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Decisional Capacity

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Introduction

Capacity considerations are inherently complex. Adding to this complexity is the fact that concerns regarding capacity are continually rising in prevalence as Canada's population rapidly ages. Longer life expectancy accounts, in part, for an increase in the occurrence of medical issues affecting mental capacity. As such, there are a wide variety of disorders that affect one's decisional capacity and increase an individual's susceptibility to being vulnerable and dependent.

Having said that, detection of capacity issues is not a simple task. A heightened degree of care, diligence, and professionalism is required. Equally important, however, is the development of practice management measures, such as, probative questioning, fact checking strategies, and the careful consideration of medical assessments.

This paper will provide an overview of decisional capacity, with a particular focus on issues that may arise in the context of certain decisions, and will address the nature and role of assessments conducted by certified capacity assessors. To facilitate a broader understanding, this paper will examine caselaw from across Canada, and in particular, case law and legislation in Prince Edward Island ("P.E.I."), referencing the different criteria or factors to be applied in determining legal decisional capacity.

Demographics: Current Trends

The population in Canada is constantly experiencing growth. Part and parcel to this is the fact that the population both here and abroad is rapidly aging. Statistics Canada estimates that by 2031, close to 1 in 4 Canadians will be 65 years of age or older. As of July 2022, the number of persons aged 65 years and older in Canada was 7,330,605. Of this figure, approximately 13,485 were centenarians (individuals over the age of 100). In Canada, the number of adults aged 65 years and older now represents 18.8 per cent of the total population.¹

¹ Statistics Canada, "Older Adults and Population Aging: Statistics" online: https://www.statcan.gc.ca/en/subjects-start/older_adults_and_population_aging.

As of July 1, 2022, the population in P.E.I. was 170,688. There is an approximate a yearly increase of 5,930 persons and an annual growth rate of 3.6 per cent.² In P.E.I., persons over the age of 65 have represented the largest population percentage increase over the past ten years. In 2022, there were an estimated 34,632 adults over the age of 65 living in P.E.I. Within this group, the largest population increase was seen in the 65 to 74-year-old age group which increased by 49.7 per cent since 2012 (representing an increase of 6,726 people).³ By the year 2032, the population of Islanders over the age of 65 is projected to rise to 44,053, 47,670 by 2042, 50,815 by 2052, and 62,409 by 2062.⁴

Similar population trends are also seen across the globe. In 2022, the United Nations (“UN”) estimated there were 8 billion people on the planet, 10 per cent of whom were adults over the age of 65. By 2050, the UN estimates that the number of adults over the age of 65 will increase to 16 per cent of the global population. The World Health Organization (“WHO”) also estimates that between 2015 and 2050, the proportion of the world’s population over 60 will nearly double from 12 per cent to 22 per cent.⁵ According to WHO, by 2030, there will be 1.4 billion persons alive over the age of 60. This figure is expected to rise to 2.1 billion in 2050, and as high as 3.1 billion in the year 2100.⁶

Of particular concern is the fact that within this growing population, there is a significant rise in the number of older adults who are living with a physical or mental disability or experiencing cognitive decline. While it is certainly not the case that all older adults are faced with cognitive decline, there is certainly evidence that a significant proportion of older adults are susceptible to becoming vulnerable due to a decline in cognitive abilities.

² This is the highest annual growth rate for PEI on record and the highest growth rate for all Canadian jurisdictions in 2022. PEI’s 5-year growth rate (from 2017 to 2022) of 13.5 per cent leads all provinces and territories.

³ Prince Edward Island, “Prince Edward Island Population Report 2022” (September 29, 2022), accessed online: http://www.princeedwardisland.ca/sites/default/files/publications/pt_pop_rep_0.pdf

⁴ Prince Edward Island, “Prince Edward Island Population Projections 2023-2062” (May 2023), accessed online: http://www.princeedwardisland.ca/sites/default/files/publications/pt_pop_proj.pdf

⁵ World Health Organization, “Ageing and health” (October 1, 2022), accessed online: <http://who.int/news-room/fact-sheets/detail/ageing-and-health>.

⁶ World Population Prospects: The 2017 Revision Population Database, UN Department of Economic and Social Affairs, online: <http://www.un.org/en/sections/issues-depth/ageing/> Accessed on 04.07.18.

Having said that, dementia in its various forms⁷ is one of the most prevalent causes of cognitive decline and the seventh leading cause of death among all diseases.⁸ Here in Canada, the Alzheimer Society reports that over 600,000 Canadians are currently living with dementia. By 2030, this figure is expected to rise to close to 1 million Canadians and by 2050, well over 1.7 million Canadians.⁹ Statistics Canada estimates that by 2050, the percentage of Canadians over the age of 65 living with dementia will increase to 13.2 per cent.¹⁰

Other Common Reasons for Incapacity

Aside from the various forms of dementia, there are other important afflictions of the mind that must be understood when considering an individual's capacity. While the following is not exhaustive of all potential reasons for a person's incapacity, it does provide a general idea of some of the temporary and even permanent conditions which may impact capacity.

Delirium, which is described as "an acute transient potentially reversible fluctuating syndrome occurring in the context of an acute medical or surgical condition,"¹¹ can have a profound impact on a person's cognitive abilities. The symptoms associated with delirium include concentration issues, language issues, delusions, and hallucinations. Delirium is common with individuals in hospital or care settings. Delirium is an important consideration to be aware of because "a person with delirium may not be legally capable of making a decision at one time, only to regain capacity a short time later."¹²

⁷ Dementia is a general term used to describe a range of symptoms associated with a decline in mental function severe enough to reduce a person's ability to perform everyday activities. It is caused by a variety of diseases and injuries that affect the brain, with Alzheimer's disease being the most common.

⁸ World Health Organization, "Dementia", n.d., accessed online: <https://www.who.int/news-room/fact-sheets/detail/dementia>.

⁹ Alzheimer Society of Canada, "The Landmark Study: Path" (2022), accessed online: http://www.alzheimer.ca/sites/default/files/documents/Landmark-Study-Report-1-Path_Alzheimer-Society-Canada.pdf

¹⁰ *Ibid.*

¹¹ British Columbia Law Institute, Report on Common-Law Tests of Capacity, BCLI Report No 73, 2013 at p. 15 [BCLI] (citing Nathan Herrmann, "Common Medical Conditions that Might Affect Competence in the Elderly: The 4Ds (Depression, Delirium, Dementia, Drugs)," in *Law Society of Upper Canada, Special Lectures 2010: A Medical-Legal Approach to Estate Planning and Decision Making for Older Clients* (Toronto: Irwin Law, 2011).

¹² *Ibid.*

Another affliction which may impact capacity is depression. Depression is described as the persistence of a depressed mood, loss of interest or loss of pleasure in previously enjoyed activities. A person suffering from depression may also be afflicted by psychotic symptoms such as delusions. Depression itself can be associated with impaired cognition and in severe cases, impaired concentration and memory in a manner similar to sufferers of dementia. Additionally, depression may be accompanied by substance abuse and drug problems.

Finally, drugs, which may be necessary to treat the above conditions, among others, may themselves cause a diminishment in a person's mental capacity. As explained by Herrmann, "most drugs can penetrate into the brain and many drugs can cause dementia, cognitive impairment, depression, delirium, and psychotic symptoms."¹³

I. Capacity in General

Often, we may speak about individuals as being "capable," or "incapable." However, a person cannot be globally "capable," or "incapable," and there is no "one size fits all" determination for establishing general decisional capacity. In the legal context, there is no single definition for "capacity," or for "mental capacity."¹⁴ Generally, capacity is determined on a case-by-case basis and in relation to a particular task, decision, and at a specific moment in time. Professor Gerald B. Robertson states in, *Mental Disability and the Law in Canada*, that "legal capacity is task specific, incapacity in one area does not necessarily mean incapacity in another."¹⁵

There is no single legal definition of "capacity." In P.E.I., the *Powers of Attorney Act*,¹⁶ defines "legal incapacity" as "mental infirmity of such a nature as would, but for this act, invalidate or terminate a power of attorney." The *Act* also has a corresponding meaning

¹³ BCLI, *supra* at p. 16 (citing Nathan Herrmann, "Common Medical Conditions that Might Affect Competence in the Elderly: The 4Ds (Depression, Delirium, Dementia, Drugs)," in *Law Society of Upper Canada, Special Lectures 2010: A Medical-Legal Approach to Estate Planning and Decision Making for Older Clients* (Toronto: Irwin Law, 2011) at p. 113.

¹⁴ See Appendix "A", "Assessing Capacity in Canada: Cross-Provincial Examination of Capacity Legislation."

¹⁵ Gerald B Robertson, *Mental Disability and the Law in Canada*, 2nd ed., (Carswell 1994), at 179.

¹⁶ RSPEI 1988, c P-16.

for “legal capacity.” Under P.E.I.’s *Mental Health Act*,¹⁷ “capable” or “incapable” is defined as “mentally capable or incapable of making a decision to give or refuse consent to treatment.”

Of significant importance is the fact that at law, all adults are deemed or presumed capable of making decisions. This presumption of capacity stands, unless, and until, that presumption is legally rebutted. This presumption is found in both legislation across Canada and in case law. For example, Ontario’s *Substitute Decisions Act, 1992*¹⁸ states that “[a] 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 or more is presumed to be capable of giving or refusing consent in connection with his or her own personal care.”¹⁹

Often, lawyers and court decisions will refer to “tests” to determine requisite decisional capacity. The term “test” simplifies the legal analysis for the layperson. It is important to understand that there are no actual “tests,” but rather, standards to be applied, or factors and criteria to be considered. In other words, capacity is determined on factors of mixed law and fact, and by applying the evidence available to those applicable factors.

Decision, Time, Situation Specific

Capacity is decision, time, and situation specific. What this means is that a person may be capable with respect to some decisions, at different times, and under different circumstances.

Capacity is inherently *decision-specific*. Notably, the capacity to execute a will, differs from the capacity to enter into a contract, which also differs from the capacity required to make a gift, to get married, or even to separate or divorce. All of these decisions involve their own unique considerations as determined by legislation or the common law. As such, an individual can be considered capable of making a personal care decision, but not capable of managing his or her own property. Likewise, an individual may be capable of granting a power of attorney document, yet, not capable of making a will. The possibilities

¹⁷ RSPEI 1988, c M-6.1.

¹⁸ SO 1992 C 30 [SDA].

¹⁹ SDA, ss 2(1) & (2).

are unlimited since each task, or decision, has its own specific capacity standard or factors to be considered in making such a determination.

Capacity is also *time*-specific, meaning that legal capacity can fluctuate over time. The legal standards have accounted for this by building in allowances for “good” and “bad” days where capacity can and does fluctuate. An example of this is seen in an otherwise capable person who may lack capacity when under the influence of alcohol. Even in situations where an individual suffers from a non-reversible or progressive disorder, that person may not be permanently incapable, and may have requisite decisional capacity at differing times. Much of this determination is dependant on the unique circumstances of the individual and the medical diagnosis. As a result, courts have consistently accepted the principle that the capacity to grant a power of attorney or even to make a will, can vary over time.²⁰

The factor of time-specificity as it relates to the determination of capacity means that any expert assessment or examination of capacity must clearly state the time and date of the assessment and address decisional capacity as at the time the task was undertaken. If an expert assessment is not contemporaneous with the giving of instructions, the making of the decision, or the undertaking of the task, then it may have less probative value than the evidence of, for example, a drafting solicitor who applies the legal standard for capacity commensurate with the time that instructions are received.²¹

Finally, capacity is *situation*-specific, meaning that under different circumstances, an individual may have differing capacity. A situation of stress or overwhelming pressure may diminish a person’s capacity. Therefore, it stands to reason that an individual in their own home may possess capacity that they are unable to display, perhaps, in a lawyer’s or doctor’s office. Although each task has its own specific capacity standard or factors to consider, in general, the capacity to make a decision is demonstrated by a person’s ability to understand all the information that is relevant to the decision to be made, or taken, and that person’s ability to understand the possible implications of the decision in question.

²⁰ See *Palahnuk v. Palahnuk Estate*, [2006] O.J. No. 5304 (QL), 154 A.C.W.S. (3d) 996 (S.C.J.) [*Palahnuk Estate*].

²¹ *Palahnuk*, *supra* at para. 71.

The 2003 Supreme Court of Canada decision of *Starson v Swayze*,²² provides an insightful analysis on the examination of capacity. In that decision, Justice Major, writing for the majority, stated that the presence of a mental disorder must not be equated with incapacity, and that the presumption of legal capacity can only be rebutted by clear evidence.²³ The decision in *Starson* also emphasized that the ability to understand and process information is the key to ascertaining capacity. As such, this ability requires that a person must “be able to apply the relevant information to his/her circumstances, and be able to weigh the foreseeable risks and benefits of a decision or lack thereof.”²⁴

A capable person requires the “ability to appreciate the consequences of a decision”, yet, not necessarily an “actual appreciation of those consequences.”²⁵ A person should not be deemed incapable for failing to understand the relevant information and/or appreciate the implications of a decision, possessing the ability to comprehend the information and consequences of a decision. In *Starson*, Justice Major pointed out that mental capacity is not equated with correctness or reasonableness. In fact, a capable person is entitled to be unwise in decision-making. In support of this notion, in the oft-cited decision in *Re Koch*,²⁶ Justice Quinn held that, “[i]t is mental capacity and not wisdom that is the subject of the *Substitute Decisions Act* and the *Health Care Consent Act*.”²⁷ The right knowingly to be foolish is not unimportant; the right to voluntarily assume risks is to be respected.”²⁸

Overarching Capacity Principles

When reviewing the various criteria or factors to be applied in assessing the decisional capacity to make legal decisions and undertake tasks, one may encounter certain high-level often repeated descriptive words such as “understand,” and “nature and effect.” Some have suggested there is one simple overarching “test” for capacity which applies to *all* decisional capacity tasks.

²² [2003] 1 S.C.R. 722 [*Starson*].

²³ *Starson*, *supra* at para. 77.

²⁴ *Ibid.*, at para. 78.

²⁵ *Ibid.*, at paras. 80-81 [emphasis in original].

²⁶ 1997 CanLII 12138 (ON S.C.) [*Koch*].

²⁷ 1996, S.O. 1996, c. 2, Sched. A [*HCCA*].

²⁸ *Koch*, *supra* at para. 89.

Such overarching principles, trace their origins to the 1829 Irish case of *Ball v Mannin*,²⁹ which directs that one must question or assess whether the person making the decision would have been “capable of understanding what he did by executing the deed in question when its general purport was fully explained to him.”³⁰ Based on his analysis of this case, John Poyser describes the overarching principle of capacity as follows:

A person has the mental capacity to validly perform a juridical act if that person enjoys the powers of mind necessary to **understand the nature and effect** of the juridical act **if given a proper explanation of its basic terms**. Some expressions of the test substitute the word ‘quality’ for the word ‘effect’ but without any apparent shift in nuance.³¹

It is arguable that at a high level, these are “general” criteria that can be used in assessing capacity for various decisions, such as entering into a contract, making an *inter vivos* gift, and executing a power of attorney document. These general criteria ask, does the individual understand the *nature and effect* of the decision being made, provided that the individual has been given a proper explanation of that decision? It is also arguable that these overarching principles or questions may only be one part of the puzzle, since depending on the decision undertaken, other elements or criteria may need to be incorporated in applying these overarching capacity principles.

As noted by Poyser, this overarching “test” has been expressed in historical and modern case law,³² but has been largely ignored where it concerns wills. This is because the vast majority of wills amount to exactly the same act for the maker: giving away everything owned upon death. The consistency inherent in these situations permits the development and application of a set “test” on the terms formulated in the decision of *Banks v Goodfellow*.³³

²⁹ (1829), 3 Bli NS1, 1 Dow & CL 380, 4 ER 1241, HL, 33 Digest (Repl) 592 (Irish Court of Exchequer) [*Ball*].

³⁰ *Ball*, *supra* at 21.

³¹ John E S Poyser, *Capacity and Undue Influence*, 2nd Ed (Toronto: Thomson Reuters Canada Limited, 2019) at 675.

³² See *R v MacNaughten* (1843), 8 ER 718, 10 CI & F 200, 1843 WL 5869 (UKHL) at 723; *Boughten v Marston v Knight* (1872-75), LR 3 P & D 64 (Eng QB) at 71-72; *K (Enduring Powers of Attorney) Re*, [1988] Ch 310 at 313; *W (Enduring Power of Attorney), Re* (2000), [2001] Ch 609 at 613; *Gibbons v Wright* (1954), 91 CLR 423, [1954] ALR 383 (Australia HC) at 437; *Masterman-Lister v Brutton & Co* (No 1), [2003] 1 WLR 1511 (Eng CA) at paras 57 & 58; *Sheffield City Council v E* (2004), [2004] EWHC 2808 (Fam), [2005] 2 WLR 953 at para 19; and *York v York*, 2011 BCCA 316 at para 39, additional reasons 2012 BCCA 347.

³³ (1870), LR 5 QB 549 at 560 (Eng. CA) [*Banks v Goodfellow*].

