

# STEP JOURNAL

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APRIL 2019 VOLUME 27/ISSUE 3

*Conversations*

*about*

*capacity*

From assisted decision making  
to life-sustaining treatment



**REGIONAL FOCUS**  
CROWN DEPENDENCIES

**SPOTLIGHT ON**

STEP JOURNAL



# NOT A PERFECT SCIENCE

**KIMBERLY A WHALEY** OUTLINES THE DIFFERING APPROACHES TO DETERMINING DECISIONAL CAPACITY ACROSS CANADA'S PROVINCES AND TERRITORIES

## KEY POINTS

### WHAT IS THE ISSUE?

In Canada, there is no single legal definition of capacity, and no single approach to determining requisite decisional capacity.

### WHAT DOES IT MEAN FOR ME?

Since legislative provisions differ throughout Canada, it is incumbent on the practitioner to determine and review the applicable legislation.

### WHAT CAN I TAKE AWAY?

An understanding of the variations and nuances in Canada's differing legislation around the issue of capacity.

**A**ssessing decisional capacity is a difficult and complex task, replete with issues that are often unclear and unfamiliar to many. In a globally ageing demographic, clients' capacity, vulnerability and susceptibility to undue influence must be routine considerations for trusts and estates professionals.

Lawyers, in particular, are obligated to ensure in any retainer that the client has the requisite capacity to retain counsel, give instructions and execute documents relative to the specific matter for which counsel is retained. Granting powers of attorney (PoAs), entering into a contract, making testamentary dispositions and effecting real property transfers all require discrete capacity considerations. As such, lawyers and other professionals advising clients on estate and trust-related proceedings routinely make time-, situation- and task-specific determinations of a client's capacity, but the varying legal and medical approaches to the assessment of capacity mean there is no single 'go-to guide' for this process in Canada.

## STATUTORY v COMMON LAW

At law, in Canada, there is no single legal definition of capacity and there is no uniform approach to determining requisite decisional capacity. Individuals are presumed to be capable of making decisions, and an assessment of decisional

capacity incorporates criteria found both statutorily and at common law.

## STATUTORY

All of Canada's ten provinces and three territories have legislation that addresses decisional capacity.<sup>1</sup> Each has statutes that govern substitute decision making, PoAs and guardianship, as well as healthcare and consent legislation.

Surprisingly, few of these statutes define capacity in any meaningful way. For example, Ontario's *Substitute Decisions Act, 1992* (the Act)<sup>2</sup> simply states that 'capable' means 'mentally capable' and that 'capacity' has a corresponding meaning. Nevertheless, this legislation is instructive, as it provides the statutory criteria for determining the requisite decisional capacity to manage property and make personal care decisions, and for granting and revoking PoAs for the same.

Other definitions of capacity are more specific. Nova Scotia's *Adult Capacity and Decision-making Act*,<sup>3</sup> defines capacity as the

'ability, with or without support, to:  
(i) understand information relevant to making a decision; and (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.'

The terminology used in the legislation varies across the country, too. For example, Manitoba's *Powers of Attorney Act*<sup>4</sup> does not refer to capacity at all and instead uses 'mental incompetence', which is defined as 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'.

The various pieces of provincial capacity legislation also assist only partially in the determination of who it is that should assess capacity, and when that assessment takes place. For example, Ontario's *Mental Health Act*<sup>5</sup> legislates criteria for voluntary, informal and involuntary admissions to designated psychiatric facilities. This legislation requires a physician to assess a psychiatric patient's capacity to manage property on admission to the facility.

Further, for healthcare decisions, Ontario's *Health Care Consent Act, 1996*<sup>6</sup> requires the treating healthcare practitioner to assess the patient's capacity and to obtain capable, informed and voluntary consent prior to proceeding with treatment and treatment decisions, which includes admission to a long-term care facility. Various items of legislation in each province govern who should conduct the required capacity assessment in certain situations (depending on the decision at hand) and when.

#### COMMON LAW

Other decisional capacity criteria are governed by common-law precedent. For example, there is no specific legislation, in any province, that provides a 'bright-line test', as commonly used in the US, for assessing testamentary capacity. And while Ontario's *Succession Law Reform Act*<sup>7</sup> does address the proper execution of a will, it deals with technical formalities, as opposed to a testator's mental capacity.

