



**Manitoba Law
Reform Commission**

ASSISTED DECISION-MAKING AGREEMENTS

CONSULTATION PAPER

March 27, 2025

Assisted Decision-Making Agreements

Consultation Paper

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The Manitoba Law Reform Commission was established by *The Law Reform Commission Act* in 1970 and began functioning in 1971.

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CONSULTATION PAPER

Comments on this consultation paper should reach the Manitoba Law Reform Commission (“the Commission”) by **May 31, 2025**.

The Commission encourages you to provide your thoughts, comments and suggestions concerning this aspect of Manitoba’s law. Please refer to the issues for discussion identified in this paper, and any other matters you think should be addressed.

Please submit your comments in writing by email, fax or regular mail to:

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EXECUTIVE SUMMARY

According to the Law Commission of Ontario’s 2014 Discussion Paper, *Legal Capacity, Decision-Making and Guardianship*, citing Statistics Canada’s 2006 *Participation and Activity Limitations Survey*, 0.5 per cent of Canadians aged 15 or older live with a developmental disability, defined as “Cognitive limitations due to an intellectual disability or developmental disorder such as Down’s syndrome, autism or an intellectual disability caused by a lack of oxygen at birth”.¹

In 2021, the Institute for Research and Development on Inclusion and Society (IRIS), completed a study on how people with developmental, cognitive, and psychosocial disabilities lose the right to decide in their lives, and what can be done to address this growing problem. The report stated that more than 50,000 people in Canada are under guardianship, trusteeship, and substitute decision-making arrangements, including 1883 in Manitoba, with an additional 880,000 to 1 million Canadians with disabilities who have someone help them make daily decisions.²

Communication Disabilities Access Canada (CDAC), in a report released in 2017 addressing access to justice for those with communication disabilities in Ontario, further stated that over 165,000 people in Ontario (about 1% of the population) have speech, language and communication disabilities, not caused primarily by deafness or significant hearing loss. For example, a person’s ability to speak; understand what is being said or read and write can be affected by many different types of conditions, such as cerebral palsy, autism spectrum disorder, Down Syndrome, learning disability, cognitive disability, acquired brain injury, aphasia after a stroke, dementia, head and neck cancer, Amyotrophic Lateral Sclerosis, Parkinson’s disease, or Multiple Sclerosis.³

There is ample research that attests to the vulnerability of people with communication disabilities. Yet, people with communication disabilities can experience serious and often insurmountable barriers when they attempt to access the justice system, participate in civil administrative

¹ Law Commission of Ontario, *Legal Capacity, Decision-Making and Guardianship: Discussion Paper* (Toronto: May 2014) at 49-51 [LCO Discussion Paper].

² Institute for Research and Development on Inclusion and Society, *The “Decision Making Capability Approach” to Legal Capacity: A Disability Rights Analysis* (Toronto: 2021) at 22-23.

³ Communication Disabilities Access Canada, *Communication Intermediaries in Justice Services: Access to Justice for Ontarians who have Communication Disabilities* (Toronto: 2017) at 16.

proceedings, or in providing instructions that affect their daily lives such as how to spend or invest money, consenting to a medical procedure, or choosing where to live.⁴

In Canada, most adults are accustomed to making their own life choices, such as where to live, what to eat, what to wear, and how to manage their finances. The ability to make independent decisions is widely recognized as a fundamental right. This principle applies equally to people with disabilities. Canadian laws assume that individuals with disabilities have the same decision-making rights as everyone else. However, laws governing decision-making vary by province and territory. While there are many commonalities across Canada, there are also key differences.⁵

According to the Autism and/or Intellectual Disability Knowledge Exchange Network (AIDE Canada), decision-making laws in Canada generally fall into two main categories: property and personal care.

- Property decisions involve financial matters, such as spending and investing money or managing assets like a home.
- Personal care decisions relate to areas such as healthcare, nutrition, housing, clothing, hygiene, and safety. For example, this could include consenting to a medical procedure or deciding where to live.

A person is considered to have legal capacity if they can both understand the relevant information about a decision and recognize the consequences of their choice. However, legal capacity is not always absolute – it can vary depending on the type of decision being made. For instance, an individual may be deemed capable of deciding where they want to live but not necessarily of managing their day-to-day finances.⁶

When someone is unable to make decisions independently, they may require accommodations or support to exercise their legal capacity. This assistance could come in various forms, such as technology, a translator, or a support person who helps interpret gestures, signs, or verbal cues. Additionally, individuals may choose to appoint someone to make decisions on their behalf or to

⁴ *Ibid.*

⁵ AIDE Canada, *Understanding Consent and Capacity Rules in Canada – Toolkit*. Online: <<https://aidecanada.ca/resources/learn/asd-id-core-knowledge/aide-canada-consent-and-capacity-toolkit>>.

⁶ *Ibid.*

assist them in decision-making. The rules surrounding this process depend on the province or territory they live in and their ability to legally designate a representative. Different regions in Canada use various terms and decision-making models, including co-decision-making, supported decision-making (assistance measure in Quebec), and representation agreements (tutorships in Quebec), among others. These differences will be explored in further detail below.

Given recent developments and reform efforts in other jurisdictions regarding assisted decision-making, and Canada's ratification of the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD) in 2010, the Commission asks: Should Manitoba implement legislation providing more formality to the process of assisted decision-making including supported decision-making and representation agreements, and if so, what should this legislation look like?

This consultation paper addresses critical aspects of decision-making authority, particularly within the context of assisted decision-making agreements, within Canada and certain international jurisdictions. The paper begins by examining the current legal landscape in Canada, providing insights into several existing frameworks and practices. Drawing from experiences abroad, it highlights comparative approaches to assisted decision-making legislation for consideration in assessing recommendations for potential reform in Manitoba.

The paper further explores areas for potential reform, centering on the scope of authority within assisted decision-making agreements. It delves into the mechanisms for initiating, enforcing, and terminating such agreements, shedding light on the eligibility criteria for their utilization. Furthermore, it addresses the qualifications and roles of assistants, delineating their powers, duties, and associated rights.

Also considered are liability issues and protective measures within the context of assisted decision-making agreements, aiming to strike a balance between empowerment and safeguarding vulnerable individuals. Additionally, it examines the potential impacts of these reforms on existing legislation in Manitoba, ensuring coherence across legal frameworks.

This consultation paper aims to gather input from various groups and individuals to consider important changes in decision-making rules, and to determine if Manitoba's assisted decision-making regime needs to be more balanced and adaptable to everyone's needs.

CHAPTER 1: INTRODUCTION

The right of a person to make decisions about their life has been characterized as an essential part of citizenship in a liberal democratic society.⁷ Public perception of disability, and the impact of the disability itself, can limit a person's ability to make decisions that truly reflect their values and wishes. The social model of disability, which emphasizes societal barriers affecting individuals rather than their medical condition, has been favourably referenced by the Supreme Court of Canada.⁸

The *social* model of disability stands in contrast to the *medical* model of disability, where a person with a disability is perceived as requiring correction of their deficits. The burden of social inclusion is placed on the person with disabilities in the *medical* model, while in the *social* model the burden is placed on society to remove barriers that prevent people with disabilities from fully participating. Older legal decision-making regimes operate in ways that reflect the *medical* model where people must prove that they can independently participate in decision-making.⁹ To enable those with disabilities to be empowered in their decision making, more modern legislative frameworks related to decision-making have been developed to provide for differing levels of involvement of others in the decision-making process. Principles included in newer legislation related to decision-making commonly include:

- Individuals are to be presumed capable unless demonstrated otherwise.
- The way a person communicates should not affect a determination of capacity.
- A person's autonomy should be preserved by choosing the least restrictive and least intrusive course of action available.
- People are entitled to choose the manner in which they live and to accept or refuse protection, so long as they have capacity to do so and do not harm others.

⁷ Krista James and Laura Watts, *Understanding the Lived Experiences of Supported Decision-Making in Canada: Legal Capacity, Decision-Making and Guardianship*, (March 2014). Online: Law Commission of Ontario <<https://www.lco-cdo.org/wp-content/uploads/2014/03/capacity-guardianship-commissioned-paper-ccel.pdf>>, at 3.

⁸ *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, 2000 SCC 27 (CanLII), [2000] 1 SCR 665.

⁹ Anna Arstein-Kerslake et al, "Future Direction in Supported Decision Making" (2017) 37:1 Disability Studies Quarterly.

- People are entitled to be informed about decisions affecting them, and to participate in making that decision to the best of their ability.
- A person should only be treated as unable to make decisions as a last resort, after all practical steps to help them to do so have been taken unsuccessfully.¹⁰

There are many different legally recognized ways of making decisions. They vary in the scope of authority that can be delegated, whether the delegator has capacity to make decisions themselves, and who ultimately has the legal authority to decide. Assisted decision-making involves the person who experiences decision-making challenges receiving assistance, in various forms, from others to make and communicate decisions. Legal authority remains with the person facing challenges and there is no need for the individual to be found incapable before another person can provide representation, assistance, or support. This type of arrangement may be referred to as associate decision-making, co-decision making, supported decision-making, or a representation agreement in various jurisdictions.

Assisted decision-making must be contrasted with substitute decision-making, committee ship, or guardianship, in which individuals requiring decision-making assistance must meet specific criteria related to incapacity. Once the criteria are met, authority to manage their affairs is granted to someone other than the individual themselves. Co-decision making is more restrictive than assisted decision-making but less than substitute decision making and leaves both individuals involved with joint responsibility to make decisions. A decision made by either alone is not legally valid. Both Alberta and Saskatchewan provide for this by judicial appointment.¹¹

Individuals are also able to delegate specific types of authority for either health care or financial decisions through health care directives or powers of attorney. A person must have capacity to enter into such an agreement and it is possible for the agreement to remain in effect after a person loses capacity to make decisions. Depending on the specific agreement, a person may retain legal authority to make decisions other than those they have delegated in the agreement. Throughout this paper, given the variations in terminology across jurisdictions, the person receiving assistance

¹⁰ Law Commission of Ontario, *Legal Capacity, Decision-making and Guardianship: Final Report* (Toronto: March 2017) at 49 [LCO Final Report].

¹¹ *Adult Guardianship and Trusteeship Act*, S.A. 2008, c A-4.2, [Alberta Act], s. 13; *The Adult Guardianship and Co-Decision-making Act*, S.S. 2000, c A.5.3, [Saskatchewan Act], s. 14, 39.

through an assisted decision-making agreement will be referred to as the decision-maker, while the person providing assistance will be referred to as the assistant, unless otherwise noted in reference to specific legislative provisions.

Assisted decision-making agreements offer individuals the opportunity to make decisions with assistance from trusted friends and family members, promoting autonomy and empowerment while ensuring choices are informed. A Manitoba Disability Task Force (DTF) report concluded that informal assisted decision-making is currently taking place, with up to 70 percent of adults with intellectual disabilities making decisions independently or via assisted decision-making.¹² Proponents of assisted decision-making arrangements suggest that such arrangements allow individual autonomy to be protected to the greatest extent possible. They are valued for enhancing the self-determination and dignity of people with disabilities, by enabling them to participate in decision-making, where they would not have capacity to do so independently.¹³

However, navigating assisted decision-making processes presents various challenges that decision-makers, their assistants and third parties may encounter. Decisions included within assisted decision-making agreements sometimes relate to financial, health care, or personal care matters and are communicated to various third parties including financial, health, or other service providers. These third parties face time or financial pressures and may have privacy related concerns when involved in an assisted decision-making process.¹⁴ The safety, security and legal accountability of the decision-maker, are also posed as being in tension with autonomy. Finally, concerns regarding abuse of assisted decision-making arrangements and options to effectively address those concerns have also been raised.

Several jurisdictions both within and outside of Canada have enacted legislation with a variety of approaches to balancing a person's right to autonomy with their safety, security and accountability. Given these recent developments and reform efforts in other jurisdictions, the Commission asks:

¹² Vulnerable Persons Living with a Mental Disability Task Force, "Pathways to Dignity: Rights, Safeguards, Planning and Decision Making", (September 2021). Online (pdf): <https://www.gov.mb.ca/fs/pubs/pathways_to_dignity_report.pdf> at 26 [DTF].

¹³ James & Watts *supra* note 7 at 77.

¹⁴ LCO Final Report *supra* note 10 at 46.

Should Manitoba implement legislation providing more formality to the process of assisted decision-making and if so, what should this legislation look like?

This consultation paper invites readers to provide their comments on issues for discussion. Background information on the state of the law on assisted decision-making and similar decision-making arrangements within Canada and other jurisdictions have been included to inform the discussion. The purpose of this paper is to gather input on the use of assisted decision-making agreements within the *Adults Living with an Intellectual Disability Act* (ALIDA), the scope of such agreements and whether they should be available to all adults or just those covered under ALIDA. In addition, whether such agreements can exist at the same time as substitute decision making (SDM) agreements for personal care and property, powers of attorney (POA) and health care directives, and what would the appropriate complaints mechanism be to resolve concerns – the Provincial Protection Investigation Unit, the Public Guardian, the Courts, or other?

The issues identified in this paper require input from legal professionals, academics, advocates, and other third parties who may participate in an assisted decision-making process, individuals with lived experience, either as a decision-maker or an assistant, as well as the public so that the Commission can craft recommendations that are practical and meaningful to those affected by any considered legislation. Based on the feedback received, the Commission may make recommendations for how to best configure a statutory regime which would govern the formal use of assisted decision-making agreements in Manitoba.

CHAPTER 2: BACKGROUND

A. State of the Law on assisted decision-making agreements in Manitoba

1. *The Adults Living with an Intellectual Disability Act*

In Manitoba, *The Adults Living with an Intellectual Disability Act*¹⁵ was developed to protect and promote the rights of adults living with an intellectual disability who need assistance to meet their basic needs regarding personal care or property management. *ALIDA* contains one section,

¹⁵ *The Adults Living with an Intellectual Disability Act*, CCSM c A6.1 [*ALIDA*], amending the *Vulnerable Persons Living with a Mental Disability Act*, CCSM c. V90 [the previous act].

amended in 2023, recognizing the United Nations *Convention on the Rights of Persons with Disabilities*, that contemplates assisted decision-making arrangements.¹⁶ However, there are no forms or provisions in the legislation to provide any further legal guidance, or detail regarding how supported or assisted decision-making agreements may be used. Except as noted, the section has remained relatively the same since the previous act was proclaimed in force on October 4, 1996.

Regarding the origin of s. 6, the Legislative Assembly discussed the first version of the Act (Bill 30) in 1993. There, Mrs. Carstairs (MLA from River Heights) read in Recommendation No. 5 from the *Report of the Review Committee Examining Legislation Affecting Adult Manitobans Living with a Mental Disability as Vulnerable Persons* (1991):

Recommendation No. 5 ... That the following statement of principles be stated in its entirety in the body of all legislation which may be enacted in respect to vulnerable persons and that such legislation provide that its provisions are to be interpreted in accordance with these principles.

[...]

Principle No. 6: Any intervention by the law in the decision-making process of an adult shall be the least restrictive and intrusive form of support, assistance or protection and shall relate directly to the needs of the adult at that time.

Principle No. 7: Where support is necessary in making decisions, interdependent or supported decision making through the advice, support and affection of family and friends chosen by the adult shall be recognized and validated.

Principle No. 8: In order to respect and preserve the legal rights of adults, any legislative or legal response that establishes a substitute decision-making process shall be invoked only as a last resort and must be based on evidence that the current practice is no longer empowering the adult. The determination by a hearing panel of a person's needs for a

¹⁶ *Ibid* s 6(1), 6(2) as amended, states:

Assisted decision making

6(1) In this section, "**assisted decision making**" refers to 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.

Role of assisted decision making

6(2) 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.

