INCAPABLE AND CAPABLE RIGHTS: THE RIGHTS OF ADULTS IN VULNERABLE CIRCUMSTANCES – SLEDGEHAMMER v. SWISS ARMY KNIFE

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PART A: INTRODUCTION

Mental capacity is a fundamental concern for older adults,

their supporters and the lawyers who serve them. Older adults often experience ageist presumptions, including the erroneous notion that they have cognitive impairments, and require someone else to make their financial decisions. The great majority of older Canadians remain mentally capable in later years.[1]

According to the Alzheimer Society of Canada, "despite the majority of older Canadians who do not and will not have some form of dementia, the issue of diminished capacity is still a significant issue in the aging Canadian population". Currently, dementia is the most significant cause of disability among Canadians older than 65–affecting 20 per cent of older adults by age 80, and more than 40 per cent by age 90. Approximately 560,000 Canadians are living with dementia.[2] By 2038, this number is expected to increase to 1.1 million people–or 2.8 percent of the population.[3] The number of Canadians affected is high, and with the current aging demographic shift, will only be higher in the next few decades.

Dementia is characterized by the progressive deterioration of cognitive capacity. Symptoms of dementia commonly include loss of memory, judgment, and reasoning, as well as changes in mood, behaviour, and communication abilities. These symptoms may affect a person's ability to function at work, in relationships, or in daily activities.[4] One of the early "red flags" of dementia is impaired ability to understand financial issues.[5]

Capacity, consent, the ability of "making choice" and any limitation on this ability ihave a long social and legal history.

In the modern era the first paradigm shift started in the 1970s and culminated in Ontario (and most Canadian provinces) in the 1990s with the introduction of "substitute decision making" legislation making the underlying principles supporting this first evolution fundamental to our discussion. This next shift saw the

1. Canadian Centre for Elder Law, "Report on Vulnerable Investors Elder Abuse, Financial Exploitation, Undue Influence and Diminished Mental Capacity" (November 2017).
2. Alzheimer Society of Canada, "Dementia Numbers in Canada," online at: <https://alzheimer.ca/en/about-dementia/what-dementia/dementia-numbers-canada>.
3. Alzheimer Society of Canada, "Rising Tide: The Impact of Dementia on Canadian Society," (2010).
4. Alzheimer's Association, "10 Warning Signs of Alzheimer's Disease" online: <http://www.alz.org/national/documents/tenwarnsigns.pdf>.
5. *Ibid.*

development and interpretation of various tools developed by the courts using the 1990s legislative structure that we argue, three decades later retrospectively to inextricably conclude that this passage of time has not been kind. These tools are "satisfying" the fundamental principles of "making choice" with less and less practical success.

Courts, clients, and practitioners alike are frustrated. We examine more closely the vulnerabilities that have emerged since the legislation went into effect, the disjointed effect that has developed and legislative reform needed to modernize the statutory framework and guide court processes given where we are now and where we are going as a society.

The principles propping up the system for the last 30 years remain not only fundamental but also critical to the foundation of legal decision making – but as our paper attempts to argue, change in the form of coordination and refocus is needed by all communities affected by incapacity planning as we look towards the next 30 years.

The challenge is, as always, when discussing the legal system, access to justice, state v. individual – finding, essentially, that balance. But to do so means we will need to take the sledgehammer that is currently the *Substitute Decisions Act, 1992*[6] ("SDA") regime and try to evolve it into the Swiss army knife.

1. Historical Background

a. *Parens Patriae*: The Inherent Jurisdiction to Protect

Any discussion about protection of the vulnerable and incapacity planning should start here. *Parens patriae* or the "heroic act of intervention"[7] is Latin for "parent of the nation" and originated in the 12th century with the King of England and literally meant "the father of the country". It allowed the

6. *Substitute Decisions Act, 1992*, S.O. 1992, c. 30 ("SDA"). The *Substitute Decisions Act* provides for legal proceedings typically relating to the affairs of allegedly mentally incapable individuals. Common issues in dispute in these proceedings surround the validity of a power of attorney; appointing guardians; holding guardians, attorneys for property, and attorneys for personal care to account; and removing attorneys and replacing guardians.
7. Sir James Munby, "Protecting the Rights of Vulnerable and Incapacitous Adults – The Role of the Courts: An Example of Judicial Law-making" (2014) 26 Child & Family Law Quarterly 64 at 77.

Kings Bench in 16th century cases involving *non compos mentis* (not having control over the mind) adults to gain control or jurisdiction over such adults. This notion of protection dates from at least 1608, as recorded in Coke's report of Calvin's Case[8] where it is said "that moral law, honora patrem... doubtless doth extend to him that is pater patriae".[9]

The *parens patriae* doctrine was gradually applied to children throughout the 17th and 18th centuries and has since evolved from the granting of absolute rights to the sovereign to being more associated with the rights and obligations of the state and courts as it relates to those "who lack capacity" namely children[10] and incapacitated adults.

In law, it refers to the public policy power of the state to intervene against an abusive or negligent parent, legal guardian, or informal caretaker, and to act as the "parent" of any child, individual or animal who needs protection.

As it is based on the role of protecting the vulnerable, there are however no clearly defined limits to the exercise of the *parens patriae* jurisdiction. Therefore, the most frequently cited Canadian case that attempts to set direction is the unanimous Supreme Court of Canada decision of *E. (Mrs.) v. Eve*.[11] Here the Court reviewed the history and application of *parens patriae* jurisdiction, explaining:

> The *parens patriae* jurisdiction is, as I have said, founded on necessity, namely the need to act for the protection of those who cannot care for themselves. The courts have frequently stated that it is to be exercised in the "best interest" of the protected person, or again, for his or her "benefit" or "welfare".

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8. *Calvin's Case* (1608), 77 E.R. 377, Co.Rep. 1a, also known as the *Case of the Postnati*, (subjects born into the allegiance of the Scottish king James after he had become the King of England in 1603) was a 1608 English legal decision establishing that a child born in Scotland, after the Union of the Crowns under King James VI and I in 1603, was considered under the common law to be an English subject and entitled to the benefits of English law. *Calvin's Case* played an important role in shaping the American rule of birthright citizenship via *jus soli* ("law of the soil", or citizenship by virtue of birth within the territory of a sovereign state).
9. Sir Edward Coke; John Henry Thomas; John Farquhar Fraser (1826). The Reports of Sir Edward Cook, Knt. [1572-1617]: In Thirteen Parts. J. Butterworth and Son. p. 21.
10. Canada Department of Justice *Legal Representation of Children in Canada* <https://www.justice.gc.ca/eng/rp-pr/other-autre/lrc-rje/p3.html>.
11. *Eve, Re*, (*sub nom.* E. v. Eve) [1986] 2 S.C.R. 388, [1986] S.C.J. No. 60 (S.C.C.) at paras. 73-74 and 77.

> The situations under which it can be exercised are legion; the jurisdiction cannot be defined in that sense. As Lord MacDermott put it in *J. v. C.*, [1970] A.C. 668, at p. 703, the authorities are not consistent and there are many twists and turns, but they have inexorably "moved towards a broader discretion, under the impact of changing social conditions and the weight of opinion ... ." In other words, the categories under which the jurisdiction can be exercised are never closed. Thus, I agree with Latey J. in *Re X*, *supra*, at p. 699, that the jurisdiction is of a very broad nature, and that it can be invoked in such matters as custody, protection of property, health problems, religious upbringing, and protection against harmful associations. This list, as he notes, is not exhaustive.
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> ...
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> Though the scope or sphere of operation of the *parens patriae* jurisdiction may be unlimited, it by no means follows that the discretion to exercise it is unlimited. It must be exercised in accordance with its underlying principle. Simply put, the discretion is to do what is necessary for the protection of the person for whose benefit it is exercised ...[12]

Any proceedings, therefore, whether judicial or quasi-judicial, cannot displace the supervisory power of the court in the exercise of its *parens patriae* function over the incapacitated adult or child relying on the "best interests" test. To the extent that such a decision conflicts with the best interests of the vulnerable person, the courts will treat it as void in respect of that person, even though it might be binding on others such as the substitute decision maker or in the case of a child, the parents. This gives rise to the concept that the "best interests of the person" can always be cited for a challenge by a parent, grandparent, an interested relative, or the person acting through a friend.

In the context of the child, the views of the child are to be considered when the matter concerns them in accordance with their age and maturity. The child has a right to be heard in any proceedings is a fundamental right such as provided in Article 24 of the Charter of Fundamental Rights of the European Union.[13] The child's best interest is the primary consideration.

The same principles apply to adults whose mental capacity is

12. *Supra*, paras. 73-74 and 77.
13. The Charter of Fundamental Rights of the European Union ("CFR") enshrines certain pollical, social, and economic rights for European Union ("EU") citizens and residents under EU law. It was drafted by the European Convention and proclaimed on 7 December 2000 by the European Parliament, the Council of Ministers and European Commission. It did

impaired and who need protection. Since these individuals are not able to protect themselves, the courts have developed what we now call an inherent jurisdiction and appoint a guardian (*ad litem*).

In England, this jurisdiction has been placed in the Court of Protection. This Court, based in London, makes decisions on financial or welfare matters for people who cannot make decisions at the time they need to be made and it is responsible for:

- deciding whether a person has the mental capacity to make a particular decision for themselves,
- appointing deputies to make ongoing decisions for people who lack mental capacity,
- giving a person permission to make one-off decisions on behalf of someone else who lacks mental capacity,
- handling urgent or emergency applications where a decision must be made on behalf of someone else without delay,
- making decisions about a lasting power of attorney or enduring power of attorney and considering any objections to their registration,
- considering applications to make statutory wills or gifts,
- making decisions about when someone can be deprived of their liberty under the *Mental Capacity Act*.

This Court has jurisdiction, most interestingly, to make decisions on behalf of someone else, deal with objections to the registration of enduring powers of attorney, make statutory Wills[14] and deal with the sale of jointly owned property.

not however have full legal effect until the passing into force of the Treaty of Lisbon on 1 December 2009.

14. This is a process for a person to apply to make (or change) a will on behalf of someone who cannot do it themselves, who may, for example have a serious brain injury or illness or have dementia. This application can be made when the person is not able to understand what making or changing a will means, how much money they have or what property they own or how making or changing a will might affect the people they know (either those mentioned in the will or those left out).

i. Inherent Jurisdiction of the Courts

The *parens patriae* royal prerogative had as one of its foundational principles that incapacitated persons might regain capacity and would expect their assets to be restored or autonomy returned to them intact, a concept that found its way into the legislative reforms of the 1990s. But with legislative reform what remains of a judicial inherent jurisdiction now exists today mainly as a fall back to address legislative gaps or when no rule or statute explicitly confers jurisdiction. Its modern use is now restricted to where it is deemed necessary to protect those who cannot protect themselves.

Hence, the key restriction of the application of "inherent jurisdiction" is that this doctrine cannot be used to override an existing statute or rule. The clearest articulation of such restriction is set out in the Supreme Court of Canada's decision in *College Housing Co-operative Ltd. v. Baxter Student Housing Ltd. (1976)*, a case dealing with whether a judge had exceeded jurisdiction in determining if mortgagees should have priority over other charges and encumbrances.

As a court cannot negate the unambiguous expression of legislative will, "inherent jurisdiction" cannot be exercised to conflict with a statute or rule. Inherent jurisdiction cannot be used to conflict with the unambiguous expression of the Rules.[15] As inherent jurisdiction is not to be used to create new rules of substantive law this power is now reduced to an extraordinary power to be used sparingly and only in clear cases.[16]

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15. The Rules of Civil Procedure in various provinces in Canada have varying relationships with the inherent jurisdiction of their courts. In Ontario, for example, the Rules are regulations of the Courts of Justice Act, and are an expression of legislative will, created and amended by a "Civil Rules Committee" which consists of fourteen judges and thirteen other persons involved in the legal community including the representative of the Attorney General. The Rules are subject to the approval of the Lieutenant Governor in Council. The judges of the Court obviously have a part in the making of the rules, but the rules are regulations under the Act. The Court of Appeal for Nova Scotia for example has confirmed that a single judge of the court may use the inherent jurisdiction of the court to manage its own procedures.
16. For a more in-depth discussion see the Margaret Hall article: Margaret Hall article: The Vulnerability Jurisdiction: Equity, Parens Patriae, and the Inherent Jurisdiction of the Court, 2016 2-1 *Canadian Journal of Comparative and Contemporary Law* 185, 2016 CanLIIDocs 46, <https://canlii.ca/t/q5.

PART B: RIGHTS PROTECTING THE AUTONOMY, PRIVACY, AND FREEDOM OF EXPRESSION OF VULNERABLE ADULTS

1. Legislative Framework and Reform: A New Paradigm Shift

Against this background the 1970's saw a paradigm shift of 'de-institutionalization' and the focus began shifting away from institutional protection to the growing awareness of community and the private or personal supports needed. This time also saw a growing need to plan for future incapacity. With this the first modern paradigm shift of substitute decision-making in Canada revealed problems, problems of political pressures and doubts,[17] all problems which, in Ontario, the substitute decisions legislation was designed to address.

In 1985, the Ontario government established the Advisory Committee on Substitute Decision Making for Mentally Incapable Persons ("Fram Report") to review all aspects of the law regarding substitute decision-making. In response to the reports produced, the *Substitute Decisions Act, 1992* ("*SDA*") was unanimously passed by the Ontario legislature in December 1992.

As things currently stand, the *Substitute Decisions Act*, "is a very important legislative policy" as stated by Justice Kitely in *Phelan, Re*[18] (in the context of a sealing order) (paras. 22-23):

> "It recognizes that persons may become temporarily or permanently incapable of managing their personal or financial affairs. It anticipates that family members or others will identify when an individual has lost such capacity. It includes significant evidentiary protections to ensure that declarations of incapacity are made after notice is given to all those affected or potentially affected by the declaration and after proof on a balance of probabilities has been advances by professionals who attest to the incapacity. It requires that a plan of management be submitted to explain the expectations. It specifies ongoing accountability to the court of the implementation of the plan and the costs of so doing.

The alternative to such legislative frameworks that incapable persons and their family might be taken advantage of by

17. Which came through during the legislative debates.
18. 1999 CarswellOnt 2039, [1999] O.J. No. 2465 (Ont. S.C.J.). See also *Stickells Estate v. Fuller*, 1998 CarswellOnt 2880, [1998] O.J. No. 2940 (Ont. Gen. Div.).

unscrupulous persons. The social values of protecting those who cannot protect themselves are of "superordinate importance".

As clarified in *Abrams v. Abrams*[19] this means incapacity "proceedings are not a *lis* or private litigation in the traditional sense. The interests that these proceedings seek to balance are not the interests of the litigants, but the interests of the person alleged to be incapable as against the interest and duty of the state to protect the vulnerable." This protection extends to the assiduous protection of the alleged incapable person's dignity, privacy and legal rights. Intrusions into personal autonomy are warranted only to the extent necessary to protect the vulnerable.[20]

The SDA and its companion legislation were informed by three separate law reform initiatives that led to an overhaul of Ontario's capacity and substitute decision-making laws. These included the *Review of Advo*cacy *of Vulnerable Adults final report* ("O'Sullivan Report"), the Fram Report and the *Committee on the Enquiry on Mental Competency, 1990* ("Weisstub Enquiry").[21]

Overall, these reports highlighted the equal and important rights of vulnerable adults and the failings of the current schemes emphasizing the vital need to incorporate change into Ontario's existing rules and framework of incapacity planning and substitute decision-making law.

a. The Consultative Reports

i. O'Sullivan Report: Right to Self-Advocacy

The O'Sullivan Report underscored the need for non-legal advocacy for vulnerable adults. Alexander Procope has commented that this Report (as in each of the three) recognized the need for client-centered advocacy for those who

19. 2008 CarswellOnt 7788, [2008] O.J. No. 5207 (Ont. S.C.J.) at para 48-49, leave to appeal refused 2009 CarswellOnt 1580, [2009] O.J. No. 1223 (Ont. Div. Ct.), additional reasons 2009 CarswellOnt 2519 (Ont. Div. Ct.), additional reasons 2009 CarswellOnt 3502 (Ont. Div. Ct.).
20. *Beretta v. Beretta*, 2014 ONSC 7178, 2014 CarswellOnt 19123 (Ont. S.C.J.) at para 34.
21. Law Commission of Ontario, "Legal Capacity, Decision-Making and Guardianship Final Report" (2017), *Law Commission of Ontario*, online: <https://www.loc-cdo.org/en/our-current-projects/legal-capacity-decision-making-and-guardianship/> [LCO, Final Report 2017].

are vulnerable due to being abused, frail and elderly, psychiatrically disabled, or developmentally handicapped.[22]

ii. Fram Report: Unnecessary Intervention and Self-Determination Rights

In December 1987, the Fram Report was completed.[23] It highlighted concerns over the historic *parens patriae* effects on substitute-decision making scheme noting that, "the history of our choices made on behalf of physically or mentally handicapped people demonstrates the effects of paternalism. The primary values underlying this report were no unnecessary intervention and self-determination were the focus to try to ensure this history was neither continued nor repeated.

According to Procope, "The Fram Report recommended that certain tasks be performed by the proposed non-legal advocates, such as meeting with the allegedly incapable person to explain the application for guardianship and to confirm whether the person opposes some or all of the application."[24]

iii. Weisstub Enquiry: Right to Autonomy and the Best Interests of Vulnerable Adults

Developing a set of recommended standards for determining the mental competence of individuals to make decisions about health care, management of financial affairs and appointment of a substitute decision-maker was assigned to the Weisstub Enquiry.

Its Final Report concluded that the process for testing legal capacity must respect both the principle of autonomy and that of best interests, and reflect the importance of proportionality, administrative simplicity, and relevance.[25]

2. The Legislative Framework: 1991-1996

The Attorney General of Ontario armed with the new legislation to give people more control over what happens to

22. Alexander Procope, "The Ongoing History of Section 3 Counsel: Origins of the Role and a Path Forward" (2020), online: < http://pbplawyers.com/wp-content/uploads/2020/10/Procope-The-Ongoing-History-of-Section-3-Counsel.pdf >, page 5 [Procope].
23. *Ibid.*, p. 18.
24. *Ibid.*, p. 8.
25. LCO, Final Report 2017, *supra*, footnote 21.

their lives if they became incapable of making their own decisions; to respect people's life choices expressed before becoming incapable of making their own decisions; recognize the important role of family and friends; to clarify and expand the rights of incapable persons and the responsibilities of substitute decision-makers; to provide safeguards and accountability to protect the vulnerable; to limit guardianship and other government interventions to the rare circumstances where there is no suitable alternative. The Attorney General summarized his attempts simply as an: "Act [that] brings the law into line with current thinking on protection of individual rights."[26]

The Hon. Howard Hampton in helping to understand the principles underpinning the new legislative framework, in introducing the SDA during the legislative debates on May 27, 1991 (1st session of the 35th Parliament of the Ontario Legislature), said the new legislation was the result of a consultative process spanning three administrations and implementation of the report of the Advisory Committee on Substitute Decision Making for Mentally Incapable Persons (Fram Report); it would allow individuals to "maintain personal dignity and control of their lives"; and it was guided by the principles of liberty, empowerment, self-determination, and the right to make choices about one's own life.[27]

On June 20, 1991, during the second reading of the bill the Hon. Mr. Hampton re-iterated the principles of the legislation as being self-determination (recognizing that all adults have the freedom to choose how to live), and the fundamental principles embodied in s. 7 of the *Charter* of the right to life, liberty and security of the person and the right not to be deprived except in accordance with the principles of fundamental justice.[28]

Before the Standing Committee on the Administration of Justice, the Hon. Mr. Hampton testified that the underlying principle of the SDA is that people must have a choice and that the central principle underlying the statute is the right of people

26. Ontario, Attorney General, "A Guide to the Substitute Decisions Act" Queen's Printer for Ontario, 2000. <https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacity/2005-06/guide-0505.pdf>.

