition and it was important, as a matter of principle, for individuals to self-identify. But States Parties understood the importance of not leaving out those who may be living on the margins of society. The second paragraph of the Purpose section is instructive in assessing any test with respect to legal capacity. It reads in part: “Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments…” The IDA stresses the connection when it opines:

On the question whether the CRPD guarantees legal capacity to all persons with disabilities it would be necessary to note that a definition of disability has not been incorporated in art 2 of CRPD. However an inclusive definition finds place in article 1. Such definition includes persons who have long-term physical, mental, intellectual or sensory impairments. \textit{Evidently the CRPD has employed the strategy of explicitly naming certain groups in the definition in order to highlight their higher discrimination and the greater need for strategies of empowerment. If national legislations and state practices are examined, it is found that it is these groups of persons with}
disabilities who are denied legal capacity. The deliberations surrounding the Convention show that the need for a separate Convention for persons with disabilities was felt because the extant human rights Conventions were not disability inclusive and could not provide the requisite justification to challenge exclusionary national laws. In the face of this overarching commitment to the goal of inclusion in the Convention, it is logical to conclude that article 12 would have been drafted in consonance with this larger objective of the CRPD. [Legal Opinion on Article 12 of CRPD, IDA, June 21, 2008, at p. d] [Emphasis added]

During their consideration of the IDA legal opinion, Bach and Kerzner affirm that legal capacity is “a social and legal status accorded independent of a person's particular abilities," by saying:

Defined in this way, legal capacity does not reflect an individual's ability to make decisions. Rather, it reflects an individual's right to make decisions and have those decisions respected, and signals a social model approach to defining and understanding disability. As such, a social model approach to defining legal capacity focuses not on the individual’s attributes or relative limitations, but rather on the social, economic and legal barriers a person faces in formulating and executing individual decisions, and the supports and accommodations they may require given their particular decision-making abilities. [Bach and Kerzner, at I B]

Their work also speaks to the issue of the reliance on a test of mental capacity for legal capacity:

There is no single, uniform test or definition for legal capacity in Canadian law.[97] Yet, laws recognize some fundamental realities. The test for legal capacity is described as a cognitive one; hence the focus on mental capacity as a condition for exercising legal capacity. [Mental] capacity is not considered from a global standpoint in that it is recognized that people may have abilities to make some types of decisions on their own and not others. [Bach and Kerzner, at V B] …

But this is a dramatic departure from the usual standards of mental capacity on which the law of legal capacity has traditionally rested - the ability to understand information and appreciate the nature and consequences of a decision. The traditional criteria are based on individual skills and abilities of cognitive functioning, as though one had to demonstrate one could answer, in language others understood, certain skill-testing, ‘decision-making capacity-proving’ questions. This approach to defining criteria of capacity is rooted in an individualistic, bio-medical model of disability that the CRPD rejects. To make recognition of legal capacity dependent on a particular set of decision-making skills, as most current capacity assessment tools do, is to import ableist assumptions about what the demonstration of decision-making ability entails. This approach to definition reproduces disability ‘status’ as the basis for restricting legal capacity, a clear violation of the CRPD, and systematically discriminates against people with intellectual, cognitive, psychosocial and communication disabilities; people whose disabilities may entail challenges with managing decision making. [Bach and Kerzner, at I C] [Emphasis added]

Bach and Kerzner have honed in on one of the most critical components as to how Article 12 was intended to mark the death toll of any relationship between mental capacity and legal capacity:

The CRPD breaks the link between mental capacity and legal capacity, by prohibiting discrimination on the basis of disability in the enjoyment and exercise of legal capacity. On their face, mental capacity statutory provisions which articulate cognitive tests for having one’s legal capacity recognized and protected appear to be in violation of the CRPD. [Bach and Kerzner, A New Paradigm for Protecting Autonomy and the Right to Legal Capacity, note 109, 67]
As one learned expert and a leader at the Ad Hoc Committee meetings said, while writing about Article 12:

*The Convention replaces the dualistic model of capacity versus incapacity with an equality-based model that complements full legal rights to individual autonomy and self-determination with entitlement to support when needed, to ensure substantial equality of opportunities to exercise those rights. It is a model that reflects established principles in international human rights, such as the universality, indivisibility, interdependence, and inter-relatedness of all human rights* …[Minkowitz, T., *The UN CRPD and the right to be Free from Nonconsensual Psychiatric Interventions*, Syracuse J.Int’l L&Com. Vol. 34, at p. 405]

Various other States Parties, like Canada, have filed initial reports to the Committee on the Rights of Persons with Disabilities, some of whom have received Observations in response from the Committee. In the General Comment released in 2014, the Committee reports that many States Parties demonstrated a clear misunderstanding on their obligations of what was required in order to comply with Article 12. As a result, the oversight Committee issued a General Comment on Article 12 in order to provide guidance to States Parties: to clearly lay out what was involved in meeting the obligations in Article 12. The Committee’s General Comment stresses the essential importance of Article 12:

*Equality before the law is a basic general principle of human rights protection and is indispensable for the exercise of other human rights.* [General Comment No. 1, at p. 1]

In its General Comment, the Committee refers to how many States Parties were failing to distinguish between legal and mental capacity:

*In most of the State party reports that the Committee has examined so far, the concepts of mental and legal capacity have been conflated so that where a person is considered to have impaired decision-making skills, often because of a cognitive or psychosocial disability, his or her legal capacity to make a particular decision is consequently removed. This is decided simply on the basis of the diagnosis of an impairment (status approach), or where a person makes a decision that is considered to have negative consequences (outcome approach), or where a person’s decision-making skills are considered to be deficient (functional approach). The functional approach attempts to assess mental capacity and deny legal capacity accordingly. It is often based on whether a person can understand the nature and consequences of a decision and/or whether he or she can use or weigh the relevant information. This approach is flawed for two key reasons: (a) it is discriminatorily applied to people with disabilities; and (b) it presumes to be able to accurately assess the inner-workings of the human mind and, when the person does not pass the assessment, it then denies him or her a core human right — the right to equal recognition before the law. In all of those approaches, a person’s disability and/or decision-making skills are taken as legitimate grounds for denying his or her legal capacity and lowering his or her status as a person before the law. Article 12 does not permit such discriminatory denial of legal capacity, but, rather, requires that support be provided in the exercise of legal capacity.* [General Comment, at p. 4, para. 15] [Emphasis added]

The CRPD is not intended to create new rights. Rather the CRPD was intended to give expression to how the rights who belong to everyone can be fully realized for persons labelled intellectually disabled.
The paradigm shift reflected in the move from substitute to supported decision making aims to retain the individual as the primary decision maker but recognizes that an individual's autonomy can be expressed in multiple ways, and that autonomy itself need not be inconsistent with having individuals in one’s life to provide support, guidance and assistance to a greater or lesser degree, so long as it is the individual’s choosing. [Dinerstein, Robert D, Implementing Legal Capacity Under Article 12 of the UN CRPD: The Difficult Road From Guardianship to Supported Decision-Making, Human rights Brief 19, no. 2(2012): 8-12]

How the Convention came to be and throughout the proceedings, it is indisputable that the CRPD was, rather than extending new human rights to persons with disabilities, meant to provide clarity in order to address the reality that people with disabilities' rights under existing international instruments, discussed below, were being ignored and disregarded, States Parties frequently in breach. The CRPD simply provides States Parties with an explanation of how the rights of persons with disabilities can be fully realized.

And as the Committee stated in the case of Article 12:

Article 12 does not set out additional rights for people with disabilities; it simply describes the specific elements that States parties are required to take into account to ensure the right to equality before the law for people with disabilities, on an equal basis with others. [General Comment, at p. 1]

Like the interpretation of any international treaty, the rights in Article 12 are to be read in the context of the treaty as a whole.

Treaties are to be interpreted as a whole and individual parts must be interpreted in the overall context of the treaty. 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.” It must also be interpreted consistent with other related and relevant articles, most notably, articles 3 and 5. [Kerzner, Lana, Paving the Way to Full Realization of the CRPD's Rights to Legal Capacity and Supported Decision-Making: A Canadian Perspective, April 2011]

For the purpose of answering the present question, therefore, the following relevant portions of the CRPD are reproduced.

Article 1 of the CRPD outlines the Purpose of the convention as follows:

The purpose of the present Convention is 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.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others. [Emphasis added]
Several paragraphs of the Preamble relate to the present question and put the Purpose section of the Convention, cited above, into context:

(e) Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others,

(h) Recognizing also that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person,

(i) Recognizing further the diversity of persons with disabilities,

(j) Recognizing the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support,

(k) Concerned that, despite these various instruments and undertakings, persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world,

(m) Recognizing the valued existing and potential contributions made by persons with disabilities to the overall well-being and diversity of their communities, and that the promotion of the full enjoyment by persons with disabilities of their human rights and fundamental freedoms and of full participation by persons with disabilities will result in their enhanced sense of belonging and in significant advances in the human, social and economic development of society and the eradication of poverty,

(n) Recognizing the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices,

(o) Considering that persons with disabilities should have the opportunity to be actively involved in decision-making processes about policies and programmes, including those directly concerning them,

(y) Convinced that a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities will make a significant contribution to redressing the profound social disadvantage of persons with disabilities and promote their participation in the civil, political, economic, social and cultural spheres with equal opportunities, in both developing and developed countries,

[Emphasis added]

Article 3 lays out the general principles intended as the bedrock underpinnings of the CRPD. The following fundamentals, a sample of the provisions in Article 3 of the CRPD, directly relate to the question of legal capacity and autonomous decision-making:

(a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
(b) Non-discrimination;
(c) Full and effective participation and inclusion in society;
(d) Respect for difference and acceptance of persons with disabilities human diversity and humanity;
(e) Equality of opportunity;
(f) Accessibility;
[Emphasis added]

Article 5 provides for the equality and non-discrimination for people with disabilities and reads as follows:

1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
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.
4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.[Emphasis added]

Prior to the CRPD, other international instruments guaranteed all persons equality before the law everywhere:

**The Universal Declaration of Human Rights [1948] [UDHR]**
Article 6.
Everyone has the right to recognition everywhere as a person before the law.

**International Covenant on Civil and Political Rights [1966 entering into force 1976] [ICCPR]**
Article 16
Everyone shall have the right to recognition everywhere as a person before the law.

The Convention on the Elimination of All Forms of Discrimination Against Women ["CEDAW"] also includes the right to legal capacity, which reads as follows:

**Article 15**
1. States Parties shall accord to women equality with men before the law.
2. 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.
3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.
4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

Reference is made to the ICCPR in the Preamble of the CRPD, which reads in part as follows:

(d) Recalling the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights …

Article 12(1) of the CRPD employs the word "reaffirm" to reflect the fact that equality before the law is a right guaranteed by its predecessors, the UDHR and the ICCPR, to all persons. Article 12 reaffirms this right for all persons with disabilities everywhere before the law as a civil and political right.

The importance of the right contained in Article 16 of the ICCPR is reflected in that Covenant’s Article 4, which reads:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 May be made under this provision. [Emphasis added]

This prohibition against depriving a person of the right to recognition as a person before the law even in emergent situations is also protected for persons with disabilities by the CRPD. This same guarantee to prohibit the derogation of a person’s recognition as a person is referentially incorporated into the CRPD by virtue of Article 4(4), which reads as follows:

4. Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of persons with disabilities and which may be contained in the law of a State Party or international law in force for that State. There shall be no restriction upon or derogation from any of the human rights and fundamental freedoms recognized or existing in any State Party to the present Convention pursuant to law, conventions, regulation or custom on the pretext that the present Convention does not recognize such rights or freedoms or that it recognizes them to a lesser extent. [Emphasis added]

In international law, the right to legal capacity is a civil right subject to immediate realization. With respect to realization, the General Comment issued by the Committee in the Rights of Persons with Disabilities [“Committee”] reads as follows:

30. The right to equality before the law has long been recognized as a civil and political right, with roots in the International Covenant on Civil and Political Rights. Civil and political rights attach at the moment of ratification and States parties are required to take steps to immediately realize those rights. As such, the rights provided for in article 12 apply at the moment of ratification and are subject to immediate realization. The State obligation, provided for in article 12, paragraph 3, to provide access to support in the exercise of legal capacity is an obligation for the fulfilment of the civil and political right to equal recognition before the law. “Progressive realization” (art. 4, para. 2) does not apply to the provisions of article 12. Upon ratifying the Convention, States parties must immediately begin taking steps towards the realization of the rights provided for in article 12. Those steps must be deliberate, well-planned and include consultation with and meaningful participation of people with disabilities and their organizations. [Committee on the Rights of Persons with Disabilities, General Comment, at para 30] [Emphasis added]

The LCO takes a different view in its Interim Report, when it states:

…the LCO is particularly concerned by the stance taken in the General Comment that these rights are not subject to progressive realization, but are those of immediate implementation. … The LCO therefore believes a “progressive realization” approach to reform in this area…is appropriate. [LCO Interim Report, at p. 149]

The LCO’s preference for progressive realization appears to be based on the need to exercise “reasonable caution so as not to inadvertently result in greater harm than benefit.” The point should be made that, notwithstanding the LCO’s desire to proceed cautiously with respect to law reform, immediate realization applies to Article 12, not because the Committee included it in its General Comment, but because, as said above, the right to equality before the law is a civil and political right subject to immediate realization under international law. The General Comment simply reflects and restates what is international law.
This is distinguishable from economic, social and cultural rights, which under international law are subject to progressive realization. This interpretation is consistent with Article 4(2) of the CRPD, which reads 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. [Emphasis added]

In the result, that means that as of March 11, 2010, Canada and its federation partners were obliged to respect the rights in Article 12 for people with disabilities in Canada. This analysis is provided to stress that while the LCO would prefer otherwise, given the complexities associated with the paradigm shift required by Article 12 and the CRPD as a whole, it is incumbent on States Parties to respect the right to legal capacity upon ratification. Proposing a recommendation to Ontario that continues to rely on a cognitive/functional approach to legal capacity works decidedly against meeting an obligation that is subject to immediate realization.

Article 4 of the CRPD lays out the following general obligations on States Parties post-ratification. In particular, Article 4(1) obliges States Parties as follows:

States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake:

(a) To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;
(b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;
(c) To take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes;
(d) To refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention;
(e) To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise;

For the government of Ontario, compliance with the CRPD, is obligatory, as a member of a federation, pursuant to Article 4(5), which reads as follows:

5. The provisions of the present Convention shall extend to all parts of federal States without any limitations or exceptions.

Legal Analysis of Canadian Jurisprudence
As Canada has yet to sign the Optional Protocol to the CRPD, any challenge to a cognitive/functional test for legal capacity will be in Canadian courts. In deciding whether a cognitive/functional test for legal capacity is in breach of Article 12 of the CRPD, it is helpful, therefore, to turn to some Canadian jurisprudence, which may assist.

The interpretation of the legal standard for capacity is a question of law. [Starson v Swayze, [2003] SCR 722; Canada (Director of Investigation and Research), [1977] 1 SCR 748, at para. 35]

Article 12 of the CRPD, along with Articles 3, 5, and 9, incorporate the principles and rights of equal benefit and protection of the law, non-discrimination, reasonable accommodation, accessibility and equality before and under the law found in Canada’s Charter. What follows is an analysis of how those principles and rights have been treated in Canadian jurisprudence under the Charter.

People with mental and/or physical disabilities have been, and continue to be, treated as second class citizens excluded from the mainstream of society. As the Supreme Court of Canada [“SCC”] said in Eldridge v Attorney General (BC), [1997] 3 SCR 624:

It is an unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization. Persons with disabilities have too often been excluded from the labour force, denied access to opportunities for social interaction and advancement, subjected to invidious stereotyping and relegated to institutions; see generally M. David Lepofsky, “A Report Card on the Charter’s Guarantee of Equality to Persons with Disabilities after 10 Years -- What Progress? What Prospects?” (1997), 7 N.J.C.L. 263. This historical disadvantage has to a great extent been shaped and perpetuated by the notion that disability is an abnormality or flaw. As a result, disabled persons have not generally been afforded the “equal concern, respect and consideration” that s. 15(1) of the Charter demands. Instead, they have been subjected to paternalistic attitudes of pity and charity, and their entrance into the social mainstream has been conditional upon their emulation of able-bodied norms. [Eldridge, at para 56] [Emphasis added]

The law has contributed, and continues to contribute, to the denigration of the rights of people with disabilities. Historically, the way in which it has done so has been by as a result of explicit differential and disenfranchising treatment such as under eugenics, electoral, mental health and marriage legislation but more often was a matter of a law of general application that was being applied in a manner that failed to take persons with disabilities into account or had a disparate impact.

Once it is accepted that effective communication is an indispensable component of the delivery of medical services, it becomes much more difficult to assert that the failure to ensure that deaf persons communicate effectively with their health care providers is not discriminatory. In their effort to persuade this Court otherwise, the respondents and their supporting interveners maintain that s. 15(1) does not oblige governments to implement programs to alleviate disadvantages that exist independently of state action. Adverse effects only arise from benefit programs, they aver, when those programs exacerbate the disparities between the group claiming a s. 15(1) violation and the general population. They assert, in other words, that governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits.
In my view, this position bespeaks a thin and impoverished vision of s. 15(1). It is belied, more importantly, by the thrust of this Court’s equality jurisprudence. It has been suggested that s. 15(1) of the Charter does not oblige the state to take positive actions, such as provide services to ameliorate the symptoms of systemic or general inequality; see Thibaudeau, supra, at para. 37 (per L’Heureux-Dubé J.). Whether or not this is true in all cases, and I do not purport to decide the matter here, the question raised in the present case is of a wholly different order. This Court has repeatedly held that once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner; see Tétreault Gadoury v. Canada, Employment and Immigration Commission, [1991] 2 S.C.R. 22, Haig v. Canada (Chief Electoral Officer), [1993] 2 S.C.R. 995, at pp. 1041-42, Native Women’s Assn. of Canada v. Canada, [1994] 3 S.C.R. 627, at p. 655, and Miron, supra. In 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; see Miron, Tétreault Gadoury, and Schachter v. Canada, [1992] 2 S.C.R. 679. Moreover, it has been suggested that, in taking this sort of positive action, the government should not be the source of further inequality; Thibaudeau, at para. 38 (per L’Heureux-Dubé J.). [Eldridge, at para. 72-73] [Emphasis added]

Differential treatment under legislation, such as the former eugenics statutes, that allowed for the sterilization of people with mental disabilities, and under the common law, where people labelled mentally disabled were considered incompetent or lacking capacity, has been the norm forever and remains the historical legal legacy for persons labelled disabled, particularly but not exclusively people with a mental disability. Guardianship law perpetuates the same paternalistic, prejudicial, stereotypical and disenfranchising attitudes, the very mischief Article 12 was intended to remedy.

Following the repeal of eugenics legislation, which has been referred to in international law as biological genocide, the Courts continued to be confronted with the issue of sterilization of persons who are labelled “mentally retarded” under guardianship provisions. In these case, the Courts have by times shown protective paternalism while other times blatant disrespect.

An application for sterilization of an adult under guardianship legislation was the issue before our Supreme Court of Canada in E. (Mrs.) v Eve, [1986] 2 SCR 388 (“Re Eve”). In that case the guardianship provisions were contained in the provincial mental health legislation and read as follows:

2. (n) "person in need of guardianship“ means a person
(i) in whom there is a condition of arrested or incomplete development of mind, whether arising from inherent causes or induced by disease or injury, or
(ii) who is suffering from such a disorder of the mind, that he requires care, supervision and control for his protection and the protection of his property.

[Mental Health Act, RSPEI, 1974, c. M-9, as amended] [Emphasis added]

The SCC relied on its inherent parens patriae jurisdiction to protect, disallowing any non-therapeutic sterilizations of a person with a mental disability, saying, in part:

The argument relating to fitness as a parent involves many value loaded questions. Studies conclude that mentally incompetent parents show as much fondness and concern for their children as other people; see Sterilization, supra, p. 33 et seq., 63 64. Many, it is true, may have difficulty in coping, particularly with the financial burdens involved. But this issue does not
relate to the benefit of the incompetent; it is a social problem, and one, moreover, that is not limited to incompetents. Above all it is not an issue that comes within the limited powers of the courts, under the parens patriae jurisdiction, to do what is necessary for the benefit of persons who are unable to care for themselves. Indeed, there are human rights considerations that should make a court extremely hesitant about attempting to solve a social problem like this by this means. It is worth noting that in dealing with such issues, provincial sterilization boards have revealed serious differences in their attitudes as between men and women, the poor and the rich, and people of different ethnic backgrounds; see Sterilization, supra, at p. 44.