Under the previous act, this section referred to "**supported decision making**". In addition, there is no more gendered language (i.e. 'his' or 'her'), and the term "vulnerable person" was replaced with "adult living with an intellectual disability." Reference to the *Convention on the Rights of Persons with Disabilities* (CRPD), *op cit*, note 53, is contained in the added headnote of the amending statute, SM 2023, c 19.

substitute decision-making process shall be personalized, comprehensive and involve those who are important to that adult's life.¹⁷

These principles, adopted in the preamble of the previous act, were based on the *Charter of Rights and Freedoms* that one cannot discriminate against any individual living within Canadian society on the basis of a physical or mental disability, “yet much of the process and procedure that was allowed in the [Mental Health] act allowed such things to happen to those people suffering from a mental disability that seriously jeopardized their protection under the Charter.”¹⁸

Section 6 is substantially less prescriptive than similar legislation and regulations in other jurisdictions, principally leaving supported decision making in Manitoba through the advice, support and affection of family and friends chosen by the adult, as it was in 1993.¹⁹

The definition of “intellectual disability” excludes people whose disability manifested after the age of 18 years old and those who experience a disability exclusively due to a mental disorder as defined in *The Mental Health Act*.²⁰ Adults living with an intellectual disability who are resident in psychiatric facilities are governed by the *MHA*.²¹ *ALIDA* contemplates assisted decision-making arrangements for people who meet the criteria for having an “intellectual disability” as that term is defined in the legislation and is based on guiding principles which include:

1. Adults living with an intellectual disability are presumed to have the capacity to make decisions on matters affecting their lives, unless demonstrated otherwise.
2. Adults living with an intellectual disability should be encouraged to make their own decisions.
3. An adult living with an intellectual disability's support network should be encouraged to assist them in making decisions to enhance their independence and self-determination.

¹⁷ Manitoba, Legislative Assembly, Hansard, 35th Leg, 4th Sess, No 92 (29 June 1993) at 4936. While similar to the United Nations *Convention on the Rights of Persons with Disabilities*, it predates it by several years.

¹⁸ *Ibid.*

¹⁹ Manitoba, Family Services. A Fact Sheet on Supported Decision Making and Support Networks. Online (pdf): <https://www.gov.mb.ca/fs/calido/pubs/sdm_support_networks.pdf>. Compared to New Brunswick's *Supported Decision-Making and Representation Regulation*, 2023-66. Filed December 14, 2023. Online (pdf): <<https://www2.gnb.ca/content/dam/gnb/Departments/ag-pg/PDF/RegulationsReglements/2023/2023-66.pdf>>. Also see the Yukon's *Adult Protection and Decision-Making Regulation*, YOIC 2005/78, Schedules Form 1 (Supported Decision-Making Agreement) and Schedule Form 2 (Representation Agreement). Online (pdf): <<https://laws.yukon.ca/cms/images/LEGISLATION/SUBORDINATE/2005/2005-0078/2005-0078.pdf>>.

²⁰ *The Mental Health Act*, CCSM c M110, s 1 [MHA].

²¹ *Ibid*, s 3.

4. Assistance with decision-making should be provided in a manner which respects the privacy and dignity of the adult living with intellectual disabilities and should be the least restrictive and least intrusive form of assistance that is appropriate in the circumstances.
5. 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, either by themselves or with the involvement of members of their support network.

ALIDA also provides for substitute decision-making, where a person's legal authority to make decisions is placed with a third party upon a finding of incapacity. A Commissioner is appointed under *ALIDA* to implement the substitute decision-making provisions of the legislation.²² The Commissioner is not only responsible for determining whether the appointment of a decision-maker is appropriate, but also for monitoring the actions of those substitute decision-makers where they are appointed, to ensure that the rights of the person with the intellectual disability are being maintained, including conducting investigations into complaints regarding substitute decision-makers.²³ *ALIDA* is one of several pieces of legislation in Manitoba governing decision-making arrangements, including the *Powers of Attorney Act*, the *Health Care Directives Act* and the *MHA*.

By law, a person who believes an adult living with an intellectual disability is, or is likely to be, abused or neglected is required to report this information to the Department of Families. The Provincial Protection Investigation Unit, a specialized unit within the Department of Families, investigates reports of abuse and neglect pursuant to *ALIDA*.²⁴

If abuse or neglect is confirmed, immediate action is taken to protect the adult living with an intellectual disability. However, protective action should be the least restrictive and least intrusive to ensure reasonable safety and security under the circumstances and to maintain the independence, privacy and dignity of the individual.²⁵

²² *ALIDA supra* note 15 Part 4.

²³ *Ibid*, s 30.

²⁴ Protecting Adults Living with an intellectual Disability from Abuse and Neglect. Family Services Guide. Online: <<https://www.gov.mb.ca/fs/clds/pubs/protection-guidebook.pdf>>.

²⁵ *Ibid*. Where the alleged abuse or neglect occurs in a personal care home, hospital or any other designated health facility, the investigation is carried out under Manitoba's health-care system pursuant to the *Protection for Persons in Care Act*, CCSM c P144.

2. *The Powers of Attorney Act*

*The Powers of Attorney Act*²⁶ aims to permit an individual (the donor) to confer rights and powers on a person (the attorney) who is then authorized to act on their behalf in respect of their property.²⁷ An enduring power of attorney is void if at the time of its execution the donor is mentally incapable of understanding the nature and effect of the document. However, even if the person becomes mentally incompetent, the power of attorney can still be valid if, among other things, the document explicitly states that it remains effective despite the mental incompetence of the donor.²⁸ An enduring power of attorney must be witnessed by one of a listed group of people specified in the *POAA* including a lawyer.²⁹ If the attorney is under a duty to act because the donor is mentally incompetent, the attorney may have an obligation to provide an accounting of the donor's estate. There are various ways by which a power of attorney can be terminated under the *POAA* including, if a substitute decision-maker with power to deal with the person's estate is appointed under *ALIDA*, or if the custody, management or administration of the person's estate is taken over by the Public Guardian and Trustee or other committee under the *MHA*.³⁰

In circumstances where the Public Guardian is appointed as committee of a person who has previously made a valid enduring power of attorney, they must investigate to determine whether it is in the best interests of the donor for the Public Guardian to continue acting as committee, or whether the attorney should continue acting under the enduring power of attorney. If necessary, the Public Guardian will manage the donor's affairs during the investigation.

Interested parties who have a concern about the enduring power of attorney, or the actions of the attorney can apply to Court of King's Bench to have the issue reviewed. Section 24(2) of *POAA* provides that any of the following persons can make such an application:

- the attorney.
- the donor's nearest relative.
- a person named in the enduring power of attorney to receive an accounting.

²⁶ *The Powers of Attorney Act*, CCSM c P97 [POAA].

²⁷ *Ibid*, s 1(1).

²⁸ *Ibid*, s 10(1).

²⁹ *Ibid*, s 11(1).

³⁰ *Ibid*, s 13.

- another interested person, with approval of the court, or
- the Public Guardian.

As discussed in a guidebook published by the Public Guardian, when a donor has made an enduring power of attorney, the donor could previously register the enduring power of attorney with the Public Guardian by filing a copy of it with their office. This would have been of assistance to the donor in the event they were hospitalized, or under the care of a doctor who is considering requesting the appointment of a committee but wishes first to know if there is a power of attorney in existence. A call to the Public Guardian’s office could then prevent the appointment of a committee when it is unnecessary.³¹

While there is a note on the Public Guardian’s website that states “The Public Guardian and Trustee no longer operates a Power of Attorney Program,” as we shall see later, in Quebec, an Application for Recognition of an Assistant (supported or assisted decision-maker agreement) is registered with the Public Curator (Guardian).

3. *The Mental Health Act*

The *MHA* applies to individuals with mental disorders which grossly impair their judgment, behaviour or capacity to recognize reality or ability to meet the ordinary demands of life. Disorders due exclusively to an intellectual disability, as defined in *ALIDA*, are excluded from application of the *MHA*.³² The *MHA* permits other individuals to make certain treatment decisions³³ or decisions relating to management of property³⁴ for a person who does not have capacity to make those decisions for themselves. A committee is the person (or persons) who has been delegated authority to make those decisions on behalf of the individual (either financial or personal, or both) and a committeehip can be created through a court order³⁵ or upon information by the individual’s health care providers to the provincial Director of Psychiatric Services.³⁶ The *MHA* also provides for suspension of an enduring power of attorney in certain circumstances where a committee has

³¹ Enduring Power of Attorney Guidebook. Public Guardian and Trustee of Manitoba (Winnipeg: 2014). Online (pdf): <https://www.gov.mb.ca/publictrustee/pdf/power_of_attorney_guidebook.pdf>, accessed March 19, 2025.

³² *MHA supra* note 20 s 1.

³³ *Ibid*, s 28.

³⁴ *Ibid*, s 40.

³⁵ *Ibid*, s 71.

³⁶ *Ibid*, s 60.

been appointed³⁷ and limits a committee's powers to make decisions respecting certain aspects of health care where the person, while capable, made a health care directive that appointed another individual to make that decision or expressed the person's decision about the proposed care.³⁸

After being satisfied that the person's incapacity is not due exclusively to an intellectual disability as defined in ALIDA, the Director of Psychiatric Services shall make an order appointing the Public Guardian as committee of both property and personal care for that person if they are satisfied that it would be in the best interests of the person.

As the person's committee, the Public Guardian may take any emergency intervention action that is necessary to protect the incapable person, including removing him or her to a place of safety, if they believe on reasonable grounds that (a) the incapable person is or is likely to be abused or to suffer neglect; and (b) there is immediate danger of death or serious harm or deterioration to the physical or mental health of the person.³⁹

4. *The Health Care Directives Act*

*The Health Care Directives Act*⁴⁰ aims to provide individuals an opportunity to express their wishes regarding the amount and type of health care and treatment they receive should they become unable to communicate this for themselves. Individuals with capacity to understand information relevant to decision making and to appreciate the reasonably foreseeable consequences of a decision, or lack of decision, may make a health care directive and either specify their wishes for care in the directive or appoint an individual as a proxy who can make decisions on their behalf, or both.⁴¹ Directives must be in writing, signed and dated, but there are no other requirements to formalize the document.⁴² With some exceptions, wishes expressed in a health care directive are binding on health care professionals, but there is no obligation for health care professionals to search for or ask about a health care directive.⁴³ In event of conflict between the *HCDA* and the *MHA*, the *MHA* prevails.⁴⁴

³⁷ *MHA*, *supra* note 20 s 67.

³⁸ *Ibid*, s 91.

³⁹ *Ibid*, s 64(1)

⁴⁰ *The Health Care Directives Act*, CCSM c. H27 [HCDA].

⁴¹ *Ibid*, s 5. A person 16 years of age or more is presumed to have the capacity to make health care decisions (s 4(2)).

⁴² *Ibid*, s 8(1), 8(2).

⁴³ *Ibid*, s 21.

⁴⁴ *Ibid*, s 3.

Comparison of Decision-Making Documents

	Supported Decision-Making Agreement (SDMA)	Health Care Directive (HCD)	Power of Attorney (POA)	Substituted Decision-Making Authority (Guardianship/Committee)
Purpose	Allows an individual to receive support in decision-making while retaining final authority.	Specifies future health care preferences and/or appoints a proxy for medical decisions if incapacitated.	Grants someone authority to make financial and/or legal decisions on behalf of an individual.	A court-appointed person makes decisions for an individual who is legally deemed incapable.
Who Makes the Decisions?	The individual makes their own decisions with assistance.	The individual's written instructions guide decisions, or a proxy makes decisions if needed.	The attorney (appointed person) makes financial/legal decisions on behalf of the individual.	The guardian/committee makes decisions for the individual.
Legal Authority Granted	No transfer of decision-making power; the individual remains in control.	Only applies to health care decisions when the individual cannot make them themselves.	The attorney has authority (can be general, enduring, or limited).	The guardian/committee has full or partial authority over the individual's affairs.
Scope of Decisions	Personal, financial, medical, legal, or other areas where support is needed.	Health care, medical treatment, and end-of-life care.	Primarily financial and legal matters (not medical unless combined with a health care directive).	Can include financial, personal, health, and legal matters.
When It Takes Effect?	As soon as signed.	Only when the individual cannot make their own health decisions.	Can be immediate or upon incapacity.	Takes effect only after a court determines incapacity.
Can It Be Revoked?	Yes, anytime by the individual if they have capacity.	Yes, as long as the individual has capacity.	Yes, as long as the individual has capacity.	Generally, only a court can modify or revoke it.
Legal Oversight	No court involvement.	No court involvement; usually requires	No court involvement	Court-supervised process; ongoing legal responsibilities.

		compliance with health care laws.	unless disputes arise.	
Who Might Need It?	Someone who needs assistance in decision-making but still wants control.	Someone who wants to ensure their health care wishes are followed in case of incapacity.	Someone who wants a trusted person to manage finances/legal affairs.	Someone who has been found incapable of making decisions by a court.

B. Other relevant legislation

1. The Manitoba Human Rights Code

*The Manitoba Human Rights Code*⁴⁵ provides protection from discrimination for individuals and groups in Manitoba. *The Code* prevents people from being treated differently based on stereotypes or generalizations made based on actual or perceived membership in a specified group, rather than on a person’s individual merit. *The Code* prohibits discrimination based on certain characteristics specified in the Code. One of the specific characteristics referenced in the Code is “physical or mental disability or related characteristics or circumstances, including reliance on a service animal, a wheelchair, or any other remedial appliance or device.”⁴⁶ A duty to reasonably accommodate needs of individuals or groups, if those needs are associated with a protected characteristic when providing a service to the public, is also imposed by *The Code*.⁴⁷ *The Code* is paramount over the rights and obligations set out in every other Act of the Legislature, unless expressly provided for.⁴⁸

2. The Accessibility for Manitobans Act

The Accessibility for Manitobans Act (AMA)⁴⁹, enacted on December 5, 2013, was in response to the *Charter of Rights and Freedoms* and Article 9 of the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD), requiring State Parties to take appropriate measures to enable persons with disabilities to live independently and participate fully in all aspects of life. The AMA seeks to identify, prevent and remove barriers for those living with disabilities in Manitoba. It affects everyone in our province, building on the requirements of *The Code*. An accessibility

⁴⁵ *The Manitoba Human Rights Code*, CCSM c H175 [The Code].
⁴⁶ *Ibid* s 9(2).
⁴⁷ *Ibid* s 9(1), 13(1).
⁴⁸ *Ibid* s 58.
⁴⁹ *The Accessibility for Manitobans Act*, CCSM c A1.7 [AMA]. CRPD, *op cit*, note 53.

barrier is anything that limits or prevents a person from receiving information, services and goods, or accessing a space, or participating in an activity.

Barriers prevent individuals from doing many of the things other people take for granted. Barriers exist all around us and impact the lives of many individuals daily. Barriers can be:

- Structural
- Information and Communication
- New Technology
- Policies and Common Practices
- Attitudes (Often the Biggest Barrier)⁵⁰

Accessibility standards set regulations and identify when specific and achievable goals must be met. They are often referred to as the building blocks of the *AMA*. The standards address barriers through five key areas of daily living.

For this consultation paper, the *Customer Service* regulation,⁵¹ enacted November 2015, requires that accessible customer service is provided when all persons who are reasonably expected to seek to obtain, use or benefit from a good or service have the same opportunity to obtain, use or benefit from the good or service. An organization's actions must be consistent with the purposes and principles of the Act and its obligations — including the obligation to make reasonable accommodations — under the Human Rights Code.

3. *The Disability Support Act*

The Disability Support Act,⁵² proclaimed in force January 1, 2023, creates a new support framework for individuals living with a severe and prolonged disability who have no other adequate means of support and who face multiple and connected barriers to full community participation and social and economic inclusion. As noted in the preamble to the DSA, it is a societal responsibility to eliminate barriers faced by persons living with severe and prolonged disabilities and to accommodate their needs.

⁵⁰ Manitoba Accessibility Office, Frequently Asked Questions (Winnipeg: Dec 2024). Online (pdf): <<https://accessibilitymb.ca/resources/ama/faq-the-accessibility-for-manitobans-act.pdf>>.

⁵¹ Accessible Customer Service Standard Regulation, M.R. 171/2015.

⁵² *The Disability Support Act*, CCSM c D76 [DSA].

C. Initiative for change

Most jurisdictions in Canada have reformed legislation governing decision-making agreements. The reforms have generally been influenced by Article 12 of the United Nations *Convention on the Rights of Persons with Disabilities*⁵³ (CRPD), which was signed by Canada in 2007 and ratified in 2010, and is recognized in the guiding principles of *ALIDA*. The CRPD sets out the obligations of State Parties (signatories to the CRPD) to protect the rights of people with disabilities. Article 12 requires States Parties to:

- recognize persons with disabilities as persons before the law.
- recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
- take appropriate measures to provide access for persons with disabilities to the supports they may require in exercising their legal capacity.
- ensure that all measures related to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse. These safeguards must ensure that measures related to the exercise of legal capacity respect the rights, will and preferences of the person; are free of conflict of interest and undue influence; are proportional and tailored to the person's circumstances; apply for the shortest time possible; and are subject to regular review by a competent, independent and impartial authority or judicial body.
- take all appropriate and effective measures, subject to the provisions of the Article, to ensure the equal rights of persons with disabilities in a range of areas, including owning or inheriting property; controlling their own financial affairs; having equal access to bank loans, mortgages and other forms of financial credit; and ensuring that persons with disabilities are not arbitrarily deprived of their property.

