



Communication Disabilities Access Canada

Session 3: Legal Context: Capacity, Decision-making and Communication Disabilities

This narrative is part of a series of online webinars that address communication supports and legal capacity. It accompanies the slide presentation at

www.cdacanada.com/communication-supports-article-12.

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Welcome to Session 3, Legal Context for capacity, decision making and communication disabilities. Our presenter for this session is Lana Kerzner who is a Barrister and Solicitor and who has extensive background in disability law. She teaches disability and the law at Ryerson University, and also teaches at the Law Society of Ontario in the Professional Conduct and Practice in Ontario course. Lana's current work focuses on legal capacity decision making, and domestic and international law implications of the United Nations Treaties, including the United Nations Convention on the Rights of Persons with Disabilities.

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In this session, I'm going to be discussing the laws relating to legal capacity, decision making and the implications for people with communication disabilities. In particular, I'm going to be talking about what legal capacity is, how it impacts on the lives of people who have communication disabilities and more particular details of the laws including the legal capacity criteria or test, legal capacity assessments, and laws which recognize supports for making decisions and also laws which covers substitute decision making. I'm also going to be reviewing some legal sources that promote equality and accessibility for people with disabilities. These sources include Human Rights Acts, the Canadian Charter of Rights and Freedoms, and the United Nations of Convention on the Rights of Persons with Disabilities.

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Legal Capacity laws determine whether a person can make decisions for themselves and when someone else will be required to make decisions for them. A person is allowed to make decisions for themselves if they satisfy the legal criteria of capacity to do so. These criteria are often, but not always, cognitive in nature. Being considered to be capable in law means that a person has power to control their own decisions.

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Legal capacity laws often have significant and dis-proportionate implications for the lives of people who have communication disabilities. This results from a few barriers that exist. One is that people often inaccurately assume that a person who has a communication disability has diminished capacity when they in fact do not. Secondly, some people who have communication disabilities use communication supports in order to demonstrate their capacity, but these supports are not available to them, and thirdly people who they interact with sometimes do not want to interact with a person with a disability, but prefer to interact with their family members or other people who accompany them.

These three barriers, or factors, come together to result in a situation where the person with a disability is denied their exercise of legal capacity and someone else is allowed to make decisions for them. This results in a loss of control over aspects of their lives and an inability to lead their lives the way they want. They feel frustrated, they feel powerless and sometimes they even develop mental health issues. The barriers that cause the situation sometimes result from the law itself, but sometimes it results from an interaction between the law and behaviours or attitudes of other people.

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Each province and territory in Canada has its own set of statutes that address legal capacity. These statutes, which cover decision-making, define capacity and set out what will happen if a person is not capable, fall into the following categories:

- Guardianship laws allow a court to appoint a substitute decision maker for a person who is incapable.
- Laws, which cover Powers of Attorney, allow a person to plan in advance of incapacity who will be their substitute decision maker.
- Laws which recognize people, sometimes referred to as support people, to assist a person to make decisions.
- Laws which regulate healthcare decisions set out how decisions will be made when a patient is not capable and
- Adult protection laws, which may allow for intervention when a person is incapable, and at risk of harm.

Courts often interpret and apply these laws. One example is the decision of the Supreme Court of Canada in *Starson and Swayze*. In that case, the Court interpreted what it means to be capable to make treatment decisions under Ontario's Healthcare Consent Act. In the decision, the Court emphasized that making one's own decision is fundamental to their

dignity and autonomy. In the words of the Court, unwarranted findings of incapacity “severely unwanted findings of incapacity severely infringe upon a person’s right to self-determination”.

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Laws which regulate legal capacity in Canada usually contain criteria, and these are sometimes referred to as a Test of Capacity. If a person meets the Test of Capacity, they are allowed to make their own decisions and if they don’t meet the Test of Capacity, another person will make decisions for them. Capacity Tests in Canada are different in every jurisdiction - that is in every province and territory in Canada. They also differ depending on the type of decision. However, many of the Capacity Tests focus on requiring that a person possess a certain level of cognitive ability and they often contain the following requirements:

- An ability to understand information that is relevant to making a decision, and
- An ability to appreciate reasonable foreseeable consequences of a decision or lack of a decision

This test is sometimes referred to in short as the Understand and Appreciate Test. While this test is seen in many laws in Canada, some laws instead may remove a person’s right to decide based on different factors including, whether a person has a particular disability. Also, some laws require a lower level of cognitive ability. Tests of capacity are found in many different laws and apply to many different kinds of decisions. They apply to health decisions including treatment, property decisions, decisions about personal care, making a Will and contracts, to name a few.

