

The Right
to **Decide.**

Intellectual Disability and the Right to Decide

Resource 3: Supported Decision-Making
Legislation and Policy in Canada

This document offers a review of legislation and legal frameworks in Canada that recognize supported decision-making, and that support the right to make choices and decisions among people who have an intellectual disability.



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.

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



Supported Decision-Making Legislation and Policy in Canada

Across Canada, there is growing attention to legal capacity, choice, and decision-making among people labelled with intellectual disability. In the past few years, several provinces have considered or implemented legislation and policy meant to reduce substitute decision-making and bolster people's ability to exercise their right to legal capacity.

This document reviews provincial supported decision-making legislation that has been passed in British Columbia, Alberta, Manitoba, Yukon, and New Brunswick, with an eye to lessons learned and provisions that might be implemented in Ontario.

1. The British Columbia *Representation Agreement Act*

Passed into law in 1996, *British Columbia's Representation Agreement Act* was one of the first examples of supported decision-making legislation in Canada, and around the world. The stated purpose of the Act is to:

- a. "Allow adults to arrange in advance how, when and by whom, decisions about their health care or personal care, the routine management of their financial affairs, or other matters will be made if they become incapable of making decisions independently."
- b. "Avoid the need for the court to appoint someone to help adults make decisions, or someone to make decisions for adults, when they are incapable of making decisions independently."

Representation Agreements presume that everyone has mental capacity. Agreements are split into two types: the 'RA9' is for adults who are considered capable of understanding the nature and consequences of the agreement at the time of making it; the 'RA7' is for adults whose mental capability to understand the agreement is in question.

A person can make a representation agreement even if they are considered incapable of making a contract or of managing their own health care, personal care, legal affairs, and financial matters. When assessing an adult's capacity to enter an agreement, the following must be considered:

- Whether they communicate a desire to have a representative make, help make, or stop making decisions.
- Whether they demonstrate choices and preferences and can express feelings of approval or disapproval of others.
- Whether they are aware that "making the representation agreement or changing or revoking any of the provisions means that the representative may make, or stop making, decisions or choices that affect the adult."
- Whether they have a relationship with the representative that is "characterized by trust."¹

Since the *Representation Agreement Act* became law, Alberta, Manitoba, Yukon, and New Brunswick have each enacted rights-informed modes of supported decision-making within provincial legislation.

2. The Alberta Adult Guardianship and Trustee Act

In Alberta, the *Adult Guardianship and Trustee Act* provides for a range of decision-making arrangements, including ‘co-decision-making,’ which can be invoked “if a capacity assessment report indicates that an adult’s capacity to make decisions is significantly impaired, but the adult can make decisions with good support.”

The Act presents co-decision-making (which is limited to ‘personal’ decisions including health care, education, and living situation, but is not applicable to financial decisions) as a less restrictive option to guardianship. (It should be noted that ‘guardianship’ is defined differently in Alberta and Ontario. For example, what Ontario calls ‘guardianship’ is referred to as ‘trusteeship’ in Alberta).²

Additionally, in cases where an adult’s mental capacity is unknown or not in question, they can identify up to three people they have a relationship with to act as decision supporters. This gives supporters the legal authority to access personal information that is needed for a decision (an issue that is often a roadblock to decision support in Ontario), and help the person make and communicate a decision.

The Alberta legislation includes several provisions that, if implemented in Ontario, could help to address consistent barriers faced by people with intellectual and communication disabilities.

For example, it notes that “an adult is entitled to communicate by any means that enables the adult to be understood, and the means by which an adult communicates is not relevant to a determination of whether the adult has the capacity to make a decision.”

The legislation also specifies that “where an adult requires assistance to make a decision or does not have the capacity to make a decision, the adult’s autonomy must be preserved by ensuring that the least restrictive and least intrusive form of assisted or substitute decision-making that is likely to be effective is provided.”

3. The Manitoba Adults Living with an Intellectual Disability Act

In Manitoba, the *Adults Living with an Intellectual Disability Act* includes the following key statements:

- “An adult living with an intellectual disability is presumed to have the capacity to make decisions affecting themselves, unless demonstrated otherwise.”
- “It is recognized that an adult living with an intellectual disability should be encouraged to make their own decisions.”
- “It is recognized that the support network of an adult living with an intellectual disability should be encouraged to assist the adult in making decisions so as to enhance his or her independence and self-determination.”