Canada ratified the CRPD with a reservation providing that “persons with disabilities are presumed to have legal capacity on an equal basis with others in all aspects of their lives,” while concurrently permitting the application of substitute decision-making regimes “in appropriate circumstances and in accordance with the law.” The reservation states that “to the extent Article 12 may be interpreted as requiring the elimination of all substitute decision-making arrangements, Canada

⁵³ *Convention on the Rights of Persons with Disabilities*, 13 December 2006, 2515 UNTS 3, GA Res 61/106 (entered into force 3 May 2008, ratified by Canada 11 March 2010) [CRPD].

reserves the right to continue their use in appropriate circumstances and subject to appropriate and effective safeguards.”⁵⁴

While the CRPD emphasized that substitute decision-making in all cases should be replaced by supported decision-making, which respects the person’s autonomy, will and preferences, Canada entered several interpretative declarations with the understanding that the Article 12 “reflects a presumption of legal capacity and permits both supported and substitute decision-making arrangements in appropriate circumstances and in accordance with the law”. This reservation preserves Canada’s ability to continue to implement substitute decision-making regimes, particularly given that “many measures relating to the exercise of legal capacity are subject to regular review by an independent and impartial authority or judicial body, while others are subject to a review or appeal mechanism.”⁵⁵

However, the UN Committee on the Rights of Persons with Disabilities, in its General Comment No. 1, denounced substitute decision-making. The UN Committee specifically outlined States’ obligations as follows:

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.⁵⁶

ALIDA, originally referred to as *The Vulnerable Persons Living with a Mental Disability Act*, came into force in 1996 to meet the needs of a distinct population of adults living with intellectual disabilities who had previously been covered by the *MHA*.⁵⁷ At the time it was enacted it was seen

⁵⁴ *Ibid* at 10.

⁵⁵ Humna Wasim, “Maximizing Autonomy and Implementing the United Nations’ Convention on the Rights of Persons with Disabilities in Canada: Canadian Jurisdictional Approaches to Substitute Decision-Making, Supported Decision-Making and Co-Decision-Making”, (2024) 44 Windsor Rev Legal Soc Issues, at 54, citing the *Convention on the Rights of Persons with Disabilities: First Report of Canada* (Ottawa: Canadian Heritage, 2014) at 3. Online (pdf): Council of Canadians with Disabilities <<http://ccdonline.ca/media/international/Convention%20on%20the%20Rights%20of%20Persons%20with%20Disabilities%20-%20First%20Report%20of%20Canada.pdf>> [Wasim]

⁵⁶ UN Committee on the Rights of Persons with Disabilities (CRPD), 2014, General comment No. 1 (2014) - Article 12: Equal recognition before the law, 19 May 2014, CRPD/C/GC/1, p.6

⁵⁷ “Bill 23 – The Vulnerable Persons Living with a Mental Disability Amendment Act”, *Legislative Assembly of Manitoba Debates and Proceedings*, Vol. LXXVII No. 43B (18 April 2023) at 1610 [Bill 23].

to be a progressive piece of legislation. However, it has not undergone any significant reform for a lengthy period and still relies on substitute decision-making.

In 2021 the DTF report was issued by the Vulnerable Persons Living with a Mental Disability Task Force. The DTF contains suggestions for the Minister of Families to improve all parts of the system for adults with intellectual disabilities. The suggestions include conducting research and consultation to incorporate representation agreements, or a similar model, into the legislation and to consider how assisted decision-making or related terms could be defined to give the concept additional authority.⁵⁸

The DTF task force concluded that formal substitute decision-making should take place less often, and assisted decision-making should be the primary support, although concerns were identified where banks or health care providers refused to recognize the decisions of the adult with an intellectual disability and their support network. As a result of the recommendations in the DTF,⁵⁹ amendments were made to the legislation in 2023 including changing the name of the act to *ALIDA*, updating the language used to reference disabilities, enhance the protection provisions in the legislation, replacing the term “supported decision making” with “assisted decision making”, and to incorporate the principles from the CRPD in the preamble.

D. State of the Law on assisted decision-making around Canada

1. *British Columbia*

British Columbia has self-contained legislation addressing assisted decision-making. It was regarded as pioneering legislation in the area,⁶⁰ being developed in the early 90’s as an alternative to adult guardianship. It came into force on February 28, 2000, prior to the CRPD. Representation agreements may authorize the adult’s representative to help the adult make decisions, or to make decisions on behalf of the adult. They can be created without court intervention or the involvement of legal counsel. An adult may make a representation agreement even if incapable of managing their health care, personal care, legal matters, or making a contract.⁶¹

⁵⁸ DTF, *supra* note 12.

⁵⁹ Bill 23, *supra* note 57 at 1609, 1610.

⁶⁰ James & Watts *supra* note 7 at 15.

⁶¹ *Representation Agreement Act*, RSBC 1996, c 405, s 8(1), and *Representation Agreement Act Regulation*, B.C. Reg. 199/2001 [BC Act]

Factors that are taken into consideration to assess whether a person is able to make a representation agreement include communication of preferences, expressions of approval and disapproval to others; an awareness by the adult that they are making a representation agreement; and whether the adult has a relationship with the representative that is characterized by trust.⁶² Personal and certain health care decisions, financial decisions and ability to instruct counsel are powers that can be included in a standard representation agreement.⁶³ Representatives must act honestly and in good faith, exercise the care, diligence and skill of a reasonably prudent person, and act within the authority granted in the agreement.⁶⁴ In terms of oversight, the *BC Act* contains provisions requiring a “monitor” to be appointed to determine whether the representative is in compliance with their duties under the *BC Act*.⁶⁵

2. Yukon

Assisted decision-making relationships, which include both supported decision-making and representation arrangements, can be created by agreement, without court intervention upon completion of a form meeting requirements specified in the regulations⁶⁶ and can be entered into by any adult who understands the nature and effect of the agreement.⁶⁷ The *Yukon Act* sets out the responsibilities of the associate as being to assist the adult to make and express a decision, obtain relevant information, explain the relevant information to the assisted adult, to ascertain the wishes of the assisted adult and communicate them, and to ensure that the adult’s decision is implemented, while the regulations extensively detail the types of decisions that can be included in an agreement.⁶⁸ Once an agreement is entered into, the associate is entitled to obtain information for purposes specified in the *Yukon Act*⁶⁹ and third parties must recognize decisions communicated through such an agreement, subject to laws regarding fraud, misrepresentation and undue influence.⁷⁰

⁶² *Ibid* s 8(2).

⁶³ *Ibid* s 7. Also see s 9 for “non-standard representation agreements”.

⁶⁴ *Ibid* s 16(1).

⁶⁵ *Ibid* s 20(1).

⁶⁶ *Adult Protection and Decision-Making Act*, SY 2003, c 21, Sch A, s 8, and the *Adult Protection and Decision-Making Regulation*, YOIC 2005/78 [Yukon Act].

⁶⁷ *Ibid* s 6 (supported decision-making agreement) and s 15(1) (representation agreement).

⁶⁸ *Ibid* s 5 (supported decision-making agreement) and s 15(2) and 23 (representation agreement).

⁶⁹ *Ibid* s 10 (supported decision-making agreement) and s 24 (representation agreement)

⁷⁰ *Ibid* s 11 (supported decision-making agreement) and s 25 (representation agreement).

3. *Alberta*

In Alberta, two different types of supportive decision-making arrangements are possible under the *Alberta Act*, one created by agreement the other through formal court order. The more informal arrangement, called a supporter relationship, can be entered into by using a form available online called a Supported Decision-Making Authorization. Any adult who understands the nature and effect of a supported decision-making authorization may make one.⁷¹ Power can be granted to a supporter to assist in any area except financial matters.⁷² The more formal arrangement (a co-decision-making order) involves court intervention and comes into play when the adult’s decision-making capacity is impaired. A decision made through a supporter relationship is to be recognized as the decision of the adult, and third parties may only refuse to recognize the decision if they have reasonable grounds to believe that the supporter exercised undue influence on the supported adult in making the decision or if there is fraud or misrepresentation on the part of the supporter.⁷³ Supporter relationship agreements can be terminated by the adult themselves, or upon the adult losing capacity to make decisions or a personal directive (similar to a health care directive) of the adult taking effect.⁷⁴

4. *New Brunswick*

On January 1, 2024, New Brunswick’s *Supported Decision-Making and Representation Act*⁷⁵ was proclaimed into law. The legislation was a significant shift in provincial decision-making rights, self-determination and legal mechanisms for assisting people who may require help with making decisions. The *NB Act* permits adults over 19 with capacity to grant decision-making authorization in the areas of personal care or financial matters to another person referred to as an “assistant”.

The *NB Act* replaced the *Infirm Persons Act*, establishing a scheme for supported decision-making based on a human rights approach to decision making that supports the right for people with a disability to exercise their legal capacity that is consistent with the CRPD. In it, individuals are

⁷¹ *Alberta Act supra* note 11, s 4(1) 3.

⁷² *Ibid* s 1(1). A fillable form is available online at: <<https://formsmgmt.gov.ab.ca/Public/OPG5557.xdp>>.

⁷³ *Ibid* s 6.

⁷⁴ *Ibid* s 8.

⁷⁵ *Supported Decision-Making and Representation Act*, SNB 2022, c 60 [NB Act]. Also see Nova Scotia’s *Adult Capacity and Decision-making Act*, SNS 2017, c 4. While the act uses representation orders, a *Report on the Review of the Adult Capacity and Decision-making Act* (Nova Scotia: 2022) recommended the government consider making supported decision-making part of the law, p 19.

presumed to have capacity to make decisions, and assessments of capacity take into consideration whether a person can understand information that is relevant to the decision and can appreciate the reasonably foreseeable consequences of the decision.⁷⁶

A comprehensive General Regulation Reg 2023-66 and related forms, along with Rule 71.1 (*Proceedings under the Supported Decision-Making and Representation Act*) also came into force on January 1, 2024, at the same time the *NB Act*.

As outlined in New Brunswick's Law Reform Notes, the *NB Act*, General Regulation, and Rule 71.1 modernizes the law in two ways:

First, it updates the law regarding court-appointed substitute decision-makers (which were known as "committees" under the *Infirm Persons Act* and are now known as "representatives"). Second, it introduces two options for supported decision-making. The first option is the appointment of a "decision-making assistant". This appointment is made by the person who requires assistance (with the help of a lawyer) through a prescribed form called a "decision-making assistance authorization". The second option is the appointment of a "decision-making supporter". This appointment is made by the court.

As a result, there are three types of appointees under the [*NB Act*]: decision-making assistants, decision-making supporters, and representatives. The main difference between them (other than the method of appointment) is their role in decision-making:

- A decision-making assistant provides assistance to the person in making decisions (e.g., by explaining the relevant information and the reasonably foreseeable consequences of the available options) (ss. 10(5), 2).
- A decision making-supporter and the person make decisions together through a "supported decision-making process" (s. 27(1)).
- A representative makes decisions on behalf of the person (on the basis of the person's wishes and preferences where possible) (s. 44).

As indicated above, the legislative package consists of three parts:

- the [*NB Act*], which deals with the three types of appointees and with related matters, including capacity assessments and the status of committees appointed under the *Infirm Persons Act*.

⁷⁶ *Ibid* s 3(4), 3(1).

- the General Regulation, which sets out various details (such as record-keeping requirements for appointees) and includes three prescribed forms: decision-making assistance authorization, financial summary, and capacity assessment report.
- Rule 71.1, which sets out the procedure for court applications under the Act – i.e., applications for an order appointing a supporter/representative (Rule 71.1.04 – 71.1.07), applications for a review of such an order, including a review of the records kept by the supporter/representative (Rule 71.1.08), applications for directions (Rule 71.1.08), and other applications (Rule 71.1.09 – 71.1.11). (There are also three new forms in the Appendix of Forms: 71.1A, 71.1B, and 71.1C.)

Inclusion NB (formerly the New Brunswick Association for Community Living) has developed a course on the [NB Act] for lawyers. It is available on their training platform, Inclusive Communities Institute.⁷⁷

Authority under the *NB Act* must be granted to the assistant in a form authorized by regulation and a lawyer must be involved in the formalization of the arrangement or a person may apply to court for an order regarding an authorization.⁷⁸ The authorization remains in effect until revoked, terminated by the court, death of the assisted person, or another decision-making appointment is made.⁷⁹ A decision made through such an arrangement remains the decision of the assisted person, provided the assistant acts within the scope of their power and duties, and third parties can refuse to recognize a decision if the assistant did not do so.⁸⁰ Decisions which were made or communicated by an assistant who acted outside the scope of their authority are still binding on the assisted person, provided the third party did not know, and had no reasonable grounds to believe, the assistant was acting outside their authority.⁸¹

The *NB Act* also includes a provision for decision-making “supporters” who must apply to court to be appointed to assist the supported person in their decision-making process.⁸² Once appointed, they provide support by discussing the relevant information and reasonably foreseeable consequences of a decision in a manner the supported person is likely to best understand and to

⁷⁷New Brunswick Law Reform Notes #48: June 2024. Online (pdf):

<<https://www2.gnb.ca/content/dam/gnb/Departments/ag-pg/PDF/en/LawReform/notes-48.pdf>>.

⁷⁸ *NB Act*, *supra* note 75, s 6. See Form 1: Decision-Making Assistance Authorization, General Regulation Reg 2023-66, online (pdf): <https://laws.gnb.ca/en/resource/cr/2023-66_en_001_001.pdf>.

⁷⁹ *Ibid* s 8.

⁸⁰ *Ibid* s 13(1)(2).

⁸¹ *Ibid* s 13(3).

⁸² *Ibid* s 18.

assess the available options together with the supported persons' wishes and preferences.⁸³ A supporter must accept a decision made by a supported person made through the decision-making process, unless doing so would cause serious harm to the supported person in which case the supporter may refuse to assist in communicating the decision or in doing anything to give effect to the decision.⁸⁴

5. Ontario

In Ontario, the *Substitute Decisions Act, 1992*⁸⁵ (*Ontario Act*) is the main law that governs decision-making for individuals who are unable to make certain decisions on their own. Unlike provinces such as British Columbia or Alberta, Ontario does not have a formal system for supported decision-making agreements. However, the *Ontario Act* does include some measures that indirectly affect assisted or supported decision-making.

The law does not stop individuals from getting help from family, friends, or advocates when making decisions. In fact, it states that courts should not appoint a legal guardian if there is a less restrictive option available.⁸⁶ While the law does not formally recognize assisted or supported decision-making agreements, individuals resort to them informally as implied by this section. Unlike Quebec, as we shall see later, because there is no formal system for supported decision-making, people can run into problems, such as:

1. There is no official way to name a supporter without giving them full control.
2. Banks, hospitals, and other organizations may not recognize a supporter's role unless they have official legal power, like a Power of Attorney.
3. People who don't want to sign over their decision-making power but still need help may struggle to have their choices respected.

If someone does not want to transfer full decision-making power through Power of Attorney or guardianship, they can still:

⁸³ *Ibid* s 27(1).

⁸⁴ *Ibid* s 27(2).

⁸⁵ *Substitute Decisions Act, 1992*, SO 1992, c 30 [Ontario Act].

⁸⁶ *Ibid* s 22(3).

1. Create an informal supported decision-making plan, outlining their preferences and the role of their supporters (similar to Manitoba’s approach).
2. Use joint financial accounts, allowing a trusted person to help with finances without giving them full control.
3. Make advanced care plans, which explain their medical wishes in case they cannot express them later.
4. Appoint a substitute decision-maker under the *Health Care Consent Act*, allowing someone to make medical decisions on their behalf.⁸⁷

Ontario’s laws follow a cognitive and functional approach to legal capacity. This means that a person’s ability to make decisions is assessed based on their understanding of the situation, their ability to retain relevant information, and their ability to evaluate the consequences of their choices. This approach was influenced by the 1990 report *Enquiry on Mental Competency*, led by David Weisstub. The legal capacity test determines whether a person can make their own decisions and whether the law needs to step in. However, legal capacity is a complex and controversial topic because it involves legal, ethical, medical, and social factors.⁸⁸

There are ongoing debates about whether Ontario’s approach is fair and practical. Some argue that the law is difficult to apply in real life, while others believe it does not fully support individuals who need help making decisions. While the need for supported decision-making was expressed during the Law Commission of Ontario’s consultations, so was the view that supported decision-making was not an appropriate approach to incorporate into Ontario law.⁸⁹

However, there has been increasing criticism of this model in Ontario. More people are supporting the social model of disability, which sees disability because of societal barriers rather than an individual’s limitations. Human rights advocates argue that people with disabilities should be empowered to make their own decisions rather than having decisions made for them. Because of

⁸⁷ *Health Care Consent Act*, 1996, SO 1996, c 2, Sch A (“substitute decision-maker” is mentioned throughout). An example of a supported decision-making plan, referenced by Community Living Ontario at page 4 of their report on Decision-Making in Action (Toronto: 2024), is one prepared by the American Civil Liberties Union and available online (pdf): <https://www.aclu.org/sites/default/files/field_document/sdm_packet_for_pwds_0.pdf>.