..., The grave intrusion on a person's rights and the certain physical damage that ensues from non-therapeutic sterilization without consent, when compared to the highly questionable advantages that can result from it, have persuaded me that it can never safely be determined that such a procedure is for the benefit of that person. Accordingly, the procedure should never be authorized for non-therapeutic purposes under the parens patriae jurisdiction. [Re Eve, at para. 84 and 86]

Two important footnotes with respect to the Re Eve case: it marked the first occasion in Canadian history that an intervenor group, composed entirely of people labelled intellectually disabled, was granted standing to intervene by and in the SCC in their own right and in a unanimous full court judgment, the SCC agreed with the position they advanced.

The SCC went on to canvass cases including from the United Kingdom that highlight the indignity even when the court was seeking to protect the person with a disability:

More recently still, the English Court of Appeal had to consider the poignantly sad case of Re B (a minor) (1982), 3 F.L.R. 117. A baby girl was born suffering from Down's Syndrome (mongolism). She also had an intestinal blockage from which she would die within a very short time unless it was operated on. If she had the operation there was a considerable risk that she would suffer from heart trouble and die within two or three months. Even if the operation was successful she would only have a life expectancy of from twenty to thirty years, during which time she would be very handicapped, both mentally and physically. Her parents took the view that the kindest thing in the interests of the child was for her not to have the operation. Nonetheless, the court, on a wardship application by a local authority, authorized the operation. Though it expressed sympathy for the parents in the agonizing decision to which they had come, it emphasized the protective quality of its jurisdiction, as the following statement by Lord Templeman, at pp. 122–23 indicates: “The evidence in this case only goes to show that if the operation takes place and is successful then the child may live the normal span of a mongoloid child with the handicaps and defects of a mongol child, and it is not for this court to say that life of that description ought to be extinguished.” [Re Eve, at para. 53] [Emphasis added]

And jurisprudence from the US Courts that viewed sterilization as a panacea for managing the troubles created by misfits was less paternalistic and more egregious in its approach:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory
The term used by the SCC to refer to people with intellectual disabilities is "feeble-minded person" or "an idiot" or "imbecile" or simply "insane". These terms are the legal equivalents to the current concepts of "mentally retarded" or "developmentally handicapped". Had the Criminal Code intended to include mentally retarded adults in the category of person subject to corporal punishment, these are the terms it would have used, not "child".

The Court rejected the idea that a functional approach to an adult person labelled mentally retarded:

- If mentally retarded adults are to be considered "children" solely on the basis of their dependency on a "parenting" figure, it is difficult to see how the category of "children" would be limited to the mentally retarded. Essentially the same argument could be made with regard to the functional relationship between sufferers from senility or other cognitive disorder, or perhaps even stroke victims or other invalids, and those who take care of them.

- If an inability to tend to one’s basic needs, or an inability, because of one’s mental state, to function unassisted in society, are indices of "childishness", then the category of adults subject to correction is a very broad one indeed. I do not believe that a functional analysis of childish dependency is appropriate in these latter cases and for similar reasons I cannot accept it with regard to mentally retarded adults.

Though beyond the scope of this opinion, the consequences of ableism for people with disabilities can be devastating. When a group of people are labelled by a definition that denigrates and devalues them based on their lack or potential lack of legal capacity, it drastically demotes their status, three generations of imbeciles are enough.
of imbeciles are enough, and leaves them open to being treated as second class 'citizens' or less than human, not worthy of life.

I cannot accept the view that Stephen would be better off dead . . . This would mean regarding the life of a handicapped child as not only less valuable than the life of a normal child, but so much less valuable that it is not worth preserving. [Re Stephen Dawson (1983), 3 WWR 629 (BCSC); See also R v Latimer, [2001] 1 SCR 3]

Section 7 of the Charter of Rights and Freedoms [*Charter*] - Right to Liberty

Section 7 of the *Charter* reads as follows:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The far-reaching impact the law can impose on persons with an intellectual disability was addressed in the *R v Demers*, [2004] 2 SCR 46 case involving an accused who had been declared unfit to stand trial. The SCC recognized that, notwithstanding the *Criminal Code* having a presumption of the possibility of recovery and a process to measure for capacity recovery, a person considered permanently disabled could never qualify as the safeguards could never apply to the benefit of the accused:

However, in the case of a permanently unfit accused, a trial is not a possibility; therefore, the objective of rendering the accused fit for trial does not apply. The criminal process will never come to an end because the accused will not become fit for trial. In enacting Part XX.1, Parliament has set up an assessment and treatment system so that the accused can become fit, thus creating a presumption of possibility of recovered capacity to stand trial.

Consequently, the continued subjection of an unfit accused to the criminal process, where there is clear evidence that capacity will never be recovered and there is no evidence of a significant threat to public safety, makes the law overbroad because the means chosen are not the least restrictive of the unfit person's liberty and are not necessary to achieve the state's objective. Accordingly, these sections of the law restrict the liberty of permanently unfit accused “for no reason”, to use Cory J.'s words in *Heywood*, supra, at p. 793. [*Demers*, at para. 42-43] [Emphasis added]

The SCC found because of the over-breadth of the legislation and its impact on the liberty of the disabled person, it was contrary to s. 7 of the *Charter*, rendering the impugned sections of the *Criminal Code* unconstitutional:

In our view, Part XX.1 Cr. C. fails to deal fairly with the permanently unfit accused who are not a significant threat to public safety. Society’s interest in bringing accused persons to trial cannot be accomplished, nor can society’s interest in treating the accused fairly. The regime fails to provide for an end to the prosecution. Permanently unfit accused are subject to indefinite conditions on their liberty, of varying degrees of restrictiveness, resulting from the disposition orders of the Review Board or the court, who do not even have the power to order a psychiatric assessment in order to adapt a disposition to meet the permanently unfit accused’s current circumstances. Thus, the failure of the regime to provide for the permanently unfit accused, combined with the continued subjection of an unfit accused to the criminal process, where there is clear evidence that capacity will never be recovered, renders the entire scheme under
Part XX.1 overbroad as it relates to permanently unfit accused who do not pose a significant threat to the safety of the public. [R v Demers, at para. 55] [Emphasis added]

Further discussion with respect to s. 7 of the Charter is under the discussion of the Ontario Status Quo Test of Legal Capacity.

Section 15 of the Charter - Right to Equality before and under the law and equal protection and benefit of the law

Section 15 of the Charter reads as follows:

15. (1) 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.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The SCC first considered the constitutionally protected rights enshrined in s. 15 of the Charter in Andrews v Law Society of British Columbia, [1989] 1SCR 143, where it said:

The principle of equality before the law has long been recognized as a feature of our constitutional tradition and it found statutory recognition in the Canadian Bill of Rights. However, unlike the Canadian Bill of Rights, which spoke only of equality before the law, s. 15(1) of the Charter provides a much broader protection. Section 15 spells out four basic rights: (1) the right to equality before the law; (2) the right to equality under the law; (3) the right to equal protection of the law; and (4) the right to equal benefit of the law. [Andrews, at p. 162]

The Andrews Court referenced what has become known as the Action Travail de Femmes case citing the Court saying:

Discrimination…means practices or attitudes that have, whether by design or impact, the effect of limiting an individual’s or a group’s right to the opportunities generally available because of attributed rather than actual characteristics

… It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone’s potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory. [Andrews, at p. 22 citing Canadian National Railway Co. v. Canada (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114, at p. 1138-1139] [Emphasis added]

The SCC goes on to summarize a definition of discrimination for the purpose of s. 15 of the Charter as follows:

I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect
of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed. [Andrews, at p. 165] [Emphasis added]

All of the Justices writing for the Andrews Court agreed that a rule, which bars an entire class of persons solely on the grounds of a protected or analogous ground and without consideration of qualifications or the other attributes or merits of individuals in the group, would infringe the equality rights protections in s. 15 of the Charter. In the decades since Andrews the SCC has never wavered from its position that the s. 15 equality rights guarantees are intended to ensure the recognition of equal worth of all human beings in Canadian society.

The SCC extended our understanding of the generous and purposively interpretation to be given s. 15 of the Charter in the Eldridge case that involved the right for people who are deaf to have access to sign interpreters in the delivery of health care services in a hospital, in which it stated:

In the case of s. 15(1), this Court has stressed that it serves two distinct but related purposes. First, it expresses a commitment -- deeply ingrained in our social, political and legal culture -- to the equal worth and human dignity of all persons. As McIntyre J. remarked in Andrews, at p. 171, s. 15(1) “entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration”. Secondly, it instantiates a desire to rectify and prevent discrimination against particular groups “suffering social, political and legal disadvantage in our society”; see R. v. Turpin, [1989] 1 S.C.R. 1296, at p. 1333 (per Wilson J.); see also Beverley McLachlin, “The Evolution of Equality” (1996), 54 Advocate 559, at p. 564. While this Court has confirmed that it is not necessary to show membership in a historically disadvantaged group in order to establish a s. 15(1) violation, the fact that a law draws a distinction on such a ground is an important indicium of discrimination. [Eldridge, at para. 54] [Emphasis added]

The impugned law in Eldridge did not explicitly provide for, or deny, access to sign interpreters. This, the Court said, in and of itself did not render the law vulnerable constitutionally. The alleged discrimination based on physical disability was about access to a service intimately connected to health care being provided in the medical system pursuant to government policy.

Adverse effects discrimination is especially relevant in the case of disability. The government will rarely single out disabled persons for discriminatory treatment. More common are laws of general application that have a disparate impact on the disabled. This was recognized by the Chief Justice in his dissenting opinion in Rodriguez, supra, where he held that the law criminalizing assisted suicide violated s. 15(1) of the Charter by discriminating on the basis of physical disability. There, a majority of the Court determined, inter alia, that the law was saved by s. 1 of the Charter, assuming without deciding that it infringed s. 15(1). While I refrain from commenting on the correctness of the Chief Justice’s conclusion on the application of s. 15(1) in that case, I endorse his general approach to the scope of that provision, which he set out as follows, at p. 549:

Not only does s. 15(1) require the government to exercise greater caution in making express or direct distinctions based on personal characteristics, but legislation equally applicable to everyone is also capable of infringing the right to equality enshrined in that provision, and so of
having to be justified in terms of s. 1. Even in imposing generally applicable provisions, the government must take into account differences which in fact exist between individuals and so far as possible ensure that the provisions adopted will not have a greater impact on certain classes of persons due to irrelevant personal characteristics than on the public as a whole. In other words, to promote the objective of the more equal society, s. 15(1) acts as a bar to the executive enacting provisions without taking into account their possible impact on already disadvantaged classes of persons. [Eldridge, at para. 64] [Emphasis added]

Discrimination will be found where a person is denied the equal protection and/or equal benefit of the law based on mental disability. A threshold disability-laden test for legal capacity employed to deny a person their guaranteed right to legal capacity, particularly where the threshold test is based on assumptions, stereotypes of a protected category of persons, is potentially constitutionally suspect.

With this context in mind, I turn to the specific elements of the appellants’ s. 15(1) claim. While this Court has not adopted a uniform approach to s. 15(1), there is broad agreement on the general analytic framework; see Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241, at para. 62, Miron, supra, and Egan, supra. A person claiming a violation of s. 15(1) must first establish that, because of a distinction drawn between the claimant and others, the claimant has been denied “equal protection” or “equal benefit” of the law. Secondly, the claimant must show that the denial constitutes discrimination on the basis of one of the enumerated grounds listed in s. 15(1) or one analogous thereto. Before concluding that a distinction is discriminatory, some members of this Court have held that it must be shown to be based on an irrelevant personal characteristic; see Miron (per Gonthier J.) and Egan (per La Forest J.). Under this view, s. 15(1) will not be infringed unless the distinguished personal characteristic is irrelevant to the functional values underlying the law, provided that those values are not themselves discriminatory. Others have suggested that relevance is only one factor to be considered in determining whether a distinction based on an enumerated or analogous ground is discriminatory; see Miron (per McLachlin J.) and Thibaudeau v. Canada, [1995] 2 S.C.R. 627 (per Cory and Iacobucci JJ.).

In my view, in the present case the same result is reached regardless of which of these approaches is applied; for similar reasoning, see Benner v. Canada (Secretary of State), [1997] 1 S.C.R. 358 (per Iacobucci J. for the Court). There is no question that the distinction here is based on a personal characteristic that is irrelevant to the functional values underlying the health care system. Those values consist of the promotion of health and the prevention and treatment of illness and disease, and the realization of those values through the vehicle of a publicly funded health care system. There could be no personal characteristic less relevant to these values than an individual’s physical disability. [Eldridge, at para. 58-59] [Emphasis added]

Some may argue that in order to constitute discrimination the distinction drawn must be based on an irrelevant personal characteristic. Even if, in the future, the SCC were to accept that irrelevance is a prerequisite to a case of discrimination under s. 15(1), which is unlikely, some will try to argue mental disability is a relevant personal characteristic in substitute decision-making legislation. It is important to note: any argument advanced that the distinguished personal characteristic of mental disability is not irrelevant will have to be able to substantiate that claim by demonstrating the values on which the claim depends are not themselves discriminatory. This, in my opinion, goes to the heart of the impugned cognitive/functional approach recommended as the test. The test has the inevitable consequence of using a mental disability measure or test against people who have a mental disability. To paraphrase the language of the SCC in Eldridge: this argument would constitute a thin and impoverished vision of s. 15 of
the Charter as there could be no personal characteristic less relevant to the underlying value of respecting the enshrined right to legal capacity than an individual’s mental disability.

In an earlier case involving access to education for a child with a disability Eaton v. Brant County Board of Education, [1997] 1 SCR 241, the SCC stressed that in the case of people with disabilities, the importance of eliminating discrimination based on assumed characteristics. The Court made an important observation as to the “adverse effects of generally applicable laws that results in discrimination.” The Eaton Court said the following:

The principles that not every distinction on a prohibited ground will constitute discrimination and that, in general, distinctions based on presumed rather than actual characteristics are the hallmarks of discrimination have particular significance when applied to physical and mental disability. Avoidance of discrimination on this ground will frequently require distinctions to be made taking into account the actual personal characteristics of disabled persons. In Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, at p. 169, McIntyre J. stated that the “accommodation of differences . . . is the essence of true equality”. This emphasizes that the purpose of s. 15(1) of the Charter is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society as has been the case with disabled persons.

The principal object of certain of the prohibited grounds is the elimination of discrimination by the attribution of untrue characteristics based on stereotypical attitudes relating to immutable conditions such as race or sex. In the case of disability, this is one of the objectives. The other equally important objective seeks to take into account the true characteristics of this group which act as headwinds to the enjoyment of society’s benefits and to accommodate them. Exclusion from the mainstream of society results from the construction of a society based solely on “mainstream” attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them. The discrimination inquiry which uses “the attribution of stereotypical characteristics” reasoning as commonly understood is simply inappropriate here. It may be seen rather as a case of reverse stereotyping which, by not allowing for the condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment. It is recognition of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability. [Eaton, at para. 66-67; cited in Eldridge, at para. 65] [Emphasis added]

Differential treatment on the basis of an enumerated or analogous ground under the law that reflects the stereotypical and prejudicial assumptions about persons with disabilities and perpetuates and/or promotes the view that such individuals are less worthy of recognition or value as human beings will be considered constitutionally vulnerable.

It may be said that the purpose of s. 15(1) is to prevent the violation of essential dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and
consideration. *Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society.* Alternatively, differential treatment will not likely constitute discrimination within the purpose of s. 15(1) where it does not violate the human dignity or freedom of a person or group in this way, and in particular where the differential treatment also assists in ameliorating the position of the disadvantaged within Canadian society. [Law, at para. 51] [Emphasis added]

It is clear the SCC considers the fundamental purpose of the equality rights guarantee in s. 15 of the Charter to be the protection of human dignity. The Court helps to make it clear what meaning should be given to dignity in the context of constitutional equality rights.

What is human dignity? There can be different conceptions of what human dignity means. For the purpose of analysis under s. 15(1) of the Charter, however, the jurisprudence of this Court reflects a specific, albeit non-exhaustive, definition. As noted by Lamer C.J. in Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519, at p. 554, the equality guarantee in s. 15(1) is concerned with the realization of personal autonomy and self-determination. Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law? [Law at para. 53] [Emphasis added]

The SCC identified four factors that may be relevant to demonstrating that legislation or state action demeans the dignity of a claimant:

1. The most compelling factor to prove discrimination is pre-existing disadvantage, vulnerability, stereotyping or prejudice experienced by an individual or a group, of which they are a member.

Under s. 15(1) the distinction must negatively impact on the dignity of the individual:

As has been consistently recognized throughout this Court’s jurisprudence, probably the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory will be, where it exists, pre-existing disadvantage, vulnerability, stereotyping, or prejudice experienced by the individual or group: see, e.g., Andrews, supra, at pp. 151-53, per Wilson J., p. 183, per McIntyre J., pp. 195-97, per La Forest J.; Turpin, supra, at pp. 1331-33; Swain, supra, at p. 992, per Lamer C.J.; Miron, supra, at paras. 147-48, per McLachlin J.; Eaton, supra, at para. 66. These factors are relevant because, to the extent that the claimant is already subject to unfair circumstances or treatment in society by virtue of personal characteristics or circumstances, persons like him or her have often not been given equal concern, respect, and consideration. It is logical to conclude that, in most cases, further differential treatment will contribute to the perpetuation or promotion of their unfair
social characterization, and will have a more severe impact upon them, since they are already vulnerable. [Law at para. 63] [Emphasis added]

2. Legislation or state action that fails to take into account the situation as it effects person(s) with a disability and by doing so negatively impacts on the person’s dignity, it will be discrimination. Where legislation properly draws on a distinction based on an enumerated ground such as disability, it will be more difficult to establish discrimination. There will be no violation of s. 15 of the Charter where the differential treatment does not violate the person or class of persons but rather the differential treatment ameliorates the position of disadvantage:

In Eaton, supra, at paras. 66-67, Sopinka J. for the full Court elaborated upon the point made by McIntyre J. in Andrews that, although in many cases a claimant will be able to establish substantively differential treatment by pointing to a formal distinction drawn by the impugned legislation, there are other ways to establish differential treatment. In particular, Sopinka J. noted that an approach which requires proof of an express legislative distinction is not necessarily applicable where a claim of “adverse effects” discrimination is made. In such cases, it is the legislation’s failure to take into account the true characteristics of a disadvantaged person or group within Canadian society (i.e., by treating all persons in a formally identical manner), and not the express drawing of a distinction, which triggers s. 15(1). Sopinka J.’s statements to this effect in Eaton were echoed in the subsequent cases of Eldridge, supra, at paras. 60-80, and Vriend, supra, at para. 72, per Cory and Iacobucci JJ. [Law at para. 36]

…

It is thus necessary to analyze in a purposive manner the ground upon which the s. 15(1) claim is based when determining whether discrimination has been established. As a general matter, as stated by McIntyre J. in Andrews, supra, and by Sopinka J. in Eaton, supra, and referred to above, legislation which takes into account the actual needs, capacity, or circumstances of the claimant and others with similar traits in a manner that respects their value as human beings and members of Canadian society will be less likely to have a negative effect on human dignity. This is not to say that the mere fact of impugned legislation’s having to some degree taken into account the actual situation of persons like the claimant will be sufficient to defeat a s. 15(1) claim. The focus must always remain upon the central question of whether, viewed from the perspective of the claimant, the differential treatment imposed by the legislation has the effect of violating human dignity. The fact that the impugned legislation may achieve a valid social purpose for one group of individuals cannot function to deny an equality claim where the effects of the legislation upon another person or group conflict with the purpose of the s. 15(1) guarantee. In line with the reasons of McIntyre J. and Sopinka J., I mean simply to state that it will be easier to establish discrimination to the extent that impugned legislation fails to take into account a claimant’s actual situation, and more difficult to establish discrimination to the extent that legislation properly accommodates the claimant’s needs, capacities, and circumstances. [Law at para. 70] [Emphasis added]

3. Section 15 has an ameliorative purpose. Where legislation targets disadvantage with a view to promoting dignity of a protected group, leaving otherwise advantaged people out will not be discrimination. On the other hand, legislation that seeks to be ameliorative but is under-inclusive leaving out historically disadvantaged groups will rarely escape a charge of discrimination:

This emphasizes the purpose of s. 15(1) of the Charter is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from the mainstream society as has been the case with disabled persons. [Eaton, at para. 66]
Where the impugned legislation did not exacerbate the disadvantage or infringe the dignity of the claimants’ or the class of person to which they belong, the legislation will withstand constitutional scrutiny. In the cases cited below, the repealed laws treated people with a mental illness as a homogenous group while the new legislative provisions examined each individual, as an individual, in an attempt to promote each person’s dignity and to avoid discriminatory practices.

