

The Right to Legal Capacity for Canadians with Disabilities: A Quest for Dignity, Equality, and Autonomy

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ABSTRACT

This essay explores whether Canadian laws on legal capacity embrace the values that the United Nations Convention on the Rights of Persons with Disabilities (CRPD) seeks to promote. This perspective was chosen so as to enable scrutiny of the strengths and weaknesses of the Canadian legal framework vis-à-vis the crux of one of the CRPD's most seminal provisions. The essay proposes that dignity, autonomy, and equality constitute key normative underpinnings of the CRPD. The paper investigates the degree to which these values are entrenched in Canadian human rights law and jurisprudence, and then assesses the concurrence between Canada's laws on legal capacity and the values that undergird Article 12 of the CRPD. The paper focuses on legislation governing guardianship, co-decision-making, and supported decision-making in various Canadian jurisdictions. The paper also examines possible directions for future law reform in this area. This essay also suggests that the central values underlying Article 12 have a strong presence in Canada's human rights legislation and jurisprudence. The right to life, liberty, and security of the person as well as the right to equality enshrined in the Canadian Charter provide a basis upon which it can be affirmed that Canada's legal capacity laws warrant reform. The essay also demonstrates how decisions rendered by certain forward-thinking Canadian judges should create an impetus for reconsidering how questions of legal capacity should be perceived in the twenty-first century. The legislative reforms enacted in Peru, Colombia, and Costa Rica may be looked upon as examples of how comprehensive systems of supported decision-making can be enshrined into law. The supported decision-making model can enhance dignity, equality, and autonomy for persons with disabilities by empowering individuals to claim agency over their own life story.

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Introduction

We have, all of us, recognized a gentle, trusting, believing spirit and very much a thinking human being who has his unique part to play in our compassionate interdependent society.

And so, in the spirit of that liberty which Learned Hand tells us seeks to understand the minds of other men, and remembers that not even a sparrow falls to earth unheeded, I find and I declare Matthew Justin Clark to be mentally competent.¹

This passage forms the end of a landmark judgement in which an Ontario judge rejected an application for guardianship launched by the parents of a young man with cerebral palsy. According to Dulcie McCallum, a Canadian lawyer who contributed to the drafting of the United Nations Convention on the Rights of Persons with Disabilities (CRPD), the above-quoted *Clark v Clark* case significantly impacted the Convention.² Notably, the case had a marked effect on the elaboration of Article 12,³ the provision on the right to legal capacity. Article 12 has been characterized as representing the very “core” of the Convention.⁴

This paper will explore whether Canadian laws on legal capacity embrace the values that Article 12 of the CRPD seeks to promote. This will enable an in-depth discussion on the strengths and weaknesses of the Canadian legal framework in this sphere vis-à-vis the spirit of one of the CRPD’s most seminal provisions. The piece will begin by providing background information on Article 12 of the CRPD and its implementation in the Canadian

¹ *Clark v Clark* (1983), 40 OR (2d) 383.

² CBC Radio, The Sunday Edition, “How Justin Clark’s fight for independence transformed disability rights in Canada” (25 November 2018), CBC News, online: <<https://www.cbc.ca/radio/thesundayedition/november-25-2018-the-sunday-edition-with-michael-enright-1.4911588/how-justin-clark-s-fight-for-independence-transformed-disability-rights-in-canada-1.4911590>>.

³ *Ibid.*

⁴ Gerard Quinn, quoted in Dimitrina Petrova, ed., *The Equal Rights Review*, Vol. Two (London, UK: The Equal Rights Trust, 2008), online: <https://www.equalrightstrust.org/ertdocumentbank/err_issue02%20reduced.pdf> at 90.

context. Next, the essay will discuss how dignity, equality, and autonomy constitute key normative underpinnings of Article 12 of the CRPD. The paper will explore the degree to which these fundamental values are entrenched in Canadian human rights law and jurisprudence, and then assess the concurrence between Canada's laws on legal capacity and these values. This paper does not purport to exhaustively discuss all legislation touching upon legal capacity, and will rather focus on legislation governing guardianship, co-decision-making, and supported decision-making. If it is possible to peel back the layers of complexity and ascertain the degree to which Canadian laws are embracing the crux of Article 12, this may help to distill the normative essence of Canada's intricate legal landscape related to legal capacity and may also help to orient Canada's priorities for future law reform in this area.

Article 12 of the Convention on the Rights of Persons with Disabilities

Chiefly, Article 12 of the CRPD calls upon States Parties to "recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life."⁵ A person who enjoys legal capacity holds rights and obligations as well as the capacity to act under the law.⁶ Endowing persons with disabilities with the right to legal capacity is critically important because of the latter aspect, as it entails granting these individuals the right to make decisions about their own lives and the right to have those decisions recognized by the law.⁷

Article 12 of the CRPD also asks States Parties to "take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity."⁸ As elucidated by the Council of Canadians with Disabilities, "the Convention focuses not on whether a person has

⁵ *Convention on the Rights of Persons with Disabilities*, 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) [CRPD], art 12.

⁶ See Arlene S Kanter, *The Development of Disability Rights Under International Law: From Charity to Human Rights* (New York: Routledge, 2015) at 236.

⁷ See Kristin Booth Glen, "Supported Decision-Making and the Human Right of Legal Capacity" (2015) 3:1 *Inclusion* 2 at 2.

⁸ CRPD, *supra* note 5, art 12(3).

capacity to make decisions, but upon how that person can be assisted so that he or she is able to make decisions affecting their life.”⁹ As clarified by the UN Committee on the Rights of Persons with Disabilities in their first General Comment on the CRPD, Article 12 of the Convention puts forward “supported decision-making” as the model mechanism through which persons with disabilities can be empowered in their own decision-making processes.¹⁰ In contrast to traditional substitute decision-making in which a court-appointed representative makes decisions on a person’s behalf in their purported “best interests,” supported decision-making allows an individual to be assisted in decision-making by a trusted individual who commits to upholding their will and preferences.¹¹

Arstein-Kerslake affirms that “the resistance to Article 12 of the Convention is palpable.”¹² Indeed, even the negotiation of the provision was fraught with disaccord, with some countries maintaining that legal capacity should constitute a universal human right, and others sustaining that the right should be restricted to those deemed “competent.”¹³ While the former view prevailed in the final text of the provision, unease with Article 12 of the CRPD has not dissipated. This is illustrated by the numerous reservations, understandings, and declarations that various States Parties maintain with respect to Article 12.¹⁴

⁹ “ARCH Alert” (22 July 2009), online: ARCH Disability Law Centre <<http://www.archdisabilitylaw.ca/sites/all/files/ARCH%20Alert%20%20July%2022%2009%20-%20Text.txt>>.

¹⁰ See Committee on the Rights of Persons with Disabilities, *General comment No.1 (2014) – Article 12: Equal recognition before the law* (19 May 2014), online: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>> at para 3.

¹¹ See *Ibid* at paras 27 & 29.

¹² Anna Arstein-Kerslake, “Legal Capacity and Supported Decision-Making: Respecting Rights and Empowering People” in *Disability Law and Policy: An Analysis of the UN Convention*, Charles O’Mahony & Gerard Quinn, eds (Dublin: Clarus Press, 2017) 69 [Arstein-Kerslake, “Legal Capacity and Supported Decision-Making”] at 70.

¹³ Kanter, *supra* note 6 at 257.

¹⁴ Arstein-Kerslake, *supra* note 12 at 70; see also “Convention on the Rights of Persons with Disabilities” (last updated November 2019), online: *United Nations Treaty Collection* <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4> for the various statements vis-à-vis Article 12.

Article 12 of the CRPD asks for radical change. It necessitates the abandonment of deeply entrenched paternalistic approaches to “protecting” persons with disabilities and demands that countries dismantle systems of substitute decision-making such as guardianship that have been used to deny legal capacity to persons with disabilities for centuries.¹⁵ In fact, substitute decision-making regimes were enshrined in Roman law as early as fifth century BC and these systems have been maintained since that era as a means of safeguarding the interests of “vulnerable” individuals.¹⁶ According to Fiala-Butora and Stein, preserving systems like guardianship for over 2000 years has helped to ingrain the stereotype that persons with intellectual disabilities are unable to make their own decisions.¹⁷ Arstein-Kerslake suggests that it is such lingering stigma that may underlie opposition to Article 12 and the desire to continue with approaches to disability that are grounded in paternalism, protection, and charity.¹⁸

Canada attached a reservation vis-à-vis Article 12 in order to enable the continued use of substitute decision-making “in appropriate circumstances and subject to appropriate and effective safeguards.”¹⁹ This reservation evidences a desire to preserve both substitute and supported decision-making in the Canadian legal framework,²⁰ and reflects the view that there will inevitably be a subset of persons with “severe” impairments for whom supported decision-making will not be suitable, on the basis

¹⁵ Arstein-Kerslake, *supra* note 12 at 70.

¹⁶ Penelope Weller, “Substituted Decision-Making” in *Health Law: Frameworks and Context*, Anne-Maree Farrell et al, eds (Cambridge, UK: Cambridge University Press, 2017) 127 at 128.

¹⁷ Janos Fiala-Butora & Michael Ashley Stein, “The Law as a Source of Stigma or Empowerment: Legal Capacity and Persons with Intellectual Disabilities” in *Intellectual Disability and Stigma: Stepping out the margins*, Katrina Scior & Shirli Werner, eds (London: Palgrave Macmillan, 2016) 195 at 204.

¹⁸ Arstein-Kerslake, “Legal Capacity and Supported Decision-Making,” *supra* note 12 at 70.

¹⁹ “Convention on the Rights of Persons with Disabilities,” *supra* note 14; see also Julian Walker, Legal and Legislative Affairs Division, “The United Nations Convention on the Rights of Persons with Disabilities: An Overview” (27 February 2013), online: *Library of Parliament* <https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201309E#ftn48>.