27. Hansard, May 27, 1991, 35th Parliament of Ontario, 1st session <https://www.ola.org/en/legislative-business/house-documents/parliament-35/session-1/1991-05-27/hansard>.

28. Hansard, June 20, 1991, 35th Parliament of Ontario, 1st session <https://www.ola.org/en/legislative-business/house-documents/parliament-35/session-1/1991-06-20/hansard>.

to choose for themselves stating "it is the basis of the common law."[29]

In testimony before the Subcommittee on the *Advocacy Act, 1991* and its companion legislation, Gary Malikowski, parliamentary assistant to the Minister of Citizenship, set out the four principles behind the legislation:

1. To promote respect for the rights, autonomy, and dignity of all persons.

2. To ensure due process where the freedom to control one's own life and body is at risk.

3. To recognize the importance of the family ties.

4. To protect the most vulnerable from abuse, neglect and exploitation.[30]

On March 25, 1992, Nadia Diakun-Thibault, executive director for the Advisory Counsel on Aging for Lanark, Leeds, and Grenville Counties, testified on the definition of incapacity (as being the incapacity to understand information relevant to making a decision, or the inability to appreciate the consequences of a decision of lack of a decision) arguing incapacity needed to be defined to ensure that persons capable of making a choice or decision would not have these choices interfered with, even if considered bizarre or eccentric. Ms. Diakun-Thibault highlighted the point that even if a person accepted the assistance of another while being able to understand and appreciate, the person is still to be considered capable (which forms the basis for the more modern discussions about a "Trusted Support Person" as argued by Krista James and Kevin Love).[31]

Against these principles came the legislative framework of the various statutes which provided the first modern attempt to impose parameters for not only those who wanted to plan for a

29. Hansard, May 28, 1991, Standing Committee on the Administration of Justice.

30. Hansard, Feb 10, 1992, Subcommittee Report, Advocacy Act & Companion legislation.

31. Krista James and Kevin Love, "Representing Clients with Capacity Issues" (June 2021), Canadian Bar Association, online: <https://www.cbabc.org/BarTalk/Articles/2021/June/Features/Representing-Clients-with-Capacity-Issues> [James and Love]. See later discussion.

subsequent legally incapable (now defined) but also for those who were to become the decision makers in substitution.

a. Consent to Treatment Act, 1992[32]

The *Consent to Treatment Act, 1992* was enacted to provide more complete guidance in the giving of consent in the medical sphere. The statute was premised on the common law principle that no medical treatment may be given unless the patient, after being advised of the alternatives, and the consequences of the treatment and side effects, has given full and informed consent.

The consent must relate to the treatment, be an informed consent, be given voluntarily and must not have been obtained through fraud or misrepresentation. The statute went beyond merely recognizing living wills or advance directives. Besides recognizing substitute decision-makers if the person could not provide the consent themself, the Act provided a mechanism for determining whether a person was competent to make his or her decisions for personal care before the proxy or substitute decision-maker could act.

The assessment of capacity and the steps to be taken in determining capacity were found in ss. 6 and 9 which stated that a person was capable with respect to a treatment if the person was "able to understand the information that was relevant to making a decision concerning the treatment and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision" (s. 6). It set out the procedure and provided a schedule of priorities of persons to whom the health practitioner could look for consent in the event of the patient's incapability.

Section 9 provided that if a person who was 14 years of age or more was found incapable with respect to treatment, the health practitioner had to ensure that the person was advised of that finding. A rights advisor, who had to be notified in certain prescribed circumstances, was then required to meet with the person and explain the results of the finding and that an application to the (then) Consent and Capacity Review Board ("CCB") could be made to review the finding of incapacity. Where the person was 16 years of age or older and found incapable, the Public Guardian and Trustee under s. 10 could be notified. An application could also be made to the CCB for the

32. M. Jasmine Sweatman, *Powers of Attorney and Capacity: Practice and Procedure*, 2st ed (Toronto: Canada Law Book, 2014) at 46-48.

appointment of a representative to give or refuse consent to treatment on behalf of the person on an ongoing basis.

The Act applied to health practitioners and attempted to ensure that no treatment was administered unless the health practitioner received the consent of the patient, or from an authorized person on the patient's behalf. It dealt mainly with the way consent was to be obtained and the circumstances in which another person was authorized to be consulted for the purposes of providing consent.[33]

b. Advocacy Act, 1992

The *Advocacy Act, 1992* ("Advocacy Act") was designed to protect adults who were considered "vulnerable" as defined in the statute. The general purposes of the legislation were, as set out in s. 1, to empower and advance (on the social agenda) the rights of "vulnerable persons". The carrying out of these functions was overseen by an independent Advocacy Commission under s. 5, a majority of whose members were older adults or individuals who are, had been or are likely to be disabled. It authorized the commission to appoint staff and authorize non-profit agencies to provide services such as advocacy services. The Advocacy Act, under s. 16, also provided for the creation of an appointments advisory committee comprised of representatives from various sectors who were given the tasks of developing procedures for the selection of candidates and selecting and recommending candidates for the Advocacy Commission.

Under s. 17 the Advocacy Act provided for advocates who, if providing services to a person, were primarily to act in a manner consistent with the instructions or wishes of the "vulnerable person" but who so acted only where the person was incapable of instructing the advocate and where the advocate believed that there was a serious risk to the harm and safety of the vulnerable person. But, pursuant to s. 19, the advocate did not make substitute decisions.

The Advocacy Act defined (s. 2) a vulnerable person to mean "a person who, because of a moderate to severe mental or physical disability, illness, or infirmity, whether temporary or permanent and whether actual or perceived, is unable to express

33. This statute was replaced by the *Health Care Consent Act, 1996* by s. 2 of the *Advocacy, Consent and Substitute Decisions Statute Law Amendment Act, 1996*.

or act on his or her wishes or to ascertain or exercise his or her rights or has difficulty in expressing or acting on his or her wishes or in ascertaining or exercising his or her rights".

Although this definition (by s. 3) only applied to vulnerable persons 16 years of age or over, the legislation, as it related to providing rights advice and other advocacy services, also applied to minors under the age of 16.

By the Advocacy Act, Ontario established a system that involved substitute decision-making for people found to be incapable of managing their affairs or dealing with their personal concerns. It went far beyond creating a system for adults. The system focused on contributing to the empowerment of vulnerable persons, promoting respect for their rights, freedoms, autonomy, and dignity, providing advocacy services and recognizing differences culturally and in the community.[34]

c. Consent and Capacity Statute Law Amendment Act, 1992

The *Consent and Capacity Statute Law Amendment Act, 1992* primarily revoked or amended other prior existing statutes, or portions of them, which had become inconsistent under the new statutes. Twenty-four statutes were amended, including the *Powers of Attorney Act,* (s. 24) which was almost totally repealed, the *Mental Incompetency Act*, which was totally repealed (s. 21), and the *Mental Health Act*, which was substantially amended (s. 20). This Act also amended the *Children's Reform Act* (s. 4), the *Freedom of Information and Protection of Privacy Act* (s. 13), the *Public Trustee Act* (s. 25) and the *Trustee Act* (s. 27).[35]

d. Health Care Consent Act, 1996

The *Health Care Consent Act, 1996*[36] ("HCCA") came next. On March 29, 1996, the HCCA[37] replaced the *Consent to Treatment Act*[38] when the *Advocacy, Consent and Substitute Decisions Statute Law Amendment Act*[39] was brought into force.

34. This statute was repealed by the *Advocacy, Consent and Substitute Decisions Statute Law Amendment Act, 1996*.
35. The statute was amended in 1996, by s. 64 of the *Advocacy, Consent and Substitute Decisions Statute Law Amendment Act, 1996,* to reflect the new *Health Care Consent Act, 1996*.
36. *Health Care Consent Act, 1996*, S.O. 1996, c. 2, Sched A.
37. *Ibid.*
38. *Consent to Treatment Act, 1992*, S.O. 1992, c. 31.

At the same time, the *Advocacy Act*[40] was repealed and the *Substitute Decisions Act*[41] was amended. The legislation now governing consent to treatment is the HCCA, not the *Consent to Treatment Act*.[42]

The HCCA applies specifically, amongst other matters, to consent to treatment issues. It also establishes a presumption of capacity and gives prominence to the expressed wishes of a person in relation to his or her personal care.

Pursuant to s. 10 of the HCCA, a health practitioner shall not administer treatment unless (a) a patient is capable with respect to treatment and has given consent, or (b) the patient is incapable with respect to treatment and their SDM has given consent in accordance with the HCCA.

Pursuant to s. 4 of the HCCA, a person is capable with respect to a treatment, admission to a care facility or a personal assistance service if the person is able to understand the information that is relevant to making a decision about the treatment, admission or personal assistance service, as the case may be, and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

The purpose of the HCCA is to enhance the autonomy of persons for whom treatment is proposed ... by (iii) requiring that wishes with respect to treatment, ...expressed by persons while capable and after attaining sixteen years of age, be adhered to .... This Act (and the SDA) seeks to maximise personal autonomy for persons who are currently incapable by allowing for prior expressed wishes, values, and beliefs to guide substitute decision:

> (a) a substitute decision for an incapable person must consider prior expressed wishes applicable in the circumstances when making a decision on behalf of the incapable person;[43] and
>
> (b) where there is no prior expressed wish applicable in the circumstances the substitute decision maker must make

39. Bill 19, *Advocacy, Consent and Substitute Decisions Statute Law Amendment Act, 1996*.
40. *Advocacy Act*, *1992*, S.O. 1992, c. 26.
41. *Substitute Decisions Act, 1992,* S.O. 1992, c. 30.
42. *Health Care Consent Act* (September 1997) online: College of Medical Radiation Technologies of Ontario <https://www.cmrito.org/pdfs/wymkas/health-act.pdf>.
43. *Ibid.*, s. 21(1)1.

> a decision in the best interests of the incapable person, which will include considering prior expressed wishes generally (that do not apply directly to the decision in question), the values and beliefs of the incapable person, the general benefit of the treatment to the proposed person and whether any less intrusive alternative is available.[44]

Outside of an emergency, the HCCA makes it clear that a person has the right to consent to or refuse treatment if they have mental capacity. This means the patient must be able to understand and appreciate the consequences of their treatment decision.[45] That means informed consent.[46]

To demonstrate informed consent, the patient must be capable of understanding the proposed or recommended treatment and the associated risks and benefits.[47] This requires the patient is able to understand the information that is relevant to deciding about the treatment within a psychiatric facility while the HCCA governs the ability to treat patients within a hospital.[48]

e. Ontario Human Rights Code

The Ontario *Human Rights Code*[49] guarantees to every person having legal capacity a right to contract on equal terms without discrimination. The prescribed social areas are services; accommodation of persons under 18; contracts; employment; and vocational associations.

The Code at Part I[50] states that services are to be provided without discrimination[51] because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual

44. *Ibid.*, ss. 21(1)2 and 21(2).
45. *Health Care Consent Act, 1996*, S.O. 1996, c. 2, Sched. A., s. 4(1).
46. *Ibid.*, s. 11(2).
47. *Ibid.*, s. 11(3).
48. *Ontario's Health Care Consent Act in Action* (February 2020) online: Wise Health Law <https://wisehealthlaw.ca/blogs/blog/ontarios-health-care-consent-act-in-action>.
49. *Human Rights Code,* R.S.O. 1990, c. H. 19.
50. *Ibid.*, s. 1.
51. *Pieters v. Peel Law Assn.*, 2013 ONCA 396 (Ont. C.A.) at para. 56 where the Peel Law Association was accused of racial discrimination on prohibited Code grounds by profiling two black lawyers and one black law student in the Law Association Library and Lounge. *Pieters* established three elements of *prima facie* discrimination: 1. That the person is a member of a group protected by the *Code,* 2. That the person was subjected to adverse

orientation, gender identity, gender expression, age, marital status, family status or disability. There must always be a connection between the adverse treatment and the ground of discrimination.

f. Privacy: Personal Health Information and Privacy Law

Another limited foundational principle in incapacity planning is privacy. Privacy is inextricably linked with freedom – freedom to control information and decision making regardless of one's mental or physical state. Arguably, vulnerability evokes a greater need or at least sensitivity to privacy.

As Strathy J said in *Kirscher v. Kirscher*,[52] "privacy and freedom from coercive interference with one's physical and mental autonomy are core values of Canadian society."

In substitute decision making the concept of privacy has evolved to focus on health and personal information with confidentiality being the concept focusing on financial or property information. The statutes in the form of PIPEDA and PHIPA now protect a person from the collection, use and disclosure of personal information and personal health information and going so far that a person (labelled a health information custodian) must not collect, use, or disclose personal health information if other information will serve the purpose and must not collect, use or disclose more personal health information than is personally necessary for the healthcare purpose.[53]

Substitute decision making law as set out in this review of statutes of 1991-1992-1996 is based on, in the end, two guiding principles:

1. The promotion of respect for the rights, autonomy, and dignity of all persons.

2. The protection of the most vulnerable from abuse, neglect, and exploitation.

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treatment, and 3. That the person's status as a member of a group protected under Part I was a factor in the alleged adverse treatment.

52. *Kischer v. Kischer*, 2009 CarswellOnt 81, [2009] O.J. No. 96 (Ont. S.C.J.) at para. 10.

53. Martha A. Healey & Adrienne Blanchard, Privacy Law In Canada - 12.4 – Personal Health Information.

PART C: THE SECOND SHIFT – WHERE WE WENT AND WHERE WE ARE TODAY – THE LAST 30 YEARS

In 2017, twenty-five years since the enactment of the SDA, the Law Commission of Ontario ("LCO") released *Legal Capacity, Decision-Making, and Guardianship: Final Report* ("LCO Report"). The LCO Report discussed the legislative framework and objectives of Ontario's incapacity planning system and considered whether Ontario had achieved its objectives in practice.

In summary the LCO described the approach/principles to substitute decision making in common-law systems as typically as:

1. Intervention is only permitted where an individual has been found to lack legal capacity.

2. If a person lacks capacity and a decision is required – a substitute decision maker will make the decision on the person's behalf.

3. The substitute decision makers may be appointed by the individual or externally.

4. Preference is given to close relationships when determining the external appointment.

And the LCO also described the approach/principles to substitute decisions in Ontario as being one where:

1. Decisions are based on 'substituted judgment' rather than 'best interests'.

2. Substitute decision-makers have a duty to promote participation.

3. Individuals have significant opportunities to choose or have input in the selection of a substitute.

4. Trusting relationships are the most important foundation of substitute decision-making.

5. Approaches to decision making are specific to particular domains or decisions.

In putting this all together the LCO concluded Ontario's system was "confusing and complex, lacking coordination; lacking clarity and consistency for capacity assessments and one in which the rights enforcement and dispute resolution mechanisms were inaccessible to most people", and argued for "a need for legal tools that are less binary and more responsive to the range of needs of those directly affected".[54]

1. Fundamental Rights and Freedoms of Vulnerable Adults

a. United Nations Convention on the Rights of Persons with Disabilities: Freedom of Expression and Opinion, and Access to Information

The United Nations Convention on the Convention on the Rights of Persons with Disabilities: Freedom of Expression and Opinion, and Access to Information ("CRPD") was adopted on 13 December 2006 and entered into force on 3 May 2008.[55]

The CRPD[56] was the first comprehensive human rights treaty of the 21st century and was the first human rights convention to be open for signature by regional integration organizations. The Convention followed decades of work by the United Nations to change attitudes and approaches to persons with disabilities. This treaty took the movement from viewing persons with disabilities as "objects" of charity, medical treatment, and social protection to viewing persons with disabilities as "subjects" with rights, who can claim those rights and making decisions for their lives based on their free and informed consent as well as being active members of society.

It was (and is still) intended as a human rights instrument

54. LCO, Final Report 2017, *supra*, footnote 21.
55. As of 6 May 2022, there were 185 ratifications/accessions and 164 signatories (these include countries or regional integration organizations that have signed the Convention and its Optional Protocol) to the Convention and 100 ratifications/accessions and 94 signatories to the Optional Protocol. When it was adopted on 13 December 2006 at the United Nations Headquarters in New York and opened for signature on 30 March 2007 there were 82 signatories to the Convention, 44 signatories to the Optional Protocol, and 1 ratification of the Convention. This was the highest number of signatories in history to a UN Convention on its opening day.
56. The Convention on the Rights of Persons with Disabilities and its Optional Protocol (A/RES/61/106). The Convention was negotiated during eight sessions of an Ad Hoc Committee of the General Assembly from 2002 to 2006, making it the fastest negotiated human rights treaty.

with an explicit, social development dimension by adopting a broad categorization of persons with disabilities and reaffirms that all persons with all types of disabilities must enjoy all human rights and fundamental freedoms. It tried to clarify and qualify how all categories of rights apply to persons with disabilities and identified areas where adaptations needed to be made for persons with disabilities for them to effectively exercise their rights in areas where their rights have been violated, and where protection of rights must be reinforced.

The CRPD took as its preamble, twenty-five guiding principles. The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

The Convention defined "persons with disabilities" to include those who have long-term physical, mental, intellectual, or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

There were eight guiding principles that underscored the Convention and each of its articles:

1. Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons

2. Non-discrimination

3. Full and effective participation and inclusion in society

4. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity

5. Equality of opportunity

6. Accessibility

7. Equality between men and women

8. Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities

The Convention also contains numerous articles that relate more closely to persons with intellectual disability.[57]

Article 12 of the Convention has received significant attention and focus, largely because of its implications for the protection of the right to legal capacity and persons with disabilities.

Article 12 – Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating 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

57. See Article 5 relating to equality and non-discrimination; Article 9 relating to accessibility and the appropriate measures state parties must develop; Article 13 requiring state parties to ensure effective access to justice for persons with disabilities on an equal basis; Article 14 requiring states parties to protect the liberty and security of the person by ensuring that persons with disabilities are not deprived of their liberty through any process; Article 15 requiring states parties to take all effective legislative, administrative, judicial or other measure; Article 16 requiring states parties to take all appropriate measures to prevent all forms of exploitation, violence, and abuse; Article 17 which holds that every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others; Article 18 requiring states parties to recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others; Article 19 requiring states parties to recognize the equal right of all persons with disabilities to live independently and be included in the community; and, Article 22 requiring states parties to protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others.

circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Article 21 is also noteworthy as it requires states parties to take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice, as defined in Article 2.

The University of Minnesota Human Rights Center ("UMHRC")[58] does an excellent job of explaining this concept of freedom of expression starting with the idea that the right to freedom of expression reflects two distinct parts; namely the right to impart or share information and ideas of all kinds and the right to seek and receive information.

