

ASSESSING CAPACITY IN CANADA: CROSS-PROVINCIAL EXAMINATION OF CAPACITY LEGISLATION

PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	Definition of “capacity/capable”?
ALBERTA	<i>Personal Directives Act</i> , RSA 2000, c P-6	Decisions dealing with “personal matters” matter of a non-financial nature that relates to an individual’s person and without limitation includes: health care; accommodation; with whom the person may live and associate; participation in social, educational and employment activities; legal matter; any other matter prescribed by the regulations;	Defines “capacity” as: “the ability to understand the information that is relevant to the making of a personal decision and the ability to appreciate the reasonably foreseeable consequences of the decision.”
	<i>Powers of Attorney Act</i> , RSA 2000, c P-20, s.2(1)-(4),	Decisions to grant or revoke enduring power of attorney.	No definition of “capacity” However, section 3 states: “An enduring power of attorney is void if, at the date of its execution, the donor is mentally incapable of understanding the nature and effect of the enduring power of attorney.”
	<i>Public Trustee Act</i> , SA 2004, c P-44.1, s. 24(2)	The Public Trustee may act: “as personal representative of a deceased person; as trustee of any trust or to hold or administer property in any other fiduciary capacity (including on behalf of incapacitated persons); to protect the property or estate of minors and unborn persons, and; in any capacity in which the Public Trustee is authorized to act (i) by an order of the Court, or (ii) under this or any other Act.”	No definition of “capacity”
	<i>Adult Guardianship and Trusteeship Act</i> , SA 2008, c. A-4.2, s. 46(2) & (5)	Decisions with respect to personal or financial matters. Governs supported decision-making, co-decision making, guardianships and trusteeships.	“capacity” means, in respect of the making of a decision about a matter, the ability to understand the information that is relevant to the decision and to appreciate the reasonably foreseeable

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		Designated “capacity assessors” under the regulations.	consequences of (i) a decision, and (ii) a failure to make a decision.
	<i>Mental Health Act, RSA 2000, c M-13</i>	Governs admission and detention in a facility.	No definition of “capacity”. “mental disorder” means a substantial disorder of thought, mood, perception, orientation or memory that grossly impairs (i) judgment, (ii) behaviour, (iii) capacity to recognize reality, or (iv) ability to meet the ordinary demands of life.
	<i>Limitations Act, RSA 2000 c L-12</i>	Governs the limitation periods to commence a lawsuit and when that period will be “tolled” or suspended when a person is “under a disability”.	1(h) A “person under disability” means (i) a represented adult as defined in the <i>Adult Guardianship and Trusteeship Act</i> or a person in respect of whom a certificate of incapacity is in effect under the <i>Public Trustee Act</i> , or (ii) an adult who is unable to make reasonable judgments in respect of matters relating to a claim. No definition of “capacity” or “incapable”.
BRITISH COLUMBIA	<i>Power of Attorney Act, RSBC 1996, c 370</i>	Decisions to grant or revoke enduring Power of Attorney for financial decisions.	No definition of “capacity”. Section 12(2) sets out the criteria for determining whether an adult “is incapable of understanding the nature and consequences of a proposed enduring power of attorney”.

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	<i>Patients Property Act, RSBC 1996, c 349</i>	Appointment of a “committee” if an individual is “mentally incapable” and no personal directives in place.	No definition for “capacity”. Section 2(1) states: “The Attorney General, a near relative of a person or other person may apply to the court for an order declaring that a person is, because of (a) mental infirmity arising from disease, age or otherwise, or (b) disorder or disability of mind arising from the use of drugs, incapable of managing his or her affairs or incapable of managing himself or herself, or incapable of managing himself or herself or his or her affairs.”
	<i>Adult Guardianship Act, RSBC 1996, c 6</i>	Governs statutory property guardians and the process by which health authorities issue certificates of incapability as a last resort, resulting in the Public Guardian and Trustee becoming an adult’s committee of estate for financial and legal matters. Also outlines BC’s response to adult abuse, neglect and self neglect by designated agencies. Governs assessment by a “qualified health care provider” according to prescribed procedures.	No definition for “capacity”. S 3(1): “Until the contrary is demonstrated, every adult is presumed to be capable of making decisions about the adult’s personal care, health care and financial affairs.”
	<i>Mental Health Act, RSBC 1996, c 288</i>	Governs admission of individuals to mental health care facilities.	No definition of “capacity”.
	<i>Health Care (Consent) and Care Facility</i>	Governs health care decisions and sets out the capacity criteria required to make an advance directive.	No definition of “capacity”.