²⁰ Lana Kerzner, “Supported Decision-Making Innovations: The Canadian Experience” in *Disability Law and Policy: An Analysis of the UN Convention*, Charles O’Mahony & Gerard Quinn, eds (Dublin: Clarus Press, 2017) 111 at 113

that such persons would lack requisite mental capacity.²¹ This position is incompatible with the interpretation of Article 12 put forward by the UN Committee on the Rights of Persons with Disabilities in their first General Comment. The Committee has declared that Article 12 demands the *categorical* abolition of substitute decision-making,²² and that even in more challenging cases where it may be difficult to ascertain a person's will and preferences, the person should receive support guided by the "best interpretation of will and preferences."²³ The UN Committee on the Rights of Persons with Disabilities has urged Canada to withdraw its reservation pertaining to Article 12, affirming that this reservation is inconsistent with the object and purpose of the Convention, while also "prevent[ing] [Canada] from fully implementing and addressing all human rights of persons with disabilities in compliance with the human rights model of disability."²⁴

Upon a visit to Canada in April 2019, the UN Special Rapporteur on the Rights of Persons with Disabilities repeated this entreaty for Canada to revoke its reservation to Article 12 and she called for concerted efforts to swiftly eradicate substitute decision-making across the country.²⁵ Since *The Constitution Act* of 1867 grants jurisdiction over "property and civil rights" to the provincial and territorial governments,²⁶ matters of legal capacity

²¹ See Walker, *supra* note 19.

²² See Committee on the Rights of Persons with Disabilities, *General comment No.1 (2014) – Article 12: Equal recognition before the law*, *supra* note 10 at para 28.

²³ *Ibid* at para 21.

²⁴ See Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Canada* (8 May 2017), online: *UN Treaty Body Database* <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fCAN%2fCO%2f1&Lang=en> at paras 7-8.

²⁵ "End of Mission Statement by the United Nations Special Rapporteur on the rights of persons with disabilities, Ms. Catalina Devandas-Aguilar, on her visit to Canada" (12 April 2019), online: *United Nations Human Rights Office of the High Commissioner* <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24481&LangID=E>> ["End of Mission Statement"].

²⁶ *The Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3, s 92(13); Lana Kerzner, "Paving the way to Full Realization of the CRPD's Rights to Legal Capacity and Supported Decision-Making: A Canadian Perspective" (April

largely fall under provincial and territorial jurisdiction.²⁷ All Canadian provinces and territories currently have laws providing for substitute decision-making for individuals who have been declared mentally incompetent.²⁸ These arrangements may take the form of guardianship or advanced planning documents, as well as informal appointment of substitute decision-makers in the health care context.²⁹ Some Canadian jurisdictions have admittedly incorporated supported decision-making regimes alongside their substitute decision-making systems.³⁰ Nevertheless, the UN Special Rapporteur on the Rights of Persons with Disabilities has emphatically stated that all Canadian legislation pertaining to legal capacity is in violation of Article 12 of the CRPD.³¹

Given Canada's reservation to Article 12 of the CRPD as well as the assertion that Canada is in contravention of this same provision, Canada is arguably at odds with the article at the heart of the Convention. As Canadian officials grapple to respond to the concerns articulated by the Special Rapporteur and the UN Committee, and as countries around the world engage in law reform on legal capacity in light of the CRPD, this is a critical moment to evaluate what Canada's laws are accomplishing for persons with disabilities by and large. It may be apropos to go beyond formalistic analyses of Canada's strict compliance with Article 12 and ask to what extent Canada's laws are promoting

2011) at 21, online:

<https://citizenship.sites.olt.ubc.ca/files/2014/07/In_From_The_Margins_Paper-Lana_Kerzner-FINAL-April_22_2011_2_.pdf>.

²⁷ *Ibid.*

²⁸ Nicholas Caivano, "Conceptualizing Capacity: Interpreting Canada's Qualified Reservation of Article 12 of the UN Disability Rights Convention" (2014) 4:1 *Western Journal of Legal Studies* 1 at 20.

²⁹ Canadian Civil Society Parallel Report Group, *Parallel Report for Canada*, CRPD Committee 17th Session (27 February 2017), online: *UN Treaty Body Database* <

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fCSS%2fCAN%2f26744&Lang=en> at 17.

³⁰ See e.g. Manitoba's *The Vulnerable Persons Living with a Mental Disability Act* SM 1993, c 29, CCSM c V90; Yukon's *Adult Protection and Decision Making Act*, SY 2003, c 21, Sch A; British Columbia's *Representation Agreement Act*, RSBC 1996, c 405.

³¹ "End of Mission Statement," *supra* note 25.

the central values underlying this provision. This is what the following sections attempt to do.

Dignity

Although the meaning of dignity is notoriously elusive and may vary between cultural contexts, it has been understood as encompassing the notion that every human being holds some “intrinsic worth” that must not be encroached upon.³² The first general principle enumerated in the CRPD demands “respect for inherent dignity.”³³ As articulated by Mégret, the CRPD is rooted in the notion that persons with disabilities are entitled to human rights due to their “inherent dignity.”³⁴ That is, the CRPD embraces the concept that rights are to be enjoyed universally, “by virtue of being human.”³⁵ According to Skarstad, the CRPD requires us to abandon the idea that the exercise of human rights should be justified by a person’s capabilities.³⁶ Rather, the CRPD asks that we conceive of human rights as “ideals that inform how we should treat each other” as human beings.³⁷ The CRPD recognizes that humanity is comprised of a vast spectrum of abilities and characteristics, and that all people are equally deserving of dignity and respect.³⁸ The human rights approach embraced by the CRPD affirms the inclusion of persons with disabilities in the “human family.”³⁹ Fundamentally, the CRPD embodies a “paradigm shift” that requires acceptance of persons with disabilities as subjects of rights, rather than objects of charity, medical treatment, and social protection.⁴⁰ This transition is crucial

³² See Christopher McCrudden, “Human Dignity and Judicial Interpretation of Human Rights” (2008) 19:4 *The European Journal of International Law* 655 at 722-733.

³³ See CRPD, *supra* note 5, art 3(1).

³⁴ Frédéric Mégret, “The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?” (2008) 30:2 *Human Rights Quarterly* 494 at 516.

³⁵ *Ibid.*

³⁶ Kjersti Skarstad, “Human rights through the lens of disability” (2018) 36:1 *Netherlands Quarterly of Human Rights* 24 at 41.

³⁷ *Ibid.*

³⁸ *Ibid* at 40.

³⁹ Lee Ann Basser, “Human Dignity,” in *Critical Perspectives on Human Rights and Disability Law*, Marcia H Rioux, Lee Ann Basser, & Melinda Jones, eds (Brill Academic Publishers, 2014) 17 at 17.

⁴⁰ “Statement by Louise Arbour, UN High Commissioner for Human Rights to the Resumed 8th Session of the Ad Hoc Committee on the Convention on the

to affirming the dignity or “intrinsic worth” of persons with disabilities.

Article 12 of the CRPD is inextricably linked to the concept of dignity. According to Glen, dignity is at the very core of the right to legal capacity.⁴¹ Dhanda maintains that by safeguarding individual aspirations, liberty, and enjoyment of the full gamut of human rights, Article 12 is a “foundational assertion of the right to be human.”⁴² Moreover, under Article 12, the only prerequisite for the exercise of legal capacity is one’s humanity.⁴³ In keeping with the CRPD’s promise of universal rights, Article 12 recognizes a universal right to legal capacity that disrupts the pervasive view that a particular threshold of intellectual and communicative capacity is a necessary condition for personhood.⁴⁴ Rather, as Wildeman argues, Article 12 reflects the notion that it is one’s status as a human being that requires others to respect one’s will and preferences.⁴⁵ In this way, Article 12 recognizes the inherent worth of all human beings. Furthermore, Article 12 empowers persons with disabilities with the “dignity of risk,” that is, the right to make “bad” decisions once provided with full information and offered the support required to make a given decision.⁴⁶ Quinn contends that in addition to allowing individuals

Rights of Persons with Disabilities, New York” (5 December 2006), online: *United Nations* <<https://www.un.org/esa/socdev/enable/rights/ahc8hrmsg.htm>>.

⁴¹ Glen, *supra* note 7 at 11.

⁴² Amita Dhanda, “Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future” (2007) 34:2 *Syracuse J Intl L & Com* 429 at 457.

⁴³ See Catalina Devandas Aguilar, *Report of the Special Rapporteur on the rights of persons with disabilities (theme: legal capacity reform and supported decision making)* (12 December 2017), online: *United Nations Human Rights Office of the High Commissioner* <<https://www.ohchr.org/Documents/Issues/Disability/A.HRC.37.56.docx>> at para 14.

⁴⁴ Kanter, *supra* note 6 at 278.

⁴⁵ Sheila Wildeman, “Protecting Rights and Building Capacities: Challenges to Global Mental Health Policy in Light of the *Convention on the Rights of Persons with Disabilities*” (2013) 41:1 *Journal of Law, Medicine & Ethics* 48 at 59; see also CRPD, *supra* note 5, art 12(4).

⁴⁶ Elionóir Flynn & Anna Arstein-Kerslake, “The Support Model of Legal Capacity: Fact, Fiction, or Fantasy?” (2014) 32:1 *Berkeley Journal of International Law* 124 at 142.

to learn from their mistakes, allowing for dignity of risk “is valuable in itself because it allows for dignity in taking risk.”⁴⁷

Restrictions on legal capacity may have deeply disempowering effects.⁴⁸ The exercise of fundamental freedoms and privacy rights is curtailed, buoyed by a paternalistic push to protect people from harming themselves.⁴⁹ As Flynn and Arstein-Kerslake remark, within the paradigm of regimes like guardianship, protected persons are more akin to “objects” than “subjects.”⁵⁰ Moreover, research has demonstrated that incompetence labelling can have a detrimental impact on an individual’s sense of self-worth and personality development, thus potentially impeding self-actualization.⁵¹ From the perspective of many disability rights organizations, by depriving individuals of personhood, substitute decision-making also leads to greater marginalization of persons with disabilities.⁵² This begs the question as to whether substitute decision-making arrangements condemn people to a life of indignity and exclusion. Concern for human dignity thus underlies the shift from substitute to supported decision-making that is mandated by Article 12.

The notion of dignity imbues Canadian human rights law and jurisprudence. Although there is no explicit right to dignity under the *Canadian Charter of Rights and Freedoms*, the Supreme Court of Canada has consistently maintained that the protection of human dignity is critical to safeguarding all of the rights laid out in the *Charter*.⁵³ The Supreme Court reflected upon

⁴⁷ Gerard Quinn, “Concept Paper- Personhood & Legal Capacity: Perspectives on the Paradigm Shift of Article 12 CRPD” (20 February 2010), HPOD Conference, Harvard Law School at 8.

⁴⁸ Anna Arstein-Kerslake, “Gendered denials: Vulnerability created by barriers to legal capacity for women and disabled women” (2019) 66 *International Journal of Law and Psychiatry* 1 [Arstein-Kerslake, “Gendered denials”] at 1.