To protect this right then the person must be given all opportunity to exchange information and articulate ideas and opinions, and to obtain information so that ideas and opinions can be developed. Unlike the right to freedom of opinion, the UMHRC points out, the right to freedom of expression carries with it certain responsibilities and can be subjected to restrictions by the State.

This is even if the expression of ideas or exchange of information is harmful to others which is why the State is permitted to impose restrictions on the right to express in the name of public safety, protection of the rights of others. Ensuring, however, that these restrictions do not weaking the right in the first place so as to effectively eliminate it.

58. University of Minnesota Human Rights Center–http://hrlibrary.umn.edu/edumat/hreduseries/HR-YES/chapter.html.

The right to freedom of expression and opinion is critical to all. Despite the importance of the right to freedom of expression and opinion, persons with disabilities face numerous barriers to full enjoyment of this right. As with other human rights, one of the greatest barriers to enjoyment of the right to freedom of expression and opinion can be the attitudes of others. Prevailing social attitudes and stereotypes can create an environment in which the opinions of persons with disabilities are not welcome or not accepted as worthy of consideration on an equal basis with those of others.

Persons with intellectual disabilities often face pressure from others to conform not only in their way of thinking, but also in their methods of expressing themselves, to a manner considered "more acceptable" so that their expression does not offend or upset other people – often in the name of "best interests".

The UMHRC also points out[59] that the violations of other human rights can also negatively impact the enjoyment of the right to freedom of expression and opinion by persons with disabilities. For example, violation of the right to privacy may discourage persons with disabilities from expressing their ideas publicly. Such concerns may be heightened for people who do not enjoy the right to live independently and in the community.

The right to freedom of expression and opinion is essential then to the ability of persons with disabilities to develop as individuals and to participate in societies on an equal basis with others.

b. Canadian Charter of Rights and Freedoms – Autonomy and Dignity

In our own country, the evolution of the protection of human rights culminated in the Canadian Charter of Rights and Freedoms.[60] The Law Commission of Ontario has posted a paper on its review of the law on the development of an anti-ageist approach within the law.[61] In doing so it reviewed s. 7 of the Charter which guarantees that everyone has the right to life,

59. *Ibid.*, what it calls the "interrelationship of rights".
60. *Canadian Charter of Rights and Freedoms,* s. 7, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
61. *Canadian Charter of Rights and Freedoms*, online: Law Commission of Ontario <https://www.lco-cdo.org/en/our-current-projects/a-framework-for-the-law-as-it-affects-older-adults/older-adults-funded-papers/developing-an-anti-ageist-approach-within-law/iii-canadian-charter-of-rights-and-freedoms>.

liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Its analysis focussed on the right to liberty as being the right to make fundamental personal decisions in addition to freedom from physical constraint and interference with physical freedom. Liberty includes "the right to an irreducible sphere of personal autonomy regarding matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they might implicate basic choices going to the core of what it means to enjoy individual dignity and independence".[62] Within that sphere, individual choices mean to be free from state interference.

The "security of the person" protected by s. 7 includes an individual's "psychological integrity",[63] the right to make decisions regarding one's own medical treatment,[64] and where a person is no longer capable of making his or her own wishes known, previously expressed wishes (while capable) are to be considered to preserve, in so far as possible, this autonomous sphere.[65]

Potentially abusive situations can be interpreted as an intrusion into the individual's sphere of autonomous decision making and independence, making s. 7 relevant in the context of legislation applying to elder abuse and exploitation. Unless an adult person is mentally incapable, he or she is responsible (absent mandatory reporting laws) for reporting and accessing help regarding any abuse (outside of a criminal offence) that they may be experiencing.[66]

Section 7 has been interpreted as not including "a generalized right to dignity", although "respect for the inherent dignity of

62. *Godbout c. Longueuil (Ville)*, [1997] 3 S.C.R. 844 (S.C.C.); see also *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 (S.C.C.).
63. *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 (S.C.C.).
64. *Fleming v. Reid* (1991), 82 D.L.R. (4th) 298 (Ont. C.A.); *Conway v. Jacques*, 2002 CarswellOnt 1920, [2002] O.J. No. 2333 (Ont. C.A.), reversing (2001), 32 Admin. L.R. (3d) 248 (Ont. S.C.J.), leave to appeal refused 2003 CarswellOnt 265, [2002] S.C.C.A. No. 341 (S.C.C.).
65. *Supra*.
66. See, Report on Inquest into the Death of Cory Clifford Moar, May 14, 2003, Provincial Court of Manitoba. Orders restricting a respondent's rights made pursuant to adult protection or domestic violence legislation (emergency protection orders for example) may also be considered to infringe the respondent's s. 7 rights, although the infringement may be justified under s. 1 of the Charter.

persons is... an essential value in our free and democratic society which must guide the courts in interpreting the Charter".[67]

Dignity then is an important consideration in the determination of best interests, when a person is no longer capable and where no prior expressed wishes are directly applicable to the situation. This situation may be more complex than a situation where the known prior wishes directly apply: "[y]et, respect for the dignity and welfare of an incapable person may require that person to be treated".[68]

The Consent and Capacity Board considered the significance of dignity in *G. (E.J.), Re*,[69] finding "guidance" in the following passage from the decision of the House of Lords in *Airedale NHS Trust v. Bland*:[70]

> The medical and nursing treatment of individuals in extremis and suffering from these conditions (persistent vegetative state) entails the constant and extensive handling and manipulation of the body. At some point, such a course of treatment upon the insensate patient is bound to touch the sensibilities of even the most detached observer. Eventually, pervasive bodily intrusions, even for the best motives, will arouse feelings akin to humiliation and mortification for the helpless patient. When cherished values of human dignity and personal privacy, which belong to every person living or dying, are sufficiently transgressed by what is being done to the individual, we should be ready to say: enough.[71]

The incapable person's decision-making rights under s. 7 does not require deference to the substitute decision maker with regards to best wishes; "[t]he substitute decision maker is important but only as part of a statutory regime which, by its terms, tries to respect an incapable person's well-being and dignity where that person's consent or refusal to treatment cannot be established".[72]

Where there is a conflict between the substitute decision maker and the treating physician regarding a person's best interests in the medical context, the hearing will hear submissions from all parties and make a decision that will be

67. *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44 (S.C.C.).
68. *M. (A.) v. Benes* (1999), 46 O.R. (3d) 271 (Ont. C.A.) at para. 38 [*Benes*].
69. 2007 CarswellOnt 6851 (Ont. Cons. & Capacity Bd.).
70. [1993] A.C. 789 (U.K. H.L.).
71. Per Lord Butler-Sloss, quoting from *Re Conroy*, (1985) NJ 321, 398-399. Both *Bland* and *Conroy* involved patients in a persistent vegetative state with no prospect of recovery.
72. *Benes*, *supra*, footnote 68, at para. 42.

consistent with the person's rights to autonomy and with his or her dignity and well being.[73]

Finally, s. 7 provides that an individual can be deprived of his or her right to "life, liberty and security of the person" but only where this is done in accordance with the "principles of fundamental justice". This means the state can incarcerate individuals of criminal offences, for example, but only where that incarceration follows procedures that are consistent with the "principles of fundamental justice".

The "principles of fundamental justice" have been given some definition and explanations by the courts. They are the "basic tenets of our legal system", with both procedural and substantive dimensions,[74] and must meet the following criteria:

(a) the principle must be a legal principle;

(b) the principle must be vital or fundamental to societal notions of justice;

(c) the principle must be capable of being identified with some precision; and[75]

(d) the principles of fundamental justice have both a procedural and a substantive aspect. Procedural principles include the right to full and proper disclosure[76] and the right to silence. Substantive principles include the subjective *mens rea* or "guilty mind" requirement for a conviction of murder.

This aspect of s. 7 is relevant in all situations involving a potential loss of liberty and security rights, including capacity assessments generally (which may result in a loss of personal decision-making authority) and capacity assessments preceding care facility admission. In *Saunders v. Bridgepoint Hospital*,[77] the court held, for example, that a person was needed to be

73. *Benes*, *supra*, footnote 68; *Scardoni v. Hawryluck*, 2004 CarswellOnt 424 (Ont. S.C.J.).
74. *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 (S.C.C.).
75. *R. v. Broyles*, [1991] 3 S.C.R. 595 (S.C.C.).
76. *R. v. Morgentaler*, (*sub nom.* R. v. Morgentaler (No. 2)) [1988] 1 S.C.R. 30 (S.C.C.).
77. 2005 CarswellOnt 7520 (Ont. S.C.J.). See also *Koch, Re*, 1997 CarswellOnt 824 (Ont. Gen. Div.), additional reasons 1997 CarswellOnt 2230 (Ont. Gen. Div.).

informed that a capacity assessment, for the purposes of determining admission to a care facility, was going to be undertaken (and the significance of that assessment) as a matter of procedural fairness.

Section 7 rights must be referred to in situations where the individuals who are most likely to be at risk with regards to their s. 7 rights and are less likely (vis a vis "mainstream society") to be able to independently protect and enforce those rights. In the substitute decision making context, this requires a robust system for independent review of decisions and accessibility to independent advocacy.

c. Right to Independent Counsel

When the very issue in a legal proceeding is the capacity of the individual or the appointment of a substitute-decision-maker, litigation guardians are not required. The client is deemed capable of instructing counsel.

Capacity to retain implies the capacity to discharge counsel or decline counsel and counsel cannot be forced upon a person who does not wish to be represented. Where capacity is the issue in the proceeding, a client who wishes to dispute the allegation of incapacity is entitled to do so and the deemed capacity to instruct removes the requirement that the lawyer be satisfied that the instructions provided by a client are capable.[78]

UN General Assembly resolution 46/119, *Principles for the protection of persons with mental illness and the improvement of mental health care* (December 1991), recommended more: any decision that, by reason of his or her mental illness, a lack of legal capacity, and any decision that, in consequence of such incapacity, should be made only after a fair hearing by an independent and impartial tribunal established by domestic law and a personal representative for free shall be appointed.[79]

78. Marshall Swadron, "Representing the Incapable Client in Capacity Proceedings" (2011), *Law Commission of Ontario*, online: <https://lco-cdo.org/wp-content/uploads/2011/01/ccel-papers_4B%20-%20Marshall%20Swadron.pdf>.

79. General Assembly resolution 46/119, *Principles for the protection of persons with mental illness and the improvement of mental health care* (December 1991), online: United Nations Human Rights Principles for the protection of persons with mental illness and the improvement of mental health care | OHCHR. The Resolution goes further to say that a person whose capacity is at issue shall be entitled to be represented by a counsel. If the person whose capacity is at issue does not himself or herself secure such representation, it shall be made available without payment by that person to the extent that he

i. Capacity to Instruct Counsel

As capacity is defined or determined upon factors of mixed law and fact, and by applying the evidence available to the applicable factors/criteria for decision specific capacity, there is no "test" per se for a finding of incapacity. It is a standard to be applied and considered of a certain decision at a particular time.

While there is a rebuttable presumption that an adult person is capable of instructing counsel, the requisite capacity to instruct counsel involves the ability to understand and appreciate the financial and legal issues at hand. The lawyer has the duty and responsibility to determine if the client has sufficient capacity.

The *Pavlick v. Hunt*,[80] the British Columbia court held the capacity to instruct counsel involved "the exercise of judgment in relation to the claims in an action and possible settlement, as a reasonable person would be expected to do".

In Ontario the courts have adopted the following test from *Costantino v. Costantino*;[81] a person must:

a) understand what they have asked the lawyer to do for them, and why;

b) be able to understand and process the information, advice, and options the lawyer presents; and,

c) be able to appreciate the advantages and drawbacks and the potential consequences associated with the options they are presented with.

In *Evans v. Evans*,[82] the Court for example, found the client lacked the ability to focus, know or understand the choices and

or she does not have sufficient means to pay for it. The counsel shall not in the same proceedings represent a mental health facility or its personnel and shall not also represent a member of the family of the person whose capacity is at issue unless the tribunal is satisfied that there is no conflict of interest. Decisions regarding capacity and the need for a personal representative shall be reviewed at reasonable intervals prescribed by domestic law. The person whose capacity is at issue, his or her personal representative, if any, and any other interested person shall have the right to appeal to a higher court against any such decision.

80. 2005 BCSC 285 (B.C. S.C.) at para. 19, additional reasons 2005 CarswellBC 3895 (B.C. S.C.).
81. 2016 ONSC 7279 (Ont. S.C.J.) at para. 47.
82. 2017 ONSC 5232 (Ont. S.C.J.).

decisions that were required of her due to her mental health issues; was unable to understand and appreciate her choices and the decisions she had to make; and was unable to concentrate on the decisions that she had to make; and therefore found the client was unable to instruct counsel.[83]

In *Sylvester v. Britton*,[84] the Ontario Superior Court drew the distinction "between a situation in which no instructions can be provided, for example the client is in a coma or speaks only gibberish, and where the client is able to articulate what they want even if they cannot fully appreciate the legal process, risks and costs associated with that position". In the latter situation, counsel must "assess the degree of comprehension and the cogency of the instructions obtained to determine capacity to instruct".[85] The Court also concluded that where a lawyer decides their client has the requisite capacity to instruct then the court should generally only intrude on that assessment with "great reluctance and where the evidence demonstrates a strong likelihood that counsel has strayed from his or her obligations to the client and to the court".[86]

The recent Alberta decision of *Guardian Law Group v. LS*,[87] looked at the requirements counsel must meet to be validly retained in a case relating to the person's own capacity hearing. On the issue of capacity to retain counsel the court started with the principles that determinations of capacity are fact specific,[88] or task-specific and can also change over time depending on the circumstances[89] meaning it does not follow from a finding of capacity or incapacity in one area that a person has or lacks capacity in any other area. In this context a client may, for example, have the capacity to instruct counsel in relation to one legal problem, but not another.[90] It all depends on the

83. Here the court Ontario found the evidence indicating the person's current mental status which prevented them from dealing with the "process" was not sufficient to prove incapacity to instruct counsel. Rather, the evidence must specifically address the issue of whether one can make decisions regarding the "process".
84. 2018 ONSC 6620 (Ont. S.C.J.) [*Sylvester*].
85. *Supra,* at para. 74.
86. The court suggested the evidence on this could be put in by affidavit which would outline the steps taken to be satisfied of the capacity to provide instructions. However, in doing so care must be taken to avoid a breach of lawyer-client privilege or other privacy rights. See also Kimberly A. Whaley, "Capacity to Instruct Counsel" (2020) 50 The Advocate's Quarterly 388.
87. 2021 ABQB 591 (Alta. Q.B.) [*Guardian*].
88. *Supra*, at paras. 33-34.
89. *Supra*, at paras. 34, 37.

"complexity of each specific task" at the time in question relative to the person's cognitive ability.

The court cited a "hierarchy of capacity" in making specific types of decisions looking to the Ontario decision in *Calvert (Litigation Guardian of) v. Calvert*[91] noting in its view the capacity to instruct counsel would "fall higher" on this hierarchy since it involved the ability to understand financial and legal issues.

The court was also mindful as set out in *Sylvester v. Britton,*[92] that a finding of capacity in a 'higher' area would not necessarily lead to a finding of capacity in a 'lower' area. On this point, there is debate as if there really is (or should be) a "hierarchy" given the inherent dangers of pigeonholing the types of capacity or tasks. Arguably, the court should not be looking at it as a hierarchy as such but rather as a legal test applicable to the task at hand and whether that legal test has been satisfied or not.

If a party lacked the requisite capacity, an otherwise valid contract could be set aside as against the incapable person.[93] *Guardian* is useful in that although it starts with the codified presumption the decision does however suggests a deviation (or "novel")[94] approach to the test for this capacity asking the questions: at the time the contract was entered into was there a lack of understanding the terms or the ability to form a "rational judgment" of the contract's effects on his/her interest? Did the other contracting party have "actual or constructive knowledge" of any incompetence?[95] [96]

What about fairness? "Courts of equity will not interfere if a

90. *Supra*, at para. 36.
91. (1997), 32 O.R. (3d) 281 (Ont. Gen. Div.), affirmed (1998), 37 O.R. (3d) 221 (Ont. C.A.), leave to appeal refused [1998] S.C.C.A. No. 161, 228 N.R. 98 (note) (S.C.C.).
92. *Sylvester*, *supra*, footnote 84.
93. In *Guardian*, *supra*, footnote 87, at para. 48, the court recognised however, that there was a distinct difference between the capacity to instruct counsel and the capacity to enter into a retainer agreement: for the retainer agreement capacity is only assessed at the time the contract is found or at the time the retainer agreement is entered into. The point in time to consider capacity is then at that time: a retainer agreement may be validly entered into if the client had capacity at the time it was created, even if over the course of the retainer the client's capacity subsequently diminishes, such that the lawyer finds that he/she can no longer accept instructions. In this case, the retainer is not voidable if it was signed at the time of capacity.
94. This decision was blogged on by Kimberly Whaley and student at law Brett Book.

contract entered into with a mentally incompetent person is fair and was made in good faith, if the other party to the contract had no knowledge of his or her mental incapacity and did not take advantage of that person."[97]

The principles considered by the court not only included the "right to representation",[98] especially where a person has questionable capacity given their vulnerability to exploitation, but also ensures participants in the justice system are free from undue influence and capable of making the required decisions.[99]

After putting it all together in this case the court fell back to equity and concluded with the following comment:[100]

> I am mindful that, in the present case, Guardian's obligations under the retainer agreement appear to have been fully performed, and LS seeks to void the contract now that only payment remains outstanding. As such, other equitable considerations may apply, as stated in *Waldock v. Bissett,* 1992 CanLII 1002 (BCCA), [1992] 67 BCLR (2d) 389 (CA) at p. 541:
>
> > In considering whether to cancel the contract for not being fair in its inception, the court, or now the registrar, may apply all the principles of equity which go to whether justice requires that a contract voidable for such things as breach of fiduciary duty or misrepresentation or duress should be rescinded even though it has been fully performed and, thus, *restitutio in integrum* in its strict sense is not possible.

d. Solicitor-Client Privilege

Often, the question of capacity focuses on the person's counsel as counsel is seen as the gatekeeper; the one who can provide insight as to their client's capacity. The probing of this relationship can raise the potential for violations of lawyer-client privilege – which is the client's constitutional right.

In *Descôteaux c. Mierzwinski*,[101] the importance of solicitor-client privilege went from a principle to a substantive rule as affirmed in *Smith v. Jones*:[102]

95. *Bank of Nova Scotia v. Kelly* (1973), 41 D.L.R. (3d) 273 (P.E.I. S.C.) at para. 10.
96. *Guardian, supra*, footnote 87, at para. 43.
97. *Supra*, at para. 44 citing *RMK v. NK*, 2020 ABQB 328 (Alta. Q.B.).
98. *Supra*, at para. 49.
99. *Supra*, at para. 53.
100. *Supra*, at para. 88.
101. [1982] 1 S.C.R. 860, 70 C.C.C. (2d) 385 (S.C.C.).
102. [1999] 1 S.C.R. 455 (S.C.C.).

1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.

2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.

3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent necessary in order to achieve the ends sought by the enabling legislation.

4. Acts providing otherwise in situations under para. 2 and enabling legislation referred to in para. 3 must be interpreted restrictively.

