**Submission to the United Nations Committee on the Rights of Persons with Disabilities**

**17th Session, March 20 – April 12, 2017**

Canada’s compliance with Article 12 of the Convention on the Rights of Persons with Disabilities

# Introduction

This report is submitted by the Centre for Human Rights and Legal Pluralism at McGill University[[1]](#footnote-1) (“the Centre”) in advance of the 17th session of the Committee on the Rights of Persons with Disabilities (“the Committee”), taking place from March 20 to April 17, 2017. The report examines the current state of protection of the right to legal capacity for persons with disabilities in Canada pursuant to Article 12 of the Convention on the Rights of Persons with Disabilities (“CRPD”).[[2]](#footnote-2)

At paragraph 18 of its List of Issues for Canada, the Committee asks:

Please inform the Committee about the number of adult persons with disabilities, at the federal, provincial and territorial levels, who are under guardianship or a similar regime of substituted decision-making. Since 2010, what kinds of decisions have been made on behalf of persons with disabilities (e.g., medical treatment, financial affairs, housing and contracts)? How many persons with disabilities receive supported decision-making services? Have there been any decreases in substitute decision-making since 2010? Are there any innovative projects or research planned in this regard?

Part I of this report will review the scope of a state party’s obligations under Article 12. Part II will address Canada’s reservation to Article 12. Part III will review existing practices with respect to substituted and supported decision-making regimes in Canada at the federal and provincial/territorial levels. Part IV sets out the Centre’s recommendations to guide Canada’s compliance with the CRPD.

# The Scope of a State Party’s Obligations under Article 12

Article 12(1) of the CRDP provides that “persons with disabilities have the right to recognition everywhere as persons before the law.” As highlighted by the Committee, the recognition of legal personality is premised on the foundational principles that underlie the CRDP as a whole and is reflected in the provisions of other international human rights conventions,[[3]](#footnote-3) including article 4(2) of the *International Covenant on Civil and Political Rights*.[[4]](#footnote-4)

Article 12 obliges State Parties to ensure that persons with disabilities enjoy legal capacity on an equal basis, including by taking appropriate measures to provide persons with disabilities with any support that they may require in the exercise of their legal capacity.[[5]](#footnote-5) Legal capacity in this context refers to the capacity of an individual to hold rights and be entitled to their protection by the legal system as well as to be recognized as an agent “with the power to engage in transactions and create, modify or end legal relationships.”[[6]](#footnote-6) As such, the recognition of legal capacity is inextricably linked to the enjoyment of many other human rights protected by the CRPD.[[7]](#footnote-7) Without equal recognition as a person before the law, the ability to assert, exercise and enforce many other rights provided for in the CRDP is significantly compromised.[[8]](#footnote-8)

Adopted by the Committee in April 2014, General Comment No 1 further clarifies the full scope of a State Party’s obligations under Article 12 with respect to the provision of supported decision-making. Supported decision-making can be understood as a regime that provides individuals with disabilities with the support they require to exercise their legal capacity to the fullest extent possible in accordance with the principles of inherent dignity and autonomy.[[9]](#footnote-9) To begin with, General Comment no 1 notes that “there has been a general failure to understand that the human rights-based model of disability implies **a shift from the substitute decision-making paradigm to one that is based on supported decision-making**.”[[10]](#footnote-10) Paragraph 28 of General Comment no 1 thus provides that:

States parties’ obligation to replace substitute decision-making regimes by supported decision-making **requires both the abolition of substitute decision-making regimes and the development of supported decision-making alternatives**. The development of supported decision-making systems in parallel with the maintenance of substitute decision-making regimes is not sufficient to comply with Article 12 of the Convention.[[11]](#footnote-11)

Further, General Comment no 1 explains that supported decision-making must not be used as justification for limiting other rights of persons with disabilities.[[12]](#footnote-12) Thus, Article 12 of the CRPD requires that States “holistically examine all areas of law”[[13]](#footnote-13) and abolish all provisions and practices that are discriminatory and deny persons with disabilities the right to make legally effective decisions.[[14]](#footnote-14)