⁸⁸ LCO Final Report *supra* note 10 at 57-59. Citing David N. Weisstub, *Enquiry on Mental Competency: Final Report* (Toronto: Publications Ontario, 1990).

⁸⁹ *Ibid.*

these issues, groups like Community Living Ontario continue to advocate for the government to create a legal Supported Decision-Making system in Ontario.⁹⁰

Different approaches to decision-making reflect different beliefs about autonomy, dignity, and the role of the law. People affected by legal capacity laws have very different needs or support requirements. For example:

- A young adult with an intellectual disability may require a different type of support than an elderly person with mid-stage Alzheimer’s disease in a long-term care home.
- A person with a severe and recurring mental health condition may have different needs than someone with a temporary cognitive impairment due to injury or illness.⁹¹

The nature of a condition or disability, the life stage at which it occurs, and the point in the life at which resort must be made to legal capacity and decision-making laws will have very significant implications for the extent and nature of a person’s relationships, the financial resources available (and the resultant temptations to abuse), and the nature and availability of appropriate supports and resources. All of these will in turn have significant implications for the way in which individuals will encounter the laws in this area. Because of these differences, a one-size-fits-all solution may not work for everyone.⁹²

It is also important to consider the experiences of caregivers, family members, and supporters who help individuals make decisions. Laws play a role in shaping social values, but in dealing with the practical challenges of day-to-day life, most people rely on common sense, ethics, and personal and community relationships rather than legal rules. Many family members acting under a Power of Attorney or as guardians may already function in a way that closely resembles supported

⁹⁰ See Community Living Ontario, “Assessing the Legal, Regulatory and Policy Basis for Supported Decision-Making Among People Who Have an Intellectual Disability in Ontario” (Toronto: 2024), online (pdf): <<https://communitylivingontario.ca/wp-content/uploads/2024/04/Assessing-the-legal-regulatory-and-policy-basis-for-supported-decision-making-in-Ontario.pdf>> and “Community Living Ontario, Supported Decision-Making in Action” (Toronto: 2024), online (pdf): <https://communitylivingontario.ca/wp-content/uploads/2024/04/Supported-decision-making-in-action_final.pdf>.

⁹¹ LCO Discussion Paper, *supra* note 1 at 116-117.

⁹² *Ibid.*

decision-making. Likewise, some supporters end up making decisions on behalf of an individual that is functionally no different than that of a substitute.⁹³

This will be one of the fundamental questions in this report – if you have been involved in a supported decision-making process (informally or formally), how well do you think it worked?

6. *Quebec*

Effective November 1, 2022, an *Act to amend the Quebec Civil Code, the Code of Civil Procedure, the Public Curator Act*, and various provisions as regards the protection of persons, came into force.⁹⁴

The Public Curator Act enhanced the measures in place to protect vulnerable individuals. The new protection system is adaptable to each situation – from Tutorships to Powers of Attorney as outlined in the chart on page 36 – to safeguard the autonomy of individuals (while considering their wishes and preferences), preserve individuals’ ability to exercise their civil rights insofar as possible, and provide more oversight for the administration of the patrimony of minors.⁹⁵

Under the new amendments a new Assistance Measure was introduced. The Assistance Measure allows a person experiencing a difficulty to be assisted free of charge by one or two people of their choice while keeping full control over their decisions. Officially recognized by the Public Curator, the assistants to the person of full age (18 years old) can help the person:

- take care of themselves,
- make decisions,
- exercise their rights,
- manage their assets (patrimony).

⁹³ *Ibid.*

⁹⁴ *Quebec Civil Code*, CQLR c CCQ-1991 and *Public Curator Act*, CQLR c 81 (as amended by SQ 2020, c. 11, *An Act to amend the Civil Code, the Code of Civil Procedure, the Public Curator Act and various provisions as regards the protection of persons*) and the *Regulation respecting the application of the Public Curator Act*, C-81, r. 1. [Quebec Act]

⁹⁵ All information in this section is taken directly from two Quebec Public Curator guidebooks regarding the new Assistance Measure – *Official recognition for assistants* (March 2023), online (pdf): <https://cdn-contenu.quebec.ca/cdn-contenu/curateur-public/pdf/aut_doc_util_en/mesur_assist_en.pdf>, and *Official recognition to better help you* (February 2025), online (pdf): <https://cdn-contenu.quebec.ca/cdn-contenu/curateur-public/pdf/dep_mesur_assist_en.pdf>.

The assistant can then communicate with third parties (government services, financial institutions, businesses, service providers and professionals, such as physicians, pharmacists, social workers, lawyers, accountants, etc.) on behalf of the assisted person. Once these parties have checked that the assistance measure is valid through the Public Curator's public register, they can exchange information with the assistant about the person being assisted.

This recognition allows the assistant to act as an intermediary between the assisted person and all third parties for a maximum of three years. That means the assisted person does not need to contact each third party individually to authorize their assistant to speak on their behalf. They also don't need to be present each time the assistant needs to contact a third party.

The assistance measure differs from a power of attorney, which is a contract that allows a person to represent and act on behalf of another person. The assistance measure does not allow the assistant to act on behalf of the assisted person. For example, the assistance measure does not allow the assistant to sign a contract or make a bank transaction. However, it does allow the assistant to send or receive information to and from third parties or acknowledge a decision on behalf of the assisted person.

The assistance measure is designed for any adult who would like assistance due to a difficulty, while being able to choose their own assistant(s). To qualify, the person must demonstrate that they understand the scope of this measure and be able to express their wishes and preferences.

Examples of difficulties that may cause a person to want to use the assistance measure include:

- age-related loss of autonomy,
- mild intellectual disability,
- vision, hearing, or motor impairment,
- mental illness,
- language barrier,
- addiction problem (substance abuse).

To become an assistant for someone close to them, they must:

- be a person of full age (or a fully emancipated minor),

- be able to exercise the person’s civil rights (not be under a representation measure, such as a tutorship or a homologated (legally validated) protection mandate,
- know the person who wants assistance (must be a relative or someone close to them, or have an interest in them, e.g., informal caregiver, neighbour or friend),
- be available to help,
- have their interests at heart,
- respect the privacy and confidentiality of their personal information.

Neither the Public Curator nor a professional (social worker, specialized educator, notary, etc.) may act as an assistant as part of their duties. Once recognized as an assistant, they must:

- intervene only upon request and for aspects identified by the assisted person,
- ensure that the assisted person understands the information and decisions communicated by third parties,
- inform the Public Curator of any change that impacts the support they provide to the assisted person.

Once recognized, each assistant is entered in a public register managed by the Public Curator, allowing them to deal with various organizations, government departments, and service providers on the person’s behalf. The assistant may send these third parties’ information or collect information from them, through a single process and on behalf of the assisted person. Application for recognition of an assistant may be sent to the Public Curator. The applications do not need to be approved by the court.

The assistant MAY:

- Act as an intermediary for the assisted person.
- Advise the assisted person.
- Contact third parties to obtain or send information, or to inform them of decisions made by the assisted person.
- Access the assisted person’s personal information, only with their consent and if the information is needed to help them.

The assistant MAY NOT:

- Sign documents on behalf of the assisted person.

- Make decisions for them.
- Act in situations of conflict of interest.
- Be paid for their help.

The process of getting an assistant recognized involves several steps, but, unlike protection measures such as a tutorship (representation), the assistance measure is not a legal process and requires no medical or psychosocial assessment. It is a voluntary measure, although the person who wants recognized help from an assistant must apply.

There are two ways to apply: Directly to the Public Curator, in which case the person can submit their application online or using a paper form, free of charge; or via a lawyer or a notary, for a fee. In all cases, the Public Curator makes the final decision whether to recognize an assistant.

Unlike a power of attorney, which entitles a person to act on behalf of another person, the assistance measure allows the assistant to collect or send information on behalf of the assisted person, but not make decisions for them, such as signing a contract or making a bank transaction.

The assistant can facilitate the communication and actions of the person being assisted in a wide range of day-to-day situations. Depending on the needs and wishes of the person being assisted, they may, for example, communicate with:

- health care professionals to:
 - obtain or provide information to facilitate the medical follow-up of the assisted person.
- product or service providers (cable, telephone, internet, electricity, etc.) to:
 - verify the details of an invoice to make sure there are no errors or to confirm whether a payment has been made.
 - find out about the best packages for the person being assisted.
 - discuss any difficulties experienced by the person being assisted.
- financial institutions and insurers to:
 - verify banking transactions.
- government departments and agencies to:

- verify the status of a request for benefits or compensation and ensure that there are no missing documents delaying the process.

The assistance measure allows the assistant's name to be entered in the public register of assistants. Using this register, those involved will be able to validate the official recognition of the assistant.

The person files the application with the Public Curator on a voluntary basis and may stop it at any time. No legal proceedings are necessary. No medical or psychosocial assessment is required. The assistance measure allows the person being assisted to continue to exercise all their rights and to control their decisions and assets.

Prevention of abuse and mistreatment is a major concern. As such, the measure is accompanied by several layers of protection, such as a criminal background check of the proposed assistant, notification of the application to at least two people close to the person requesting assistance (who will agree or disagree with the proposed assistant), and termination of the measure after three years.







The Public Curator mission is mainly to see that incapable persons are protected. The Public Curator shall exercise their functions in the interest of the incapable person and in such a manner as to respect their rights and safeguard their autonomy, considering their wishes and preferences. They are also responsible for recognizing assistants to persons of full age and for seeing to the protection of the patrimony of minors.

The Public Curator may, of their own initiative or on request, hold an inquiry relating to the persons they represent, the property they administer or that should be entrusted to their administration and, generally, to any minor or to any person under tutorship, temporary representation or assistance; he may, in the same manner, hold an inquiry relating to any incapable person whose care or the administration of whose property has been entrusted to a mandatary. In addition, they may use their investigative powers when deemed necessary, for example, if it receives a report regarding the actions of a recognized assistant.

A chart prepared by the Government of Quebec in 2023 outlining the new protection system and the various types of orders and agreements is found on the following page.

Draft summary chart of assistance and representation measures

Incapacity occurs when a person lacks the intellectual capacity to take care of themselves or manage their assets. A physical handicap is not a cause of incapacity unless it prevents the person from expressing their wishes.

	TUTORSHIP FOR ADULTS	TEMPORARY REPRESENTATION	ASSISTANCE MEASURE	PROTECTION MANDATE	POWER OF ATTORNEY (PROXY)
FOR WHOM? 	Any incapacitated adult who needs to be represented to exercise their rights.	Any person of full age who is unable to perform a specific act due to incapacity when it is their only need for representation.	Any adult experiencing difficulties. The person must understand the scope of the measure and be able to express their wishes and preferences.	Any capable adult, in anticipation of incapacity.	Any capable adult.
FOR WHAT PURPOSES? 	So that a person can ensure either the protection of the incapacitated person or the management of their assets, or both and, in general, the exercise of their rights.	So that a person performs the act for which they have been appointed.	To be assisted by one or two people closer to them when making decisions, managing assets, taking care of themselves and, in general, exercising their rights.	To appoint a mandatory to take care of them, should they become incapacitated. The mandatory may also be appointed to manage the person's assets.	So that a person can perform specific actions relating to the management of the assets of the person granting power of attorney.
WHAT TYPE OF ACTIONS? 	Depending on the person's incapacity and need for representation, a tutorship may cover the management of their assets and the exercise of rights relating to assets (tutorship of property); the protection of their person, i.e. their moral well-being, their representation when exercising their civil rights and the defence of their rights (tutorship of the person); or both aspects. The tutor involves the represented person in the decisions to be made, takes into account their wishes and preferences, and informs them of the steps taken and decisions made in their regard.	The temporary representative performs the act for which they have been authorized within the limits imposed by the court. The tutor involves the represented person in the decisions to be made, takes into account their wishes and preferences, and informs them of the steps taken and decisions made in their regard.	Once recognized by the Curateur public, the assistant can communicate with third parties on behalf of and at the request of the assisted person, including government departments, businesses, professionals and other service providers.	When the person becomes incapacitated and the mandate is homologated, the mandatory or mandataries exercise the powers granted to them under the mandate, including the protection of the person, the management of their assets, or both. They must take into account the wishes and preferences of the represented person, including those specified in the mandate.	The person acts on behalf of the adult who has entrusted them with this role for the situations specified in the power of attorney, such as paying bills, selling a car or signing a lease.
IS IT SAFER? 	In the case of private tutorship, the tutor's management is supervised by the tutorship council. The tutor must provide an inventory of the represented person's assets and, if the represented person's assets exceed \$40,000, the tutor(s) must also provide security. Once a year, the tutor(s) must prepare an annual management report. These documents must be submitted to the tutorship council and to the Curateur public for verification. In the case of public tutorship, the Curateur public assumes the role of tutor. Once a year, at the request of the adult or a relative, the Curateur must provide a summarized management report.	The temporary representative may act only in respect of the act for which temporary representation has been authorized and in accordance with the terms and conditions for the exercise of powers laid down by the court. Protective filers are in place, such as mandatory reporting to the represented person and, if requested by the court, to a relative or the Curateur public. The measure ends as soon as the act is completed.	The assistant cannot make decisions, sign documents or carry out banking transactions on behalf of the person being assisted. Protective filers are in place, such as interviews with both the person requesting assistance and the prospective assistant, and maintenance of the Public Register of Assistants, which can be consulted by third parties wishing to verify the assistant status of the person contacting them. The assistance measure ends after three years. The person being assisted may ask for the service to be terminated at any time.	The protection mandate has no effect if it is not homologated. The mandatory must also draw up an inventory of the person's assets. Third-party reporting is mandatory for all mandates signed on or after November 1, 2022.	The power of attorney may be revoked at any time. It is the responsibility of the person granting the power of attorney to ensure that the terms of the power of attorney are respected and that it continues to meet their needs.
TAKING IT TO COURT? 	Yes. The request must be made to the court, which analyzes the medical and psychosocial assessments and meets with the person concerned and their relatives. In the event of a favourable decision, the court declares the tutorship open and appoints the tutor, the substitute tutor, if any, and the members of the tutorship council.	Yes. The request must be made to the court, which analyzes the medical and psychosocial assessments and, in the event of a favourable decision, determines the particular conditions of the powers granted to the temporary representative.	No. The request for recognition of the assistant is made to the Curateur public.	Yes. Should the person become incapacitated, the mandatory must provide medical and psychosocial assessments to the court and apply to have the protection mandate homologated, whether in the presence of two witnesses or a notary.	No, there is no court application. What's more, it doesn't have to be witnessed or notarized.
IS IT COMPATIBLE WITH OTHER MEASURES? 	The person under tutorship cannot benefit from any other measure unless they have a protection mandate that needs to be completed.	The person benefiting from temporary representation can call on: • the Assistance Measure; • the power of attorney for an act other than temporary representation, if they are able to supervise the mandatory. The person cannot be under tutorship or homologated protection mandate.	The person benefiting from the assistance measure can call on: • a temporary representative; • a power of attorney. The person cannot be under tutorship or homologated protection mandate.	If the mandate is not homologated, the mandatory may request: • a temporary representation; • the Assistance Measure; • a power of attorney. If the mandate is homologated, the person cannot benefit from another measure unless tutorship is required to complete the mandate.	The person who has granted a power of attorney may call upon: • a temporary representation. However, if it is for the same act, the power of attorney ends; • the Assistance Measure. The person cannot be under tutorship or homologated protection mandate.
TO LEARN MORE	Quebec.ca/tutorship-for-adults	Quebec.ca/temporary-representation	Quebec.ca/assistance-measure	Quebec.ca/protection-mandate	Quebec.ca/finance-income-and-others/taxes/power-attorney-legal-protection/power-attorney

June 2023 – Text originally drafted in French.