In 2001, the Supreme Court of Canada formally declared in *R. v. McClure*[103] that the solicitor-client privilege is a principle of fundamental justice, protected by s. 7 of the *Charter*. Following this, subsequent courts further defined that a client has a reasonable expectation of privacy in communications with a lawyer as guaranteed under s. 8 of the *Charter*.[104]

In the Ontario case of *Whitell v. Whitell*,[105] a family law and SDA dispute, the court held that solicitor-client privilege attached to communications between a lawyer and client for the purpose of seeking or giving legal advice which is intended by the parties to be confidential.

The importance of respecting solicitor-client privilege also respects the fact that counsel performs an assessment to

103. [2001] 1 S.C.R. 445, 151 C.C.C. (3d) 321 (S.C.C.).

104. See *R. v. Lavallee, Rackel & Heintz; White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink* (2002), 167 C.C.C. (3d) 1, 2002 SCC 61 (S.C.C.). See Jamal, Mahmud and Morgan, Brian. "The Constitutionalization of Solicitor-Client Privilege." The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 20. (2003).

105. 2020 ONSC 2310 (Ont. S.C.J.).

determine if their client has the capacity to make legal decisions. In the case of *Sylvester v. Britton*[106] (a s. 3 counsel case) the court made the distinction between a client in a coma or similar condition who cannot provide instructions and one where a client can articulate what they want without fully appreciating the legal process/risks/costs associated with their position.

In *Mamaca (Litigation Guardian of) v. Coseco Insurance Co.*,[107] a personal injury case with questions of capacity, the defendants argued they were entitled to lawyer information not communicated for legal advice but for the facts or acts. In the alternative the defendants argued privilege had been waived by implication as the plaintiff had put her state of mind in issue. The balance for the court was between the interest of full disclosure for a fair trial versus the interest of preserving solicitor-client privilege. Master Dash found that privilege could be waived where interests of fairness and consistency dictate so or when the communication is legitimately brought into issue in action: "The involvement of the solicitor in [client's] state of mind is that of a witness to his competence and in my view that is insufficient to waive solicitor-client privilege by implication."

In the British Columbia case of *Cepuran v. Carlton*[108] the court also had to dealt with the specific issue of the waiver of solicitor-client privilege. The court looked at the issue of whether privilege may be waived impliedly where a party voluntarily injects its understanding of its legal position in a case involving estate planning services. It found privilege had been waived, and a capacity assessment was also ordered.

PART D: TOOLS

These fundamental rights and freedoms made it obvious that certain tools needed to be created to support and provide guidance and the framework to ensure their protection for persons under disability including the vulnerable and incapable and for those who become substitute decision makers.

106. *Sylvester*, *supra*, footnote 84, at paras. 74-76.
107. 2007 CarswellOnt 8133 (Ont. S.C.J.), leave to appeal refused 2008 CarswellOnt 3755 (Ont. Div. Ct.).
108. 2021 BCSC 542 (B.C. S.C.) at para. 25, additional reasons 2021 CarswellBC 2010 (B.C. S.C.), reversed in part 2022 CarswellBC 446 (B.C. C.A.).

1. Presumption of Capacity

It is also often assumed that those who cannot take care of themselves, do not have the capacity to make decisions for themselves, and if not for the statutory presumption of capacity this view would likely prevail. However, as clearly outlined in *Husby Forest Products Ltd. v. British Columbia (Minister of Forests)*[109] until the contrary is demonstrated, every adult is presumed to be capable of making his or her own decisions.[110] In *Ocean v. Economical Mutual Insurance Co.*,[111] the court overturned a finding of incapacity because neither a physical or mental condition was an issue in the proceeding and "inherent jurisdiction" did not give the trial judge the right to do whatever he thought was "fair".

The codification of the presumption of capacity was one of the simplest yet most significant tool brought in by the 1992 legislative reform. The presumption of capacity is a statutorily strict test. If a person is at least 18 years of age the presumption of capacity has been established. This is a presumption that is not to be displaced lightly.

Section 2 of the SDA states any person who is eighteen years of age, or more is presumed to be capable of entering into a contract and a person who is sixteen years of age of more is presumed to be capable of giving or refusing consent in connection with his or her own personal care. Further, a person is entitled to rely upon the presumption of capacity with respect to another person unless he or she has reasonable grounds to believe that the other person is incapable of entering into the contract or of giving or refusing consent.

As there is also no single legal definition of capacity and each task or decision undertaken has its own corresponding capacity characteristics the baseline of this presumption of capacity is critical as a starting point: all persons are presumed or deemed capable of making decisions at law.

This presumption serves as a reminder of the importance of respecting the presumption of an older adult's autonomy and

109. 2003 BCSC 1978 (B.C. S.C.) at para. 33, additional reasons 2004 CarswellBC 1244 (B.C. S.C.).

110. *Ocean v. Economical Mutual Insurance Co.*, 2009 NSCA 81 (N.S. C.A.). Here the decision of a trial judge to grant a respondent's motion for an Order to have the plaintiff undergo a capacity test was overturned by the Nova Scotia Court of Appeal on the basis that "[t]he fundamental precept is that an adult person is presumed to be competent to manage her own affairs".

111. 2009 NSCA 81 (N.S. C.A.).

decision-making capabilities. Autonomy or "self-determination" being the ability of competent individuals to make decisions over their own lives. Autonomy includes, but is not limited to, having the freedom to make decisions about one's own health care, finances and living arrangements. For autonomy to be meaningful, a competent individual's decisions will need to be respected even when those decisions conflict with what others believe to be reasonable.

But as with any presumption, the law needed the flexibility to ensure protection of the vulnerable making it a rebuttable presumption; the onus being on the person alleging incapacity, keeping in mind the relevant time to assess capacity is the time at which a decision in issue is (or was) made.

Given the presumption, displacing capacity requires clear evidence. In *Lengyel v. TD Home and Auto Insurance*[112] which affirmed the decision of *Koch (Re)*, the court held that when determining incapacity, reasonableness in the eyes of others is not a test of capacity – the law calls for an objective test requiring compelling evidence to override the presumption. In *Koch (Re)*, Justice Quinn stated "[i]t is mental capacity and not wisdom that is the subject of the *Substitute Decisions Act* and the *Health Care Consent Act*. The right knowingly to be foolish is not unimportant; the right to voluntarily assume risks is to be respected".[113]

In the mental health / medical context, we often turn to the *Starson* decision[114] which held that the presumption can only be displaced by evidence that the person lacked the requisite elements of capacity. These elements focus on the legal test of capacity to include the ability to understand information and appreciate that information to make decisions decided on the facts including medical evidence,[115] on a balance of probabilities, and with an appreciation for the various "degrees" of capacity.[116]

112. 2017 ONSC 2512 (Ont. S.C.J.).

113. *Koch, Re* (1997), 33 O.R. (3d) 485, 27 O.T.C. 161, 1997 CarswellOnt 824 (Ont. Gen. Div.) at para. 17, additional reasons 1997 CarswellOnt 2230 (Ont. Gen. Div.).

114. *Starson v. Swayze*, [2003] 1 S.C.R. 722, 2003 SCC 32 (S.C.C.) at para. 77.

115. *Barnes v. Kirk*, 1968 CarswellOnt 711 (Ont. C.A.), *Torok v. Toronto Transit Commission*, 2007 CarswellOnt 2834, [2007] O.J. No. 1773, 157 A.C.W.S. (3d) 179 (Ont. S.C.J.) at para. 48.

116. The matter of degrees of capacity has been trite law since 1828. More recently see *Calvert (Litigation Guardian of) v. Calvert* (1997), 32 O.R. (3d) 281 (Ont. Gen. Div.), affirmed (1998), 37 O.R. (3d) 221 (Ont. C.A.), leave to appeal refused [1998] S.C.C.A. No. 161, 228 N.R. 98 (note) (S.C.C.).2018 ONSC 6620 *Sylvester v. Britton*, 2018 ONSC 6620 (Ont. S.C.J.) and *Banton*

Other common law jurisdictions (such as the United Kingdom) have held that to have capacity to make genuine decisions, a person needs to be able to comprehend and retain relevant information, believe the information, weigh the information, and balance the risks and needs.[117]

2. Litigation Guardian

Another tool codified by our Rules of Court is the concept of a litigation guardian. Procedurally, individuals requiring protection are required in court proceedings to have an alternate or litigation guardian.

The *Rules of Civil Procedure*[118] in Ontario, for example, require all parties under disability[119] to be represented by a litigation guardian with one exception: the respondent in an SDA application (the person sought to be declared incapable) does not need a litigation guardian unless the court directs one.[120]

This exemption is carved out, not because the person does not need protection, but rather to gain consistency with the legislative scheme of having the private ability or right to create powers of attorney to appoint one's choice of substitute decision maker. This appointment (assumingly done properly) carries with it the right and responsibility of being that litigation guardian. It is also carved out to give support to the court's right to order the public guardian and trustee to appoint counsel for the alleged incapable person under s. 3 of the SDA.

If a proper power of attorney is not in place, then the court has the jurisdiction to appoint the litigation guardian - a jurisdiction a court treads lightly in exercising. Again, to ensure a person's autonomy including their right to participate for

v. Banton, 1998 CarswellOnt 3423 (Ont. Gen. Div.), additional reasons 1998 CarswellOnt 4688 (Ont. Gen. Div.).

117. *C (Adult: Refusal of Medical Treatment), Re* (1993), [1994] 1 All E.R. 819 (Eng. Fam. Div.).

118. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

119. Rule 1.03 defines a party "under disability" to include a person mentally incapable within the meaning of s. 6 or s. 45 of the SDA in respect of n issue in the proceeding.

120. Rule 7.01(2) If there is any doubt regarding a party's mental capacity, the court can be asked to appoint a litigation guardian. A litigation guardian is only appointed after the court has determined that the person lacks the mental capacity to instruct counsel. Rules 7.03, 7,04, 7,05, 7.06 and 7.07 of the Rules of Civil Procedure deal with the appointment, removal and duties of a litigation guardian.

themselves in court proceedings, the court will examine closely the need for such an appointment.

In *Kozaruk v. Kozaruk*,[121] the court held that in giving evidence at trial, if a party demonstrates the person is legally incapable, a litigation guardian may be appointed. In *Holland (Guardian ad litem of) v. Marshall*,[122] the court exercised its discretion to refuse the appointment of a litigation guardian citing a lack of evidence establishing that the appellant had a mental disorder or was a person under a disability.

In *Susan Eng v. Elizabeth Eng*[123] the court set out the level of incapacity required to appoint a litigation guardian. This evidence is to be set out in the proposed litigation guardian's supporting affidavit and includes such things as his or her consent to act, given written authority to a named lawyer to act in the proceeding, details of the nature and extent of the disability (to be provided by a qualified assessor[124] which does not need to be a health professional), if a minor the date of birth, states whether the person under disability and themselves are ordinarily resident in Ontario, states his or her relationship if any to the person under disability and acknowledges that he or she has been informed of his or her liability to personally pay any costs awarded against him or her or against the person under disability.

Often, capacity including the presumption of capacity is overlooked, leading to the minimalization, of the ability of a person to choose or instruct independent counsel or to select a litigation guardian. In some circumstances, individuals may require support to instruct counsel (i.e. a "Trusted Support Person"; but there are no guidelines for this, and the concept is only described in commentary) yet still be capable.[125]

There are obvious cases where a person may need a litigation guardian, but once again as capacity fluctuates and is situational, the courts try to be mindful of making long-term

121. [1953] O.W.N. 265, 1953 CarswellOnt 178, [1953] O.J. No. 8 (Ont. H.C.).
122. 2009 CarswellBC 1682, 2009 BCCA 311 (B.C. C.A. [In Chambers]).
123. 2021 ONSC 464 (Ont. S.C.J.).
124. This report should confirm the assessor is familiar with the purpose of the examination and the suitable test and is sufficiently familiar with the nature and scope of the litigation. It should summarize the materials reviewed, describe the information sought and provided, describe the examination conducted and the observations made, and set out the assessor's opinion with specific reference to the test and an explanation as to the grounds for the conclusions reached.
125. James and Love, *supra*, footnote 31.

orders. In *Chutskoff Estate v. Bonora,*[126] during an application to hold the respondent in contempt, the court was advised that the respondent was hospitalized for a psychiatric condition. The contempt application was adjourned *sine die*, requiring the applicant to give 30 days' notice so the respondent could file an affidavit detailing his psychiatric condition. The evidence regarding capacity in the form of unsworn physician letters and report and a sworn physician's affidavit was admitted with the consent of the parties indicating the respondent suffered from several serious psychiatric conditions.[127]

Justice Ross noted that the admitted fact that the respondent suffered from a psychiatric condition did not mean that he lacked capacity as defined under the Rules.; rather the lack of capacity in the defined sense must be proved on a balance of probabilities. Since none of the letters or reports directly addressed the respondent's capacity to understand relevant information or to appreciate the consequences of decisions relating to the action the court held there was no basis, on the evidence, to conclude the respondent lacked capacity as defined and therefore did not direct the appointment of a litigation representative.[128] The evidence suggested that the respondent's condition might affect his ability to control his actions and, if this was the case, the respondent might require strict case management to enforce timelines and to deal with repeated applications.[129]

126. 2013 ABQB 119 (Alta. Q.B.) at para. 19 [*Chutskoff Estate*].
127. *Supra*, at para. 4.
128. *Supra*, at para. 23.
129. *Supra*, at para. 21. Justice Ross noted that Rule 2.15 put adverse parties in a difficult position by imposing an obligation on them to seek court appointment of a litigation representative when an opposite party lacks capacity to make decisions about a claim in an action. The determination of a party's capacity must be based on proper evidence, and the adverse party might not have the ability to provide that evidence. In this case, the applicants asked the respondent to obtain an up-to-date letter from his doctor, but the respondent did not do so. Based on this, the court held that the applicants fulfilled the obligation imposed by Rule 2.15 and were free to pursue their intention to bring a summary dismissal application (para/ 24).
130. For a more detailed discussion see the article by Alexander Procope: The Ongoing History of Section 3 Counsel: Origins of the Role and a Path Forward presented at the 2019 *22nd Estates and Trusts Summit, Day 1* where he argues that s. 3 counsel "is not so complex" and that he presents "a simple but robust framework for understanding the role" arguing that "a client-

3. Section 3 Counsel[130]

The Fram Report as discussed looked specifically at substitute decision making and made various proposals, (some of which were implemented) relating to legal proceedings and access to protection of rights including the right to counsel. The following were some of the recommendations:[131]

> 3.4 In a legal proceeding in which the mental capacity of a person is an issue, the court should have authority to direct that legal representation be provided for the allegedly incapable person. The office of the Public Guardian and Trustee should be responsible for arranging for representation.
>
> 3.5 Whether or not the provision of legal representation is directed by the court, a person alleged to be mentally incapable should be free to choose his or her own legal counsel and to reject counsel proposed by the Public Guardian and Trustee.
>
> 3.6 To ensure that legal counsel will be free to act and to preclude prejudging the issue of mental capacity, a person whose mental capacity is an issue should be deemed to have capacity to retain and instruct counsel.

The Fram Report also described the role of counsel for the

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centred approach is instructions-based advocacy grounded in the *Rules of Professional Conduct*." See also D'Arcy Hiltz, "The Role of Counsel Pursuant to Section 3 of the Substitute Decisions Act" (2009), online: Whaley Estate Litigation Partners <welpartners.com/resources/WEL_-Hiltz_Paper_Section3Counsel_24Nov2009.pdf> [unpublished]; Marshall Swadron, "Representing the Incapable Client in Capacity Proceedings" (Paper presented to the LSUC Estates and Trusts Summit November 2009), online: Law Commission of Ontario <www.lco-cdo.org/wp-content/uploads/2011/01/ccel-papers_4B%20-%20Marshall%20Swadron.pdf> [unpublished]; Kimberley A. Whaley and Ameena Sultan, "Between A Rock and A Hard Place: The Complex Role and Duties of Counsel Appointed Under Section Three of the Substitute Decisions Act, 1992" [2012] 40 Advocates' Q., 408; Clare Burns, "A Riddle Wrapped In a Mystery, Inside an Enigma. The Developing Role of Section Three Counsel" (Paper presented to the LSUC Estates and Trusts Summit November 2013) [unpublished].

131. Procope, *supra*, footnote 22, citing Advisory Committee on Substitute Decision Making for Mentally Incapable Persons, Final Report (Toronto: Ontario Ministry of the Attorney General 1987), at page 16 [Fram Report].

allegedly incapable person, including recommending an instructions-based starting point:

> A court finding of the mental incapacity of an individual has grave consequences for the individual with respect to fundamental rights and freedoms. Personal care and/or financial decisions are taken away and transferred to someone appointed to act as substitute decider. The substitute often determines how the person who is incapable is to live.
>
> It is assumed that most applications for conservatorship and guardianship will be unopposed because the subject of the application is mentally incapable of understanding the nature of the proceedings. However, the court needs the power to direct the provision of legal representation for a person who contests an application or simply when representation is warranted. Such representation by a lawyer ensures that an individual's rights are protected as much as possible and may prevent needless determinations of incapacity. The office of the Public Guardian and Trustee is appropriate to make such arrangements.
>
> A lawyer can only act on a client's instructions. In a proceeding where the mental capacity of a person is at issue, it is, therefore, necessary to deem the person capable of retaining and instructing counsel. Otherwise, the issue of incapacity is predetermined under existing civil procedure rules involving the appointment of a litigation guardian.[132]

Finally, the commentary to the draft legislation that would become the current s. 3, included the following explanations:

> In addition, section 3(1) of the SDA provides that the court's authority to direct the Public Guardian and Trustee to appoint counsel arises only where the person whose capacity is at issue does not have legal representation. A person whose capacity is in issue in a proceeding may therefore secure legal representation independently consistent with the expectation that a choice of lawyer should be respected.

132. *Ibid.*, citing Fram Report at pages 92-93.

Section 3 gives the court authority to order the Public Guardian and Trustee to arrange for legal representation (s. 3 counsel) for a person who is not represented where his/her capacity is in issue in a proceeding under the statute:

> 3(1) If the capacity of a person who does not have legal representation is in issue in a proceeding under this Act,
>
> (a) The court may direct that the Public Guardian and Trustee arrange for legal representation to be provided for the person; and
>
> (b) The person shall be deemed to have capacity to retain and instruct counsel.

The purpose of s. 3 is to ensure an allegedly incapable person in proceedings under the SDA - usually guardianship applications/challenges to powers of attorney - is treated like any other party litigant and given the opportunity for legal representation balancing the autonomy of the client and the public interest in protecting the vulnerable. This is a balance between what Procope calls "the conscious avoidance of paternalism and the need for accommodation of disability in keeping with lawyers' human rights obligations" means keeping the focus on the client's "interests" rather than "best interests" and setting this role of counsel apart from the distinct roles of a litigation guardian, witness, receiver, capacity expert, or judge.