Finally, General Comment no 1 emphasizes the absolute character of the right to support in the exercise of legal capacity. It notes that the need for such support in making decisions “shall not be used to question a person’s legal capacity”[[15]](#footnote-15) and explains that “the right to support in the exercise of legal capacity shall not be limited by the claim of disproportionate burden.”[[16]](#footnote-16)

# Canada’s Reservation to Article 12

Upon ratifying the CRPD in 2010, Canada issued both a declaration and reservation with regard to Article 12, noting its interpretation of Article 12 as allowing supported decision-making systems[[17]](#footnote-17) and reserving its right to use such arrangements “in appropriate circumstances and in accordance with the law.”[[18]](#footnote-18) In light of the authoritative interpretation of Article 12 provided in General Comment no 1 discussed above, we submit that Canada’s ongoing use of substituted decision-making regimes does not affirm the spirit of the CRDP, goes against the clear preference under a right-based model of disability for supported decision-making systems, and creates additional barriers to the full exercise of the rights enshrined in Article 12 of the Convention.

In addition, it is worth noting that this position is also supported by a number of Canadian decisions regarding the provision of supported decision-making in judicial proceedings. In *Clark v. Clark,* the court held that the plaintiff suffering from cerebral palsy was “mentally competent” despite his intellectual disability and inability to speak only through pictures.[[19]](#footnote-19) In *Koch* *(Re)*, the need for supported decision-making was recognized and that “mental capacity exists if the appellant is able to carry out her decisions with the help of others.”[[20]](#footnote-20) In relation to legal capacity, the Supreme Court of Canada has clearly and explicitly recognized the autonomy of people with disabilities in its statement that “[u]nwarranted findings of incapacity severely infringe upon a person’s right to self-determination.”[[21]](#footnote-21) The Court also advanced the value to be placed in autonomous and minimizing state intervention in decision-making in relation to incapable people in *Nova Scotia (Minister of Health) v. J.J*.[[22]](#footnote-22)

# Substitute and supported decision-making in Canada

In a federal system like Canada’s, the full and effective implementation of the CRDP requires coordinated actions by the federal, provincial, and territorial governments. Indeed, provincial and territorial governments each regulate provisions related to legal capacity and substitute decision-making in a range of fields such as health, education, and civil capacity. In what follows, we review current practices with respect to substitute and supported decision-making at the federal level as well as in several Canadian provinces.

## Federal Level

There are numerous provisions at the federal level that regulate or affect legal capacity, such as the *Income Tax Act*,*[[23]](#footnote-23)* the *Canada Revenue Agency Act*,[[24]](#footnote-24) the *Registered Disability Savings Plan*,[[25]](#footnote-25) and the *Privacy Act*.[[26]](#footnote-26) A number of these provisions require “contractual competence,” without an explicit requirement to provide accommodations or support for those who need it. Canadian law has generally required that an individual possess a requisite level of decision-making ability without which substitute decision-maker make decisions instead.[[27]](#footnote-27)

One notable example of the continued use of substituted decision-making in Canadian federal law concerns the Registered Disability Savings Plan (RDSP).[[28]](#footnote-28) The RDSP is a savings vehicle created by the federal government to assist persons with disabilities with long‐term financial security. However, a financial institution may decline to enter into an RDSP arrangement with a beneficiary who does not meet the common law test of capacity to enter into a contract. An adult or another interested person, such as a family member, may also believe that an adult has diminished capacity and wish to appoint a qualifying person before approaching a financial institution.  As a result, adults can only open an RDSP if they are “contractually competent”.[[29]](#footnote-29)

