

The Right
to **Decide.**

Intellectual Disability and the Right to Decide

Resource #1: Defining 'Legal capacity'
and supported decision-making

*This document is a simple reference sheet with definitions related to the
Right to Decide in Canada.*



The Right to Decide Project – Overview

Legal capacity’ refers to people’s experience of being recognized as persons before the law, exercising rights, accessing the civil and judicial system, entering into contracts, making decisions about their own life and property, and communicating on their own behalf.

In many situations (for example, in the case of guardianship) substitute decision-making removes people’s legal capacity, i.e., the right to direct their own lives, including managing their money, making health-related decisions, and deciding where and with whom they live.

From 2018 to 2023, Community Living Ontario worked with five front line service organizations to understand how people who have an intellectual disability exercise their right to legal capacity – that is, how they make choices and decisions, and the barriers they face in doing so.

Our collaborative work uncovered many enablers of legal capacity, as well as many barriers. This resource is part of a series of documents that address this important issue.

Our local partners in the project were Community Living Dryden & Sioux Lookout, Brockville & District Association for Community Involvement, Durham Family Resources, and Community Living Windsor in partnership with Windsor Essex Brokerage for Personal Supports.

Special thanks to the Institute for Research and Development on Inclusion and Society (IRIS), PooranLaw, and Inclusion Canada.

For more information and resources related to this project, please visit our Right to Decide resource page.

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Definitions: Understanding the language of ‘legal capacity,’ ‘mental capacity,’ ‘will and preference,’ and ‘supported decision-making’

Discussions about decision-making and control among people who have an intellectual disability can be complex and sometimes confusing. It is important to define a few key words and phrases that are commonly used: ‘legal capacity,’ ‘mental capacity,’ ‘will and preference,’ and ‘supported decision-making.’

What is ‘legal capacity’?

‘Legal capacity’ refers to people’s right to be recognized as persons before the law, exercise rights, access the civil and judicial system, enter contracts, make decisions about their own life and property, and speak on their own behalf.

In many situations (e.g., in the case of guardianship), substitute decision-making removes people’s legal capacity, i.e., the right to direct their own lives, including managing their money, making medical decisions, and deciding where and with whom they live.

What is ‘mental capacity’?

In Ontario’s *Substitute Decisions Act*, ‘mental capacity’ is defined as the ability to understand information that is relevant to making a decision, and the ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.

In Ontario, the *Substitute Decisions Act* states that everyone over age eighteen is presumed to be capable of managing their property, and that everyone over age sixteen is presumed to be capable of managing their own personal care.

What is ‘will and preference’?

Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD) refers to the “rights, will and preferences of the person.” While many articles have been written about the definition of ‘will and preference,’ Community Living Ontario is informed by the realities of the past in thinking about these concepts. For example:

- People with disabilities have an overwhelming *preference* not to be sterilized against their *will*.
- People with disabilities have an overwhelming *preference* not to be forced into large, controlled-access facilities against their *will*.
- People with disabilities have an overwhelming *preference* to not be physically touched, abused, or restrained against their *will*.

We know this because people with disabilities are people, and no person wants these things. All people, including disabled people, have an overwhelming *preference* to control their own lives and make their own decisions.

As we know, disabled people have been sterilized against their will, forced into locked residential wards, and physically and sexually abused on a disturbing scale. These experiences inform the way we currently approach decisions about related things like sexual and reproductive health, housing, and medical care. They translate into how we understand people's desire to control and manage their own money, who they choose to provide support and care, who they choose to hang out with, which foods they like to eat, and what substances they want to put into their body.

Decades of experience have taught us that all people can express will and preference, even if they don't use spoken, written, or signed language to communicate. Therefore – and this is a central tenet of the CRPD – all people are presumed to be capable of exercising their legal capacity.

What is 'supported decision-making'?

Supported decision-making includes three main things:

- Help with understanding information, and what options are available to a person.
- Help with choosing between different options, based on an understanding of the positives and negatives of each option.
- Help with communicating a decision that has been made.

While the idea is often seen as applying only to people who have an intellectual disability, supported decision-making is just another way of describing how we all make decisions. For example, when we fill in our tax returns, get our

car fixed, or choose to undergo a health procedure, we turn to experts and the people around us to help make informed decisions.