Gifts and other *inter vivos* wealth transfers do not feature the same consistency and generally arise in different situations and under different forms. As such, no single specific “test” can be formulated to fit these different scenarios. As Poyser argues, the generality test from *Ball*, standing beside the specific test from *Banks v Goodfellow* for wills, may lead to the erroneous conclusion that two different tests are at play. The modern view, however, found in various passages from case law, expresses a unitary and overarching test which is applicable to all.³⁴ No case of any authority appears to have expressed or defended the existence of two separate tests as a competing view.³⁵

Similarly, the British Columbia Law Institute (“BCLI”) also noted in its publication, “Report on Common-Law Tests of Capacity,” that there is a “baseline common law test of capacity” which holds that, “the person concerned must at the relevant time understand in broad terms what he is doing and the likely effects of his actions.”³⁶ This, however, is only part of the picture since many common law factors for capacity also incorporate other elements in addition to the baseline test of capacity. According to the BCLI, “common-law tests of capacity form a relatively neglected area of the law,”³⁷ and while there are numerous studies on mental capacity, comparatively few law-reform agencies have examined common-law tests of capacity.

Across Canada, certain legislation has been brought in to replace certain common-law tests for requisite capacity. For example, the BCLI has opined that “this development occurred for the test of capacity to make an enduring power of attorney, which was long the subject of a common law test of capacity and is now the subject of a reformed legislative test of capacity.”³⁸ That reformed legislative test in British Columbia is now found in the *Power of Attorney Act*.³⁹

³⁴ That test involves a single principle to be applied in determining capacity, whether it be testamentary, *inter vivos*, or a compound transaction combining both.

³⁵ Poyser, *supra* at 679.

³⁶ BCLI, *supra* at p 19, citing Law Commission for England and Wales, *Consultation Paper on Mentally Incapacitated Adults and Decision-Making: An Overview*, CP119 (London: HMSO, 1991) at 19-20.

³⁷ *Ibid.*, at p 20.

³⁸ See *Re K. (Enduring Powers of Attorney)*, [1988] 2 W.L.R. 781 (Ct. of Protection); *Re F.*, [1988] 1 Ch. 310 (UK Court of Protection); *Egli (Committee of) v Egli*, 2004 BCSC 529, 28 BCLR (4th) 375, *aff'd*, 2005 BCCA 627, 48 BCLR (4th) 90.

³⁹ RSBC 1996, c 370.

Hierarchy Myth

In their determination and assessment of decisional capacity, courts will often compare the various factors or standards applicable to the different decisions being made. In this comparison, it is often common for courts to organize these criteria or factors in a type of “hierarchy,” with the idea being that certain decisions require a “higher” level of mental capacity than others. This hierarchy concept is connected to the previously discussed notion of overarching principles as the criteria or standards to be applied builds on those basic elements. Under this concept, those criteria closest to the basic overarching principles would be considered on the “low level” while those with more criteria built upon the basic principles would be considered on the “high level.”

While this may appear to be a helpful tool for legal analysis, it is seemingly at odds with the functional approach to mental capacity that is favoured by the common law.⁴⁰ The idea of a capacity hierarchy is inherently misleading and is not widely supported by authoritative case law. While it may be easier or more instinctive to apply hierarchies to such an analysis, a hierarchy which seeks to delineate different levels of decisional capacity does not actually exist. As such, there is no hierarchy *per se*, instead, there are different standards and applicable determinative factors to be applied in establishing decision capacity for different decisions or tasks. In 2016, Dr. Kenneth Shulman, Kimberly Whaley and Kerri Crawford co-authored a paper in the *Advocates Quarterly* which discussed the myth of a hierarchy of decisional capacity from a medico-legal perspective.⁴¹ But where does this hierarchy myth come from?

One authority for the capacity hierarchy argument comes from the oft-cited quote of Justice Benotto in the 1997 Ontario Superior Court of Justice decision in *Calvert (Litigation Guardian of) v Calvert*.⁴² In that decision, Justice Benotto compared the factors or criteria for determining testamentary capacity with the criteria for determining the capacity to instruct counsel, noting that:

⁴⁰ BCLI, “Report on Common-Law Test of Capacity”, at 19

⁴¹ See generally, Kenneth I. Shulman, Kimberly Whaley and Kerri Crawford, “The Myth of a Hierarchy of Decisional Capacity: A Medico-Legal Perspective” (2016) 45:4 *The Advocates Quarterly* 395 [Shulman].

⁴² (1997) 32 OR (3d) 281 (GD) [*Calvert*].

There is a distinction between the decisions a person makes regarding personal matters, such as where or with whom to live, and decisions regarding financial matters. Financial matters require a *higher level of understanding*. The capacity to instruct counsel involves the ability to understand financial and legal issues. *This puts it significantly higher on the competency hierarchy.* [emphasis added]⁴³

In *Calvert*, Justice Benotto also referenced the various “levels” for the capacity to separate, divorce, and marry within a hierarchical analysis. In error, several cases across Canada have referred to this hierarchy of levels of capacity and adopted Justice Benotto’s statement. This was more recently observed, in the 2019 Saskatchewan Court of Appeal decision in *Hess v Thomas Estate*.⁴⁴

There is a long line of authoritative cases which more appropriately find that the hierarchy approach fundamentally misunderstands the nature of decisional capacity.⁴⁵ In Ontario, a line of jurisprudence observes that no hierarchy exists at all and holds that each of the various types of decisional capacity simply call for different criteria to be applied. In the decision in *Johnson v Huchkewich*,⁴⁶ Justice Corbett concluded that:

The applicant notes that testamentary capacity is not the same thing as the capacity to manage one’s property or the capacity to confer a power of attorney. I agree. *This does not mean the test is “higher” for testamentary capacity; rather, it is different.* [emphasis added]⁴⁷

Similarly, in the 2015 decision in *Ohenhen (Re)*, the Court of Appeal for Ontario observed that:

The law has long recognized that a person’s capacity to make important life decisions is not an all-or-nothing proposition; rather, there are varying degrees of capacity required that derive from the nature of the decision being made.

...

Simpler acts require lower levels of understanding, while more complicated ones require greater understanding. This is true both across and within categories of decision making. For example, a person may be capable of managing personal care, but not his or her

⁴³ *Calvert*, *supra* at para 54

⁴⁴ 2019 SKCA 26 at para 63.

⁴⁵ See *Boughten and Marston v Knight*, (1872-75), LR 3 P & D 64 (Eng QB); See also, Poyser, *supra* at 688, noting *Burdett v Thompson*, which appears to be unreported, but referred to in a footnote in *Boughten and Marston v Knight*, (1872-75), LR 3 P & D 64 (Eng QB) appearing at 72; *Park Estate (Re)* (1953), [1954] P 112 (Eng CA) at 135-136.

⁴⁶ 2010 ONSC 6002 [*Johnson*].

⁴⁷ *Johnson*, *supra* at para 34.

finances. Or, a person may have the capacity to make a will for a simple estate but not for a more complicated one.⁴⁸

Legally and medically speaking, the assessment of decisional capacity is an inexact science. Regardless of the decision being made, the level of conflict and complexity required in the context of a specific decision emphasizes the importance of situation-specific factors. The greater the conflict and complexity in the life circumstances of the decision maker, the more onerous the threshold to reach capacity for a specific decision. The more impaired or emotionally vulnerable a decision maker, the less conflict or complexity will be required to reach a level of incapacity. In similar life circumstances, even an impaired individual may retain decisional capacity.

Despite what some decisions suggest, it does not always follow that simply because one may have capacity with respect to certain decisions, and not others, that those decisions must fall along a linear hierarchy. A hierarchy of decisional capacity is not necessary where each decision is analyzed as it should be: with reference to the particular time and situation in which it is contemplated.⁴⁹

II. Capacity to Grant or Revoke a Power of Attorney

The factors to determine the requisite capacity to grant or revoke a power of attorney for property or personal care are found in some provincial legislation with guidance from case law.⁵⁰

In P.E.I., the *Powers of Attorney Act*⁵¹ does **not** contain a presumption of capacity specific to making a power of attorney (“POA”). The capacity to enter into a contract is, however, presumed for persons over 18. A lawyer who is asked to prepare a POA, can rely on this presumption unless they have reasonable grounds to believe the individual is in fact, incapable of entering into the contract or of giving and refusing consent.

⁴⁸ *Ohenhen (Re)*, 2018 ONCA 65 at paras 79-80.

⁴⁹ See generally, Shulman, *supra*.

⁵⁰ See Appendix “A”, “Assessing Capacity in Canada: Cross-Provincial Examination of Capacity Legislation.”

⁵¹ RSPEI 1988, c P-16.

A POA may survive a donor's incapacity if there is a provision in the POA document which expressly states that the powers outlined therein may be exercised during any subsequent legal incapacity of the donor.⁵² Under P.E.I.'s legislation, a POA may be revoked by the donor at any time while having "legal capacity." As previously discussed, in P.E.I. legal capacity for the purposes of the *Powers of Attorney Act* is defined as, "mental infirmity of such a nature as would, but for this Act, invalidate or terminate a power of attorney" and "legal incapacity" has a corresponding meaning.⁵³

In the 2003 P.E.I. Supreme Court decision in *Coughlan, Re*,⁵⁴ the capacity to revoke a POA for property was addressed alongside the question of testamentary capacity. While the *Coughlan* decision did not provide any specific criteria, Justice Cheverie made several important observations, including that:

- The drafting solicitor spent close to twenty minutes questioning the testator and addressing his capacity to revoke the POA;⁵⁵
- The solicitor concluded the testator was lucid, focused, and expressed a desire to regain control over his assets, even discussing his existing POA and the fact that it was stated to be irrevocable;⁵⁶
- The solicitor satisfied himself that the testator had knowledge of his assets and reviewed and understood the revocation when he signed it;⁵⁷
- The solicitor had arranged for the testator to meet with two psychiatrists who were engaged to assess the testator's capacity to revoke a POA as well as his testamentary capacity; and,
- That one of the psychiatrists who assessed the testator testified that "her opinion with respect to the ability of Coughlan to revoke a Power of Attorney is that he has to understand what it is in order to revoke it."⁵⁸

⁵² *Powers of Attorney Act*, RSPEI 1988 c P-16, s. 5 [*Powers of Attorney Act*]

⁵³ *Powers of Attorney Act*, *supra* at s.1.

⁵⁴ 2003 PESCTD 64 [*Coughlan*].

⁵⁵ *Coughlan*, *supra* at para. 88.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*, at para. 90.

⁵⁸ *Ibid.*, at para. 117.

It may also be helpful to look at the situation in Nova Scotia, where the province has recently adopted a capacity analysis in its new *Powers of Attorney Act*.⁵⁹ Nova Scotia's previous *Incompetent Persons Act*,⁶⁰ was heavily criticized for reflecting an outdated view of capacity. Under that act, an incompetent person was defined as "a person, not an infant, who is incapable from infirmity of mind of managing the person's own affairs."⁶¹ According to Margaret Hall, this definition relied on, "a vague and generalized definition of capacity directed to general mental status ('infirmity' for example) rather than a graduated reference to specific decision-making capabilities (the ability to understand and appreciate a particular category of decisions)."⁶²

As Nova Scotia's Act (at the time) did not set out a test for requisite capacity to execute an enduring power of attorney ("EPA"), guidance as to the requisite capacity was provided for in relevant case law. In *Re Isnor Estate*,⁶³ the court cited with approval, the holding in *Godelie v. Pauli (Committee of)*,⁶⁴ that in order to have capacity to execute an EPA, a donor must be able to understand the nature and effect of granting an EPA. The court in *Re Isnor Estate*, cited Misenor D.C.J. in *Godelie*, who stated that:

In my view, mental incapacity, by itself, is irrelevant to the common law unless it deprives the actor of his ability to make an informed judgment about the particular matter under consideration. When that ability is lacking because of mental incapacity, then the particular right under consideration may be circumscribed, or the particular obligation relieved against. It is therefore necessary in every case to examine the precise conduct in question, to determine the essential elements of that conduct, and to inquire as to the actor's ability to understand the nature and quality of those elements so that an informed judgment can be made. If that understanding is present, then any other form of mental disability, however great, is irrelevant. It follows therefore that the criteria to determine whether mental disability is relevant are not universal. Rather they will vary from case to case simply because the essential elements of conduct inevitably vary from case to case...⁶⁵

The decision in *Re Isnor* also provided the following criteria to determine the requisite capacity to execute a general EPA:

⁵⁹ R.S., c. 352, s. 1.

⁶⁰ RSNS 1989, c. 218 [*IPA*].

⁶¹ *IPA*, *supra* at s. 2(b).

⁶² Law Reform Commission of Nova Scotia, "Discussion Paper – Powers of Attorney Act" (March 2014), accessed online: <https://lawreform.ns.ca/wp-content/uploads/2020/04/powers-of-attorney-act-discussion-paper-2014.pdf> at p. 52.

⁶³ 2001 CanLII 25721, NSJ No 659 (SC) [*Re Isnor*].

⁶⁴ (1990) 39 ETR 40; 21 ACWS (3d) 1251 (Dist Ct) [*Godelie*].

⁶⁵ *Re Isnor*, *supra* at para 49.

- (1) An appreciation that the document authorizes the donee to exercise all the powers in the lifetime of the donor that the donor can himself exercise with respect to the matters set forth in the terms of the document, unless and until the document is revoked or otherwise terminated;
- (2) An appreciation that the all-embracing terms of the document give to the donee power to deal with everything that the donor owns and with respect to the total financial affairs of the donor; and,
- (3) An appreciation by the donor of the nature and extent of his property and financial affairs, as they exist at the time of the execution of the document, over which the attorney will be entitled to assume control.

The Law Reform Commission of Nova Scotia examined the decision in *Re Isnor* in its 2014 discussion paper on the creation of a Powers of Attorney Act. In that publication, the Commission proposed that the Act should expressly adopt a model of capacity that reflects a functional and graduated approach to capacity. The Commission also proposed that the Act should include provisions to confirm that a person may have capacity to make a decision even if requiring support in order to do so. Support in this context, according to the Commission, includes having the nature and effects of a decision explained by someone else, and also in terms of requiring assistance to express him or herself.⁶⁶ Supported decision making is addressed below.

On April 22, 2022, Nova Scotia's *Powers of Attorney Act* received Royal Assent. The Act was proclaimed on July 6, 2022 and came into force and effect on July 7, 2022. The Act introduces a new capacity analysis which features criteria that confirm the court's decision in *Re Isnor Estate*. According to Richard Niedermayer, "most other provincial power of attorney statutes address what constitutes capacity to execute a power of attorney, and the definition most commonly centres on the donor's ability to understand and appreciate the nature and effect of that appointment."⁶⁷ Nova Scotia's new Act attempts to take the analysis a step further in providing broader considerations that "generally require the donor to be of particularly sound mind in order to be deemed capable to execute a power

⁶⁶ British Columbia's *Power of Attorney Act*, s 11(2) for example, provides that an adult is presumed to have capacity and "An adult's way of communicating with others is not grounds for deciding that the adult is incapable of making the decisions or having the understanding referred to in subsection (1)", ie, having the capacity to make decisions about their financial affairs and to grant, revoke or change an EPA.

⁶⁷ Richard Niedermayer, Sarah Almon, and Madeleine Coats, "Accountability and Oversight: Nova Scotia's new *Powers of Attorney Act*" (May 9, 2022), accessed online: <https://www.stewartmckelvey.com/thought-leadership/accountability-and-oversight-nova-scotias-new-powers-of-attorney-act/>

of attorney.”⁶⁸ What’s more, the Act requires that an attorney must “now consult with a donor even after they have lost capacity, if reasonable to do so, in order to ascertain instructions prior to acting. If the donor is sufficiently able to provide instructions, the attorney must follow the most relevant instructions from the donor, even if they are inconsistent with prior instructions.”⁶⁹

Also, in P.E.I., if a person believes that an older adult does not have the decision-making capacity to manage their financial affairs, they can make an application to the court under the *Public Trustee Act*.⁷⁰ Subject to section 23 (1) of the *Public Trustee Act*, where a person is believed to be incompetent, the court may, on application, order that the person be examined by two physicians to ascertain the person’s state of mind and capability of managing their financial affairs.⁷¹ If the court is satisfied the older adult is not capable of managing their affairs and that having a committee⁷² would be in the adult’s best interest, the court can appoint a committee.⁷³ In addition, the court may order the committee take any action as is necessary to preserve the adult’s estate; bring legal proceedings on behalf of the adult; or, transfer or dispose of property.⁷⁴

Supported Decision Making

Supported Decision-making (“SDM”) is an alternative to traditional substitute decision-making models. It is argued that it enhances self-determination and dignity for individuals with compromised mental capacity. One of the first self-contained SDM legal regimes in the world is under British Columbia’s *Representation Agreement Act*,⁷⁵ which is legislation that allows adults to enter into an agreement to appoint a supported or substitute decision-maker.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ RSPEI 1988, c P-32.2 [*Public Trustee Act*].

⁷¹ *Public Trustee Act, supra* at s. 23.

⁷² A committee takes custody of all of the adult’s property and finances. Generally, a committee has the power to make payments for the maintenance of the adult; invest and deposit the adult’s money; lease property for a term not more than three years; and, perform any contracts entered into by the adult before the adult became incapable.

⁷³ *Public Trustee Act, supra* at s. 25.

⁷⁴ *Ibid.*, at s. 26.

⁷⁵ RSBC 1996, c 405.

Most recently, in February of 2022, Brad Trivers, who was then Social Development and Housing Minister for P.E.I., introduced the *Supported Decision-Making Agreement Act*.⁷⁶ The intent of the act was to “set out a legal framework to recognize supported decision-making agreements, which allow an individual with a cognitive disability to select a team of trusted people to help with making financial or personal health decisions.”⁷⁷

Under the proposed Act, capacity means, “in making a decision about a matter, the ability of a person, independently or with assistance, to understand the information that is relevant to the decision and to appreciate the reasonably foreseeable consequences of a decision and the failure to make a decision.”⁷⁸ The Act also provides that it should be administered in accordance with the following principles:

A person is presumed to have capacity to make decisions about the person’s financial matters and personal matters until the contrary is determined, including the capacity to make an agreement under this Act⁷⁹

...