In many provinces the only alternative has been Adult Guardianship because individuals without legal capacity are not able to appoint Powers of Attorney. Adult guardianship is slightly different in each province because each province has its own legislation.  The federal government reported in the Economic Action Plan 2012 that many of these processes require “the individual to be declared legally incompetent and have someone else named as their legal guardian”.[[30]](#footnote-30) Specific concerns included that such processes “can involve a considerable amount of time and expense” and “may have significant repercussions for the individual”.[[31]](#footnote-31) However, the federal government stated that questions of legal representation for the RDSP are a matter of provincial and territorial responsibility. It suggested that the provinces and territories develop “more appropriate, long‐term solutions to address RDSP legal representation issues”.[[32]](#footnote-32) It also encouraged some provinces and territories, such as Ontario (with substituted decision-making regime), to “examine whether streamlined processes would be suitable for their jurisdiction”[[33]](#footnote-33) These decisions open the doors for reform in many provinces still maintaining a substituted decision-making regime.[[34]](#footnote-34)

While Canada has made progress at the federal level by recognizing that supported decision-making should be the dominant form of assistance,[[35]](#footnote-35) the absence of alternative supported decision-making in many areas of federal law undermines the full recognition of the legal capacity of persons with disabilities in Canada.

## Provincial Level

While supported decision-making and co-decision-making are each given some status in Canadian laws, substitute decision-making regimes, both in the form of guardianship and planning documents, have been most widely used and developed across all jurisdictions in Canada. Across jurisdictions there are a wide variety of laws regulating legal capacity, and tests employed to determine requisite mental capacity. In fact, it has been stated that “[t]here are as many different operational definitions of mental (in)capacity as there are jurisdictions.”[[36]](#footnote-36)

Supported and co-decision-making have been introduced only relatively recently and are limited in their application.  For example, **Manitoba**’s recognition of supported decision-making in the Vulnerable Persons Living with a Mental Disability Act applies only to people with intellectual disabilities, **British Columbia’s** Representation Agreement Act only allows for supported decision-making arrangements with respect to some aspects of property management, and **Alberta**’s Adult Guardianship and Trusteeship Act’s provisions for supported and co decision-making apply only to personal and not property decisions. Some other Province specific particularities are:

Alberta: Under the *Personal Directives Act*,[[37]](#footnote-37) individuals may choose a representative to make personal, non-financial decisions on their behalf. The *Adult Guardianship and Trusteeship Act[[38]](#footnote-38)* provide options and safeguards to protect vulnerable adults who require support in making decisions.

Manitoba: *Vulnerable Persons Living with a Mental Disability Act[[39]](#footnote-39)* supports and regulates both supported and substitute decision-making for adults with a mental disability.

Nunavut: The *Guardianship and Trusteeship Act[[40]](#footnote-40)* 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*,[[41]](#footnote-41) 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.

Yukon: The Adult Protection and Decision-Making Act provide 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[[42]](#footnote-42)* and the *Care Consent Act*,[[43]](#footnote-43) 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.

We provide further details on specific arrangements pertaining to guardianship in three large provinces of Canada: British Columbia, Quebec and Ontario.

### British Columbia

**Supported Decision-Making**

British Columbia’s statutory framework respects the equal recognition before the law requirement of Article 12 and is an ethical decision-making framework. The *Representation Agreement Act[[44]](#footnote-44)* was created to provide an alternative to adult guardianship. The representative keeps the focus clearly on the individual desires, beliefs and values out of recognition of the fact that self-determination is every person’s reason for being and consequently the guiding principle of the statute.

A representative does not take the place of the individual, they act as a bridge to help third parties get to know and interact with the individual, which in turn provides opportunity for the individual to demonstrate and develop new capacities. The representative is governed by a set of duties, supported by the presence of others and must follow protocol for making and signing Agreements. While the Government of British Columbia amended the *Representation Agreement Act* to increase accessibility to representation agreements, it also maintained related safeguards, such as requiring a monitor to be appointed in certain circumstances.

Section7 of the *Representation Act* can cover all areas of life. The standard powers are minor and major health care, personal care, legal affairs and routine management of financial affairs. If finances are included, an extra safeguard is required. This safeguard can be met by naming a monitor or at least two representatives to act jointly for finances.