In its purpose and effect, it reflects the view that NCR accused are entitled to sensitive care, rehabilitation and meaningful attempts to foster their participation in the community, to the maximum extent compatible with the individual’s actual situation. [Winko v Director (FPI) [1999] 2 SCR 625, at para. 91; Refer also to Bese v. Director (FPI), [1999] 2 SCR 722; (SCC); Orlowski v Director (FPI), [1999] 2 SCR 733; Refer also to Article 5(4) of the CRPD]

4. In ascertaining the impact on the dignity of persons with disabilities, it may be necessary to examine the nature of the interest affected. The Court will look at the economic, constitutional and societal significant of the interest adversely affected by the impugned legislation to assess exactly what is the impact of the distinction drawn:

A further contextual factor which may be relevant in appropriate cases in determining whether the claimant’s dignity has been violated will be the nature and scope of the interest affected by the legislation. This point was well explained by L’Heureux-Dubé J. in Egan, supra, at paras. 63-64. As she noted, at para. 63, “[i]f all other things are equal, the more severe and localized the . . . consequences on the affected group, the more likely that the distinction responsible for these consequences is discriminatory within the meaning of s. 15 of the Charter”. L’Heureux-Dubé J. explained, at para. 64, that the discriminatory calibre of differential treatment cannot be fully appreciated without evaluating not only the economic but also the constitutional and societal significance attributed to the interest or interests adversely affected by the legislation in question. Moreover, it is relevant to consider whether the distinction restricts access to a fundamental social institution, or affects “a basic aspect of full membership in Canadian society”, or “constitute[s] a complete non-recognition of a particular group”. [Law, at para. 74; See also Egan, at paras. 63-64] [Emphasis added]

The SCC in the Law judgment concludes:

The general theme, though, may be simply stated. An infringement of s. 15(1) of the Charter exists if it can be demonstrated that, from the perspective of a reasonable person in circumstances similar to those of the claimant who takes into account the contextual factors relevant to the claim, the legislative imposition of differential treatment has the effect of demeaning his or her dignity: see Egan, supra, at para. 56, per L’Heureux-Dubé J. Demonstrating the existence of discrimination in this purposive sense will require a claimant to advert to factors capable of supporting an inference that the purpose of s. 15(1) of the Charter has been infringed by the legislation. [Law, at para. 75] [Emphasis added]

In R v Kapp, [2008] 2 SCR 483 the SCC had the opportunity to look back nearly 20 years since the Andrews decision, which it refers to as setting the template for the SCC’s commitment to substantive equality, and revisit Law.

The template in Andrews, as further developed in a series of cases culminating in Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497, established in essence a two-part
test for showing discrimination under s. 15(1): (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? These were divided, in Law, into three steps, but in our view the test is, in substance, the same. [Kapp, at para. 17]

The Kapp Court acknowledged some difficulties have arisen since Law when the SCC said:

But as critics have pointed out, human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply: it has also proven to be an additional burden on equality claimants, rather than the philosophical enhancement it was intended to be. Criticism has also accrued for the way Law has allowed the formalism of some of the Court’s post-Andrews jurisprudence to resurface in the form of an artificial comparator analysis focussed on treating likes alike.

The analysis in a particular case, as Law itself recognizes, more usefully focusses on the factors that identify impact amounting to discrimination. The four factors cited in Law are based on and relate to the identification in Andrews of perpetuation of disadvantage and stereotyping as the primary indicators of discrimination. Pre-existing disadvantage and the nature of the interest affected (factors one and four in Law) go to perpetuation of disadvantage and prejudice, while the second factor deals with stereotyping. The ameliorative purpose or effect of a law or program (the third factor in Law) goes to whether the purpose is remedial within the meaning of s. 15(2). (We would suggest, without deciding here, that the third Law factor might also be relevant to the question under s. 15(1) as to whether the effect of the law or program is to perpetuate disadvantage.)

Viewed in this way, Law does not impose a new and distinctive test for discrimination, but rather affirms the approach to substantive equality under s. 15 set out in Andrews and developed in numerous subsequent decisions. The factors cited in Law should not be read literally as if they were legislative dispositions, but as a way of focussing on the central concern of s. 15 identified in Andrews — combatting discrimination, defined in terms of perpetuating disadvantage and stereotyping.

The central purpose of combatting discrimination, as discussed, underlies both s. 15(1) and s. 15(2). **Under s. 15(1), the focus is on preventing governments from making distinctions based on the enumerated or analogous grounds that: have the effect of perpetuating group disadvantage and prejudice; or impose disadvantage on the basis of stereotyping. Under s. 15(2), the focus is on enabling governments to pro-actively combat existing discrimination through affirmative measures.** [Kapp, at para. 22-25] [Emphasis added]

The SCC continued to expand on its approach following Kapp in Withler v Canada (AG) [2011] 1 SCR 396 and Quebec (AG) v A [2013] 1 SCR 61, and others. In the A case the SCC stated:

*The principle of personal autonomy or self determination, to which self worth, self confidence and self respect are tied, is an integral part of the values of dignity and freedom that underlie the equality guarantee: Law, at para. 53; Gosselin, at para. 65. **Safeguarding personal autonomy implies the recognition of each individual’s right to make decisions regarding his or her own person, to control his or her bodily integrity and to pursue his or her own conception of a full and rewarding life free from government interference with fundamental personal choices:** R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, at p. 346, per Dickson J; R. v. Morgentaler, [1988] 1 S.C.R. 30, at p. 164, per Wilson J.; Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519, at p. 554, per Lamer C.J., at pp. 587-88, per Sopinka J.; Blencoe, at para. 77, per Bastarache J.

In the application of s. 15, promotion of the values of equality, dignity, freedom and autonomy requires "the remedying of discriminatory treatment" based on the personal characteristics enumerated in s. 15(1) or characteristics analogous to them: Law, at para. 52. **Under the Charter, it is unfair to limit an individual’s full participation in society solely because the individual has one of**
these personal characteristics: Miron, at para. 146; Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624, at paras. 72 – 73. Likewise, it is unacceptable to refuse on the basis of these characteristics to treat a person as a full member of society who deserves to realize his or her full human potential: Miron, at para. 146; Gosselin, at para. 23. [A, at para 139-140] [Emphasis added]

The same case went on to discuss how the Law decision was being refined:

Nearly 10 years after Law, the Court, in reasons written by McLachlin C.J. and Abella J., reviewed the synthesis proposed by Iacobucci J.: see Kapp. Almost three years after Kapp, the Court continued that review in Withler v. Canada (Attorney General), 2011 SCC 12, [2011] 1 S.C.R. 396, a unanimous decision written, once again, by McLachlin C.J. and Abella J.

In those two decisions, the Court observed that, despite the changes made to the s. 15 analysis over the years, the concept of substantive equality had remained central to the analytical framework for that provision: Kapp, at para. 15. The Court also noted that, although the analytical framework adopted in Andrews had been enriched since that case, including by Iacobucci J. in Law, it had never been abandoned: Kapp, at para. 14. The Court added that the purpose of s. 15(1) is “the elimination from the law of measures that impose or perpetuate substantial inequality”: Withler, at para. 40.

In Kapp, the Court reworked the three-stage analytical framework from Law in light of the purpose of s. 15, namely to promote substantive equality, reshaping it into a two-part test for showing discrimination under s. 15(1). Where a violation of s. 15(1) is alleged, a court must ask the following questions: “(1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?” (Kapp, at para. 17). If the answer to each of these questions is yes, it can be concluded that the impugned legislative provision violates the equality guarantee in s. 15(1). The Court stated that this two-part test was, “in substance, the same” as the test from Law and that Law had confirmed the approach to substantive equality set out in Andrews: Kapp, at paras. 17 and 24. [A, at para. 160-162]

The SCC focuses on two components of the second part of the two-part Kapp test that synthesized the three-part test in Law, under s. 15(1): prejudice and stereotyping.

The claimant must therefore prove on a balance of probabilities (a) that the law creates an adverse distinction based on an enumerated or analogous ground and (b) that the disadvantage is discriminatory because (i) it perpetuates prejudice or (ii) it stereotypes. Because of their fundamental importance to the application of s. 15, I will now review the key concepts of “disadvantage”, “prejudice” and “stereotyping” in order to more precisely set out the legal framework applicable to their use. [A, at para. 186]

Turning first to a discussion about what it means for a law to perpetuate prejudice, the SCC had this to say, in part:

The first way that substantive inequality — discrimination — may be established is by showing that the impugned disadvantageous law, in purpose or effect, perpetuates prejudice against members of a group on the basis of personal characteristics covered by s. 15(1): Withler, at para. 35. Such a law will be found to be discriminatory if it “has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society”: Law, at para. 51. In my view, this inquiry is of particular importance, as it is most likely to result in a finding of the types of discrimination to which s. 15 applies. It provides a framework to enable courts to consider such discrimination without lapsing totally into subjectivism. I do not rule out the theoretical possibility that there are forms of exclusion for which this analytical framework would be ill-suited. In practice, however, I feel that it would be hard to identify them unless all that was required for s. 15 to apply was a finding of disadvantages related to prohibited grounds.
and unless the inquiry into discrimination per se was dispensed with. This is another possible conception of the right to equality guaranteed by s. 15, but it is not the one this Court has adopted since Andrews.

An adverse distinction therefore discriminates by perpetuating prejudice if it denotes an attitude or view concerning a person that is at first glance negative and that is based on one or more of the personal characteristics enumerated in s. 15(1) or on characteristics analogous to them. An adverse distinction can also be inconsistent with s. 15, even if there is no discriminatory intent whatsoever, if it has a discriminatory effect. Since equality is an expression of the values of a society in which all are secure in the knowledge that they are recognized at law as human beings equally entitled to respect, the perpetuation of such a negative view constitutes a denial of substantive equality. [A, at para. 192-193] [Emphasis added]

The SCC quotes Denise Réaume with respect to the nature of the harm resulting from prejudice as follows:

A legislative distinction based on prejudice denies a class of persons a benefit out of animus or contempt. It directly connotes a belief in their inferiority, a denial of equal moral status. Legislated prejudice denies a benefit for the sake of causing harm to those denied. It thus treats members of a group as loci of intrinsic negative value, rather than intrinsic moral worth. Such treatment not only deprives them of the concrete benefit at issue, but also, through doing so, treats them as unworthy of basic human respect. . . .

Prejudice works through the attribution of negative worth to personal characteristics that are important aspects of identity; it thus constitutes an assault on the sense of self of its victims. Personal identity has both an individual and a social dimension. The kinds of characteristics that people regard as important to their sense of self tend to be, at the same time, characteristics by which they define themselves as individuals and through which they identify as members of a group. This group affiliation is as important to human identity as any purely individual understanding of the self. We develop a sense of self only through our interactions with others, and our most intimate and formative interactions are frequently with people who share a cultural or ethnic identity that distinguishes them from other such clusters of people in society. And we know from our social and political history that it has tended to be precisely this aspect of identity that has often been targeted for contempt — individuals have been denied respect through use of a characteristic identifying them as part of a group that is devalued. [A, at para.195; Refer to Réaume, Denise G. “Discrimination and Dignity” (2003), 63 La. L. Rev. 645, at p. 679-680] [Emphasis added]

Turning to the second component, stereotyping, Justice LeBel had this to say:

In the analytical approach I am recommending here, the second way that substantive inequality — discrimination — may be established is “by showing that the disadvantage imposed by the law is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant or claimant group”: Withler, at para. 36. Such a law will be discriminatory because it is premised upon personal traits or circumstances that do not relate to individual needs, capacities or merits: Law, at para. 53. Laws premised on an inaccurate characterization of an individual or group on grounds that are unacceptable under s. 15(1) thus become arbitrary themselves: see, inter alia, Moreau, “The Wrongs of Unequal Treatment”, at p. 298.

The following comments by Réaume contain an interesting description of the nature of negative stereotypes and their impact on the right to equality:

Stereotypes are inaccurate generalizations about the characteristics or attributes of members of a group that can usually be traced back to a time when social relations were
based more overtly on contempt for the moral worth of the group. Negative characteristics, such as lack of intelligence, laziness, being fit for some pursuits rather than others, predisposition to criminality, avarice, vice, etc., which are in fact distributed throughout the human race, are falsely attributed predominantly to members of a particular group. It is then the negative characteristic that becomes the focus of contempt. Nevertheless, inaccurate assumptions and stereotypes about the capacities, needs, or desires of members of a particular group can carry forward ancient connotations of second class status, even if the legislators did not intend that meaning. The overt hostility may have come to be washed out of the picture with the passage of time or the “normalization” of such attitudes, but the implication that those to whom the stereotype applies are less worthy than others remains.

Once this construction of a group has set in, others are likely to treat members of that group disadvantageously out of an honest belief that this merely reflects their just deserts or even simply because that is how everyone treats them, without ever thinking about the insult involved. They may even understand their conduct, as with certain traditional practices, as a positive effort to accommodate the “natural weaknesses” of the stereotyped group. However, neither the absence of contempt as a subjective matter nor well meaning paternalism prevents the use of stereotype from violating dignity. To be denied access to benefits or opportunities available to others on the basis of the false view that because of certain attributes members of one’s group are less worthy of those benefits or less capable of taking up those opportunities can scarcely fail to be experienced as demeaning because it is demeaning. The message such legislation sends is that members of this group are inferior or less capable, and such a message is likely, in turn, to reinforce social attitudes attributing false inferiority to the group. [A, at para. 201-203; Réaume, at p. 681-682; This approach has continued to be the analysis adopted by the SCC see Kahkewistahaw First Nation v Taypotat, [2015] 2SCR 548] [Emphasis added]

A cognitive/functional approach to legal capacity, locked inside substitute decision-making legislation ostensibly to prevent risk to people with disabilities, is a prime example of the same kind of compassionate or romantic paternalism that has worked and continues to work against the rights of women. [Refer for example to “Overbearing”, NY Times, February 21, 2016]

The SCC in the Moore v BC (Education), [2012] SCR 360 found a breach of human rights legislation when a child was denied an education, a service customarily available to the public, on the basis of his disability.

The preamble to the School Act, the operative legislation when Jeffrey was in school, stated that “the purpose of the British Columbia school system is to enable all learners to develop their individual potential and to acquire the knowledge, skills and attitudes needed to contribute to a healthy, democratic and pluralistic society and a prosperous and sustainable economy”. This declaration of purpose is an acknowledgment by the government that the reason all children are entitled to an education, is because a healthy democracy and economy require their educated contribution. Adequate special education, therefore, is not a dispensable luxury. For those with severe learning disabilities, it is the ramp that provides access to the statutory commitment to education made to all children in British Columbia. [Moore, at para. 5] [Emphasis added]

The SCC held that that the child with a disability, like all children in the province, was entitled to meaningful access to an education as a service without discrimination. To try to define a child with a
disability only in relation to other special needs students “risks perpetuating the very disadvantage and exclusion the [human rights legislation] was intended to remedy.”

The Ontario Status Quo Test of Legal Capacity

The Ontario case of Fleming v Reid that held that the right to refuse to consent to unwanted medical treatment is “fundamental to a person’s dignity and autonomy” was cited by the SCC with approval in the Starson v Swayze case. In the latter case, the Court said the following:

*Unwarranted findings of incapacity severely infringe upon a person’s right to self-determination.*

... The right knowingly to be foolish is not unimportant; the right to voluntarily assume risks is to be respected. The State has no business meddling with either. The dignity of the individual is at stake.

... The law presumes a person is capable to decide to accept or reject medical treatment: s. 4(2) of the Act. At a capacity hearing, the onus is on the attending physician to prove that the patient is incapable.

... Professor D. N. Weisstub, in his Enquiry on Mental Competency: Final Report (1990), at p. 116 (“Weisstub Report”), notes the historical failure to respect this presumption:

*The tendency to conflate mental illness with lack of capacity, which occurs to an even greater extent when involuntary commitment is involved, has deep historical roots, and even though changes have occurred in the law over the past twenty years, attitudes and beliefs have been slow to change. For this reason it is particularly important that autonomy and self determination be given priority when assessing individuals in this group.*

The Board must avoid the error of equating the presence of a mental disorder with incapacity. Here, the respondent did not forfeit his right to self-determination upon admission to the psychiatric facility: see Fleming v. Reid, supra, at p. 86. The presumption of capacity can be displaced only by evidence that a patient lacks the requisite elements of capacity provided by the Act. [Starson, at para. 75-77; Also citing Re Koch (1997), 33 OR (3d) 485, at p. 521] [Emphasis added]

The SCC goes on to list the elements of the statutory definition of capability contained in s. 41(1) of the *Health Care Consent Act* and followed with its interpretation of that definition, as follows:

*A person is capable with respect to a treatment, admission to a care facility or a personal assistance service if the person is able to understand the information that is relevant to making a decision about the treatment, admission or personal assistance service, as the case may be, and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.*

The Starson judgment is hailed as giving patients with psycho-social disabilities a greater right to self-determination and the right to non-interference by others based on their so-called ‘best interests.’ A summary of the decision reads:

*In addition, the Board misapplied the statutory test for capacity. The interpretation of this legal standard is a question of law. No deference is owed to the Board on this issue and a correctness standard of review is to be applied. Although the Board found the respondent failed to appreciate the risks and benefits of treatment, it neglected to address whether the reasons for that failure demonstrated an inability to appreciate those risks and benefits. Furthermore, the Board’s reasons*
indicate that it strayed from its legislative mandate, which was to adjudicate solely upon the patient’s capacity. The wisdom of the respondent’s treatment decision is irrelevant to that determination. The Board improperly allowed its own conception of the respondent’s best interests to influence its finding of incapacity. [Starson, headnote]

Despite that advancement, the Starson judgment, for the purposes of this opinion, is instructive because it clearly demonstrates how the Courts may continue to interpret legal capacity if what is proposed in Draft Recommendation 3 is left unaltered.

Capacity involves two criteria. First, a person must be able to understand the information that is relevant to making a treatment decision. This requires the cognitive ability to process, retain and understand the relevant information. There is no doubt that the respondent satisfied this criterion. Second, a person must be able to appreciate the reasonably foreseeable consequences of the decision or lack of one. This requires the patient to be able to apply the relevant information to his or her circumstances, and to be able to weigh the foreseeable risks and benefits of a decision or lack thereof. The Board’s finding of incapacity was based on their perception of Professor Starson’s failure in this regard. [Starson, at para. 78]

Secondly, the Act requires a patient to have the ability to appreciate the consequences of a decision. It does not require actual appreciation of those consequences. The distinction is subtle but important: see L. H. Roth, A. Meisel and C. W. Lidz, “Tests of Competency to Consent to Treatment” (1977), 134 Am. J. Psychiatry 279, at pp. 281-82, and Weisstub Report, supra, at p. 249. In practice, the determination of capacity should begin with an inquiry into the patient’s actual appreciation of the parameters of the decision being made: the nature and purpose of the proposed treatment; the foreseeable benefits and risks of treatment; the alternative courses of action available; and the expected consequences of not having the treatment. If the patient shows an appreciation of these parameters — regardless of whether he weighs or values the information differently than the attending physician and disagrees with the treatment recommendation — he has the ability to appreciate the decision he makes: see Roth, Meisel and Lidz, supra, at p. 281.

However, a patient’s failure to demonstrate actual appreciation does not inexorably lead to a conclusion of incapacity. The patient’s lack of appreciation may derive from causes that do not undermine his ability to appreciate consequences. For instance, a lack of appreciation may reflect the attending physician’s failure to adequately inform the patient of the decision’s consequences: see the Weisstub Report, supra, at p. 249. Accordingly, it is imperative that the Board inquire into the reasons for the patient’s failure to appreciate consequences. A finding of incapacity is justified only if those reasons demonstrate that the patient’s mental disorder prevents him from having the ability to appreciate the foreseeable consequences of the decision. [Starson, at para. 80-81] [Underline emphasis in the original] [Emphasis added]

In interpreting Ontario’s definition of capacity, the SCC also unequivocally points to fact that the status quo legal capacity test, which the LCO recommends be retained, is based on a measure of cognitive ability in relation to mental disorder. This is the very kind of “ableist” test that Article 12 of the CRPD was intended to rectify and did so by entrenching the right to legal capacity and the right to supports in exercising that civil right.