A person is entitled to communicate by any means that enables the person to be understood, and the means by which a person communicates that is not relevant to a determination of whether the person has the capacity to make an agreement under this Act.⁸⁰

In September of 2022, representatives of P.E.I.’s Coalition for Supported Decision-Making told a parliamentary standing committee that P.E.I.’s proposed law could actually lead to fewer rights for residents with intellectual or cognitive disabilities. According to Julie Smith, the former director of the P.E.I. Association for Community Living, the wording used in the definition of capacity undermines equal rights for persons with disabilities and is inconsistent with the Charter of Rights and Freedoms and the CRPD.⁸¹

⁷⁶ Bill 49, *Supported Decision-Making Agreement Act*, 2^d Sess., 66th Gen. Ass., Prince Edward Island, 2022 [Bill 49].

⁷⁷ Stu Neatby, “P.E.I.’s proposed law could result in rights violations for adults with disabilities, say advocates” (September 8, 2022), *SaltWIRE*, accessed online: <https://www.saltwire.com/atlantic-canada/news/peis-proposed-law-could-result-in-rights-violations-for-adults-with-disabilities-say-advocates-100770526/> [Neatby].

⁷⁸ Bill 49, *supra* at s. 1(c).

⁷⁹ *Ibid.*, at s. 3(a).

⁸⁰ *Ibid.*, at s. 3(b).

⁸¹ Neatby, *supra*.

Recently, New Brunswick introduced its *Supported Decision-Making and Representation Act*.⁸² The *Act* not only defines capacity,⁸³ but also, outlines how assistance and support factor into the decision-making process. The *Act* also outlines the capacity assessment process and provides that a person is entitled to refuse, or, undergo, or, to continue with a capacity assessment but also that during the assessment, a person is entitled to have a person accompany them, have a device or interpreter or other person to assist them to communicate, and ask the assessor questions or raise concerns with the assessor about the assessment.⁸⁴

III. Capacity to Consent to Healthcare Treatment

In P.E.I., the *Consent to Treatment and Health Care Directives Act*,⁸⁵ sets out the requisite capacity to consent to treatment. Here, it is held that a person has the requisite capacity to consent to treatment and healthcare including:

1. Understanding the information that is relevant to making the decision;
2. Understanding the information applicable one's particular situation;
3. Understanding the right to make a decision; and,
4. Appreciating the reasonably foreseeable consequences of a decision, or, lack of decision.⁸⁶

The *Consent to Treatment and Health Care Directives Act* also provides that in P.E.I., everyone over the age of sixteen years who is capable may execute a health care directive. Under said directive, a maker can appoint a proxy.⁸⁷

A directive and the authority of a proxy become effective when the maker is no longer capable of making or communicating decisions about healthcare, or, upon the occurrence

⁸² SNB 2022, c 60 [SDRA].

⁸³ *SDRA*, *supra* at section 3(1) provides that a person has the capacity to make a decision if the person is able to, (a) understand the information that is relevant to the decision, and (b) appreciate the reasonably foreseeable consequences of the decision.

⁸⁴ *SDRA*, *supra* at s. 54.

⁸⁵ RSPEI 1988, c C-17.2 [*Consent to Treatment and Health Care Directives Act*].

⁸⁶ *Consent to Treatment and Health Care Directives Act*, *supra* at s. 7.

⁸⁷ A proxy is a person appointed by the maker of the directive to make decisions on his or her behalf.

of such other event or condition as may be specified in the directive and continue to be effective for the duration of the maker's incapacity or inability to communicate.⁸⁸

For the purposes of section 25 of the *Consent to Treatment and Health Care Directives Act*, as long as the maker has the capacity to make decisions, a directive may be revoked by:

- a) A later directive;
- b) A later writing declaring an intention to revoke the directive by the maker and in accordance with the Act; or,
- c) The destruction, with intent to revoke, of all original executed copies of the directive either by the maker or by some other person in the presence and direction of the maker.

Also, unless the directive expressly provides otherwise, the appointment of a spouse as a proxy in a directive is revoked if the person ceases to be a spouse after executing the directive.⁸⁹

IV. Testamentary Capacity

Capacity to Make a Will

The law surrounding the capacity to make a will is established in the common law. The requisite test for the capacity to make a will was developed in a series of 19th century English decisions which declared that a testator must be of sound mind, memory and understanding.⁹⁰ The starting point of these decisions and the legal criterion for determining the requisite capacity to make a will was established in Chief Justice Cockburn's 1870 judgment in *Banks v Goodfellow*.⁹¹ Several recent testamentary

⁸⁸ *Consent to Treatment and Health Care Directives Act*, section 21(4).

⁸⁹ *Ibid.*, section 25(2).

⁹⁰ Law Commission of UK, "Consultation Paper on Mentally Incapacitated Adults and Decision-Making: An Overview" (April 5, 1993), accessed online: <https://www.lawcom.gov.uk/project/mentally-incapacitated-adults-and-decision-making-an-overview/> at 26 (citing *Boughton v. Knight* (1873), LR 3 P. & D. 64 (Eng. Prob. & Div. Ct.); *Smith v. Tebbitt* (1867), 1 P. & D. 398 (Eng. Prob. & Div. Ct.); *Harwood v. Baker* (1840), 3 Moo. PC 282, 13 ER 117).

⁹¹ *Banks v Goodfellow*, *supra*.

capacity cases across Canada have applied *Banks v Goodfellow*.⁹² The key passage from that decision reads as follows:

It is essential to the exercise of [the testamentary power] that the testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.⁹³

The test can be summarized as requiring the testator of being able to understand the following elements:

1. The nature and effect of making a will;
2. The extent of the testator's property that may be disposed by a will;
3. The person's who are to receive the property under the will, and the moral claims of persons who should receive a share of that property; and,
4. The way in which the assets are to be distributed under the will.⁹⁴

⁹² **Alberta:** *Christensen v Bootsman*, 2014 ABQB 94; *Mah v Zukas Estate*, 2016 ABQB 587; *Wasylynuk v Bouma*, 2018 ABQB 159; *Mawhinney v Scobie*, 2019 ABCA 76, reversing 2017 ABQB 422, leave to appeal refused, 2019 CarswellAlta 1654 (SCC), *Re From Estate*, 2019 ABQB 988. **British Columbia:** *Laszlo v Lawton*, 2013 BCSC 305; *Devore-Thompson v Poulain*, 2017 BCSC 1289; *Re Singh Estate*, 2019 BCSC 272; *Halliday v Halliday Estate*, 2019 BCSC 554. **Manitoba:** *Schrof v Schrof*, 2017 MBQB 51. **New Brunswick:** *Marsden v Talbot*, 2018 NBCA 82, affirming *Re Estate of Jean Agnes Marsden*, 2017 NBQB 199. **Nova Scotia:** *Wittenberg v Wittenberg Estate*, 2015 NSCA 79, affirming 2014 NSSC 301; *Whitford v Baird*, 2015 NSCA 98, affirming *Re Baird Estate*, 2014 NSSC 266. **Ontario:** *Orfus Estate v Samuel & Bessie Orfus Family Foundation*, 2013 ONCA 225, affirming 2011 ONSC 3043; *Walman v Walman Estate*, 2015 ONSC 185; *Yeas v Yeas*, 2017 ONSC 7402; *Birtzu v McCron*, 2017 ONSC 1420; *Stekar v Wilcox*, 2017 ONCA 1010, affirming 2016 ONSC 5835; *Shannon v Hrabovsky*, 2018 ONSC 6593; *Dujardin v Dujardin*, 2018 ONCA 597, affirming 2016 ONSC 6980; *Slover v Rellinger*, 2019 ONSC 6497 & unreported *voir dire* Court File No CV-16-005069-00ES, 21 February 2019 (Ont SCJ); *Graham v Graham*, 2019 ONSC 3632; *Kay v Kay Sr*, 2019 ONSC 3166; *Quaggiotto v Quaggiotto*, 2019 ONCA 107, affirming 2018 ONSC 345; **Quebec:** *Gidney v Lemieux*, 2016 QCCA 1381; **Saskatchewan:** *Cutts v Phillips*, 2016 SKQB 126, *Bachman v Scheidt*, 2016 SKCA 150, affirming 2016 SKQB 102; *Karpinski v Zookewich Estate*, 2018 SKCA 56, affirming 2017 SKQB 278; *Olson v Skarsgard Estate* 2018 SKCA 64, *Carlson v Carlson (Estate)*, 2018 SKQB 196.

⁹³ *Banks v Goodfellow*, (1870), [1861-1873] All ER Rep 47, 39 LJQB 237, [1871] LR 11 Eq 472, LR 5 QB 549, 22 LT 813 (Eng QB) at 565.

⁹⁴ British Columbia Legal Institute, "Report on Common-Law Tests of Capacity" (September 2013), *BCLI Report*, 73, accessed online: http://www.bcli.org/wp-content/uploads/2013/09/2013-09-24_BCLI_Report_on_Common_Law_Tests_of_Capacity_FINAL.pdf

The first element of the test requires that the testator be able to understand the making of *their particular* will, but not will-making in general.⁹⁵ The second element of the test is a determination of whether the testator understood the extent of the property in their estate. Where it concerns the second element of the test, courts have been clear in explaining that the testator does not need to have “encyclopedic knowledge,”⁹⁶ or the “precise makeup” of their estate as long as they have a general idea, or “general structure” of the types of property owned.⁹⁷

The third element is often raised by disappointed heirs who expected to inherit from the estate. Here, the requirement is that the testator is able to appreciate who would have a natural claim to their accumulated assets. Then, the testator must use a rational mind to decide to include or exclude members of that group from her will.⁹⁸ The testator has testamentary freedom to exclude whomever she chooses, however, if she suffers from a mental disorder that causes her to disinherit close relatives, the court will not let the will stand.⁹⁹

Finally, the fourth element is a requirement that no insane delusions shall influence the testator’s will. In *Banks v Goodfellow*, an insane delusion was defined as one that causes the testator to dispose of his property in a way that would not have been made if the mind had been sound. Several decisions have struck down a will for delusions that resulted in a partial or total disinheritance of the testator’s family. In *Smee v Smee*,¹⁰⁰ the testator believed that he was the illegitimate son of King George IV. In *Corbett v Wall*,¹⁰¹ the testator believed that his daughter had wired his chair and given him an electric shock. Other delusions that have invalidated wills included the testator believing that two of her

⁹⁵ See *Hoff v Atherton*, [2004] EWCA Civ 1554 at para 35, and Albert H Oosterhoff, “A Review of Testamentary Capacity in Canada with Reference to Recent Cases”, Isaac Pitblado Lectures, November 8, 2019 at 5.

⁹⁶ *Quaggiotto v Quaggiotto*, 2019 ONCA 107 at para 7, affirming 2018 ONSC 345.

⁹⁷ See *Orfus Estate v Samuel & Bessie Orfus Family Foundation*, 2011 ONSC 3043 at para 106, affirmed 2013 ONCA 225 at para 60.

⁹⁸ Albert H Oosterhoff, “A Review of Testamentary Capacity in Canada with Reference to Recent Cases”. Isaac Pitblado Lectures, November 8, 2019 at 6.

⁹⁹ See *Sharp v Adam*, [2006] EWCA Civ 449.

¹⁰⁰ (1879), 5 PD 84 (CA).

¹⁰¹ [1939] 2 DLR 201 (NBCA).

brothers alienated her from her mother in *Re Fawson Estate*,¹⁰² and delusions that children opposed their father's connection to a church in *Fuller Estate v Fuller*.¹⁰³

Whether a testator has the requisite capacity to make a will is a question of fact to be determined in all of the circumstances. This assessment is a highly individualized and fact-specific inquiry. As such, the question of testamentary capacity focuses on the time at which instructions are given and not necessarily when the will is executed. Though, as our case law expands, we know this to be a factor.¹⁰⁴

The rule in *Parker v Felgate*¹⁰⁵ provides that even if the testator lacked testamentary capacity at the time the will was executed, the will is still valid if:

- (a) The testator had testamentary capacity at the time he or she gave the lawyer instructions for the will;
- (b) The will was prepared in compliance with those instructions; and,
- (c) When the testator executed the will, he or she was capable of understanding that he or she was signing a will that reflected his or her own previous instructions.

As cautioned by courts, the rule in *Parker v Felgate* can only be applied where instructions for the will were given to a lawyer. In other words, even if the testator provided instructions to a non-lawyer at a time when they had capacity, and that layperson then conveyed those instructions to a lawyer, the resulting will could not be valid if the testator lacked testamentary capacity on the date of its execution.

¹⁰² 2012 NSSC 55.

¹⁰³ 2004 BCCA 218.

¹⁰⁴ *Banton v Banton*, 1998, 164 DLR (4th) 176; *Eady v Waring* (1974), 2 OR (2d) 627 (CA): “While the ultimate probative fact which a Probate Court is seeking is whether or not the testator has testamentary capacity at the time of the execution of his will, the evidence from which the Court's conclusion is to be drawn will in most cases be largely circumstantial. It is quite proper to consider the background of the testator, the nature of his assets, his relatives and other having claims upon his bounty, and his relationship to them, and his capacity at times subsequent to the execution of the will, to the extent that it throws light upon his capacity at the time of the making of the will. Proven incapacity at a later date obviously does not establish incapacity at the time of execution of the disputed will, but neither is that fact irrelevant. Its weight depends upon how long after the crucial time the incapacity is shown to exist, and its relationship to matters that have gone before or arose at or near the time of the execution of the will itself.” at p. 639 [emphasis added], para. 178.

¹⁰⁵ (1883), 8 PD 171, most recently cited in *Geluch v Geluch Estate*, 2019 BCSC 2203 at para 102 [*Parker v Felgate*].

A solicitor drafting a will is obliged to assess the client's testamentary capacity prior to preparing the will. The drafting lawyer must ask probing questions and be satisfied that the testator can not only communicate clearly, and answer questions in a rational manner, but also that the testator has the ability to understand the nature and effect of the will, the extent of the testator's property, and all potential claims that could be expected with respect to the estate. Notably, regardless of capacity, the requirements for due execution as set out in Section III of P.E.I.'s *Probate Act*¹⁰⁶ must be met to have a legal testamentary document.¹⁰⁷

In the 2002 Prince Edward Island decision in *Praught, Re*,¹⁰⁸ Justice Jenkins set aside a will after finding that the testator lacked testamentary capacity. In that decision, there was no evidence to demonstrate that the testator was "generally aware of the nature and extent of her property."¹⁰⁹ There was, however, ample evidence that the drafting solicitor had failed to make the necessary inquiries.¹¹⁰

In *Praught*, evidence of the testator's incapacity came from her doctor, her retirement residence, and her caregivers and demonstrated a lack of testamentary capacity. When taken together with the evidence of what transpired in the solicitor's office, Justice Jenkins was of the view that the totality of the evidence did not approach satisfying the test of requisite testamentary capacity.

In summary, Justice Jenkins held that:

Upon considering all the evidence in relation to the attributes of testamentary capacity, I conclude that the testator did not have testamentary capacity when she made her will. This conclusion presents itself to me quite obviously. **The absence of a disposing mind and memory was ubiquitous. The evidence of Dr. Lantz, the caregivers, and the nieces shows a clear picture of an elderly person with senile dementia who had lost the use of her mental faculties requisite to will-making.** Gladys Praught's loss of her ability to comprehend of her own volition even the basics of daily living, let alone the elements of will-making, was pervasive and constant. The evidence of any general basis

¹⁰⁶ RSPEI, 1988 c P-21

¹⁰⁷ *Probate Act, RS PEI* 1988, c P-21 s. 60

¹⁰⁸ 2002 PESCTD 1 [*Praught*].

¹⁰⁹ *Praught, supra* at para. 93.

¹¹⁰ The drafting solicitor did not inquire about the value of the testator's property, the state of her health, and did not probe further into her condition of "being forgetful and confused," which was ultimately a sign of her senile dementia. Her instructions also made mention of siblings, however, the drafting solicitor failed to canvass her close family members and did not look further into the instructions that were provided to him.

to find otherwise is very limited, and except for the observations of niece Colleen, is mainly conclusions based on quite limited observations. [emphasis added]¹¹¹

In the 2003 Prince Edward Island decision in *Coughlan*¹¹² a daughter was able to propound her father's will by successful in establishing his testamentary capacity. In *Coughlan*, the testator was 90 years old at the time he executed his Will. At issue were lingering questions of the testator's age-appropriate memory loss and whether or not he suffered from Alzheimer's disease.

In *Coughlan*, the court relied on the evidence of the drafting solicitor and two expert witnesses (both psychiatrists) who were all of the opinion that the testator had the requisite capacity to execute a will. While Justice Cheverie acknowledge that the testator may have had "some details mixed up," he recognized that the testator "generally knew the nature and extent of his property. He knew he had some savings; he knew he had a pension; he knew he had an interest in some real estate."¹¹³ As a result, Justice Cheverie concluded that the evidence supported the finding that the testator was sufficiently clear in his understanding and memory to know, on his own, and in a general way the nature and extent of his property.

Unlike the decision in *Praught*, the *Coughlan* decision featured a drafting solicitor who "went to great lengths" to determine whether the testator was sufficiently clear in his understanding and memory to make the testamentary provisions provided for in his will. The solicitor even went so far as to engage two psychiatrists to offer their professional opinions on the testator's capacity. Justice Cheverie concluded that "the weight of expert opinion in this case supports the conclusion that he had the requisite capacity, and I so find."¹¹⁴

On the role of the drafting solicitor, Justice Cheverie had the following to say:

I wish to comment on the process and actions engaged by Mr. Mitchell [the drafting solicitor] in his dealings with John James Coughlan [the testator]. **I was impressed by the steps which he took to satisfy himself as to Coughlan's capacity to make a will and the manner in which he approached the topic from a professional and common**

¹¹¹ *Ibid.*, para. 107.