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	<i>(Admission) Act</i> , RSBC 1996, c 181		S. 3(1) outlines a presumption of capability with respect to health care decisions.
	<i>Public Guardian and Trustee Act</i> , RSBC 1996, c 383	Governs the powers and duties of the Public Guardian and Trustee (including the ability to investigate allegations of possible financial mismanagement including by those acting as an adult’s substitute decision maker (trustee, representative, attorney, committee).	No definition of “capacity”.
	<i>Representation Agreement Act</i> , RSBC 1996, c 405	Governs the making of representation agreements by adults that identify one or more representatives to make or assist with personal and health care and/or financial and legal decisions.	No definition of “capacity”. S. 3(1) outlines a presumption of capability. S 8(1) An adult may make a representation agreement consisting of one or more of the standard provisions authorized even though the adult is incapable of (a)making a contract, (b)managing his or her health care, personal care or legal matters, or (c)the routine management of his or her financial affairs.
	<i>Limitation Act</i> , SBS 2012, c 13	Governs the limitation periods to commence a claim and when those limitation periods will be “tolled” or suspended when a person is “under a disability”.	“person under a disability” means an adult person who is incapable of or substantially impeded in managing his or her affairs. No definition of “incapable”.
MANITOBA	<i>The Powers of Attorney Act</i> ,	Governs enduring and springing power of attorneys.	No definition of “capacity”.

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	<i>CCSM c P97</i>		"mental incompetence" means the inability of a person to manage his or her affairs by reason of mental infirmity arising from age or a disease, addiction or other cause.
	<i>Mental Health Act, CCSM c M110</i>	<p>Governs the admission and treatment requirements for patients in psychiatric facilities.</p> <p>The Act also applies to individuals on leave from a facility as well as individuals under Orders of Committeeship living in the community.</p>	<p>No definition of “capacity”</p> <p>“incapable person” means a person for whom a committee has been appointed.</p> <p>S 3: “a person is incapable of personal care if he or she is repeatedly or continuously unable, because of mental incapacity,</p> <p>(a) to care for himself or herself; and</p> <p>(b) to make reasonable decisions about matters relating to his or her person or appreciate the reasonably foreseeable consequences of a decision or lack of decision.</p>
	<i>Health Care Directives Act, CCSM c H27</i>	Governs the making of health care directives regarding health care and treatment decisions.	“capacity”: “For the purpose of this Act, a person has capacity to make health care decisions if he or she is able to understand the information that is relevant to making a decision and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.”

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	<i>Vulnerable Persons Living with a Mental Disability Act, CCSM c V90</i>	This Act promotes and protects the rights of adults living with a mental disability who need assistance to meet their basic needs. Deals with support and substitute decision making.	"capable" means mentally capable and "capacity" has a corresponding meaning. s.2: “If the capacity of a vulnerable person or, a person for whom an application for the appointment of a substitute decision maker is made, is in issue under this Act, the person shall be deemed to have capacity to retain and instruct counsel”
	<i>The Limitation of Actions Act, CCSM c L150</i>	Governs the limitation period within which to commence a claim and the “tolling” of the limitation period while the person is under a “disability”.	s.7(1) A person is under a “disability. . . while he is in fact incapable of the management of his affairs because of disease or impairment of his physical or mental condition”. No definition of “incapable”.
NEW BRUNSWICK	<i>Property Act, RSNB 1973, c P-19</i>	Granting and revoking power of attorney for property.	No definition for “capacity”.
	<i>Infirm Persons Act, RSNB 1973, c I-8</i>	Governs granting and revoking power of attorney for personal care and committeeships.	No definition for “capacity” “mentally incompetent person” means a person (a) in whom there is such a condition of arrested or incomplete development of mind, whether arising from inherent causes or induced by disease or injury, or (b) who is suffering from such a disorder of the mind that he requires care, supervision and control for his protection or welfare or for the protection of others or for the protection of his property.