⁴⁹ Kanter, *supra* note 6 at 241.

⁵⁰ Eilionóir Flynn & Anna Arstein-Kerslake, “Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity” (2014) 10:1 *Intl J of L in Context* 81 at 82.

⁵¹ Kanter, *supra* note 6 at 242.

⁵² Canadian Human Rights Commission, *Submission to the Committee on the Rights of Persons with Disabilities in Advance of the Committee’s Development of the List of Issues Prior to Reporting for Canada’s 2nd Periodic Review* (July 2019), *UN Treaty Body Database* <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fIFR%2fCAN%2f35591&Lang=en> at 19.

⁵³ Basser, *supra* note 39 at 33; see *R v Kapp*, 2008 SCC 41 at para 21.

the definition of dignity in *Law v Canada*, affirming that “[h]uman dignity means that an individual or group feels self-respect and self-worth.”⁵⁴ The Court proceeded to affirm that “[h]uman dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.”⁵⁵

Canadian judges have recognized the relevance of dignity to the context of legal capacity restrictions. For instance, in *Webb v Webb*, a Nova Scotia judge discussed the impact of a plenary guardianship order on the life of a young man, contending that he “lost control over his personhood,”⁵⁶ and “was deprived of his basic human dignity.”⁵⁷ The judge stressed that “[l]osing the fundamental control over his life goes to the core of what it means to be an adult human being in a free and democratic society.”⁵⁸ This reasoning is reminiscent of the judgment in the aforementioned *Clark v Clark* case, in which the judge also appeared to characterize matters of legal capacity as striking at the very core of one’s humanity. In *Clark v Clark*, the judge stated that “[t]his case, in Justin’s mind, revolves around his right to make a decision, about the friends he chooses to have, where he wishes to live and how he chooses to live his life.”⁵⁹ Thus, some Canadian courts have acknowledged how restrictions on legal capacity have far-reaching consequences on people’s potential to flourish as human beings, echoing the concerns about substitute decision-making that underpin Article 12 of the CRPD.

Moreover, one may also point to the *Re Koch* case, in which an Ontario judge contemplated matters of legal capacity and pronounced that “[t]he right knowingly to be foolish is not unimportant; the right to voluntarily assume risks is to be respected. [...] The dignity of the individual is at stake.”⁶⁰ These musings are reminiscent of the dignity of risk argument that justifies the abolition of substitute decision-making under the CRPD. Therefore, there has been recognition within Canadian

⁵⁴ *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 at para 53.

⁵⁵ *Ibid.*

⁵⁶ *Webb v Webb*, 2016 NSSC 180 (CanLII) at para 8.

⁵⁷ *Ibid* at para 29.

⁵⁸ *Ibid.*

⁵⁹ *Clark v Clark*, *supra* note 1.

⁶⁰ *Koch (Re)*, 1997 CanLII 12138 (ON SC) at para 17.

jurisprudence that an individual's dignity is bolstered when they are allowed to have agency over their own life and can take risks when they are duly informed about a given context.

With the background of the CPRD as well as Canadian law and jurisprudence in mind, it is pertinent to consider whether Canadian laws on legal capacity promote dignity of persons with disabilities. Réaume affirms that “[g]overnments tend to understand dignity as simple respect for choice, and when that seems implausible, they shift to patronizing people as incapable of choice.”⁶¹ It is critical to question whether Canada's legislation on legal capacity paternalistically denies agency to persons with disabilities, in such a way as to engender oppressive and stigmatizing effects. As previously mentioned, all provincial regimes in Canada allow for declarations of incapacity and appointment of substitute decision-makers for personal and/or property matters.⁶² For example, under the *Civil Code of Québec*,⁶³ those deemed to be totally and permanently incapacitated will have a curator appointed to them to make personal decisions, manage property, and exercise civil rights on their behalf.⁶⁴ An individual's ability to exercise control over their person under such an arrangement is thus vastly impeded. Some Quebec jurisprudence would suggest that a person under curatorship loses the ability to make any decision regarding their life, including extremely personal choices and even when the person is able to express their will.⁶⁵ This inevitably amounts to a profound interference with one's dignity. Furthermore, if a person

⁶¹ Denise Réaume, “Dignity, Choice, and Circumstances” in *Understanding Human Dignity*, ed Christopher McCrudden (Proceedings of the British Academy/Oxford University Press 2013) 539 at 540.

⁶² Canadian Civil Society Parallel Report Group, *supra* note 29 at 17.

⁶³ Please note that the framework governing legal capacity in Quebec will soon be overhauled by virtue of Bill 18, *An Act to amend the Civil Code, the Code of Civil Procedure, the Public Curator Act and various provisions as regards the protection of persons*, 1st Sess, 42nd Leg, Quebec, 2019 (assented to 2 June 2020), SQ 2020, c 11. Bill 18 was adopted on June 2, 2020, although it will not pass into law for 18 to 24 months after this date. Bill 18 eliminates curatorship and advisers to persons of full age, while retaining tutorship and introducing a non-judicial “assistance” measure in the spirit of supported decision-making. This essay discusses the legal provisions that were in force in Quebec at the time of writing (2019).

⁶⁴ *Civil Code of Québec*, CQLR c CCQ-1991 [CCQ], art 281.

⁶⁵ Pierre Deschamps, “La confiscation des droits fondamentaux des personnes inaptes et les régimes de protection” (2013) *Barreau du Québec – Service de la formation continue* 69 at 102.

under curatorship undertakes a legal act without being represented or assisted, the act can be annulled, or the ensuing obligations reduced, without any obligation to prove that harm had resulted.⁶⁶ This latter provision deprives people under curatorship of enjoying any dignity of risk whatsoever and may thus be construed as deeply demeaning. Additionally, as argued by Deschamps, this kind of provision prioritizes the protection of an individual's patrimony over the protection of their person.⁶⁷

Speaking about Canada's substitute decision-making laws, Bach and Kernzer maintain that "civil, political, and equality rights can be sweepingly restricted in so many fundamental aspects of people's lives."⁶⁸ According to these same authors, this "speaks volumes about the status and recognition of people with intellectual, cognitive, and psychological disabilities in Canadian society."⁶⁹ Bach and Kerzner's reflections on the Canadian legal landscape are evocative of the concerns underlying Article 12 regarding the disempowering effects of legal capacity restrictions. Moreover, one must also ask whether Canada's legal capacity legislation genuinely "recognize[s] the full place of all individuals and groups within Canadian society"⁷⁰ by allowing for such pervasive limitations on the rights of persons with disabilities.

While some legislative frameworks, such as Nova Scotia's *Adult Capacity and Decision-making Act* recognize the promotion of dignity as one of its central purposes,⁷¹ it is important to scrutinize whether the substantive content of substitute decision-making laws actually fulfill this goal. The continued existence of incapacity labelling and accompanying limitations of legal capacity in all Canadian jurisdictions arguably denies personhood to individuals with disabilities and in so doing impinges on their dignity and self-worth in a way that is inconsistent with the

⁶⁶ CCQ, *supra* note 64, art 283.

⁶⁷ Deschamps, *supra* note 65 at 111.

⁶⁸ Michael Bach & Lana Kerzner, *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity: Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice* (Commissioned by the Law Commission of Ontario, October 2010), online: *Law Commission of Ontario* <<https://www.lco-cdo.org/wp-content/uploads/2010/11/disabilities-commissioned-paper-bach-kerzner.pdf>> at 46.

⁶⁹ *Ibid.*

⁷⁰ *Law v Canada*, *supra* note 54 at para 53.

⁷¹ See *Adult Capacity and Decision-making Act*, SNS 2017, c 4, s 2(c).

underlying values of Article 12 and the current of Canadian human rights law and jurisprudence.

Moreover, as proposed by Fiala-Butora and Stein, the law can be a source of stigma or a source of empowerment.⁷² By allowing for far-reaching restrictions on the exercise of rights by persons with disabilities, Canada's legal capacity laws may lead to the perpetuation of the stereotype that persons with disabilities are unable to make decisions and thus undeserving of agency. These denigrating attitudes violate the dignity of persons with disabilities and lead to their further marginalization within society.

That said, as will be discussed subsequently, the legislative frameworks in some Canadian jurisdictions have recognized supported decision-making, which foresees greater involvement of the person with disabilities in the decision-making process and safeguards their personal wishes. Such emancipatory measures can be seen as reinforcing the inherent worth of individuals who require assistance in decision-making. In fact, in Manitoba, *The Vulnerable Persons Living with a Mental Disability Act* explicitly acknowledges supported decision-making as "an important means of enhancing the... dignity of a vulnerable person."⁷³ Moreover, as per Fiala-Butora and Stein's reasoning, enshrining supported decision-making might help to promulgate a vision of persons with disabilities as full citizens and rights holders. In this way, the law could provide a path towards empowering persons with disabilities and fostering their inclusion in society.

Equality

The ideal of equality is embedded within the CRPD. Indeed, a main purpose of the Convention is "to promote, protect, and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities."⁷⁴ Article 5 of the CRPD is also explicitly devoted to upholding the principles of equality and non-discrimination, as well as the related concept of reasonable accommodation. According to Degener, the Convention incorporates notions of formal, substantive, and

⁷² See Fiala-Butora & Stein, *supra* note 17.

⁷³ *The Vulnerable Persons Living with a Mental Disability Act*, *supra* note 30, s 6(2).

⁷⁴ CRPD, *supra* note 5, art 1.

transformative equality alike.⁷⁵ Formal equality aims to tackle direct discrimination, while substantive equality endeavours to respond to differences between persons and power relations between them.⁷⁶ Finally, transformative equality seeks to address structural and institutional, in addition to both direct and indirect discrimination, by imposing positive duties to change society.⁷⁷

The notion of equality is central to Article 12 of the CRPD. Article 12 explicitly recognizes the right of persons with disabilities to legal capacity “on an equal basis with others.”⁷⁸ The meaning of this phrase was elucidated by the Committee on the Rights of Persons with Disabilities in their General Comment on Article 12 released in 2014.⁷⁹ Herein, the Committee reviewed three common legislative approaches to the denial of legal capacity.⁸⁰ With the “status approach,” a person’s legal capacity is removed due to the diagnosis of a given impairment. With the “outcome approach,” legal capacity is denied where a person makes a decision that is deemed to have adverse effects. Finally, through the “functional approach,” a person is stripped of legal capacity where their decision-making skills are perceived to be lacking. The Committee characterizes all three of these approaches as “discriminatory denial[s] of legal capacity,” as with each method, an individual’s disability and/or decision-making skills are used as justification for a denial of legal capacity and the diminishment of their status as a person before the law.⁸¹ Evidently, the status approach discriminates directly on the basis of disability. According to the Committee, the functional and outcome approaches are likewise discriminatory - though perhaps more subtly so - as these kinds of tests that purport to measure cognitive functioning are discriminatorily applied to persons with disabilities.⁸² Moreover, it is a fallacy that such tests can precisely evaluate the functions of the mind.⁸³ Hence, when persons with

⁷⁵ Theresia Degener, “Disability in a Human Rights Context” (2016) 5:35 *Laws* 1 at 19.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ CRPD, *supra* note 5, art 12(2).