### Quebec

The *Civil Code of Quebec* provides different protective measures for people who are declared in incapable. These measures differ according to the seriousness of the incapacity and whether it is permanent or temporary in nature. As such, Quebec is midway between substituted and supported decision making. While the two first forms of protective measures respects the equal recognition before the law requirement of Article 12, the curatorship measure does not recognise the person declared incapable as a legal person.

1. **Advisor to a person of Full Age**

This form of protection is adapted to the needs of a person suffering from mild intellectual impairment or a temporary disability caused by an illness or accident. This measure respects Article 12 of the CRPD because the person remains independent and continues to exercise their civil rights, including managing their income and voting. The advisor is only appointed to assist them with certain things, usually in relation to managing their affairs.[[45]](#footnote-45)

1. **Tutorship**

This form of protection proposed for a person who is partially or temporarily incapacitated. A person declared incapable benefiting from tutorship can perform certain actions on their own (for example, deciding how to spend their income) or be assisted by their tutor. The tutor represents them when it comes to making other decisions. The scope of a tutor’s responsibility is determined by the court, following the recommendation of a meeting of family and friends or in conformity with the Civil Code of Quebec. With this form of. A tutor is responsible for looking after the person, or managing their property.[[46]](#footnote-46)

1. **Curatorship**

Curatorshipis applicable when a person is totally and permanently incapable of caring for themselves and managing their affairs. A curator to a person of full age is appointed by the court following the recommendation of a meeting of family and friends. A curator represents the person declared incapable with respect to all of their actions covered under civil law.[[47]](#footnote-47)

### Ontario

### Continuation of Substituted Decision-Making

Substituted decision-making is in place in Canada’s province with the largest population: Ontario.[[48]](#footnote-48) Ontario’s statutory framework for legal capacity, decision-making and guardianship, constitutes two main statutes: the *Substitute Decisions Act* (SDA)[[49]](#footnote-49), which addresses decisions related to property management and personal care, and identifies the appointment processes and the duties of guardians and those acting under powers of attorney (POA); and the *Health Care Consent Act*,[[50]](#footnote-50) 1996 (HCCA), which addresses consent to treatment, admission to long-term care homes and personal assistance services for residents of long-term care homes. In addition, the *Mental Health Act* (MHA)[[51]](#footnote-51) addresses examinations of capacity to manage property upon admission to or discharge from a psychiatric facility.

The SDA contains several inconsistencies with Article 12 of the CRPD:

* **Broad discretion to “capacity assessors”**: under the SDA any person may request that a “capacity assessor”, a certified professional, perform an assessment to determine whether the adult should have a guardian; if a person who is capable is labeled as incapable their rights will be severely violated without just cause.[[52]](#footnote-52) **Unclear guidance**: the SDA does not specify that an assessment may not be requested merely because a person is afflicted with a disability. Further, the provision does not suggest what factors should be used to guide a person’s decision to request such an assessment.
* **Eroding independence**: attention must be devoted to ensuring that the extents of incapacity as well as existing capacities are appreciated and balanced so that a person can be independent to the greatest extent possible. The SDA does not account for situations where a person’s decision-making capacity fluctuates on a day-to-day and decision-by-decision basis due to the nature of the specific disability or medical condition.[[53]](#footnote-53)
* **Exploitation**: expropriation of money for purposes that do not benefit the patient and are often clearly fraudulent. This type of exploitation can be perpetrated by a substitute decision-maker, an employee of the Office of the Public Guardian and Trustee, a lawyer representing the client or an employee in an institution. Other types of exploitation can include abuse and neglect.Reports of exploitation as a result of section 40(1), which allows a guardian to take “compensation” from the person with disabilities on a “monthly, quarterly or [annual]” basis, suggest that the SDA does not provide for the appropriate “safeguards to prevent abuse” mandated by the CRPD*.[[54]](#footnote-54)*
* **Failure to receive "necessary care" versus "personal autonomy": t**here is a conflict of interest in that the community's reasons for wanting a course of action to be imposed on a person are not necessarily the same as that person's, yet he/she is the one who will be required to make the change.