Denying a person the right to legal capacity is not merely a breach of one article in the CRPD but has far reaching implications. The right to exercise legal capacity, in other words, the right to decide and make choices, is the foundational springboard for all other rights contained in the CRPD [including Article 19’s
right to choose place of residence]. In the Godbout case involving the right to choose where to live, the SCC finds a breach of s. 7 of the Charter and references Canada’s commitment under the ICCPR:

The right to choose where to establish one’s home falls within the scope of the liberty interest guaranteed by s, 7 of the Canadian Charter. The right to liberty in s. 7 goes beyond the notion of mere freedom from physical constraint and protects within its scope a narrow sphere of personal autonomy wherein individuals may make inherently private choices free from state interference. The autonomy protected by the s. 7 right to liberty, however, encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence. Choosing where to establish one’s home is a quintessentially private decision going to the very heart of personal or individual autonomy and the state ought not to be permitted to interfere in this private decision-making process, absent compelling reasons for doing so. Support for this view is found in the fact that the right to choose where to establish one’s home is afforded explicit protection in the International Covenant on Civil and Political Rights to which Canada is a party. [Godbout v Longueuil (City) [1997] 3SCR 844, at p. 844] [Emphasis added]

The SCC in the R v DAI case clarified people with mental disabilities are not required to meet a more onerous test to testify than others considered “normal” with respect to testimonial capacity, even before taking the stand. The ruling provides insight into how laws, which are inclusive and enabling for people with disabilities, will be judged.

The first policy consideration is self-evident and requires little amplification. Those with mental disabilities are easy prey for sexual abusers. In the past, mentally challenged victims of sexual offences have been frequently precluded from testifying, not on the ground that they could not relate what happened, but on the ground that they lacked the capacity to articulate in abstract terms the difference between the truth and a lie and the nature of the obligation imposed by promising to tell the truth. As discussed earlier, such witnesses may well be capable of telling the truth and in fact understanding that when they do promise, they should tell the truth. To reject this evidence on the ground that they cannot explain the nature of the obligation to tell the truth in philosophical terms that even those possessed of normal intelligence may find challenging is to exclude reliable and relevant evidence and make it impossible to bring to justice those charged with crimes against the mentally disabled.

The inability to prosecute such crimes and see justice done, whatever the outcome, may be devastating to the family of the alleged victim, and to the victim herself. But the harm does not stop there. To set the bar too high for the testimonial competence of adults with mental disabilities is to permit violators to sexually abuse them with near impunity. It is to jeopardize one of the fundamental desiderata of the rule of law: that the law be enforceable. It is also to effectively immunize an entire category of offenders from criminal responsibility for their acts and to further marginalize the already vulnerable victims of sexual predators. Without a realistic prospect of prosecution, they become fair game for those inclined to abuse. [DAI, at para. 66-67] [Emphasis added]

Courts increasingly will enable an adult person to speak for themselves even in situations where, by the usual test for testimonial competence, their ability is called into question. In R v DAI, the SCC held that the provisions in s. 16(3) of the Canada Evidence Act provided for competence based on only two requirements:
Sexual assault is an evil. Too frequently, its victims are the vulnerable in our society — children and the mentally handicapped. Yet rules of evidence and criminal procedure, based on the norm of the average witness, may make it difficult for these victims to testify in courts of law. The challenge for the law is to permit the truth to be told, while protecting the right of the accused to a fair trial and guarding against wrongful conviction.

…

Second, the history of s. 16 supports the view that Parliament intended to remove barriers that had prevented adults with mental disabilities from testifying prior to the 1987 amendments (S.C. 1987, c. 24). The amendments altered the common law rule, by virtue of which only witnesses under oath could testify. To take the oath or affirm, a witness must have an understanding of the duty to tell the truth: R. v. Brasier (1779), 1 Leach 199, 168 E.R. 202. Adults with mental disabilities might not be able to do this. To remove this barrier, Parliament provided an alternative basis for competence for this class of individuals. Section 16(1) of the 1987 provision continued to maintain the oath or affirmation as the first option for adults with mental disabilities, but s. 16(3) provided for competence based simply on the ability to communicate the evidence and a promise to tell the truth. [R v DAI, [2012] 1 SCR 149, at para. 1 and 27] [Emphasis added]

Looking at legal capacity or competency in new ways for people with intellectual disabilities can have sound results that meet the goals of equality, inclusion and dignity. This includes the requirement to accommodate and support the individual. The SCC in DAI included as one of the eight considerations in applying s. 16(3) of the Evidence Act:

Third, the primary source of evidence for a witness’s competence is the witness herself. Her examination should be permitted. Questioning an adult with mental disabilities requires consideration and accommodation for her particular needs; questions should be phrased patiently in a clear, simple manner. [DAI, at para. 78]

Arguably, the development of legislation with respect to decision-making that respects the right to legal capacity for everyone, regardless of disability, will require taking into account how people with disabilities can be included, supported and accommodated. While the SCC in DAI did not make reference to Canada’s international obligations, the ruling is consistent with Canada’s commitments in Articles 12, 13 and 16 of the CRPD and Article 15 of CEDAW.

In the famous guardianship case Clark v Clark 1982 CanLII 2253 (ON SC)], Justin Clark successfully communicated all his testimony through Blissymbolics as this was his mode of non-verbal communication. The Judge, in rejecting the application for guardianship brought by his parents, had this to say:

Sir William Blackstone in Book the First of Commentaries on the Laws of England stated in 1809 that the principle [sic] aim of society is to guard and protect individuals in the proper exercise of their individual rights. Such rights he characterized as absolute. I believe a courageous man such as Justin Clark is entitled to take a risk.

With incredible effort Justin Clark has managed to communicate his passion for freedom as well as his love of family during the course of this trial.

…

We have, all of us, recognized a gentle, trusting, believing spirit and very much a thinking human being who has his unique part to play in our compassionate interdependent society.
And so, in the spirit of that liberty which learned hand tells us seeks to understand the minds of other men, and remembers that not even a sparrow falls to earth unheeded, I find and I declare Matthew Justin Clark to be mentally competent. [Emphasis added]

New technologies and the internet have opened up seemingly endless possibilities of innovative means of communication that will enable people to communicate their will and preferences in new and alternate ways. The onus is on lawmakers not to create any law that would abort the efforts to communicate or stymie technological advancements. This a prime example of the inter-working relationship between Articles, in this case, Article 12 and Article 9, specifically Article 9(2)(g) and (h), which read:

(g) To promote access for persons with disabilities to new information and communications technologies and systems, including the Internet.

(h) To promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost.

What is required is for the law to address head-on the discrimination that has plagued and continues to plague the lives of people labelled. When people who have a mental disability are thought of [or worse, referred to] as imbeciles, idiots, feeble-minded, morons, retardates, developmentally or intellectually disabled it is assumed that they lack legal capacity, are less than human and after that, simply put, no one bothers to listen to them. To restate from the work of Réaume quoted by the SCC:

Once this construction of a group has set in, others are likely to treat members of that group disadvantageously out of an honest belief that this merely reflects their just deserts [sic] or even simply because that is how everyone treats them, without ever thinking about the insult involved. They may even understand their conduct, as with certain traditional … [ableist] … practices, as a positive effort to accommodate the “natural weaknesses” of the stereotyped group. However, neither the absence of contempt as a subjective matter nor well meaning paternalism prevents the use of stereotype from violating dignity. To be denied access to benefits or opportunities available to others on the basis of the false view that because of certain attributes members of one’s group are less worthy of those benefits or less capable of taking up those opportunities can scarcely fail to be experienced as demeaning because it is demeaning. The message such legislation sends is that members of this group are inferior or less capable, and such a message is likely, in turn, to reinforce social attitudes attributing false inferiority to the group.

The requisite legal correction can only be achieved by eliminating reliance on a statutory medical-model cognitive/functional test that creates a threshold to remove legal capacity and replacing it with decision-making legislation that enables everyone to exercise their right to legal capacity with or without reliance on supports, according to choice. There can be little doubt that achieving this in a manner that makes the law uniform, understandable, consistent, constitutional and in compliance with international law will be a major challenge. But given the constitutionally protected right to equality without discrimination on the basis of mental disability in s. 15 of the Charter and the obligations set out in Articles 5, 9 and 12 of the CRPD, it is not only necessary, it is, in my opinion, the law.
Conclusions

1. A test for legal capacity that disproportionately and adversely effects individuals with a mental disability [intellectual or psycho-social] will be found contrary to Article 12 of the CRPD. The text of Article 12, on a full reading, provides insight into what is necessary in order for the right to legal capacity to become a reality for persons with a disability on an equal basis with others. Article 12(3) specifies what the obligation on States Parties is in order for people with an intellectual disability [or any person whose means of communication, physical attributes, place of residence, medical diagnosis status, third-party perceptions as to functional or cognitive abilities] to achieve meaningful equality. Supports are the ladder into the world of decision-making. Any test that removes the universal right to exercise legal capacity is in contravention of Article 12 of the CRPD.

2. A cognitive/functional approach sets a test that is based on a norm of what considered to be so-called normal legal capacity setting the bar unnecessarily too high for persons with disabilities, particularly mental disabilities. The LCO has failed to understand that there is no test for legal capacity and no presumption of capacity contained in Article 12 or anywhere in the CRPD. While it is open to a State Party to control its domestic legislative agenda, it may not do so in a manner that is explicitly contrary to rights guaranteed within an international instrument it has ratified.

3. A cognitive/functional test treats legal capacity as a rebuttable presumption when it is not. It is a civil right enshrined in Article 12 of the CRPD [reaffirming Article 16 of the ICCPR]. The Reservation to retain substitute decision-making where appropriate does not permit Canada or its federation partners to remove, dilute, reduce or alter the universal right to legal capacity for any person with a disability. A statute that declares a statutory presumption of capacity is not sufficient to comply with Article 12. Canada’s Reservation uses similar language: “presumed to have legal capacity.” This, with respect, is not what Article 12 requires. Not referencing legal capacity as a presumption is particularly critical because for labelled persons any presumption, by definition, is rebuttable and leaves people with a mental disability exposed and vulnerable to being denied their guaranteed legal capacity. Canada’s reference in the Reservation to a presumption rather than a right to legal capacity is inconsistent with the CRPD and international law.

4. The fact is that a cognitive/functional test relies on an irrelevant personal characteristic, mental disability, that perpetuates the stereotype of their lack of ability. If a cognitive/functional test is retained there may be an attempt to justify it on the basis that mental disability is a relevant personal characteristic in substitute decision-making legislation. Any argument advanced under s. 15 of the Charter that the distinguished personal characteristic of mental disability is relevant will have to be able to substantiate that claim by demonstrating the values on which the claim depends are not
themselves discriminatory. This, in my opinion, goes to the heart of the impugned cognitive/functional approach recommended as the test. The test has the inevitable consequence of using a mental disability measure or test against people who have a mental disability to deny them a guaranteed civil right under Article 12 of the CRPD.

5. The historical over-use of ‘ableist’ tests to exclude people with disabilities is the very mischief Article 12 was intended to remedy for all persons with a disability, particularly for people with mental disabilities and/or those who rely on alternative means of communicating. It is impossible to honour and respect a person’s right to legal capacity if a disability-laden test is used to remove it thereby totally disenfranchising the person. Even if, because of Canada’s decision to file a Reservation, Ontario chooses to rely on some form of substitute decision-making [such as when a person is unconscious and the legislation provides a list of the next-of-kin substitutes], this does not give the province the latitude to extend the scope of the Reservation to allow for a disability-defined test to disqualify a person with a disability from exercising their legal capacity.

6. In my opinion, it appears that the LCO may have misinterpreted the working inter-relationship between the distinct rights and component parts contained in Article 12. Based on my participation on Canada’s delegation, the lead State Party, my understanding of Article 12 is as follows:

* While use of the language of presumption was considered during development of the CRPD, it was rejected and thus there is no reference to legal capacity being a presumption in the agreed upon text. Because the right is a universal civil right that can never be removed even in emergent situations, Article 12 does not include or make reference to a presumption and does not, therefore, include or anticipate any test for legal capacity; and

* Article 12 reaffirms the civil right to legal capacity for everyone everywhere; and

* Article 12(2) obliges States Parties to recognize all persons must enjoy legal capacity on an equal basis with others; and

* Article 12(3) and 12(4) [as one of the safeguards] obliges States Parties to provide persons with disabilities access to supports, to which they are entitled as a right, to ensure their legal capacity is respected, as a right; and

* Article 12(3) entitles persons with disabilities to access supports, as a right and by choice, in the exercise of their legal capacity in making a decision [in addition to the right to reasonable accommodation pursuant to Article 5(3); and
* Article 12(3) and 12(4) obliges States Parties to ensure that measures are put in place to safeguard the exercise of legal capacity, not safeguards to be used when the right to legal capacity has been ‘removed’; and

* Article 12(4) gives meaning to the safeguards required including:

  * safeguards to respect all rights including the right to legal capacity; and
  
  * safeguard to respect the will and preferences of the person; and
  
  * safeguards that the process of providing supports is free from conflict of interest and undue influence; and
  
  * safeguards to ensure the supports relied upon in the exercise of legal capacity are tailored to the individual, time limited and reviewable by an accountability body to ensure the supports are proportional such that an individual can expect that supports in decision-making will only be in place when the person elects to have those supports for when they require them and not for every decision.

* Article 12(5) provides specifics with respect to property ownership and transactions, typically decision-making areas where persons with disabilities have been disenfranchised under antiquated substitute decision-making laws.

* This interpretation is strengthened and supported when Article 12 is read together with the Preamble and Articles 1 [purpose], 3 [dignity, autonomy, freedom to make choices], 5 [non-discrimination], and 9 [accessibility].

7. A cognitive/functional test used to deny a person’s legal capacity may be both direct and adverse effect discrimination contrary to s. 15(1) of the Charter: direct because the proposed cognitive/functional test is ‘ableist’ by definition and adverse because the test will have a disproportionate and disparate impact on people with disabilities. Any attempt to argue that a cognitive/functional test has an ameliorative effect that seeks to redress the prejudice and stereotyping that haunts people with a mental disability will have an uphill battle to prove that in reality and, in my opinion, will be unsuccessful in claiming the test is protected under Article 5(4) of the CRPD and/or s. 15(2) of the Charter.

8. Should the LCO’s final report not remove Draft Recommendation 3 and replace it with a new recommendation providing guidance to the Ontario government with respect to the appropriate way to proceed to be in compliance with Article 12 of the CRPD and sections 7 and 15 of the Charter, I am of the opinion that any reliance on a cognitive/functional test to legal capacity for people who have an
intellectual disability, whether the test for legal capacity is found in legislation or in practice, will be constitutionally vulnerable under the Charter and in contravention of the CRPD.

9. It is inappropriate for the LCO to flat out reject the guidance provided for in the General Comment. While the General Comment is not technically binding, such comments are issued by international oversight committees, from time to time, to guide States Parties in meeting their obligations under international law. This is an accepted practice that helps States Parties to meet their obligations in advance of filing a report to the oversight Committee and avoids the delay associated with States Parties filing a report and receiving observations back from the Committee before taking steps to comply.

10. The LCO fails to distinguish between the right to supports in Article 12(3) and the right to reasonable accommodation in Article 5 when it states such that if an individual can meet the test for legal capacity with appropriate accommodations, that person should be considered to have legal capacity. The right to support and right to reasonable accommodation, with respect to honouring the right to legal capacity, are distinct rights, both of which are a part of the obligation to enable all persons to exercise their legal capacity.

11. By restricting consideration of one potential form of supported decision-making [networks] in Draft Recommendation 20 to where the cognitive/functional test has removed legal capacity, the LCO has made a recommendation that is wholly inconsistent with what Article 12 requires. The draft recommendation appears to suggest that a person can only access networks as their support of choice after being found to lack legal capacity. Support is a right within the context of decision-making, not outside of it.

12. By proposing retention of the cognitive/functional test for legal capacity, the LCO, with all due respect, is misinterpreting the obligations in Article 12 by even proposing retention of any test, the sole purpose of which is to remove the universal right to legal capacity. If not rectified in the final LCO report and if the Ontario government acts on LCO’s advice, this will potentially leave Canada/Ontario open to critique from the Committee that they have failed to meet their obligations under the CRPD.

13. For the LCO to issue such specifics regarding amendments to existing laws and practices but to remain silent on the details for reform to the concept of legal capacity, arguably the central driver and foundation of the CRPD, sends a troubling message that the LCO believes that the obligations set down in Article 12 are met by Ontario’s existing legal capacity cognitive/functional test. Rather than a cognitive/functional test for legal capacity, what is necessary is proposals for constitutionally sound legislation that respects the universal right to legal capacity and adheres to the right to support provided for in Article 12 and the right to reasonable accommodation in Article 5. Such a proposed
law will revamp how people usually excluded can be supported and accommodated to communicate their will and preferences while keeping their right to legal capacity intact.

14. Were an enabling approach adopted in legislation with respect to the right to exercise legal capacity in decision-making with or without supports, in keeping with what is found in Article 12 - the measures relating to the exercise of legal capacity respect the rights, will and preferences of the person - that law, in my opinion, will be judged, by the Courts, under s. 15(2) of the Charter and by the Committee under Article 5(4), as ameliorating disadvantage, prejudice, and stereotyping thereby meeting the human rights litmus test. Similarly, that new law, which must cement the right to legal capacity and the right to supports, for everyone, will focus on the individual and their particular circumstances in a model of inclusive and interdependent decision-making, will comply with Article 12 of the CRPD.

15. Finally, and most importantly, I would urge the LCO to reconsider Draft Recommendation 3 with respect to continued reliance on a cognitive/functional test for legal capacity. Some may consider this to be an insurmountable undertaking. But one needs to keep in mind how the Chair, Ambassador Don MacKay, frequently referred to the CRPD as involving a paradigm shift: a time when the usual approach to how we think or do something changes completely. Article 12 was never intended to be ‘guardianship in a nicer outfit.’ An example may assist the reader to see what that shift looks like on the ground. One model worth exploring can be found in Sweden where guardianship legislation has been abolished other than for minor children. Sweden, the country that gave us the concept of Ombudsman, has new legislation that honours the obligations in Article 12: a person who needs assistance cannot be declared incompetent and regardless of the reason they require support [not solely for people with disabilities], there are two main options available: the primary and least restrictive is the god man [good or fair man], which in English equates with mentor or supportive assistant, acting as an aide or interpreter to make known a person’s will and preferences. The second is an administrator who will, as a last resort, provide a substitute decision. But unlike under guardianship, in the latter case, the person does not lose their right to legal capacity or any other right, for example, the right to vote. I would encourage the LCO to explore this and other possible innovative law reforms to embody the dignity and respect underlying, and the obligations contained within, Article 12: universal legal capacity to which all persons everywhere are entitled.
Appendix 'B': Expert Opinion of Professor Arlene Kanter
Introduction

On October 15, 2015, the Ontario Law Commission published its Interim Report on Legal Capacity, Decisionmaking and Guardianship. I am submitting this Expert Opinion at the request of the Coalition on Alternatives to Guardianship. The Coalition sought my Expert Opinion on the international law obligations and interpretations of Article 12 of the Convention on the Rights of People with Disabilities (CRPD) as well as the international legal implications of the analysis and recommendations presented in the Law Commission’s Interim Report. This Expert Opinion is organized according to the questions posed to me by Coalition.

I have drafted this Expert Opinion based on my experience, expertise, and comparative legal research in disability law, international human rights law, and, in particular the CRPD. I have not seen nor had access to the Coalition’s Brief to the Law Commission, so as to ensure the level of objectivity required of an expert legal opinion.