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The criteria for test of legal capacity seems quite clear at first brush, however it is often very challenging to know whether or not a person in fact possesses capacity. The law provides some guidance, which helps to clarify the meaning of capacity. To make it easier to understand, I am now going to highlight some features of legal capacity. Sometimes unintentionally misunderstanding these features result in wrongful removal of a person’s right to make their own decisions.

Capacity is not an inherent feature of an individual. A person is not considered either capable or incapable generally. Rather being determined to be capable relates to a particular decision. A person’s capacity is determined based on the legal test to make a particular type of decision. A person may meet the Test of Capacity to make a healthcare decision, such as whether to undergo minor surgery, and at the same time may not meet

the Test of Capacity to make a Will. So a person may understand the information about the surgery and risks and benefits to make that decision, but not understand details about their property sufficiently to make their own Will.

Also, a person's capacity may change over time. Some people have disabilities that result in changes in their cognitive abilities. It may be that today the person is able to understand the details in opening a bank account and be able to sign the related paper work, but three days from now, they can't understand those same details. They might have possessed the needed capacity to open the bank account three days ago and not today. However, it is important to remember that having a disability does not equate to incapacity. The fact that a person may have difficulty speaking or understanding does not mean that they are incapable. They are only incapable if they don't meet the legal Test of Capacity. Because there is often confusion about this point, some Canadian statutes specify that a person's way of communicating is not relevant for deciding whether they are capable.

Also, sometimes, it is believed that people with disabilities are vulnerable, at risk and need to be protected from harm. This can result in overprotective behaviour and attempts to make decision on their behalf. But capacity laws allow people to make all of their own decisions where they are capable, even if those decisions are believed by others to be risky or unwise. For example, a person who is capable can decide to forego lifesaving surgery, or can decide to go on a trip that they really can't afford, even if others think these decisions are risky or not in their best interest.

We often don't realize it, but we rarely make decisions without consulting others. Most of us talk to people who we respect, such as friends or family, before we make decisions. Doing so does not mean that we are incapable to make the decisions ourselves. In fact, getting help and support from others is important in the decision making process.

For people who have communication disabilities, they may use strategies to help them communicate and make decisions. Having a support person to help them make decisions and to understand, using picture displays, or taking more time to make a decision, does not mean that the person is not capable to make their own decision. For example, a person may not understand what a Power of Attorney is, many people don't. In order to be capable to make a Power of Attorney, the question to ask is whether the person meets the Test of Capacity once they have accessed all the support and assistance they may need. Having someone explain the Power of Attorney to them in everyday language and being able to communicate their decision using their own picture displays may be crucial to demonstrating their capacity to make a Power of Attorney.

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While many laws contain Test of Capacity, some of them provide more detail than others about the assessment of capacity, including who must make the assessment. There is no single type of capacity assessor or assessment that applies to all situations.

Whether or not a person needs a formal assessment of capacity depends on the type of decision and the specific law that relates to that decision. These laws are different in each province and territory in Canada. Examples of situations where capacity assessments may be needed include for healthcare decisions, decisions about long-term care admissions and as part of court processes for appointing a guardian. Not all situations that involve capacity criteria require a formal assessment. For example, no formal capacity assessment is required to enter into a contract. It is important to look at the law in each circumstance to know who has to assess capacity. It may be a doctor, another type of healthcare professional, or someone who was referred to as a capacity assessor. Sometimes Speech Language Pathologists are allowed to assess capacity. People with disabilities should be accommodated by the assessor when their capacity is being assessed. This may mean that they can have a support person with them during the assessment, have the assessment at a time of day that meets their disability related needs, or that the assessor should speak in everyday language that is easy for them to understand.

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Most of us make decisions with the help of our family, friends or other people we trust. Whether the decision is about how we spend our money, where we will live, what medical care we will have, or what activities we want to spend our days doing, we usually, without often realizing we are doing so, want to get input from others. This is often done informally, such as when we are eating meals together, talking on the phone, or in an email exchange. This is a normal part of life.

For people who have communication disabilities, they too, rely on people to help them with making decisions. Because of their disability, there may be disability specific related needs that they need that person to help with. The person, sometimes referred to as a support person, may explain to them information relating to the decision, or help them to communicate their decision. Sometimes they cannot make decisions without a support person to help with these tasks.

Not all jurisdictions in Canada have laws which recognize the role of support people for making decisions, but laws in British Columbia, Alberta, Saskatchewan and Yukon, do grant formal legal recognition to support people. Each law that recognizes support people does so in many different ways.

There are two main types of recognition. One type allows a person to appoint support people that they choose to help them make decisions. They can do so by creating a document that allows for the appointment. For example, in British Columbia, these documents are called Representation Agreement. Another type gives courts authority to appoint support people. For example, this is called Co-Decision Making in Alberta and Saskatchewan.