¹¹² *Coughlan*, *supra*.

¹¹³ *Ibid.*, at para. 129.

¹¹⁴ *Ibid.*, at para. 130.

sense approach. Some of the inquiries he made of Coughlan appear light and superficial. For example, the baseball references.¹¹⁵ But in the end, the answers to those questions were very telling. Mitchell made sure Mary Coughlan [the daughter] was not present when he took his instructions, and was careful to determine Coughlan's knowledge of the extent of his estate, his potential beneficiaries, and his reasons for his dispositions. Further, Mitchell, from his experience, had a sense this will would be contested. It is for that reason he engaged the psychiatrists to comment on what he felt was the disposing mind of John James Coughlan. Mitchell indeed made detailed notes of his meetings with Coughlan and his observations from those meetings and they are now part of the record at this trial. Suffice it to say that Mitchell was not going to rely on his memory alone if this matter were contested - he had his notes. [emphasis added]¹¹⁶

Capacity to Revoke a Will

A testator who seeks to revoke a will requires testamentary capacity, especially in cases where a testator revokes a will by executing a later will or testamentary document.

Where it concerns the revocation of a will by physical destruction, the requisite capacity for that decision requires that the testator must be able to understand the nature and effect of the destruction and revocation at the time the will is destroyed and must have testamentary capacity at the time of the destruction. If the testator lacks that ability at the time of the destruction of the will, then the will is not deemed properly revoked.¹¹⁷ To make this determination, it is vitally important to know precisely when a will was destroyed, and if at that time, the person was capable of revoking his will.

As revocation requires testamentary capacity, in cases where a testator makes a will and then subsequently and permanently loses testamentary capacity, that testator cannot revoke that will. The only exception to this, in some Canadian provinces, is where a testator marries (and has the requisite capacity to marry) at which time the will is effectively revoked.

¹¹⁵ The lawyer asked about the testator's interest in baseball and specifically the Mark McGuire home run race. He questioned the testator about how many home runs Mark McGuire had at the time and the testator was correct: 62.

¹¹⁶ *Coughlan, Re* 2003 PESCTD 64 (CanLII) at para. 132.

¹¹⁷ This principle is outlined in the English case of *Re. Sabatini* (1969), 114 Sol. J 35 (Prob. D.), as well as in Canadian case law: *Re. Beattie Estate*, [1944] 3 WWR 727 (Alta Dist Ct) at 729-730, *Re Drath* (1982), 38 AR 23 (QB) at 537. For more detailed discussion on revocation and destruction of wills, please see Gerald Robertson, *Mental Disability and the Law in Canada*, 2nd ed, (Toronto: Carswell, 1994) at 224 to 225. See also *Re Green (Estate)* 2001 ABQB 835 at para 34.

This revocation of a Will upon marriage can raise serious consequential issues when a vulnerable adult marries yet lacks the requisite capacity to make a new Will thereafter or even dies before a new Will can be executed.

As a result, some provinces have now recognized this inequity as an issue and have enacted legislation to prevent revocation of Wills upon marriage. Marriage does not revoke a Will in Quebec. Alberta's *Wills and Succession Act* came into force on February 1, 2012, and under that act marriage now no longer revokes a Will.¹¹⁸ British Columbia followed suit and on March 31, 2014, that province's new *Wills, Estates and Succession Act* ("WESA") came into force.¹¹⁹ Under WESA, marriage now no longer revokes a Will. In 2019, Saskatchewan introduced Bill 175, *An Act to amend The Marriage Act, 1995 and to make consequential amendments to The Wills Act, 1996*. Under this act, which received Royal Assent on March 16, 2020, marriage no longer revokes a Will. Marriage no longer revokes a Will in Yukon since Bill 12, *Amend the Wills Act, 2020*, came into force on May 1, 2021. Finally, Ontario's Bill 245, *Accelerating Access to Justice Act, 2021*, was tabled in February 2021 and included amendments which repealed the revocation of a Will by marriage. These changes to the *Succession Law Reform Act*¹²⁰ came into effect on January 1, 2022.

Capacity to Make a Codicil

Where it concerns the capacity to make a codicil, various provincial legislation defines a "will" as including a "codicil."¹²¹ Therefore, capacity to make a codicil is determined on the criteria applied to determining testamentary capacity.

¹¹⁸ *Wills and Succession Act*, SA 2010, c W-12.2.

¹¹⁹ *Wills, Estates and Succession Act*, SBC 2009 c 13.

¹²⁰ R.S.O. 1990, c. S.26 [SLRA].

¹²¹ See *Wills, Estates and Succession Act*, SBC 2009, c 13 section 1(1); *Wills and Succession Act*, SA 2010, c W-12.2, section 1(1); *The Wills Act*, 1996, SS 1996, c W-14.1, section 1(1); *The Wills Act*, CCSM c W150, section 1; *Succession Law Reform Act*, RSO 1990, c S 26, section 1(1); *Wills Act*, RSNB 973, c W-9, section 1; *Wills Act*, RSNS 1989, c 505, 2(f); *Probate Act*, RSPEI 1988, c P-21, section 1(t); *Wills Act*, RSNL 1990, c W-10, section 11 (and see *King Estate v. Hiscock*, 2015 CanLII 78084 (NLSC)); *Wills Act*, RSY 2002, c 230, section 1; *Wills Act*, RSNWT 1988, c W-5, section 1; *Wills Act*, RSNWT (Nu) 1988, c W-5, section 1.

V. Capacity to Make an *Inter Vivos* Gift

There is a notable difference between making a gift during one's lifetime and making a gift through a testamentary instrument. *Inter vivos* gifts come in all different shapes and sizes and can include a small cash gift, or the gift of a deed to a substantive real property. The gift could include a very small portion of the gift-maker's possessions, or could amount to their entire life savings. Testamentary gifts, on the other hand, have the same characteristics, in that the will-maker is gifting away the entirety of their estate, all of their assets, and the gift takes place upon death.

This determination is solely reliant on the common law as no statutory criteria exists to assist with determining the requisite capacity to make a gift. Common law factors therefore apply. These factors are to be determined in part, on the size and nature of the gift being given.

In the 1829 case of *Ball v Mannin*,¹²² criteria were set out which found that in order to have capacity to make an *inter vivos* gift, a gift-maker must be able to understand the "nature and effect" of the transaction, if the gift-maker were given a full explanation of its basic terms. This has been refined over the years through various cases and is easily divided into two requirements. In order to be capable of making a gift, a donor requires the following:

- a) The ability to understand the nature of the gift; and,
- b) The ability to understand the specific effect of the gift in the circumstances.¹²³

This criteria was re-iterated in the 1977 English decision of *Re Beaney*,¹²⁴ which was subsequently adopted and followed in Canadian case law.¹²⁵ The criteria was also

¹²² (1829), 3 Bli NS 1, 1 Dow & CL 380, 4 ER 1241 HL (Irish Court of Exchequer).

¹²³ See *Royal Trust Company v Diamant*, [1953] (3d) DLR 102 (BCSC) at 6; and *Bunio v Bunio Estate* 2005 ABQB 137 at paras 4 and 6.

¹²⁴ [1978] 1 WLR 770, [1978] 2 ALL ER 595 (Ch D).

¹²⁵ See for example, *Lynch Estate v Lynch Estate*, 1993 CanLII 7024 (ABQB) at para 96; *MacGrotty v Anderson*, 1995 CanLII 2952 (BCSC) at para 20(2); *Elsie Jones (Re)*, 2009 BCSC 1723 at para 100; *Estate of Emiel Cyrille Van de Keere*, 2012 MBQB 33 at para 27; *Gironda v Gironda*, 2013 ONSC 4133 at para 99; *Wasylynuk v Bouma*, 2018 ABQB 159 at para 123; *Gordon Estate (Re)*, 2018 BCSC 487 at para 44, *Gauthier et al v Gauthier*, 2019 MBCA 71 at para 11; *Slover v Rellinger*, 2019 ONSC 6497 at para 277; and *Bolster Estate(Re)*, 2020 ABQB 100 at para 21.

discussed in the 1953 British Columbia decision in *Royal Trust Co v Diamant*.¹²⁶ In that case, Justice Whittaker determined that the “degree of mental incapacity which must be established in order to render a transaction *inter vivos* invalid, is such a degree of incapacity as would interfere with the capacity to *understand substantially the nature and effect of the transaction*.”¹²⁷ *Royal Trust Co v Diamant* has been cited favourably in a large number of subsequent cases on capacity to make a gift.¹²⁸

While some case law suggests the onus is on the person attacking the gift to prove the incapacity of the maker,¹²⁹ the general consensus is that the onus is on the party alleging a valid gift to prove that the gift-maker had capacity.¹³⁰ The standard of proof is always the civil standard, requiring proof on a balance of probabilities. A gift or other *inter vivos* wealth transfer is void, not voidable, for want of capacity.¹³¹

The determination of the requisite capacity to gift changes if the gift is significant in value in relation to the donor’s estate. In such cases, the applicable capacity criteria applied changes to that required for the capacity to make a will, that is, testamentary capacity.

In *Re Beaney*, the court explained the difference in approach:

At one extreme, if the subject-matter and value of a gift are trivial in relation to the donor’s other assets a low degree of understanding will suffice. But, at the other, if its effect is to dispose of the donor’s only asset of value and thus for practical purposes to pre-empt the devolution of his estate under his will or on an intestacy, then the degree of understanding required is as high as that required to make a will, and the donor must understand the claims of all potential donees’ and the extent of the property to be disposed of.¹³²

¹²⁶ [1953] (3d) DLR 102 (BCSC).

¹²⁷ *Royal Trust Co v Diamant*, [1953] (3d) DLR 102 (BCSC) at 6; most recently cited and applied in *Geluch v Geluch Estate*, 2019 BCSC 2203 at para 103 and *Gauthier et al v Gauthier*, 2019 MBCA 71 at para 11.

¹²⁸ *Ewart v Abrahams* (1988), 22 BCLR (2d) 138 (CA) at 143; *Dahlem (Guardian ad litem of) v Thore* (1994) 2 ETR (2d) 300 at para 45, 47 ACWS (3d); *Booth Estate v McGowan* (1998), 72 OTC 115, [1998] OJ No 3464 (SCJ) at para 52; *Lodge (Attorney for) v Royal Trust Corp of Canada*, 2003 BCSC 1416 at para 51; *St. Onge Etsate v Breau*, 2009 NBCA 36 at para 29; *York v York*, 2011 BCCA 316 at para 38

¹²⁹ Poyser at 414, citing *Rogers (Re)* 1963 CarswellBC 51. See also *Archer v St John*, 2008 ABQB 9 at para 22.

¹³⁰ *Elsie Jones (Re)*, 2009 BCSC 1723 at para 5; *Breau v The Estate of Ernest St. Onge et al*, 2009 NBCA 36 at paras 27; *Lodge v Royal Trust Corp*, 2003 BCSC 1416 at para 49; *Weisbrod v Weisbrod*, 2013 SKQB 282 at para 18; *Blake v Blake*, 2019 ONSC 1464 at paras 24-25; *Slover v Rellinger*, 2019 ONSC 6497 at para 41; *The Canada Trust Company v Umanoff et al*; *Re Estate of John Alan Kell*, 2019 MBQB 88 at para 6.

¹³¹ Poyser at 401.

¹³² *Re Beaney*, [1978] 2 All ER 595 (Ch Div) at 601.

While the court in *Re Beaney* imposed the standard of testamentary capacity for gifts that are the donor's "only asset of value" and effectively comprise most of the estate, Canadian law has imposed the standard of testamentary capacity for gifts that comprise less than the majority of an estate. In an even earlier case, *Mathieu v Saint-Michel*,¹³³ the Supreme Court of Canada ruled that the standard of testamentary capacity applied for an *inter vivos* gift of real property, even though the gift was not the donor's sole asset of value. The principle appears to be that once the gift is *significant*, relative to the donor's estate, even if it is less than the entirety of the estate, then the standard for testamentary capacity applies for the gift to be valid.

VI. Capacity to Marry, Separate, Divorce, or Reconcile

An individual must have the requisite decisional capacity to enter into a marriage - but also, to separate from one's spouse, commence divorce proceedings, and to reconcile. The capacity for each decision is governed by the common law.

Capacity to Marry

Some, but not all, provinces and territories in Canada have marriage legislation that contemplates the necessity of capacity in order to get married, however, none of these jurisdictions actually set out the criteria to determine that capacity.¹³⁴ For example, certain statutes prevent a marriage commissioner from issuing a license to, or solemnizing the marriage of someone who is known to lack mental capacity or where there are reasonable grounds to believe they lack the mental capacity to marry,¹³⁵ are incapable of giving a valid consent,¹³⁶ or have been certified as mentally disordered.¹³⁷

¹³³ [1956] S.C.R. 477 at 487.

¹³⁴ See Appendix "B", "Capacity to Marry in Canada: Cross-Provincial Examination"

¹³⁵ Section 7 of the Ontario *Marriage Act*, R.S.O. 1990, c. M.3, provides: "No person shall issue a license to or solemnize the marriage of any person who, based on what he or she knows or has reasonable grounds to believe, lacks mental capacity to marry by reason of being under the influence of intoxicating liquor or drugs or for any other reason."

¹³⁶ *Marriage Act*, R.S.N.W.T. (Nu.) 1988, c. M-4 (Nunavut).

¹³⁷ *The Marriage Act*, CCSM c. M50 (Manitoba).

In Manitoba, persons certified as “mentally disordered” cannot marry unless a psychiatrist certifies in writing that the individual is able to understand the nature of marriage and its duties and responsibilities.¹³⁸ In fact, a person who issues a marriage license or solemnizes the marriage of someone who is known to be certified as mentally disordered in Manitoba, will be guilty of an offence and liable on summary conviction to a fine.¹³⁹

In Ontario, Section 7 of the *Marriage Act* prohibits persons from issuing a license to or solemnizing the marriage of any person who, based on what he/she knows, or has reasonable grounds to believe, lacks mental capacity to marry by reason of being under the influence of intoxicating liquor or drugs *or for any other reason*.¹⁴⁰

In British Columbia, the *Marriage Act*,¹⁴¹ makes it a criminal offence to issue a license for a marriage, or to solemnize a marriage, when the authority in question knows, or has reason to believe that either of the parties to the marriage is mentally disordered or impaired by drugs or alcohol.¹⁴² The legislation further provides that a caveat can be lodged with an issuer of marriage licenses against the issuing of a license to persons named in the caveat.¹⁴³ Once lodged, the caveat prevents the issuing of a marriage license until the issuer has inquired about the caveat and is satisfied the marriage ought not to be obstructed, or the caveat is withdrawn by the person who lodged it.¹⁴⁴ However, there are no reported cases citing section 35 of the British Columbia legislation, which suggests that offences under this legislation, if they occur, are not prosecuted.¹⁴⁵

New Brunswick’s *Marriage Act* also features a similarly worded *caveat* provision. In Quebec, the Civil Code also allows interested parties to oppose the solemnization or issuing of a marriage to individuals that may lack the mental capacity to do so. Quebec’s

¹³⁸ *The Marriage Act*, CCSM c M50, section 20.

¹³⁹ *The Marriage Act*, CCSM c M50, sub-section 20(3).

¹⁴⁰ *Marriage Act*, RSO 1990, c M 3, section 7

¹⁴¹ RSBC 1996, chapter 282.

¹⁴² *Ibid.*, at section 35.

¹⁴³ *Ibid.*, at section 23.

¹⁴⁴ *Ibid.*, at subsection 23(2).

¹⁴⁵ The writer had been told, however, by British Columbia counsel that this provision is successfully used for protective purposes where predatory marriages are suspected. Discussion with lawyers in British Columbia suggests further, however, that the caveat system, although useful in theory, is not fully implemented; we understand that there is no centralized, searchable roster of caveats lodged in the province.

Civil Code holds that a marriage may be declared null upon the application of an interested person who applies within three years of the solemnization, except where public order is concerned, in particular if the consent of one of the spouses was not “free or enlightened”.

In Prince Edward Island, under the *Marriage Act*,¹⁴⁶ no person may issue a marriage certificate or solemnize a marriage of a person under the age of 16 years old.¹⁴⁷ However there are no other “capacity” requirements or criteria, but for age.

Where provincial or territorial legislation is silent on this issue of capacity and marriage, common law dictates that a marriage may be found to be void *ab initio* if one or both of the spouses did not have the requisite mental capacity to marry.

As such, whether by statute or at common law, every province requires that persons have legal capacity in order to consent to, and therefore enter into a valid marriage. A lack of capacity will render a marriage void *ab initio*, meaning it is as if it never happened. The marriage is null and void from the start.¹⁴⁸

While various legislation exists which addresses the commissioning of a marriage, it appears there is no diligence in heeding the provisions since marriages continue to be convened where there is no apparent attention paid to capacity and consent. With less than ideal legislation currently in place, we must turn to the common law to determine the criteria for the capacity to marry. There is still no single or complete definition of the requisite capacity to marry, or even of what the concept of consent to marry truly involves.

There have been historical, and more modern, cases that take the view that marriage is but a mere contract, and a simple one at that, “not at all difficult to understand,”¹⁴⁹ and which “does not require a high intelligence to comprehend.”¹⁵⁰ The 2011 British Columbia

¹⁴⁶ RSPEI 1988, M-3.