⁷⁹ See Committee on the Rights of Persons with Disabilities, *General comment No.1 (2014) – Article 12: Equal recognition before the law*, *supra* note 10.

⁸⁰ See *ibid* at para 15.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.*

disabilities are disproportionately stripped of their legal capacity in these paternalistic ways, this group's right to legal capacity on an equal basis with others cannot be secured.⁸⁴

The *Canadian Charter of Rights and Freedoms* guarantees the right to equality in section 15.⁸⁵ In *R v Kapp*, the Supreme Court affirmed that the goal of section 15(1) of the *Charter* is to “[prevent] governments from making distinctions based on the enumerated or analogous grounds that: have the effect of perpetuating group disadvantage or prejudice; or impose disadvantage on the basis of stereotyping.”⁸⁶ Notably, section 15(1) explicitly lists mental and physical disability as enumerated grounds on the basis of which discrimination is prohibited. Section 15(2) of the *Charter* allows governments to prophylactically tackle discrimination via affirmative action.⁸⁷ Canada's richly developed equality and non-discrimination principles are said to have informed the content of the CRPD.⁸⁸

Canadian laws pertaining to legal capacity rely heavily on cognitive tests to grant or deny legal capacity. For instance, Ontario's *Substitute Decisions Act* encapsulates a classic common law test resembling the functional approach. This test inquires as to whether an individual can “understand information that is relevant to making a decision” with respect to their property or their person and whether they can “appreciate the reasonably foreseeable consequences of a decision or lack of decision.”⁸⁹ A person is deprived of legal capacity and a substitute decision-maker is appointed to them when they are not able to satisfy the

⁸⁴ Arstein-Kerslake, “Gendered denials,” *supra* note 48 at 4.

⁸⁵ See *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*], s 15.

⁸⁶ *R v Kapp*, *supra* note 53 at para 25.

⁸⁷ *Ibid.*

⁸⁸ Centre for Independent Living in Toronto (CILT), Council of Canadians with Disabilities (CCD), & ARCH Disability Law Centre, “Disability and Rights for Citizens (DRC) Project: Convention on the Rights of Persons with Disabilities (CRPD),” online: CILT <<https://www.cilt.ca/wp-content/uploads/2016/12/CRPD-Key-Articles-and-Community-Priorities.pdf>> at 2.

⁸⁹ *Substitute Decisions Act*, 1992, SO 1992, c 30, ss 6 & 45.

requirements of this mental capacity assessment. This kind of test is very pervasive throughout Canada.⁹⁰

The *Civil Code of Québec's* provisions on legal capacity are formulated slightly differently. These mandate investigation into whether a person is "incapable of caring for himself or herself or administering property by reason, in particular, of illness, deficiency or debility due to age which impairs the person's mental faculties or physical ability to express his or her will."⁹¹ A representative is appointed to make decisions on a person's behalf when the individual's level of mental capacity is deemed to be sufficiently limited.⁹² The Quebec approach would seem to combine assessment of a person's decision-making skills with some diagnosis of a given impairment as justification for denial of legal capacity. Thus, by relying on cognitive assessments and the presence of a given disability, both the Ontario and Quebec tests presented here could be perceived as discriminatory as per the standards of the CRPD.

Interestingly, McCallum has posited that "[a] cognitive/functional test used to deny a person's legal capacity may be both direct and adverse discrimination contrary to s. 15(1) of the *Charter*."⁹³ This author argues that these tests may be perceived as directly discriminatory as they are "ableist" in nature and that they may equally be understood as having a "disproportionate and disparate impact on persons with disabilities."⁹⁴ Thus, it is worthwhile considering whether Canadian laws on legal capacity are consistent with section 15 of the *Charter* as well as with the principles of the CRPD.

⁹⁰ Lana Kerzner, "Paving the way to Full Realization of the CRPD's Rights to Legal Capacity and Supported Decision-Making: A Canadian Perspective," *supra* note 26.

⁹¹ CCQ, *supra* note 64, art 258.

⁹² *Ibid*, arts 281 & 285.

⁹³ The Coalition on Alternatives to Guardianship, *The Right to Legal Capacity and Supported Decision Making for All: A Preliminary Brief to the Law Commission of Ontario in Response to: Legal Capacity, Decision-Making and Guardianship, Interim Report, October 2015* (7 March 2016), online: <https://communitylivingontario.ca/wp-content/uploads/2017/08/Coalition-on-Alternatives-to-Guardianship-Preliminary-Brief-to-LCO-on-Interim-Report-March-7-2016.pdf> at 50.

⁹⁴ *Ibid*.

Next, it is also significant that some Canadian jurisdictions that allow for less intrusive decision-making regimes do not make these measures equally available to all. Rather, some laws impose a threshold standard of mental capacity that must be satisfied in order to access supported decision-making or co-decision-making. This is the case for supported decision-making in Alberta and Yukon,⁹⁵ and for co-decision-making in Alberta,⁹⁶ Saskatchewan,⁹⁷ and Quebec.⁹⁸ Therefore, the intimation underlying all of these regimes is that there will be a subset of individuals who have insufficient mental capacity to benefit from a regime that is less restrictive than substitute decision-making. It is noteworthy that the Committee on the Rights of Persons with Disabilities has emphasized that “[t]he provision of support to exercise legal capacity should not hinge on mental capacity assessments.”⁹⁹ Thus, the Committee espouses a vision of supported decision-making being made available in a non-discriminatory fashion, accessible to all persons with disabilities on an equal footing. Canadian jurisdictions where supports are available are not all living up to this expectation. Individuals with high support needs may be effectively barred from accessing supported decision-making.

That said, the BC legislative scheme has been praised for making supported decision-making more widely available, since individuals are not required to complete a mental capacity test in order to conclude a representation agreement.¹⁰⁰ Nevertheless, other criteria are analyzed when determining a person’s eligibility for receiving such assistance, such as whether the individual can communicate a desire to be helped by a representative and whether they can indicate choices and preferences.¹⁰¹ There is

⁹⁵ *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2, s 4(1); *Adult Protection and Decision Making Act*, *supra* note 30, s 6.

⁹⁶ See *Adult Guardianship and Trusteeship Act*, *supra* note 95, s 13(4)(a).

⁹⁷ *The Adult Guardianship and Co-decision-making Act*, SS 2000, c A-5.3, s 14(1)(a).

⁹⁸ CCQ, *supra* note 64, art 291.

⁹⁹ Committee on the Rights of Persons with Disabilities, *General comment No. 1 (2014) – Article 12: Equal recognition before the law*, *supra* note 10 at para 29(i).

¹⁰⁰ Kerzner, “Paving the way to Full Realization of the CRPD’s Rights to Legal Capacity and Supported Decision-Making: A Canadian Perspective,” *supra* note 26 at 38.

¹⁰¹ See *Representation Agreement Act*, *supra* note 30, s 8(2).

ambiguity as to how exactly these factors are to be applied,¹⁰² which leaves open the possibility that individuals in need of greater support would be precluded from signing representation agreements. Sensitivity is required in legislative drafting in order to ensure that support is equally accessible to persons with a range of cognitive functioning.

Next, it is critical to question whether the right to support to exercise legal capacity may be construed as part and parcel of the right to equality, especially through the lens of more substantive conceptions of equality. Article 12 no doubt stands for the notion that in order for persons with disabilities to be able to enjoy the right to legal capacity on an equal basis with others, they must be provided with adequate supports for decision-making. That is, without the provision of support, the right to legal capacity in practice is rendered hollow. Indeed, Glen describes supported decision-making as “the means to the end of the human right of legal capacity.”¹⁰³ Browning et al make explicit the link between the right to legal capacity and the right to equality by drawing on the equality law concept of reasonable accommodation. These authors maintain that “just as people with physical disabilities need a ramp to ensure that they can be reasonably accommodated to access a building, supported decision-making is seen as the vehicle to reasonably accommodate people with cognitive disabilities to exercise their legal capacity.”¹⁰⁴

Kerzner has notably proposed that “recognition of supports in decision-making flows naturally from, and is mandated by, the legal duty to accommodate found in both Canada’s laws and the CRPD.”¹⁰⁵ In fact, both section 15 of the *Charter* and provincial human rights codes grant persons with disabilities the right to be accommodated.¹⁰⁶ Kerzner argues that these duties to

¹⁰² Kerzner, “Paving the way to Full Realization of the CRPD’s Rights to Legal Capacity and Supported Decision-Making: A Canadian Perspective,” *supra* note 26 at 40.

¹⁰³ Glen, *supra* note 7 at 6.

¹⁰⁴ Michelle Browning, Christine Bigby, & Jacinta Douglas, “Supported Decision Making: Understanding How its Conceptual Link to Legal Capacity is Influencing the Development of Practice” (2014) 1:1 *Research and Practice in Intellectual and Developmental Disabilities* 34 at 36.

¹⁰⁵ Kerzner, *supra* note 26 at 6.