The SDA does not explicitly refer to supported decision-making as an alternative. *“*Canada’s reservation to Article 12 of the CRPD allows Ontario to continue using the guardianship system set out under the SDA, a statute drafted almost twenty years ago, and avoid the obligations that would be imposed by Article 12(4) to establish appropriate safeguards against abuse.”[[55]](#footnote-55)

Further Ontario’s *Substitute Decisions Act* (SDA), the Office of the Public Guardian and Trustee’s “Guidelines for Conducting Assessments of Capacity” states the following:

In its legislation, the Government of Ontario has codified the belief that mental capacity is, at its core, a cognitive function. The SDA operationally defines capacity as the ability to understand information relevant to making a decision and appreciate the reasonably foreseeable consequences of a decision or lack of decision.[[56]](#footnote-56)

Thus, having the status of being considered legally capable is determined based on a person’s own ability to understand information and assess consequences of making a decision. Legal capacity, in this sense, is attached to the attributes of a person. In contrast, legal capacity as it is used in the CRPD is a social and legal status accorded independent of a person’s particular capabilities. Rather, it reflects an individual’s right to make decisions and have those decisions respected. As such, a social model approach to defining legal capacity focuses not on the individual’s limitations, but rather on the social barriers a person faces in formulating and executing individual decisions, and the supports and accommodations they may require given their particular decision-making abilities.

Additionally, Ontario’s *Human Rights Code*, which guarantees to every person having legal capacity a right to contract on equal terms without discrimination, also appears to rest on the traditional assumptions of capacity law that some persons are without legal capacity.[[57]](#footnote-57)

Many Canadian court judgments, highlighted below, in principle, are consistent with Article 12 of the CRPD in that they recognize that persons with disabilities who are unable to communicate their decisions in the same way as people without disabilities should not be deprived of legal capacity, and instead should be given the appropriate supports to exercise their rights. *[[58]](#footnote-58)*

Though these judgements comply with the principles of the CRPD, policy changes and legal reform is necessary to recognize the legal capacity of persons with disability. In the 2009-10 fiscal year, 52 per cent of all applications to the Human Rights Tribunal of Ontario cited disability as a ground,[[59]](#footnote-59) which demonstrates that laws such as the SDA, and the *Ontario Health Care Consent Act,* which follow a substitute decision-making regime, are problematic in terms of their effect on persons with disabilities, whether because they incorporate discriminatory attitudes, or because they fail to take into account the realities of existence for persons with disabilities.

# Recommendations

1. ***Withdrawal of Canada’s Reservation of Article 12***

In line with the recommendation of the Committee as well as emerging Canadian jurisprudence, we urge Canada to withdraw its reservation to Article 12 and give full effect to the rights enshrined in the CRPD.

As Canada notes at paragraph 14 of its First Report: “The reservation to Article 12 preserves Canada’s ability to continue to use substitute decision-making arrangements in appropriate circumstances and subject to appropriate and effective safeguards”.[[60]](#footnote-60) It is of utmost importance that Canada complies with the entirety of Article 12 to allow persons with disabilities to access the support they require to exercise their legal capacity and thus receive protection as equal persons under the law.

1. ***Realization of the Right to Legal Capacity for Persons with Disabilities in Federal Legislation***

The Federal Government should take leadership to protect the legal capacity of people with intellectual disabilities by: (a) Amending the Income Tax Act and other Federal legislation as needed to recognize formal and informal supported decision‐making mechanisms. (b) Recognizing supported decision-making as sufficient authorization to open a Registered Disability Savings Plan. (c) Working with the disability community and the Canadian Bankers’ Association to issue a progressive statement about legal capacity.[[61]](#footnote-61)

1. ***Creation of an Inter-Provincial Task Force***

The Federal and Provincial/Territorial Governments should work together to develop the legislative and policy framework to ensure people have access to supports they require to exercise their legal capacity, including through the provision of supported decision-making arrangements. We recommend that provinces and territories should work together to harmonize their policies and legislations with Article 12. We propose that an Inter-Provincial Task Force be created to undertake a comprehensive review of the divergent legal and policy regimes across Canada with the aim of making them comply with Article 12. In addition to identifying specific goals for provinces and territories, the Task-Force should also put in a place a monitoring mechanism, to ensure the realization of them in a time bound manner. It is critical that the Task Force represents all stakeholders concerned with Article 12.