¹⁴⁷ *Marriage Act*, RSPEI, 1988 M-3 at section 17.

¹⁴⁸ *Feng v Sung Estate*, (2003) 1 ETR (3d) 296, aff'd 11 ETR (3d) 169 (ONCA) at para 66 and *Hunt v Worrod*, 2017 ONSC 7397 at para 12.

¹⁴⁹ See *Hart v Cooper*, [1994] BCJ No 159 (SC) at para 30. See also, *In the Estate of Park, Park v Park*, [1954] CA; *Hunter v Edney*, (1881) 10 PD 93 at 95-96; *Durham v Durham* (1885) 10 PD 80; *Cannon v. Smalley (otherwise Cannon)* (1885), LR 10 PD 80.

¹⁵⁰ *Lacey v Lacey (Pubic Trustee of)* [1983] BCJ No 1016 (SC)

Court of Appeal case of *Wolfman-Stotland v Stotland*,¹⁵¹ cited with approval the trial decision of *Calvert v (Litigation Guardian of) Calvert*¹⁵² that described the contract of marriage as “the essence of simplicity.”

Currently, in Canada, to enter into a valid marriage that cannot be subsequently voided or declared a nullity, there must be a minimal understanding of the nature of the contract of marriage.¹⁵³ No party is required to understand all of the consequences of marriage. The reason for this is that cases dealing with claims to void or declare a marriage a nullity on the basis of incapacity often cite long-standing classic English cases,¹⁵⁴ which collectively adopt the principle that “the contract of marriage is a very simple one, one which does not require a high degree of intelligence to comprehend.”¹⁵⁵

However, other courts have espoused the view, that the requirement to marry is not so simple. In the 1945 British Columbia Court of Appeal case of *Shaw v Shaw*,¹⁵⁶ Sidney Smith JA., commented: “it should be remembered that marriage is more than a simple contract. It is a status involving other interests.”¹⁵⁷ Other cases have the view that one must be capable of managing one’s person or one’s property, or both,¹⁵⁸ in order to enter into valid marriage.

In the Alberta case of *Barrett Estate v Dexter*,¹⁵⁹ Justice Wilkins cited the Court of Appeal for Alberta in *Chertkow v Feinstein*,¹⁶⁰ and noted:

What must be established is set out in *Durham v Durham* (1885) 10 PD 80) at p 82 where it is stated that the capacity to enter into a valid contract of marriage is, “A capacity to understand the nature of the contract, **and the duties and responsibility which it creates.**” [emphasis added]¹⁶¹

¹⁵¹ 2011 BCCA 175.

¹⁵² (1997) 32 OR (3d) 281 (GD) at para 55.

¹⁵³ Kimberly Whaley *et. al*, *Capacity to Marry and the Estate Plan* (Aurora: Canada Law Book, 2010) at 50.

¹⁵⁴ *Durham v Durham* (1885), 10 PD 80 [*Durham*].

¹⁵⁵ *Durham*, *supra* at 82.

¹⁵⁶ [1946] 1 DLR 174.

¹⁵⁷ *Shaw v Shaw*, [1946] 1 DLR 174 at 177. See also *Rutherford v Richardson*, [1923] AC 1.

¹⁵⁸ See *Spier v Benyen (sub nom Spier Estate, Re)*, [1947] WN 46 (Eng PDA); *Spier v Spier*, [1947] The Weekly Notes at para 46 per Willmer J; *Browning v Reane*, (1812), 161 ER 1080, [1803-13] All ER Rep 265

¹⁵⁹ 2000 ABQB 530.

¹⁶⁰ 1929 CanLII 513 (AB CA), [1929] 3 DLR 339.

¹⁶¹ *Barrett Estate v Dexter*, 2000 ABQB 530 at para 51.

Also, in *Barrett Estate v Dexter*, an expert witness, Dr. Malloy opined that, “[a] person must understand the nature of the marriage contract, the state of previous marriages, one’s children and how they may be affected.”¹⁶²

Similarly, in the 2014 British Columbia case of *Ross-Scott v Potvin*,¹⁶³ Justice Armstrong concluded that:

A person is capable of entering into a marriage contract only if he or she has the capacity to understand the *nature of the contract and the duties and responsibilities it creates. The assessment of a person’s capacity to understand the nature of the marriage commitment is informed, in part, by an ability to manage themselves and their affairs.* Delusional thinking or reduced cognitive abilities alone may not destroy an individual’s capacity to form an intention to marry as long as the person is capable of managing their own affairs. [emphasis added]¹⁶⁴

This paragraph was cited with approval in the 2017 Ontario case of *Hunt v Worrod*,¹⁶⁵ and Justice Koke importantly noted that:

In determining whether a person had the capacity to enter into a marriage contract, the tension in the analysis is between preserving Mr. Hunt’s personal autonomy and the right to choose how to spend the balance of his life against the possibility that *he did not fully appreciate how marriage affected his legal status or contractual obligations.* [emphasis added]¹⁶⁶

Also, in 2017, Justice Griffin observed in the case of *Devore-Thompson v Poulain*,¹⁶⁷ that, “[t]he authorities suggest that the capacity to marry must involve some understanding of with whom a person wants to live and some understanding that it will have an effect on one’s future in that it will be an exclusively mutually supportive relationship until death or divorce.”¹⁶⁸

Justice Griffin went on to assess several factors in determining that the individual in this case, Ms. Walker, lacked the capacity to marry:

¹⁶² *Barrett Estate v Dexter*, 2000 ABQB 530 at para 72.

¹⁶³ 2014 BCSC 435.

¹⁶⁴ *Ross-Scott v Potvin*, 2014 BCSC 435 at para 177, citing *AB v CD*, 2009 BCCA 200 at para 21 and 22 [*Ross-Scott*].

¹⁶⁵ *Hunt v Worrod*, 2017 ONSC 7397, additional reasons on costs, 2018 ONSC 2133, costs decision rev’d 2019 ONCA 540, leave to appeal dismissed 2020 CanLII 3696 (SCC). See comments further below-this case was argued by WEL PARTNERS

¹⁶⁶ *Hunt v Worrod*, 2017 ONSC 7397 at para 10.

¹⁶⁷ 2017 BCSC 1289.

¹⁶⁸ *Devore-Thompson v Poulain*, 2017 BCSC 1289 at para 48.

I find on the whole of the evidence, given her state of dementia, Ms. Walker could not know even the most basic meaning of marriage or understand any of its implications at the time of the marriage including: who she was marrying in the sense of what kind of person he was; what their emotional attachment was; where they would be living and whether he would be living with her; and fundamentally, how marriage would affect her life on a day to day basis and in future.¹⁶⁹

...

She did not understand...what it meant to live together with another person, nor could she understand the concept of a lifetime bond.¹⁷⁰

In the 2017 Ontario Superior Court of Justice decision in *Hunt v. Worrod*,¹⁷¹ the requisite decisional capacity to enter into a marriage contract was examined in a case where a father of two suffered a catastrophic brain injury in an ATV accident. Three days after returning from hospital, Mr. Hunt disappeared and was later discovered at a hotel with his on-again, off-again partner, Ms. Worrod. Mr. Hunt's sons learned that Ms. Worrod had taken their father to be married. The police were contacted and released Mr. Hunt into the care of his sons. The sons subsequently brought an application, and one of the issues that the court was required to determine was whether Mr. Hunt had the capacity to marry Ms. Worrod and if not, whether the marriage was *void ab initio*?

Justice Koke started the court's analysis by citing *Ross-Scott*:

A person is capable of entering into a marriage contract only if he or she has the capacity to understand the nature of the contract and duties and responsibilities it creates. The assessment of a person's capacity to understand the nature of the marriage commitment is informed, in part, by an ability to manage themselves and their affairs. Delusional thinking or reduced cognitive abilities alone may not destroy an individual's capacity to form an intention to marry as long as the person is capable of managing their own affairs.¹⁷²

In *Hunt*, Justice Koke recognized there was a need to balance Mr. Hunt's autonomy and the possibility that he did not fully appreciate how the marriage affected his legal status or contractual obligations.¹⁷³ Justice Koke went on to conclude that a finding by a Court that an individual has capacity to marry, as set out in *Ross-Scott*, requires that that person

¹⁶⁹ *Devore-Thompson v Poulain*, 2017 BCSC 1289 at para 347.

¹⁷⁰ *Devore-Thompson v Poulain*, 2017 BCSC 1289 at para 345.

¹⁷¹ 2017 ONSC 7397 [*Hunt*].

¹⁷² *Ross-Scott v. Potvin*, 2014 BCSC 435 at para.177.

¹⁷³ *Hunt v. Worrod* 2017 ONSC 7397 at paras. 10-11.

“entering into a marriage contract understand the duties and responsibilities which a marriage creates *and* have the ability to manage themselves and their affairs” .¹⁷⁴

In reaching a determination, Justice Koke thoroughly examined a significant amount of evidence dealing with the issue of capacity presented at trial.¹⁷⁵ A number of medical professionals testified that prior to the marriage and shortly thereafter, Mr. Hunt exhibited a number of severe cognitive and physical impairments.¹⁷⁶ Justice Koke concluded that the evidence of the lay witnesses called by the sons supported the opinion of the medical experts as to Mr. Hunt’s cognitive and physical impairments.

Evidence also demonstrated that before being released from the hospital, Mr. Hunt was assessed by a capacity assessor on two occasions. On the first, he was found to be incapable of managing his property. On the second, which occurred five days before the marriage, he was found incapable of making personal care decisions with respect to the areas of health care, nutrition, shelter, and safety.

After reviewing this extensive medical evidence, and evidence from the sons, Mr. Hunt, Ms. Worrod, and others, Justice Koke concluded that Mr. Hunt did not have the requisite capacity to marry and declared the marriage to be *void ab initio*.

Capacity to Separate

The question of the requisite capacity to separate was addressed in the 2009 British Columbia Court of Appeal case in *AB v CD*.¹⁷⁷ In that decision, the Court of Appeal agreed with the characterization of the different standards of capacity, including the standard of capacity to form the intention to leave a marriage, as set out by Professor Robertson in his text, *Mental Disability and the Law in Canada*.¹⁷⁸ Professor Robertson focuses on the

¹⁷⁴ *Hunt v. Worrod* 2017 ONSC 7397 at para. 83.

¹⁷⁵ Evidence was presented in the form of expert medical testimony, medical reports, as well as the oral testimony of lay witnesses.

¹⁷⁶ Including impairments to his executive functions which impacted his ability to make decisions, organize and execute tasks; a neurologically based lack of awareness of his deficits and impairments; little emotional reactivity and apathy; that he should not be left alone and required supervision and reminders to take his medication; difficulty initiating conversation; and, a limited range of motion in his left shoulder, and difficulties with balance which impacted his ability to walk.

¹⁷⁷ 2009 BCCA 200 [*AB v CD*].

¹⁷⁸ Gerald Robertson, *Mental Disability and the Law in Canada*, 2nd ed., (Toronto: Carswell, 1994).

spouse's overall capacity to manage his or her own affairs. This standard, which the lower court relied on as well, was described in the decision:

Where it is the mentally ill spouse who is alleged to have formed the intention to live separate and apart, the court must be satisfied that that spouse possessed the necessary mental capacity to form that intention. This is probably a similar requirement to the requisite capacity to marry and involves an ability to appreciate the nature and consequences of abandoning the marital relationship.¹⁷⁹

The court in *AB v CD* noted that this standard differs from that which was adopted in the English cases of *Perry v Perry*,¹⁸⁰ and *Brannan v Brannan*,¹⁸¹ both of which conclude that when a spouse suffers from delusions that lead to a decision to leave the marriage, that spouse lacks the requisite intent to leave the marriage. The Court of Appeal notes that it prefers Professor Robertson's characterization of capacity to that found in the older English cases, as it prioritizes the personal autonomy of the individual in making decisions about his or her life.¹⁸²

The Saskatchewan Court of Queen's Bench has also weighed in on the capacity to separate, amongst other issues, in the 2014 decision in the case of *Babiuk v Babiuk*.¹⁸³ In that decision, Justice Brown concluded that:

In deciding issues of capacity, insofar as the law is able to, the appropriate approach is to respect the personal autonomy of the individual in making decisions about his or her life...There is evidence that [the wife] wants to live in the care home and not with [her husband] and that she wants her half of the family property.

Justice Brown in *Babiuk* relied on the findings in *Calvert (Litigation Guardian of) v Calvert* stating that, "[s]eparation is the simplest act, requiring the lowest level of understanding. A person has to know with whom he or she does or does not want to live."¹⁸⁴

It should be noted, however, that the finding that separation only requires the decisional capacity to decide with whom one wants to live is actually not in keeping with the Supreme Court of Canada decision of *M v H*¹⁸⁵ which confirmed the non-exhaustive list of several

¹⁷⁹ *AB v CD*, *supra* at para 21.

¹⁸⁰ [1963] 3 All ER 766 (Eng PDA)

¹⁸¹ (1972), [1973] 1 All ER 38 (Eng Fam Div)

¹⁸² *AB v CD*, 2009 BCCA 200 at para 30.

¹⁸³ 2014 SKQB 320.

¹⁸⁴ *Calvert (Litigation Guardian of) v Calvert*, 1997 CanLII 12096 (ONSC), 32 OR 3d 281 [*Calvert*].

¹⁸⁵ 1999 CanLII 686 (SCC).

factors set out in *Molodowich v Penttinen*,¹⁸⁶ in determining whether a conjugal relationship exists.

Capacity to Divorce

In the decision in *Calvert*, Justice Benotto controversially compared the different standards of capacity with respect to the capacity to divorce:

Separation is the simplest act, requiring the lowest level of understanding. A person has to know with whom he or she does or does not want to live. *Divorce, while still simple, requires a bit more understanding. It requires the desire to remain separate and to be no longer married to one's spouse.* It is the undoing of the contract of marriage. [emphasis added]¹⁸⁷

In *Calvert*, Justice Benotto equated the threshold for the capacity to divorce with the threshold for the capacity to marry, citing the “simple” factors or criteria for the capacity to marry. However, Justice Benotto also relied on the evidence of an expert physician to explain the requisite factors for determining capacity. For a person to be competent to make a decision, a person must: understand the context of the decision; know his or her specific choices; and, appreciate the consequences of these choices.¹⁸⁸

Capacity to Reconcile

The issue of whether an individual had the requisite capacity to reconcile with his wife was examined in the 2018 decision of *Chuvalo v Chuvalo*.¹⁸⁹ In that decision, the children of legendary boxer, George Chuvalo, in their capacity as his attorneys under powers of attorney brought divorce proceedings against Chuvalo’s wife Joanne, on behalf of Chuvalo.¹⁹⁰ Joanne on the other hand, sought to reconcile and not divorce, despite the fact that the parties were in fact separated. Justice Kiteley reviewed several capacity cases including *Calvert v Calvert*,¹⁹¹ *Banton v Banton*,¹⁹² *Feng v Sung Estate*,¹⁹³ and ultimately concluded that Chuvalo did not have the requisite decisional capacity to

¹⁸⁶ 1980 CanLII 1537 (ONSC) [*Molodowich*] where the list includes several factors dealing with shelter, sexual and personal behaviour, services, social factors, societal factors, economic support and children.

¹⁸⁷ *Ibid.*, at para 54.

¹⁸⁸ *Ibid.*, at para 73.

¹⁸⁹ 2018 ONSC 311 [*Chuvalo*].

¹⁹⁰ George Chuvalo, at the time, was in his eighties and suffering from significant cognitive decline.

¹⁹¹ 1997 CanLII 12096 (ONSC), 32 OR 3d 281

¹⁹² 1998 CarswellOnt 3423, 164 DLR (4th) 176 (Gen Div).

¹⁹³ 2003 CarswellOnt 1461, [2003] OTC 355, 122 ACWS (3d) 508.

reconcile. While Chuvalo expressed a wish to live with his wife there was no evidence that he understood whether there would be consequences that followed from that decision:

Expressing a desire to live with his wife is just that. There is no evidence that he understood whether there would be consequences to a decision to “live with” his wife. Indeed, there are consequences such as changing the financial status quo between them; such as changing the date of separation for purposes of s. 8(2) of the *Divorce Act*. There are other consequences such as the emotional impact if the attempted reconciliation fails.

...

This court cannot rely on Mr. Chuvalo’s assertions that he wants to live with his wife as a basis on which to find that he is capable of making the decision to reconcile.¹⁹⁴

Drawing on this case and the authorities discussed within, moving forward when assessing requisite decisional capacity to reconcile, the individual would be required to be able to foresee and understand the consequences of a reconciliation which necessarily would involve not only emotional, but, also financial consequences.

Put simply, the factors for establishing the requisite decisional capacity to divorce, to marry, to separate or reconcile, at common law appears to be based on the consideration of whether the person in question has an ability to appreciate the nature and consequences of the decision in question, and in particular, the fact that the decision taken is legally binding. As the law on capacity to marry is evolving, so must the law on the capacity to divorce, separate and reconcile. This is an area warranted of tracking since the law continues to develop in light of the financial considerations raised in both marriage and divorce, the development of property rights, and attendant legislative changes.

VII. Capacity to Enter into a Contract

There are no statutory criteria for determining the requisite capacity to enter into a contract. All persons who are eighteen years of age or older are, however, presumed to be capable of entering into a contract. A person is entitled to rely on this presumption of

¹⁹⁴ *Chuvalo v Chuvalo*, 2018 ONSC 311 at paras 61-62

capacity to contract unless there are reasonable grounds to believe that the other person is incapable of entering into the contract.

