



**LEGAL CONTEXT:
CAPACITY, DECISION-MAKING AND
COMMUNICATION DISABILITIES**

Session 3
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Agenda


- Legal Capacity
 - What is legal capacity?
 - Implications for people with communication disabilities
 - Legal capacity laws
 - Substitute decision-making; decision-making with supports
- Equality and Accessibility - Legal Sources
 - Human rights acts, duty to accommodate and applicability to legal capacity
 - Canadian Charter of Rights and Freedoms
 - United Nations Convention on the Rights of Persons with Disabilities



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Legal Capacity

- 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 if they satisfy the legal criteria of “capacity” to do so
 - These criteria are often cognitive in nature
- Being considered to be “capable” in law means a person has power to control their own decisions



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Legal Capacity: Implications for People with Communication Disabilities

Barriers:

- Inaccurate assumptions that people who have communication disabilities have diminished capacity
- Insufficient communication supports may prevent a person from demonstrating their capacity
- People communicate with family or others who accompany the person, rather than communicating directly with the person with a disability

Result of Barriers:

- often a person is denied their exercise of legal capacity and someone else makes decisions for them

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Legal Capacity: Implications for People with Communication Disabilities

Cause:

- Some barriers result from the law itself, some result from behaviour/attitudes and some are a mix of factors

Impact:

- People may be prevented from making their own decisions, resulting in:
 - little or no control over aspects of their life; inability to lead the life they want; frustration, powerlessness and mental health issues

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Laws Impacting the Exercise of Legal Capacity

- Laws (legislation) which regulate legal capacity cover the following areas:
 - Guardianship
 - Powers of attorney
 - Legal recognition of support people
 - Health care decisions
 - Adult protection
- These laws are all provincial/territorial and are different in each jurisdiction
- Case law
 - Example – *Starson v. Swayze*, Supreme Court of Canada, 2013 (capacity to make treatment decisions)

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Capacity Laws: Capacity Criteria/Tests

Laws which regulate legal capacity usually contain criteria, sometimes referred to as a “test of capacity”

Capacity Criteria/Tests:

- Often (but not always) focus on cognition, and often contain the following requirements:
 - Ability to understand information that is relevant to making a decision
 - Ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision
- Apply to many types of decisions, such as: health, property, personal care, making a will and contracts
- Differ depending on:
 - Type of decision
 - Specific law that governs the decision
 - jurisdiction

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Features of Legal Capacity

- Not ‘all or nothing’
 - Time-specific
 - Decision-specific
- Having a disability does not equate to incapacity
 - Some laws specify explicitly that a person’s way of communicating is not relevant for deciding whether they are capable
- Right to make ‘bad decisions’
- Capacity can be maximized
 - For example, by involving support people, using strategies such as clear, everyday language, or using tools such as picture displays

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Capacity Assessment

- Occurs in a variety of contexts, such as health care decisions, applications for guardianship appointments, and long-term care admission
- Differs across jurisdictions, laws and types of decisions
- No single type of capacity assessor or assessment applies to all situations
- not all situations that involve capacity criteria require a formal capacity assessment e.g. entering into a contract
- In some contexts, the law specifies who must assess capacity
 - Sometimes speech-language pathologists are allowed to assess capacity
- People should be accommodated in the assessment process
 - e.g. assistance from support people

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Decision Making with Support People

- Any measure that involves a person/persons who assist another person to make a decision
- May be formal or informal assistance
- Only some Canadian jurisdictions grant formal legal recognition to support people e.g. British Columbia, Alberta, Saskatchewan and Yukon
- Each of the laws that recognize supporters do so differently
- Legal recognition takes different forms, for example:
 - Planning documents – person appoints their supporter(s) (e.g. representation agreement, British Columbia)
 - Court appointment of supporter(s) (e.g. co-decision-making, Alberta)

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Substitute Decision Making

- All Canadian provinces and territories have laws that allow for the appointment of a substitute decision-maker
- A substitute decision-maker may be:
 - Appointed by a court to make decisions on behalf of a person who is found to be incapable in law to make their own decisions (e.g. guardianship)
 - Granted authority, through a power of attorney, to make substitute decisions on someone else's behalf
- Once the substitute decision-maker has authority to act, they make the decision on behalf of the incapable person
- In some circumstances the law obliges substitute decision-makers to adhere to a person's wishes (expressed while capable), and to take account of a person's values and beliefs

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Equality and Accessibility – Legal Sources

- Human Rights laws
- Canadian Charter of Rights and Freedoms
- United Nations Convention on the Rights of Persons with Disabilities
- Accessibility Laws

Each of these laws complement each other in promoting inclusion of people with disabilities in Canada

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Human Rights Acts and the Duty to Accommodate

- Purpose: prohibition of discrimination
- Different human rights acts in each province and territory; also a federal human rights act

Duty to Accommodate:

- Human rights laws include a duty to accommodate people with disabilities
- Obligation to make adjustments to enable equality and full participation
- Applies to areas which human rights laws cover, such as employment, education and service provision
- Accommodations are integral to achieving non-discrimination
- Duty extends only to the point of undue hardship

Human Rights Principles related to the Exercise of Legal Capacity

- Dignity
- Confidentiality
- Autonomy
- Individualization

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Duty to Accommodate, Legal Capacity and People with Communication Disabilities

Accommodations are a **legal obligation** – they are not voluntary
Accommodations for people with communication disabilities are no less valid or important to achieving equality than those that are more well known - such as ramps for people who have mobility disabilities and sign language for people who are Deaf

Role of Accommodations:

- Assist a person to demonstrate that they meet the test of capacity
- Assist a person in the decision-making process

Examples:

- Support person – assist with communication and/or decision-making
- Additional time for communication
- Personal communication systems e.g. picture boards; speech output devices

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Canadian Charter of Rights and Freedoms

Constitutionally protected rights in Canada, including the following, are relevant to legal capacity laws:

- Right to life, liberty and security of the person – s. 7
- Right to equality without discrimination based on mental or physical disability (among other grounds) – s. 15
- Applies only to government and not to private actors
- All Canadian laws, including legal capacity laws, must comply with the Charter
- *Eldridge v. British Columbia (Attorney General)*, Supreme Court of Canada, 1997
 - s. 15 right to equality – recognition of importance of sign language interpretation to Deaf people for effective communication

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Convention on the Rights of Persons with Disabilities (CRPD)

- United Nations human rights treaty
- Canada is bound by the CRPD under international law

Article 12: Focus on legal capacity, and recognizes that:

- Persons with disabilities enjoy legal capacity on an equal basis
- Government has a role to play in providing access to support that people with disabilities may require in exercising their legal capacity

Article 5: Equality and Non-Discrimination

- Prohibition of discrimination on the basis of disability
- Reasonable accommodation

Canada's legal capacity laws are not fully consistent with the CRPD
