

**Issues Related to Meeting Canada's Obligations
To Recognize the Right to Legal Capacity without Discrimination and
Enable Access to Supports**

Under Article 12, Convention on the Rights of Persons with Disabilities

Submission to:

**Committee on the Rights of Persons with Disabilities
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Submitted By:

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Plain Language Summary

There have been some good steps in Canada to put Article 12 into laws, policies and community practice. However, the Coalition on Alternatives to Guardianship (a national civil society coalition) is concerned that tens of thousands of people are still under guardianship in Canada. More needs to be done.

A system is needed for legal capacity and supports – The Coalition believes a system should have five main parts:

1. Laws that recognize the right to legal capacity and supports
2. Options for appointing a decision-making supporter
3. Duties of decision-making supporters stated in the law
4. Community-based resources to give people support and raise public awareness.
5. Safeguards – to protect people from abuse and solve problems.

‘Interpretive Declaration’ – Canada has declared that Article 12 allows it to keep guardianship in place for some people. We disagree. But Canada has also declared that people should have support for legal capacity. We strongly agree with this, and believe that Canada must do more to make sure this happens.

Our Concerns –

- Laws in Canada do not yet provide all the elements of the system, as defined above.
- Tens of thousands of Canadians with disabilities are forced under guardianship. They do not have the supports they need to exercise legal capacity.
- Canada has not taken leadership with provinces and territories to change laws.
- Many in the legal and health profession, and financial institutions, still define legal capacity to mean mental ability. The Committee on the Rights of Persons with Disabilities has said this definition discriminates against people. We agree.

Our Recommendations –

The Coalition urges the Committee to recommend that Canada take the following steps:

1. Canada should put into law the five-part system for legal capacity (as we outline above).
2. Canada should take the test of ‘contractual capacity’ out of the Income Tax Act. It discriminates based on mental ability.
3. Canada should change the Bank Act and other laws to include supported decision making so people can control their own money and property.
4. Canada should do a study of how existing laws affect the right to legal capacity and supports for decision making for people with disabilities.
5. Canada should create a way to monitor implementation of the CRPD, including how laws, policies and programs affect the right to legal capacity.

Introduction

Canada was one of the leaders in advancing inclusion of Article 12 in the UN Convention on the Rights of Persons with Disabilities (CRPD). Despite some promising developments and a growing body of knowledge about design of supported decision making in law, policy and practice, progress in full implementation seems stalled in most jurisdictions in Canada. Moreover, there are concerning signs of deep institutional resistance in Canada to fully recognizing and supporting enjoyment by people with disabilities of the right to legal capacity and power over their own lives.

This brief outlines:

- Needed elements in a system to ensure right to legal capacity and supports
- Context in Canada for meeting obligations under Article 12
- Promising developments in implementing supported decision making in Canada
- Key concerns
- Recommendations to ensure Canada fulfills its obligations under Article 12

A. Needed elements for a system

The Coalition believes that a legal and policy framework for recognizing the right to legal capacity and ensuring access to needed supports for decision making must include five main parts:¹

1. Legal recognition of the right to legal capacity – without discrimination based on intellectual, cognitive or psychosocial disability.
2. Options for appointing a decision-making supporter:
 - a. Appointing a support person by yourself
 - b. Where a person is not able to make an appointment, people in a relationship of personal trust and commitment to the person should be able to apply to be recognized as their supporters.
3. Legislated duties of decision-making supporters – to act only according to the best interpretation of the will and preference of the person, and to act without conflict of interest.
4. Designated community-based resources to:
 - assist people develop supported decision-making networks;
 - provide advocacy services to help persons exercise their right to decide;
 - provide information tools and resources about supported decision making – for individuals, families, support networks, doctors, banks, and lawyers, and the public;

¹ For more detailed overview of these system elements, see Coalition on Alternatives to Guardianship (2014), The Right to Legal Capacity and Supported Decision Making for All. Retrieved from **NTD**

- raise public awareness about the right to legal capacity and supported decision making for all.
5. Safeguards, including:
- Legislated duties of decision-making supporters;
 - Option to appoint monitors of supported decision-making arrangements;
 - Disputes resolution – to challenge need for supported decision making, or deal with conflicts among supporters and/or third parties;
 - Response to complaints of abuse/neglect, while protecting the right to legal capacity and support;
 - Independent review of decisions which could fundamentally affect personal integrity or human dignity for adults with a supported decision-making arrangement (e.g. sterilization).