A cogent approach for determining the requisite capacity to contract is set out in the Prince Edward Island Supreme Court decision in *Bank of Nova Scotia v. Kelly*.¹⁹⁵ In that decision, the requisite capacity to enter into a contract is defined as:

- a) The ability to understand the nature of the contract; and,
- b) The ability to understand the contract's specific effect in the specific circumstances.

In undertaking an analysis of the requisite capacity to contract, the determining factor is a person's ability to understand the nature and consequences of the contract at hand. A person capable of entering into a contract has the ability not only to understand the nature of the contract, but the impact on his or her interests.

In *Bank of Nova Scotia v. Kelly*, the Court emphasized that a person entering into a contract must exhibit an ability to understand all *possible* ramifications of the contract. In the ruling, Nicholson J. concluded:

It is my opinion that failure of the defendant to fully understand the consequences of his failure to meet his obligations under the promissory notes is a circumstance which must be taken into account. I find that the defendant was probably able to understand the terms and his obligations to pay the notes but that he was incapable, because of his mental incompetence, of forming a rational judgment of their effect on his interests. I therefore find that by reason of mental incompetence the defendant was not capable of understanding the terms of the notes *and of forming a rational judgment of their effect on his interests*.¹⁹⁶

The criteria to be applied for determining capacity to contract are based on the principle that a contract requires informed consensus on the part of the contracting parties. In *Royal Trust Co. v. Diamant*,¹⁹⁷ the Court stated as follows:

The general theory of the law in regard to acts done and contracts made by parties affecting their rights and interests is that in all cases there must be free and full consent to bind the parties. Consent is an act of reason accompanied by deliberation, and it is

¹⁹⁵ (1973), 41 D.L.R. (3d) 273 (P.E.I. S.C.) [*Bank of Nova Scotia v. Kelly*]

¹⁹⁶ *Ibid.* at 284 [emphasis in original].

¹⁹⁷ [1953] 3 D.L.R. 102 B.C.S.C. [*Royal Trust v. Diamant*]

upon the ground that there is a want of rational and deliberate consent that the conveyances and contracts of persons of unsound mind are generally deemed to be invalid.

...

The degree of mental incapacity which must be established in order to render a transaction inter vivos invalid is such a degree of incapacity as would interfere with the capacity to understand substantially the nature and effect of the transaction. The plaintiff here need not prove that the donor failed to understand the nature and effect of the transaction. The question is whether she was capable of understanding it: *Manches v. Trimborn* (1946), 115 L.J.K.B. 305.¹⁹⁸

VIII. Capacity to Enter into a Legal Retainer

Lawyers must be satisfied that potential clients have the requisite capacity to enter into a legal retainer or contract for legal services. There is a presumption that every person over the age of 18 has the capacity to enter into a contract. However, up until recently, there has been no authority which provides a legal test for the determination of whether an individual has the requisite capacity to enter into a legal retainer or contract.

In the 2021 decision in *Guardian Law Group v LS*,¹⁹⁹ the Honourable Justice Jones was tasked with answering as to the requirements that must be met by counsel to be validly retained to represent an individual within the context of that individual's own capacity hearing. In *Guardian*, Justice Jones' decision provides the criteria or, novel test for voiding a retainer agreement for incapacity. Subsequently, the commentary provided by Justice Jones in this decision not only helps to clarify the criteria or test but also provides helpful guidance to lawyers in approaching capacity issues.

The facts in *Guardian* are uncontested. An older adult retained a law firm to represent him at a capacity hearing. The hearing resulted in his daughter becoming Guardian and Trustee. The older adult was unhappy with his daughter's handling of his accounts and hired Guardian Law to represent him. Guardian Law retained a physician who concluded the older adult did in fact have capacity to retain and instruct counsel and to manage financial affairs. Justice Jones ordered an independent capacity assessment and a

¹⁹⁸ *Supra* note 76 at 6

¹⁹⁹ 2021 ABQB 591 [*Guardian*].

litigation guardian to be appointed. The daughter opposed the application on the grounds that the older adult lacked the capacity to retain Guardian Law.

As previously discussed, there is a presumption that adults have the capacity to enter into a contract. However, where a party lacks the requisite capacity, an otherwise valid contract can be defeated. In *Guardian*, Justice Jones canvassed authority for whether a contract is voidable based on mental incapacity. Looking at the decision in *Bank of Nova Scotia v Kelly*, Justice Jones held that the test is illustrated as follows:

1. At the time of the contract, the party seeking relief was incompetent;
2. By reason of such incompetence, that party was incapable of understanding the terms of the contract and forming a rational judgment of its effect upon his or her interests; and
3. The other party had actual or constructive knowledge of such incompetence.²⁰⁰

In *Guardian*, Justice Jones recognized that for a contract to be voided for incapacity, it must be unfair to the party lacking capacity. For the purposes of the decision in *RMK v NK*, Justice Jones held that, “Courts of equity will not interfere if a 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.”²⁰¹ Justice Jones held that the capacity to enter a retainer agreement was therefore, very closely connected to the capacity to instruct counsel. In *RMK*, the court adopted the criteria required for the capacity to instruct counsel from the Ontario decision in *Costantino*.²⁰²

The test

Justice Jones adopted a particularization of the test for contractual capacity from *Kelly*, with elements specific to retainer agreements, and proposed the following criteria, or novel test for voiding a retainer agreement:

²⁰⁰ *Guardian*, *supra* at para. 43.

²⁰¹ *Ibid.*, at para. 44.

²⁰² See *Costantino v Costantino*, 2016 ONSC 7279 [*Costantino*].

1) Did the client, at the time of entering into the retainer agreement, have the capacity to understand its terms and form a rational judgment of its effect on his or her interests?

2) Did the lawyer know that the client lacked capacity, and more specifically,

a) Were there sufficient indicia or incapacity known to the lawyer to establish a suspicion that the client lacked the requisite capacity?

b) If yes, did the lawyer take sufficient steps to rebut a finding of actual or constructive knowledge of incapacity?²⁰³

Notably, Justice Jones held that the sequence of the test (answering question 1 or 2 first) is not important since any order will work based on practical considerations.²⁰⁴ What is important, however, is that it is up to the trier of fact to determine how to approach the order, based on the circumstances of each case.²⁰⁵

The decision in *Guardian* also provides a thorough analysis of each part of the test. Beginning with part 1 which asks, did the client have capacity, Justice Jones notes that most definitions which purport to guide this inquiry share two common concerns:

1. Does the person understand the relevant information; and
2. Does the person appreciate how the relevant information will affect him or her?

Justice Jones held that the essence of this inquiry should focus on “whether the person can understand and appreciate the consequences of the retainer agreement.”²⁰⁶

At Part 2 (a), which asks if there were sufficient indicia of incapacity known to the lawyer to establish a suspicion that the client lacked the requisite capacity, Justice Jones held that the emphasis is an analysis under the framework of the contract. His Honour, citing *Chitty on Contracts* at page 876, went on to say that in contract, parties have no duty to take positive steps and that “absent information that alerts them to incapacity, they are entitled to rely on the presumption of capacity.”²⁰⁷ Justice Jones also provided a non-

²⁰³ *Guardian, supra* at 57.

²⁰⁴ *Ibid.*, at para. 59.

²⁰⁵ *Ibid.*, at para. 63.

²⁰⁶ *Ibid.*, at para. 69.

²⁰⁷ *Ibid.*, at para. 70

mandatory, non-exhaustive list captured from the decisions in *RMK* and *Kozak Estate (Re)*²⁰⁸ which may prove helpful to the analysis.²⁰⁹

While lists may be helpful in illustrating the different kinds of indicators of capacity or incapacity, they are not authoritative. As such, the decision in *Guardian* held that the analysis must always proceed on a case-by-case basis. The fact-specific nature of capacity means there could be many relevant factors to consider; no single factor will necessarily lead to a finding either way.

Notably, Justice Jones also clarified that medical evidence does not necessarily outweigh a lawyer or layperson's opinion regarding capacity and held that, "[i]f suspicion cannot be made out, the inquiry ends, and the retainer agreement stands."²¹⁰

The second half of the Part 2 analysis, to be conducted if the answer to part 2 (a) is yes, asks whether the lawyer took sufficient steps to ascertain capacity so as to rebut a finding of actual or constructive knowledge of incapacity to contract. Justice Jones held that *if* suspicion is made out, the focus of the analysis must shift to the actions of the lawyer. His Honour went on to provide that there are two ways to prevent a suspicion of incapacity from rising to the level of actual or constructive knowledge: mitigate the client's potential incapacity or make reasonable inquiries to confirm the client's capacity.²¹¹

Justice Jones also held that knowledge can be rebutted where further action is taken which confirms the client's capacity. To this end, His Honour provided five reasonable steps an inquiring lawyer could take.²¹² Whether these steps (or any other reasonable steps chosen) will be considered reasonable will be "determined with reference to the

²⁰⁸ *Kozak Estate (Re)*, 2018 ABQB 185 [*Kozak*].

²⁰⁹ The retainer pertains to proceedings which concern the client's capacity; whether the client appreciates the nature of the proceedings; a past history of being unable to keep and choose counsel; psychological or documentary evidence of incapacity; how the client presents when meeting counsel; inability to communicate objectives and priorities clearly; a repeated focus on irrelevant issues or facts; mistaken beliefs regarding court procedures; reliance on another party to communicate with counsel; or, increasing isolation from friends and family.

²¹⁰ *Guardian*, *supra* at para. 76.

²¹¹ *Ibid.*, at 77.

²¹² See *Guardian*, *supra* at para. 82 where Justice Jones' list includes obtaining consent from the client to speak with his or her family doctor or psychologist; obtaining consent from the client to request their medical records; reviewing any capacity assessments that have been performed; speaking with family, friends, or close contacts for their opinion on the client's capacity; or, requesting a capacity assessment.

lawyer's level of knowledge after they were completed."²¹³ If the court is satisfied, a lawyer ought to have known, the efforts will be considered insufficient. If the court is satisfied the lawyer's efforts led to a sufficient certainty the client had capacity, the inquiry ends and the contract stands.

Furthermore, where the lawyer's efforts led to uncertainty or doubt regarding capacity, the court must endeavour to ask whether the steps taken constituted "reasonable care and diligence" or whether a reasonable lawyer would have looked further. It is critically important that the trier of fact assess the reasonableness of any steps taken.

Finally, the decision in *Guardian* looked at whether equitable considerations exist. Here, Justice Jones relied on the decision in *Waldock v Bissett*, which held that:

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.

IX. Capacity to Instruct Counsel / Litigate

Lawyers must satisfy themselves that a client has the requisite capacity to instruct them on legal matters. This capacity to instruct is required in both litigation and non-litigation matters. As a result, the law has developed factors which can be reviewed to determine whether a client has the requisite decisional capacity to commence a lawsuit. An incapable litigant may be required to be represented by a litigation guardian or guardian *ad litem* in litigation proceedings.

Capacity to Instruct

In 2011, lawyer Ed Montigny wrote a helpful paper, *Notes on Capacity to Instruct Counsel*, which succinctly sets out the capacity criteria for instructing counsel as follows:

1. An understanding of what the lawyer has been asked to do and why;

²¹³ *Ibid.*, at para. 84.

2. The ability to understand and process the information, advice and options the lawyer presents to them; and,
3. An appreciation of the advantages, disadvantages and potential consequences of the various options.²¹⁴

In the previously discussed decision in *Costantino*, Justice Price cited and applied this criterion after canvassing the case law on point. His Honour also explained the rationale behind the capacity to instruct counsel in litigation proceedings, holding that:

In determining a litigant's capacity to instruct counsel, the court is concerned with the person's decision making over the entire duration of the proceeding. The litigant must decide, at every point in the proceeding, whether to continue the proceeding or to offer to settle it. In making this decision, the litigant must consider the costs and benefits of settlement and of continuing to litigate. If at any time an offer to settle is received, the recipient must decide whether or not to accept it, and the longer a decision is deferred the greater the potential cost consequences.²¹⁵

In possessing the requisite capacity to instruct counsel, the client should be able to understand that the retainer agreement will confer authority on the lawyer that will impose contractual liability. The client should also understand the nature and effect of the transaction which the lawyer is being authorized to negotiate for the client. As such, the client should be able to retain information on an ongoing basis so that they can interact meaningfully with counsel and retain information as the transaction proceeds.²¹⁶ As noted by Montigny, it is not necessary that a client understands *all* of the details necessary to pursue their legal matter.

The assessment of a client's capacity to instruct counsel must also be done at every point in which the client interacts with the lawyer. As Master Graham noted in the decision in *Torok v Toronto Transit Commission*,²¹⁷ the client's capacity to instruct counsel entails

²¹⁴ Ed Montigny, "Notes on Capacity to Instruct Counsel", February 2011, online: https://cleoconnect.ca/ylr-files/files/resource_files/1299611679NotesonCapacitytoInstructCounsel-FINAL-Feb1111.pdf [accessed on February 10, 2020]. See also, Clare Burns & Anastasja Sumakova, LSUC, *Compelling Capacity and Medical Evidence*, October 2015 at 40.

²¹⁵ *Costantino*, *supra* at para. 56(d).

²¹⁶ Clare Burns & Anastasja Sumakova, LSO CLE, *Compelling Capacity and Medical Evidence*, October 2015 at 40.

²¹⁷ 2007 CanLII 15479 [*Torok*].

the ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision and a reasonable range of possible outcomes, both positive and negative.²¹⁸

Capacity to Commence Litigation

In the context of litigation and ongoing legal proceedings, the client must possess the capacity to sue or commence litigation or continue litigation on their own behalf. If found incapable of doing so, a litigation guardian or guardian *ad litem* will be appointed. Individuals who are “under a disability” whether due to infancy (those under the age of 18) or due to mental incapacity, are necessarily unable to commence litigation.

The English case of *Kirby v Leather*,²¹⁹ which has been cited with approval in cases across Canada,²²⁰ provides an oft-cited definition of “a person under disability” with respect to the ability to instruct counsel in litigation proceedings and asks:

Whether the person in question is capable, aside from any disability established by law, such as infancy, to instruct counsel and to exercise judgment in relation to the claims in issue and the possible settlement, as a reasonable person would be expected to do.

This rule regarding “persons under disability” is also codified across Canada in the provincial *Rules of Court* or *Rules of Civil Procedure*. In P.E.I., Rule 7 of the *Rules of Civil Procedure* deals with parties under disability. This rule addresses the representation of an incapable party at subrule 7.01(1) by providing that unless the court orders or a statute provides otherwise, a proceeding shall be commenced, continued or defended on behalf of:

- a) a minor, by a litigation guardian;
- b) a person who has been declared mentally incompetent under the *Public Trustees Act*, by the committee of the estate of that person;
- c) a person who has been declared mentally incapable under the *Mental Health Act*, by the guardian of that person;
- d) a person who has been determined mentally incapable of managing their affairs and has a duly appointed power of attorney for financial affairs, by the attorney of that person; and

²¹⁸ *Torok, supra* at para 40.

²¹⁹ [1965] 2 ALL ER 441 (CA).

²²⁰ See for example, *Boury v Iten*, 2019 BCCA 81 at para 47, *Pavlick v Hunt and Gagnon*, 2005 BCSC 285 at para 19, *Walker v Manufacturers Life Insurance Company*, 2015 BCCA 473 at para 29, *Kennedy v Saskatchewan Cancer Foundation*, 1990 CanLII 7806 (SK QB) at para 11, *Ms R v WA (Re Rule 60)*, 2000 ABQB 975 at para 11, *Chung v Dale*, 2018 ONSC 1820 at para 29, *Coffey v Bassett*, 2001 CanLII 3797 (NC SC).

- e) any other person who is under disability, but has not been so declared or determined, by a litigation guardian.

The *Rules* also outline the powers and duties of a litigation guardian at subrules 7.02(1) - (3) and provide that where a party is under a disability, anything that a party in a proceeding is required or authorized to do may be done by the party's litigation guardian.

The litigation guardian (other than the Official Guardian, the Public Trustee or the Public Guardian) shall be represented by a lawyer. In providing instructions to the lawyer representative, a litigation guardian is also expected to "diligently attend to the interests of the person under disability," and "act solely in the best interests of the person under disability, including the commencement, defence and conduct of a proceeding. Sub rules 7.09 (1) and (2) also hold that no settlement concerning a person under a disability is binding without the approval of a judge. These sub rules are particularly important because mental incapacity is frequently a basis upon which litigants oppose motions to enforce settlements. The procedural safeguards of appointing a litigation guardian are therefore designed for the protection of not only the incapable litigant, but also, for the other parties to the litigation and the protection of the integrity of the judicial process for all participants in the litigation including the court and court procedures.²²¹

There are a number of cases in PEI which have addressed the operation of Rule 7 in various proceedings. In *MacKinnon v Ross*,²²² the court found that Rule 7 had no application to the case at bar because the person under disability was not a party to the proceeding. The court in *Wood (Litigation Guardian of) v Wood*,²²³ held that on a motion under Rule 7, the inherent *parens patriae* jurisdiction of the court is invoked. Here, it was held that it is the court's duty to protect the person under a disability and to ensure that any settlement is in the best interests of the party. The decision in *Wood* also held that an application under Rule 7.08 to approve a settlement also constitutes a judicial determination as to whether a legal account is fair and reasonable.

²²¹ 626381 *Ontario Ltd v Kagan, Shastri, Barristers & Solicitors*, 2013 ONSC 4114; *Murphy v Carmelite Order of Nuns*, 2004 CarswellOnt 9965, *Lico v Griffiths*, [2008] OJ No 1018 (SC); *Bilek v Constitution Insurance*, [1990] OJ No 3117 at para 2, *Costantino v Costantino*, 2016 ONSC 7279 at para 56(g).