E. State of the Law on assisted decision-making Outside of Canada

1. Ireland

Ireland signed the CRPD in 2007 and ratified it in 2018. Like Canada, when ratifying the CRPD, Ireland initially entered a declaration and reservation on Article 12, the text of which stated that:

Ireland recognises that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. Ireland declares its understanding that the Convention permits supported and substitute decision-making arrangements which provide for decisions to be made on behalf of a person, where such arrangements are necessary, in accordance with the law, and subject to appropriate and effective safeguards.

To the extent article 12 may be interpreted as requiring the elimination of all substitute decision making arrangements, Ireland reserves the right to permit such arrangements in appropriate circumstances and subject to appropriate and effective safeguards.⁹⁶

As Ireland adheres to the common law tradition of not implementing treaties until such time as Irish domestic law is considered in general conformity with the treaty, the *Assisted Decision-Making (Capacity)(Amendment) Act 2022*, was enacted on December 17, 2022, and substantially in force on April 26, 2023.⁹⁷

The Decision Support Service (DSS), a statutory service established by the *ADMCA* provides an essential service for people who face difficulties in exercising their decision-making capacity. The establishment and operation of the DSS, along with 13 detailed Codes of Practice, is an important part of Ireland's compliance with the CRPD.⁹⁸

The *ADMCA* and DSS establishes a legal framework for supported decision-making around personal welfare, property and affairs. The DSS was created to regulate and register support arrangements, supervise the actions of supporters, maintain a panel of experts who will act as

⁹⁶ United Nations, Ireland's 'Declaration: Articles 12 and 14', March 20, 2018. Online (pdf): <<https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-15.en.pdf>>, accessed March 19, 2025.

⁹⁷ *Assisted Decision-Making (Capacity) Act (NI) 201*, as amended [*ADMCA*]. See commencement information, online: <https://www.irishstatutebook.ie/eli/isbc/2022_46.html>.

⁹⁸ Introduction to the Decision Support Service [DSS], online: <<https://decisionsupportservice.ie/resources/codes-practice/about-codes-practice>>. All 13 Codes of Practice for decision supporters, interveners and relevant professionals can also be found online: <<https://decisionsupportservice.ie/resources/codes-practice>>.

decision-making representatives, review and investigate complaints made under the *ADMCA* and promote awareness and provide information about the *ADMCA*.⁹⁹

The *ADMCA* sets out a functional test for the assessment of capacity. This means that a person over the age of 18 is always presumed to have capacity. Where a person's capacity is called into question, the first step must always be to support that person as much as possible to make their own decision. In a situation where the person's capacity is in question, even after all necessary supports have been provided, an assessment of their capacity is based on their ability to make a specific decision at a specific time.¹⁰⁰

A tiered framework of decision support arrangements is set out in the *ADMCA*. These arrangements are based on the different levels of support that a person requires to make a specific decision at a specific time. In addition, the Act provides for future planning arrangements by way of an enduring power of attorney or advance healthcare directive, for adults who want to plan for a time when they may not have capacity to make certain decisions.¹⁰¹

The different types of decision-making arrangements include a decision-making assistance agreement where another person is chosen by the assisted person to assist in making decisions, a co-decision-making agreement to grant another person legal authority to make decisions with the supported person and, if a person is unable to make certain decisions even after all supports have been exhausted, the court may make a declaration about the person's capacity and appoint a decision-making representative to make those decisions on their behalf.¹⁰²

2. Australia

Australia signed the CRPD in 2007 and ratified it in July 2008 with a similar reservation as Canada, providing that persons with disabilities are presumed to have legal capacity on an equal basis with others in all aspects of their lives, but that the Convention allows for fully supported or substituted decision-making arrangements.

⁹⁹ *Ibid* p 1.

¹⁰⁰ *Ibid* p 2.

¹⁰¹ *Ibid* p 3.

¹⁰² *Ibid*.

In 2013 the Australian Law Reform Commission undertook a comprehensive review of the Commonwealth's laws regarding equal recognition and legal capacity for people with disability based on Australia's ratification of the CRPD. The Commission's report, *Equality, Capacity and Disability in Commonwealth Laws* was tabled on November 24, 2014.¹⁰³ The central point of the inquiry was the equal recognition of people with disability as persons before the law and their ability to exercise legal capacity as outlined by the CRPD. Not unlike Canada, the federal review was seen as a challenge as much of the law relating to capacity is entrenched in state law, especially the laws relating to guardianship and administration.¹⁰⁴ As noted in a recent academic article, this has resulted in "glacial" changes.¹⁰⁵

However, under the *National Disability Insurance Scheme Act*,¹⁰⁶ a plan nominee may be appointed in writing at the request of a National Disability Insurance Scheme (NDIS) participant or on the initiative of the National Disability Insurance Agency (NDIA), to act on behalf of someone participating in the NDIS.

A plan nominee has a duty to:

- ascertain the wishes of the participant
- act in a manner that promotes the personal and social wellbeing of the participant
- only act if the participant is not capable of doing the act
- develop the capacity of the participant
- avoid or manage conflicts of interest.

Nevertheless, the State of Victoria has made several legislative changes using supported decision-making in recognition of the CRPD.

a. State of Victoria

¹⁰³ Australian Law Reform Commission. *Equality, Capacity and Disability in Commonwealth Laws*, ALRC Report 124 (2014). Online (pdf): <https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_124_whole_pdf_file.pdf>.

¹⁰⁴ See Modelling Supported Decision Making in Commonwealth Laws – The ALRC's 2014 Report and Making It Work, online: <<https://www.alrc.gov.au/news/modelling-supported-decision-making-in-commonwealth-laws-the-alrcs-2014-report-and-making-it-work/>>.

¹⁰⁵ Terry Carney, Shih-Ning Then & Craig Sinclair. *A New Aged Care Act: Progress in Implementing a Supported Decision-Making Approach in Australia's Federation*. UNSW Law Journal Forum, [2024] 1(1).

¹⁰⁶ *National Disability Insurance Scheme Act 2013*, No. 20, 2013, ss 78-94.

In 2012 the Victorian Law Reform Commission also began recognising supported decision-making in the areas of guardianship, powers of attorney, mental health, and medical treatment.¹⁰⁷

There are currently four state laws that operate in Victoria which allow for supported decision-making:

- *Powers of Attorney Act 2014* (supportive attorney)
- *Guardianship and Administration Act 2019* (supportive guardian and supportive administrator)
- *Medical Treatment Planning and Decisions Act 2016* (support person)
- *Mental Health and Wellbeing Act 2022*.¹⁰⁸ (nominated support person)

A supportive attorney may be appointed under the *Powers of Attorney Act*¹⁰⁹ by a person to support them to make and act on their decisions. The person gives their supportive attorney power to:

- access or provide information about them to organisations such as hospitals, banks and utility providers
- communicate with organisations
- communicate their decisions
- give effect to their decisions.

The person decides what type of decisions they want support to make and act on, which can include personal matters, such as access to support services, and financial matters, such as paying expenses. But does not include decisions about significant financial matters.

A supportive guardian and supportive administrator appointed under the *Guardianship and Administration Act*¹¹⁰ is very similar to a supportive attorney appointment. The main difference is that the Victorian Civil and Administrative Tribunal (VCAT) makes the appointment.

The role of a supportive guardian or supportive administrator is to support a person with a disability to make, communicate and/or give effect to decisions about:

¹⁰⁷ Victorian Law Reform Commission, *Guardianship, Final Report 24* (Melbourne: 2012). See chapters 8 (Supporters), 9 (Co-decision making) and 10 (Personal appointments of substitute decision makers).

¹⁰⁸ Information in this section is taken directly from Office of the Public Advocate, *Supported Decision-Making in Victoria* (State of Victoria: 2020), except for the 2022 *Mental Health and Wellbeing Act* (MHWA). Online (pdf): <<https://www.publicadvocate.vic.gov.au/resource/file?id=31>>.

¹⁰⁹ *Powers of Attorney Act 2014*, No. 57 of 2014, ss 70-89.

¹¹⁰ *Guardianship and Administration Act 2019*, No. 13 of 2019, ss 68-82.

- the personal matters set out in the order (supportive guardian).
- the financial matters set out in the order (supportive administrator).

Any person can apply to VCAT for a supportive guardianship or supportive administration order for an adult with disability. However, the application needs to propose someone for the role, and the person needs to agree to take it on.

As well as other personal matters set out in the order, a supportive guardian can support the person to make medical treatment decisions if the supportive guardianship order states this, including help with:

- information to decide
- explaining information
- breaking down a decision into smaller steps'
- communicating a decision
- carrying out a decision.

A support person under the *Medical Treatment Planning and Decisions Act*¹¹¹ can be appointed by another person to help them make, communicate and act on their medical treatment decisions.

When the person does not have decision-making capacity to make medical treatment decisions their support person represents their interests in relation to their medical treatment, for example explaining previous treatment preferences to medical staff. A support person does not have the authority to make a person's medical treatment decisions unless they are also appointed to be a medical treatment decision maker.

Victoria's *Mental Health and Wellbeing Act*,¹¹² which replaced the *Mental Health Act in 2023*, provides for a nominated support person to be chosen by a person receiving mental health services to represent their interests and support them if they become a patient under the Act.

The role of a nominated person is to:

- advocate for the views and preferences of the patient,
- support the patient to communicate their views, preferences, decisions, questions or concern,

¹¹¹ *Medical Treatment Planning and Decisions Act 2016*, No. 69 of 2016, ss 31-35.

¹¹² *Mental Health and Wellbeing Act*, No. 39 of 2022 [MHWB], in force September 1, 2023.

- advocate for any appropriate supports that would assist the patient to communicate and participate in decision making,
- support the patient to understand information and decisions,
- receive information, and be consulted, about the patient in accordance with this Act,
- undertake the role until the nomination is withdrawn.¹¹³

Mental health is defined in the *MHWA* to include a medical condition characterized by a significant disturbance of thought, mood, perception or memory.¹¹⁴ Principles for supported decision-making are included within the *MHWA* and require priority to be placed on the views and preferences of the person receiving mental health and wellbeing services,¹¹⁵ along with respect for the right of a person receiving such services to take reasonable risks in order to achieve personal growth, self-esteem and overall quality of life.¹¹⁶

Supported decision-making agreements must meet certain requirements within the *MHWA*, but do not require involvement of a lawyer or completion of a specified form.¹¹⁷ The provisions under the *MHWA* to promote supported decision making include a presumption of capacity, a requirement for those communicating with a supported person or a supporter to explain what they are communicating, answer questions as clearly and completely as possible, and provide appropriate supports to help the person understand the information, make decisions and communicate their views.

The Government of Victoria has also established an independent mental health advocacy office to provide non-legal advocacy services. Advocates act on the instruction of the consumer of the services and assist the consumer in understanding and accessing information regarding their care, making decisions about their care, expressing their decisions, views and preferences and in understanding and exercising their rights.¹¹⁸

¹¹³ *Ibid* Part 2.6, s 61-66.

¹¹⁴ *Ibid* Part 1.2, s 4(1).

¹¹⁵ *Ibid* Part 1.5 s 18, 19.

¹¹⁶ *Ibid* Part 1.5 s 23.

¹¹⁷ *Ibid* Part 2.6, s 63.

¹¹⁸ Victoria Department of Health, “Mental Health Advocacy (non-legal) Handbook” (August 2023), online: <<https://www.health.vic.gov.au/mental-health-and-wellbeing-act-handbook/supported-decision-making/mental-health-advocacy-non-legal>>.

In relation to people with disabilities more generally, the Royal Commission released a report in 2023 on *Violence, Abuse, Neglect and Exploitation of People with Disability*.¹¹⁹ The report recommended a new supported decision-making framework and describes the reforms needed to embed it in the relevant state and territory guardianship and administration legislation, building on the State of Victoria's legislative reforms under the *MHWA* relating to presumption of capacity and recognition of the right to make decisions, including those with risk. Additionally, principles relating to the inclusion of safeguards to prevent abuse, promotion of processes co-designed with people with disabilities, and recognition of diversity and cultural safety were recommended.

3. *Sweden*

Sweden signed the CRPD in 2007 without reservations concerning Article 12 and ratified it in 2008. The ratification of the treaty came into force in 2009. However, the CRPD has not received the status of domestic law in Sweden as it is the position of Parliament that Sweden is already compliant with most of the CRPD's provisions, and significant legislative changes were not required. For example, prior to 1989, there was a possibility for total legal incapacitation of an adult person. The procedure was called *omyndigförklaring*, which can be translated as 'pronouncement as being underaged'. On January 1, 1989, the Family Code was amended, abolishing the possibility of declaring a person totally legally incapable. The abolition of total legal incompetence was due to the stigmatising and traumatic effects of total legal incapacity on persons. Since then, a formal declaration of full legal incapacity has been illegal in Sweden.¹²⁰

Instead of proclaiming a person totally incapable of acting, Swedish family law legislation nowadays provides at least four other options. A person can receive an administrator (*förvaltare*) or a special representative (*god man*) appointed. A court's decision appoints both administrator and a special representative. The third option is *ex lege* representation of adults not capable of deciding. Finally, a person can provide a lasting power of attorney [*framtidensfullmakt*] for the cases when he or she becomes unable to decide in future.¹²¹

¹¹⁹ Royal Commission, *Violence, Abuse, Neglect and Exploitation of People with Disability: Final report – volume 6 - Enabling autonomy and access* [2023] AUROYALC 13 (29 September 2023), p 115-253. Online: <<https://disability.royalcommission.gov.au/publications/final-report-volume-6-enabling-autonomy-and-access>>.

Also see *Volume 4, Realising the human rights of people with disability*.

¹²⁰ Yana Litins'ka, *Implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities in the Kingdom of Sweden* in *Models of Implementation of Article 12 of the Convention on the Rights of Persons with Disabilities* (New York: Routledge, 2024), at 514.

¹²¹ *Ibid* at 514-15.

Nevertheless, Sweden was criticized by the UN CRPD Committee for non-abolition of guardianship in the form of appointing an administrator and not substituting it with the mechanisms for support in exercising legal capacity. While a review in 2021 suggested some amendments to national legislation requiring administrators to consult with the persons to whom the agreements were established, there has been no movement on the bill since May 31, 2021.¹²²

Sweden's assisted decision-making system operates through a public appointments process. A "god man" or mentor is appointed as a first choice and this appointment has no impact on the legal capacity of the supported person. The mentor must act in consultation with the decision-maker to discuss decisions and transactions. Appointments are available to people who need assistance in safeguarding rights, administering property or providing for their needs because of "sickness, arrested mental development, a weakened state of health or the like." The appointment process must proceed through court but is designed to be informal, fast and free with the decision-maker, a close relative or the public trustee being eligible to apply. Duties can include or be limited to representation for individual rights, supervision of financial matters, or attendance to the other person's needs for support and guidance.¹²³

CHAPTER 3: POTENTIAL REFORM IN MANITOBA

The Commission seeks input from the public with respect to whether Manitoba should amend the current legislation or enact self-contained legislation and regulations that would govern the use of assisted decision-making agreements in the province, and if so, what provisions should be included in the legislation.

Do those who require accommodations or support to exercise their legal capacity, and their support network, want greater legislative support? Are there things that could make decision-making arrangements easier or more effective, such as providing forms or templated documents or offering training to supporters who are helping people to make decisions. Would access through a public

¹²² *Ibid* at 518. See Bill SOU 2021:36. *Gode män och förvaltare – en översyn* [Special Representatives and Administrators – A Review]. online: <<https://www.regeringen.se/rattsliga-dokument/statens-offentliga-utredningar/2021/05/sou-202136/>>.

¹²³ Inclusion Europe, *Justice, rights and Inclusion for People with Intellectual Disability* (Brussels: 2007), 5-6. Online: <<https://ecommons.cornell.edu/server/api/core/bitstreams/da38dd45-54f6-4719-addf-4ceb6be33366/content>>.

appointment process to professional decision-making and advocacy support on an ongoing basis, such as Sweden's "god man" be beneficial?

Accordingly, this chapter will consider the competing interests in play with such legislation and the key elements of existing assisted decision-making legislation, with the goal of identifying how Manitobans currently use it and if changes are necessary. Rather than make recommendations at this time, the Commission seeks input into the issues for discussion posed in this chapter.