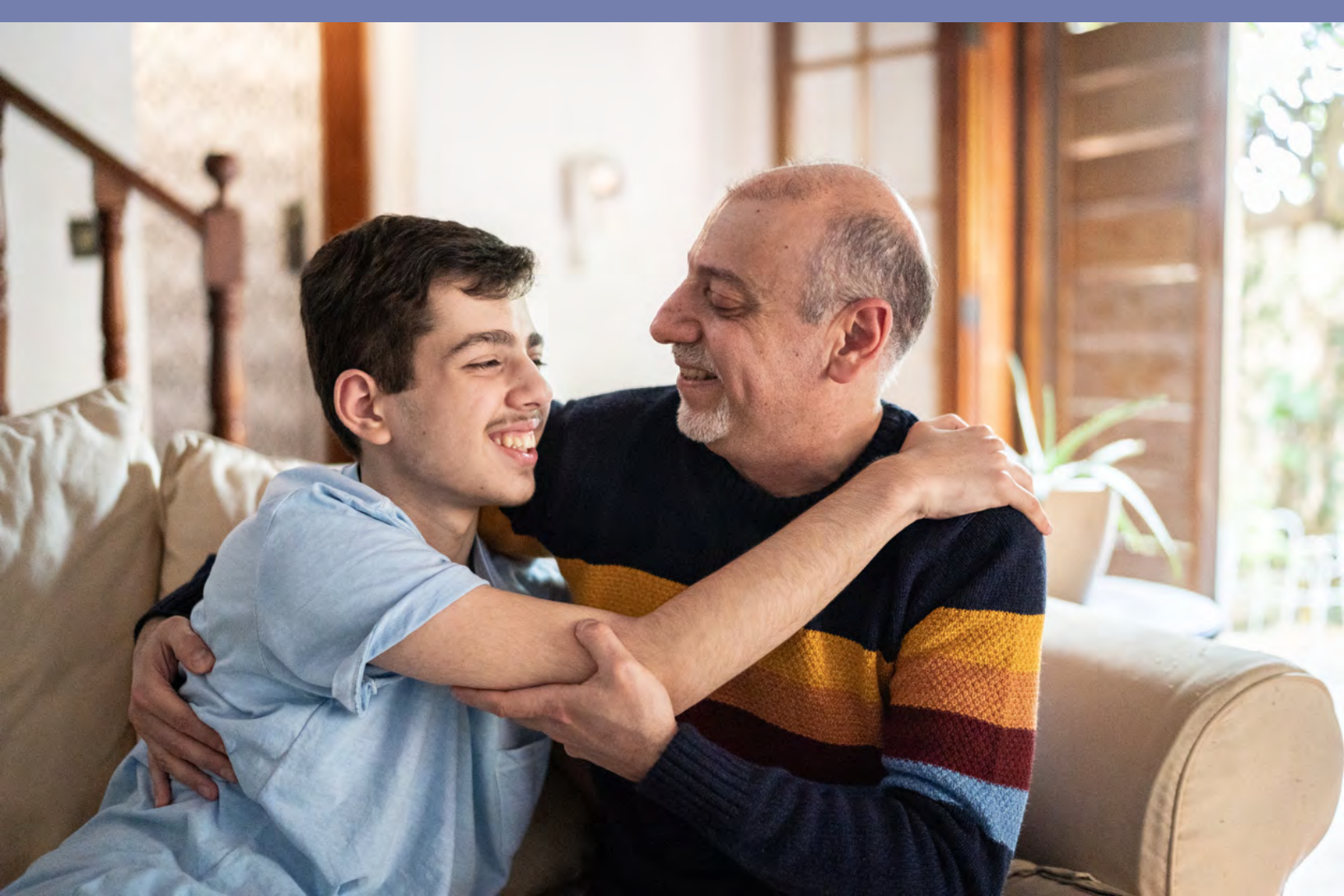
Recently, the Institute for Research and Development on Inclusion and Society (IRIS) put forward the decision-making capability approach to legal capacity, which is helpful in understanding supported decision-making:

“Unlike the usual approaches to recognizing the right to decide, which require that a person must demonstrate a certain level of ability to understand information about a decision and appreciate the consequences of a decision or non-decision, the decision-making capability approach recognizes that we all need support to make decisions.

“The foundational, and universal, decision-making ability in this approach is that a person manifests an intention and expresses their will and preference to achieve it. This is the basis for decision-making in a particular circumstance. As needed, others can, to a lesser or greater extent, bring the understanding and appreciation needed to interpret a person's intentions, will, and preferences and apply them to a decision at hand.

“There are two main ways a person's decision-making capability can be constituted:

- Independent decision-making capability – a person can carry out the understanding and appreciation needed for a valid decision, with only minimal support from others.



- Interdependent decision-making capability – a person requires significant or total support of others in interpreting and translating their will and preferences into a particular decision.”

In simpler terms, this approach revolves around the idea that disabled and non-disabled people alike are able to understand information, and are able to think about the consequences of decisions, with assistance from people that they know and trust, and who know them well. Further, the argument is that this approach is safer for people who have an intellectual disability, and produces greater health and well-being, than substitute decision-making arrangements like guardianship.

For more information and resources related to this project, please visit our [Right to Decide](#) resource page.

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Notes

1. United Nations Department of Economic and Social Affairs. *Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities. Chapter Six: From provisions to practice: implementing the Convention – Legal capacity and supported decision-making.*
<https://www.un.org/development/desa/disabilities/resources/handbook-for-parliamentarians-on-the-convention-on-the-rights-of-persons-with-disabilities/chapter-six-from-provisions-to-practice-implementing-the-convention-5.html>.
2. Inclusion Canada (2020). What is legal capacity?
<https://inclusioncanada.ca/2017/11/15/what-is-legal-capacity>.



Community Living Ontario is a non-profit provincial association that has been advocating with people who have an intellectual disability and their families for 70 years. We proudly work alongside more than 115 local agencies and advocate on behalf of more than 100,000 people across Ontario.

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