SDA proceedings are subject to the *Rules of Civil Procedure*, which define "disability" to include being "mentally incapable within the meaning of ss. 6 or 45 of the [SDA] in respect of an issue in the proceeding" and guardianship proceedings are expressly exempted from the general rule that a party under disability must be represented by a litigation guardian.[133]

Courts have grappled with the decision of when or why to appoint litigation guardian or order the appointment of counsel for the alleged incapable person. In *Dawson v. Dawson*,[134] the court looked at the cases on Rule 7.01 and s. 3 of the SDA for guidance in determining whether to appoint a litigation guardian. The court concluded that in making this determination it had to focus on the evidence submitted regarding the person's capacity to understand, appreciate, and

133. Rule 7.01 of the *Rules of Civil Procedure*.

134. 2020 ONSC 6724 (Ont. S.C.J.), additional reasons *Dawson et al v. Dawson et al.*, 2020 CarswellOnt 16930 (Ont. S.C.J.).

make decisions, whether the litigation involves questions other than guardianship, whether the proposed litigation guardian is appropriate, and "any other relevant information." It becomes a matter of discretion.

In *Chu v. Chang*[135] the court also concluded in the context of s. 3 of the *SDA* that this determination was discretionary as the provision did not make the appointment of legal representation mandatory. This left the door open for the court to assess (usually very early on in the proceeding) whether the facts and legal issues made such an appointment "appropriate". In *Miziolek v. Miziolek*,[136] the court decided it was not and declined to appoint counsel (based on the evidence of a physician who concluded that the person would be harmed by the appointment of counsel).

As Procope has articulated, the difficulty in interpreting the role is rooted in confusion about the concepts of a client's "interests" with a client's "best interests".[137] The other parties and the court will often have the client's best interests in mind, while counsel, including s. 3 counsel, is there to advocate for the client's subjective interests.[138]

The other issue Procope points out is that role of s. 3 counsel is straightforward where, as initially envisioned, the sole issue before the court is the capacity of the client and the client instructs the lawyer to oppose the incapacity finding. But where more is before the court and there are interconnected issues (such as challenges to powers of attorney, compelling an accounting, removal of existing attorneys) then challenges can arise.

Given the strong bias towards the importance of legal

135. 2010 ONSC 294 (Ont. S.C.J.), additional reasons 2010 CarswellOnt 1765 (Ont. S.C.J.), affirmed 2011 CarswellOnt 3251 (Ont. C.A.).

136. 2018 ONSC 2841 (Ont. S.C.J.), additional reasons 2018 CarswellOnt 12326 (Ont. S.C.J.).

137. Beyond what may be inherent to the references to the lawyer's fiduciary duties to a client, only the term "interests" as opposed to the phrase "best interests" appear in the *Rules of Professional Conduct* in relation to the role as an advocate.

138. Alexander Procope, "The Ongoing History of Section 3 Counsel: Origins of the Role and a Path Forward" http://pbplawyers.com/wp-content/uploads/2020/10/Procope-The-Ongoing-History-of-Section-3-Counsel.pdf, at pg. 4. The article also makes the point that the statutory language of "deemed" capacity to "retain and instruct" has also proven difficult to apply in practice and to interpret (similar language appears in the *Health Care Consent Act, 1996*, the *Mental Health Act*, and the *Prevention of and Remedies for Human Trafficking Act*) but there is no consistent interpretation of this language.

representation most courts would order the appointment of s. 3 counsel, it appears regardless of the capacity of the person if there is not evidence of being capable; or in other words there is evidence of incapacity. Typically coupled with these discussions is the question of whether the person can instruct counsel. However, whether a person can or cannot instruct counsel should never be assumed.

4. Consent and Capacity Board

The Consent and Capacity Board ("CCB") is an independent provincial tribunal. Its mission is the fair and accessible adjudication of consent and capacity issues, balancing the rights of vulnerable individuals with public safety. The Board has the authority to hold hearings to deal with the following matters: *Health Care Consent Act, Mental Health Act, Personal Health Information Protection Act, Child Youth and Family Services Act*, *Substitute Decisions Act,* and the *Mandatory Blood Testing Act*.[139]

The legislative mandate of the Consent and Capacity Board is to adjudicate solely upon a patient's capacity and the Board's conception of the patient's best interests is irrelevant to that determination.[140]

Typically, the CCB deals with issues of involuntary detention in psychiatric facilities, community treatment orders, capacity to consent to treatment, capacity to manage property and capacity to consent to admission to a care facility. The CCB also addresses applications from health care providers and substitute decision makers in respect of decision-making for incapable persons, as well as applications to address the appointment and removal of substitute decision makers for incapable persons.[141]

In *MS, Re*,[142] a 70-year-old woman with a history of schizophrenia and periods of homelessness was admitted to a long-term care home and found incapable despite the presumption of capacity. When she retained counsel, she appealed the decision of incapacity which was overturned due to a lack of evidence.

139. Consent and Capacity Board, "About Us" online: <http://www.ccboard.on.ca/scripts/english/aboutus/index.asp>.
140. *Starson v. Swayze*, [2003] 1 S.C.R. 722, 2003 SCC 32 (S.C.C.).
141. WEL Partners, "Consent and Capacity Board" (2022) online: <https://welpartners.com/practiceareas/consentcapacityboard>.
142. 2019 CarswellOnt 13772 (Ont. Cons. & Capacity Bd.).
143. 2016 CarswellOnt 16178 (Ont. Cons. & Capacity Bd.).

The decision in *L. (K.A.), Re*[143] commented there needs to better mechanisms available against those who borrow and spend money irresponsibly.

In *Bon Hillier v. Milojevic*,[144] a man with a traumatic brain injury sustained in British Columbia, arrived in Ontario to the intervention of the Public Guardian and Trustee. Mr. Bon Hillier had no representation and could not afford to retain counsel creating an access to justice/fairness issue leading the court to appoint an *amicus* for him. *Amicus* argued for an appeal on the basis that the physician who had submitted the affidavit on capacity had never met Mr. Bon Hillier. Trotter J. held that fairness required that he be given a fair opportunity to meaningfully challenge the opinion of Ms. Milojevic of the Public Guardian and Trustee, a result which may not have presented itself if *Amicus* had not been appointed.[145]

5. Privacy

The courts and judicial system have similarly developed tools for attempting to address the issues and concerns of privacy. These tools include sealing orders, "reactivating" the tort of intrusion upon seclusion and recognizing confidentiality.

a. Sealing Orders

The fundamental principle of our legal system is the open court principle. This principle, as confirmed in *Sherman Estate v. Donovan*,[146] by the Supreme Court is to protect this principle by the constitutionally-entrenched right of freedom of expression which represents a central feature of a liberal democracy (para. 1). There is therefore a strong presumption in favour of open courts even though this allows for public scrutiny which can be the source of inconvenience and embarrassment (para. 2). Exceptional circumstances can arise where competing interests justify a restriction on the open court principle by means of a sealing order (para. 3). Privacy concerns can justify a sealing order if the dignity of an individual is at serious risk by reason of the dissemination of sufficiently sensitive information (para.

144. 2009 CarswellOnt 7862, [2009] O.J. No. 5378 (Ont. S.C.J.), 2010 ONSC 435, (Ont. S.C.J.).

145. In contrast, this solution was not applied in *Willis v. Burgie*, 2018 ONSC 6266 (Ont. S.C.J.) where s. 3 counsel was not appointed because the court did not know how counsel's fees would be paid.

146. 2021 SCC 25 (S.C.C.) at para. 30.

33). The "question is not whether the information is "personal" to the individual concerned, but whether, because of its highly sensitive character, its dissemination would occasion an affront to their dignity that society as a whole has a stake in protecting" (para. 33). The focus is on the impact of the dissemination of sensitive personal information and not the mere fact of this dissemination (para. 34).

Traditionally, therefore if protection is needed from the "public" the request is for the court to make a sealing order. Currently, there are no guidelines, and the SDA is unclear on the use of sealing orders to protect the confidential information of the vulnerable. Despite this, the courts have been willing to seal court records as the solution for privacy protection.

This "remedy" despite the long-held principle that solicitor-client privilege is considered a fundamental principle of justice in Canada guidelines for dealing with this kind of privileged information in an SDA proceeding is lacking with the default often being to ask the court to seal the court record, a tool developed in the last three decades which we will be discussing in the next section.

In *Foss v. Foss*,[147] a sealing motion in an SDA proceeding was granted relying on the reasoning of Justice Iacobucci in *Sierra Club of Canada v. Canada (Minister of Finance)*,[148] that a sealing order should only be granted when:

1. the order is necessary to prevent a serious risk to an important interest in the context of litigation because reasonably alternative measures will not prevent said risk, and

2. the salutary effects of the confidentiality order (including effects on the right to a fair trial) outweigh its deleterious effects (including right to free expression, public interest in open and accessible proceedings).

The court concluded in *Sylvester v. Britton*[149] it should only intrude with great reluctance and where evidence indicates there is a strong likelihood that counsel strayed from their obligations: "In the future, it may be preferable for s. 3 counsel in similar circumstances to swear an affidavit outlining the steps taken to satisfy himself or herself as to the client's capacity to provide

147. 2013 ONSC 1345 (Ont. S.C.J.) at para. 30.
148. [2002] 2 S.C.R. 522, 2002 SCC 41 (S.C.C.) at para. 45.
149. *Sylvester*, *supra*, footnote 84.

instructions. That affidavit could be provided to the court in a sealed envelope as is done where matters of solicitor-client privilege are at stake."[150]

The concern for the protection of privacy has led to the sealing the affidavits of s. 3 counsel as the "remedy". See *Parker v. Fockler*[151] and *Elias v. Hawa*,[152] where the affidavit of a s. 3 counsel's law clerk detailing suspicions of incapacity was admitted (even where the respondent required a translator and was illiterate) and *Evans v. Evans*,[153] a family law proceeding, the respondent who wanted to rely on a sealed lawyer's affidavit for a special party declaring under the Family Law Rules[154] was allowed.

Sealing orders have also been granted to protect the privacy of infants and parties under a disability or having a mental disorder.[155] However sealing orders are not without their challenges. In *Khokhar v. Aviva Insurance Company*[156] (albeit not an SDA proceeding) the limitations of sealing orders were discussed, and the court emphasized again that sealing orders are only to be used in extraordinary circumstances.[157]

Aside from sealing orders, there are "softer" measures available. In the mental health law context,[158] as there is an absence of uniform rules or procedures governing privacy over medical records and identifying information, CCB proceedings, for example, provide some measure of default confidentiality by anonymizing identifying information in published decisions,

150. *Supra*.
151. 2012 ONSC 699 (Ont. S.C.J.).
152. 2018 ONSC 5703 (Ont. S.C.J.).
153. 2017 ONSC 5232 (Ont. S.C.J.).
154. O. Reg. 114/99.
155. *Kaybar Fluid Power Ltd. v. Danfoss A/S*, 2000 CarswellOnt 1663, [2000] O.J. No. 1692 (Ont. S.C.J.); *J.B. Trust (Trustee of) v. B. (J.) (Litigation Guardian of)*, 2009 CarswellOnt 3723, [2009] O.J. No. 2693 (Ont. S.C.J.).
156. 2020 ONSC 2464 (Ont. S.C.J.), additional reasons 2020 CarswellOnt 10575 (Ont. S.C.J.).
157. See also *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76 (S.C.C.) where Leitch J. set out the test for that province citing *Rops (Litigation guardian of) v. Intact Insurance Co.*, 2013 ONSC 7366 (Ont. S.C.J.).
158. See, for example, Intervenors' Factum: <https://www.scc-csc.ca/WebDocuments-DocumentsWeb/38695/FM030_Interveners_HIV-&-Aids-Legal-Clinic-Ontario-et-al.pdf>.
159. See Consent and Capacity Board, "Reasons for Decisions" online: <http://www.ccboard.on.ca/scripts/english/legal/reasonsfordecisions.asp> where it is explained that this protection is lost if a CCB decision is appealed to the

pursuant to an internal policy (without any statutory requirement to do so).[159]

When confidentiality orders are sought before certain other tribunals in Ontario, the applicable test may vary. For example, certain health related tribunals are now subject to Ontario's *Tribunal Adjudicative Records Act, 2019* ("TARA"). TARA sets out a test for granting orders that would limit access to adjudicative records of certain listed tribunals ("TARA Test"). The TARA Test therefore seemingly applies to requests for anonymization orders and sealing orders before TARA listed tribunals (because such orders limit access to a tribunal's adjudicative records), but not to requests for publication bans, which remain governed by the Sierra Club Test.[160] In tribunal jurisprudence considering TARA, however, questions have been raised about whether the (likely less onerous) TARA Test or the Sierra Club Test ought to govern requests for anonymization orders and sealing orders before TARA-listed tribunals. Depending on how the tribunal jurisprudence unfolds, the Sierra Club Test could govern requests for anonymization orders and sealing orders before TARA-listed tribunals (and does presently govern requests for publication bans before such tribunals).

b. Privacy Torts

The evolution on the privacy front and its growing importance for protection has seen the recent revitalization in Canada of this tort in privacy.[161]

Here, as stated in the Restatement (Second) of Torts (2010) at 652B "One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person."

Many of the modern decisions refer to egregious abuses of privacy in the name of establishing capacity which can be an even worst case if a vulnerable person is involved in the proceeding. Again, the court is to only intervene where there is

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Ontario Superior Court of Justice; the Sierra Club Test must then be satisfied to obtain continued protection of privacy.

160. *Supra*, footnote 158.

161. *Jones v. Tsige*, 2012 ONCA 32 (Ont. C.A.) [*Jones*].

162. *Sylvester*, *supra*, footnote 84.

reason to believe the lawyer has departed from their obligations.[162]

Intrusion upon seclusion is one of four privacy torts set out by Professor Prosser. The other three are making their way in the courts and in civil cases.

As cited by the court in *Jones v. Tsige*,[163] Professor Prosser's article picked up the threads of the American jurisprudence that had developed in the 70 years following the influential Warren and Brandeis article. Prosser argued that what had emerged from the hundreds of cases he canvassed was not one tort, but four, tied together by a common theme and name, but comprising different elements and protecting different interests. Prosser delineated a four-tort catalogue, summarized as follows, at p. 389:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.

2. Public disclosure of embarrassing private facts about the plaintiff.

3. Publicity which places the plaintiff in a false light in the public eye.

4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

c. Confidentiality

Confidentiality has a broader scope than privilege. Black's Law Dictionary defines "confidential" as: Intrusted with the confidence of another or with his secret affairs or purposes; intended to be held in confidence or kept secret.[164] All client information is confidential and deserving of protection.

In *Lac Minerals Ltd. v. International Corona Resources Ltd.*,[165] the SCC held that confidential information is that which has the "quality of confidence" about it. The test is whether a person, acting reasonably, should have expected the

163. *Jones*, *supra*, footnote 161.
164. Chicago. Brian A. Garner, editor in chief. Black's Law Dictionary. St. Paul, MN: Thomson Reuters, 2014.
165. [1989] 2 S.C.R. 574 (S.C.C.).

information to be confidential requiring satisfaction of three essential elements to prove a breach:

(a) confidential information was conveyed; and

(b) the information was conveyed in confidence; and

(c) the information was misused by the defendant to whom it was communicated to the detriment of the plaintiff

In *GasTOPS Ltd. v. Forsyth*,[166] the Ontario Court of Appeal applied the 'reasonable person test' to determine whether the information in question embodied the necessary quality of confidence. The Court held that a decision maker must examine whether a person, acting reasonably, should have expected the information to be confidential. The Court turned to the decision in *Coco v. A.N. Clark (Engineers) Ltd.*,[167] which held that if the person should have realized that the information was to be maintained in privacy, then there will be an implied obligation to maintain it in confidence.

6. Capacity Assessments[168]

Whenever a legal decision or act is involved, capacity is a factor. In the context of powers of attorney, capacity or the lack therefore is foundational (given its nature), and therefore the assessment of capacity is fundamental whether conducted formally or informally.

Each of the SDA, the *Mental Health Act,* and the *Health Care Consent Act, 1996* provide for capacity assessments. There are two broad categories of capacity assessment: those undertaken pursuant to statutory authority and those commissioned privately. Capacity assessments conducted under the first category can have immediate and drastic consequences, while assessments conducted under the second category do not have such immediate effects on the person being assessed.

Capacity assessments undertaken under statutory authority (statutory assessments) may result in an immediate loss or diminution of the person's legal capacity to make decisions resulting in significant consequences. As an example, if a

166. 2012 ONCA 134 (Ont. C.A.).
167. [1969] R.P.C. 41.
168. M. Jasmine Sweatman, *Powers of Attorney and Capacity Practice and Procedure*, 2nd ed (Toronto: Canada Law Book, 2014) at 244-246.

capacity assessor finds a person is incapable of managing property under the SDA, the result is likely the nearly automatic appointment at first instance of the Public Guardian and Trustee as the person's statutory guardian of property. A certificate issued by a physician under the *Mental Health Act* with respect to an in-patient of a psychiatric facility has the same effect.

The SDA, however, provides for a somewhat informal process by which the Public Guardian and Trustee may be replaced as the incapable person's statutory guardian of property. Any of the following persons may apply[169] to the Public Guardian and Trustee to replace the Public Guardian and Trustee as an incapable person's statutory guardian of property:

(a) the incapable person's spouse or partner;

(b) a relative of the incapable person;

(c) the incapable person's attorney under a continuing power of attorney (if that document was made prior to the issuance of the Certificate of Capacity, but does not give the attorney authority over all of the incapable person's property); or

(d) a trust company.

With respect to personal care and the consent to treatment, a health care practitioner who is proposing treatment has, under s. 13 of the *Health Care Consent Act, 1996*, the ability to determine (and under s. 10 if one is of the opinion) if the person is capable of consenting or not consenting to the proposed treatment. If the health care practitioner determines the person is not capable of consenting, the person, subject to appeal, is immediately disentitled from making decisions with respect to his or her treatment, and his or her substitute decision-maker is the party authorized to make that treatment decision. A review can be sought by the CCB.

169. The applicant must make the application in the prescribed form, which must be accompanied by a management plan for property. The PGT shall appoint the applicant as the person's statutory guardian of property if it is satisfied that the applicant is suitable to manage the property and the management plan is appropriate, but is to consider the incapable person's current wishes, if they can be ascertained, and the closeness of the applicant's relationship to the person. The PGT may refuse to appoint the applicant unless the applicant provides security in a manner approved by the PGT.

The second type of assessment is the type commissioned privately, often by lawyers, to determine for example, whether they can take instructions from a client or to support a finding of capacity or incapacity. The introduction of this mechanism for "privately" assessing the capacity of individuals was a significant innovation of the SDA. If there is concern about a person's capacity, a qualified capacity assessor is hired without the involvement of the government, typically through the person's lawyer, health practitioner referral or on-line through The Capacity Clinic.[170] Either way, a private assessment is an expense to the client and being voluntary, requires the cooperation and consent of the person, which may not always be forthcoming. His or her participation may need to be encouraged, along with that of appropriate family members or trusted support person.

Privately commissioned assessments resulting in a finding of incapacity however may not automatically deprive the person of his or her decision-making ability. Since the assessments are not statute driven and can be task or time specific, the consequences are not as direct. One assessment may lead to the commissioning of a second assessment or a change in lawyers.

Here, the assessor retained is chosen, much like the retaining of an expert or evaluator, and the lawyer and person being assessed have the discretion to determine the subject matter of the assessment as well as who performs it. The assessment in these cases can serve to protect both the client and the lawyer and can help establish the client's capacity at a particular point in time.