The Canadian Association for Community Living, one of the Coalition members, has developed a comprehensive Draft Statutory Framework for implementing this system for recognizing the right to legal capacity and supported decision making in provinces and territories.²

B. Context in Canada for meeting obligations under Article 12

- **Canada’s Interpretive Declaration recognizing both supported and substitute decision making** – When Canada ratified the CRPD in 2010 it lodged a ‘interpretive declaration’ stating its understanding that Article 12 permits both supported and substitute decision making.³ It affirmed this position in its First Report to the Committee on the Rights of Persons with Disabilities.⁴ The Coalition on Alternatives to Guardianship rejects this position, and believes that guardianship systems in Canada and elsewhere should be abolished.
- **Canada’s recognition that people should have access to supports needed to exercise legal capacity** – In its interpretive declaration on Article 12, Canada states that: “Anyone who requires support in exercising their legal capacity should have access to the support required to do so.” The Coalition believes that Canada must do more to ensure this commitment is fulfilled.
- **Implementing measures for legal capacity in a federal context** – Civil rights, and therefore the right to legal capacity, is largely regulated under provincial/territorial jurisdiction in Canada. The Parliament of Canada does have authority for income tax

² Canadian Association for Community Living, (2014), *A Statutory Framework for The Right to Legal Capacity and Supported Decision Making: For Application in Provincial/Territorial Jurisdictions in Canada*. Retrieved from <http://www.cacl.ca/sites/default/files/Draft%20Statutory%20Fmwk%20-%20Legal%20Capacity%20-%20June%209.pdf>.

³ Canada, (2010), Declaration and reservation on Article 12, CRPD. Retrieved from <https://treaties.un.org/Pages/Declarations.aspx?index=Canada&lang=en&chapter=4&treaty=1>.

⁴ Canada, (2014), *Convention on the Rights of Persons with Disabilities: First Report of Canada*, p. 9. Retrieved from <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/150/62/PDF/G1515062.pdf?OpenElement>.

and criminal law, and regulates financial institutions. Through these powers it regulates the right and enjoyment of legal capacity. For example, the *Income Tax Act*, which requires that any person who opens a Registered Disability Savings Plan, a benefit which is regulated under the federal *Income Tax Act*, must meet the test of “contractual capacity”.

C. Promising Developments

- Some provinces and territories have introduced statutory provisions to legally recognize supported or assisted decision making – including British Columbia, Alberta, Saskatchewan, Manitoba, Yukon, and the Northwest Territories.
- The provincial governments of Newfoundland and Labrador, and of Nova Scotia, have signaled commitment to legally recognize supported decision making and put a system in place for that purpose.
- The Government of Canada has provided a temporary supported decision making measure for those wishing to open a Registered Disability Savings Plan (RDSP) – which means that even though a person does not have the required capacity to independently contract, they can open a plan with the support of a parent, common-law partner or parent. So far Canada has not indicated that it will make this a permanent measure.
- With the encouragement of the Government of Canada, some provinces and territories have passed legislation to enable people to open RDSPs through a supported decision making arrangement.

D. Key Concerns

- ***Existing provincial/territorial legislative schemes are not providing needed options for all people with disabilities.*** No existing provincial/territorial scheme provides all required components of a system for supported decision making, as outlined in Section A, above.
- ***Tens of thousands of Canadians with disabilities without needed supports for decision making*** – Because provinces and territories have not put in place needed support systems, tens of thousands of Canadians with disabilities are forced to live under guardianship. In Ontario alone, there are 17,000 people under guardianship orders.⁵ There are good examples of community-based supports to enable access to supported decision making (for example Nidus in British Columbia, www.nidus.ca). However, in no province or territory is there a public policy framework for delivery of needed community-based supports as outlined in Section A.4 above. The result is that people are being placed under guardianship in the tens of thousands across the country.

⁵ Law Commission of Ontario, (2017), *Legal Capacity, Decision-making and Guardianship: Final Report*, p. i. Retrieved from <http://www.lco-cdo.org/wp-content/uploads/2017/03/CG-Final-Report-EN-online.pdf>