- “It is recognized that when an adult living with an intellectual disability is assisted in decision making, the assistance should be guided by the adult's wishes, values and beliefs and provided in a manner that respects their rights, privacy and dignity and be the least restrictive and least intrusive form of assistance that is appropriate in the circumstances.”
- “Substitute decision making should be invoked only as a last resort when an adult living with an intellectual disability needs decisions to be made and is unable to make these decisions by himself or herself or with the involvement of members of his or her support network.”³

The province has made significant recent changes to its legal capacity regime. This includes removing responsibility for decisions about substitute decision-making from the courts, and placing that responsibility in the quasi-judicial Office of the Commissioner for Adults Living With an Intellectual Disability. This means that all applications for substitute decision-makers are heard by ‘hearing panels,’ which are available across the province and are composed of relatives of adults living with an intellectual disability, lawyers, and community members.

The Commissioner for Adults Living With an Intellectual Disability must establish a three-person hearing panel for each application for the appointment of a substitute decision-maker, and panel members must “have a substantial connection to the same region of the province as the person for whom the

application is made.” The person with an intellectual disability has a right to attend the panel hearing and to present information; they are also entitled to invite others to present information and make representations. All hearing panel recommendations must be approved by the Commissioner, and all Commissioner decisions can be appealed to the Court of Queen’s Bench.⁵

With respect to hearing panels, the province has stated that “adults living with an intellectual disability should have the opportunity to make their own decisions and direct their own lives, with support if necessary.” It is also made clear that the Commissioner “is appointed to protect the decision-making rights of adults living with an intellectual disability.”⁶

The legislation includes important elements that are meant to protect people against substitute decision-making and the loss of rights this entails. For example, on receiving an application for substitute decision-making, the Commissioner must investigate:

- Whether the person with an intellectual disability for whom the application is made has a support network, and efforts have been made to involve that support network with the person.
- Whether the person seems capable of personal care by themselves or with the involvement of a support network.
- Whether the person seems to need decisions to be made on their behalf with respect to personal care.

If the commissioner determines that insufficient efforts have been made to involve a support network, or that the person does not in fact need someone else to make decisions for them, they can dismiss the application. They can also instruct Ministry staff to take steps to involve a support network with the person, and to develop or review an individual plan for the person.⁷

In cases where the Commissioner appoints a substitute decision-maker for property or personal care, the Act includes several provisions that may help to reduce the power of any one person to have control over another person's life. For example:

- Substitute decision-maker appointments are effective for a maximum of five years.
- The Commissioner may appoint two or more people to act as substitute decision-makers, and may require them to act jointly.
- Guardians of both property and personal care may be empowered to make decisions for all areas, or only some areas. They may also be given limited powers to act in specific areas.
- Property-related powers are separated into 17 separate areas, including to receive, deposit, and invest money, and to purchase, sell, dispose of, encumber, or transfer personal property.

Importantly, the Act does not apply to people in psychiatric institutions, nor to people whose disability manifested after 18 years of age. As the name makes clear, it only applies to people

diagnosed with an intellectual disability. This could be a useful example for Ontario, where supported decision-making legislation and policy have faltered, in part, because of disagreements between stakeholders in the intellectual disability, mental health, and elder care sectors.

The Manitoba legislation also includes provisions for “assisted decision-making,” defined as “the process whereby an adult living with an intellectual disability is enabled to make and communicate decisions with respect to their personal care or property and in which advice, support or assistance is provided to the adult by members of the adult's support network.” The Act notes that “assisted decision-making by an adult living with an intellectual disability with members of their support network should be respected and recognized as an important means of enhancing the adult's self-determination, independence and dignity.”

As part of its review of the previous version of the legislation, the provincial government funded the *Vulnerable Persons Living with a Mental Disability Task Force*, which produced an exhaustive list of recommendations that included comprehensive training for decision supporters and substantial oversight provisions for substitute decision-makers.

The province has also funded the *Community Based Assisted Decision-Making Pilot Project*, which has objectives including “developing peer support networks for families, increasing capacity for the use of support networks, motivating the use of community-based assisted decision-makers and assisted decision-making, and reducing reliance on the Public Guardian and Trustee.”

4. The Yukon Adult Protection and Decision Making Act

In Yukon, the *Adult Protection and Decision Making Act* includes provisions on supported decision-making that are clearly informed by a human rights model of disability. The territorial government's resource document on the Act notes:

“We all need help to make some decisions. We might talk with a friend or family member before choosing to have an operation. Or we might talk to a mechanic before we buy a car. We all rely on some support for some decisions.”⁹

As with other Canadian jurisdictions, the Act states that “until the contrary is demonstrated, every adult is presumed to be capable of managing their affairs.” However, unlike some other jurisdictions, the Act also accounts for different communication modes, clarifying that “an adult's way of communicating with others is not grounds for deciding that they are incapable of managing their affairs.”¹⁰

Similar to recent changes in New Brunswick (discussed below), the Yukon legislation provides for a continuum of decision supports. These are separated as follows:

Supported Decision-making Agreements

“enable friends and relatives to help adults who do not need guardianship and are substantially able to manage their affairs, but whose ability to make or communicate decisions with respect to some or all of those affairs is impaired.”