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	<i>Mental Health Act, RSNB 1973, c M-10</i>	Governs custody and admission to psychiatric facility.	No definition for “capacity” “serious mental illness” means a substantial disorder of thought, mood, perception, orientation or memory that grossly impairs a person’s behaviour, judgment, capacity to recognize reality or ability to meet the ordinary demands of life, but does not include an intellectual disability.”
	<i>Limitation of Actions Act, SNB 2009, c L-8.5</i>	Governs the limitation periods to commence a claim and when those periods will be “tolled” or suspended when a person is “incapable”.	s. 18(1) The limitation period is suspended when the “claimant is incapable of bringing a claim because of his or her physical, mental or psychological condition” No definition of “incapable”.
NEWFOUNDLAND & LABRADOR	<i>Advance Health Care Directives Act, SNL 1995, c A-4.1</i>	Decisions regarding health care and making an advance directive.	“mental competence”: A maker shall be considered competent to make an advance health care directive where he or she is able to understand the information that is relevant to making a health care decision and able to appreciate the reasonably foreseeable consequences of that decision.
	<i>Enduring Powers of Attorney Act, RSNL 1990, C E-11</i>	Granting and revoking enduring powers of attorney.	"legal incapacity" means mental disability of a nature (i) such that were a person to engage in an action he or she would be unable to understand its nature and

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			effect, and (ii) that would, but for this Act, invalidate or terminate a power of attorney, RDSP or another legal agreement.
	<i>Mental Health Care and Treatment Act</i> , SNL 2006, c M-9.1	Governs admission, custody, detention, assessment in a mental health care facility.	"mental disorder" means a disorder of thought, mood, perception, orientation or memory that impairs (i) judgment or behaviour, (ii) the capacity to recognize reality, or (iii) the ability to meet the ordinary demands of life, and in respect of which psychiatric treatment is advisable
	<i>Adult Protection Act</i> , SNL 2011, c A-4.01	The act protects adults who are at risk of abuse and neglect, and who do not understand or appreciate that risk. The Act and its policies presume that every adult has the capacity to make decisions unless proven otherwise, and if the adult does not harm him/herself or others, than he/she may choose to live as he/she wishes, even if some may consider it unwise or not socially acceptable.	s. 6(2) An adult shall be considered to lack the capacity to make a decision where that adult (a) is unable to understand information relevant to the decision where that decision concerns his or her health care, physical, emotional, psychological, financial, legal, residential or social needs; or (b) is unable to appreciate the reasonably foreseeable consequences of a decision or the lack of a decision.
	<i>Limitations Act</i> , SNL 1995 c L-16.1	Governs the limitation periods to commence a claim and “tolling” or postponement of the limitation period where person under a “disability”.	S. 15(5)(b)(c) A person is under a disability when they are “incapable of the management of his or her affairs because of disease or impairment of his or her physical or mental condition; or for the purpose of an action for misconduct of a sexual nature . . . incapable of