²²² 2015 PESC 38 [*MacKinnon*].

²²³ 2013 PESC 11 [*Wood*].

Finally, in the 2001 decision in *Dunphy v Registrar of Motor Vehicles*,²²⁴ an applicant who also happened to be a minor, made an application for judicial review without being assisted by a litigation guardian. The trial judge applied Rule 2.03²²⁵ and dispensed with the requirement of Rule 7.01 that a proceeding by a minor shall be commenced by a litigation guardian.

Pursuant to the *Statute of Limitations*,²²⁶ the limitation period can be tolled or suspended for a plaintiff during any time which that person is “under a disability.” For the purposes of section 5 of the *Statute*, “[i]f a person entitled to bring an action is under disability at the time the cause of action arises, he may bring the action within the time hereinbefore limited with respect to the action or at any time within two years after he first ceased to be under disability.” Notably, in P.E.I., there is no limitation period in respect of a claim that relates to a sexual assault or battery.

X. The Code of Professional Conduct and Capacity

The *Law Society of Prince Edward Island Code of Professional Conduct*²²⁷ provides some guidance to lawyers facing clients with potential capacity challenges. Rule 3.2-9 provides that a lawyer, in dealing with a client who may have compromised capacity, is required to maintain as much of a regular solicitor-client relationship as possible.²²⁸ This presumes that the client in question has the requisite capacity to retain and instruct counsel such that the lawyer may be retained and act on his or her behalf. The commentary provided by the Law Society of Prince Edward Island at Rule 3.2-9 is also helpful and provides as follows (emphasis added):

Commentary

²²⁴ 2001 PESCTD 28 [*Dunphy*].

²²⁵ Rule 2.03 holds that the court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.

²²⁶ RSPEI 1988, c S-7.

²²⁷ Law Society of Prince Edward Island, “Code of Professional Conduct,” accessed online: <https://lawsocietypei.ca/media/files/Professional%20Code%20of%20Conduct.pdf>

²²⁸ Rule 3.2-9 provides that “[w]hen a client’s ability to make decisions is impaired because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship.”

[1] A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions. A client's ability to make decisions depends on such factors as age, intelligence, experience and mental and physical health and on the advice, guidance and support of others. A client's ability to make decisions may change, for better or worse, over time. A client may be mentally capable of making some decisions but not others. The key is whether the client Page | 25 has the ability to understand the information relative to the decision that has to be made and is able to appreciate the reasonably foreseeable consequences of the decision or lack of decision. Accordingly, when a client is, or comes to be, under a disability that impairs his or her ability to make decisions, the lawyer will have to assess whether the impairment is minor or whether it prevents the client from giving instructions or entering into binding legal relationships.

[2] A lawyer who believes a person to be incapable of giving instructions should decline to act. However, if a lawyer reasonably believes that the person has no other agent or representative and a failure to act could result in imminent and irreparable harm, the lawyer may take action on behalf of the person lacking capacity only to the extent necessary to protect the person until a legal representative can be appointed. **A lawyer undertaking to so act has the same duties under these rules to the person lacking capacity as the lawyer would with any client.**

[3] If a client's incapacity is discovered or arises after the solicitor-client relationship is established, the lawyer may need to take steps to have a lawfully authorized representative, such as a litigation guardian, appointed or to obtain the assistance of the Office of the Public Trustee to protect the interests of the client. Whether that should be done depends on all relevant circumstances, including the importance and urgency of any matter requiring instruction. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned. Until the appointment of a legal representative occurs, the lawyer should act to preserve and protect the client's interests.

[4] In some circumstances when there is a legal representative, the lawyer may disagree with the legal representative's assessment of what is in the best interests of the client under a disability. So long as there is no lack of good faith or authority, the judgment of the legal representative should prevail. If a lawyer becomes aware of conduct or intended conduct of the legal representative that is clearly in bad faith or outside that person's authority, and contrary to the best interests of the client with diminished capacity, the lawyer may act to protect those interests. This may require reporting the misconduct to a person or institution such as a family member or the Public Trustee.

[5] When a lawyer takes protective action on behalf of a person or client lacking in capacity, the authority to disclose necessary confidential information may be implied in some circumstances: See Commentary under Rule 3.3-1 (Confidentiality) for a discussion of the relevant factors. If the court or other counsel becomes involved, the lawyer should inform them of the nature of the lawyer's relationship with the person lacking capacity.

Counsel should not only be aware of the requirements of the Law Society of Prince Edward Island but also, of a client's impairment in relation to their ability to give instructions, enter into binding legal relationships, and manage their legal affairs. Lawyers must as far as reasonably possible, maintain a normal lawyer and client relationship. As

previously discussed, capacity is fluid. This means that a client's ability to make decisions can change and fluctuate over time.

In addition to maintaining a normal client-solicitor relationship as far as reasonably possible, the rules also require that in dealing with a client who may have some capacity challenges, a lawyer is also necessarily bound by the rule respecting confidentiality. As such, Rule 3.3 provides that the duty of confidentiality is owed "to every client without exception." When dealing with older adult clients, the issue of confidentiality can become challenging. This is often due to the fact that older adults may have family members who are highly involved and active in assisting with many aspects of their lives. To the extent that a practitioner represents a client, whether an older adult or otherwise, they are required to adhere to the duty of confidentiality, except in cases where the client instructs the lawyer to divulge information to particular individuals.

There are other rules which are relevant to providing service to clients with diminished capacity, including Rule 3.7 which requires a lawyer to only withdraw from representing a client "for good cause." For the purposes of this rule, if a lawyer has determined that their client is capable of instructing them, and undertaking the particular transactions, then the lawyer should continue to act. In situations where capacity later becomes an issue, there are options short of withdrawal that can be exercised, including seeking a litigation guardian. In addition, Rule 5.1 requires that a lawyer act honestly and ensure fairness in representing clients. This holds true for clients who have potential capacity challenges as well. Ultimately, while clients with potentially compromised capacity pose challenges for their lawyers, a lawyer who acts for a client is still required to abide by all of the duties set out in the *Code of Professional Conduct*.

XI. Capacity Assessments

Capacity is an area of enquiry where medicine and law collide. Legal practitioners are often interacting with clients who have medical and cognitive challenges. Conversely, medical practitioners are asked to apply legal concepts in their clinical practices, or are asked to review evidence retrospectively to determine whether an individual had the

requisite capacity to complete a specific task or make a specific decision at a particular point in time.

The assessment of capacity is a less-than-perfect science, both from a legal and medical point of view. Capacity determinations are often complicated and involve not only relevant professional and expert evidence, but also, lay-person evidence.

Complicating matters further, is the fact that the standard of any assessment varies. This can become an obstacle which may be difficult to overcome in determining capacity as well as in resolving disputes concerning the quality and integrity of an assessment and resultant report. Another layer of complication is evident in contentious settings, especially in the practice of estate litigation where capacity is frequently evaluated retrospectively when a conflict arises in relation to a past made decision of a person, alive or even deceased. The evidentiary weight given to such assessments also varies. In some cases, where medical records exist, a retrospective analysis over time can provide comprehensive and compelling evidence of decisional capacity.

Capacity assessors are healthcare professionals that assess a person's mental capacity to determine whether they are capable of making decisions regarding their property or personal care. In P.E.I., for the purposes of section 5 of the *Adult Protection Act*,²²⁹ where the Minister receives a report or otherwise has reasonable grounds to believe an adult may be in need of assistance or protection, the Minister may carry out an investigation, during the course of which, the Minister may request the adult participate in a capacity assessment. Where that is unsuccessful, section 6 of the *APA* permits the Minister to apply to court for an order to participate in a capacity assessment.²³⁰

As previously discussed, a lawyer has a duty to satisfy themselves that their client has the requisite capacity. Often this may require the lawyer to make the determination of whether or not their client requires an assessment of capacity. In the 2014 Nova Scotia Supreme Court decision in *Weldon McInnis v McGuire*,²³¹ the court held that lawyers are

²²⁹ RSPEI 1988, c A-5 [APA].

²³⁰ *APA*, *supra* at ss. 5 & 6.

²³¹ 2014 NSSC 437.

allowed a reasonable degree of deference in making such a decision of whether to have a capacity assessment completed or not.

Because P.E.I. does not have a system in place for capacity assessments, it may be helpful to examine how the process works in Ontario.

Legislation Concerning Capacity Assessments in Ontario

Generally, in Ontario, a court can make an order for an assessment under section 105 of the *Courts of Justice Act*.²³² Section 105 (2) provides that:

Where the physical or mental condition of a party to a proceeding is in question, the court, on motion, may order the party to undergo a physical or mental examination by one or more health practitioners.

Such an order under section 105 is, however, considered an exception. In *626381 Ontario Ltd. v Kagan, Shastri, Barristers & Solicitors*,²³³ Justice Stinson held that “a s. 105 order to obtain the required evidence should be the rare exception and not the rule. Moreover, such an order is discretionary and should not be granted lightly or without good reason. Due consideration must be given to the autonomy of the individual, having regard to the intrusive nature of a mental examination.”²³⁴

A capacity assessment may also be ordered legislatively, in under the context of a *Substitute Decisions Act*²³⁵ proceeding. Section 16 of the *SDA* provides a mechanism to request an assessor perform an assessment of an individual’s capacity to manage property for the purpose of having the Public Guardian and Trustee (“PGT”) become the statutory guardian of property. If the person is found incapable, section 16 provides that the PGT automatically becomes the person’s statutory guardian. Section 78 of the *SDA* provides procedural safeguards for the individual being assessed for capacity to manage property or personal care. Pursuant to section 78, an individual has the right to refuse an assessment; to receive information about the purpose and significance of the assessment; the use of a prescribed form by the assessor; and the right to written notice

²³² RSO 1990, c C.43.

²³³ 2013 ONSC 4114 [*Kagan*].

²³⁴ *Kagan*, *supra* at para 40.

²³⁵ SO 1992, c 30 [*SDA*].

of the findings of the assessor. Section 79 provides for a court-ordered capacity assessment if an individual's capacity is in issue during the course of an *SDA* proceeding and the court is satisfied that reasonable grounds exist to believe the person is incapable. In protecting the process, section 80 allows the court to make an order restraining an individual (who is not the person whose capacity is in issue) from hindering or obstructing an assessment that has been ordered pursuant to section 79.²³⁶ Section 79 (1) of the *SDA* provides that:

If a person's capacity is in issue in a proceeding under the Act and the court is satisfied there are reasonable grounds to believe that the person is incapable, the court may, on motion or on its own initiative, order that the person be assessed by one or more assessors named in the order, for the purpose of giving an opinion as to the persons capacity.²³⁷

Pursuant to section 79 (2) of the *SDA*, the order may require the person to submit to the assessment, permit entry to his or her home for the purpose of the assessment, or to attend at such other places and at such times as specified in the order.²³⁸

Where an individual is resistant of undergoing a capacity assessment, section 81 of the *SDA* allows the court to order the apprehension of a person for the purpose of enforcing an assessment order.

The principles to be applied in Ontario when considering whether to direct a capacity assessment under s.79 (1) were set out by Justice Strathy (as he then was) in *Abrams v Abrams*,²³⁹ and provided that:

In considering whether to order an assessment [...] 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 Mr. Justice Pattillo said in *Flynn v. Flynn* (December 18, 2007), Doc. 03-66/07 (Ont. S.C.J.): '[a] capacity assessment is an intrusive and demeaning process.'²⁴⁰

²³⁶ Kelley Bryan, "Capacity Assessments: The What, When, Who, Why and How in *SDA* Proceedings" (October 26, 2020), *Canadian Bar Association, "Your Comprehensive Guide to Section 3 Counsel under the Substitute Decisions Act"*, at p. 3 [Bryan].

²³⁷ *SDA*, *supra* at s. 79(1).

²³⁸ *SDA*, *supra* at s. 79(2).

²³⁹ [2008] O.J. No. 5207 [*Abrams*].

²⁴⁰ *Abrams*, *supra* at para. 50.

Justice Strathy went on further and held that when considering whether to order a capacity assessment, the court is likely to consider:

- (a) the purpose of the SDA;
- (b) the terms of section 79:
 - (i) the person's capacity must be in issue; and
 - (ii) there are reasonable grounds to believe that the person is incapable;
- (c) the nature and circumstances of the proceedings in which the issue is raised;
- (d) the nature and quality of the evidence before the court as to the person's capacity and vulnerability to exploitation;
- (e) if there has been a previous assessment, the qualifications of the assessor, the comprehensiveness of the report and the conclusions reached;
- (f) whether there are flaws on the previous report, evidence of bias or lack of objectivity, a failure to consider relevant evidence, the consideration of irrelevant evidence and the application of the proper criteria;
- (g) whether the assessment will be necessary in order to decide the issues for the court;
- (h) whether any harm will be done if an assessment does not take place;
- (i) whether there is any urgency to the assessment; and,
- (j) the wishes of the person sought to be examined, taking into account his or her capacity.²⁴¹

In *Kischer v Kischer*,²⁴² a case decided less than a month after the release of the *Abrams* decision, Justice Strathy applied the same criteria set out in *Abrams* in a rare circumstance where the court did in fact order a capacity assessment against the individual's objections.

How the Process Works

According to the Law Commission of Ontario ("LCO"), the current approach to capacity in Ontario is cognitive and heavily professionalized.²⁴³ This was apparent from the outset of

²⁴¹ *Abrams*, *supra* at para. 53.

²⁴² (2009) O.J. No. 96 (S.C.).

²⁴³ Law Commission of Ontario, "Legal Capacity, Decision-Making and Guardianship" (May 2014), accessed online: <http://www.lco-cdo.org/wp-content/uploads/2014/06/capacity-guardianship-discussion-paper.pdf>

Ontario's capacity regime and evident in David Weisstub's 1990 *Enquiry on Mental Competency*. There, Weisstub, discussed the consultations which led to the creation of the rules surrounding capacity assessments in Ontario and provided the following:

Almost all submissions which addressed the point suggested that the physicians ought to have a central role in the process, although there was broad agreement that the guidelines now extant for the exercise of physician discretion were not clear enough.²⁴⁴

Due to this heavily professionalized regime, only certain professions are eligible to be capacity assessors. If selected, one must attend, and pass a specialized training course from the Capacity Assessment Office. Doctors, nurses, psychologists, social workers, and occupational therapists are eligible to perform capacity assessments in Ontario. The Capacity Assessment Office also maintains an updated list of qualified assessors, provides on-going education and consultation services to capacity assessors, offers financial assistance plans to people who request a capacity assessment but cannot afford it, answer questions regarding capacity assessments, and assists individuals in locating capacity assessors who speak other languages.²⁴⁵

In Ontario, capacity assessors are required to conduct assessments in the manner and form described in the "Guidelines for Conducting Assessments of Capacity."²⁴⁶ No "formal" assessments are necessary in all circumstances to determine that a person is incapable and lacks decisional capacity. Formal assessments are only required if the statute specifies for a specific purpose or this requirement has been specifically drafted into a power of attorney document.

Capacity assessments are not subsidized or covered by provincial health insurance and assessors charge fees for assessments they undertake. The person who requests the assessment is usually responsible for the payment of the assessment, however, requestors may ask for reimbursement from the estate of the person to be assessed if

²⁴⁴ David N. Weisstub, *Enquiry on Mental Competency: Final Report* (Toronto: Publications Ontario, 1990), at 35-36.

²⁴⁵ Government of Ontario, "List of capacity assessors" (March 1, 2022), <http://www.ontario.ca/page/list-capacity-assessors>

²⁴⁶ Capacity Assessment, O. Reg. 460/05, s. 3.

found incapable and there are sufficient funds in the incapable person's estate to pay for the assessment.²⁴⁷

There is an expectation that capacity assessors will follow a fair process and should not use terminology or technical language but rather, should gear their questions to the education level and abilities of the individual being assessed. A capacity assessor is also expected to "probe" and verify and ask questions to determine the thought process of the person being assessed and to check if what the person is saying is correct or logical and not the product of delusions.²⁴⁸

The evaluation process of a capacity assessor is ultimately derived from the *SDA*, and primarily through the Guidelines for Conducting Assessments of Capacity, and the requirements in *Re Koch*. Information gathered and questions asked in the evaluation process are not legislated and capacity assessors are required to base decisions of incapacity and capacity on the legal test for capacity, which is not a medical test. In *Re Koch*, Justice Quinn outlined fourteen requirements for capacity assessors:

1. The assessor\evaluator must maintain meticulous files;
2. The assessor\evaluator must be alive to an informant harboring improper motives;
3. The assessor\evaluator must ensure the person being examined is made aware of the significance and effect of a finding of incapacity. Furthermore, that this "warning" is a requirement of section 78(2)(b) of the *SDA*, for the notes of the assessor must refer to the fact that the person being assessed was made aware of the significance and effect of the finding of incapacity and that person was informed of the right to refuse to be interviewed.”;
4. Section 78 of the *SDA* represents the minimum requirements for an assessment and that the person being assessed should be advised that she has the right to have a lawyer, friend, relative, present for the interview;
5. The assessor must do more than merely record information provided by the person being assessed and then form an opinion;
6. The assessor must probe and determine the process by which the person being assessed arrived at an answer or statement;
7. Clarification of the information received should be sought;
8. The assessor must establish whether, or not, the person being assessed is able

²⁴⁷ Judith Wahl, "Capacity and Capacity Assessment in Ontario" (May 2009), *Advocacy Centre for the Elderly*, accessed online: http://www.cba.org/cba/cle/PDF/ELD09_Wahl_notes.pdf [Wahl].