A. Should Manitoba legislation include provisions formalizing the assisted decision-making process?

Assisted decision-making regimes have been said to be "an important option for self-determination, dignity and rights."¹²⁴ A decision-makers' assistant or support network play a critical role in these regimes. Recent changes to *ALIDA* emphasize the importance of an adult's support network in decision-making and the role that the support network plays in assisting the adult to realize their wishes, values and beliefs. Taking away a person's right to make their own decisions, through appointment of a substitute decision-maker, is said to be a last resort in *ALIDA* and proponents of assisted decision-making suggest that assisted decision-making can lessen the need for this type of intervention. However, *ALIDA* does not provide any additional guidance on how an assisted decision-making regime should operate as do the *BC, Yukon* or *NB Acts*.

One criticism of assisted decision-making regimes is the lack of focus on operationalization. As explained by a focus group participant in the article written by Arstein-Kerslake et al, "I think we are at risk of supported decision-making becoming another thing that services are just required to do, like planning. There is no real focus on how and why, just that it is done." Another participant replied, "Yes, I think you are right... there needs to be focus on the how. How do we really work out what people want? A written plan or a supported decision-making agreement is well and good, but how do we get there?"¹²⁵

Another consideration in the operationalization of the current regime is the application of the *Human Rights Code* which prevents discrimination based on protected characteristics, including

¹²⁴ James & Watts *supra* note 7 at 13.

¹²⁵ Anna Arstein-Kerslake et al, *supra* note 9 at 14.

physical or mental disabilities.¹²⁶ In theory, individuals requiring accommodation in the form of assistance and support from their support network to make decisions, should be able to receive the assistance, so long as this does not create undue hardship for the entity providing the service. While assisted decision-making regimes hold promise as a means to uphold self-determination, dignity, and rights for individuals with cognitive impairments, there remains a critical need for clear guidelines on their operation and implementation, ensuring that the support networks crucial to these regimes are effectively utilized.

The concerns regarding assisted decision-making agreements centre around prevention of abuse, suitability for each unique group of people who experience challenges in decision-making and around clarity and liability. Lawyers, health care professionals, government agencies and financial institutions often express the need for more formality in the process so they have clarity on who is making the decision and where liability sits.¹²⁷ Concerns can be heightened depending on the nature of the decision to be made, with decisions such as end of life care or transactions at financial institutions, and opening and using a Registered Disability Savings Plan attracting heightened concerns compared to decisions made regarding attire or participation in recreational activities where the need for clarity and liability may be less critical. As well, each group of decision-makers who may benefit from assistance in decision-making may be at a heightened risk of abuse considering their financial circumstances or stage of life.

As we noted on page 5, more than 50,000 people in Canada were under guardianship, trusteeship, and substitute decision-making arrangements in 2021, including 1883 in Manitoba, with an additional 880,000 to 1 million Canadians with disabilities who have someone help them make daily decisions. For many of those with a developmental disability, their median income is only \$10,415, as a result they may face barriers that lead to unnecessary dependency. Older adults, on the other hand, who experience cognitive decline later in life or older adults with acquired brain injuries may have accumulated some assets, such as a pension, financial savings or a house, may be more susceptible to financial abuse than a younger person who has experienced economic marginalization as a result of their disability.¹²⁸

¹²⁶ *The Code*, *supra* note 45 s 9, 13.

¹²⁷ James & Watts, *supra* note 7 at 77.

¹²⁸ LCO Discussion Paper, *supra* note 1.

Another concern from the perspective of third parties such as financial institutions, are that they are subject to extensive and complicated regulation and oversight, and laws centered on decision-making are not the only ones they must comply with. Clarity around decision-making laws can make it easier for those third parties to comply and provide services more effectively to people. Addressing concerns surrounding assisted decision-making agreements requires balancing abuse prevention, suitability for diverse groups, and clarity on liability, while also ensuring compliance and effective service provision.

The Commission asks stakeholders to consider: are the current assisted decision-making provisions achieving their purpose?

ISSUE FOR DISCUSSION 1:

The Commission would welcome input from individuals and professionals who have been involved in drafting assisted decision-making agreements. How well do they work? Could they be improved?

B. Elements of a formal assisted decision-making regime in Manitoba, should it be recommended

Depending on whether you believe Manitoba should implement legislation for assisted decision-making in a more formal manner, the Commission asks you to consider the appropriate configuration of such a statutory regime, having regard to the following key questions reflecting common statutory elements:

1. Who is eligible to enter into such an agreement?
2. What criteria for capacity needs to be met to enter into such an agreement?
3. What level of formality is needed to create a decision-making agreement or to terminate one?
4. Should such an agreement require a witness to be valid? If so, what categories of people can act as a witness?
5. What types of decisions should these agreements cover?
6. Should the level of formality vary depending upon the types of decisions being included in the agreement? Would it be useful to consider a tiered system of agreements, with greater formality required depending on the nature of the decisions?

7. Who can act as an assistant?
8. What powers and duties should an assistant have?
9. What is the risk for abuse and how can that risk be mitigated?
10. What are the obligations of third parties when presented with an assisted decision-making agreement?
11. Should the agreement be disclosed or registered with an independent body. This could allow third parties to verify the relationship. The independent body could also have an education and/or oversight role?
12. Should the agreement have an expiry date, or a date of renewal?
13. How would formalized assisted decision-making legislation impact already existing decision-making legislation in Manitoba?

What role can the law play in keeping people experiencing decision-making challenges safe from abuse, neglect and being taken advantage of. What safeguards and accountability mechanisms are appropriate for assistants. While there is no specific legal framework for decision-making supporters in Manitoba, the following sections will compare how different key elements have been addressed in legislation in select provinces and other jurisdiction around the world providing a broad perspective of possible options. Considering the comparisons between a variety of statutory schemes, the issues for discussion will contemplate how these elements should be reflected in any potential legislation in Manitoba.

ISSUE FOR DISCUSSION 2:

In addition to powers of attorney, substituted decision-making, health care directives, and committeeship that already exist, what are the advantages or disadvantages of expanding the types of decision-making processes in Manitoba? Are the current decision-making provisions achieving their purpose?

Eligibility to enter into an assisted decision-making agreement

People can face challenges in making decisions for a variety of reasons including the impact of an intellectual disability, certain mental health conditions or other health conditions sometimes associated with ageing, such as dementia. The representation agreement regime in BC was

developed in response to the disability community's desire to ensure that people with intellectual disabilities are supported in maintaining autonomy over their decisions as that community has most embraced the representation agreement model.¹²⁹ People who experience other types of fluctuating cognitive impairment, such as people with episodic mental health issues, traumatic brain injury and older adults did not see representation agreements as particularly helpful.¹³⁰

Although developed in BC to support adults with intellectual disabilities, the *BC Act* does not limit use of representation agreements to only adults with intellectual disabilities, nor do other jurisdictions in Canada. Provision for assisted decision-making agreements in Manitoba is currently situated in reference to intellectual disability and housed within *ALIDA*. As discussed earlier in this consultation paper, *ALIDA* would exclude many people with challenges in decision-making from its application, such as adults with brain injuries or other health conditions impacting cognitive abilities acquired or manifesting after the age of 18, individuals with intellectual disabilities who had not received a formal diagnosis, and people with mental health conditions impacting their decision-making ability.

ISSUE FOR DISCUSSION 3:

Should anyone with experiencing challenges in decision-making be eligible to enter into formal assisted decision-making agreements or should eligibility be based on the underlying cause of the challenge or other criteria? If so, what other criteria should be considered?

Criteria for capacity

Capacity is a legal concept centered on decision-making ability. Definitions of capacity vary across jurisdiction and may be statutorily defined, but generally; to have capacity a person must be able to understand information, evaluate data and appreciate the consequences of a decision. Capacity is focused on the process of making the decision, rather than the outcome or reasonableness of the decision itself.¹³¹ Capacity may be global or decision specific, where a person may be able to

¹²⁹ James & Watts, *supra* note 7 at 49.

¹³⁰ *Ibid* at 49.

¹³¹ Canadian Centre for Elder Law, BC Adult Abuse and Neglect Prevention Collaborative, *Vulnerable Adults and Capacity Issues in BC: Provincial Strategy Document* (2009), at 17. Online (pdf): <http://www.bcli.org/sites/default/files/Vanguard_%2816May09%29.pdf>.

understand information, evaluate information and appreciate consequences of one decision but not others. BC, Yukon, Alberta, Saskatchewan and Manitoba all presume capacity in respective assisted decision-making legislation.

However, differences exist in the kind of capacity required to enter into an assisted decision-making agreement. In BC, adults can enter into a representation agreement even though they are incapable of making a contract, managing their health or personal care or legal matters, or the routine management of their financial affairs. Capacity is determined by considering whether the adult communicates a desire to have a representative, whether they demonstrate choice and preference or expressions of approval and disapproval, awareness that making a representation agreement will affect them, and whether the person has a relationship with the proposed representative that is characterised by trust.

In Manitoba, under *ALIDA*, when considering incapacity in terms of appointment of a substitute decision-maker for personal care, a person with intellectual disability is considered to lack capacity if they are not able to understand information that is relevant to making a decision concerning their own health care, physical, emotional, psychological, residential, education, vocational or social needs or similar needs or is not able to appreciate the reasonably foreseeable consequences of a decision or a lack of a decision.¹³²

In the *Alberta Act*, capacity is defined as the ability to understand information that is relevant to the decision and to appreciate the reasonably foreseeable consequences of the decision and the failure to make the decision.¹³³ In relation to assisted decision-making specifically, an adult who understands the nature and effect of an assisted decision-making agreement may make one.

ISSUE FOR DISCUSSION 4:

What level of capacity should a decision-maker need to enter into an assisted decision-making agreement?

¹³² *ALIDA supra* note 15 s 46. Under the *HCDCA supra* note 40, s 2 “a person has capacity to make health care decisions if he or she is able to understand the information that is relevant to making a decision and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision”.

¹³³ *Alberta Act supra* note 11 s 1.

Creation and termination of assisted decision-making agreements

Differences exist in Canada in three main areas when considering how various decision-making agreements are brought into effect: the form of the agreement, involvement of third parties to bring the agreements into effect, and whether the appointment of a decision-maker is a public or private process.

In jurisdictions with more formality, an application to court (or Public Curator) is involved,¹³⁴ while in jurisdictions with less formality, agreements can be made privately upon being written, signed and witnessed.¹³⁵ A middle ground exists in jurisdictions where a form prescribed by regulation and meeting requirements for signature and witnessing must be completed and, in the case of Quebec, filed with the Public Curator. Proponents of less formal arrangements suggest that benefits include a lower cost and accessibility to anyone who wishes to use one.¹³⁶

Conversely, the private nature and ease of access have been said to raise concerns about potential for abuse. Lawyers involved in the drafting or preparation of an assisted decision-making agreement “lawyers can act as a kind of ‘watchdog’ to ensure, to the greatest extent they can, that things are done properly. Lawyers are trained to identify conflicts and competence issues ... to assist in preventing or averting situations of financial abuse, unfair exercise of influence and so forth.”¹³⁷ As well, lawyers can provide legal advice and information on assisted decision-making agreements so that the agreements truly reflect the decision-makers wishes. Additionally, although the more private nature of the representation agreement regime provides greater accessibility for individuals with challenges in making decisions in the context of functional families and relationships, the same cannot be said for circumstances other than functional relationships.¹³⁸

In terms of termination of assisted decision-making agreements, a variety of options exist as well. The Yukon does not include any specific provisions relating to termination of assisted decision-

¹³⁴ For example, *Saskatchewan Act supra* note 11 at s 14; *Quebec Act, supra* note 93, s 6.1 of the Regulations.

¹³⁵ *BC Act supra* note 61 s 13.

¹³⁶ Ruth P. Magnusson, “A Criticism of the Proposed Representation Agreement Act” (1998) 56:4 *The Advocate* (Vancouver Bar Assn) 517.

¹³⁷ *Ibid* at 518.

¹³⁸ Mary Donnelly, “Deciding in Dementia: The possibilities and limits of supported decision-making” (2019) 66 *Intl J L & Psychiatry* 1 at 4.

making agreements within its legislation, while in BC an agreement can include criteria for revocation.¹³⁹ In Quebec the agreement must be terminated and/or renewed after three years.

Agreements where the representative has authority to make decisions regarding management of financial affairs automatically are cancelled on bankruptcy of the decision-maker or representative, on conviction of the representative for an offence involving dishonesty, or if the representative is a credit union or a trust company, on dissolution of the company.¹⁴⁰ Finally, agreements can come to an end on a number of other occurrences such as death of the adult; cancellation of the agreement by the court; death, incapability or resignation of the assistant; or if the assistant is a spouse of the decision-maker on termination of their relationship.¹⁴¹ New Brunswick contains some similar provisions for ending of assisted decision-making agreements, such as death of the decision-maker or court order.¹⁴²

ISSUE FOR DISCUSSION 5:

If Manitoba were to enact assisted decision-making legislation, is a less formal process preferred? Or is a more formal process with varying levels of involvement of the court, legal counsel and prescribed forms more desirable?

Scope of authority delegated

People make a vast array of decisions in their daily lives, each with different levels of impact. Decisions range in scope from what to wear or who to associate with to how to spend one's life's savings or whether to receive life sustaining medical treatment. Where there is significant potential for negative impact of a decision on a person's life, there is a heightened potential for abuse or concerns regarding liability. Jurisdictions have in turn permitted assistants to assist decision-makers in a more limited scope of decision-making, with the common areas of decision-making authority being health care, personal care, and financial matters.

In Manitoba, health care is defined within *ALIDA* as, "any care, service, treatment, or procedure to maintain, diagnose, treat or provide for a person's physical or mental health and includes

¹³⁹ *BC Act supra* note 61 s 27.

¹⁴⁰ *Ibid* s 28.

¹⁴¹ *Ibid* s 29.

¹⁴² *NB Act supra* note 75 s 8.

anything done for a therapeutic, preventive, palliative, diagnostic, cosmetic or other health-related purpose”.¹⁴³ The specific provisions of *ALIDA* relating to assisted decision-making describe the process as being limited to decisions made respecting personal care and property, however when personal care is referenced in regard to substitute decision-making within *ALIDA*, health care decisions are included.

Specifically excluded from the kinds of decisions a substitute decision-maker can make are commencement of divorce proceedings; changes in custody or access arrangements; settlement of a claim or proceeding on the supported person’s behalf; medical treatment or participation in an activity for the primary purpose of research; sterilization not necessary for protection of the adult’s health; the removal of tissue for transplant, medical education or research; voluntary admission to a psychiatric facility; or adoption or guardianship of a child.¹⁴⁴ When substitute decision-makers are granted power to make decisions in respect of personal care, the substitute decision-maker does not have power to make health care decisions if the person made a health care directive appointing a proxy or expressed their decision in a health care directive.¹⁴⁵

In relation to assisted decision-making, New Brunswick limits the scope of authority that can be delegated to personal care and financial matters.¹⁴⁶ Personal care encompasses health care and includes diet, clothing, accommodation, support services, education, employment, recreation and social activities as well. Financial matters are defined as “relating to the property or finances of a person.”¹⁴⁷ In addition to similar items included as “personal care” matters in New Brunswick, BC includes contact or association by an adult with other persons and licenses, permits, approvals or other authorizations of an adult to do something and excludes health care from the definition of personal care.¹⁴⁸ Decision-makers can be granted power to make decisions in relation to personal care, routine management of financial affairs, major and minor health care, including admission to certain health care facilities, obtaining legal services and instructing counsel, but not to commence divorce proceedings, on the adults behalf.

¹⁴³ *ALIDA supra* note 15 s 1.

¹⁴⁴ *Ibid* s 59, 60, 61.

¹⁴⁵ *Ibid* s 68.

¹⁴⁶ *NB Act supra* note 75 s 6(3).

¹⁴⁷ *Ibid* s 1.

¹⁴⁸ *BC Act supra* note 61 s 1.

Under the *BC Act*, assistants under what are referred to as non-standard agreements may in addition, physically restrain the adult despite their objection and to make decisions to give or refuse consent to health care necessary to preserve life.¹⁴⁹ Assisted decision-making has roots in more informal personal support networks, based on relationships of trust and their day-to-day practices. However, where support networks assist in making decisions in areas of increased formality such as health care, major financial decisions and legal issues different sets of expectations exist.¹⁵⁰ Some medical treatment decisions can be high stakes, involve consideration of complex information, and need a quick response. Financial and property management decisions may have long-term consequences for the decision-makers. The disconnection between flexibility and trust on one hand and need for formality has been cited as a challenge surrounding the implementation of assisted decision-making regimes.¹⁵¹ The complexities of decisions regarding personal care, financial matters, and health care underscore the need for balance between flexibility and formality within assisted decision-making frameworks.