¹⁰⁶ *Ibid* at 78.

accommodate could justify a right to recognition of supports in decision-making applicable to governments and to private third parties.¹⁰⁷ Enshrining supports into laws is undoubtedly vital, as is ensuring sufficient funding for the provision of supports so as to make certain that persons who are socially isolated are able to build support networks.¹⁰⁸ The strong guarantees of equality reflected in both Canadian human rights law and the CRPD may mandate substantive government action to ensure that persons with disabilities can access the support that will allow them to genuinely exercise the right to legal capacity on an equal basis with others. Nevertheless, there may exist significant impediments to affirming a right to support in the Canadian context, given the reticence of courts to place positive duties on the state.¹⁰⁹

Autonomy

Although the concept of autonomy is not defined in the Convention,¹¹⁰ it is listed as one of the central principles of the CRPD and is understood to encompass the “freedom to make one’s own choices.”¹¹¹ As articulated by Skarstad, the CRPD accepts the idea that all human beings have autonomy.¹¹² Nevertheless, the Convention also embraces the notion that all persons are interdependent,¹¹³ and that rights are realized through social relations.¹¹⁴ In point of fact, the CRPD “sees autonomy as being enabled through the help of others.”¹¹⁵

Article 12 may be conceived as the pinnacle of the CRPD’s push to assert the autonomy of persons with disabilities.¹¹⁶ The provision recognizes the entitlement of persons with disabilities to autonomy in the sense that is prevalent in theoretical rights literature - that is, the right to make one’s own decisions and to control one’s own life.¹¹⁷ Endowing persons with disabilities with

¹⁰⁷ Kerzner, *supra* note 26 at 78.

¹⁰⁸ *Ibid* at 70-71

¹⁰⁹ See *ibid* at 72.

¹¹⁰ Mégret, *supra* note 34 at 511.

¹¹¹ See CRPD, *supra* note 5, art 3.

¹¹² Skarstad, *supra* note 36 at 30.

¹¹³ *Ibid* at 33.

¹¹⁴ *Ibid* at 37.

¹¹⁵ *Ibid*.

¹¹⁶ Mégret, *supra* note 34 at 511.

¹¹⁷ Skarstad, *supra* note 36 at 37.

meaningful autonomy in the classical sense helps to cement their recognition as legal actors and rights holders.¹¹⁸ Conversely, Article 12 concurrently calls upon States to ensure that persons with disabilities are provided with the requisite support in the decision-making process.¹¹⁹ Thus, Article 12 clearly endeavors to further self-determination, while also redefining traditional notions of autonomy to recognize the inherent interdependence of humanity. As Mégret argues, even amongst persons without disabilities, the idea that individuals are wholly independent is “by and large a fiction.”¹²⁰ Article 12 recognizes and celebrates this reality.

Article 12 can also be seen to endorse autonomy by virtue of its emphasis on upholding the “will and preferences” of persons with disabilities.¹²¹ As expressed by an American ethicist:

paternalistic interventions against the expressed wishes or desires of another individual seem morally invidious and unjustified, even though the person who acts in this way can be seen as acting out of caring concern for the wellbeing of the person whose wishes are thwarted. And we typically and intuitively describe what we object to here in terms of respect: we say the person who intervened showed a lack of respect for their autonomy as individuals.¹²²

It is certainly this very kind of paternalistic interference with a person’s wishes that is resoundingly rejected by Article 12 of the CRPD. In fact, the article is entirely devoid of any references to protecting persons with disabilities or promoting their wellbeing. Though Article 12 calls upon States to put in place safeguards to prevent abuse such as undue influence when persons with disabilities make decisions,¹²³ the thrust of this provision is to empower persons with disabilities in decision-

¹¹⁸ Mégret, *supra* note 34 at 512-514.

¹¹⁹ Skarstad, *supra* note 36 at 37.

¹²⁰ Mégret, *supra* note 34 at 512.

¹²¹ See CRPD, *supra* note 5, art 12(4).

¹²² Michael Slote, *The Ethics of Care and Empathy* (New York: Routledge, 2007) at 56.

¹²³ CRPD, *supra* note 5, art 12(4).

making. It is thus the autonomy of the individual that takes centre stage.

In the Canadian context, autonomy constitutes a cornerstone of human rights law and jurisprudence. In *R v Morgentaler*, the Supreme Court of Canada recognized that “the right to liberty contained in s. 7 [of the *Charter*] guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives.”¹²⁴ Similarly in *Godbout v Longueuil*, the Supreme Court held that “the right to liberty enshrined in s.7 of the *Charter* protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference.”¹²⁵ The Court proceeded to specify that “the autonomy protected by the s. 7 right to liberty encompasses only those matters that ... implicate basic choices going to the core of what it means to enjoy individual dignity and independence.”¹²⁶ The *Charter* thus resolutely embodies the values of liberty, autonomy, and freedom from unnecessary intervention.¹²⁷

Beyond Canadian case law’s general recognition of the centrality of autonomy to personal decision-making, courts in this country have also considered questions of autonomy in cases pertaining to legal capacity. For example, in a 2003 ruling related to the Ontario *Health Care Consent Act*, the Supreme Court of Canada held that “unwarranted findings of incapacity severely infringe upon a person’s right to self-determination.”¹²⁸ In *Nova Scotia v JJ*, the Supreme Court highlighted the need to limit restrictions on legal capacity due to the corresponding impact on a person’s autonomous decision-making and liberty.¹²⁹ Some Canadian jurisprudence has also acknowledged that supported decision-making measures should be promoted in order to maximize individual autonomy. Notably, in *Gray v Ontario*, the Ontario Superior Court of Justice concluded that “a process short of full or partial guardianship is preferable in many cases, as it best recognizes the autonomy and dignity of the individual and

¹²⁴ *R v Morgentaler* [1988] 1 SCR 30 at 171; see *Charter*, *supra* note 85, s 7.

¹²⁵ *Godbout v Longueuil (City)* [1997] 3 SCR 844 at para 66.

¹²⁶ *Ibid.*

¹²⁷ *Bach & Kerzner*, *supra* note 68 at 50.

¹²⁸ *Starson v Swayze* 2003 SCC 32 at para 75.

¹²⁹ See *Nova Scotia (Minister of Health) v JJ*, 2005 SCC 12 at para 23.

the inclusiveness of the decision-making process.”¹³⁰ Moreover, in *Re Koch*, this same court held that “mental capacity exists if the appellant is able to carry out her decisions with the help of others,”¹³¹ thus fundamentally recognizing the role that supports play in enabling persons to meaningfully partake in the decision-making process. In short, this smattering of Canadian case law evidences a commitment to fostering autonomy in decision-making, while also apparently endorsing the view that a subset of persons deemed to have more “severe” mental impairments warrant substitute decision-making arrangements.

Substitute decision-making regimes, both in the shape of guardianship and advanced planning measures, are the most heavily utilized and developed frameworks in all Canadian jurisdictions.¹³² As discussed in the section on dignity, substitute decision-making systems considerably restrict a person’s ability to make decisions pertaining to their own life, which obviously has a deleterious impact on the exercise of one’s autonomy. As also touched upon previously, substitute decision-making regimes may categorically prevent individuals from acting on their own altogether,¹³³ which in addition to degrading one’s sense of self, equally entails serious consequences for autonomy.

As much as substitute decision-making predominates across Canada, we must recall that legislation in select provinces and territories also allows for supported decision-making as well as co-decision-making: systems through which greater autonomy can be enjoyed. British Columbia’s *Representation Agreement Act* allows for supported decision-making in the form of “representation agreements,” which may cover a range of areas, including personal care, health care, and routine management of financial affairs.¹³⁴ The autonomy granted to an individual under such an agreement is variable, however, as a representative may be given authority to “help” in the decision-process or to “make decisions on behalf of” the person.¹³⁵ Moreover, the Act specifies

¹³⁰ *Gray v Ontario*, 2006 CanLII 1764 (ON SDC) at para 47.

¹³¹ *Koch (Re)*, *supra* note 60 at para 20.

¹³² *Bach & Kerzner*, *supra* note 68 at 56.

¹³³ See e.g. *CCQ*, *supra* note 64, art 283.

¹³⁴ *Representation Agreement Act*, *supra* note 30, s 7(1).

¹³⁵ *Ibid.*

that representatives must only comply with the person's wishes "if it is reasonable to do so."¹³⁶

Alberta's *Adult Guardianship and Trusteeship Act* allows a person to appoint a supported decision-maker for personal matters.¹³⁷ Via a special form, a person can authorize a supporter to: help them gather and understand information pertinent to the decision-making process, aid them with the making of decisions, and assist in them in the communication of decisions to third parties.¹³⁸ The fact that these roles held by supporters are ancillary in nature reinforces the conception of the support recipient as the primary decision-maker possessing ultimate control over the process.

Yukon's *Adult Protection and Decision Making Act* outlines the possibility for supported decision-making agreements to be concluded for financial, health, and personal matters.¹³⁹ Under such an agreement, an individual designates an "associate decision-maker" to help them to make decisions, collect information, elucidate pertinent considerations, and express their wishes to others.¹⁴⁰ Notably, the Act stipulates that "[a]n associate decision-maker shall not... make decisions on behalf of, the adult."¹⁴¹ The latter provision promotes autonomy by clarifying that the decision-making power wholly and genuinely resides in the hands of the support recipient. This kind of stipulation may be integral to ensuring that supported decision-making does not amount to *de facto* substitute decision-making.

In the Manitoban context, *The Vulnerable Persons Living with a Mental Disability Act* expressly acknowledges the potential for supported decision-making to further self-determination and independence.¹⁴² The Act defines supported decision-making as a "process whereby a vulnerable person is enabled to make and communicate decisions with respect to personal care or his or her property and in which advice, support or assistance is provided

¹³⁶ *Ibid*, s 16(2)(b).

¹³⁷ See *Adult Guardianship and Trusteeship Act*, *supra* note 95, s 3.

¹³⁸ See *ibid*, s 4(2).

¹³⁹ See *Adult Protection and Decision Making Act*, *supra* note 30, s 9.

¹⁴⁰ See *ibid*, s 5(1).

¹⁴¹ *Ibid*, s 5(2).

¹⁴² *The Vulnerable Persons Living with a Mental Disability Act*, *supra* note 30, s 6(2).

to the vulnerable person by members of his or her support network.”¹⁴³ Although the Act declares that supported decision-making “should be respected and recognized,” it does not lay out a formal process for nominating supporters via agreements or before a court. It would thus appear to relegate supported decision-making to the private, informal sphere. This has important implications for the degree of autonomy that persons receiving support may actually exercise in practice. This is so, because third parties may refuse to respect support mechanisms if they are not recognized by a legal framework.¹⁴⁴ Despite this shortcoming, the Manitoba legislative scheme notably does help to secure access to supports. Upon the initiation of an application for a substitute decision-maker, a designated commission may file a request with a government program that can help to develop a support network for the given individual.¹⁴⁵ This government aid may result in preventing an individual from automatically being subjected to substitute decision-making.¹⁴⁶ This feature of the Manitoban legislative scheme may be construed as significantly promoting autonomy by offering government-sponsored support to avert the imposition of more oppressive measures.