The factors for determining requisite testamentary capacity are the same in Canada as in the UK, and are found in the 150-year-old case of *Banks v Goodfellow*.<sup>8</sup> Similarly, the requisite decisional capacity to marry, separate, divorce and reconcile are all determined at common law, as is the requisite capacity to instruct counsel, to gift and to enter into a contract.

The Supreme Court of Canada confirmed in the decision of the 2003 case *Starson v Swayze*<sup>9</sup> that, generally, for a person to be found capable, they 'must be able to understand the information that is relevant to making a decision'. This requires 'the cognitive ability to process, retain and understand the relevant information'. Second, the Court held that:

[A] person must be able to appreciate the reasonably foreseeable consequences

of the decision or lack of one. This requires the patient to be able to apply the relevant information to his or her circumstances, and to be able to weigh the foreseeable risks and benefits of a decision or lack thereof.

#### MEDICAL AND LEGAL

Capacity in Canada is assessed by applying the evidence available to the applicable required factors or standards for determining capacity. Each particular task, or decision undertaken, has its own corresponding determining criteria that can be found in legislation, either unique to each province or in the common law applied across Canada. Capacity is also assessed on both legal and medical factors and by different types of professionals, e.g. healthcare professionals or lawyers, depending on the decision being made or the task being completed.

The assessment of capacity is a less-than-perfect science, and sometimes the demarcation between legal and medical may become blurred. For example, in all provinces (under the applicable provincial legislation), a treating physician must assess whether a patient is capable of consenting to healthcare treatment, while, also in all provinces, common law requires that it be a lawyer who assesses whether a client has testamentary capacity.

To do this, some lawyers choose to administer a version of the Mini-Mental State Examination, respecting their older clients before being retained. This is not advisable for a number of reasons, primarily as such an exam and most similar cognitive screening tools are not fundamentally designed to determine decisional capacity, or even executive functioning, particularly in a legal context. It should not be presumed that a high score on such an exam equates with the requisite decisional capacity to make the decision at hand.

#### CAPACITY ASSESSORS

While various professionals, including lawyers, assess capacity depending on the decision at hand, each province has its own guidelines on obtaining legislated capacity assessments. In Ontario, capacity assessments made with respect to certain decisions under the Act can be completed by an assessor certified by the Ministry of the Attorney General.<sup>10</sup> Expert assessments or examinations must adhere to certain procedures that include clear demarcations of date and time, as well as to rights' advice.

As some decisional capacity is determined by legal or common-law

*'Sometimes the demarcation between legal and medical may become blurred'*

factors or criteria, lawyers should not assume that a healthcare professional or other capacity assessor is more knowledgeable about determining capacity to instruct, or make a decision, on a particular matter. In fact, it is often the case that the healthcare professional is not familiar with the specific legal criteria for determining decisional capacity for the particular purpose, so a lawyer's input as to these is advised.

#### STANDARDISED TESTING TOOLS

The use of different tools, methods and approaches by medical experts in assessing capacity can create difficulties for a court when comparing conflicting expert opinions.

The use of a standardised assessment tool could assist courts in ensuring that consistent criteria are employed by medical experts and therefore could provide greater clarity when weighing competing medical opinions. A standardised assessment tool could assist both the lawyer and an attending physician in providing a contemporaneous determination of a testator's capacity.

#### CONCLUSION

Issues of capacity frequently arise for trusts and estates practitioners, and are only bound to increase in frequency as our population continues to age. Professionals must understand and balance the various duties they owe to their client when capacity is at issue, including protecting the autonomous rights of the client, paying especially close attention to the varying provisions that apply across Canada's provinces and territories.

<sup>1</sup> For a comparative list of each region's relevant Acts, see WEL Partners, *Assessing Capacity in Canada: Cross-provincial examination of capacity legislation*, [bit.ly/2T5n0kh](http://bit.ly/2T5n0kh) <sup>2</sup> SO 1992, c 30 <sup>3</sup> SNS 2017, c 4 <sup>4</sup> CCSM c P 97 <sup>5</sup> RSO 1990, c M 7 <sup>6</sup> SO 1996, c 2 Sch A <sup>7</sup> RSO 1990, c S 26 <sup>8</sup> (1870) All ER Rep 47 (Eng QB) <sup>9</sup> 2003 SCC 32 <sup>10</sup> A list of qualified capacity assessors is available on the Ministry's website: [bit.ly/2XyQ43E](http://bit.ly/2XyQ43E)



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