Whichever route is chosen, it is important for the lawyer to identify the purpose or purposes of the capacity assessment and to provide sufficient background information, as well as family contact, to assist with the assessment.

a. Production of Medical Files & Expert Witnesses

Where it concerns evidence, the judge may exclude it if the court judges that the harm of admitting it outweighs the benefits of the trial process: *White Burgess Langille Inman v. Abbott and Haliburton Co.*[171]

170. Online at: https://www.capacityclinic.ca/.
171. [2015] 2 S.C.R. 182 (S.C.C.).
172. [1994] 2 S.C.R. 9 (S.C.C.).
173. 2019 ONSC 3037 (Ont. S.C.J.) [*Adler*].

The modern criteria for admitting expert evidence were outlined in *R. v. Mohan*[172] where the majority held that only expert evidence that is relevant, necessary, and from a properly qualified expert, not subject to any exclusionary rule is admissible. As *Adler v. Gregor*[173] recognized "in the context of contested litigation, the court, in exercising its gatekeeper role, must also scrutinize expert evidence to ensure it meets the modern criteria for the admission of expert evidence established in *Mohan*".

In cases involving children or young adults, the courts generally take a hard-line opposing production. In the New Brunswick case of *H. (J.D.) v. New Brunswick (Minister of Health & Community Services)*,[174] the court heard an application to produce medical records from one of the parents of a child with psychological issues during their divorce proceedings. The court denied the request.

In the Newfoundland and Labrador case of *H. (P.) v. Eastern Regional Integrated Health Authority*[175] reached similar conclusion, citing privacy concerns when refusing to disclose a young adult's medical records.

In Ontario, in *Beretta v. Beretta*[176] the court rejected a motion for an order requiring the production of medical records and for the respondent to undergo a capacity assessment – the decision stressed that the court must exercise discretion in ordering a capacity assessment, doing so only to protect the vulnerable.

In *Flynn v. Flynn*,[177] the court held that it is inappropriate to order a capacity assessment to rebut an allegation of incapacity. In *Adler*,[178] the court held that legal capacity assessments are not to be used as weapons in high conflict litigation but that the court must exercise its role as gatekeeper; scrutinizing evidence and ensuring it meets the modern criteria for admission of expert evidence.

In *Botelho v. Faulkner*,[179] medical documents as the evidence needed where the court found it would be too stressful for the person to swear an affidavit. The medical files were justifiably relied on in *Bothelo* as the person was the subject of and a party

174. 2000 CarswellNB 146 (N.B. Q.B.).
175. 2010 NLTD 34 (N.L. T.D.).
176. 2014 ONSC 7178 (Ont. S.C.J.).
177. 2007 CarswellOnt 10220 (Ont. S.C.J.)
178. *Adler*, *supra*, footnote 173.
179. 2020 ONSC 6471 (Ont. S.C.J.).

to the litigation and her state of mind and wishes were the center of the dispute between two rival children.

b. Ordering Capacity Assessments

Adults that are presumed capable should not have to undergo a capacity assessment unless there are extreme circumstances warranting such an intrusion. Section 79 of the SDA[180] provides a two-part test that must be satisfied by the party seeking the assessment before the court will order a person to undergo an assessment.

The historical leading case in Ontario is the *Abrams* decision. Here, Justice Strathy articulated and expressed that: "In considering whether to order an assessment, whether on motion or on its own initiative, a court must balance the affected party's fundamental rights against the court's duty to protect the vulnerable." The appointment of an assessor to conduct what is essentially a psychiatric examination is a substantial intervention into the privacy and security of the individual. As the court held in *Flynn* "[a] capacity assessment is an intrusive and demeaning process".[181] Although the court recognized the utility of a capacity assessment it "cannot be understated" relying on *Kischer* that it is important to resist the temptation to order an assessment based on the argument "it can't hurt". It can hurt.[182]

When considering whether the applicant has demonstrated that there are reasonable grounds to believe that a person is incapable, the courts review to the following factors, including:[183]

180. Which states that if a person's capacity is in issue in a proceeding under the SDA and the court is satisfied that there are reasonable grounds to believe that the person is incapable then the court on motion or on its own initiative may order the person to be assess for the purpose of obtaining an opinion as to the person's capacity.

181. *Abrams v. Abrams*, 2008 CarswellOnt 7788 (Ont. S.C.J.) at para. 50, leave to appeal refused 2009 CarswellOnt 1580 (Ont. Div. Ct.), additional reasons 2009 CarswellOnt 2519 (Ont. Div. Ct.), additional reasons 2009 CarswellOnt 3502 (Ont. Div. Ct.).

182. *Kischer v. Kischer*, 2009 CarswellOnt 81, [2009] O.J. No. 96 (Ont. S.C.J.) at para. 10.

183. *Abrams v. Abrams*, *supra*, footnote 181, at para. 53 quoted in *Urbisci v. Urbisci*, 2010 ONSC 6130 (Ont. S.C.J.) at para. 28, additional reasons 2010 CarswellOnt 9325 (Ont. S.C.J.), additional reasons 2011 CarswellOnt 198 (Ont. S.C.J.).

(a) The wishes of the person sought to be examined, taking into account the evidence concerning his or her capacity,

(b) The nature and quality of the non-medical evidence before the court about the person's capacity, including the person's behaviour personality changes, susceptibility to undue influence or exploitation, or unusual dispositions of property,

(c) The nature and quality of the medical evidence before the court about the person's capacity,

(d) If there has been a previous assessment, the qualifications of the assessor the comprehensiveness of the report and the conclusions reached, the adequacy and reliability of the report, including any evidence of bias or lack of objectivity, a failure to consider relevant evidence, the consideration of irrelevant evidence and the application of the proper statutory criteria,

(e) The probative value of an assessment to the adjudication of the issues before the court,

(f) What harm might result if an assessment does not take place, whether any risk would exist for the person's capacity who is in issue should an assessment not be preformed, and

(g) Whether there any urgency exists to perform a capacity assessment.

In *Sadhu v. Kaul*,[184] the court ordered the respondent to undergo a capacity assessment at the cost of the applicant (after referencing *626381 Ontario Ltd. v. Kagan, Shastri, Barristers & Solicitors*,[185] where the court held that a mental examination should be the exception not the norm).

In *Ballinger v. Marshall*,[186] a lack of medical evidence led the court to rely on the observations of the applicant to find the

184. 2019 ONSC 140 (Ont. S.C.J.). See also *Urbisci v. Urbisci*, 2010 ONSC 6130 (Ont. S.C.J.), additional reasons 2010 CarswellOnt 9325 (Ont. S.C.J.), additional reasons 2011 CarswellOnt 198 (Ont. S.C.J.).

185. 2013 ONSC 4114 (Ont. S.C.J.).

186. 2018 ONSC 3020 (Ont. S.C.J.).

187. 2016 CarswellOnt 16178 (Ont. Cons. & Capacity Bd.).

respondent (his mother) lacked the capacity to manage property. The Public Guardian and Trustee then arranged for legal counsel who opposed the order, arguing a lack of evidence demonstrating incapacity to manage property.

In contrast the court in *L. (K.A.), Re*[187] found that an elderly woman with a gambling problem and debt appealed her finding of incapacity and the adjudicator held that "there are other mechanisms available in our society against capable people who borrow and spend money mischievously or irresponsibly."

In Ontario, in *Erlich (Attorney for) v. Erlich*[188] the court refused to accept the observations of the applicant and also refused to order a capacity assessment of the 93- and 95-year-old couple. The court looked at the factors from the *Abrams* decision which highlighted the importance of balancing fundamental rights to privacy and legal rights against the court's duty to protect the vulnerable.

A similar decision was seen in Alberta in the case of *Melin v. Melin*[189] where the grantor sought termination of a Power of Attorney for Property and Personal Care, and the son (Attorney) cross-appealed seeking a capacity assessment for the father. In making its decision the court reviewed *Ocean v. Economical Mutual Insurance Co.*,[190] determining the court only had jurisdiction to order an assessment when the applicant specifically put the person's mental condition in issue and held the use of the court's inherent *parens patriae* jurisdiction in considering whether to order a capacity evaluation should only be use in the interests and protection of the person.

However, we also have in Ontario the decision of the Court of Appeal in *Neill v. Pellolio*[191] which reviewed the jurisdiction of the court to order a capacity assessment and access rights under the SDA and the HCCA. At first instance this relief sought (albeit interim orders for access were granted) by the applicant was declined (in large measure as the applicant had not sought a guardianship application). On the issue of access, the Court of Appeal agreed that an attorney for an incapable person under a power of attorney for personal care is obliged to foster regular personal contact between the incapable person and

188. [2018] O.J. No. 3628 [*Erlich*].
189. 2018 ABQB 1056 (Alta. Q.B.) at para. 91, additional reasons 2019 CarswellAlta 624 (Alta. Q.B.).
190. 2009 NSCA 81 (N.S. C.A.).
191. (2001), 43 E.T.R. (2d) 99, 151 O.A.C. 343, [2001] O.J. No. 4639, 110 A.C.W.S. (3d) 185 (Ont. C.A.).

supportive family members and friends and consult with support family members and friends of the incapable person under ss. 66(6), 66(7) and 67 of the SDA. was granted. A similar objective was identified as one of the purposes of the HCCA when a person lacks the capacity to decide about a treatment under paragraph 1(e). However, these obligations only arise under the SDA where a finding of incapacity has been made or under the HCCA when a person "lacks the capacity" to make decisions about his or her treatment. The appeal was dismissed on both issues on the basis that the court had no jurisdiction to grant the relief sought.

In *Dimitrova v. Dimitrova*,[192] a case concerning the approval of a litigation guardian, the court refused to submit the respondent to further assessment. Although s. 3 counsel argued there was a lack of evidence on a balance of probabilities the respondent lacked capacity, the court relied on evidence previously submitted in family court and two physicians' applications. The court held a capacity assessment would offend the respondent's dignity, privacy, and autonomy.

An example of where the court has on its "own motion" ordered a capacity assessment is the decision in *Zabawskyj v. Zabawskyj*,[193] a Family Law application surrounding a trust property ownership. The respondent made disruptive outbursts in court by yelling that what the applicant's counsel said during their opening statement was not true and that it was a lie. The court ordered the respondent to remain quiet. The respondent's counsel subsequently advised the court that he had spoken with their client but could not guarantee that there would be no further outbursts. He suggested the court exclude the respondent from the courtroom which the court did.

The court later concluded the respondent's outbursts led to reasonable grounds to believe the respondent was incapable stating:

> I am concerned that if, on the resumption of the trial, the respondent engages in similar conduct when he takes the stand, there may be an issue as to whether he is simply irascible, as put by his counsel, or whether there is some diminution in his capacity. I therefore order, pursuant to sections 79(1) and (2) of the *SDA*, that the respondent

192. 2021 ONSC 3239 (Ont. S.C.J.).
193. 2007 CarswellOnt 7644 (Ont. S.C.J.) [*Zabawskyj*].
194. *Zabawskyj*, *supra*, footnote 193, at para. 24.

> submit to an assessment for the purpose of having an assessor give an opinion on his capacity, including a consideration of matters relevant to determining whether he is a 'special party' within the meaning of the *Family Law Rules* or a 'party under disability' within the meaning of the *Rules of Civil Procedure*.[194]

c. Giving Evidence – Subjecting Incapable Litigants to Examination

Rule 31.03(5) of the Rules of Civil Procedure provide the guidelines for a party under disability and Rule 31.11(5) provides that the transcript from the examination for discovery of a party under disability may be read into or used as evidence in trial only with leave of the trial judge.

There are two requirements for an adult with mental disabilities to give evidence on the stand: the ability to communicate the evidence and a promise to tell the truth.[195] The trial judge is to make these inquiries of competence on *voir dire* and ask the questions does the proposed witness understand the nature of an oath or affirmation and can she/he communicate the evidence. By analogy this would be the same test for giving evidence on an examination for discovery.

The issue with giving evidence when dealing with a vulnerable person is that they may not be "parties under disability" but being vulnerable being exposed to the litigation or adversarial process and be stressful and even arguably, not in their "best interests".

Counsel trying to protect their older client can be criticized leaving little choice but to try to engage the vulnerable person in the process without unduly bringing them harm. When the need to respond (prove I am capable) overcomes the presumption of capacity this can expose the vulnerable person to further abuse and emotional turmoil – an unexpected consequence of our adversarial judicial system.

There are compromises attempts which are not completely satisfactory such as the attempt in *Bakr v. Sooriabalan*,[196] The court held that under Rule 31.11(5) the examination for discovery of a person under disability may be read in or used

195. *Canada Evidence Act,* R.S.C. 1985, c. C-5, s. 16(3).
196. 2003 CarswellOnt 4109 (Ont. S.C.J.) [*Bakr*].
197. (1985), 6 C.P.C. 89 (Ont M.C.).

in evidence at the trial only with leave of the trial judge. This subrule may afford the plaintiff full protection as regards the use at trial of any transcript evidence. However, as regards the plaintiff's capacity to testify, the ultimate issue of his capacity to testify left to the trial judge, as was done in *Emberton v. Wittick et al.*.[197] In this way "the trial judge will have the advantage of live testimony and will not be required to decide the issue of capacity solely" based on "transcripts and conflicting medical reports".[198]

Often when the presumption of capacity is questioned, the decision to declare a person incapable is reached too hastily. In *R. v. I. (D.)*, [199] the Supreme Court of Canada reminds us that it is preferable to hear all available evidence that can be reasonably considered before preventing a witness from testifying.

In *Evans v. Evans*,[200] a party who wished to be declared a special party was able to avoid a medical examination, submit sealed medical information. The applicant was denied a request for an opportunity to view the sealed medical information.

In *Michriky v. Hack*,[201] the court held that the onus of exempting a party from examination rests with the party seeking to fall within the exemption. The decision looked at *Abrahamson v. Buckland*[202] which had held that when determining whether a party under disability should be compelled to attend an examination for discovery, the court must consider the nature of the disability and the effect that disability has, if any, on the competence to answer questions.[203]

Similar reasoning is seen in British Columbia in the cases of *Morrison (Committee of) v. Cormier Vegetation Control Ltd.*[204] and *Arden v. Arden*[205] where leave was not granted where examinations will lead to harm or be futile, a rather vague test. In Saskatchewan, the court in *Buckley* noted that their Rules of Court were less detailed than Ontario's, and the determination

198. *Bakr*, *supra*, footnote 196, at para. 10.
199. (*sub nom.* R. v. D.A.I.) [2012] 1 S.C.R. 149, 2012 SCC 5 (S.C.C.).
200. 2017 ONSC 5232 (Ont. S.C.J.).
201. 2005 CarswellOnt 962, [2005] O.J. No. 982 (Ont. S.C.J.).
202. 1990 CarswellSask 160 (Sask. C.A.).
203. Query here what test of capacity the court would use to determine this "competence to asnwer questions".
204. (1995), 21 B.C.L.R. (3d) 311 (B.C. S.C.).
205. 2005 BCSC 1949 (B.C. S.C.).
206. (2014), 51 R.F.L. (7th) 334, 2014 CarswellSask 649, 2014 SKQB 320 (Sask. Q.B.).

of the validity of a power of attorney and its revocation (including the issue of capacity of the grantor) was sent to trial with *viva voce* evidence and a new medical assessment. In an extreme case from that province (*Babiuk v. Babiuk*[206]), an abused, malnourished senior was not cross-examined given the clear and obvious signs of abuse based on the need to protect the vulnerable.

d. Admissibility of Audio and Video Recordings

In determining capacity, individuals' rights and dignity can be violated to be able to make the assessment. This could include the admission of unsworn evidence and surreptitious recordings. Violations to the autonomy and dignity of an individual are in direct contravention of the fundamental principles of the SDA.

In Ontario, in *Rudin-Brown et al. v. Brown*,[207] 15 recordings were allowed into evidence, despite the potential that the recordings violated the alleged incapable person's privacy rights and dignity.

In *Perino v. Perino,*[208] an adult with a disability was caught in a custody battle between parents over access. Leading up to a meeting with s. 3 counsel and her mother, the adult (Marisa) did not sleep well the night before and scratched herself until she bled. However, what the court found particularly disconcerting was the submission of a sworn affidavit that included a surreptitious recording of Marisa. The court stated parties and the court should discourage this kind of evidence except where it clearly concerns protecting the vulnerable.

In *Lockhart v. Lockhart*,[209] the court reluctantly admitted evidence in the form of surreptitious recordings, but did not ascribe much evidentiary weight to them.

In *Salzman v. Salzman,*[210] the court provided guidelines in an SDA proceeding where s. 3 counsel and the client were surreptitiously recorded by a caregiver who listened to their conversation on a baby monitor. Despite the violation to dignity

207. 2021 ONSC 3366 (Ont. S.C.J.), additional reasons 2021 CarswellOnt 13464 (Ont. S.C.J.), additional reasons *Rudin-Brown et al. v. Brown et al.*, 2022 CarswellOnt 266 (Ont. S.C.J.).
208. 2012 CarswellOnt 6099, [2012] O.J. No. 2208 (Ont. S.C.J.), affirmed 2012 CarswellOnt 16432 (Ont. C.A.).
209. 2020 CarswellOnt 12189 (Ont. S.C.J.) at para. 42 [*Lockhart*].
210. 2011 ONSC 3555 (Ont. S.C.J.).
211. 2010 BCSC 1894 (B.C. S.C. [In Chambers]).
212. 2015 SKQB 306 (Sask. Q.B.), at para 31.

and privacy of both individuals which was made worse by the violation of solicitor-client privilege (all client's rights) the court admitted the affidavit of the caregiver detailing what was heard on the baby monitor.

In British Columbia in *Palamarek, Re,*[211] the court allowed audio recordings into evidence, but only because of the "Wills exception" to solicitor-client privilege.

In Saskatchewan, in *Hilbig v. Pasloski,*[212] the court expressly forbade the use of surreptitious recordings submitted by both sides in a power of attorney case where a husband had hired a former police officer to spy (he had dressed up as a clergy member and recorded the wife in her room and while eating dinner) on his wife in a care home.

PART E: THE DISCONNECT

Ontario has previously amended/tailored its legislation to mirror the accepted thinking at the time. This section reviews whether there is a need for a new paradigm. This section also considers whether it is time for Ontario to go further than to put a band aid on the sledgehammer and create that Swiss army knife by introducing new legislation: *The Protection of Vulnerable Adults Act*.

1. The Older Adult and Best Interests

Best interests of the elderly are to be taken into consideration. It is important to involve the elderly in the decision-making process as much as possible as it is vital to recognize what their views and wishes are even if they are legally incapable of making decisions.

The fundamental principle in dealing with issues of personal contact – whether it be telephone calls, mail, e-mails, or visits – is that every capable adult has the legal right to choose whether or not he or she wishes to communicate with family members.

A mentally capable older adult has no legal obligation to have any form of communication with friends and family members and is legally entitled to refuse to communicate with

213. Graham Webb, "Access to Older Adults" (2008) 5:1 *ACE Newsletter* 1, online: <https://advocacycentreelderly.org/appimages/file/Access%20to%20Older%20Adults%20-%202008.pdf>.

them. The challenge is knowing whether the right to refuse contact is being exercised capably and voluntarily.[213]

However, dealing with disputes over access is unfortunately common. This could be where the person lives in her or his own home or in the home of a child where the child (or other caregiving person or family member) comes to dominate the older person's life. The older adult may be vulnerable, the care provider may be the abuser who controls all contact with the outside world. The owner of the home could issue a "no trespass order". There may be issues of perceived favouritism on the part of the older adult. New friends might be suspected of "gold digging". Add the overlay of financial matters there can be significant long-standing discord.