In addition to these legislative acknowledgements of supported decision-making, some Canadian jurisdictions allow for co-decision-making. Although not as invasive as substitute decision-making, co-decision-making does not enable complete autonomy, as supports are ordered by courts and not freely selected by persons themselves.¹⁴⁷ For instance, Alberta’s legislative framework empowers the court to appoint a co-decision-maker for personal matters.¹⁴⁸ In Saskatchewan, *The Adult Guardianship and Co-decision-making Act* allows the court to appoint a “personal co-decision-maker” or a “property co-

¹⁴³ *Ibid*, s 6(1).

¹⁴⁴ Kerzner, “Supported Decision-Making Innovations: The Canadian Experience,” *supra* note 20 at 117.

¹⁴⁵ See *The Vulnerable Persons Living with a Mental Disability Act*, *supra* note 30, ss 50(2) & 85(2); see also Kerzner, “Supported Decision-Making Innovations: The Canadian Experience,” *supra* note 20 at 117.

¹⁴⁶ Kerzner, “Supported Decision-Making Innovations: The Canadian Experience,” *supra* note 20 at 117.

¹⁴⁷ Bach & Kerzner, *supra* note 68 at 55.

¹⁴⁸ See *Adult Guardianship and Trusteeship Act*, *supra* note 95, Division 2.

decision-maker.”¹⁴⁹ Finally, the *Civil Code of Québec* also lays out a regime akin to co-decision-making for property matters, known as advisorship.¹⁵⁰

Another feature of these co-decision-making frameworks that is relevant to the question of autonomy is the veto power that the co-decision-maker can wield in some cases. Although the mandate of co-decision-makers in all three aforementioned regimes is one of assistance, the Albertan and Saskatchewan laws entitle the co-decision-maker to refuse to sign a document if a reasonable person would not have made the given decision or if the decision is likely to cause harm to the assisted person.¹⁵¹ An analogous provision in the *Civil Code of Québec* allows for the annulment of an act performed by a person without the involvement of their adviser if the person has suffered resulting harm.¹⁵² These provisions arguably restrict autonomy in a paternalistic manner that would seem to be more focused on the persons “best interests” rather than respecting their will and preferences as per Article 12 of the CRPD. They also deny persons dignity of risk, in parallel with the earlier discussion on curatorship in the Quebec context.

The Canadian legal landscape relating to legal capacity evidently constitutes a hodgepodge of substitute decision-making, co-decision-making, and supported decision-making systems, each with varying implications for individual autonomy. It is noteworthy that many laws explicitly call for maximizing autonomy when selecting an appropriate decision-making regime for a given person. For example, Alberta’s legislation affirms that “the adult’s autonomy must be preserved by ensuring that the least restrictive and least intrusive form of assisted or substitute decision-making that is likely to be effective is provided.”¹⁵³ Similar provisions are contained in other provincial and territorial laws, such as those in Saskatchewan, Manitoba, and Yukon.¹⁵⁴ Moreover, the law in

¹⁴⁹ See *The Adult Guardianship and Co-decision-making Act*, *supra* note 97, ss 14ff & 40ff.

¹⁵⁰ See CCQ, *supra* note 64, arts 291ff.

¹⁵¹ *Adult Guardianship and Trusteeship Act*, *supra* note 95, s 18(5); *The Adult Guardianship and Co-decision-making Act*, *supra* note 97, ss 17(2) & 42(2).

¹⁵² CCQ, *supra* note 64, art 294.

¹⁵³ *Adult Guardianship and Trusteeship Act*, *supra* note 95, s 2(c).

¹⁵⁴ See *The Adult Guardianship and Co-decision-making Act*, *supra* note 97, s 3(d); *Adult Protection and Decision Making Act*, *supra* note 30, s 2 (c); *The*

Yukon and Manitoba present substitute decision-making as a measure of “last resort.”¹⁵⁵ The *Civil Code of Québec* demands that every decision relating to the establishment of a decision-making regime protect the autonomy of the individual concerned.¹⁵⁶

It is critical to ask whether courts in practice do respect these provisions that call for maximizing autonomy upon the institution of a decision-making regime. Indeed, commenting on the Quebec context, Soden remarks that advisorship is a “rarity” and that tutorship (substitute decision-making in select areas) is vastly less common than curatorship (a plenary form of substitute decision-making).¹⁵⁷ Similarly, studies have indicated that co-decision-making in Saskatchewan¹⁵⁸ as well as supported decision-making in Yukon¹⁵⁹ are sparsely used. If less restrictive decision-making regimes are under-utilized in practice, this renders meaningless legislative pronouncements that promote maximal autonomy. Legislation and the courts must go beyond merely paying lip service to the principle of autonomy.

It is also interesting to note that some pieces of legislation call upon substitute, co-, and supported decision-makers alike to safeguard the autonomy of person whom they are assisting. For instance, the *Civil Code of Québec* stipulates that all decisions touching protected persons should uphold their autonomy.¹⁶⁰ Also, Ontario’s legislation maintains that “the guardian shall, as far as possible, seek to foster the person’s independence.”¹⁶¹ Once again, however, it is critical to ascertain whether these

Vulnerable Persons Living with a Mental Disability Act, *supra* note 30, Preamble.

¹⁵⁵ *The Vulnerable Persons Living with a Mental Disability Act*, *supra* note 30, Preamble; *Adult Protection and Decision Making Act*, *supra* note 30, s 2(d).

¹⁵⁶ CCQ, *supra* note 64, art 257.

¹⁵⁷ Ann Soden, “Beyond Incapacity” (2011) 5:2 MLJHH 295 at 299.

¹⁵⁸ Doug Surtees, “The Evolution of Co-Decision-Making in Saskatchewan” (2010) 73:1 Sask L Rev 75 at 91-92.

¹⁵⁹ Michelle Browning, *Report to Investigate New Models of Guardianship and the Emerging Practice of Supported Decision Making* (Winston Churchill Memorial Trust of Australia, 2010), online: *The Winston Churchill Memorial Trust* <https://www.churchilltrust.com.au/media/fellows/Browning_Michelle_2010.pdf> at 29.

¹⁶⁰ See CCQ, *supra* note 64, art 257.

¹⁶¹ *Substitute Decisions Act*, *supra* note 89, s 66(8).

provisions are actually adhered to. Speaking about the Quebec framework, Deschamps argues that there is a genuine risk that representatives of persons deemed incapacitated may act in a paternalistic fashion and act according to what they perceive to be the best interests of the protected person, effectively sidelining the person's wishes.¹⁶² Furthermore, it is vital to reiterate the severe limitations on personal choice imposed by substitute decision-making. As Bach and Kerzner opine, "[w]hile our laws encourage autonomous decision-making, for the most part they create a wall around a group of people whose rights to decide for themselves are removed."¹⁶³ Thus, calls for substitute decision-makers to maximize autonomy of persons under their protection seem fundamentally incongruous with the very nature of substitute decision-making, which bestows sweeping powers upon decision-makers.

Canadian human rights law and jurisprudence would seem to prioritize freedom of choice with respect to private decisions. This echoes the crux of Article 12 of the CRPD, which is fundamentally focused on rejecting substitute decision-making and the corresponding pursuit of the purported "best interests" of persons with disabilities. Canada's laws on legal capacity still heavily rely on the substitute decision-making model, which would appear to conflict with the fundamental values underlying the *Charter* and the CRPD. Nevertheless, the integration of supported decision-making and co-decision-making frameworks in some Canadian jurisdictions, along with provisions that demand respect for autonomy, signal that Canadian legislation on legal capacity is not entirely unconcerned with fostering self-determination among those who need help with decision-making.

Conclusion: Where to from Here?

The previous sections have demonstrated the ways in which the values of dignity, equality, and autonomy form the backbone of Article 12 of the CRPD. To be sure, these values are not watertight containers and there is inevitable overlap and linkages between them. In fact, one need only turn to Canadian jurisprudence on section 15 of the *Charter* to appreciate some of the connections that have been made between these concepts.

¹⁶² Deschamps, *supra* note 65 at 112.

¹⁶³ Bach & Kerzner, *supra* note 68 at 45.

The Supreme Court of Canada has identified human dignity as a critical value underpinning the equality guarantee contained in section 15.¹⁶⁴ Moreover, historic Canadian jurisprudence under section 15 of the *Charter* endeavoured to apply human dignity as a sort of legal test in order to ascertain whether discrimination had occurred.¹⁶⁵ The Supreme Court has also affirmed that “the equality guarantee in s. 15(1) is concerned with the realization of personal autonomy and self-determination.”¹⁶⁶ This leads one to conclude that dignity, equality, and autonomy are all mutually constitutive values. Meaningful respect for each of these values in the context of persons with disabilities is no doubt essential to upholding the human rights approach that the CRPD attempts to deliver.

In spite of the inextricable commonalities and links between these three key values, scrutinizing the concepts of dignity, equality, and autonomy separately allows for a deeper comprehension of the foundational normative justifications for Article 12 of the CRPD. These are perhaps not the only values upon which this provision rests, but this essay has presented this trilogy of concepts as ones that are central to the mission underlying Article 12.

The foregoing discussion has also made it apparent that the key values underpinning Article 12 have a strong presence in Canada’s human rights legislation and jurisprudence. The right to life, liberty, and security of the person as well as the right to equality enshrined in the *Charter* provide a basis upon which we can argue that Canada’s legal capacity laws warrant reform. The essay has also demonstrated how certain forward-thinking Canadian judges are also pushing us to revisit how we should be perceiving questions of legal capacity in the twenty-first century. Thus, the fact that Canada has attached a reservation with respect to Article 12 should not be used as an excuse to avoid reassessing our legal capacity laws. On the contrary, our robust domestic body of human rights law should provide us with a more than adequate impetus to reconsider what our laws are achieving in

¹⁶⁴ *R v Kapp*, *supra* note 53 at para 21.

¹⁶⁵ *Ibid* at paras 20-21.

¹⁶⁶ *Law v Canada*, *supra* note 54 at para 53.

terms of dignity, equality, and autonomy for persons with disabilities.