1. ***Creation of a Provincial/Territorial, and National Ombudsperson Offices for People with Disabilities***

The absence of a centralised agency responsible to receive complaints with regards to discrimination people with disabilities suffer perpetuates the issue further. There is a need for greater coordination of policy and advocacy for people with disabilities throughout Canada. **We propose the creation of the positions of ombudspersons in every province and territory, which in our view would help advance the equal recognition of people with disabilities before the law.**  Sweden established the personal ombudsperson support model, particularly to address the needs of, people with psychosocial disabilities, who encountered numerous barriers in accessing services and entitlements, due to lack of coordination among different agencies.[[62]](#footnote-62)

Canada with its sustained and demonstrated commitment to protection and promotion of human rights at home and abroad, must urgently address the issue of the lack of compliance with Article 12.The three specific recommendations we outline in this report provide guidance to the government to move in the right direction.

1. For more information about the Centre for Human Rights and Legal Pluralism, please visit our website: <http://www.mcgill.ca/humanrights/>. [↑](#footnote-ref-1)
2. Convention on the Rights of Persons with Disabilities, 30 March 2007, UN GAOR, 61st Sess, Annex I, UN Doc A/RES/61/106, 46 ILM 443 [CRPD], art 12. [↑](#footnote-ref-2)
3. Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal Recognition Before the Law (April 2014) UN Doc. No. CRPD/C/GC/1, adopted at the 11th Session, para 4-5 [General Comment no 1]. [↑](#footnote-ref-3)
4. UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 [↑](#footnote-ref-4)
5. CRDP, article 12, paras 2 and 3. [↑](#footnote-ref-5)
6. General Comment no 1, para. 12. [↑](#footnote-ref-6)
7. *ibid* at para 1 (noting that “[e]quality before the law is a basic general principle of human rights protection and is indispensable for the exercise of other human rights.”) [↑](#footnote-ref-7)
8. *ibid*  at para 31. [↑](#footnote-ref-8)
9. United Nations Office of the High Commissioner for Human Rights, From Exclusion to Equality: Realizing the Rights of Individuals with Disabilities (New York, NY: Division for Social Policy and Developmenr, 2007) at 89-90. [↑](#footnote-ref-9)
10. ibid. para 3. [↑](#footnote-ref-10)
11. *ibid* at para 28. [↑](#footnote-ref-11)
12. *ibid* at para 29(f). [↑](#footnote-ref-12)
13. *ibid* at para 7. [↑](#footnote-ref-13)
14. *ibid* at para 25. [↑](#footnote-ref-14)
15. *Ibid* at para. 33. [↑](#footnote-ref-15)
16. *Ibid* at para. 34. [↑](#footnote-ref-16)
17. Amita Dhanda, “Legal Capacity in the Disability Rights CRPD: Stranglehold of the Past or Lodestar for the Future?” (2007) 34:2 Syracuse J. Int’l L. & Com. 429 at 460-461. [↑](#footnote-ref-17)
18. Online: United Nations treaties series: <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en#EndDec> [last accessed Feb 23 2017] [↑](#footnote-ref-18)
19. *Clark v Clark*, (1983), 40 OR (2d) 383 (Co Ct). [↑](#footnote-ref-19)
20. *Koch (Re),* (1997), 33 OR (3d) 485 (Gen Div) at 521 [↑](#footnote-ref-20)
21. *Starson v.* Swayze, [2003] 1 S.C.R. 722, 2003 SCC 32 at para 75. [↑](#footnote-ref-21)
22. Nova Scotia (Minister of Health) *v.* J.J., 2005 1 S.C.R. 177, 2005 SCC 12. [↑](#footnote-ref-22)
23. Income Tax Act, R.S.C., 1985, c. 1 (5th Supp.) [↑](#footnote-ref-23)
24. #  Canada Revenue Agency Act (S.C. 1999, c. 17)