Family members can be worried about their estate interests and take actions with an effort to preserve their future inheritance. There may be issues of perceived financial abuse. In all these cases, the control of older persons is seen as necessary by the warring children to gain control of the future estate.

a. Best Interests

Ontario's legislation is not based on a strict 'best interests' approach in which the substitute decision maker judges for him or herself what is 'best' for the person who lacks legal capacity. For the most part, Ontario requires a substitute decision maker to attempt to place her or himself in the individual's shoes, applying the individual's values and preferences to the degree that they are known and understood, and to make the decision that the individual would make if able to understand and apply all the relevant information.

For personal care decisions under the SDA and for all decisions under the HCCA, substitute decision makers must consider the "prior capable wishes" of the individual, the values and beliefs held while the person was capable, and current wishes where they can be ascertained.[214]

i. Children's Law Reform Act

The *Children's Law Reform Act*[215] could be looked to for

214. LCO, Final Report 2017, *supra*, footnote 21.
215. R.S.O. 1990, c. C.12 [*Children's Law Reform Act*].
216. *Ibid.*, s. 20(4).
217. *Ibid.*, s. 20(5).

parallel analogy when it comes to "best interests". By law both parents are equally entitled to decision-making responsibility of the child and under s. 20(4)[216] that right may be suspended if the parents are separated, and the child resides with one of the parents with the consent (express or implied) or acquiescence of the other. The right to parenting time is not restricted and the custodial arrangements may be varied through an agreement or court order.

"Parenting time" is found under s. 20(5) of the Act[217] and similarly to "contact" under the *Divorce Act* it includes the right to visit the child, ask questions and receive information relevant to the child's well-bring and upbringing:

> 20(5) The entitlement to parenting time to a child includes the right to visit with and be visited by the child and the same right as a parent to make inquiries and to be given information as to the health, education and welfare of the child.

Similarly, to the *Divorce Act*,[218] the *Children's Law Reform Act* provides under s. 24(2)-(3) a very detailed, thorough, and comprehensive list of factors to be considered when a court is making a decision about the child including: [219]

1. the child's needs, given the child's age and stage of development, such as the child's need for stability;

2. the nature and strength of the child's relationship with each parent, each of the child's siblings and grandparents and any other person who plays an important role in the child's life;

3. each parent's willingness to support the development and maintenance of the child's relationship with the other parent;

4. the history of care of the child;

218. R.S.C. 1985, c. 3 (2nd Supp.), s 16.1(1) [*Divorce Act*].

219. The process, however, is almost identical to that under the *Divorce Act,* however under the *Divorce Act,* the language has been changed to "*parenting time"* and "*decision-making responsibility"* rather than custody and access.

5. the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;

6. the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;

7. any plans for the child's care;

8. the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;

9. the ability and willingness of each person in respect of whom the order would apply to communicate and co-operate, in particular with one another, on matters affecting the child;

10. any family violence and its impact on,

    (i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and

    (ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to co-operate on issues affecting the child; and

11. any civil or criminal proceeding, order, condition or measure that is relevant to the safety, security and well-being of the child.

There is also a list of factors to consider when family violence is present:[220]

1. the nature, seriousness and frequency of the family violence and when it occurred;

220. *Children's Law Reform Act*, *supra*, footnote 215, s. 24(4). In these cases, the court is primarily concerned with instances of 'family violence' concerning a family member.

2. whether there is a pattern of coercive and controlling behavior in relation to a family member;

3. whether the family violence is directed toward the child or whether the child is directly or indirectly exposed to the family violence;

4. the physical, emotional and psychological harm or risk of harm to the child;

5. any compromise to the safety of the child or other family member;

6. whether the family violence causes the child or other family member to fear for their own safety or for that of another person;

7. any steps taken by the person engaging in the family violence to prevent further family violence from occurring and improve the person's ability to care for and meet the needs of the child; and

8. any other relevant factor.

However, a person's past conduct is not to be considered, unless the conduct is relevant to the exercise of that person's decision-making responsibility, parenting time or contact regarding the child[221] and when allocating parenting time, the court is to give effect to the principle that a child should have as much time with each parent as is consistent with the best interests of the child.[222]

Ultimately, the court when considering the issues of decision-making responsibility and parenting time the most important consideration is "the best interests of the child".

Finally, also in parallel fashion the court under s. 30(1)[223] can order an assessment if it is of the view that more evidence is needed to make a decision about the decision-making

221. *Ibid.*, s. 24(5).
222. *Ibid.*, s. 24(6).
223. *Ibid.*, s. 30(1).
224. Feldstein Family Law Group, *Decision-Making Responsibility and Parenting Time: Children's Law Reform Act* (June 2017) online: Feldstein Family Law Group <https://www.separation.ca/blog/2017/june/child-custody-and-access-childrens-law-reform-ac/>.

responsibility of your child. This request for an assessment by the court does not, however, limit the ability of the parties or the child's representative/lawyer to submit other relevant and expert evidence on the best interests of the child.[224]

2. The Older Adult and Financial Exploitation

Elder abuse is another area relevant to our discussion. It comprises a wide range of activity from fraud targeting unsuspecting seniors to family members or friends taking advantage of an elderly person's finances.

The National Initiative for the Care of the Elderly ("NICE") has defined financial abuse as:[225]

> an action or lack of action with respect to material possessions, funds, assets, property, or legal documents, that is unauthorized, or coerced, or a misuse of legal authority;" or where someone tricks, threatens or persuades older adults out of their money, property, or possessions.

Elder financial abuse is one of the most common forms of elder abuse, and its prevalence is increasing in sheer numbers given the compounding factors of the demographic aging of the Baby Boomer generation, increased life expectancy (with an average well into the 80s for both men and women) and the inter-generational transfer of wealth. This type of financial exploitation occurs simply when a person steals or misuses another adult's financial property.[226]

According to the Canadian Department of Justice, financial abuse is the most reported type of abuse against older adults[227] yet often the targeted person does not realize they are being taken advantage of until it is too late. Statistics Canada says 96 percent of abuse experienced by older adults goes hidden or undetected. Regardless of the devastation of the impact, elder

225. *National Initiative for the Care of the Elderly. Defining and Measuring Elder Abuse (NICE)*. 2014.http://www.nicenet.ca/tools-dmea-defining-and-measuring-elder-abuse.

226. Canadian Centre for Elder Law, "Report on Vulnerable Investors Elder Abuse, Financial Exploitation, Undue Influence and Diminished Mental Capacity" (November 2017).

227. Department of Justice, *Background Elder Abuse Legislation,* online: <http://www.justice.gc.ca/eng/news-nouv/nr-cp/2012/doc_32716.html>.

228. Vancity, "The Invisible Crime: A Report on Seniors Financial Abuse" (2014).

financial abuse is widely underreported, due to a lack of awareness of the abuse, fear of being considered mentally incapable because the abuse happened, stigma of family violence, shame, or because the abuser may also be a caregiver or an important social connection.[228] And with Statistics Canada projecting that the share of people aged 65 years and older will continue to increase in coming years and will account for 20 percent of the population by 2024[229] this is a serious issue that will only get worst as the population ages.

Financial abuse comes in various forms. It can consist of the improper use of a joint bank account,[230] forgery or abuse involving a power of attorney document, sharing an older adult's home without payment or sharing in expenses, misuse, appropriation, or theft of an older adult's assets, transfer of real property, and ATM fraud, undocumented loans,[231] private care agreements where the older adult transfers title of property in exchange for anticipated care that is not provided; withholding of the older person's pension cheque by attorney or other decision-maker or family member with access to the older person's mail, predatory marriage, pressuring the older adult to

229. Statistics Canada, "Canada's population estimates: age and sex, July 1, 2015".

230. Older adults often enter joint accounts without understanding the legal or financial implications such a decision will have during their lifetime or after death. Communities with elder abuse units include Vancouver, New Westminster, Edmonton, Calgary, Toronto, Halton, Durham, Hamilton, Niagara, Ottawa, Waterloo.

231. Family loans are frequently undocumented, with the result that there will not necessarily be a common understanding concerning the terms of repayment and related matters. BC CEAS, *Legal Programs,* online: http://bcceas.ca/programs/legal-programs/; Queen's University, Faculty of Law, *Elder Law Clinic,* online: http://lawqueensu.ca/students/queensElderLawClinic.html.

232. WEL Partners, "Elder Financial Abuse" online: <https://welpartners.com/practiceareas/elderfinancialabuse> [WEL Partners].

233. Law Commission of Ontario, "A Framework for the Law as it Affects Older Adults: Advancing Substantive Equality for Older Persons Through Law, Policy and Practice" (2012), online: <http://www.lco-cdo.org/en/older-adults-final-report-framework>.

234. Advocacy Centre for the Elderly, online: <http://www.advocacycentreelderly.org>.

235. Canadian Centre for Elder Law (a division of BC Law Institute), "Backgrounder Paper - Financial Abuse of Seniors: An Overview of Key Legal Issues and Concepts" (March 2013) *Canadian Centre for Elder Law (a division of BC Law Institute)*, 2013 CanLIIDocs 120, online: <https://canlii.ca/t/27wk> [CCEL, Financial Abuse].

sign documents they do not have the capacity to understand, to name a few.[232]

Financial abuse can also include more subtle dynamics such as circumstances where an older adult is financially supporting other family members and/or allowing them to live in his or her home, due to pressure or where this dynamic is causing harm to the senior,[233] or due to "special circumstances" that create new opportunities for financial victimization.[234] These factors compound the delivery of services to seniors.[235]

Often financial abuse is perpetrated by a family member upon whom the older adult is dependent and who is potentially influenced by or controlled and victimized. Financial abuse can also be inflicted by a caregiver, service provider, or other person in a position of power or trust (where there is a power imbalance).[236]

Financial exploitation can be particularly devastating for older adults, who often depend on fixed incomes, and who usually do not have the means or time to offset significant losses.[237] However, elder financial abuse is often only one factor. Where it occurs, often other forms of abuse are also present. This makes it difficult to reach out – if, for example, a person reaches out to a family member, without understanding the

236. Government of Canada, Seniors Canada, *Facts on the Abuse of Seniors*, online: <http://www.seniors.gc.ca/c.4nt.2nt@.jsp?lang=eng&cid=155>.

237. Karen A. Roberto and Pamela B. Teaster, "The MetLife Study of Elder Financial Abuse: Crimes of Occasion, Desperation, and Predation Against America's Elders" (2011).

238. WEL Partners, *supra*, footnote 232, where it is indicated that red flags include such things as changes in living arrangements, such as previously uninvolved relatives or new friends moving in, with or without permission or consent, unexplained or sudden inability to pay bills; unexplained or sudden withdrawal of money from accounts, poor living conditions in comparison to the value of the assets, changes in banking patterns, changes in appearance, controlled spending, confusion or lack of knowledge about a financial situation and execution of legal documents, being forced to sign multiple documents at once, or successively, being coerced into a situation of overwork and underpay, unexplained disappearance of possessions (lost jewelry or silverware), changes in power of attorney documents, necessaries of life denied or not provided by an attorney for personal care or property (shelter, food, medication, assistive devices, being overcharged for services or products by providers, or being denied the right to make independent financial decisions.

239. Canadian Centre for Elder Law, "Report on Vulnerable Investors Elder Abuse, Financial Exploitation, Undue Influence and Diminished Mental Capacity" (November 2017).

240. 2010 ONSC 6002 (Ont. S.C.J.).

broader social risks, it could put the vulnerable person at further or other risk of physical assault, threats, increased isolation, or abuse from a beloved grandchild. A broad understanding in general and learning of the "red flags"[238] specifically is critical to avoid accidentally exacerbating a situation.[239]

As but one example, in *Johnson v. Huchkewich*,[240] one of the widows' two daughters invited her mother to stay with her while the mother's home was being painted. What ensued was described by the Court as "a disgraceful tug-of-war over [the mother], clearly motivated by [the daughter's] desire to obtain some or all of [the mother's] assets".

During this brief visit, the daughter took her mother to a lawyer and had her execute powers of attorney for personal care and for property in her favour. Not only did the daughter instruct the lawyer, with her mother present, but the daughter explained the document to her mother in Polish as no one else in the room understood Polish. Shortly after that, "before the ink had dried", the daughter used the power of attorney to transfer $200,000 from the joint account in her mother's and other sister's names into her own account.

The court ordered the daughter to return the $200,000 to the joint bank account, appointed the other daughter as guardian of property and of the person, ordered the mother to reside with that daughter, and restrained the attorney/daughter from harassing and annoying the appointed guardian. This result may seem self-evident on paper, but the process and cost involved in getting that result is where the sledgehammer system fails the mother.

Part of this is due to the reaction of the older adult who are experiencing abuse. The consequences of financial abuse extend beyond monetary impacts. It can have social, mental health and health impact. It is a violation of trust usually by someone close to them; someone who hey care and love. It robs the older adult of their sense of dignity, sense of personal power and sense of worth.

As Charmaine Spencer writes, "older people view financial abuse as [a] fundamental violation of their trust by someone

241. Charmaine Spencer, *Financial Abuse of Older Adults* (Ottawa: Human Resources and Skills Development Canada, 2012).

242. These types of abuse are discussed in: Kathleen Cunningham, Financial Abuse: The Ways and Means (Vancouver: Canadian Centre for Elder Law, 2012), online: ; Joan Braun, Elder Abuse: An Overview of Current Issues and Practice Considerations" (Paper delivered at a Continuing Legal Education

close to them, in many cases someone they loved and cared for throughout their lives. Financial abuse at any age often occurs in conjunction with emotional abuse, robbing people of their dignity and sense of worth".[241]Abuse may also undermine an older person's sense of personal power and self-determination. Older adult abuse is characterized by an abuse of power; as Joan Braun has stated, "victims often have trauma reactions and may respond to professionals in ways that impede an investigation".[242] Most abusive treatment is inherently connected to the abused person's lack of capacity and the abuser's knowledge of the older adult's compromised decision-making ability.[243]

Yes, despite these negative impacts, one of "the greatest obstacle to successful intervention is the refusal of help by the victim"[244] for which there are numerous reasons.[245]

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course given in Vancouver, 2009), Continuing Legal Society of BC, at 10.1.3 [Elder Abuse: An Overview]; Financial Abuse of Older Adults, supra note 5 at 12. This list of examples is not exhaustive.

243. CCEL, Financial Abuse, *supra*, footnote 235.

244. Maxine Lithwick, Marie Beaulieu, Sylvie Gravel, and Silvia Straka, "The Mistreatment of Older Adults: Perpetrator-Victim Relationships and Interventions" (2000) 11:4 Journal of Elder Abuse & Neglect, 95 at 104.

245. Such as it is hard to consider relationship changes or separation after so many years together, stigma on the family, resistance to having strangers in the home providing services, fear of (a) reprisal by the abuser, difficulties saying no to a child with longstanding dependency on the older adult, of (b) a loss of independence if abuse is reported (especially if assistance by the abuser is helping an adult to stay in his or her home), of (3) loss of the long-time home, and of being placed in an institution or care facility, of (4) discussing other abuse connected to the financial abuse, shame of public discussion and of being hurt by someone in their own family and extracting oneself from abusive dynamics can be complicated and the older person may not understand their rights and options.

246. Mental capacity is also referred to in some sources as "mental capability" or "mental competency".

247. See for example, *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, s. 3; *Representation Agreement Act*, R.S.B.C. 1996, c. 405, s. 3; *Health Care (Consent) and Care Facility (Admission) Act*, R.S.B.C. 1996, c. 181, s. 3; *Adult Guardianship and Trusteeship Act*, S.A. 2008, c. A-4.2, s. 2; *Adult Guardianship and Co-decision-making Act*, S.S. 2000, c. A-5.3, s. 3; *Vulnerable Persons Living with a Mental Disability Act*, C.C.S.M. c. V90, Preamble*; The Health Care Directives Act*, C.C.S.M. c. H27, s. 4; *Substitute Decisions Act, 1992*, S.O. 1992, c. 30, s. 2; *Code civil du Québec*, L.R.Q., c. C-1991, s. 154*;*

PART F: REFORMING A NEW PARADIGM FOR PROTECTING AUTONOMY AND THE RIGHT TO LEGAL CAPACITY

At its core, mental capacity is about decision making and decision making is about mental capacity.[246] A person with mental capacity has the right to make his or her own decisions. Although legislation varies across the country, most espouse the underlying principle that all adults of legal majority are presumed to be mentally capable of making their own decisions unless and until the contrary has been proven.[247]

Definitions of capacity vary however, key is the notion that a capable adult must be able to understand information and appreciate the consequences of decisions.[248] All adults retain the right to make unwise or risky decisions, where they make these choices with capacity, regardless of age, disability, or illness–even in the context of abuse. Guardianship laws do not restrain adults who are mentally capable of choosing to take risks. Capable adults retain the right to choose the people with whom they live or associate–including people who treat them poorly or are abusive.[249]

In this sense capacity is about a person's decision-making process, and it is neutral as to the outcome of that process.

Health Care Consent Act, *1996*, S.O. 1996, c. 2, Schedule A, s. 4(2); *Consent to Treatment and Health Care Directives Act*, R.S.P.E.I. 1998, c. C-17.2, s. 3; *Hospitals Act,* R.S.N.S. 1989, c. 208, s. 52; *Advance Health Care Directives Act*, S.N.L. 1995, c. A-4.1, s. 7; *Guardianship and Trusteeship Act*, S.N.W.T. 1994, c. 29, s. 1.1; *Guardianship and Trusteeship Act*, S.N.W.T. (Nu.) 1994, c. 29, s. 1.1; *Adult Protection and Decision-Making Act*, S.Y. 2003, c. 21, Schedule A, s. 3.

248. *Adult Guardianship and Trusteeship Act*, *ibid*., s. 1*; The Health Care Directives Act*, *ibid*., s. 2; *Health Care Directives and Substitute Health Care Decision Makers Act*, S.S. 1997, c. H-0.001, s. 2; *Advance Health Care Directives Act*, *ibid*., s. 14; *Personal Directives Act*, S.N.S. 2008, c. 8, s. 2; *Adult Guardianship and Co-decision-making Act*, *ibid*., s. 2*; Consent to Treatment and Health Care Directives Act*, *ibid*., s. 7.

249. CCEL, Financial Abuse, *supra*, footnote 235.

250. *Patients Property Act*, R.S.B.C. 1996, c. 349; *Incompetent Persons Act*, R.S.N.S. 1989, c. 218; *Infirm Persons Act*, R.S.N.B. 1973, c. I-8.

251. Under modern guardianship regimes the powers of the guardian are expressed and limited rather than plenary: See, for example, *Adult Guardianship and Trusteeship Act*, S.A. 2008, c. A-4.2, s. 33; *Guardianship and Trusteeship Act*, S.N.W.T. (Nu) 1994, c. 29, s. 11; *Adult Guardianship and Co-decision-making Act*, S.S. 2000, c.. A-5.3, s. 15. In Ontario a guardian of the person may be full or partial: *Substitute Decisions Act, 1992*, S.O. 1992, c. 30, s. 58.