- ***The Government of Canada has not taken required leadership.*** Canada is not yet working with provinces and territories to create a comprehensive framework for recognizing the right to legal capacity, and ensuring access to supports needed to exercise legal capacity, despite its recognition in its interpretive declaration on Article 12 that all persons should have access to the supports they may need for this purpose.
- ***Legal capacity and mental ability continue to be equated by leading authorities for law reform in Canada*** – A 2017 report by the Law Commission of Ontario on legal capacity and guardianship reform directly rejects the UN Committee’s General Comment No. 1, de-linking mental capacity and legal capacity.⁶ The report recommends that the Government of Ontario keep in place a statutory definition that equates legal capacity with mental ability, and that it not implement a comprehensive system for supported decision making. Instead, it recommends reforming guardianship practices and introduce additional safeguards. While this is not a government report, it is from an organization governed by highly respected members of the legal profession.
- ***Pressure that financial institutions need a system of guardianship to disburse funds*** – One of the main concerns expressed by legal and financial professionals and institutions is that supported decision making does not provide adequate safeguards to ensure valid contracts and transfer of property from financial institutions to individuals. These concerns have been addressed in proposals for statutory reform, which in fact include more robust safeguards than many guardianship systems.⁷ Political leadership is required to introduce recognition of supported decision making and requisite safeguards in the regulatory framework for financial institutions in Canada.

E. Recommendations

We urge the Committee to recommend that Canada take the following steps to address the gaps in legislation, policy and programs that result in denial of access to needed supports. We believe these steps are both justified and essential to fulfill Canada’s continued obligations under Article 12:

1. ***Canada and each provincial and territorial government should take steps to recognize in their respective legislative spheres the right to legal capacity and the supports that may be needed for this purpose, including for people with significant intellectual, cognitive and psychosocial disabilities.***

⁶ Law Commission of Ontario, (2017), *Legal Capacity, Decision-making and Guardianship: Final Report*. Retrieved from <http://www.lco-cdo.org/wp-content/uploads/2017/03/CG-Final-Report-EN-online.pdf>.

⁷ See for example, safeguards presented in Canadian Association for Community Living, (2014), *A Statutory Framework for The Right to Legal Capacity and Supported Decision Making: For Application in Provincial/Territorial Jurisdictions in Canada*. Retrieved from <http://www.cacl.ca/sites/default/files/Draft%20Statutory%20Fmwk%20-%20Legal%20Capacity%20-%20June%2009.pdf>.

- 2. To further fulfill its obligations to recognize the right to legal capacity and to ensuring persons have access to the supports needed to exercise legal capacity, Canada should remove the requirement in the Income Tax Act for 'contractual capacity' to open a Registered Disability Savings Plan.**
- 3. In consultation with provincial/territorial governments and Canada's financial sector, Canada should introduce into Canada's Bank Act and other regulatory regimes for financial institutions, provisions to recognize supported decision making, with appropriate safeguards.**
- 4. Canada, in collaboration with provincial/territorial governments, should conduct an impact assessment of laws, policies and programs affecting the right to legal capacity and supports for decision making for people with disabilities.**

The assessment should address: the inconsistent provisions for legal capacity and supported decision making across provincial/territorial and the federal jurisdictions; lack of resourcing for community-based systems needed for supported decision making; and continued reliance on guardianship systems because of lack of supports.

Canada should ensure that such assessment is rights-based and meaningfully involves persons with disabilities and their representative organizations.

- 5. In collaboration with provincial/territorial governments and with the representative organizations of persons with disabilities, Canada should establish a system (including rights-based indicators) to independently monitor implementation of federal and provincial /territorial laws, policies and programs on the rights of persons with disabilities under the CRPD.**

Among other indicators, the framework should track implementation of legal recognition of the right to legal capacity and policies and programs to ensure access to supports needed to exercise legal capacity.

Conclusion

The Coalition appreciates Canada's leadership in advancing inclusion of Article 12 in the CRPD. While we disagree with Canada's interpretive declaration, we applaud its recognition that "Anyone who requires support in exercising their legal capacity should have access to the support required to do so."⁸

We are encouraged by incremental reforms in some provinces and territories, and by recent commitments to comprehensive reform by the Governments of Newfoundland and Labrador, and the Government of Nova Scotia.

However, we are extremely concerned that the Law Commission of Ontario, a leading and prestigious institution for progressive law reform in Canada, would explicitly reject the UN Committee's interpretation of Article 12 along with detailed proposals our Coalition presented for comprehensive reforms to introduce supported decision making. We are concerned that this may signal a trend in the legal and financial community that would undermine Canada's obligations under Article 12 of the CRPD, even with the interpretive declaration it has lodged.

Canada's leadership on this issue is therefore urgently needed. Tens of thousands of Canadians are under guardianship because they do not have the supports they need to exercise legal capacity. We encourage the Committee to recommend that Canada take the necessary steps to make sure all Canadians can enjoy the right to legal capacity, without discrimination based on disability.

⁸ Canada, (2010), Declaration and reservation on Article 12, CRPD. Retrieved from <https://treaties.un.org/Pages/Declarations.aspx?index=Canada&lang=en&chapter=4&treaty=1>.