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Even though making decisions with the help of others is the most natural and autonomy enhancing way for most people to make decisions, including people who have communication disabilities, there are some times when the law provides for someone to make substitute decisions on another person's behalf.

When a person does not meet Test of Capacity to make a particular decision that needs to be made, the law provides a way for the decisions to be made by another person who is referred to as a Substitute Decision Maker. To illustrate, using a straight forward example, if someone becomes unconscious as a result of being injured in a car accident, they will not be able to meet the Test of Capacity, even with assistance. But, decisions will need to be made about that person's medical care. A substitute decision maker may be appointed for this purpose.

All Canadian provinces and territories have laws that allow for the appointment of a substitute decision-maker, although the laws are different in each jurisdiction. Substitute decision makers may be appointed in different ways, depending on the particular law that applies in the circumstances in the relevant province or territory. These include:

- Court appointments, which are often referred to as guardianship
- Healthcare consent laws which may specify who can make substitute treatment decisions if a person is incapable to make them and
- Documents, often referred to as a Power of Attorney. Powers of Attorney, and similar planning documents, are created by an individual. They allow an individual to plan in case they become incapable in the future. In a Power of Attorney, an individual can say who they want to make decisions for them should they become incapable.

Once a substitute decision maker is authorized by law to act, they make the decisions on behalf of the incapable person. This doesn't mean that the incapable person is ignored when the substitute decision maker makes the decision. In some circumstances, the law applies to the substitute decision maker to adhere to a person's wishes expressed while they were capable and to take account of a person's values and beliefs.

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The most significant outcome of a finding of incapacity is that a person is not allowed to make decisions for themselves. They lose control over their lives and may not be able to live the lives they want. They often feel excluded from society and have low self-esteem. They sometimes feel that they are treated unfairly as they are prevented from making decisions that other members of society are allowed to make. Canada's laws address unfair treatment, which may be considered discrimination. Canada's laws also address exclusion of people with disabilities.

The Canadian Charter of Rights and Freedoms, as well as Canada's Human Rights Act, each have provisions that aim at providing protection from discrimination against people with disabilities. The federal government and some provinces also have accessibility laws, which have as their purpose to remove and prevent barriers to accessibility. These laws together promote equality and inclusion for people with disabilities. The United Nations Convention on the Rights of Persons with Disabilities complements these laws. Human rights laws, the Canadian Charter of Rights and Freedoms, and the Convention on the Rights of Persons with Disabilities, have direct applicability to legal capacity but in different ways. I will next turn to describe each of these. At present, accessibility legislation, although promoting accessibility in many different areas of activity, does not provide Canadians with disabilities with many concrete ways to advance their exercise of legal capacity.

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There are different Human Rights Act in each province and territory in Canada. There is also a federal Human Rights Act. The purpose of these laws is to prohibit discrimination. Discrimination has no fixed definition in law, but in general it refers to treating someone differently and unfairly on the basis of a group characteristic, such as disability.

Each Human Rights law sets out a list of areas to which the protection from discrimination applies. A broad range of areas are covered. They include employment, and services such as healthcare, education, stores, restaurants and housing. In order to achieve equality and full participation, people with disabilities often require that adjustments be made to things, such as printed material, signs, buildings, schools and jobs. These kinds of adjustments are referred to as accommodations in law. In fact, Canada's Human Rights laws make it a requirement that people with disabilities are accommodated. Accommodations can go a long way to ensure that people with disabilities are not discriminated against, however the duty to accommodate is not unlimited. Those that owe the duty, such as employers, schools, restaurants, health care providers and housing providers, need only accommodate to the point of undue hardship.

When accommodating people with disabilities, the accommodations must be provided in a way which most respects their dignity and autonomy and respects their choices as much as possible. The accommodations must also respect each person's unique needs. No two people are alike. For example, as illustrated in this resource, there are a wide range of accommodations and supports that people with communication disabilities access. The kinds of accommodations they use depend on the nature of their disability. To a large degree, they also depend on the quality that is unique to them. For example, some people who have communication disabilities prefer technology based assistance while others prefer to receive assistance from support people.

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Accommodating people with disabilities is not voluntary. It is a legal obligation. When people think about accommodating people with disabilities, images of ramps to buildings, sign language interpreters for people who are Deaf and materials produced in alternate formats, like braille for people who are blind, often come to mind. These are the types of accommodations that are often most visible to the public.