ISSUE FOR DISCUSSION 6:

- (a) What types of decisions should an assistant have authority to assist in making?**
- (b) Are there any types of decisions that should be explicitly excluded?**

Eligibility to act as an assistant

The support network of people who face challenges in making decisions have an important role to play in the decision-making process. The extensive knowledge of and commitment to the well-being of the decision-maker work to their benefit. However, some family and friends may not be available or able to assist the decision-maker for a variety of reasons. Geography, differing lifespans, or the reduction or elimination of the decision-makers support network due to social stigma and isolation associated with some disabilities may all impact the availability of support networks. In some jurisdictions with assisted decision-making provisions, the Public Guardian and Trustee equivalent¹⁵² is available to act as an assistant. However, a relationship with a

¹⁴⁹ *Ibid* s 9(1)(viii) and 9(3). However, this power is not available under s 7(2.1) for a standard agreement.

¹⁵⁰ LCO Discussion Paper *supra* note 1 at 134.

¹⁵¹ *Ibid* at 135.

¹⁵² *ALIDA supra* note 15 s 54(1) in relation to substitute decision-making authority, *BC Act supra* note 61 s 5(1)(b).

representative from the Public Guardian and Trustee likely is not built on the same level of trust and intimacy as a relationship with a decision-makers' family and friends. The Public Guardian is specifically excluded from acting in the role in both Quebec and New Brunswick.¹⁵³

Other people commonly excluded from acting as an assistant are relationships where a conflict of interest may arise, such as persons who provide health or personal care services for the decision-maker,¹⁵⁴ the employer or employees of the decision-maker,¹⁵⁵ or a person who has committed family violence.¹⁵⁶ The Government of Victoria has established an independent mental health advocacy office to provide non-legal advocacy services. Advocates act on the instruction of the consumer of the services and assist the consumer in understanding and accessing information regarding their care, make decisions about their care, express their decisions, views and preferences and assist the decision-maker to understand and exercise their rights.¹⁵⁷

Finally, jurisdictions commonly require assistants to be at least 18 years of age or older to act as assistants.¹⁵⁸ Others also consider bankruptcy and convictions for certain indictable offences when reviewing applications for assistants.¹⁵⁹

ISSUE FOR DISCUSSION 7:

Who should be able to act as an assistant or be excluded from doing so?

Powers and duties of assistants

Powers and duties are legal permissions and responsibilities that come with acting as a person's decision-making assistant. In addition to the power to assist in making certain types of decisions as already mentioned, assistants are also commonly granted power to access certain information

¹⁵³ *NB Act supra* note 75 s 9(2)(a).

¹⁵⁴ *BC Act supra* note 61 s 5(1)(a).

¹⁵⁵ *Yukon Act supra* note 66 s 7(a), the *NB Act* excludes people who provide support services for compensation.

¹⁵⁶ *Ibid* s 7(b).

¹⁵⁷ Victoria Department of Health, Mental Health Advocacy (non-legal) handbook. Online: <<https://www.health.vic.gov.au/mental-health-and-wellbeing-act-handbook/supported-decision-making/mental-health-advocacy-non-legal>>.

¹⁵⁸ *HCDA supra* note 40 s 12 at least 18 years old; *Alberta Act supra* note 11 s 4(1) age of 18 or older required, *Yukon Act supra* note 66 s 16(2), *BC Act supra* note 61 s 5(1)(a) requires assistants to be 19 or older.

¹⁵⁹ *Ireland's ADMCA supra* note 96 s 11, *Saskatchewan Act supra* note 11 s 13, and *BC Act supra* note 61 s 28. Also see *Adult Guardianship and Trusteeship Act*, SPEI 2023, c 11 s 30. Similar conditions exist in Manitoba's *Power of Attorney Act*, *supra* note 26 ss 13(d), 16 and 18(b).

or to communicate decisions on behalf of a decision-maker. Responsibilities of assistants can include varying degrees of supporting the decision-makers autonomy, record keeping and other considerations the assistant must keep in mind when acting in their role.

In terms of supporting a decision-makers' autonomy, different jurisdictions focus on a range of options from acting in the decision-makers best interests to helping the decision-maker realize their wishes and goals, provided some degree of harm is avoided. In relation to supporting autonomy, one of the criticisms of BC's legislation is that the vague and loose drafting of the legislation could create the potential for the representative to act in a paternalistic manner, rather than to assist the decision-maker in realizing their own wishes and goals.¹⁶⁰ Assistants in BC must "consult, to the extent reasonable, with the adult to determine the adult's current wishes and to comply with those wishes if it reasonable to do so."¹⁶¹

Other jurisdictions leave more room for the decision-maker to be truly autonomous in their decision making. For example, the Yukon has included guiding principles within the legislation which include mention that "values, beliefs, wishes and cultural norms and traditions" held by an adult should be respected in managing their affairs and that adults are entitled to live in the way they wish, provided that they don't harm others, and they are capable of making decisions.¹⁶²

New Brunswick defines "assistance" as any "measure that helps a person have the capacity to make a decision, including explanations of relevant information and reasonably foreseeable consequences of the available options".¹⁶³ The assistant's role in the process is to: (a) discuss the relevant information and the reasonably foreseeable consequences of the available options with the supported person in a manner that the supported person is likely to best understand; (b) assess the available options together with the supported person on the basis of the supported person's wishes and preferences, including those expressed by the supported person at the time the options are discussed and those that are otherwise known to the decision-making supporter; and (c) ensure that the decision is guided by the supported person's wishes and preferences.¹⁶⁴ The assistant must

¹⁶⁰ Wasim, *supra* note 55.

¹⁶¹ *BC Act supra* note 61 s 16(2).

¹⁶² *Yukon Act supra* note 66 s 2(a)(e).

¹⁶³ *NB Act supra* note 75 s 2.

¹⁶⁴ *Ibid* s 27(1).

accept the decision-maker's decision unless doing so would cause serious harm to the decision-maker.¹⁶⁵

In Manitoba, the preamble of *ALIDA* describes assistance provided to a decision-maker to 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”. *ALIDA* applies to adults. However, section 2 of the *Divorce Act*, RSC 1985, c 3 (2nd Supp), contemplates an adult child of two spouses remaining in their charge if unable to withdraw from their care by reason of illness, disability or other cause.

Under the *Divorce Act*, courts are to focus on the best interests of the child, with “... primary consideration to the child’s physical, emotional and psychological safety, security and well-being.”¹⁶⁶ The child’s wishes are included as only one of many factors to be considered when determining the best interests of the child. The problem of conflicting interests and legislation in the context of decision-making for adult disabled children in family law, was described by an experienced lawyer in Ontario:

... in cases involving an adult disabled child of divorced or divorcing parents, there is often a conflict between the application of the *Divorce Act* (“DA”) and the SDA. This places the court in the position to decide which act should apply and how to balance the conflicting statutes and interests at hand. This has resulted in *inconsistent judgments*, several of which undermine the rights of the adult child under the SDA.¹⁶⁷

The decision-making obligations of a proxy under Manitoba’s *HCDA* is interesting: If the maker's decisions are not expressed in a directive, the proxy shall act in accordance with any wishes that he or she knows the maker expressed when the maker had capacity and believes the maker would still act on if capable.¹⁶⁸

The spectrum of autonomy provided to decision-makers within assisted decision-making agreements ranges from ensuring decisions are reasonable to more actively supporting decision-

¹⁶⁵ *Ibid* s 27(2).

¹⁶⁶ *Divorce Act*, RSC 1985, c 3 (2nd Supp.) at s 16(2).

¹⁶⁷ Nimali Gamage, “Legal Issues for Minor and Adult “Children” with Disabilities: Part Two” (17 April 2023), online (blog): Goddard Gamage LLP <<https://www.ggslawyers.com/post/blog/legal-issues-for-minors-and-adult-children-with-disabilities-part-two>>; Nimali Gamage, “Legal Issues for Minor and Adult “Children” with Disabilities: Part 5” (6 July 2023), online (blog): <<https://www.ggslawyers.com/post/blog/legal-issues-for-minors-and-adult-children-with-disabilities-part5>>.

¹⁶⁸ *HCDA supra* note 40, ss 3 and 4.

makers in achieving their own goals and aspirations and this enhanced autonomy has been said to pose a conflict in terms of younger decision-makers of divorcing parents.

Another power commonly granted to assistants is the ability to access information, which is included in New Brunswick,¹⁶⁹ BC,¹⁷⁰ the Yukon¹⁷¹ and Quebec, but not in Manitoba. Access to information is restricted in several ways, however. One restriction includes allowing access only to information within the assistants' authorized scope of authority and use of the information solely for the exercise of the assistants' powers and duties.¹⁷² Another restriction permits access to information only as it relates to the incapability of the decision-maker,¹⁷³ or for use in certain related investigations or court applications.¹⁷⁴ Duties that come along with the power to access information include a requirement to take care of the information to ensure that it isn't disclosed other than for the specified purposes¹⁷⁵ and to dispose of it in a responsible manner.¹⁷⁶

Other powers are granted to assistants in other jurisdictions as well. For example, BC's legislation includes the power to retain the services of a qualified person to assist the representative within the scope of their authority,¹⁷⁷ and an express prohibition on making or changing the decision-makers will.¹⁷⁸ Also excluded from the assistants authority is the ability to delegate the authority granted to them in the assisted decision-making agreement,¹⁷⁹ except authority may be delegated to an investment specialist with respect to investment matters.¹⁸⁰ Finally, assistants are also commonly disentitled to remuneration for their role¹⁸¹ but are entitled to reasonable expenses incurred while exercising their authority.¹⁸²

¹⁶⁹ *NB Act supra* note 75 s 11.

¹⁷⁰ *BC Act supra* note 61 s 18.

¹⁷¹ *Yukon Act supra* note 52 s 10.

¹⁷² *NB Act supra* note 61 s 11, *BC Act supra* note 61 s 18(1)(b), 22(a), *Yukon Act supra* note 66 s 10(1), 10(2)(a)&(b).

¹⁷³ *BC Act supra* note 61 s 18(1)(a).

¹⁷⁴ *Yukon Act supra* note 66 s 10(3), *BC Act supra* note 61 s 22(b)&(c).

¹⁷⁵ *Yukon Act supra* note 66 s 10(2)(c), *NB Act supra* note 75 s 11(4)(c).

¹⁷⁶ *Yukon Act supra* note 66 s 10(2)(d).

¹⁷⁷ *BC Act supra* note 61 s 17.

¹⁷⁸ *Ibid* s 19.01.

¹⁷⁹ *Ibid* s 16(6).

¹⁸⁰ *Ibid* s 16(6.1).

¹⁸¹ *NB Act supra* note 75 s 15(1), *BC Act supra* note 61 s 26(1) but the *BC Act* permits remuneration if expressly authorized by the agreement or court.

¹⁸² *NB Act supra* note 75 s 15(2), *BC Act supra* note 61 s 26(2).

Along with the power to assist a decision-maker in making decisions come duties or responsibilities. Duties vary but are primarily focused on safeguarding the well-being and rights of the individual receiving assistance. Duties that are commonly included are a duty to act honestly and in good faith¹⁸³ and to exercise some degree of care¹⁸⁴ or not to exert undue influence on the decision-maker,¹⁸⁵ and to keep accounts or records relating to the exercise of the assistants' authority.¹⁸⁶ The Yukon goes into some detail regarding responsibilities directly relating to the decision-making process including the responsibility to advise the decision-maker by explaining relevant information and considerations, to ascertain the wishes and decisions of the decision-maker and to assist in communicating them and finally to endeavour to ensure that the decision-makers decision is implemented.¹⁸⁷

ISSUE FOR DISCUSSION 8:

What powers and duties should an assistant have? What principles should guide assistants when acting in their role?

Risk for abuse and mitigation

Much of the time, decision-making arrangements work well and there are no issues. However, sometimes things can go wrong. Unfortunately, potential for abuse in the context of decision-making laws is not uncommon. The very nature of a persons' impairment that causes challenges in making decisions also make them more susceptible to abuse that may not be readily detected. In the context of women with intellectual disabilities, Community Living Manitoba explains:

The cognitive limitations experienced by women with a severe level of intellectual disability can render them unaware that they are in harm's way. That is, they are unable to read the cues in others' behaviours as menacing, exploitative or as potentially dangerous. Moreover, after the fact they may not be able to appreciate that they have been mistreated.¹⁸⁸

¹⁸³ *BC Act supra* note 61 s 16(1)(a), *NB Act supra* note 75 s 12(1).

¹⁸⁴ *NB Act supra* note 75 s 12(1) references "reasonable care", while the *BC Act supra* note 61 s 16(1)(b) references "the care, diligence and skill of a reasonably prudent person".

¹⁸⁵ *Yukon Act supra* note 66 s 5(2).

¹⁸⁶ *BC Act supra* note 61 s 16(8)(a), *NB Act supra* note 75 s 14(a).

¹⁸⁷ *Yukon Act supra* note 66 s 5(1)(c), (d) &(e).

¹⁸⁸ Cameron Crawford, *When Bad Things Happen: Violence, Abuse, Neglect and Other Mistreatments against Manitoban Women with Intellectual Disabilities* (Winnipeg: Community Living – Manitoba, 2007) at 45.

Also, given the association between disability and marginalization, people with disabilities that impact their decision-making ability may be economically or socially vulnerable with stigma, social isolation or economic precarity reducing their choices.¹⁸⁹ Finally, the nature of a decision-makers' support networks, which often include family members, may impact susceptibility to abuse. People with challenges in decision-making may have a dysfunctional family history, and even without a dysfunctional family history, a decision-maker may be reluctant to disagree with a family members suggestion for fear of negatively impacting the relationship or may be hesitant to believe that a family member could be taking advantage of them in some way.¹⁹⁰

As the scope of an assistant's authority broadens so does the potential for abuse given the different decisions an assistant may be involved in making. Depending on the specific areas of decision-making authority included within an assisted decision-making agreement, decision-makers may be at increased risk for physical, sexual, mental, emotional or financial abuse. Assisted decision-making legislation includes provisions that may limit this risk in a variety of ways, including limiting the scope of authority granted in the agreement, requiring another person to monitor the use of the assisted decision-making agreement or by creation of some other independent body charged with receipt of complaints and investigations in the misuse of such agreements.

Under *ALIDA*, a person who believes that an adult living with an intellectual disability is or is likely to be abused or neglected has a duty to report that to a designated government authority.¹⁹¹ The authority is required to investigate the complaint and is granted certain powers to enable them to do so.¹⁹² In relation to substitute decision-making, a Commissioner is appointed to implement the related provisions,¹⁹³ including determining appropriateness of appointment for and monitoring of a substitute decision-maker.¹⁹⁴ In BC, where a decision-maker grants authority to an assistant in relation to management of routine financial affairs, the decision maker is also required to appoint a monitor tasked with ensuring that the assistant is acting in accordance with their duties.¹⁹⁵ The scope of authority that can be delegated in Alberta limits the potential for

¹⁸⁹ LCO Discussion Paper *supra* note 1 at 198.

¹⁹⁰ *Ibid* at 203.

¹⁹¹ *ALIDA supra* note 15 s 21(1).

¹⁹² *Ibid* s 22(1), 22(2), 23.

¹⁹³ *Ibid*, at Part 4.

¹⁹⁴ *Ibid* s 30.

¹⁹⁵ *BC Act supra* note 61 s 20(1), s 12(1).

financial abuse, as financial matters are excluded from the scope of matters which can be included within an assisted decision-making agreement.¹⁹⁶

Although there are some commonalities in methods to address abuse, some, such as limiting the scope of the assistant's authority, may in turn limit the decision-makers autonomy but almost eliminate the likelihood for certain types of abuse. Such differences and the impact are something to be considered when evaluating the various options for preventing or reducing the likelihood of abuse.

ISSUE FOR DISCUSSION 9:

What is the risk for abuse in the context of assisted decision-making agreements and how should this risk for abuse be mitigated?

Obligations of third parties, liabilities and protections

Other key players in assisted decision-making arrangements are third parties and assistants or support networks. Given the significant implications in terms of impact of decisions on the decision-makers life and the roles that third parties and assistants play, their needs in the decision-making process should be taken into consideration as well. Taking into consideration these needs include two major elements of decision-making legislation – the need to safeguard against abuse and the need for clarity and certainty in transactions.