Historically several provincial and territorial legal systems required the presence of a disabling condition or diagnosis[250] with more recent guardianship legislation[251] dispensing with this requirement.

Although a legal process is needed to formally deem a person incapable, there is often an aspect of informal capability assessment in practice. Across all sectors practitioners must assess capacity every time a client provides instruction or requests a transaction or signs a document. Capacity is being evaluated unconsciously, and without any formal training in this area.[252]

1. Considerations

Series et al. propose[253] that Article 12 of the CRDP represents a new paradigm on thinking about human rights and legal capacity: guaranteeing it on a universal rather than qualified basis. Series et al. argue Article 12 provides an opportunity for critically reappraising our approach to legal capacity and upholding the CRPD's guiding principles of equality, autonomy, and participation in the crafting of any reforms. For our purpose, Series et al. raises the question; how can we bring the SDA closer in line with international norms and emerging paradigms (the SDA itself was created based on an emerging paradigm – de-institutionalization – re-evaluation of the role of community supports – focus on individual).

Booth Glen[254] has looked at the emerging paradigm shift premised on international human rights including the current

252. Many capacity assessment tools exist including The Capacity Clinic services. https://www.capacityclinic.ca/.

253. Lucy Series, Anna Nilsson, Ilias Bantekas, Michael Ashley Stein, Dimitris Anastasiou, *Article 12 CRPD: Equal Recognition before the Law*. 1st ed (Oxford: Oxford University Press, 2018).

254. Kristin Booth Glen, "Supported Decision-Making and the Human Right of Legal Capacity" (2015) 3:1 American Association on Intellectual and Developmental Disabilities 2.

255. Michael Bach and Lana Kerzner, "A New Paradigm for Protecting Autonomy and the Right to Legal Capacity" (2010), online: <https://www.lco-cdo.org/en/our-current-projects/the-law-and-persons-with-disabilities/disabilities-call-for-papers-january-2010/commissioned-papers-the-law-and-persons-with-disabilities/a-new-paradigm-for-protecting-autonomy-and-the-right-to-legal-capacity/> [Bach and Kerzner].

256. Nicholas Caivano, "Conceptualizing Capacity: Interpreting Canada's Qualified Ratification of Article 12 of the UN Disability Rights Convention" (2014) 4:1 UWO J Leg Stud 3.

paradigm is instead a 'tailored' or limited guardianship finding what is happening internationally is important to our re-assessment of the SDA to better reflect the equality of rights of incapable person.

Lana Kerzner[255] has taken a closer look at the CRPD and its implications in Canada. Kerzner argues that Canada has declared its understanding that Article 12 permits supported and substituted-making arrangements in appropriate circumstances and in accordance with the law. Importantly, Kerzner outlined the CRPD distinction between capacity and legal capacity (the latter a term we already use in Ontario).

Caivano[256] uses Canada as an example of a jurisdiction that has yet but will need to content with the legislative implications of Article 12: "the drafters of Article 12 intended to set out a strong presumption of capacity and to permit substituted decision-making only in rare circumstances" something that would need to see areas where substitute decision-making provisions would need to ensure a strong presumption of capacity such as that a person deemed capable at the beginning of a proceeding should retain this presumption throughout the proceeding.

Hoffman et al.[257] describes a divide in Canada; a barrier to implementing due to CRPD the practical impact of Article 12 on domestic policymaking and court decisions in Canada. The authors present a sociolegal approach that argue "Overall, while the CRPD remains conspicuously absent from Canadian legislation, public policy, and jurisprudence, the country's ratification of the Convention has facilitated an important shift in the social and cultural paradigms surrounding psychosocial disability in Canada."

Underscoring the need for guaranteeing legal capacity on a universal level can be found in the comments by Cliona Bhailis

257. Steven J. Hoffman, Lathika Sritharan, and Ali Tejpar, "Is the UN Convention on the Rights of Persons with Disabilities Impacting Mental Health Laws and Policies in High-Income Countries? A Case Study of Implementation in Canada" (2016) 16:28 BMC International Health and Human Rights 2.

258. Cliona de Bhailis and Eilionóir Flynn, *Recognising legal capacity: commentary and analysis of Article 12 CRPD*, 1st ed (Cambridge: Cambridge University Press, 2017).

259. Mathieu Dufour, Thomas Hastings, Richard O'Reilly, "Canada Should Retain Its Reservation on the United Nation's Convention on the Rights of Persons with Disabilities" in *The Canadian Journal of Psychiatry*. 2018: 63(12); 809-812.

who argued that "mental capacity is used in many states as a means to assess and deny legal capacity".[258]

In their Canadian Journal of Psychiatry article,[259] Dufour et al argue however that Canada should retain its reservation on its CRPD implementation. They argue the CRPD Committees interpretation, which insists every person can make decisions with sufficient support and that if a person lacks capacity to make a decision, we must rely on their 'will and preferences' is unrealistic and would result in extensive harm and suffering for people with severe cognitive or psychotic disorders. These psychiatrists argue that the interpretations call for the elimination of community treatment orders and that if all individuals have a presumed legal capacity to make decisions, any law based on the concept of incapacity is in contravention with the Committee's interpretation of the CRPD – according to the author's this would have a drastic impact on substitute decision making provisions. Ultimately, the authors conclude that "before abandoning substitute decision making, we would need detailed proposals about how supported decision making would work in specific situations and not the current vague generalizations".[260]

The LCO has commented that "it is important to keep in mind that the CRPD applies to a broadly defined group of persons with disabilities and not necessarily to all persons who may be affected by legal capacity and decision-making laws". There is considerable debate here – the LCO points out that in one view, Article 12 protects individuals from discriminatory determinations of incapacity based on disability status, consistent with substitute decision-making as a last resort, i.e. Canada's view and for this reason, Canada was able to ratify the Convention albeit with a reservation: "Canada recognizes that persons with disabilities are presumed to have legal capacity on an equal basis with others in all aspects of their lives."

Canada reserved the right to continue using substitute decision-making legislation in appropriate circumstances leading to another view, namely that Article 12 creates an inalienable and non-derogable right for persons with disabilities

260. *Ibid.*

261. Committee on the Rights of Persons with Disabilities, *General Comment No. 1* (May 2014) online: UN Convention on the Rights of Persons with Disabilities https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement.

262. LCO, Final Report 2017, *supra*, footnote 21, at 69.

to be always considered as legally capable consistent with the view shared by the *2014 General Comment* developed by the Committee of the Rights of Persons with Disabilities.[261]

The LCO has also reported that in Canada, examples of supported decision-making in legislation exist in the support authorizations or agreements available in Alberta and Yukon, and the representation agreements available in British Columbia and the Yukon. In other common law jurisdictions, supported decision-making exists in reforms to Ireland's guardianship laws and recent additions to Israel's guardianship laws.[262]

In a recent article submitted to the Canadian Bar Association, Krista James and Kevin Love[263] discuss the importance of the ability of the CRPD's intention to allow people with disabilities the right to enjoy legal capacity on an equal basis and for governments to take appropriate measures. The authors advocate for the role of a 'Trusted Support Person' (which is in line with a recommendation of the O'Sullivan Report Ontario and recent developments in the financial sector).

2. The Manitoba Lead

On October 4, 1996, a law came into force in Manitoba called *The Vulnerable Persons Living with a Mental Disability Act*.[264] The Act was developed to promote and protect the rights of adults living with a mental disability who need assistance to meet their basic needs.

The legislation recognizes individuals residing in Manitoba who may be vulnerable persons and is based on five guiding principles:

1. vulnerable persons are presumed to have the capacity to make decisions affecting themselves, unless demonstrated otherwise;

2. vulnerable persons should be encouraged to make their own decisions;

3. the vulnerable person's support network should be encouraged to assist the vulnerable person in making decisions so as to enhance his or her independence and self-determination;

263. James and Love, *supra*, footnote 31.
264. S.M. 1993, c. 29.

4. assistance with decision making should be provided in a manner which respects the privacy and dignity of the person and should be the least restrictive and lease intrusive form of assistance that is appropriate in the circumstances; and

5. substitute decision making should be invoked only as a last resort when a vulnerable person needs decisions to be made and is unable to make these decisions by himself or herself or with the involvement of members of his or her support network.[265]

It repealed part II of the Manitoba *Mental Health Act* and provides the statutory framework for how decisions are to be made with respect to the lives of vulnerable persons defined as "an adult living with a mental disability who is in need of assistance to meet his or her basic needs with regard to personal care or management of his or her property". "Mental disability" is defined as meaning "significant impairment intellectual functioning existing concurrently with impaired adaptive behaviour and manifested prior to the age of 18 years but excludes a mental disability due exclusively to a mental disorder as defined in s. 1 of the *Mental Health Act*".

There are three key areas of The Act – support services, protection from abuse and neglect, and substitute decision making:

Support Services: The Act states that the Department of Manitoba Family Services may provide support services for a vulnerable person and that an individual plan shall be developed for each person receiving such services (such as residential services, counselling, vocational training, and life skills programs).

Protection from Abuse and Neglect: The Act provides for the protection of vulnerable persons from abuse or neglect. All persons who have reasonable grounds to believe that the person is or is likely to be abused or neglected are obligated to report these suspicions to the Department of Family Services.

Substitute Decision Making: If a vulnerable person is not able to make decisions even with help, a person known as a "substitute decision maker" may be appointed to make decisions

265. *The Vulnerable Persons Living With a Mental Disability Act*: https://gov.mb.ca/fs/pwd/what_is_vpa.html.

on his or her behalf. The Act sets out provisions for the appointment of substitute decision makers.

The Act introduces the concept of a Vulnerable Persons' Commissioner who can, on application, appoint a person as a substitute decision maker for personal care, for property or for both which can be appointed by the person (failing which the Commissioner may appoint the Public Guardian and Trustee).

3. New Paradigm Framework for Legislative Reform

A policy, legislative, judicial, and institutional framework is needed to create and support decision-making processes that protect and promote an equal right to legal capacity.

The framework must be based on the basic immutable principles of:[266]

1. respect for autonomy in decision-making;
2. respect for personal dignity; and
3. protection against abuse and neglect.

This means as suggested by Bach and Kerzner putting in place safeguards that promote and protect the integrity of the decision-making process; that ensure appropriate decision-making status is recognized, accommodated, and supported and protect against serious adverse effects, including neglect and abuse, suggesting eight main features to such a system: [267]

1. Legislated Framework for Legal Capacity and Decision-making Supports;
2. Legislated Duties and Liability of Representatives and Facilitators;
3. Monitors;
4. Community-based Resource Centre;
5. Legal Capacity and Support Office;

266. Bach and Kerzner, *supra*, footnote 255.
267. *Ibid.*

6. Administrative Tribunal with a Focus exclusively on Decision-Making;

7. Access to Legal Counsel; and

8. Formal Advocate.

On the question of a Legislated Framework the LCO states that:

> Ideally, a legislative framework would mandate provision of supports needed for people to exercise legal capacity and would provide for the institutional framework outlined in this section. A legislative mandate for these supports would also give effect to the interdependence we outline in the previous section between third party duties to accommodate in decision-making processes, and the role of governments to make reasonable efforts in providing supports beyond the point of undue hardship to these parties. In the Canadian context, such legislation would likely fall primarily within the powers of provincial and territorial governments.

This framework would enact the fiduciary responsibilities of representatives and facilitators going further[268] than for example, the British Columbia *Representation Agreement Act* which states that representatives who comply with the legislated duties are not to be found liable "for injury to or death of the adult or for loss or damage to the adult's financial affairs, business, or assets.[269]

The reformed structure would involve the introduction of *monitors* whose role (suggested to be modified after that created British Columbia's *Representation Agreement Act*,[270] with necessary modifications, considering the successes and limitations of that system) would be to protect the decision-

268. Suggesting the following language: Representatives and facilitators who comply with all legislated duties would not be liable for any injury death, loss or damage that results from actions they have taken in their role as representatives or facilitators.

269. *Representation Agreement Act,* R.S.B.C. 1996, c. 405, s. 23.

270. *Ibid.*, ss. 12, 20 and 21.

271. Bach and Kerzner, *supra*, footnote 255.

272. *Ibid.*

273. Using the Nidus Personal Planning Resource Centre as an example. Online: Nidus Personal Planning <http://www.nidus.ca/>.

making rights of the adult and oversee the work of the representative or facilitator[271] and who would be required to make reasonable efforts to determine whether the representative or facilitator is complying with their legal duties.

The reformed structure would also introduce *Community-based Resource Centres* as a resource to provide information and assistance with the practicalities of the accommodation process and accessing of supports.[272] These Centres it is suggested would be government funded but at arm's length, and run by a board of directors, the majority of whom would be persons with disabilities.[273]

A *Legal Capacity and Support Office* would be created to address the experiences of isolation and abuse. This Office would have a role (not dissimilar to some roles of Public Guardian and Trustee), would be required to investigate allegations of serious adverse effects as defined as well as act as a facilitator or monitor of last resort, to arrange for supports as needed to address situations where serious adverse effects are occurring or may occur and there is reason to believe that a person's ability to make and/or act on their decisions will be enhanced by such supports.[274]

But since, a breach of these legal duties requires oversight if not resolved informally, the LCO introduces a *tribunal* with exclusive jurisdiction on decision-making cases who would be mandated generally to:

> (a) adjudicate disputes between monitors and representative/facilitator.
>
> (b) provide appropriate input and direction to the Legal Capacity and Support Office.
>
> (c) give direction on any question related to a person's decision-making status, or role of other persons in relation to that status, including where questions or issues were raised related to decision-making.[275]

274. Bach and Kerzner, *supra*, footnote 255.

275. LCO, Final Report 2017, *supra*, footnote 21.

276. It may be that a tribunal may only do so in the context of a statutory framework that mandates provision of needed accommodations and supports, and eligibility criteria for this purpose. For example, the Ontario Social Benefits Tribunal/Social Assistance Review Board hears appeals and makes determinations for those for whom benefits under the provincial Ontario Disability Support Program or Ontario Works Program are refused,

This tribunal it is contemplated would adjudicate disputes over what type of support is required; whether reasonable accommodations have in fact been made; and the status through which a person should be empowered to exercise their legal capacity. It would be empowered to make judgments in cases where representational support is required to exercise legal capacity, and there is dispute over who will provide that representational support if the person is not able to indicate a choice in ways that others understand (recognizing that the extent to which a tribunal, in the context of administrative law in Canada, could compel private entities as well as the government to provide accommodations and/or supports would require further analysis). The scope of its mandate would be needed to be laid out in a related statute.[276]

The LCO recognized that while some of the concerns the tribunal would be mandated to address may be pursued by launching human rights complaints/applications or pursuing remedies for Charter violations in court, the tribunal it proposes would provide for a more comprehensive remedial scheme specifically tailored to the decision-making context given it argues that human rights and Charter remedies can be time consuming and expensive to pursue and decisions about the most fundamental aspects of people's lives cannot be held up waiting for processes and decisions by slow moving court and tribunal processes, especially where its view litigation involving people whose capacity is in question has its own unique complexities.

The tribunal would be legislatively created and as the cases in its mandate impact upon the core values of liberty and autonomy, its decisions must be reviewable. It would be given a wide degree of latitude to deal with each case on its own facts with a goal to promoting autonomy as much as possible using "highly skilled and knowledgeable tribunal members, who have training in capacity issues and experience with people with disabilities and older adults".[277]

The tribunal would approach cases in a manner that maximizes an individual's legal capacity, thus, giving the tribunal a wide degree of latitude including imposing *mandatory mediation* as part of the process.

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denied, canceled, or reduced. In this case benefits and eligibility criteria and the role of the tribunal are clearly laid out in related statutes.

277. Bach and Kerzner, *supra*, footnote 255.

278. *Ibid.* The roles the formal advocate could play include provide advice in

With this, the need to have *access to legal counsel* came next. The LCO argued that while the tribunal is a necessary safeguard, the safeguard is only of significance to the extent that it is used. As it is a legal forum, people whose decision-making status is in issue must have access to it and access must not be impeded by their inability to access and/or pay for a lawyer. Therefore, state funding would le needed to be available to hire a lawyer, should an individual be unable to pay.

An *independent advocate* also forms part of the LCO recommendations. As an aspect of an individual's right to make their own decisions the Bach and Kerzner suggests the creation of a formal advocate "who would assist the individual in expressing their wishes and inform other parties of the individual's rights, and of their corresponding duties".[278]

PART G: THE THIRD SHIFT – WHERE WE NEED TO GO – THE NEXT 30 YEARS

1. The Protection of Vulnerable Persons Act: The Right to Legal Capacity

Any remedial process, like the recommendations of the LCO will need to consider the inevitable barriers that people with intellectual, cognitive and/or psychosocial disabilities experience in pursuing legal avenues. A host of barriers have been documented in relation to both courts and administrative tribunals.[279] These include difficulty understanding court/tribunal processes, lack of accommodation during the hearing

relation to decision-making statuses, provide information to a person in relation to legal processes and options where there is a capacity issue, explain to the person (who is the subject of a capacity proceeding) the nature and implications of the proceeding, including explaining the significance of any possible orders or consequences, and support individuals who are in the supported or facilitated status, including assisting the person to address neglect and abuse by the representative or facilitator.

279. Tess Sheldon & Ivana Petricone, "Addressing the Capacity of Parties before Ontario's Administrative Tribunals: Promoting Autonomy and Preserving Fairness"(December 2009) at 31-32, online: ARCH Disability Law Centre; "Making Ontario's Courts Fully Accessible to Persons with Disabilities [Report of Courts Disabilities Committee] (December 2006), online: Ontario Courts.

280. LCO, Final Report 2017, *supra*, footnote 21.

281. Med-arb is dispute resolution process that combines mediation and arbitration. If there are issues not resolved through mediation, an arbitrator

and having the very right of their participation challenged based on alleged incapacity.

Access to remedies for a breach of the duty to accommodate in the decision-making process cannot pose a further barrier for people with disabilities to make their own decisions. A remedial process is needed that also minimizes the time and money a person with the disability needs to expend to prove his/her right to make his/her own decisions. An expeditious, fair, and accessible method of adjudicating and resolving disputes is needed.

The model presented by the Consent and Capacity Board which adjudicates consent and capacity issues could be informative (as suggested by the LCO)[280] but this is insufficient. Having an alternate dispute resolution forum such as med-arb process and hot tubbing[281] supports the flexibility needed in this area. It would appreciate the nuance, give much needed speed of decision making and ensure specialized experienced adjudicators.

However, the issue is not necessarily the use or default to the court system since there will always need to be a review forum given the nature of the rights and duties involved. What is missing is the overall legislative framework that would codify better these rights and factors that are to be considered, to make the presumption of capacity more robust and develop guidance for those older adults who may have some cognitive decline but are not legally incapable to ensure their rights continue to be protected. Hence the need for a Protection of Vulnerable Persons Act to turn that sledgehammer into a Swiss army knife: an all-in-one statute that integrates all the principles, tools and processes we discussed.

(often the same person who acted as mediator) makes a decision for the parties. Hot tubbing refers to concurrent expert evidence, particularly where both parties' experts give their evidence together in the form of a discussion.