 [↑](#footnote-ref-24)
25. Registered Disability Savings Plan, website: <http://www.cra-arc.gc.ca/rdsp/> [accessed 28 February 2017] [↑](#footnote-ref-25)
26. Privacy Act, RSC 1985, c P-21. [↑](#footnote-ref-26)
27. Canadian Association for Community Living, Position on Legal Capacity, June 2010, online: <http://www.cacl.ca/sites/default/files/CACL%20Policy%20Position%20legal%20capacity_0.pdf> [↑](#footnote-ref-27)
28. Registered Disability Savings Plan : <http://www.cra-arc.gc.ca/rdsp/> [↑](#footnote-ref-28)
29. RDSP website: <http://rdspresource.ca/index.php/our-policy-work/> [accessed on Feb 23 2017]. [↑](#footnote-ref-29)
30. Government of Canada, Jobs, Growth and Long-Term Prosperity: Economic Action Plan 2012 (Ottawa: March 29, 2012) [Government of Canada, Economic Action Plan], note 6 383. [↑](#footnote-ref-30)
31. *Ibid.* [↑](#footnote-ref-31)
32. *Ibid* at note 6, 182-183.     [↑](#footnote-ref-32)
33. *Ibid.* [↑](#footnote-ref-33)
34. Law Commission of Ontario, Capacity of Adults with Mental Disabilities and the Federal RDSP: Discussion Paper (Toronto: October 2013) at p.130. [LCO] [↑](#footnote-ref-34)
35. Nicholas Caivano , "Conceptualizing Capacity: Interpreting Canada’s Qualified Ratification of Article 12 of the UN Disability Rights Convention", (2014) 4:1 online: UWO J Leg Stud 3 <<http://ir.lib.uwo.ca/uwojls/vol4/iss1/3>>.at p.21. [↑](#footnote-ref-35)
36. Capacity Assessment Office, “Guidelines for Conducting Assessments of Capacity” (May 2005) at II.1, online: Ministry of the Attorney General of Ontario <http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacity/2005-05/guide-0505.pdf> [↑](#footnote-ref-36)
37. Personal Directives Regulation, Alta Reg 99/2008, [↑](#footnote-ref-37)
38. Adult Guardianship and Trusteeship Act, SA 2008, c A-4.2. [↑](#footnote-ref-38)
39. The Vulnerable Persons Living with a Mental Disability Act, C.C.S.M. c. V90, ss. 46, 81. [↑](#footnote-ref-39)
40. Guardianship and Trusteeship Act, SNWT (Nu) 1994, c 29. [↑](#footnote-ref-40)
41. *ibid.* [↑](#footnote-ref-41)
42. Mental Health Act, RSY 2002, c 150. [↑](#footnote-ref-42)
43. Care Consent Act, SY 2003, c 21, Sch B. [↑](#footnote-ref-43)
44. Representation Agreement Regulation, BC Reg 199/2001 [↑](#footnote-ref-44)
45. *Civil Code of Quebec*, arts 291-4. [↑](#footnote-ref-45)
46. *Civil Code of Quebec*, arts 285-90. [↑](#footnote-ref-46)
47. *Civil Code of Quebec*, arts 281-4. [↑](#footnote-ref-47)
48. http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo02a-eng.htm [↑](#footnote-ref-48)
49. *Substitute Decisions Act*. SO 1992, C 30. [↑](#footnote-ref-49)
50. Health Care Consent Act, 1996, SO 1996, c 2, Sch A [↑](#footnote-ref-50)
51. #  Mental Health Act, R.S.O. 1990, c. M.7