Scouting out future directions for law reform in the realm of legal capacity may seem like a daunting task. Nonetheless, several countries have led major, comprehensive overhauls of their legislation in this area of late. Indeed, newly developed legislation in several Latin American states may well be viewed as sources of inspiration. In 2018, the Peruvian Government issued *Legislative Decree No. 1384*, which recognized legal capacity for persons with disabilities on an equal basis with others, completely abolished the country's guardianship regime, and instituted a framework for appointing supported decision-makers before a notary or judge.¹⁶⁷ The UN Special Rapporteur on the Rights of Persons with Disabilities has touted the Peruvian legislative reform as "an example for all states to follow."¹⁶⁸ Comparable legislative changes have been enacted in Costa Rica and Colombia.¹⁶⁹

Article 12 of the CRPD has evidently served as a catalyst for legal capacity law reform in several states. In 2017, the UN Special Rapporteur on the Rights of Persons with Disabilities relayed that law reform on the right to legal capacity had been either initiated or concluded at least 32 countries since the entry into force of the Convention.¹⁷⁰ According to the Special Rapporteur, "[w]hile most of these laws and bills are not in full compliance with article 12 of the Convention, they show that a growing number of States acknowledge that their legal systems,

¹⁶⁷ *Legislative Decree No 1384: Legislative Decree that Recognizes and Regulates the Legal Capacity of Persons with Disabilities on Equal Basis*, Peru, 3 September 2018.

¹⁶⁸ "Peru: Milestone disability reforms lead the way for other States, says UN expert" (4 September 2018), online: *United Nations Human Rights Office of the High Commissioner* <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23501&LangID=E>>.

¹⁶⁹ See *Law for the Promotion of the Personal Autonomy of Persons with Disabilities (Law Number 9379)*, Costa Rica, 30 August 2016; *Law 1996 of 2019, By means of which the regime for the exercise of the legal capacity of persons with disabilities of legal age is established*, Colombia, 26 August 2019; "UN expert welcomes legal capacity reform in Colombia to end guardianship regime" (29 August 2019), online: *United Nations Human Rights Office of the High Commissioner* <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24926&LangID=E>>.

¹⁷⁰ Devandas Aguilar, *supra* note 43 at para 38.

and particularly their substitute decision-making regimes, fail to guarantee the rights of persons with disabilities.”¹⁷¹ The tide is shifting on the international stage with respect to legal capacity laws. Canadian provinces and territories could embrace this surge of change and review their laws in this sphere. Moreover, the federal government could also take on a leadership role with respect to law reform efforts. Indeed, in 2017, the Committee on the Rights of Persons with Disabilities recommended that the Canadian government cooperate with provinces and territories to establish “a consistent framework for recognizing legal capacity and to enable access to the support needed to exercise legal capacity.”¹⁷² To this end, the McGill Centre for Human Rights and Legal Pluralism has suggested that a national task force be set up to comprehensively review laws and policies across Canada, suggest avenues for reform, and foster inter-jurisdictional coordination of legal and policy frameworks in line with Article 12.¹⁷³ Moreover, government resources will certainly be required in order to make sure that people have adequate access to support,¹⁷⁴ with a need for particular attention to be paid to those who are socially isolated. In this respect, inspiration could be drawn from the Colombian legislative scheme, which allows for professional support persons for individuals who require support but who have no one in their own lives who could serve as a supporter.¹⁷⁵

Additionally, as emphasized by the UN Special Rapporteur on the Rights of Persons with Disabilities, the involvement of civil society organizations in the legislative reform process is key.¹⁷⁶ The Bulgarian Center for Not-for-Profit Law (BCNL) constitutes a prime example of how civil society organizations can constructively support governments in this context.¹⁷⁷ In addition to helping to prepare a draft law that would

¹⁷¹ *Ibid.*

¹⁷² Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Canada*, *supra* note 24 at para 28.

¹⁷³ *Ibid.*

¹⁷⁴ See Devandas Aguilar, *supra* note 43 at para 80.

¹⁷⁵ See *Law 1996 of 2019*, *supra* note 169, article 14.

¹⁷⁶ See Devandas Aguilar, *supra* note 43 at para 74.

¹⁷⁷ See e.g. “Advancing CRPD Article 12: NEXT STEP Program in Bulgaria (2014-2016)” (1 October 2014), online BCNL <<http://bcnl.org/en/projects/advancing-crpd-article-12-next-step-program-in-bulgaria-2014-2016.html>>; “DEVELOPERS: scaling up the community level of

recognize legal capacity for all persons with disabilities and institute a comprehensive framework for supported decision-making, BCNL has conducted extensive research and orchestrated pilot projects on supported decision-making. These research and pilot project efforts heavily informed the draft legislation. BCNL has also carried out public outreach initiatives to raise awareness about problematic aspects of the Bulgarian guardianship model and to galvanize public support for legislative change. Despite these sustained endeavours, the proposed draft law has yet to be passed by the Bulgarian Parliament.

Some instructive lessons can be drawn from the Bulgarian context. Firstly, due to their embeddedness in the social reality on the ground, civil society organizations with expertise on disability rights are uniquely well-positioned to contribute to law reform efforts related to legal capacity. Given their firsthand contact with the disability community via pilot projects and other outreach programmes, such organizations may be able to give government policymakers advice that is in touch with the needs and priorities of persons with disabilities. Next, the BCNL experience illustrates that political will is a central ingredient for success. Any hope for legislative reform is dashed without a government that is willing to make it a political priority, no matter how zealous civil society actors are. Hence, the Bulgarian situation demonstrates that civil society organizations can be productive partners in matters of law reform, but that the full impact of their efforts will be contingent upon the willingness of governments to meaningfully engage with civil society and to be genuinely receptive of their contributions. Canadian lawmakers could undoubtedly build on these experiences and consider collaborating with civil society representatives to design laws that are tailored to the practical realities facing Canadians with disabilities.

Fiala-Butora and Stein affirm that “the task of systemic reform in this context is to put in place legal institutions that promote the image of persons with disabilities as equally capable and empowered with agency.”¹⁷⁸ Enshrining comprehensive

the Next Step Program” (8 March 2019), online: BCNL <<http://bcnl.org/en/projects/developers-scaling-up-the-community-level-of-the-next-step-program.html>>.

¹⁷⁸ Fiala-Butora & Stein, *supra* note 17 at 202.

supported decision-making measures into law may accomplish this goal. Critically, the preceding sections have revealed how supported decision-making can enhance dignity, equality, and autonomy for persons with disabilities. By placing the person in need of assistance at the heart of the decision-making process, the individual concerned is empowered as a person and legal actor, can exercise their right to legal capacity on an equal basis with others, and can claim agency over their own life story. The fledgling supported decision-making models that have been developed in some Canadian jurisdictions must be buttressed and expanded to ensure that support is widely available to Canadians with disabilities for decisions in all areas of life.

It is important to recognize, however, that reform may be impeded by ingrained societal attitudes of paternalism and ableism.¹⁷⁹ Evolution in societal perceptions of persons with disabilities must accompany change on the legal and policy front. This necessitates uprooting the pervasive medical model of disability and transferring to a social model, which locates issues within societal structures rather than within persons with disabilities themselves.¹⁸⁰ Realizing cultural change at the societal level will inevitably require concerted awareness-raising efforts, in which governments must take the lead.¹⁸¹ Fundamentally, if we are genuinely committed to upholding the human rights of persons with disabilities, we must strive to foster an inclusive society that sees all individuals as having an important role to play.¹⁸² Supported decision-making provides an innovative pathway towards fulfilling this vision, given its democratizing commitment to secure full citizenship for persons with disabilities.

¹⁷⁹ Dalun Zhang et al, "A Call to Society for Supported Decision-Making: Theoretical and Legal Reasoning" (2019) 28 *Journal of Child and Family Studies* 1803 at 1812.

¹⁸⁰ *Ibid.*

¹⁸¹ Devandas Aguilar, *supra* note 43 at para 79.

¹⁸² See Michael Ashley Stein & Penelope JS Stein, "Beyond Disability Civil Rights" (2006) 58:6 *Hastings LJ* 1203 at 1223.

Bibliography

JURISPRUDENCE

Clark v Clark (1983), 40 OR (2d) 383.

Godbout v Longueuil (City) [1997] 3 SCR 844.

Gray v Ontario, 2006 CanLII 1764 (ON SCDC).

Koch (Re), 1997 CanLII 12138 (ON SC).

Law v Canada (Minister of Employment and Immigration) [1999] 1 SCR 497.

Nova Scotia (Minister of Health) v JJ, 2005 SCC 12.

R v Kapp, 2008 SCC 41.

R v Morgentaler [1988] 1 SCR 30.

Starson v Swayze 2003 SCC 32.

Webb v Webb, 2016 NSSC 180 (CanLII).

LEGISLATION & INTERNATIONAL AGREEMENTS

Adult Capacity and Decision-making Act, SNS 2017, c 4, s 2(c).

Adult Guardianship and Trusteeship Act, SA 2008, c A-4.2.

Adult Protection and Decision Making Act, SY 2003, c 21, Sch A.

Bill 18, *An Act to amend the Civil Code, the Code of Civil Procedure, the Public Curator Act and various provisions as regards the protection of persons*, 1st Sess, 42nd Leg, Quebec, 2019 (assented to 2 June 2020), SQ 2020, c 11

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

Convention on the Rights of Persons with Disabilities, 13 December 2006, 2515 UNTS 3.

Civil Code of Québec, CQLR c CCQ-1991.

Law 1996 of 2019, By means of which the regime for the exercise of the legal capacity of persons with disabilities of legal age is established, Colombia, 26 August 2019.

Law for the Promotion of the Personal Autonomy of Persons with Disabilities (Law Number 9379), Costa Rica, 30 August 2016.

Legislative Decree No 1384: Legislative Decree that Recognizes and Regulates the Legal Capacity of Persons with Disabilities on Equal Basis, Peru, 3 September 2018.

Representation Agreement Act, RSBC 1996, c 405.

Substitute Decisions Act, 1992, SO 1992, c 30.

The Adult Guardianship and Co-decision-making Act, SS 2000, c A-5.3.

The Constitution Act, 1867 (UK), 30 & 31 Victoria, c 3.

The Vulnerable Persons Living with a Mental Disability Act SM 1993, c 29, CCSM c V90

SECONDARY MATERIAL: ARTICLES

Arstein-Kerslake, Anna, "Gendered denials: Vulnerability created by barriers to legal capacity for women and disabled women" (2019) 66 *International Journal of Law and Psychiatry* 1.

Basser, Lee Ann, "Human Dignity," in *Critical Perspectives on Human Rights and Disability Law*, Marcia H Rioux, Lee Ann Basser, & Melinda Jones, eds (Brill Academic Publishers, 2014) 17.