Accommodations that people who have communication disabilities need are much less visible and much less understood, but they are no less valid or important to achieving equality and full participation. For people who have communication disabilities, there are two roles that can play to achieve equality in decision making. These are:

1. Accommodations may be needed for the assessment of capacity to demonstrate that they meet the test of capacity
2. Accommodations may be needed for making decisions

Other sessions in this resource provides extensive details on how people with communication disabilities can be supported and accommodated to demonstrate their capacity and to make their own decisions. These tools, strategies and types of assistance may each, either alone or in combination, be required to meet the legal duty to accommodate. Here are some examples of accommodations:

- a) a person who has difficulty with comprehension may need a support person with them when their capacity is being assessed so that the support person can explain the questions the assessor is asking
- b) a person who has difficulty with speech and who speaks slowly, may need a longer appointment with their doctor to give them time to ask questions and communicate their choices and decisions about their treatment
- c) a person who speaks in ways that are difficult for others to understand may need to communicate their decisions using picture boards.

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I want to underscore that each of these examples are accommodations that are no less legal requirements than the more visible types of accommodations such as a ramp into a building.

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The Canadian Charter of Rights and Freedoms is part of Canada's constitution. Two Charter rights are particularly relevant to legal capacity laws.

1. The Right to Life, Liberty and Security of the person which is contained in Section 7 of the Charter, and
2. The Right to Equality without discrimination based on mental or physical disability among other grounds, which are contained in Section 15 of the Charter.

All Canadian laws, including the legal capacity laws I've described in this session, must comply with the Charter. Some features of these laws lead us to question whether they are consistent with the Section 7 Right to Life, Liberty and Security of a person and the Section 15 right to equality. For example, when people with disabilities are found to be incapable, their autonomy and dignity are interfered with. They are also deprived of the right to make personal choices.

On its face, these results seem to deprive them of liberty and security of the person. Also, because of inaccurate perceptions about their cognitive abilities, combined with insufficient communication support, people with communication disabilities are more likely to be found to be incapable than people who don't have disabilities. Thus, they are treated unequally as they are impacted by the laws in a way that does not affect people who don't have disabilities.

On its face, this seems to amount to discrimination. The Charter applies only to government and not to private people or businesses. A person with a disability cannot mount a Charter challenge against a private entity. Nevertheless the Charter can be a powerful tool for challenging laws that appear to violate Charter rights and thus for promoting the rights of people with disabilities. One example is the Supreme Court of Canada decision in *Eldridge and British Columbia*. In that case, the Court decided that Deaf people were treated unequally in their receipt of medical services. The Court found a violation of Section 15 of the Charter because of the failure to provide sign language interpretation where it was necessary for effective communication. Without sign language interpretation, Deaf people were deprived of the ability to communicate effectively with health care providers, in comparison to people who were not Deaf and had no barriers to communication.

Court adjudicates cases where there is a claim that the law is inconsistent with the Charter. Until a Charter challenge to a law is heard by a Court, it is never clear whether a particular law, including legal capacity laws, are in compliance. There are often divergent views about Charter compliance.

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The Convention on the Rights of Persons with Disabilities, often referred to as the CRPD, is a United Nations Human Rights Treaty. They promote and protect human rights for people with disabilities. The government of Canada described it as an important means for the international community to recognize this and reinforce the need to prohibit discrimination against people with disabilities in all aspects of life. Canada agreed to follow and is bound by the CRPD under international law. While the Canadian government is taking steps to implement the CRPD, laws are not yet fully compliant with it. It sets out many specific rights. Two of these are particularly important for ensuring that people with disabilities can make decisions on an equal basis and that they can exercise legal capacity without discrimination. They are as follows:

- Article 12 focuses on legal capacity and recognizes that people with disabilities enjoy legal capacity on an equal basis and that government has a role to play in providing access to support that people with disabilities may require in exercising legal capacity
- Article 5 sets out rights relating to equality and non-discrimination by specifying that the discrimination on the basis of disabilities is prohibited and recognizing the role that reasonable accommodation plays in promoting equality and eliminating discrimination

Two factors lead to the conclusion that Canada's legal system does not yet comply with Articles 5 and 12 of the CRPD. Firstly, Canada's legal capacity laws do not allow people with disabilities to enjoy legal capacity on an equal basis and do not provide full recognition of the role that support people play in maximizing a person's capacity. Secondly, the duty to accommodate people with disabilities in decision-making is not well developed or recognized in Canada's laws.

Despite these short-comings, there are ongoing activities within Canada to promote the rights set out in the CRPD. People with disabilities and disability organizations have a vital role to play to promote the CRPD and advocate to ensure it is followed. It is hoped that ongoing efforts to promote rights in the CRPD will result in laws and policies that ensures people with communication disabilities will have an equal right to make decisions and have their decisions respected. Achieving equality in this way will allow people with

communication disabilities to claim control over their lives, feeling included and respected, and have more opportunities to follow their dreams.