I have devoted my nearly four decade-long career to scholarship, teaching and advocacy in the area of international and comparative disability law and policy. A CV is attached for your information. In 2001-06, I was invited to participate in the drafting of the CRPD at the UN, including Article 12. Since then I have worked with governments and civil society organizations in more than a dozen countries on implementation of the CRPD, including legislative reform specifically related to Articles 12. My recent book, THE DEVELOPMENT OF DISABILITY RIGHTS UNDER INTERNATIONAL LAW: FROM CHARITY TO HUMAN RIGHTS (Routledge 2015) provides an overview of the development of disability law prior to the CRPD as well as in depth analysis of several articles of the CRPD and their potential for promoting greater equality, access and inclusion of people with disabilities in societies throughout the world. I discuss the history and implications of Article 12 in Chapter 7 (pages 235-291).

Summary of Expert Legal Opinion

In 2006, the UN adopted the Convention on the Rights of People with Disabilities. Four years later, Canada ratified the CRPD, with a Declaration and Reservation limiting the scope of Article 12. In October 2015, the Law Commission of Ontario issued its Interim Report on Legal Capacity, Decision-Making and Guardianship. Based on Canada’s Declaration and Reservations, this Interim Report takes the position that Article 12 does not prohibit denial of legal capacity based on a cognitive and functional approach nor does it prohibit substituted decisionmaking, despite the authoritative interpretation of the CRPD Committee to the contrary. According to the Interim Report, Ontario may continue its substituted-decision making regime which prevents people with certain disabilities from making decisions on their own or with others based on their own will and preferences. The analysis of the Law Commission’s Interim Report appears contrary to the language and overall purpose of the CRPD by discriminating against people on the basis of their cognitive or functional ability; it also runs
counter to well established principles of international law by rejecting the CRPD Committee’s authoritative interpretation of Article 12.

1. What is the history and intent of the right to Equal Recognition before the Law contained in Article 12 of the CRPD?

Background

The purpose of the CRPD is “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.”

It does so by prohibiting discrimination against people with disabilities in all aspects of life, including their right to enjoy equal recognition before the law on an equal basis with other people without disabilities, as provided in Article 12.

Article 12, like all articles in the CRPD, applies to all people with disabilities including those “who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.” No exception is provided for people who can not communicate, need help in making decisions, or those who have significant intellectual or cognitive impairments. Under Article 12, all people with disabilities, regardless of the existence or severity of their particular impairment, are entitled to legal capacity as well as the opportunity to exercise their legal capacity on an equal basis with people without disabilities.

The Right to Equal Recognition Before the Law Prior to the CRPD

Prior to the CRPD, the right to equal recognition before the law was included in both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR). Article 4(2) of the ICCPR even goes so far as to state that there may be no derogation of the right to equal recognition before the law, even in times of public emergency. The right to equal recognition under law is also included in Article 15 of the Convention on the Elimination of All Forms of Discrimination against Women, Article 3 of the African Charter on Human and Peoples’ Rights, and Article 3 of the American Convention on Human Rights.

Despite these international pronouncements, prior to the CRPD, people with disabilities, particularly people with mental disabilities, had been routinely denied equal recognition before the law. With the adoption of the CRPD, however, legal distinctions based on unwarranted assumptions about a person’s abilities is now prohibited. As such, Article 12 creates a new approach to decision-making and confers upon all people with disabilities the right to legal capacity as well as their right to exercise their legal capacity, with or without assistance.

The Drafting History of Article 12

Article 12 was not drafted without controversy. Although Article 12 was eventually approved by consensus, the history of the drafting process of Article 12 reflected deep divisions among countries regarding the very nature of human rights, generally, and legal capacity, in particular. On one hand,
some countries and organizations went on record contending that all people with disabilities have legal
capacity and must be presumed to be legally competent. To them, legal capacity is a universal human
right that must be protected unequivocally. However, even those countries and others who viewed
legal capacity as a universal human right did not deny variations among people with disabilities and
the need for assistance to help some people make and carry out certain decisions. Indeed, “just as
there are great differences among people without disabilities in their decision-making abilities, so too
are there differences among people with disabilities.”

On the other hand, a minority of countries expressed an opposing view, arguing that legal capacity is
not a universal right but rather one to which only competent people (as defined in their countries) are
entitled. According to this view, states should be free to decide who is entitled to legal capacity and
who is not. The Ad Hoc Committee rejected this minority view and in Article 12 makes clear that the
right to legal capacity applies to all people with disabilities.

The final version of Article 12, therefore, recognizes that while people have different needs and
abilities, as well as different preferences regarding their support needs, their right to legal capacity is
universal. This reading of Article 12 is supported by Article 2, which requires reasonable
accommodations to be provided to ensure “to persons with disabilities the enjoyment or exercise on
an equal basis with others of all human rights and fundamental freedoms.” Such reasonable
accommodations include the support envisioned in Article 12(3).

Paragraph 3 of Article 12 was included to address the support needs of people who may not be able
to make all decisions on their own. It provides that “States Parties shall take appropriate measures
to provide access by persons with disabilities to the support they may require in exercising their legal
capacity.” Although paragraph 12(3) does not refer specifically to the term “supported decision-
making,” its intent is to replace substituted decision-making with a new supported decision-making
model.

The drafters of the CRPD also included Article 12(4) to ensure safeguards against abuse of support.
Article 12(4) reads as follows:

State 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 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 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.


Amita Dhanda, “Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the

Arlene S. Kanter, THE DEVELOPMENT OF DISABILITY RIGHTS UNDER INTERNATIONAL LAW: FROM CHARITY TO

CRPD, supra note 1, art. 2.

CRPD, supra note 1, art. 12.

Id.
This Section was added specifically to protect people with disabilities who have high support needs, such as those unable to communicate verbally or who are lacking in certain cognitive or functional abilities. Such people often are denied full personhood and legal capacity in many countries, and would have continued to be denied legal capacity had Article 12 not included the right to support and safeguards against abuse contained in Article 12 (3) and (4). Indeed, the duty to provide support to enable even the most significantly impaired people their right to exercise legal capacity, together with the definition of disability that includes people with all types of disabilities, confirms that Article 12 was intended to confer legal capacity on all persons with disabilities, and without exceptions.

Accordingly, the final version of Article 12, entitled “Equal recognition before the law,” guarantees that all persons with disabilities enjoy not only the right to legal capacity but also the right to exercise their legal capacity on an equal basis with others without disabilities. As such, Article 12 challenges long-standing paternalistic laws and policies that had deprived people with disabilities throughout the world of their right to make and exercise decisions that people who are not labeled as disabled are free to make every day. By ensuring the right of legal capacity to all people, with all types of disabilities, the drafting committee has made clear that disability may never be a legitimate reason to deny that person equal recognition before the law under international law.

In contrast to the conclusion we may draw from the drafting history of the CRPD, the Law Commission of Ontario has proposed limiting legal capacity to those who satisfy a cognitive or functional test. However, if the CRPD were intended to limit Article 12 in this way, then the Ad Hoc Committee on the CRPD would have included such language in the final version of Article 12. The Committee was not opposed to adding limiting language, as it did in other sections of the CRPD, such as in Article 2 and Article 5, which limit accommodations to those that are “reasonable.” No such limiting language is included in Article 12. Therefore, the Law Commission’s effort to limit the applicability to Article 12 only to those who satisfy a cognitive or functional test appears contrary to both the drafting history and language of Article 12.

2. What is the role of Canada’s Declaration and Reservation on Article 12 with respect to law reform on legal capacity?

Upon ratifying the CRPD, Canada adopted the following Declaration and Reservation on Article 12:

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 supplied 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....

The Law Commission has based its analysis on Canada’s Declaration and Reservation, as well as its rejection of the CRPD Committee’s General Comment on Article 12. As the Interim Report states:

Both Canada’s Declaration and Reservation and the General Comment provide important insights into potential interpretations of Article 12 of the CRPD, which Canada has committed itself to implement. Given the nature of the LCO’s role and mandate, neither the General Comment nor the Declaration and Reservation limits the LCO’s potential recommendations,
although they certainly inform them. It is the responsibility of the LCO to make recommendations that are at minimum consistent with Canada’s international commitments. Given the non-binding nature of a General Comment and the existence of Canada’s Declaration and Reservation, Canada is not clearly bound to carry out the program of reform set out in the General Comment. However, the LCO may certainly recommend that the government take steps beyond minimum compliance with its obligations. This does not mean that the LCO accepts the interpretation given Article 12 by the General Comment. It is the responsibility of the LCO to carefully review available research and the results of public consultations, and to make recommendations for law reform based on that review; it is then the role of government to evaluate the LCO’s analysis and recommendations and to take such steps as it believes appropriate.⁹

Canada, like any country, is free to adopt reservations, understandings and declarations to any treaty it ratifies.¹⁰ But according to well established principles of international law, such reservations, understandings and declarations may not violate “the object and purpose of a treaty.”¹¹ The CRPD Committee has issued its interpretation of Article 12 in General Comment, which contradicts Canada’s Declaration and Reservation on Article 12. Therefore, as a matter of international law, Canada’s Declaration and Reservation may no longer provide a legitimate justification for the Law Commission’s recommendations, particularly insofar as they contradict the CRPD Committee’s interpretation of Article 12.

The prohibition against Reservations, Understandings and Declaration, or “RUDS” which contradict the object and purpose of a treaty was established in 1969, with the adoption of the UN Vienna Convention on the Law of Treaties.¹² Canada ratified the Vienna Convention in 1970. By its terms, the Vienna Convention, limits the scope of Reservations, Understandings and Declaration, or “RUDS,” as they are known. Article 2(1) (d) of the Vienna Convention defines a reservation as a “unilateral statement” made by a State when ratifying a treaty “whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State.”¹³ Article 19 of the Vienna Convention further prohibits any reservation that is “incompatible with the object and purpose of the treaty.”¹⁴ Thus the Vienna Convention makes clear that RUDS may not be used to undermine the force

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¹⁰ The International Court of Justice addressed the question of the effect of reservations to a multilateral human rights treaty in its 1951 Advisory Opinion on Reservations to the Genocide Convention (Advisory Opinion, 1951 I.C.J. 15). In this opinion, it rejected the argument that any State is entitled to become a party to a treaty while also making any reservation it chooses by virtue of its sovereignty. As the Opinion continued, “It is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of the State in making the reservation on accession as well as its appraisal by a State in objecting to a reservation.” See Restatement (Third) FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) at § 313, quoted in Philip Alston and Ryan Goodman, INTERNATIONAL HUMAN RIGHTS 1080-1082 (2012).
¹¹ For a discussion of the effect of reservations on treaties, see generally Philip Alston and Ryan Goodman, supra note 10, at 1080-1087; see also Anthony Aust, MODERN TREATY LAW AND PRACTICE, 3d ed. (2013); see also Richard Gardiner, TREATY INTERPRETATION, 2d ed. (2015).
¹³ Id. at art. 2(1)(d).
¹⁴ VIENNA CONVENTION ON THE LAW OF TREATIES, supra note 12.
and effect of any particular article in a human rights treaty.\textsuperscript{15} As explained in the highly regarded International Law Commission’s \textit{Guide to Practice on Reservations to Treaties}, “[a] reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general tenor, in such a way that the reservation impairs the \textit{raison d’être} of the treaty.”\textsuperscript{16} Another way to think about the compatibility of RUDS with the purpose of the treaty, such as Canada’s reservation with respect to Article 12, is whether or not the reservation contemplates enduring inconsistency between state law or practice and the obligations of the treaty. If it does, then the reservation is considered incompatible with the treaty’s object and purpose.\textsuperscript{17}

Even if one assumes that Canada’s Declaration and Reservation on Article 12 is not a reservation per se, but instead an interpretive declaration, the effect is the same. Although the Vienna Convention does not define interpretive declaration and nor is the law and practice of making interpretive declarations as developed as the law on reservations, the aim of the interpretive declarations must not be to undermine the purpose of the treaty. Instead, the aim of an interpretive declaration is to “influence the interpretation to be given to provisions of a treaty when they come to be applied.”\textsuperscript{18} In this case, regardless of whether Canada issued its Declaration and Reservation on Article 12 as either a Reservation or an Interpretive Declaration, so long as its intent is to continue the use of substituted decisionmaking, it may be interpreted as inconsistent with the language and intent of Article 12 as well as the CRPD Committee’s subsequent General Comment on Article 12.

Moreover, the CRPD specifically incorporates Article 2.1 of the Vienna Convention in Article 46, which prohibits reservations that are incompatible with the object and purpose of the CRPD.\textsuperscript{19} As stated above, the purpose of the CRPD is “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.” This purpose is furthered by all the provisions of the CRPD, including Article

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\textsuperscript{15} \textit{Id.} As explained in the International Law Commission’s \textit{Guide to Practice on Reservations to Treaties}, “[a] reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general tenor, in such a way that the reservation impairs the \textit{raison d’être} of the treaty.” International Law Commission, \textit{Guide to Practice on Reservations to Treaties}, 63d Sess. A/66/10 (2011) s. 3.1.5; see also Advisory Opinion on Reservations of the Genocide Convention, Advisory Opinion, 1951, I.C.J. 15 (“It is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation”).
\textsuperscript{16} \textit{International Law Commission}, \textit{supra} note 15.
\textsuperscript{18} For a comprehensive discussion of treaty interpretation, and a discussion of the relationship between reservations and interpretive declarations, see Richard K. Gardiner, \textit{supra} note 11, at 87-89.
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12. Further, equality and nondiscrimination, together with respect for dignity, individual autonomy and freedom to make one’s own choices are all included in the general principles of CRPD, specifically to render the object and purpose of the Convention explicit. Canada’s reservation on Article 12 appears antithetical to these general principles and may therefore be considered incompatible with Article 46 of the CRPD.

Other countries, too, have adopted RUDS with respect to Article 12. But in response to these various RUDS, some countries noted their objections, as is also their right under international law. Mexico, one of the original sponsors of the CRPD, has objected specifically to reservations and declarations on Article 12, declaring that they are “incompatible with the object and purpose of that instrument. Mexico went on to say that...the claim that domestic laws take precedence over the provisions of treaties that are in force for the Parties is therefore inadmissible.” The Law Commission’s view that Canada’s Declaration and Reservation on Article justifies its recommendation denying legal capacity to people with certain intellectual and functional abilities may be considered invalid as violative of the “object and purpose” of Article 12, if not contrary to the overall nondiscrimination mandate of the CRPD.

While it is true that the Law Commission’s Interim Report does not require substituted decision making for all persons with intellectual disabilities, it nonetheless continues the use of substituted decision-making “in appropriate circumstances and in accordance with the law.” The Commission apparently believes that because Article 12 does not ban substituted decision making altogether, it is free to decide when and to whom it may authorize the use of substituted decision-making in its jurisdiction. However, Canada’s own Declaration and Reservation seems to belie the Commission’s position. The fact that Canada (and other countries) felt a need to submit a RUD on Article 12 supports the view that Article 12 is so clear in prohibiting substituted decision-making that without a RUD, Canada would have been forced to change its laws. Arguably, if Article 12 had been less clear regarding its intent to put all people with disabilities on equal footing with respect to legal capacity and to ban substituted decisionmaking, Canada, as well as other countries may not have felt compelled to explain their position in a Reservation and Declaration on Article 12. Thus contrary to the view of the Law Commission, Canada’s Declaration and Reservation on Article 12 does not provide a legitimate justification to continue the use of substituted decisionmaking.

3. How has Article 12 been interpreted in international law and related sources?

Not only is it doubtful that Canada’s Declaration and Reservation provides a legitimate basis for the Recommendations of the Law Commission’s Interim Report, but the Law Commissions’ rejection of the CRPD Committee’s General Comment on Article 12 is also inappropriate.

In 2014, the CRPD Committee issued General Comment 1, entitled Equal Recognition of the Law. The Committee issued this General Comment in response to questions that arose with respect to Article 12 both in the drafting process, and in the RUDS, following the CRPD’s adoption. During the drafting

20 See Richard K. Gardiner, supra note 11, at 92-93; Anthony Aust, supra note 11, at 118-26; 137-39.
process, some countries sought to dispute the mandate of Article 12 by proposing a footnote to Article 12 restricting the meaning of legal capacity in three of the six official UN languages. This proposed footnote read, “[i]n Arabic, Chinese and Russian, the term ‘legal capacity’ refers to ‘legal capacity for rights,’ rather than ‘legal capacity to act.” The intent of this footnote was to remove from the CRPD’s protection people with certain disabilities who were considered (by some countries) as not qualified to exercise their legal rights on an equal basis with people without disabilities.

Opposition to the proposed footnote mounted at the final meeting of the Ad Hoc Committee. After several hours, the Ad Hoc Committee firmly rejected the proposed footnote, and without a vote. The controversial footnote was removed from the final draft of the CRPD, well before it reached the floor of the General Assembly on December 13, 2006. The result of the Ad Hoc Committee’s decision to reject the proposed footnote is clear: by extending the right to equal recognition before the law to all people with disabilities, Article 12 ensures the right of all people with all types of disabilities to equal recognition under law, which means an end to distinctions based on one’s functioning or intellectual ability as well as an end to substituted decisionmaking regimes based on such differences.

Nevertheless, even after the CRPD was adopted, Article 12 continued to be subject to various interpretations. In response to what appeared to be confusion about the meaning and scope of Article 12, the CRPD Committee issued General Comment 1, entitled Equal Recognition before the Law. The Committee sought to finally put to rest any lingering questions about Article 12. Accordingly, in the General Comment, the CRPD Committee makes clear that the CRPD prohibits all types of discrimination against people with disabilities, including different treatment with respect to legal capacity. Article 12 ensures the right of all people with all types of disabilities to equal recognition under law, which means an end to distinctions based on one’s functioning or intellectual ability as well as an end to substituted decisionmaking regimes based on such differences.

While it is true that the CRPD Committee’s General Comment is not binding per se, it is considered authoritative under international law. The purpose of a General Comment is to give meaning to the abstract rights included in treaties and to clarify the duties of States Parties as well as to identify approaches to implement treaty provisions. Therefore, the Law Commission’s decision to disregard the CRPD Committee’s interpretation of Article 12 disappointing.

In the Interim Report, the Law Commission writes that it considered and rejected the approach proposed in the General Comment, in which all individuals retain at all times legal capacity to make decisions. The Report goes on to state that “[g]iven the non-binding nature of a General Comment and the existence of Canada’s Declaration and Reservation, Canada is not clearly bound to carry out the program of reform set out in the General Comment.”

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23 See Arlene S. Kanter, supra note 5, at 251-258 (discussion of the drafting process that lead to Article 12).
24 Id. at 252.
25 Id. at 256.
28 INTERIM REPORT, supra note 9, at 60 (also stating: “[b]oth Canada’s Declaration and Reservation and the General Comment provide important insights into potential interpretations of Article 12 of the
However, in the General Comment, the CRPD Committee clarifies that although Article 12 does not mention supported decision making by name, the intent of Article 12 is to ensure legal capacity for all people with disabilities and to end the use of substituted decision-making. Paragraph 7 of the General Comment specifically makes this point:

Historically, persons with disabilities have been denied their right to legal capacity in many areas in a discriminatory manner under substitute decision-making regimes such as guardianship, conservatorship and mental health laws that permit forced treatment. These practices must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others."

Further, in Paragraph 25 of the General Comment, the CRPD Committee writes as follows:

“In order to fully recognize “universal legal capacity”, whereby all persons, regardless of disability or decision-making skills, inherently possess legal capacity, States parties must abolish denials of legal capacity that are discriminatory on the basis of disability in purpose or effect.”

Based on these statements, there can no longer be any doubt that Article 12 prohibits the type of substituted decisionmaking regime proposed in the Law Commission’s Interim Report.

The CRPD Committee’s General Comment also sets forth specific criteria for evaluating the progress of States Parties in their implementation of the rights included in the CRPD. For example, in Paragraph 28, the Committee includes the obligations of States Parties with respect to new supported decision making regimes. Such supported decision-making regimes must now include the following characteristics:

a. Supported decision-making must be available to all. A person’s level of support needs, especially where these are high, should not be a barrier to obtaining support in decision-making;

b. All forms of support in the exercise of legal capacity, including more intensive forms of support, must be based on the will and preference of the person, not on what is perceived as being in his or her objective best interests;

CRPD, which Canada has committed itself to implement. Given the nature of the LCO’s role and mandate, neither the General Comment nor the Declaration and Reservation limits the LCO’s potential recommendations, although they certainly inform them. It is the responsibility of the LCO to make recommendations that are at minimum consistent with Canada’s international commitments. Given the non-binding nature of a General Comment and the existence of Canada’s Declaration and Reservation, Canada is not clearly bound to carry out the program of reform set out in the General Comment. However, the LCO may certainly recommend that the government take steps beyond minimum compliance with its obligations. This does not mean that the LCO accepts the interpretation given Article 12 by the General Comment. It is the responsibility of the LCO to carefully review available research and the results of public consultations, and to make recommendations for law reform based on that review: it is then the role of government to evaluate the LCO’s analysis and recommendations and to take such steps as it believes appropriate.