 [↑](#footnote-ref-51)
52. *LCO, supra* note 35, at p.33-34. [↑](#footnote-ref-52)
53. *Supra* note 49. [↑](#footnote-ref-53)
54. Susan Pigg, “It's unseemly how eager some are to inherit”, The Toronto Star (13 March 2010) online: The Toronto Star. [↑](#footnote-ref-54)
55. *Caivano , supra* note 18 at p.20-21. [↑](#footnote-ref-55)
56. Capacity Assessment Office, “Guidelines for Conducting Assessments of Capacity” (May 2005) at I.1, online: Ministry of the Attorney General of Ontario <http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacity/2005-05/guide-0505.pdf> (last accessed: 7 October 2010). [↑](#footnote-ref-56)
57. Law Commission of Ontario, “A NEW PARADIGM FOR PROTECTING AUTONOMY AND THE RIGHT TO LEGAL CAPACITY: Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice”, October 2010, at p.17. [↑](#footnote-ref-57)
58. \****Gray v. Ontario* (2006):** “Where alternatives to the appointment of a guardian will allow for decisions to be made concerning an individual’s personal care, this is to be preferred to a guardianship order, which requires a finding that the person is incapable of personal care.”[*Gray v. Ontario* [2006] O.J. No.266 (Ont. Sup. Ct.)];
*\*****Kacan v. Ontario Public Service Employees Union*** **(2010):** Human Rights Tribunal of Ontario affirmed the significance of promoting the autonomy and dignity of people with disabilities, even where supports were required to exercise such autonomy. [*Kacan v. Ontario Public Service Employees Union*, 2010 HRTO 795, File No. 2008-00381-I at para. 22.];
\****Starson* v. *Swayze*****(2003):** interpreted the statutory test for mental capacity in Ontario’s *Health Care Consent Act* to have a relatively low threshold of decision-making ability. *[Starson v.* Swayze, [2003] 1 S.C.R. 722, 2003 SCC 32];
\****Cuthbertson v. Rasouli*** **(2013):** reaffirms the objective of the *Ontario Health Care Consent Act* to uphold the patient’s autonomy interest as much as possible and allow the substitute decision-making model to be used only when absolutely necessary due to the patient's incapacity to make decisions. [*Cuthbertson v Rasouli,* 2013 SCC 53, 3 SCR 341]. [↑](#footnote-ref-58)
59. Human Rights Tribunal of Ontario, Annual Report 2009-10 (Toronto, 2010) 3. Online: http://www.hrto.ca/hrto/ ?q=en/node/26. Recent Annual related to employment made up approximately 75 per cent of complaints citing the ground of disability during the fiscal years 2006-07 and 2007-08. [↑](#footnote-ref-59)
60. <http://www.pch.gc.ca/DAMAssetPub/DAM-drtPrs-humRts/STAGING/texte-text/fINALForPdfAccessibleConversion-CRPD-FirstReportOfCanadaKatherineChanges_QA_Finalpdf_1395327558604_eng.pdf?WT.contentAuthority=3.1> [↑](#footnote-ref-60)
61. <http://www.cacl.ca/sites/default/files/CACL%20Policy%20Position%20legal%20capacity_0.pdf> [↑](#footnote-ref-61)
62. Based on the Swedish model, most of the ombudsperson is employed by PO-Skåne, which is an independent NGO run by the user organization called the Swedish National Association for Social and Mental Health (RSMH), and the family organization called the Schizophrenia Fellowship Association (IFS). The organization is totally user-controlled and ombudsperson are working according to the users’ guidelines. Some of these guidelines are:

-The ombudsperson works with an adjusted schedule; the PO is prepared to work at any time, because their clients' problems are not concentrated to office hours and it is easier to contact some people at evenings and weekends.

-The ombudsperson does not hold an office because “office is power”, and works from home & internet. He meets his clients in their home or at neutral places out in town.

-Although the ombudsperson’s main task is to receive complaints and address them, an ombudsperson can support the client in all kind of matters. According to PO-Skåne’s experience the clients’ first priorities are usually not housing or occupation, but existential matters. A PO not only acts as an advocate but also serves as a confidante and an ally.

-All PO's of PO-Skåne have University level education. Although majority of PO are trained social workers, some layers and other professional are also in the mix. Client anonymity is a paramount consideration. [↑](#footnote-ref-62)