²⁴⁸ *Ibid.*

to understand the information relevant to making a decision in the management of property;

9. The assessor should be sure that the person being assessed understands the information relevant to making a decision about admission to a long-term care facility;

10. The assessor should make a distinction between failing to understand and appreciate risk and consequences as opposed to being unable to understand and appreciate risks and consequences;

11. The assessor is not to interject personal values, judgments, priorities into the process as such the reasonableness of the person's words, deeds and choices is not the test;

12. The test for incapacity is an objective test;

13. Some real effort must be undertaken to determine which evidence to rely on from other witnesses when assessing capacity; and,

14. Compelling evidence is required to override the presumption of capacity found in s. 2(2) of the SDA.²⁴⁹

Capacity Assessments in the United Kingdom

In the United Kingdom (UK), there is no system involving designated capacity assessors or qualified professionals for certain assessments, rather, the question of who assesses capacity is determined by the specific circumstances in which the need to assess arises. In their analysis of the UK system under its *Mental Capacity Act 2005*, the LCO has provided that:

The person who assesses an individual's capacity to make a decision will usually be the person who is directly concerned with the individual at the time the decision needs to be made. This means that different people will be involved in assessing someone's capacity to make different decisions at different times. For most day-to-day decisions, this will be the person caring for them at the time a decision must be made. For example, a care worker might need to assess if the person can agree to being bathed. Then a district nurse might assess if the person can consent to have a dressing changed.²⁵⁰

²⁴⁹ Koch, *supra* at 518-522.

²⁵⁰ See LCO, *supra* at 84 which quotes Department of Constitutional Affairs, *Mental Capacity Act 2005 Code of Practice* (London: TSO, 2007), 53.

Concluding Comments

In every case, a lawyer has the overriding duty of ensuring that a client has the requisite decisional capacity to retain and instruct counsel and has the capacity to undertake the task at hand. Any defense or assertion of a client's legal rights must rest on a foundation of a valid lawyer-client relationship. It may not always be possible to detect every instance of incapacity, but a lawyer must always be satisfied of the ability to act for a given client and fulfill all of the duties and obligations owed to that client.

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

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2023

APPENDIX “A”: 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> ,	Decisions with respect to personal or financial matters. Governs supported	“capacity” means, in respect of the making of a decision about a matter, the

PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	Definition of “capacity/capable”?
	SA 2008, c. A-4.2, s. 46(2) & (5)	decision-making, co-decision making, guardianships and trusteeships.	ability to understand the information that is relevant to the decision and to appreciate the reasonably foreseeable consequences of (i)
		Designated “capacity assessors” under the regulations.	a decision, and (ii) a failure to make a decision.
	<i>Mental Health Act</i> , RSA 2000, c M-13	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</i> , RSA 2000 c L-12	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 Adult Guardianship and Trusteeship Act or a person in respect of whom a certificate of incapacity is in effect under the Public Trustee Act, 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</i> , RSBC 1996, c 370	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”.
	<i>Patients Property Act</i> , RSBC 1996, c 349	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,

PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	Definition of “capacity/capable”?
			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</i> , RSBC 1996, c 6	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</i> , RSBC 1996, c 288	Governs admission of individuals to mental health care facilities.	No definition of “capacity”.
	<i>Health Care (Consent) and Care Facility (Admission) Act</i> , RSBC 1996, c 181	Governs health care decisions and sets out the capacity criteria required to make an advance directive.	No definition of “capacity”.
	<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

PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	Definition of “capacity/capable”?
			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, SBS 2012, c 13</i>	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, CCSM c P97</i>	Governs enduring and springing power of attorneys.	No definition of “capacity”. "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>	Governs the admission and treatment requirements for patients in psychiatric facilities. The Act also applies to individuals on leave from a facility as well as individuals under Orders of Committeeship living in the community.	No definition of “capacity” “Incapable person” means a person for whom a committee has been appointed. S 3: “a person is incapable of personal care if he or she is repeatedly or continuously unable, because of mental incapacity, (a) to care for himself or herself; and (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.

PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	Definition of “capacity/capable”?
	<i>Health Care Directives Act</i> , CCSM c H27	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.”
	<i>Vulnerable Persons Living with a Mental Disability Act</i> , CCSM c V90	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</i> , CCSM c L150	Governs the limitation period within which to commence a claim and the “tolling” of the limitation period while the person is under a “disability”.	No definition of “incapable”. 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”.
NEW BRUNSWICK	<i>Property Act</i> , RSNB 1973, c P-19	Granting and revoking power of attorney for property.	No definition for “capacity”.
	<i>Infirm Persons Act</i> , RSNB 1973, c I-8	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

PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	Definition of “capacity/capable”?
			requires care, supervision and control for his protection or welfare or for the protection of others or for the protection of his property.
	<i>Mental Health Act</i> , RSNB 1973, c M-10	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</i> , SNB 2009, c L-8.5	Governs the limitation periods to commence a claim and when those periods will be “tolled” or suspended when a person is “incapable”.	No definition of “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”
NEWFOUNDLAND & LABRADOR	<i>Advance Health Care Directives Act</i> , SNL 1995, c A-4.1	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</i> , RSNL 1990, C E-11	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 effect, and (ii) that would, but for this Act, invalidate or terminate a power of

PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	Definition of “capacity/capable”?
			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 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

PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	Definition of “capacity/capable”?
			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.
	<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.	No definition of “incapable”. 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”.
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.

PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	Definition of “capacity/capable”?
	<i>Powers of Attorney Act</i> , RSNS 1989 c 352	Decisions to grant / revoke powers of attorney for property.	No definition of capacity. s. 2A (2) A person is incapable of making a power of attorney if the person is incapable of understanding and appreciating the nature and effects of granting a power of attorney.
	<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, 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</i> , SNS 2014 c 35	Governs the limitation periods for commencing a lawsuit and when they will be tolled or suspended due to incapacity.	No definition of “incapable”. 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.”
NUNAVUT	<i>Powers of Attorney Act</i> , S. Nu 2005 c 9 s3(1)	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

PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	Definition of “capacity/capable”?
			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</i> , SNWT (Nu) 1994, c 29	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 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</i> , RSNWT (Nu) 1988, c M-10	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</i> , RSNWT (Nu) 1988, c L-8	Governs limitation periods to commence a claim and when those limitations periods will be “tolled” or extended for individuals who are “incapable”.	No definition of “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”.
ONTARIO	<i>Substitute Decisions Act</i> , 1992, SO 1992 c 30	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</i> , RSO 1990, c M 7	Governs criteria for voluntary, informal and involuntary admissions to specially designated psychiatric facilities.	s. 1 “Mental disorder” “any disease of the mind”.

PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	Definition of “capacity/capable”?
	<i>Health Care Consent Act</i> , 1996, SO 1996, c 2 Sch A	Consent regarding health care decisions and admission to long-term care facility.	“Capable” means mentally capable, and “capacity” has a corresponding meaning.
	<i>Limitations Act</i> , 2002 SO 2002, c 24 Sch B	Governs limitation periods for the commencement of a lawsuit.	No definition of “incapable”. 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.
PRINCE EDWARD ISLAND	<i>Powers of Attorney Act</i> , RSPEI 1988, c P16	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</i> , RSPEI 1988, c C-17.2	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 patient has the right to make a decision; and (d) to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.

PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	Definition of “capacity/capable”?
	<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”.	No definition of “capacity” or “incapable”. s.1 “disability” means disability arising from minority or disability unsoundness of mind.
QUEBEC	<i>Civil Code of Quebec, CCQ-1991, art. 2166-2174</i>	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 P38.001</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 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

PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	Definition of “capacity/capable”?
			consequences of making or not making a decision.
	<i>The Health Care Directives and Substitute Health Care Decision Makers Act</i> , SS 2015 c H-0.002	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</i> , SS 1984- 85-86, c M-13.	Governs the admission, custody, detention, assessment, in psychiatric facilities.	“Capacity” means capacity as defined in The Health Care Directives and Substitute Health Care Decision Makers Act.
	<i>The Limitations Act</i> , SS 2004 c L-16.1	Governs the limitation periods to commence a claim and suspends the limitation period for persons with a “mental disability”.	No definition of “capacity” or “incapable”. “Mental disability” means: (i) an intellectual disability or impairment; or (ii) a mental disorder. 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 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.”

PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	Definition of “capacity/capable”?
YUKON	<i>Enduring Power of Attorney Act</i> , RSY 2002, c 73	Decision on granting and revoking power of attorneys for property.	No definition of “capacity”.
	<i>Care Consent Act</i> , SY 2003, c 21	Governs consent and substitute consent to health care and admission to care facilities, and advance directives.	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). 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 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 Care Consent Act apply with the necessary

PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	Definition of “capacity/capable”?
			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”.

APPENDIX “B”: CAPACITY TO MARRY IN CANADA: CROSS-PROVINCIAL EXAMINATION OF MARRIAGE LEGISLATION

PROVINCE	LEGISLATION	IMPORTANT/RELEVANT SECTIONS	Definition of “capacity to marry”?
ALBERTA	<i>Marriage Act</i> , RSA 2000, c M-5	<p>Section 27 (1) – states that marriages cannot be issued where there is reason to believe one of the parties is mentally incompetent by way of a guardianship/trusteeship order or certificate of incapacity under the Adult Guardianship and Trusteeship Act or equivalent legislation of another jurisdiction, is a committee under The Mentally Incapacitated Persons Act, RSA 1970 c232, or equivalent legislation of another jurisdiction.</p> <p>However, section 27 (2) holds that a marriage licence may be issued with proof the trustee or guardian has been given 30 days’ notice and that no trustee or guardian has served an originating notice concerning the issuance of the marriage licence.</p> <p>Section 27 (4) States that punishment for issuing a licence in contravention of this is a fine of not more than \$1000 and in default of payment to imprisonment for a term not exceeding 30 days.</p>	<p>Despite addressing capacity issues, the <i>Marriage Act</i>, Alberta provides no definition of “capacity” or “capacity to enter into a marriage”</p> <p>At common law, a marriage may be found to be void <i>ab initio</i> if one or both of the spouses did not have the requisite mental capacity to marry.</p>
BRITISH COLUMBIA	<i>Marriage Act</i> , RSBC 1996, c 282	Section 23 states that a caveat can be lodged with the issuer of marriage licences against issuing a licence for the person’s named in the caveat. Once lodged, the caveat prevents	No definition of “capacity” or “capacity to enter into a marriage”

PROVINCE	LEGISLATION	IMPORTANT/RELEVANT SECTIONS	Definition of “capacity to marry”?
		<p>the issuing of a marriage license until the issuer has inquired about the caveat and is satisfied the marriage ought not to be obstructed, or the caveat is withdrawn by the person who lodged it</p> <p>Section 35 states that it is a criminal offence to issue a license for a marriage, or to solemnize a marriage, when the authority in question knows or has reason to believe that either of the parties to the marriage is mentally disordered or impaired by drugs or alcohol.</p>	
MANITOBA	<i>The Marriage Act, CCSM c M50</i>	<p>Section 20 states that persons declared mentally disordered cannot be issued a marriage licence until a psychiatrist certifies in writing that they have the capacity to understand the nature of the contract of marriage and the duties and responsibilities which it creates. A person who contravenes this will be guilty of an offence and liable on summary conviction to a fine of not more than \$500.</p> <p>Section 30 states that a declaration that a valid marriage was not effected or entered into shall only be made after a trial relying on witness examination or depositions read into evidence.</p>	No definition of “capacity” or “capacity to enter into a marriage”

PROVINCE	LEGISLATION	IMPORTANT/RELEVANT SECTIONS	Definition of “capacity to marry”?
<p>NEW BRUNSWICK</p>	<p><i>Marriage Act, RSNB 2011, c188</i></p>	<p>Caveats against issuance of marriage licence</p> <p>19(1) Any person on payment of a fee prescribed by regulation may lodge with any issuer a caveat against the issuing of a licence for the marriage of any person named in the caveat, and if a caveat is lodged with the issuer and is duly signed by or on behalf of the person who lodges the caveat and states that person’s place of residence and the ground of objection on which that person’s caveat is founded, no marriage licence shall be issued by the issuer until either the issuer has examined into the matter of the caveat and is satisfied that it ought not to obstruct the issuing of the licence or the caveat is withdrawn by the person who lodged it.</p> <p>19(2) The issuer may in case of doubt refer the matter of the caveat to the Registrar for his or her advice.</p> <p>Section 27 concerning validation holds that nothing in the section has the effect of confirming or rendering valid a marriage between parties who were not legally competent to enter into the marriage contract by reason of consanguinity, affinity or otherwise.</p>	<p>No definition of “capacity” or “capacity to enter into a marriage”</p>

PROVINCE	LEGISLATION	IMPORTANT/RELEVANT SECTIONS	Definition of “capacity to marry”?
NEWFOUNDLAND & LABRADOR	<i>Marriage Act</i> , SNL 2009, c M-1.02	<p>Newfoundland is silent on the capacity to marry.</p> <p>Section 18, however, holds that a marriage licence will not be issued to anyone under 16, under the influence of drugs and alcohol, or in respect of the issuer’s own marriage</p>	No definition of “capacity” or “capacity to enter into a marriage”
NORTHWEST TERRITORIES	<i>Marriage Act</i> , SNWT 2017, c2	<p>Per section 19, the issuer of a marriage in NWT shall meet with each of the parties separately to ensure they understand the contents of the licence and its significance.</p> <p>Section 43 holds that an issuer shall not issue a marriage where they know or have reason to believe either of the party to the intended marriage is ineligible or incapable of freely consenting or under the influence of drugs or alcohol.</p> <p>Section 45 makes it a summary offence to issue or solemnize a marriage contrary to the <i>Act</i>.</p>	No definition of “capacity” or “capacity to enter into a marriage”
NOVA SCOTIA	<i>Marriage Act</i> , RSNS 1989, c 436	<p>Nova Scotia’s <i>Marriage Act</i> is silent on the issue of capacity to marry.</p> <p>Section 46 holds that the determination a valid marriage was not effected or entered into shall only be rendered after a trial.</p>	<p>No definition of “capacity” or “capacity to enter into a marriage”</p> <p>Common law: a marriage may be found to be void <i>ab initio</i> if one or both of the spouses did not</p>

PROVINCE	LEGISLATION	IMPORTANT/RELEVANT SECTIONS	Definition of “capacity to marry”?
			have the requisite mental capacity to marry
NUNAVUT	<i>Marriage Act</i> , RSNWT (Nu) 1988, c M-4	Section 18 holds that no one shall perform a marriage ceremony and no person shall go through with a form of marriage with any other person in Nunavut where they know or have reason to believe that either of the contracting parties are incapable of giving a valid consent.	No definition of “capacity” or “capacity to enter into a marriage”
ONTARIO	<i>Marriage Act</i> , RSO 1990, c M3	Ontario’s <i>Marriage Act</i> , at section 7 holds that no person shall issue a licence or solemnize the marriage of any person who, based on what he or she knows or has reasonable grounds to believe, lacks mental capacity to marry by reason of being under the influence of intoxicating liquor or drugs or for any other reason.	No definition of “capacity” or “capacity to enter into a marriage”
PRINCE EDWARD ISLAND	<i>Marriage Act</i> , RSPEI 1974, c M-5	PEI at section 23 of its <i>Marriage Act</i> makes it a summary offence to issue a licence or solemnize a marriage where the issuer knows or has reason to believe that either of the parties to the intended marriage is mentally incompetent.	No definition of “capacity” or “capacity to enter into a marriage”
QUEBEC	<i>Civil Code of Quebec</i> , CQLR c CCQ-1991	Like the caveat provisions of British Columbia and New Brunswick, Quebec’s Civil Code at section 372 allows any interested person to oppose the solemnization of a marriage	

PROVINCE	LEGISLATION	IMPORTANT/RELEVANT SECTIONS	Definition of “capacity to marry”?
		<p>between persons incapable of contracting it. A minor may oppose a marriage alone. They may also act alone as defendant.</p>	
<p>SASKATCHEWAN</p>	<p><i>The Marriage Act</i>, SSA 1995, c M-4.1</p>	<p>Section 32.1 of Saskatchewan’s <i>Marriage Act</i>, allows a number of interested parties to bring an action to declare that a valid marriage was not effected or entered into because of a lack of consent.</p> <p>Any of the following parties can bring an action: (a) a party to the marriage; (b) a family member of one of the parties to the marriage; (c) any other person who has a close personal connection to one of the parties to the marriage; (d) the public guardian and trustee if the public guardian and trustee is acting pursuant to The Public Guardian and Trustee Act as a personal guardian, property guardian or administrator for one of the parties to the marriage.</p> <p>A declaration that a valid marriage was not effected or entered into shall only be made after a trial including evidence taken orally in open court or of witnesses examined de bene esse, where, according to the practice of the court, depositions of that nature may be read in evidence.</p>	<p>No definition of “capacity” or “capacity to enter into a marriage”</p>

PROVINCE	LEGISLATION	IMPORTANT/RELEVANT SECTIONS	Definition of “capacity to marry”?
YUKON	<i>Marriage Act</i> , RSY 2002, c.146	<p>Yukon’s <i>Marriage Act</i> is silent on capacity, capacity to marry, or mental competency.</p> <p>Section 45 addresses the nullity of a marriage and holds that pursuant to s 45 (5), before a trial to determine the nullity of a marriage, a Judge may order a physical examination of either of the parties by a medical practitioner or nurse practitioner appointed for the purpose by the Judge.</p>	No definition of “capacity” or “capacity to enter into a marriage”

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

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