These signed agreements also give decision supporters (known as “associate

decision-makers”) legal status to be present and participate when a person is making a decision or obtaining relevant information. Decisions made with associate decision-makers are recognized as the decision of the person supported.

Representation Agreements “enable an adult to agree to allow two or more trusted friends or relatives to make a limited range of daily living decisions regarding the adult's personal or financial affairs for and on behalf of the adult,” in cases where the person supported “does not need guardianship” and “is capable of managing most or all of their affairs under some circumstances but has difficulty doing so under other circumstances.”

In the case of property-related decisions, representatives are fiduciaries, meaning that decisions must benefit the person supported rather than the representative. Decisions made with or by representatives are recognized as the decisions of the person supported.

Court-appointed Guardians make decisions, according to the Act, “for adults who are incapable of managing all or part of their affairs.” Guardians are responsible “to manage an adult's affairs on the adult's behalf and to care for, assist, and protect the adult during the period specified in the application.”

The legislation states that guardians may only be appointed if “forms of available support and assistance less intrusive than guardianship have been tried or carefully considered.” Further, guardianships may be partial, giving only as much authority as

“will result in the most effective, but the least restrictive and intrusive, form of assistance and support for the adult.”

As with associate decision-makers and representatives, decisions made by guardians are recognized as the decisions of the person under guardianship.¹¹

5. The New Brunswick *Supported Decision-Making and Representation Act*

The New Brunswick Legislative Assembly passed the *Supported Decision-Making and Representation Act* in December 2022. The Act presumes capacity, and states that a person has the capacity to make a decision if they are able to “understand the information that is relevant to the decision,” and “appreciate the reasonably foreseeable consequences of the decision... with the assistance that is available.” It acknowledges that capacity can change over time, and that people have the right to “make a decision that another person would consider risky or unwise.”¹²

In the new legislation, decision supporters and decision makers are separated into three categories:

Decision-making Assistants are appointed by people who want assistance making decisions, via a ‘decision-making assistance authorization.’ Such authorizations permit people to (a) obtain information with or on behalf of an ‘assisted person’ and (b) communicate a decision with or on behalf of that person. They may also “provide assistance to the assisted person in making a decision but shall not make a decision on behalf of the assisted person.”

Decision-making Supporters are people who apply to the court to be appointed as such for a ‘supported person.’ They must be in a relationship “characterized by trust” with the supported person, whose views must also be considered. They have the power to engage in a “supported decision-making process” (which is briefly elaborated in the Act) with respect to personal care and financial matters. They “shall not make a decision on behalf of the supported person.”

Representatives are people who apply to the court to be appointed as such, and have powers that are quite similar to guardians in Ontario. They have the power to make decisions on behalf of people who do “not have the capacity to make all the decisions that are likely to arise in relation to all or some of their” personal care matters and/or financial matters.

6. Three current Canadian approaches to supported decision-making

Nova Scotia is another jurisdiction that has recently reviewed its substitute decision-making legislation.¹³ In its report on that review, the Nova Scotia Department of Justice offered a helpful overview of approaches to supported decision-making in Canada:

- a. Supported decision-making agreements, which allow people to “appoint one or more supporters to help them make and/or communicate decisions. The supporter has legal status to help the person, but the decision-making authority stays with the person.” These approaches are available in Alberta, Yukon, and Manitoba (and in yet-to-be proclaimed form in PEI).



- b. Representation agreements, which allow people to appoint a representative to help them make decisions, and also to make decisions on their behalf. While most well known in BC, they are also available in Yukon.
- c. Co-decision-making arrangements, made by court order, which “permits and requires the adult and the co-decision-maker to make decisions jointly.” This approach is available in Saskatchewan and Alberta.¹⁴

While Ontario’s Substitute Decisions Act touches on these kinds of approaches, our findings from the Right to Decide project show that substitute decision-making is too often the default in our province.

Other jurisdictions have made advances toward meeting the legal capacity-related requirements set out in the Convention on the Rights of Persons with Disabilities, and in Charter-related jurisprudence. When viewed in this context, as well as in light of recent advances in the United States,¹⁵ it appears that Ontario has fallen behind in recognizing and supporting the legal capacity rights of people with intellectual disabilities and other cognitive impairments.

For more information, including our recommendations for change, please visit our Right to Decide resource page.



Notes

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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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