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			commencing that action by reason of his or her mental or physical condition resulting from that sexual misconduct” No definition of “incapable”
NORTHWEST TERRITORIES	<i>Powers of Attorney Act</i> , SNWT 2001, c 15 s 7	Decision to grant or revoke enduring or springing power of attorney for property.	"mental incapacity" means the inability of a person, by himself or herself or with assistance, to (a) understand information that is relevant to making a decision concerning his or her financial affairs, or (b) appreciate the reasonably foreseeable consequences of a decision concerning his or her financial affairs or the lack of such a decision
	<i>Personal Directives Act</i> , SNWT 2005, c 16	Decision to grant revoke personal directives re personal care decisions including giving, refusal or withdrawal of consent for health care and other personal matters.	"capacity" means the ability to (a) understand the information that is relevant to the making of a personal decision, and (b) appreciate the reasonably foreseeable consequences of that personal decision;
	<i>Guardianship and Trusteeship Act</i> , SNWT 1994, c 29	Governs the appointment and duties of guardians and trustees.	No definition of capacity.
	<i>Mental Health Act</i> , RSNWT 1988, c M-10	Governs admission, custody, detention, assessment in a mental health care facility.	“mental disorder” means a substantial disorder of thought, mood, perception, orientation or memory that grossly impairs judgement, behaviour, capacity to recognize reality or ability to meet the ordinary demands of life.

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	<i>Limitation of Actions Act</i> , RSNWT 1988 c L18	Governs the limitation periods for commencing a claim and the “tolling” or suspending of those periods where person is incapable of commencing a claim.	s.2.1(3) The limitation period does not run so long as the “aggrieved person is incapable of commencing the action because of his or her physical, mental or psychological condition”. No definition of “incapable”
NOVA SCOTIA	<i>Adult Capacity and Decision-Making Act</i> , SNS 2017 c 4	Governs appointment of representatives (formerly guardians); capacity assessments;	“capacity” means the ability, with or without support, to (i) understand information relevant to making a decision, (ii) appreciate the reasonably foreseeable consequences of making or not making a decision including, for greater certainty, the reasonably foreseeable consequences of the decision to be made
	<i>Powers of Attorney Act</i> , RSNS 1989 c 352	Decisions to grant / revoke powers of attorney for property.	No definition of capacity.
	<i>Personal Directives Act</i> , SNS 2008 c 8	Decision to grant / revoke personal care directives for personal care decisions.	"capacity" means the ability to understand information that is relevant to the making of a personal-care decision and the ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision
	<i>Involuntary Psychiatric Treatment Act</i> , SNS 205, c 42	Admission and detention in a psychiatric facility.	“mental disorder” means a substantial disorder of behaviour, thought, mood, perception, orientation or memory that severely impairs judgement, behaviour,

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			capacity to recognize reality or the ability to meet the ordinary demands of life, in respect of which psychiatric treatment is advisable
	<i>Limitation of Actions Act, SNS 2014 c 35</i>	Governs the limitation periods for commencing a lawsuit and when they will be tolled or suspended due to incapacity.	S 19(1) The limitation periods will “not run while a claimant is incapable of bringing a claim because of the claimant’s physical, mental or psychological condition.” No definition of “incapable”
NUNAVUT	<i>Powers of Attorney Act, S. Nu 2005 c 9 s3(1)</i>	Decision to grant or revoke springing or enduring powers of attorney for property	“mental incapacity”, unless otherwise specified in a power of attorney, means the inability of a person, due to infirmity or impaired judgment, whether arising from disease, disability, age, addiction or other cause (a) to understand information that is relevant to making a decision concerning his or her property or financial interests, or (b) to appreciate the reasonably foreseeable consequences of a decision concerning his or her property or financial interests or the lack of such a decision;
	<i>Guardianship and Trusteeship Act, SNWT (Nu) 1994, c 29</i>	Governs the appointment and duties of guardians and trustees.	“capable”: A person is "capable" if the person has (a) the ability, by himself or herself or with assistance, to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene

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			or safety; and (b) the ability, by himself or herself or with assistance, to appreciate the reasonably foreseeable consequences of a decision referred to in paragraph (a) or lack of such a decision.
	<i>Mental Health Act, RSNWT (Nu) 1988, c M-10</i>	Governs the admission, detention, custody and assessment in psychiatric facilities.	“mentally competent” means having the ability to understand the subject-matter in respect of which consent is requested and the ability to appreciate the consequences of giving or withholding consent
	<i>Limitation of Actions Act, RSNWT (Nu) 1988, c L-8</i>	Governs limitation periods to commence a claim and when those limitations periods will be “tolled” or extended for individuals who are “incapable”.	S 2.1(3) the limitation period does not commence so long as the individual is “incapable of commencing the action because of his or her physical, mental or psychological condition”. No definition of “incapable”
ONTARIO	<i>Substitute Decisions Act, 1992, SO 1992 c 30</i>	Decisions to grant or evoke power of attorneys for property or personal care; management of property and personal care decisions; appointment of guardians.	“capable” means mentally capable, and “capacity” has a corresponding meaning
	<i>Mental Health Act, RSO 1990, c M 7</i>	Governs criteria for voluntary, informal and involuntary admissions to specially designated psychiatric facilities.	s. 1 “Mental disorder” “any disease of the mind”
	<i>Health Care Consent Act, 1996, SO 1996, c 2 Sch A</i>	Consent regarding health care decisions and admission to long-term care facility.	“capable” means mentally capable, and “capacity” has a corresponding meaning

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	<i>Limitations Act, 2002</i> SO 2002, c 24 Sch B	Governs limitation periods for the commencement of a lawsuit.	Section 7 governs a “tolling” of the limitation period to commence a lawsuit when a person with a claim is “incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition” and does not have a litigation guardian. No definition of “incapable”.
PRINCE EDWARD ISLAND	<i>Powers of Attorney Act, RSPEI 1988, c P-16</i>	Decision to grant or revoke a power of attorney for property.	“legal incapacity” means mental infirmity of such a nature as would, but for this Act, invalidate or terminate a power of attorney and “legal capacity” has a corresponding meaning.
	<i>Mental Health Act</i> RSPEI 1988, c M-6.1	Governs criteria for admission, detention, custody in psychiatric facility.	“capable” or “incapable” means mentally capable or incapable of making a decision to give or refuse consent to treatment.
	<i>Consent to Treatment and Health Care Directives Act, RSPEI 1988, c C-17.2</i>	Governs consent to health care treatment and making of health care directives.	“capable” means mentally capable, in accordance with section 7, of making a decision, and “capacity” is used as the corresponding noun indicating the state of being capable. S 7: . . .a patient is capable with respect to treatment if the patient is, in the health practitioner’s opinion, able (a) to understand the information that is relevant to making a decision concerning the treatment; (b) to understand that the information applies to his or her particular situation; (c) to understand that the

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			patient has the right to make a decision; and (d) to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.
	<i>Statute of Limitations, RSPEI 1988, c S-7</i>	Governs the limitation periods to commence a lawsuit and the “tolling” or suspension of the limitation period if a person is under a “disability”.	s.1 “disability” means disability arising from minority or disability unsoundness of mind. No definition of “capacity” or “incapable”.
QUEBEC	Civil Code of Quebec, CCQ-1991, art. 2166-2174	Governs the appointment of a protection mandate which can apply to both property and protection of the person. The mandate must be homologated by the court, which must then have evidence that the mandator has become incapable.	No definition of “capacity” 2166: The performance of the mandate is conditional upon the occurrence of the incapacity. . .
	<i>An Act respecting health services and social services, CQLR, c S-4.2</i>	Governs consent in health care context as well as accessibility to health and social services.	No definition of “capacity”
	<i>An Act respecting the protection of persons whose mental state presents a danger to themselves or to others, CQLR, c P-38.001</i>	Governs the admission, retention, custody, assessment in a psychiatric facility.	No definition of “capacity”
SASKATCHEWAN	<i>Powers of Attorney Act, 2002, SS 2002, c P-20.3</i>	Decisions to grant or revoke enduring power or attorneys for property and personal affairs.	“capacity” means, . . ., the ability: (a) to understand information relevant to making decisions with respect to property