In Quebec, the application for an assistance measure is accompanied by several layers of protection, such as a criminal background check of the proposed assistant, notification of the application to at least two people close to the person requesting assistance (who will agree or disagree with the proposed assistant), a register of the assistance measure, and termination of the measure after three years.

Third parties that interact with decision-makers vary widely depending on the individual, but can include health care providers, lawyers, social workers, financial institutions, social service providers and organisations that support people with disabilities.¹⁹⁷ However, that interaction can lead to frustration on the part of decision-makers and assistants in several ways. James & Watts

¹⁹⁶ *Alberta Act supra* note 11 s 3, s 1(bb).

¹⁹⁷ James & Watts, *supra* note 7 at 73, 74

describe this frustration arising from several common themes including requests to sign forms created by the third party rather than the third party relying on the agreement prepared on the decision-makers end. Assistants also reported experiencing disrespect from various health or home care providers when the assistant would try to learn more about the decision-makers' health issue, but staff would be too busy to provide the information requested.

Recognition of assisted decision-making agreements were reported to be inconsistent as well, with third parties' responses to learning about the existence of the agreement ranging from taking the word of the assistant that an agreement was in place without having to see it to the assistant having to educate the third party about what an assisted decision-making agreement was. On the other hand, third parties such as financial institutions or health care providers are subject to extensive and complicated regulation and oversight, apart from decision-making legislation.

During consultations undertaken by the Law Commission of Ontario, service providers and third parties expressed concerns about the lack of clarity in assisted decision-making arrangements and the need for third parties to receive instructions from a person who has binding authority.¹⁹⁸ As an example of how these challenges present in financial institutions, bank employees reported being asked by assistants to open a Registered Disability Savings Plan in the decision-makers name, but to hide the existence of the account from the decision-maker or to refuse to release assets to the decision-maker on their request. Financial institutions felt that they were being asked both to provide legal status as account holder to the decision-maker, yet to deny them the rights of an account holder because assistants believed the decision-maker couldn't exercise those rights, even with assistance.¹⁹⁹

Inherent with the autonomy that comes with assisted decision-making agreements is a right to take risks and made bad decisions. As noted in the LCO's Final Report, "all individuals have the right to make foolish decisions, yet the fundamental question here is something slightly different: whether it is just for an individual to suffer adverse consequences which he or she was not able to understand or foresee."²⁰⁰

¹⁹⁸ LCO Final Report *supra* note 4 at 80.

¹⁹⁹ LCO Final Report *supra* note 4 at 81.

²⁰⁰ *Ibid* at 78.

Another risk is that decision-makers may be subject to undue influence by an assistant, with that influence being harder to detect given the private nature of the decision-making process which may make it challenging to discern the true identity of the decision-maker or the factors considered in arriving at the decision.²⁰¹ Jurisdictions across Canada have approached apportionment of legal responsibility and mitigation of the risk for abuse in a number of ways. In Alberta and the Yukon if fraud, misrepresentation or undue influence are involved, the decision may not be recognized as belonging to the decision-maker.²⁰² New Brunswick holds the decision-maker to account for decisions made, provided the assistant acted in accordance with their powers and duties.²⁰³ Third parties may refuse to recognize a decision if there are reasonable grounds to believe that the assistant acted outside of the scope of their powers and duties.

If assistants do act outside their authority, the decision is binding on the assisted person in relation to people affected by the decision who didn't know or believe that the assistant acted outside their authority.²⁰⁴ In terms of liability for assistants, in BC, assistants who act in accordance with their duties will not be liable for injury to or death of the adult or for loss or damage arising from the routine management of the adult's financial affairs.²⁰⁵ The Yukon is similar in that assistants who act honestly, in good faith and in the best interests of the adult while exercising care, diligence and skill of a reasonably prudent person are protected against liability for injury, death, financial damage or loss on the part of the decision-maker. In addition, assistants aren't liable for decisions made by the decision-maker if they don't agree with the decision and advise the adult not to make it.²⁰⁶ If a third party doesn't consult with an assistant on a matter under the scope of the assistant's authority, a person can apply to court to have the matter declared void.²⁰⁷

There are competing considerations in this area of decision-making legislation and ensuring robust mechanisms for both accountability and enforceability in assisted decision-making regimes is essential for upholding the rights, dignity, and well-being of the individuals involved, fostering

²⁰¹ *Ibid* at 79.

²⁰² *Alberta Act supra* note 11 s 6(2); *Yukon Act supra* note 66 s 11.

²⁰³ *NB Act supra* note 75 s 13(1).

²⁰⁴ *Ibid* s 13(2)&(3).

²⁰⁵ *BC Act supra* note 61 s 23(1).

²⁰⁶ *Yukon Act supra* note 66 s 13(1)&(2).

²⁰⁷ *Ibid* s 12.

trust in the process, and promoting effective support and assistance where needed. The question is, how best to accomplish these goals within decision-making legislation.

ISSUE FOR DISCUSSION 10:

- (a) What are the obligations of third parties when presented with an assisted decision-making agreement?**
- (b) What protections should be in place for third parties when transacting with assisted decision-makers?**
- (c) How should liability be apportioned between assistant and decision-maker?**

Interaction between decision-making legislation in Manitoba

In Quebec, the Public Curator maintains a register of tutorships to minors, a register of tutorships to persons of full age, a register of assistants to persons of full age, a register of homologated protection mandates and a register of authorizations for temporary representation of incapable persons of full age. The register is used to confirm the identity of an assistant whenever the latter takes steps to obtain or send information on behalf of the assisted person. It is also used to confirm that the person is in fact recognized as an assistant. The public register of assistants is accessible to:

- all employees of financial institutions, businesses, service providers, and public or para-public service organizations.
- professionals in different fields (e.g., doctors, lawyers and notaries, pharmacists, accountants, social workers, etc.).²⁰⁸

In Ontario, because supported or assisted decision-making is done informally, there is no register of assistants. As discussed earlier, because there is no formal system for supported decision-making, people can run into problems, such as:

4. There is no official way to name a supporter without giving them full control.

²⁰⁸ Public register of assistants, online: <<https://www.quebec.ca/en/justice-and-civil-status/legal-protection/assistance-measure/public-register-assistants>>. Pursuant to s 153 of the *Quebec Civil Code*, CQLR c CCQ-1991, “full age or the age of majority is 18 years”.

5. Banks, hospitals, and other organizations may not recognize a supporter's role unless they have official legal power, like a Power of Attorney.
6. People who don't want to sign over their decision-making power but still need help may struggle to have their choices respected.

At one time, in Manitoba, the Public Trustee maintained a registry of Powers of Attorney. However, they no longer do so. Would having such a registry assist both the assistant and third parties when transacting for decision-makers?

In Manitoba, legislation encompasses decisions made in a variety of areas including financial matters, health and personal care. Certain legislation applies to people based on the cause of their condition – such as *ALIDA* to adults who live with an intellectual disability, the *MHA* to individuals who experience mental health disorders and certain adults living with intellectual disabilities. The *POAA* and the *HCDA* each consider a specific area of decision-making regarding financial and health care matters respectively. Common to all statutes is reference to capacity to make certain decisions covered by the legislation.

As discussed earlier in this consultation paper, capacity can be decision specific. In theory, and depending on the drafting of future legislation, it may be possible for a person to have an assisted decision-making agreement in place with respect to certain health care or financial decisions and to have a health care directive or a power of attorney in place at the same time for other decisions they lacked capacity to make or had delegated authority to another person to make. In other jurisdictions with similar interrelated legislation, problems have arisen where there is a lack of clarity on which legislation is applicable and who has authority to make the decision in question, as well as regarding differentiating between people based on the cause of their disability.

In *Bentley v. Maplewood Seniors Care Society*²⁰⁹, a woman who would later go on to develop advanced Alzheimer's made a document referred to as a "Statement of Wishes" (SoW) setting out her desires should she become incapable of expressing them in the future. This document was prepared prior to the enactment of legislation permitting assisted decision-making agreements.

²⁰⁹ *Bentley v. Maplewood Seniors Care Society*, 2015 BCCA 91. Also see Margaret Isabel Hall, *Dementia, Decision-Making, and the Modern (Adult) Guardianship Paradigm: Bentley v Maplewood Seniors Care Society*, 2015 1-1 Canadian Journal of Comparative and Contemporary Law 293.

Due to her health, Ms. Bentley came to reside at a care home. In her later days, staff at the care home continued to feed her despite her family's belief that she had expressed a desire not to receive nourishment in her state of health. The family applied to court to prevent the care home from providing Ms. Bentley with any nourishment. An issue in the case was whether provision of nourishment was a health care decision or a personal care decision as the answer to this question would impact how substitute consent would be sought if Mrs. Bentley was found to be incapable of consenting.

The Court initially found Mrs. Bentley to be capable, but the decision was appealed. The decision on appeal was limited to issues relating to consent, but the issues considered by the lower-level court regarding the distinction between health and personal care and the impact of other relevant legislation highlight some issues that may arise in applying assisted decision-making agreement legislation if it were enacted in Manitoba. The court concluded that the decision to receive nourishment was a personal care decision. Given the conclusion that it was a personal care decision, legislation like the *HCDA*, which governed only health care decisions, was said not to apply. The court went on to consider other applicable legislation, including the *Representation Agreement Act*²¹⁰ and legislation similar to the *MHA*, that could grant a substitute decision-maker authority to make personal care decisions on behalf of Mrs. Bentley, as well as legislation which would impact the care facility as a result of their choice to provide nourishment.

The Court considered whether the SoW was a representation agreement within the meaning of the *BC Act* and concluded it was not, taking issue with the clarity of the authority delegated. The SoW delegated authority by indicating that Mrs. Bentley's husband and alternatively her daughter could "serve as my proxy for the purpose of making medical decision on my behalf in the event that I become incompetent and unable to make such decisions for myself." The SoW included a request that "any treatment which has no benefit other than a mere prolongation of my existence" should be withheld or withdrawn. A prior SoW had specifically indicated a desire not to receive "nourishment or liquids" if there was "no reasonable expectation of my recovery from extreme physical or mental disability" and specified that Mrs. Bentley be "allowed to die and not be kept alive by artificial means or 'heroic measures'."

²¹⁰ *BC Act supra* note 61.

The court found that it was unclear whether the intention was to grant authority to make only health care decisions or to include both health and personal care decisions. This uncertainty was sufficient for the court to decide that it would be inappropriate to conclude that the SoW was a valid representation agreement. After considering other legislation by which a substitute decision-maker could be granted authority, the court concluded that there were none and Mrs. Bentley would be left in legal limbo without anyone legally authorized to make decisions on her behalf. When considering other legislation that would prevent the care facility from withdrawing provision of nourishment, the court found that the facility had a statutory duty to provide support and to assist anyone who is unable to seek support and assistance because of a disease or other condition, leaving Mrs. Bentley in a situation where she continued to receive nourishment from staff at the care facility.

Issues have also arisen in BC where the effect of the interrelated legislation in the area of decision-making authority are to deem consent to treatment in certain situations for people with mental health conditions. In *British Columbia (Attorney General) v. Council of Canadians with Disabilities*,²¹¹ the Council of Canadians with Disabilities (CCD) challenged provisions in the *BC Act* along with the *MHA* and *HCDA* equivalent legislation, the effect of which they claimed would deprive involuntarily detained persons with mental disabilities of the right to refuse psychiatric treatment. The relevant provisions in the *BC Act* provided that a person may not authorize a representative to refuse consent to involuntary admission or treatment based on mental disability.²¹² The effect of the interplay between the provisions was to interfere with the persons decision-making rights regarding consent to psychiatric treatment by removing access to their personally appointed decision-maker, thereby interfering with their section 7 rights to liberty. The claim appeared at the Supreme Court as a standing application by the CCD and does not appear to have proceeded through court after standing was granted. Similarly, and although not specifically related to supported decision-making arrangements, provisions in Ontario legislation which empowered the Ontario Review Board to authorize treatment of an involuntarily detained patient, contrary to their refusal expressed through their substitute decision-maker, were found to be

²¹¹ *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, 2022 SCC 27.

²¹² *BC Act supra* note 61 s 11(1).

contrary to section 7 of the *Charter* as they deprived the person of their right to security of the person.²¹³

The case of *Bentley v. Maplewood Seniors Care Society* demonstrates the challenges of applying legislation on assisted decision-making in real-life situations. The ambiguity surrounding the delegation of decision-making authority left Mrs. Bentley without a designated decision-maker. This highlights the need for clear legislative frameworks to uphold individuals' rights while minimizing legal uncertainties. Similarly, cases like *British Columbia (Attorney General) v. Council of Canadians with Disabilities* underscore the broader implications of interrelated legislation on decision-making rights, emphasizing the importance of addressing legislative ambiguities to protect individuals' autonomy and liberty.

ISSUE FOR DISCUSSION 11:

Would it be desirable to have an assisted decision-making agreement in place at the same time as a health care directive, power of attorney or substitute decision-making authority?

Multiple or tiered framework of supports

ALIDA is one of several pieces of legislation in Manitoba governing decision-making arrangements, including the *Powers of Attorney Act*, the *Health Care Directives Act* and the *MHA*. However, there are no forms or provisions in *ALIDA* to provide any legal guidance, or detail for how supported decision-making may be used, or if they can even be used jointly or in concert with the other pieces of legislation.

Personal and certain health care decisions, financial decisions and ability to instruct counsel are powers that can be included in a standard representation agreement in British Columbia. In addition, a non-standard representation agreement may also provide for advance care planning in the case of incapacity, allowing a representative to do anything they consider necessary in relation to personal care and health care – including the giving or refusing of consent to health care necessary to preserve life.²¹⁴

²¹³ *Fleming v. Reid*, 1991 CanLII 2728 (ON CA).

²¹⁴ *BC Act supra*, note 63 (non-standard representation agreements).

Ireland's *ADMCA* and the DSS's Codes of Practice set out a detailed framework of each of the supports with the intent that any support provided will represent the least possible imposition on the person's rights and freedoms, including ongoing support where appropriate. These arrangements are based on the different levels of support that a person requires to make a specific decision at a specific time. In addition, the Act provides for future planning arrangements by way of enduring power of attorney or advance healthcare directive, for adults who want to plan for a time when they may not have the capacity to make certain decisions.²¹⁵

While patients still have decision-making capacity, the *ADMCA* allows them to put formal directives on their future treatment preferences in place. This directive becomes active and must be respected if the patient subsequently loses capacity. The Service Guide mentions that it is good practice for practitioners with an ongoing relationship with patients to hold discussions with them about their future treatment.

CHAPTER 4: SUMMARY OF ISSUES FOR DISCUSSION

The following provides a summary of all issues for discussion contained in this consultation paper:

ISSUE FOR DISCUSSION 1:

The Commission would welcome input from individuals and professionals who have been involved in drafting decision-making agreements. How well do they work? Could they be improved?

ISSUE FOR DISCUSSION 2:

What are the advantages and disadvantages of expanding the assisted decision-making process in Manitoba law? Are the current assisted decision-making provisions achieving their purpose?

ISSUE FOR DISCUSSION 3:

²¹⁵ *ADMCA* and Regulations, *supra*, notes 97 and 98.

Should anyone with challenges in decision-making be eligible to enter assisted decision-making agreements or should eligibility be based on the cause of the challenge or other criteria? If so, what other criteria should be considered?

ISSUE FOR DISCUSSION 4:

What level of capacity should a decision-maker need to enter into an assisted decision-making agreement?

ISSUE FOR DISCUSSION 5:

If Manitoba were to enact assisted decision-making legislation, is a less formal process preferred? Or is a more formal process with varying levels of involvement of the court, legal counsel and prescribed forms more desirable?

ISSUE FOR DISCUSSION 6:

- (a) What types of decisions should an assistant have authority to assist in making?
- (b) Are there any types of decisions that should be explicitly excluded?

ISSUE FOR DISCUSSION 7:

Who should be able to act as an assistant or be excluded from doing so?

ISSUE FOR DISCUSSION 8:

What powers and duties should an assistant have? What principles should guide assistants when acting in their role?

ISSUE FOR DISCUSSION 9:

What is the risk for abuse in the context of assisted decision-making agreements and how should this risk for abuse be mitigated?

ISSUE FOR DISCUSSION 10:

- (a) What are the obligations of third parties when presented with an assisted decision-making agreement?

(b) What protections should be in place for third parties when transacting with assisted decision-makers?

(c) How should liability be apportioned between assistant and decision-maker?

ISSUE FOR DISCUSSION 11:

Would it be desirable to have an assisted decision-making agreement in place at the same time as a health care directive, power of attorney or substitute decision-making authority?