29 GENERAL COMMENTS, supra note 27, para. 7.
30 GENERAL COMMENTS, supra note 27, para. 25.
c. A person’s mode of communication must not be a barrier to obtaining support in decision-making, even where this communication is non-conventional, or understood by very few people;

d. Legal recognition of the support person(s) formally chosen by a person must be available and accessible, and States have an obligation to facilitate the creation of support, particularly for people who are isolated and may not have access to naturally occurring support in the community. This must include a mechanism for third parties to verify the identity of a support person as well as a mechanism for third parties to challenge the action of a support person if they believe that the support person is not acting in accordance with the will and preferences of the person concerned;

e. In order to comply with the requirement, set out in article 12, paragraph 3, of the Convention, for States parties to take measures to “provide access” to the support required, States parties must ensure that support is available at nominal or no cost to persons with disabilities and that lack of financial resources is not a barrier to accessing support in the exercise of legal capacity;

f. Support in decision-making must not be used as justification for limiting other fundamental rights of persons with disabilities, especially the right to vote, the right to marry, or establish a civil partnership, and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships and medical treatment, and the right to liberty;

g. The person must have the right to refuse support and terminate or change the support relationship at any time;

h. Safeguards must be set up for all processes relating to legal capacity and support in exercising legal capacity. The goal of safeguards is to ensure that the person’s will and preferences are respected.

i. The provision of support to exercise legal capacity should not hinge on mental capacity assessments; new, non-discriminatory indicators of support needs are required in the provision of support to exercise legal capacity.

It is this list of characteristics that the CRPD Committee will now use to evaluate each country’s report with respect to its compliance with Article 12. Yet in its Interim Report, the Law Commission rejects the Committee’s interpretation of Article 12. Although Canada is free to adopt declarations and reservations, once the CRPD Committee issued its interpretation of Article 12, the Law Commission was advised to avoid using Canada’s declaration and reservation as a basis to disregard the CRPD Committee’s interpretation of Article 12.31

Moreover, if the Law Commission was not sure about the authoritative nature of the CRPD Committee’s interpretation of Article 12, a review of the CRPD Committee’s Concluding Observations should have put to rest any such doubt. Each and every concluding observation filed by the CRPD Committee in response to country reports on Article 12 unequivocally call for an end to the type of substituted decision-making regimes that the Law Commission is now recommending in its Interim Report.

For example, the CRPD Committee’s response to the country reports filed by Spain and Tunisia support a reading of Article 12 as abolishing guardianships. In its Concluding Observations submitted in response to Spain’s report, the CRPD Committee requests in paragraph 11, the following: “Please

31 The highly authoritative nature of the General Comment is supported by the fact that it is the result of a comprehensive participatory process including interest groups of different regions and cultures as well as non-governmental organizations. See Nisuke Ando, General Comments/Recommendations, MAX PLANCK INST. FOR COMP. PUB. L. & INT’L L. (2010), http://ilmc.univie.ac.at/uploads/media/general_comments_recommendations_empil.pdf.
provide information on the measures planned or taken to replace substitute decision-making (guardianship) with supported decision-making in the exercise of legal capacity, in accordance with article 12 of the Convention.” 32 Similarly, in response to Tunisia’s country report, the CRPD Committee requests in paragraph 23, the State to “review the laws allowing for guardianship and trusteeship, and take action to develop laws and policies to replace regimes of substitute decision-making by supported decision-making.” 33 Despite the Law Commission’s effort to create doubt about the scope and meaning of Article 12, there is nothing ambiguous about the CRPD Committee’s intent to require State Parties to repeal laws based on substituted decision making as incompatible with the object and purpose of the CRPD.

4. Is the cognitive and functional approach set out in the Recommendation #3 of the Law Commission’s Interim Report consistent with Article 12?

The cognitive and functional approach to legal capacity adopted by the Law Commission is not consistent with Article 12. The Law Commission writes that the cognitive and functional approach “emphasizes the ability to make a specific decision or type of decision at a particular time, evaluating the abilities of the individual to understand, retain and evaluate information relevant to a decision.” 34 This view is belied not only by the CRPD Committee’s interpretation of Article 12 but also by the purpose and language of the CRPD itself as well as recent international developments.

It is beyond dispute that the CRPD applies to all people with disabilities and prohibits any and all sorts of discrimination based on disability. Both the Ad Hoc Committee that drafted the CRPD as well as the CRPD Committee’s interpretation of Article 12 in its General Comment, recognize that even individuals with significantly impaired decision-making abilities have the right to freely seek and receive supports to help them in decision-making. Yet the Law Commission seems to reject this approach.

The Interim Report’s Recommendation #3 conditions the right to equal recognition of the law upon the lack of a cognitive or intellectual impairment. Conditioning the exercise of such an important right as equal recognition of the law upon the lack of an impairment is discrimination on its face and undermines the very purpose of the CRPD. As such, Recommendation #3 runs counter to the very essence of the prohibition of discrimination found in Article 2 of the CRPD. Indeed as the CRPD Committee’s General Comment recognizes, an individual’s status as a person with a disability or the existence of an impairment may not be the basis for denial of legal capacity under Article 12.

Moreover, in the section of the General Comment entitled the Obligations of States Parties, the CRPD Committee affirms States Parties’ obligations not only to refrain from actions that deprive people with disabilities of their equal recognition before the law but also their affirmative obligation to ensure “universal legal capacity” for all people with disabilities, regardless of their disability or

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33 Id.
34 INTERIM REPORT, supra note 9, at 55.
decision-making skills. Such universal legal capacity necessarily requires the repeal of facially discriminatory policies as violative of Article 12, including those contained in Recommendation #3, which permit the imposition of substituted decision-making or functional tests of mental capacity as a basis for the denial of legal capacity. Arguably, no document of a UN Committee has ever been as unequivocal as this General Comment on the need for countries to change current laws and practices that deprive people with disabilities of their opportunity for equal treatment under law. Yet the Law Commission ignores such legal precedent by adopting a cognitive and functional approach to legal capacity. The Commission’s position is contrary to reports, case law, and research in this area that now reject the cognitive and functional approach in favor of universal legal capacity. Although resources that reject the Commission’s position were available for review by the Law Commission, they are not cited in their Interim Report.

For example, in 2013, the Mental Disability Advocacy Center issued a report on Article 12, entitled *Legal Capacity: A Call to Action to Governments and to the EU.* This report provides a comprehensive review of the many problems with guardianship in several European countries, as well as an overview of the legal capacity cases decided by the ECtHR. As such, it provides a useful roadmap on how to transform now-invalid substituted decision-making regimes with supported decision-making.

Similarly, in 2010, the European Foundation Center issued a comprehensive report on the CRPD, entitled *Study on Challenges and Good Practices in the Implementation of the UN Convention on the Rights of Persons with Disabilities.* This report also suggests repealing current legal regimes that deny persons with disabilities legal capacity and calls for the creation of systems that support people with disabilities in making their own decisions.

In 2012, Commissioner Thomas Hammarberg himself published a paper on the right to legal capacity, entitled “Who Gets to Decide?” In this paper, Commissioner Hammarberg interprets Article 12 to require States Parties to “abolish mechanisms providing for full incapacitation and plenary guardianship.” He goes on to write that “reforming current mechanisms for legal capacity is one of the most significant human rights issues in Europe today.” In addition, he recommends that States Parties develop supported decision-making systems and “establish robust safeguards” that ensure the provision of support services to individuals, based on their preference. Only then, in his view, will people with disabilities worldwide enjoy the right to fundamental freedoms and human rights. The Commissioner concludes his report with a call for “no less than a radical overhaul of present

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35 GENERAL COMMENTS, *supra* note 27, para. 25.
37 *Id.*
39 *Id.*
41 *Id.*
42 *Id.*
43 *Id.*
policies." \(^{44}\) The right to legal capacity, he concludes, is “not about being able to do everything on your own, but about having control of your life and the possibility to make decisions and have them respected by others.” \(^{45}\)

Another report which compares the legal capacity laws of nine countries in the European Union was released in 2013 by the European Union Agency for Fundamental Rights. \(^{46}\) This report concludes that States Parties should “replace decision making by others on behalf of people with disabilities with decision making by people with disabilities guided by others. This change is necessary, according to the report, in order to respect the autonomy, will, and preferences of people with disabilities.” \(^{47}\)

Moreover, the Law Commission’s argument that Article 25’s inclusion of the requirement of informed consent supports rather than rejects substituted decisionmaking is also not persuasive. By reading Article 25 (which requires informed consent) in conjunction with Article 12 affirms that the consent of third parties is not considered an appropriate substitute for consent of the person with a disability, who at all times must enjoy the right to exercise legal capacity, and with support, if needed, according to his or her own will and preferences. Indeed, as I have written elsewhere, because reference to substitute decision-making was included in earlier drafts of Article 12 but not in the final draft of Article 12, it is clear that the Ad Hoc Committee may have considered but then rejected the continued use of substituted decision making in Article 12. \(^{48}\)

In sum, the Law Commission’s Recommendation #3 that legal capacity must be based on a functional and cognitive approach is not consistent with the language and intent of the CRPD, its drafting history, or recent international reports.

5. Does international law support the Law Commission’s analysis in the Interim Report that the provisions in Article 12 are subject to the principle of progressive realization?

According to the Law Commission, the rights provided under Article 12 are subject to progressive realization. This view is contrary to well established principles of international law.

On page 149 of the Interim Report, the Law Commission writes as follows:

...the LCO is particularly concerned by the stance taken in the General Comment that these rights are not subject to progressive realization, but are those of immediate implementation. It is essential to progress towards greater dignity and autonomy for persons affected by this area of the law, but it is also essential to do so in a way that seeks to build on evidence, realistically and practically addresses the difficulties, takes into account the diversity of needs and circumstances of those affected, and proceeds with reasonable caution so as not to inadvertently result in greater harm than benefit.

The LCO therefore believes a “progressive realization” approach to reform in this area, which adopts the approach underlying Article 12, aims to better promote and protect the

\(^{44}\) Id.
\(^{45}\) Id.
\(^{47}\) Id.
\(^{48}\) Arlene S. Kanter, supra note 5, at 263-265.
Framework principles, and seeks to implement them by building on existing good practices, providing new options with carefully considered safeguards, and evaluating the evidence on which reform is based, is appropriate.49

It is well established that the concept of progressive realization in international law applies to social, economic and cultural rights and not civil or political rights. As Article 2.1 of the International Covenant on Social, Economic and Cultural Rights (ICSECR) states,

Each state party to the present Covenant undertakes to take steps individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means including in particular the adoption of legislative measures.50

This phrase, "to the maximum of available resources with a view to achieving progressively the full realization of the rights," was included in the Covenant to recognize differences among countries in the nature and extent of economic, social and cultural policies, programs and services. 51

By contrast, the International Covenant on Civil and Political Rights (ICCPR), specifically does not include the option of progressive realization. Civil and political rights, as opposed to social, economic and cultural rights must be effectuated immediately. Thus unlike the State’s obligations to enforce rights under the ICSECR progressively, the ICCPR requires States Parties to refrain immediately from interfering with the political and civil rights of its citizens.52 The reason for this difference is that the

49 INTERIM REPORT, supra note 9, at 149.
51 Id. The Limburg Principles state that "the economic, social and cultural rights may be realized in a variety of political settings. There is no single road to their full realization. Successes and failures have been registered in both market and non-market economies, in both centralized and decentralized political structures." The Limburg Principles go on to explain that the "obligation of progressive realization exists independently of the increase in resources" and therefore applies in all countries, regardless of the level of economic development. (General Comment No. 1 (1989), Committee on Economic, Social and Cultural Rights in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Document, HRI/Gen./1/Rev.1, July 1994).
52 See Dominic McGoldrick, THE HUMAN RIGHTS COMMITTEE 2 (1991). Citing the history of the drafting of the ICCPR, McGoldrick describes the importance of the immediate realization of civil and political right in this way: “There were marked differences of opinion during the drafting on the matter of the obligations that would be incurred by a State Party to the ICCPR. Some representatives argued that the obligations under the ICCPR were absolute and immediate and that, therefore, a State could only become a party to the ICCPR after, or simultaneously with, taking the necessary measures to secure those rights.... If there were disparities between the Covenant and national law, they would best be met by reservations... Against this view it was argued that the prior adoption of the necessary measures in domestic law was not required under international law.... Proposals to provide that the necessary measures be taken within a specified time limit or within a reasonable time were rejected as was a suggestion that each State fix its own time limits in its instrument of ratification.... The notion of implementation at the earliest possible moment was implicit in Article 2 as a whole. Moreover, the reporting requirement in article 49 (later article 40) would indeed service as an effective curb on undue
rights contained in the ICCPR are seen as such basic human rights that there can be no excuse for delaying their immediate protection.

One such basic human right included in the ICCPR is the right to equal recognition under law. Article 16 of the ICCPR specifically provides: “Everyone shall have the right to recognition everywhere as a person before the law.”\(^{53}\) It is no accident that this same language is included in the CRPD. When the CRPD was drafted, the Ad Hoc Committee intended to apply existing human rights laws to people with disabilities. The right to equal recognition of the law is an example of such a right. As such, Article 12, like Article 16, is not subject to progressive realization but must be implemented immediately. The CRPD Committee affirmed the inapplicability of the principle of progressive realization to Article 12 when it stated unequivocally:

> [T]he rights provided for in article 12 apply at the moment of ratification and are subject to immediate realization. The State’s obligation, as provided in article 12, paragraph 3, to provide access to support in the exercise of legal capacity is an obligation for the fulfilment of the civil and political right to equality before the law. “Progressive realization” (art. 4, para. 2) does not apply to the provisions of article 12. Upon ratifying the Convention, States parties must immediately begin taking steps towards the realization of the rights provided for in article 12. Those steps must be deliberate, well-planned and include consultation with and meaningful participation of people with disabilities and their organizations.”\(^{54}\)

In contrast to these well-established principles of international law that require the right to equal recognition of the law to be implemented immediately, the Law Commission recommends delaying implementation of Article 12 until it has an ability to assess the reforms underway. Not only does this view challenge well-established principles of international law, but it also contradicts the process of legislative reform. While there is always a role for research and pilot projects in the process of legislative reform, waiting for the results of such projects is not a sufficient justification to delay compliance with Article 12. In fact, if the Law Commission wishes to review examples of how decision-making laws and policies may work without substituted decision-making, they may look nearby to British Columbia. The British Columbia law authorizing representation agreements is highly regarded internationally and one which I often cite as an example of a law that goes further in complying with Article 12 than other guardianship laws in the US or other countries.\(^{55}\)

Similarly, the Law Commission may look to the 2004 Montreal Declaration on Intellectual Disabilities, the first international document to call for supported decision-making, as an alternative to substituted decision-making for people with intellectual disabilities.\(^{56}\) The Montreal Declaration acknowledges the tendency of governments to declare people incompetent and to appoint guardians to make decisions for them. For this reason, the Montreal Declaration rejects the use of guardians for people who are

\(^{53}\) ICCPR, supra note 52, art. 16.

\(^{54}\) GENERAL COMMENTS, supra note 27.

\(^{55}\) Arlene S. Kanter, supra note 5, at 270.

deemed lacking in capacity owing to their intellectual disability. Instead, the Montreal Declaration addresses the needs of people who are considered “lacking capacity” not through laws that substitute a guardian’s decision for the decision of the individual (as the LCO is recommending in its Interim Report), but with a new model of supported decision-making. This new model recognizes that all people have the right to make decisions and choices about their own lives, while also acknowledging that, at times, people with intellectual disabilities, just like anyone else, may seek and need help from family and friends in making their decisions. It is this model of supported decision-making that is envisioned by Article 12 of the CRPD.

Other countries, too, have begun to review and rewrite their laws to introduce supported decision-making to replace substituted decision making regimes. For example, in Bulgaria, the Ministry of Justice, has recently offered a draft comprehensive bill titled, “Persons and Support Measures Act,” that includes a statutory provision for supported decision making for people with profound cognitive disabilities, as well as a provision for court orders for “facilitated decision making,” to apply in situations when an adult cannot be understood, or where being directed by the adult’s will and preferences would place the person or public at fundamental risk.⁵⁷ While the Bulgarian Bill has not yet been adopted, its presentation by the Ministry of Justice signals significant institutional support for what would constitute statutory provisions that are consistent with the CRPD and the General Comment. Other countries such as Ireland, Argentina, Columbia, Peru, Spain, India and Israel also are considering new laws which will replace substituted decisionmaking regimes with supported decision making. And, none of these legislative reforms are being delayed, pending the results of additional research or pilot projects.

In fact, none of the many jurisdictions that are working to revise their domestic laws to conform to Article 12 seem to be conditioning their law reform efforts on the type of additional information that the Law Commission seems to be seeking. Indeed, as we look back at major legislative reforms in Canada (and in the US) during the 1980s and 1990s, we see that successful completion of certain research or pilot projects, were never a prerequisite to legislative action. Instead, what has triggered most legislative reform in the area of disability law throughout the world has been successful advocacy by parents and people with disabilities, themselves, in collaboration with other advocates and legislators. Further, when the fundamental human right of equal recognition under law is at stake, such as in this case, there can be no justification for delaying its implementation.

An example in the United States may be instructive. In Olmstead v. L.C.,⁵⁸ the state had argued that the named plaintiffs should not be released into the community until the state could decide the “appropriate course... [with] respect to the States' historical role as the dominant authority responsible for providing services to individuals with disabilities.”⁵⁹ The majority of the Supreme Court justices rejected the State’s call to delay relief in this case and instead ordered the immediate release of the plaintiffs in order to ensure their right to be free from discrimination under the Americans with Disabilities Act.⁶⁰ People with disabilities who are currently denied legal capacity in Ontario based on

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⁵⁹ Id.

⁶⁰ Id.; see Arlene S. Kanter, There’s No Place Like Home: The Right to Live in the Community for People with Disabilities, Under International Law and the Domestic Law, 45 ISRAEL L. REV. 181 (2012); see
their functional or cognitive ability should similarly be accorded their right to equal recognition of the law without further delay.

Concluding Remarks: Article 12 and The Right to Equal Recognition Before the Law Since the Adoption of the CRPD

Since the adoption of the CRPD, many jurisdictions have begun evaluating their domestic laws in relation to the CRPD, generally, and Article 12’s call for an end to substituted decisionmaking, in particular. The Law Commission of Ontario is now engaging in such a consultative process. However, as I have explained in this Expert Opinion, the Commission’s Interim Report on Article 12 seems at odds with international law as well as international developments with respect to the object and purpose of the CRPD.

While it is true that Article 12 does not mention supported decisionmaking specifically, the language and purpose of Article 12 comports with the goal of supported decisionmaking. Supported decisionmaking is a mechanism to ensure that all people have the right to make decisions and choices about their own lives and to secure assistance in that process, if needed. As such, Article 12 represents an important breakthrough in international law by advancing the self-determination and equality rights of people with all types of disabilities. People with intellectual disabilities and people who, for other reasons, may be considered unable to care for themselves, are particularly vulnerable to being identified as legally incompetent and incapable. Difficulties in learning or even different ways of communicating often lead others to conclude that a person does not have the intellectual or functional capacity to be fully recognized as a person at law. This situation is the result of deep-rooted and often mistaken assumptions that certain levels of intellectual and communicative capacity are essential prerequisites of personhood. Article 12 was drafted specifically to counter this view.

Article 12 recognizes that some people with disabilities, on a temporary or permanent basis, may need assistance, support, and accommodations. But it also clarifies for the first time in international law that the need for assistance, support or accommodations is never a justification for depriving the person of his or her fundamental human rights. Under Article 12, no person may lose his or her right to legal capacity simply because the person is labeled as disabled. This view reflects the CRPD’s commitment to the principle that persons with disabilities are holders of rights and not objects of others’ protection. It also furthers the CRPD’s commitment to the principle of nondiscrimination.