Browning, Michelle, Christine Bigby & Jacinta Douglas, "Supported Decision Making: Understanding How its Conceptual Link to Legal Capacity is Influencing the Development of Practice" (2014) 1:1 *Research and Practice in Intellectual and Developmental Disabilities* 34.

Caivano, Nicholas, "Conceptualizing Capacity: Interpreting Canada's Qualified Reservation of Article 12 of the

UN Disability Rights Convention” (2014) 4:1 *Western Journal of Legal Studies* 1.

Degener, Theresia, “Disability in a Human Rights Context” (2016) 5:35 *Laws* 1.

Deschamps, Pierre, “La confiscation des droits fondamentaux des personnes inaptes et les régimes de protection” (2013) *Barreau du Québec – Service de la formation continue* 69.

Dhanda, Amita, “Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future” (2007) 34:2 *Syracuse J Intl L & Com* 429.

Flynn, Eilionóir & Anna Arstein-Kerslake, “Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity” (2014) 10:1 *Intl J of L in Context* 81.

Flynn, Eilionóir & Anna Arstein-Kerslake, “The Support Model of Legal Capacity: Fact, Fiction, or Fantasy?” (2014) 32:1 *Berkeley Journal of International Law* 124.

Glen, Kristin Booth, “Supported Decision-Making and the Human Right of Legal Capacity” (2015) 3:1 *Inclusion* 2.

Kerzner, Lana, “Paving the way to Full Realization of the CRPD’s Rights to Legal Capacity and Supported Decision-Making: A Canadian Perspective” (April 2011), online: <https://citizenship.sites.olt.ubc.ca/files/2014/07/In_From_The_Margins_Paper-Lana_Kerzner-FINAL-April_22_2011_2_.pdf>.

McCrudden, Christopher, “Human Dignity and Judicial Interpretation of Human Rights” (2008) 19:4 *The European Journal of International Law* 655.

Mégret, Frédéric, “The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?” (2008) 30:2 *Human Rights Quarterly* 494.

Quinn, Gerard, “Concept Paper- Personhood & Legal Capacity: Perspectives on the Paradigm Shift of Article 12 CRPD” (20 February 2010), HPOD Conference, Harvard Law School.

Skarstad, Kjersti. "Human rights through the lens of disability" (2018) 36:1 *Netherlands Quarterly of Human Rights* 24.

Soden, Ann, "Beyond Incapacity" (2011) 5:2 *MLJHH* 295.

Stein, Michael Ashley & Penelope JS Stein, "Beyond Disability Civil Rights" (2006) 58:6 *Hastings LJ* 1203.

Surtees, Doug, "The Evolution of Co-Decision-Making in Saskatchewan" (2010) 73:1 *Sask L Rev* 75.

Wildeman, Sheila, "Protecting Rights and Building Capacities: Challenges to Global Mental Health Policy in Light of the *Convention on the Rights of Persons with Disabilities*" (2013) 41:1 *Journal of Law, Medicine & Ethics* 48.

Zhang, Dalun et al, "A Call to Society for Supported Decision-Making: Theoretical and Legal Reasoning" (2019) 28 *Journal of Child and Family Studies* 1803.

SECONDARY MATERIAL: BOOKS

Arstein-Kerslake, Anna, "Legal Capacity and Supported Decision-Making: Respecting Rights and Empowering People" in *Disability Law and Policy: An Analysis of the UN Convention*, Charles O'Mahony & Gerard Quinn, eds (Dublin: Clarus Press, 2017) 69.

Fiala-Butora, Janos & Michael Ashley Stein, "The Law as a Source of Stigma or Empowerment: Legal Capacity and Persons with Intellectual Disabilities" in *Intellectual Disability and Stigma: Stepping out the margins*, Katrina Scior & Shirli Werner, eds (London: Palgrave Macmillan, 2016) 195

Kanter, Arlene S, *The Development of Disability Rights Under International Law: From Charity to Human Rights* (New York: Routledge, 2015).

Kerzner, Lana, "Supported Decision-Making Innovations: The Canadian Experience" in *Disability Law and Policy: An Analysis of the UN Convention*, Charles O'Mahony & Gerard Quinn, eds (Dublin: Clarus Press, 2017) 111.

Réaume, Denise, "Dignity, Choice, and Circumstances" in *Understanding Human Dignity*, ed Christopher McCrudden (Proceedings of the British Academy/Oxford University Press 2013) 539.

Slote, Michael, *The Ethics of Care and Empathy* (New York: Routledge, 2007).

Weller, Penelope. "Substituted Decision-Making" in *Health Law: Frameworks and Context*, Anne-Maree Farrell et al, eds (Cambridge, UK: Cambridge University Press, 2017) 127.

SECONDARY MATERIAL: REPORTS & OFFICIAL DOCUMENTS

Bach, Michael & Lana Kerzner, *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity: Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice* (Commissioned by the Law Commission of Ontario, October 2010). Canadian Civil Society Parallel Report Group, *Parallel Report for Canada*, CRPD Committee 17th Session (27 February 2017), online: *Law Commission of Ontario* <<https://www.lco-cdo.org/wp-content/uploads/2010/11/disabilities-commissioned-paper-bach-kerzner.pdf>>.

Browning, Michelle, *Report to Investigate New Models of Guardianship and the Emerging Practice of Supported Decision Making* (Winston Churchill Memorial Trust of Australia, 2010), online: *The Winston Churchill Memorial Trust* <https://www.churchilltrust.com.au/media/fellows/Browning_Michelle_2010.pdf>.

Canadian Civil Society Parallel Report Group, *Parallel Report for Canada*, CRPD Committee 17th Session (27 February 2017), online: *UN Treaty Body Database* <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fCSS%2fCAN%2f26744&Lang=en>.

Canadian Human Rights Commission, *Submission to the Committee on the Rights of Persons with Disabilities in Advance of the Committee's Development of the List of Issues Prior to Reporting for Canada's 2nd Periodic Review* (July 2019), online: *UN Treaty Body Database* <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/D

[ownload.aspx?symbolno=INT%2fCRPD%2fIFR%2fCAN%2f35591&Lang=en](https://www.ohchr.org/Documents/Issues/Disability/A.HRC.37.56.docx)>.

Catalina Devandas Aguilar, *Report of the Special Rapporteur on the rights of persons with disabilities (theme: legal capacity reform and supported decision making)* (12 December 2017), online: *United Nations Human Rights Office of the High Commissioner* <<https://www.ohchr.org/Documents/Issues/Disability/A.HRC.37.56.docx>>.

Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Canada* (8 May 2017), online: *UN Treaty Body Database* <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fCAN%2fCO%2f1&Lang=en>.

Committee on the Rights of Persons with Disabilities, *General comment No.1 (2014) – Article 12: Equal recognition before the law* (19 May 2014), online: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>>.

The Coalition on Alternatives to Guardianship, *The Right to Legal Capacity and Supported Decision Making for All: A Preliminary Brief to the Law Commission of Ontario in Response to: Legal Capacity, Decision-Making and Guardianship, Interim Report, October 2015* (7 March 2016), online: *Community Living Ontario* <<https://communitylivingontario.ca/wp-content/uploads/2017/08/Coalition-on-Alternatives-to-Guardianship-Preliminary-Brief-to-LCO-on-Interim-Report-March-7-2016.pdf>>.

SECONDARY MATERIAL: OTHER ONLINE RESOURCES

“Advancing CRPD Article 12: NEXT STEP Program in Bulgaria (2014-2016)” (1 October 2014), online *BCNL* <<http://bcnl.org/en/projects/advancing-crpd-article-12-next-step-program-in-bulgaria-2014-2016.html>>.

“ARCH Alert” (22 July 2009), online: *ARCH Disability Law Centre* <<http://www.archdisabilitylaw.ca/sites/all/files/ARCH%20Alert%20-%20July%2022%2009%20-%20Text.txt>>.

CBC Radio, The Sunday Edition, “How Justin Clark’s fight for independence transformed disability rights in Canada” (25 November 2018), CBC News, online: <https://www.cbc.ca/radio/thesundayedition/november-25-2018-the-sunday-edition-with-michael-enright-1.4911588/how-justin-clark-s-fight-for-independence-transformed-disability-rights-in-canada-1.4911590>.

Centre for Independent Living in Toronto (CILT), Council of Canadians with Disabilities (CCD), & ARCH Disability Law Centre, “Disability and Rights for Citizens (DRC) Project: Convention on the Rights of Persons with Disabilities (CRPD),” online: CILT <https://www.cilt.ca/wp-content/uploads/2016/12/CRPD-Key-Articles-and-Community-Priorities.pdf>.

“Convention on the Rights of Persons with Disabilities” (last updated November 2019), online: *United Nations Treaty Collection* https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4.

“DEVELOPERS: scaling up the community level of the Next Step Program” (8 March 2019), online: BCNL <http://bcnl.org/en/projects/developers-scaling-up-the-community-level-of-the-next-step-program.html>.

“End of Mission Statement by the United Nations Special Rapporteur on the rights of persons with disabilities, Ms. Catalina Devandas-Aguilar, on her visit to Canada” (12 April 2019), online: *United Nations Human Rights Office of the High Commissioner* <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24481&LangID=E>.

“Peru: Milestone disability reforms lead the way for other States, says UN expert” (4 September 2018), online: *United Nations Human Rights Office of the High Commissioner* <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23501&LangID=E>.

Petrova, Dimitrina, ed., *The Equal Rights Review, Vol. Two* (London, UK: The Equal Rights Trust, 2008), online: https://www.equalrightstrust.org/ertdocumentbank/err_issue02%20reduced.pdf.

“Statement by Louise Arbour, UN High Commissioner for Human Rights to the Resumed 8th Session of the Ad Hoc Committee on the Convention on the Rights of Persons with Disabilities, New York” (5 December 2006), online: *United Nations* <<https://www.un.org/esa/socdev/enable/rights/ahc8hrcmsg.htm>>.

“UN expert welcomes legal capacity reform in Colombia to end guardianship regime” (29 August 2019), online: *United Nations Human Rights Office of the High Commissioner* <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24926&LangID=E>>.

Walker, Julian, Legal and Legislative Affairs Division, “The United Nations Convention on the Rights of Persons with Disabilities: An Overview” (27 February 2013), online: *Library of Parliament* <https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201309E#ftn48>.