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			and financial affairs or personal affairs, as the case may be; and (b) to appreciate the reasonably foreseeable consequences of making or not making a decision referred to in clause (a)
	<i>Adult Guardianship and Co-Decision-Making Act, SS 2000, c A-5.3</i>	Governs the appointment of guardians and co-decision makers with respect to property and personal care decisions.	“capacity” means the ability: (i) to understand information relevant to making a decision; and (ii) to appreciate the reasonably foreseeable consequences of making or not making a decision.
	<i>The Health Care Directives and Substitute Health Care Decision Makers Act, SS 2015 c H-0.002</i>	Governs the making of health care directives and hierarchy of substitute decision makers if no directive in place.	“capacity” means the ability: (a) to understand information relevant to a health care decision respecting a proposed treatment; (b) to appreciate the reasonably foreseeable consequences of making or not making a health care decision respecting a proposed treatment; and (c) to communicate a health care decision with respect to a proposed treatment.
	<i>Mental Health Services Act, SS 1984-85-86, c M-13.</i>	Governs the admission, custody, detention, assessment, in psychiatric facilities.	“capacity” means capacity as defined in <i>The Health Care Directives and Substitute Health Care Decision Makers Act</i>
	<i>The Limitations Act, SS 2004 c L-16.1</i>	Governs the limitation periods to commence a claim and suspends the limitation period for persons with a “mental disability”.	S 8(1) provides that the limitation period is suspended for a “person who, by reason of mental disability, is not competent to manage his or her affairs or estate and is not represented by a

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			<p>personal guardian or property guardian pursuant . . . or a decision-maker pursuant to who: (i) is aware of the claim; and (ii) has the legal capacity to commence the proceeding on behalf of that person or the person’s estate.”</p> <p>“Mental disability” means: (i) an intellectual disability or impairment; or (ii) a mental disorder</p> <p>No definition of “capacity” or “incapable”.</p>
YUKON	<i>Enduring Power of Attorney Act, RSY 2002, c 73</i>	Decision on granting and revoking power of attorneys for property.	No definition of “capacity”.
	<i>Care Consent Act, SY 2003, c 21</i>	Governs consent and substitute consent to health care and admission to care facilities, and advance directives.	<p>6 (2) When deciding whether a person is incapable of giving or refusing consent to care, a care provider must base the decision on whether or not the person demonstrates that they understand (a) the information provided under paragraph 5(e). . . .</p> <p>5(e) (e) the person is given the information a reasonable person would require to understand the proposed care and to make a decision, including information about (i) the reason or reasons why the care is proposed, (ii) the nature of the proposed care, (iii) the risks and benefits of receiving and not</p>

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			receiving the proposed care that a reasonable person would expect to be told about, and (iv) alternative courses of care.
	<i>Mental Health Act</i> , RSY 2002, c 150	Governs the admission, detention, custody, assessment in psychiatric facilities.	No definition of “capacity” “mental disorder” means a substantial disorder of thought, mood, perception, orientation, or memory that grossly impairs judgment, behaviour, capacity to recognize reality, or ability to meet the ordinary demands of life;
	<i>Adult Protection and Decision-Making Act</i> , RSY 2002, c 150	Governs court appointed guardianships, representation agreements and supported-decision making agreements.	No definition of “capacity” s.82: Subsections 6(2) to (4) of the <i>Care Consent Act</i> apply with the necessary changes to determining the incapability of an adult (a) to give or refuse consent under paragraph 78(1)(c); or (b) to make a decision under subsection 81(1)
	<i>Limitation of Actions Act</i> , RSY 2002, c 139	Governs limitation periods to commence a claim and when those limitations periods will be “tolled” or extended for individuals under “disability”.	Disability “means disability arising from infancy or a mental disorder” No definition of “mental disorder”

This chart is intended for the purposes of providing information and guidance only. This chart is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.

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