The Law Commission of Ontario has expressed its view that substituted decision-making is here to stay because there will always be a group of people who will be considered by society and policymakers as “too disabled” to make decisions for themselves. However, this view runs counter to the overall purpose of the CRPD, which now requires States Parties, including Canada, to rethink their role as parens patriae, and to review, and repeal, as needed, those laws and policies that deprive people with disabilities of their chance to exercise their own decision-making abilities. In order to fully comply with the object and purpose of the CRPD, the Law Commission should reconsider its recommendations in light of well-established principles of international law, the CRPD Committee’s authoritative interpretation of Article 12, as well as recent international developments.

61 See Arlene S. Kanter, supra note 5, at 291-303.
Appendix 'C': Resumes of Dulcie McCallum and Arlene Kanter
Dulcie McCallum, LL.B.

Special Advisor on Canada’s Delegation to the United Nations [CRPD]
Co-Counsel in *Re Eve* [Supreme Court of Canada]
Former Ombudsman for Province of British Columbia
Former Access to Information and Privacy Commissioner for Province of Nova Scotia
Adopted by the Haida Nation *Ts’xuu jaad*
Honorary Patron Canadian Mental Health Association [BC Div]
Recipient of the Diamond Jubilee Medal

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<td>2004 – 2007</td>
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<td>Special Advisor to Canada’s Delegation to the UN Ad Hoc Committee CRPD</td>
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<td>2004</td>
<td>Montreal</td>
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<td>Disability Expert</td>
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<td>PAHO/World Health Organization Special Session International Experts [Montreal Declaration]</td>
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<td>2003 - 2005</td>
<td>Ottawa</td>
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<td>Researcher and Writer</td>
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<td>Accreditation Ontario Criminal Justice Project</td>
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<td>2002 – 2004</td>
<td>Ottawa</td>
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<td>Researcher Inter-Generational Justice</td>
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<td>Law Commission of Canada</td>
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<td>2000 - 2004</td>
<td>BC</td>
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<td>Chairperson</td>
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<td>Health Care (Consent) and Care Facility Review Board</td>
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<td>2000 – 2003</td>
<td>Victoria</td>
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<td>Sessional Instructor</td>
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<td>University of Victoria School of Child and Youth Care</td>
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<td>2000</td>
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<td>Consultation: Review of the Mental Health Advocate Ministry of Health</td>
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<td>1999 – 2002</td>
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<td>Legal Researcher</td>
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<td>Investigator into Woodlands School Sexual and Physical Abuse [Need to Know Report]</td>
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1999 – 2001 BC
Consultation [Guardianship]
Public Guardian and Trustee for BC

1992 – 1999 BC
Ombudsman
Province of British Columbia

1987 – 1992 Toronto
Government and Legal Affairs Consultant
Canadian Association for Community Living

1988 – 1992 Winnipeg
Researcher
Canadian Disability Rights Council

1982 – 1988 Victoria
Barrister and Solicitor
Vickers and Palmer

1975 – 1977 Haida Gwaii
Community Public Health Nurse In-Charge
Health and Welfare Canada

Education

2002
Human Rights Certificate
Wash DC Executive Secretariat Inter-American
Commission on Human Rights

1982 - present
Member of the BC Bar

1982
Call to the Bar
Law Society of British Columbia

1978-1981
Bachelor of Law Degree
University of Victoria

1973-1975
Under-graduate Criminology/Psychology
Simon Fraser University

1970 - 1971
Conversa Language School: French

1968-1970
Registered Nurse
BC Institute of Technology

Honours and Awards

2012
Queen Elizabeth II Diamond Jubilee Medal

2011
President’s Award Canadian Association for Community Living

2002 and 2007
Certificate of Appreciation Minister’s Advisory Council on Mental Health

2001
UNIFEM Canada Certificate of Appreciation

1999
Honourary Recognition BC Law Society Victoria Chapter

1999
Canadian Ombudsman [CAO] Recognition Award

1999
US Ombudsman [USOA] Outstanding Contribution Award

1999
Honourary Patron Canadian Mental Health Association

1997
Distinguished Alumni Award University of Victoria

1997
Honourary Elder International Rediscovery Foundation
1996
YWCA Women of Distinction Award [Community Service]
1993
Governor General of Canada’s 125th Commemorative Medal

1992
Certificate of Appreciation BC Aboriginal Network and Disability Society
1978
Haida Nation Adoption Haida Gwaii/Haida Name tx’xuu jaad

Presentation Highlights
Speaker: On Forced Sterilization
FIGO World Congress
October 7, 2015 Vancouver

Strategic Litigation Advisory Committee
Canadian Association for Community Living
2008 – present

Facilitator: Civil Society Oversight under the CRPD
UN States Parties Session
June 10-12, 2014 New York City, US

Facilitator: Report Card on Canada’s Access to Information
Privacy and Access 20/20: A New Vision for Information Rights
October 10-11, 2013 Vancouver, BC

Speaker: Speaking Truth to Power: Finding the Disability Boson
10th World Conference of the International Ombudsman Institute
November 12 – 16, 2012 Wellington, New Zealand

Host and Co-Chair Canadian Association for Community Living 2011 National Conference and AGM
September, 2011 Halifax NS

Keynote Speaker: Making Community Living a Reality
PEI Forum on the CRPD
March 2011 Charlottetown, PEI

Keynote Speaker: Honouring the Convention
BCACL Forum
December 2010 Vancouver, BC

Keynote Speaker The Audacity of Inclusion
Chief Justice Thane A. Campbell Lectureship in Law
University of PEI May, 2009 Charlottetown, PEI

Chairperson and Speaker: Bottom Line Depression Conference Canadian Mental Health Association
2002 Vancouver, BC

Keynote Speaker: Human Rights in the New Millennium
CACL Annual Conference
1999 Quebec City, QC

References and copies of publications available upon request.
ARLENE S. KANTER  
BOND, SCHOENECK AND KING DISTINGUISHED PROFESSOR OF LAW  
LAURA J. AND L. DOUGLAS MEREDITH PROFESSOR OF TEACHING EXCELLENCE  
DIRECTOR, DISABILITY LAW AND POLICY PROGRAM  
Syracuse University College of Law, Syracuse, NY 13233-1030  
Email: kantera@law.syr.edu  
Web https://law.syr.edu/profile/arlene-kanter1  

Work Address:  
Syracuse University College of Law  
Syracuse, NY 13244-1030  
(315) 443-9551/ Fax (315) 443-4141  

Home Address:  
6243 Turnwood Drive  
Jamesville, NY 13078  
(315) 214-5411  

EDUCATION  
Georgetown University  
LL.M. 1983  
New York University  
J.D. 1981 (with honors)  
Columbia University  
1977-78 Attended Masters in Social Work Program  
Trinity College  
B.A. 1976 (with honors)  
Amherst College  
Invited visiting student, 1975-76.  

PROFESSIONAL EXPERIENCE  
SYRACUSE UNIVERSITY  
Laura J. and L. Douglas Meredith Professor of Teaching Excellence  
Co-Director, Syracuse University Center on Human Policy, Law, and Disability Studies, 2004-present. The CHPLS is a university wide, multidisciplinary academic center dedicated to full inclusion and acceptance of people with disabilities through education, research and advocacy. The CHPLDS is an expansion of the Center on Human Policy, the first university-based disability center which was founded in 1971.  
Co-Chair, Chancellor’s Task Force on Disability, September 2004-2014.  
University Committee Service: Vice Chancellor’s Review Committee; Committee of Department Chairs, Dean’s Search Committee; Committee on Academic Freedom and Tenure; University Senate, etc.  

SYRACUSE UNIVERSITY COLLEGE OF LAW  
Bond, Schoeneck & Kind Distinguished Professor of Law  
Director, Disability Law and Policy Program  
Professor of Law and Professor of Law, 1993-present; Associate Professor, 1990-1993; Assistant Professor, 1989-1990; Visiting Assistant Professor, 1988-1989.  
Courses: International Human Rights and Comparative Disability Law; Disability Law; Adv. Disability Law and Policy; Legislation and Policy: Special Education Law; Law and Psychiatry, Education Law; Civil Rights; Legal Ethics; Public Interest Lawyering.  
Administrative Appointments:  
Director and Founder, Disability Law and Policy Program, 2003-present.  
Coordinator, LLM Human Rights and Disability Fellowship Program, 2013-present.  
Associate Dean of Academic Affairs, 1997-2000.  

SYRACUSE UNIVERSITY SCHOOL OF EDUCATION  
Professor of Education, courtesy appointment, 2005-present.
Dissertation Comm. Member and Chair, for Ph.D. students in Disability Studies, 2000-present.

VISITING FACULTY POSITIONS

TEL AVIV UNIVERSITY, Tel Aviv, Israel, 2009-2010, Fulbright Scholar; 2010-11, Visiting Professor, Faculty of Law.
HEBREW UNIVERSITY, Jerusalem, Israel, 2010-11, Visiting Professor, Faculty of Law; 1994-95. Visiting Professor, Faculty of Law and Faculty of School of Social Work, Joint Appointment.
NALSAR University, Hyderabad, India, Spring 2010. Guest Inaugural Lecturer, Center for Disability and Law.
CHARLES UNIVERSITY, Prague, Czech Republic, November 1993 and June 1994. Guest Lecturer, Galsky Training Institute.

EDITORIAL POSITIONS

SYRACUSE UNIVERSITY PRESS, CRITICAL PERSPECTIVES IN DISABILITY STUDIES SERIES, Co-founder and Co-editor, 2008-present.
JOURNAL OF DISABILITY LAW, Founder and Editor, LSN Subject Matter Journals, Social Science Research Network, 2006 - present.
MENTAL AND PHYSICAL DISABILITY LAW REPORTER, Editorial Board Member, 2004-2009.

BOOKS

ARLENE S. KANTER, THE DEVELOPMENT OF DISABILITY RIGHTS UNDER INTERNATIONAL LAW: FROM CHARITY TO HUMAN RIGHTS (Routledge, 2015).


LEARNING FROM PRACTICE: A PROFESSIONAL DEVELOPMENT TEXT FOR LEGAL EXTERNS 2ND ED. (with J.P. OGILVY, LISA G. LERMAN & LEAH WORTHAM, 2007).

LEARNING FROM PRACTICE: A PROFESSIONAL DEVELOPMENT TEXT FOR LEGAL EXTERNS, 2ND ED. TEACHERS' MANUAL (with J.P. OGILVY, LISA G. LERMAN & LEAH WORTHAM, eds., 2007).

MICHAEL PERLIN, MARY PAT TREUTHART, EVA SZELI & KRIS GLEDHILL, INTERNATIONAL HUMAN RIGHTS AND COMPARATIVE MENTAL DISABILITY LAW DOCUMENTS SUPPLEMENT (Carolina Academic Press, 2006).


BOOK CHAPTERS AND REPORTS


The Right to Community Living Under International Law, in THE RIGHT TO LIVE IN THE COMMUNITY: COMMUNITY BASED SERVICES FOR PEOPLE WITH MENTAL DISABILITIES (in Turkish) (Fatma Z. Dagidir, ed., 2010).


Bazelon Center for Mental Health Law, chapter in 1 ENCYCLOPEDIA OF AMERICAN DISABILITY HISTORY 92 (Susan Burch ed., 2009).


The Globalization of Disability Law, chapter in P. Blanck, Ed., DISABILITY RIGHTS (Ashgate
Students with Disabilities Studying Abroad, chapter in RIGHTS AND RESPONSIBILITIES OF STUDENTS WITH DISABILITIES, Mobility International USA (2004).


Legal and Ethical Issues in the Community Care of Older People and Protecting Elders Rights, two chapters in AT HOME: STRATEGIES FOR SERVING OLDER PEOPLE WITH MENTAL DISABILITIES IN THE COMMUNITY (1995).


CURRENT ISSUES IN MENTAL HEALTH LAW, University of Texas, (1989).


SELECTED ARTICLES


The Right to Asylum for People with Disabilities: An Update (forthcoming).


Country Report for Morocco, AFRICAN DISABILITY RIGHTS YEARBOOK 2015.

Country Report for Tunisia, AFRICAN DISABILITY RIGHTS YEARBOOK 2015.


The Right to Inclusive Education under International Law: Following Italy’s Lead (with Beth Ferri & Michelle Damiani), 17 J. INT’L SPECIAL NEEDS EDUC. 21 (2014).


The Right to Inclusive Education under International Law: Following Italy’s Lead (with Beth Ferri & Michelle Damiani), 17 J. INT’L SPECIAL NEEDS EDUC. 21 (2014).


In Search of Justice, Not Charity, Op-Ed, Jerusalem Post, May 14, 2011.


The Right of People with Disabilities to Exercise Their Right to Vote under the Help America Vote Act (with R. Russo), 30 MENTAL & PHYSICAL DISABILITY L. RPTR. 852 (2006).

Ethics in Externships: Confidentiality, Conflicts and Competence; Issues in the Field and in the Classroom (with A. Anderson & C. Slane), 10 CLINICAL L. REV. 473 (2004).


Homeless Mentally Ill People: No Longer Out of Sight and Out of Mind, 3 N.Y. L. SCH. J. HUMAN RTS. 331 (1986).

SELECTED PRESENTATIONS
2016

2015
Supported Decision Making as an Alternative to Guardianship under The UN Convention on the Rights of People with Disabilities, Keynote Speaker, International Conference on Supported Decision Making, Jerusalem, Israel, December 21, 2105.

Supported Decision Making and the UN Convention on the Rights of People with Disabilities: Lessons for Brazil, Invited Speaker (by skype), national Association of Public Defenders, Sao Paulo, Brazil, December 10, 2015.

Who’s In and Who’s Out: The Case for Disability Rights, University Lecturer, SUNY, Oswego, Oswego, NY, December 2, 2105.

Make Gender and Disability Inclusion Work: Advancing Equity for Women and Girls with Disabilities, participant (by Skype) at event sponsored by Handicap International, launching MAKING IT WORK INITIATIVE ON GENERA AND DISABILITY INCLUSION: ADVANCING EQUITY FOR WOMEN AND GIRLS WITH DISABILITIES, Geneva, Switzerland, November 18, 2015.

Supported Decision Making as an Alternative to Guardianship in New York State and Beyond, Albany AATI Training Institute, Albany, NY, November 18, 2015.

Federal Disability Law and Policies, Where We Are and Where We Need to Go, Speaker and Moderator, Ruderman Inclusion Summit, Boston, MA, November 2, 2015.

The Development of Disability Rights Under Law, University Lecturer, University of West Indies, Kingston, Jamaica, as a guest of the Organization of American States, October 22, 2015.


The Importance of Centers to Support Students with Disabilities In Higher Education, Speaker at Achva College, Israel, June 8, 2015.


The ADA and the UN Convention on the Rights of people with Disabilities, Invited Speaker, ADA Conference, Ohio State University, Columbus, Ohio, April 14, 2015.

The Invisibility of Women and Girls with Disabilities in the Country Reports Filed to the Commission the Status of Women, Convener and Moderator, at a session at the Commission on the Status of Women, United Nations, March 13, 2015.

The Convention on the Rights of People with Disabilities and Its Relationship to the Rights of Older Americans, Faculty Presentation at the SU Aging Institute, February 123, 2015.


The Right to Education For All, Keynote Speaker at International Conference of the Council on Exceptional Children, Braga, Portugal, July 2014.

Alternatives to Guardianship for Young Adults with Disabilities, Invited Speaker, Third World Congress on Guardianship, V.A., May 29, 2014.

Guardianship and Young Adults with Disabilities: The Need for Supported Not Substituted Decision-Making, Invited Speaker, American Bar Association Commission on Disability, National Conference, Los Angeles CA., April 9, 2014.


2013


From Charity to Human Rights For People with Disabilities Under International Law, Faculty Speaker, Columbia University, Graduate School of International and Public Affairs, New York, NY, October 22, 2013.


Taking Access to Justice Personally: Ensuring the Right of People with Disabilities To Make Their Own Decisions under the CRPD, Law and Society Association Conference, Boston, MA, May 2013.

The Rights of People with Disabilities to Employment, Federal Bar Association, Keynote Speaker, Syracuse, NY, February 6, 2013.

The Rights of Students with Disabilities to Education and Lifelong Learning Under the Convention on the Rights of People with Disabilities, Syracuse University, Speaker, Syracuse, NY, February 21, 2013 and April 10, 2013.

From Charity to Human Rights for People with Disabilities, Distinguished Presenter of Annual President's Lecture, State U of New York at Geneseo, Geneseo, NY, February 27, 2013

2012

The Right of People with Disabilities Under the ADA in Employment and School Settings, Moderator and Speaker, Federal Court Bar Association, NY, November 2012.


The Right of People with Disabilities to Live in the Community, Brookdale Research Institute, JDC, Jerusalem, Israel, July 2012.


The Meaning of Inclusive Education for Turkey, Faculty Speaker Bahçeşehir University, Istanbul, Turkey, June 18, 2012.

Access to Justice and People with Disabilities, Speaker and Moderator, Leadership Conference on

Disability Identity and the Law, Speaker, Jacobus tenBroek Annual Disability Law Symposium, Baltimore, MD, April 2012.

Keeping the Doors Open for All: An International Perspective on the Disability Rights Movement, Speaker, American Bar Association, International Law Section, New York, NY, April 2012.


The Right to Live at Home for People with Disabilities Under International Law, Speaker, AALS, Co-sponsored Session of the Disability Law Section and Mental Disability and the Law Sections, January 6, 2012.

2011

Guardianship and Supported Decision making for People with Disabilities, Plenary Speaker, Cardozo Law School, New York, NY, November 15, 2011.


The Right to Live in the Community Under International Law, US Law, and Israeli Law, Faculty Speaker, Hebrew University Law Faculty, Jerusalem, Israel, May 11, 2011.

Disability and Human Rights: The Meaning for Professionals in the Disability Field, Faculty Speaker, Haifa University, Haifa, Israel, May 18, 2011.


Disability Studies and The Law, Faculty Speaker, Tel Aviv University, Tel Aviv, Israel, January 5, 2011.

2010


The Emerging Academic Field of Disability Studies: What it is and What it is Not, Lecture to the Medical and Society Group, Tel Aviv University Medical School, and Department of Cultural Studies, Tel Aviv University, Tel Aviv, Israel, November 24, 2010.

Disability Rights Under US and International Law, Lecture presented at Bar Ilan Law School, Sponsored by the Bar Ilan Disability Rights Clinic, Tel Aviv, Israel, November 22, 2010.


International Developments in Disability Rights Law, Lecture to Organization of Public Services Lawyers, Jerusalem, Israel, October 7, 2010.

Legal Capacity and Guardianship Under the UN CRPD: A Challenge to Mexico, Keynote Speaker, Conference sponsored by Mexico NGO’s and Rehabilitation International, Mexico City, Mexico, June 11, 2010.


The Globalization of Disability Rights Law: A Perspective from the Middle East Region, Public Lecture, Tel Aviv University, co-sponsored by Fulbright-United States-Israel Educational Foundation, Tel Aviv, Israel, May 9, 2010.

Disability Studies and Social Work – Where the Paths Meet, Invited Faculty Lecture, School of Social Work, Tel Aviv University, Tel Aviv, Israel, May 4, 2010.

From Segregation to Inclusion to Belonging: Community Living in Israel, Presentation, Israeli International Film Festival, April 28, 2010.

The Social Model of Disability and Its Implications for Sociological Research, Invited Faculty Lecture, Department of Sociology, Tel Aviv University, Israel, March 24, 2010.

Disability and Human Rights: International Perspectives and Comparisons, Invited as Guest Keynote Speaker to inaugurate a new Center on Disability Studies, NALSAR University of Law, Hyderabad, India, March 9, 2010.

The Relationship Between Disability and Poverty: A Human Rights Perspective, Guest Lecturer, NALSAR University of Law, Hyderabad, India, March 8, 2010.

Inclusion of Students with Disabilities in Higher Education: Trends and Policies, Invited Lecturer, University of Delhi, Delhi, India, March 2, 2010.


Self Advocacy: Setting the Stage in Israel, Keynote Speaker, Ono College, Tel Aviv, Israel. February 11, 2010.

Disability Studies Across the Curriculum, Faculty Lecture, College of Health Professions, Tel Aviv University, February 2, 2010.


2009

International and Comparative Disability Laws: What They Mean for People with Disabilities in Turkey, Keynote Speaker, International Disability Conference, Sponsored by Turkish Foundation of Disabled People, Istanbul, Turkey, December 11, 2009.

Disability as a Human Rights Issue, Speaker at Conference of the Commission on the Equal Rights of People with Disabilities, Bar Ilan University, Tel Aviv, Israel, December 3, 2009.


From Inclusion to Belonging, Presentation at David Yellin Teachers College, Jerusalem, Israel, November 16, 2009.


Disability Studies: What It Is and What It Is Not, Faculty Presentation to College of Social Sciences, Tel Aviv University, Israel, October 29, 2009.

The Principle and Practice of Accessibility in the UN Convention on the Rights of People with Disabilities Three day workshop, Guest of Bigli University, Istanbul, Turkey, September 5-8, 2009.

The UN Convention on the Rights of People with Disabilities and Its Application to Turkey Today, Conducted 3 day workshop, Guest of Bigli University, Istanbul, Turkey, September 4, 2009.


Teaching Students with and without Disabilities, Syracuse University, Faculty Forum, March 25, 2009, organizer and panelist.


2008


Disability Studies: A Critical Examination or What It Is and Is Not, Guest of Disability Studies Reading Group, Tel Aviv University July 2008.

Trends in Comparative Disability Law, National Association of People with Disabilities, Cairo, Egypt, July 2008.

Disability Studies: A Critical Examination of What It Is and What It Is Not, Faculty Presentation, Tel Aviv University, July 2008.

Disability Studies Programs in Higher Education, Presentation to Faculty, Haifa University, July 2008.


Teaching Law Students with and Without Disabilities, Organized and moderated panel for College of Law Faculty with Tomas Gonzalez, COL Dean of Students, Steve Simon, Director Office of Disability Studies, Professors Michael Schwartz (Law), Corinne Smith (Ed) and students, February 2008.


2007

The Challenge and Promise of the UN Convention on the Rights of People with Disabilities, Guest Faculty speaker, Columbia University, April 2007.


2006


International Human Rights Law and the Right to be Free from Institutionalization and Involuntary Treatment, Invited Speaker, World Congress on Psychiatry, Istanbul Turkey, July 2006.

From Charity to Changing Society: Disability Rights within the International Human Rights Framework, Keynote speaker at Conference Sponsored by the Israeli Commission on Equal Rights of People with Disabilities, Tel Aviv, Israel, July 2006.

Developing a University-Wide Disability Studies Program: The Case of Syracuse University's Center on Human Policy, Law, and Disability Studies, Invited speaker, Conference Sponsored by the Israeli Commission on Equal Rights of People with Disabilities, Tel Aviv, Israel, July 2006.


Reframing Disability Law from an International Human Rights Perspective, Guest Faculty Speaker, University of Maine School of Law, April 2006.

Disability Studies Throughout Law School and the University Curriculum, American Association of Law Schools, Co-organizer of panel and invited panelist, Washington, D.C., January 2006.


DRAGONFIRE, Quoted in: Qualifying to be Disabled, Elizabeth Harrin in Paris, France at
2005

*Guest on WVBR,* Interviewed about the rights of people with disabilities in employment and the community, November 2005.


*International Human rights and Disability Law,* Guest lecturer in week-long course on Human Rights for students in SU Summer Program in Strasbourg, France, June 2005.

*International Perspectives on the ADA,* Speaker, conference on Multiple Perspectives on the ADA, Ohio State University, OH, April 2005.


*Disability Studies Throughout the University and Law School Curricula,* Presenter at a panel, entitled *Disability Across the Curriculum,* sponsored by the Section on Mental and Physical Disability Law, AALS, San Francisco, CA, January 2005.

2004


*Turkish Mental Health Laws and International Human Rights Standards,* Plenary speaker at Forum sponsored by the Turkish Medical Society for policymakers, professionals, advocates and scholars, Istanbul, Turkey, August 2004.


1993-2003


Foreign Policy and Disability: Legislative Strategies and Civil Rights Protections to Ensure Inclusion of People with Disabilities, Invited speaker at presentation to Congressional Committee and press conference, with Senator Tom Harkin, Washington D.C., October 2003.


Disabling Images of People with Disabilities in Film and Law, Invited speaker at International Conference on Humanities and Arts, Honolulu, CA, January 2003.

Foreign Policy and Disability, Guest speaker at meeting convened by the National Council on Disability, Washington, D.C., December 2002.

Disability Rights Law in a Clinical Setting, Moderator and presenter at Herr Memorial Conference, University of Maryland, Baltimore, MD, October 2002.

Commemorating the Twentieth Anniversary of the Supreme Court's Decision in Hendrick Hudson District Board of Education v. Rowley, Convener and presenter, with guests Michael Chatoff, Esq. and Nancy and Cliff Rowley, SUCOL, Syracuse, NY, October 2002.


ADA and Strategies for Implementation, Conference on the ADA, Invited speaker at Ohio State University, OH, June 2000.


Disability Law in the Czech Republic, Invited speaker at day-long conference sponsored by Mental Disability Rights International, American University, Washington, D.C., June 1996.


Women with Mental Illness: A Case of Double Discrimination, Invited speaker, International Conference on Gender and Disability, Tel Aviv, Israel, February 1995.


Redefining Mental Illness, Invited speaker, World Congress on Medical Law, Jerusalem, Israel, September 1994.

Civil Rights and People with Disabilities: An Israeli and United States Comparative Perspective,

*The Role of Litigation and Legislation in Achieving Equality for People with Disabilities*, Lecturer of week-long seminar for judges and lawyers, Galsky Training Institute, Charles University, Prague, Czech Republic, June 1994.

*Community Integration for People with Disabilities: A Comparative Perspective*, Invited to deliver public lecture at Hebrew University, Jerusalem, Israel, December 1993.

*The Role of Advocacy in Achieving Community Integration for People with Disabilities*, Guest Lecturer of week-long seminar at Galsky Training Institute, Charles University, Prague, Czech Republic, November 1993.


In addition, I have written briefs to courts, including the United States Supreme Court, testified before federal, state, and local legislative bodies, and my writings have been cited in numerous articles and court briefs, including, *The Presumption Against Extraterritoriality As Applied to Disability Discrimination Law*, 14 STANFORD L. AND POL. REV. 291(2003), in the plaintiffs' successful brief to the United States Supreme Court in *Spector v. Norwegian Cruise Lines*, 545 U.S. 119 (2005).

**PROFESSIONAL EXPERIENCE**


*World Health Organization*, consultant to the Committee for a Mental Health Law, appointed by the Turkish Ministry of Health to develop Turkey’s first mental health law, Istanbul, Turkey 2009-present.

*National Insurance Institute*, Israel, Consultant to program to develop support centers for students with disabilities in Israeli universities and colleges, 2009-2012.

*Joint Distribution Committee of Israel*, Consultant, Department of Disabilities and Rehabilitation, 2010-2012.


*United Nations Ad Hoc Committee* on drafting the Convention on the Rights of People with Disabilities, Consultant to NGO’s, 2001-2006.

*American Association of Law Schools* (AALS), Member; 1989-present; AALS Section on Disability Law, co-founder and inaugural co-chair, 2005-present; AALS Section on Law and Community, Chair, 1991-93; AALS Section on Clinical Legal Education, Chair, Committee on Integration of Clinic and Non-Clinic Legal Education; AALS Section on Mental Disability,
Member, 1993-present.


*Disability Rights International*, Advisory Board Member and Consultant, 1994-present.

**Supreme Court Cases:**

Co-counsel in *Cleburne v. Cleburne Living Center*, Supreme Court case involving group home for people with disabilities.

Co-counsel in *CCNV v. Watt*, Supreme Court case involving first amendment right of homeless people to demonstrate by sleeping in a public park.

### GRANTS AND AWARDS

<table>
<thead>
<tr>
<th>Year</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>2015</td>
<td>Recipient of the International Scholar of the Year Award, Syracuse International Center.</td>
</tr>
<tr>
<td>2010-2013</td>
<td>Selected as member of the Professional Review Committee for the US Fulbright Program.</td>
</tr>
<tr>
<td>2012</td>
<td>Named the Bond, Schoeneck and King Distinguished Professor of Law, Syracuse University College of Law.</td>
</tr>
<tr>
<td>2010-2011</td>
<td>Middle East Partnership Initiative, Grant to establish a legal advocacy program at Al Manarah (an Arab-Israeli Disability Rights Organization).</td>
</tr>
<tr>
<td>2010-2011</td>
<td>Named Distinguished Switzer Fellow, National Institute on Disability and Rehabilitation Research, US. Dept. of Education.</td>
</tr>
<tr>
<td>2009-2010</td>
<td>Named Fulbright Scholar, Tel Aviv University, Israel.</td>
</tr>
<tr>
<td>2009</td>
<td>Awarded the 2009 New York State Bar Association Award of the Lawyers Assistance Trust for “a significant contribution to an understanding of the issues of mental health issues in law school or in the profession.”</td>
</tr>
<tr>
<td>2009</td>
<td>Recipient of $1 million grant to Center on Human Policy, Law, and Disability Studies, from NYS Department of Education to establish a parent advocacy center for families of children with disabilities in nine county area of NYS.</td>
</tr>
<tr>
<td>2006</td>
<td>Grant from the John F. Marsellus fund of the Central New York Community Foundation to initiate a first-of-its-kind study of barriers to access by people with disabilities to services, programs, and buildings in Syracuse.</td>
</tr>
<tr>
<td>2005</td>
<td>Named the Laura J. and L. Douglas Meredith Professor for Teaching Excellence of Syracuse University, SU’s Highest Teaching Award.</td>
</tr>
<tr>
<td>1991-2014</td>
<td>Summer research grants, Syracuse University College of Law.</td>
</tr>
<tr>
<td>1989-2005</td>
<td>Wrote and received federal, state, and foundation grants totaling over $2 million for the Office of Clinical Legal Education, which I directed.</td>
</tr>
<tr>
<td>1991</td>
<td>American Bar Association Award in recognition of my work as co-founder of the ABA Commission on Homelessness and Poverty.</td>
</tr>
</tbody>
</table>
1990  American Association of Law Schools, Emil Gumpert Award, awarded to Syracuse University College of Law in recognition of the excellence of its advocacy program and the clinical programs, which I directed.

1986  American Bar Association, Harrison Tweed Award, awarded to the D.C. Bar Association for the development of the Washington Legal Clinic, which I co-founded.

Admitted to practice: United States Supreme Court; various federal courts; and State Bars of New York, D.C. and Pennsylvania.
Appendix 'D':

Chart of Proposed Ways to Recognize Legal Capacity and Supported Decision Making in a Reformed *Substitute Decisions Act*
# Proposed Ways to Recognize Legal Capacity and Supported Decision Making in a Reformed SDA

<table>
<thead>
<tr>
<th>Way of exercising legal capacity regulated in a reformed SDA</th>
<th>Threshold of Decision Making Capacity</th>
<th>Safeguards</th>
</tr>
</thead>
</table>
| 1. Legal independence                                       | Understand and appreciate test, with supports and accommodations | • Legislative presumption of ability to act legally independently with supports and accommodations as may be required  
• Opportunities for appeal and review |
| 2. Continuing Power of Attorney for property                | As in SDA                             | As in SDA, or as may be recommended by LCO |
| 3. Power of attorney for personal care                      | As in SDA                             | As in SDA, or as may be recommended by LCO |
| 4. Statutory Supported Decision-Making Agreements by Appointing Decision-Making Supporter(s) to assist in making personal and property decisions | **Threshold for the creation of a supported decision-making agreement**  
(based on current SDA threshold for appointing a POA for personal, but additional safeguards attached):  
A person may appoint decision-making supporters in a supported decision-making agreement if the person:  
(a) communicates a desire to have the decision-making supporter(s) help make decisions; | Safeguards for consideration  
• Legislated duties of decision-making supporters (see attached proposed duties, powers and liabilities)  
• Appeals to CCB about actions of supporters  
• PGT\(^2\) role in mediating concerns between persons and supporters\(^3\)  
• Consider registration of supported decision-making agreements with PGT  
• Provision for voluntary appointment of monitor, at request of individual or supporters (see attached proposed duties, powers and liabilities of monitors)  
• Supported decision-making agreement describes nature and scope of authority of person and supporters, and manner in which decisions will be made and communicated |

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\(^1\) This table is drawn from a forthcoming paper by Michael Bach and Lana Kerzner, *Fulfilling the Promise: Alternatives to Guardianship in Ontario.*

\(^2\) PGT – refers to the Office of the Public Guardian and Trustee of Ontario. In a revised statutory framework the Office would ideally have a designated authority, or there would be a separate office for administration of supported decision-making provisions.

\(^3\) There is already scope for a mediation role by the PGT in s.88 of the SDA.
<table>
<thead>
<tr>
<th>Way of exercising legal capacity regulated in a reformed SDA</th>
<th>Threshold of Decision Making Capacity</th>
<th>Safeguards</th>
</tr>
</thead>
<tbody>
<tr>
<td>(b) is able to understand whether the decision-making supporter(s) has a genuine concern for the person’s welfare; and (c) appreciates that the person wants the decision-making supporter(s) to assist in making decisions as specified in the supported decision-making agreement</td>
<td>• Process for addressing abuse and neglect</td>
<td></td>
</tr>
<tr>
<td>Where less than three supporters are appointed, all supporters are family members, and/or non-routine affairs (e.g. major property or health care decisions) will be managed under the agreement, additional safeguards to be considered could include:</td>
<td>• 3rd party attestation by affidavit of demonstrated relationship of trust, personal knowledge of the person, and commitment and ability of the supporter to abide by duties • Affidavit by decision-making supporter(s) where acting to execute a non-routine decision, that he/she has abided by the legislated duties of a decision-making supporter • Mandatory appointment of monitor</td>
<td></td>
</tr>
<tr>
<td>5. Statutory supported decision-making appointment by application by decision-making supporters</td>
<td><strong>Threshold for appointment of supported decision-making supporters by application of supporters, where the person in relation to which an application is being made,</strong> a) is not able to exercise legal capacity in ways specified in 1 through 4 above. b) is able to express his/her will and preferences in ways that a least one other person,</td>
<td><strong>Safeguards</strong></td>
</tr>
<tr>
<td></td>
<td>• Application to and approval by the PGT(^5) - Evidence, by affidavit, that threshold criteria are met - Notice of application sent to other family members • Monitor appointed at discretion of PGT • Appeals to CCB about actions of supporters • PGT or designated community agency role in mediating concerns between persons and supporters(^6) • Mandatory registration • Legislated Duties of Supporters and Monitors • Arrangement describes nature and scope of authority of person and supporters, and manner in which decisions will be made and communicated</td>
<td></td>
</tr>
</tbody>
</table>

\(^5\) There is already scope for the PGT to make appointments through a similar process under the SDA. For example, the process for appointing statutory guardians. Also the PGT may appoint volunteers to provide advice and assistance pursuant to s.87 of the SDA.

\(^6\) There is already scope for a mediation role by the PGT in s.88 of the SDA.
Way of exercising legal capacity regulated in a reformed SDA | Threshold of Decision Making Capacity | Safeguards
---|---|---
| • is able to interpret the person’s will and preferences as the basis for developing person-centred plans for the person,\(^4\)  
• is able to apply this understanding to execute particular decisions; and  
• the proposed supporter(s) is in a demonstrated relationship of knowledge, trust and commitment with the person on whose behalf the application is being made. | • Process for addressing abuse and neglect

\(^4\)There is common law recognition of supported decision making arrangements in Ontario in *Gray v. Ontario* [2006] *OJ. No. 266* (Div. Ct.). That decision was concerned in part with how to obtain consent and make community placement decisions for people with developmental disabilities moving from large residential institutions to the community. In the decision, Hackland, J. found that under the alternative course of action provisions of the SDA, supported decision making arrangements to make such decisions could be recognized insofar as the Ontario Ministry of Community and Social Services’ had established person-centred planning principles and processes for making the decisions, which did not require persons involved to be declared incapable or to have substitute decision makers appointed on their behalf under the SDA. See *Gray v. Ontario* [2006] *OJ. No. 266* (Div. Ct.) at para. 47.
Proposed Duties, Powers and Liabilities of Decision-Making Supporters and Monitors

Proposed Duties of Decision-making Supporters

Subject to all applicable legislation, decision-making supporters appointed under statutory provisions for supported decision making would have the duty to:

(a) Act diligently, honestly and in good faith, and in accordance the principles of supported decision making set out in the legislation;
(b) Be guided by the will and preferences of the person;
(c) Act based on their best interpretation of the person’s will and preferences;
(d) Be guided by, and act consistent with, person-centred planning principles and processes;
(e) Be guided by the values, beliefs, wishes, and cultural, spiritual and religious norms and traditions that a person holds;
(f) Despite ss. (b), (c), (d) or (e), act in a manner which respects the person’s dignity of risk, without placing him or her in grave and imminent risk of a situation of serious adverse effects or without failing to address a situation of serious adverse effects;
(g) Invest in and maintain a personal relationship of trust and connection with the person;
(h) Act in accordance with all laws and legislation;
(i) Act in accordance with any relevant agreements or Tribunal orders;
(j) Keep personal information about the person, and his/her affairs, confidential;
(k) Keep records in relation to all aspects of their role;
(l) Treat the person in all respects as a party to the agreement;
(m) Involve supportive family members and friends, as indicated by the person’s will and preferences;
(n) Be accountable solely to the person and not to health care, social services or any other authority or person;

These duties, powers and liabilities are based on a draft statutory framework for supported decision making. See Canadian Association for Community Living, A Statutory Framework for the Right to Legal Capacity and Supported Decision Making: For Application in Provincial/Territorial Jurisdictions in Canada (Toronto: 2014).
Proposed Duties of Monitors

Subject to all applicable legislation, monitors appointed under statutory provisions would have a duty to:

(a) Act diligently, honestly and in good faith, and in accordance with the principles of supported decision making (as would be laid out in legislation);
(b) Respect the roles and relationships of decision-making supporters;
(c) Abide by the values, beliefs, wishes, and cultural, spiritual and religious norms and traditions that a person holds;
(d) In fulfilling the monitoring role specified for them under any particular supported decision making arrangement, carry out their activities with full respect for the duties of decision-making supporters under that arrangement;
(e) Act in accordance with any relevant agreements or court or tribunal orders;
(f) Keep personal information about the person, and his/her affairs, confidential;
(g) Keep records in relation to all aspects of their role;
(h) Exercise the care, diligence and skill of a reasonably prudent person;
(i) Be accountable solely to the person and not to health care, social services or any other authority or person;
(j) Fulfil any other duties as mandated by the relevant Office;

(2) If the monitor has reason to believe the supporter is not complying with their duties and reasonable requests of the monitor, the monitor shall:

(a) notify the person, the decision-making supporter and all other decision-making supporters of the monitor’s reason(s) for the belief;
(b) promptly inform the relevant Office of his or her concerns.

Proposed Powers of Monitors

A monitor named by or appointed for a person would be required to make reasonable efforts to determine whether a decision-making supporter of the person is complying with their duties, and would have the following powers for this purpose:

(1) At any reasonable time, the monitor may visit and speak with the person.
(2) Anyone having custody or control of the person shall not hinder the monitor from visiting or speaking with the person.
(3) If the monitor has reason to believe that a decision-making supporter is not complying with their duties, the monitor may require the decision-making supporter to:
(a) produce accounts and other records required to be kept under the legislation, and
(b) report to the monitor on the matters specified by the monitor;

Proposed Rights of Decision-making Supporters to Information

Notwithstanding any provisions of privacy legislation,

(1) A decision-making supporter of a person has the right to all information and documents to which the person is entitled and that relate to the supporter’s area of authority under the relevant agreement or arrangement;
(2) A person who has custody or control of any information or document referred to in subsection (1) shall, at the supporter(s)’s request, disclose that information to the decision-making supporter and produce that document for inspection and copying by them;
(3) This section is subject to any restriction in the supported decision-making agreement, but the section overrides:
   (a) any claim of confidentiality or privilege, except a claim based on solicitor-client privilege; and
   (b) any restriction in an enactment or the common law about the disclosure or confidentiality of information, except a restriction made pursuant to section 51 (1) of the Canada Evidence Act;

Proposed Liability of Decision-making Supporters

A decision-making supporter would not be liable for injury to or death of the person or for financial damage or loss to the person if the decision-making supporter complies with their legislated duties as specified in the legislation.

Proposed Liability of Monitors

A monitor is not liable for any act or failure to act of a decision-making supporter if the monitor acts in accordance with their legislated duties as specified in the legislation.