



SUPPORTED DECISION MAKING A ROADMAP FOR REFORM IN NEWFOUNDLAND & LABRADOR

SUMMARY REPORT

by **Michael Bach** and **Lana Kerzner**



A LEGAL CAPACITY RESEARCH REPORT

from IRIS – Institute for Research and Development on Inclusion and Society

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20-850 King Street West Oshawa, ON L1J 8N5
Telephone: 416-661-9611
www.irisinstitute.ca

Author: Michael Bach and Lana Kerzner for the Institute for Research and Development on Inclusion and Society

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Michael Bach, PhD., is Managing Director at IRIS and Adjunct Professor in Disability Studies at Ryerson University. His research, publications and presentations cover disability theory, policy and practice in a range of areas, including education, employment, and funding and delivery of community-based services. A particular area of expertise is legal capacity and decision making.

Lana Kerzner, Barrister and Solicitor, has had a diverse legal career, having worked in private practice, public interest law, teaching in law, and legal research. Her area of specialty has been in disability law, with sub-specialties in legal capacity, abuse of people with disabilities, accessibility of telecommunications, services for people with intellectual disabilities and assistive devices. She has written and presented extensively in Canada and internationally.

DISCLAIMER

This report, and the legal research and analysis contained in it, is not intended to be legal advice. The legal content is intended solely to provide background and context for the policy analysis and options presented.

Table of Contents

EXECUTIVE SUMMARY	i
List of Acronyms/Short Forms	vi
Note to Readers on:	vi
INTRODUCTION	1
I. APPROACH TO THE CONSULTATION AND RESEARCH	2
II. KEY TERMS AND CONCEPTS	3
A. Defining Disability	3
B. Legal Capacity – Mainstream Approaches.....	3
C. Decision-making Capability Approach to Legal Capacity.....	3
D. Guardianship and Substitute Decision Making (Formal and Informal)	4
E. Legal Capacity Regime	4
III. CONCERNS ABOUT GUARDIANSHIP AND SUBSTITUTE DECISION MAKING	5
IV. NEWFOUNDLAND AND LABRADOR’S CURRENT LEGAL REGIME FOR REGULATING LEGAL CAPACITY.....	6
V. PERSONAL/INTER-PERSONAL, PROGRAM, AND POLICY BARRIERS TO EXERCISING LEGAL CAPACITY.....	7
VI. BARRIERS IN LAW TO EXERCISING LEGAL CAPACITY	10
A. Main Themes	10
B. Considerations for Assessing Compliance with the Canadian Charter of Rights and Freedoms	11
C. Summary of Legal Analysis.....	13
VII. GUARDIANSHIP AND SUBSTITUTE DECISION MAKING: DO DATA LIMITATIONS HIDE THE PROBLEM?.....	14
VIII. OPTIONS FOR MEETING CONSTITUTIONAL IMPERATIVES FOR REFORM	15
A. Overview of Options for Reform.....	15
B. Criteria for Assessing Options.....	16
C. Assessment of Options	17

IX. RECOMMENDED DIRECTIONS: A PHASED-IN FULLY INCLUSIVE APPROACH TO LEGAL CAPACITY.....	18
X. IMPLEMENTING RECOMMENDATIONS: AN INITIAL FIVE-YEAR ROADMAP	20
CONCLUSION.....	25
ENDNOTES.....	26

EXECUTIVE SUMMARY

Background

Legal capacity is the legally-recognized capacity and power to make personal life, health care and financial decisions. The right to equality in exercising legal capacity without discrimination based on disability has been recognized under the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD).

Community stakeholders have expressed concern that several laws and policies in Newfoundland and Labrador operate in ways that restrict or deny the exercise of legal capacity by imposing guardianship and substitute decision making based on disability.

The provincial government has acknowledged these concerns and mandated the exploration of “supported decision making” alternatives to guardianship and substitute decision making.

Scope of Research

IRIS – Institute for Research and Development on Inclusion and Society was engaged by the Newfoundland and Labrador Association for Community Living, on behalf of the ‘Steering Committee on Citizenship and Legal Capacity for All’ to: identify key issues and barriers to legal capacity; recommend directions for reform; and outline a ‘roadmap’ to implement them. The review involved focus groups and key informant interviews with community stakeholders and senior government officials, as well as extensive legal research.

The ‘Decision-Making Capability’ Approach to Legal Capacity

Laws regulating legal capacity in Newfoundland and Labrador, and the rest of Canada, evidence three main approaches to defining criteria for who can make legally valid decisions:

- The ‘status’ approach restricts capacity based on a ‘mental disability’ or ‘disorder.’
- The ‘outcome’ approach adds to the status approach behavioural criteria – like not being a harm to oneself or others.
- The ‘cognitive/functional’ approach establishes cognitive criteria like being able to understand information and appreciate consequences relevant to a decision for determining who can exercise legal capacity.

The UN Committee on the Rights of Persons with Disabilities has found all these approaches to be discriminatory because they restrict access based on disability.

The alternative “decision-making capability approach” is non-discriminatory because it recognizes that the capacity to understand information and appreciate consequences in making decisions can be provided by the person themselves (independent decision-making capability), or by others supporting a person (interdependent decision-making capability).

Several features of Canada’s current laws that reflect this approach were examined.

Legal Regime Regulating Legal Capacity in Newfoundland and Labrador

The research examined international law, the *Canadian Charter of Rights and Freedoms*, and several pieces of provincial legislation and jurisprudence regulating legal capacity, including: the *Mentally Disabled Persons' Estates Act*, *Enduring Powers of Attorney Act*, *Adult Protection Act*, *Advance Health Care Directives Act*, *Mental Health Care and Treatment Act*, *Judicature Act*, and *Human Rights Act*.

Research Findings: Key Issues and Barriers in Exercising Legal Capacity

A. Personal and Inter-personal barriers:

1. People often “relinquish their voice”, after sustained loss of autonomy;
2. Some are “not ready” to make choices on their own, and lack the opportunities and supports to do so;
3. Some individuals are making choices that result in severe risk or harm;
4. Families are feeling pressured by health and social services systems and financial institutions to apply for guardianship to protect a person’s future; and
5. Some have seen families, support providers and appointed representatives who, in their perception, are exercising undue control over adults with disabilities.

B. Program issues and barriers:

1. Limited resources and clear direction means programs fit “people into boxes;”
2. Province-wide capacity to deliver responsive and individualized supports in health care, home support and community services is lacking;
3. Lack of affordable housing options providing choice, support, safety and inclusion;
4. Inadequate future planning services are “short-changing” future financial security;
5. Concern that some Regional Health Authority staff appear ineffective in supporting a person’s right to decide;
6. “Institutional mistrust” among some health and community support providers and government departments; and
7. Community-based health and social service providers not providing needed supports for decision making.

C. Policy issues and barriers:

1. No mandated approach to create alternatives to guardianship and substitute decision making;
2. A patchwork system of decision-making support and community capacity leaves people without needed:
 - a) Independent person-centred planning facilitation;
 - b) Assistance to arrange and access decision-making supports;
 - c) Flexible and responsive individualized funding for disability supports;
 - d) Community navigation support; and
 - e) Assistance in working with other parties to arrange accommodations;

3. Gaps for youth in care transitioning to adulthood who need decision-making support; and
4. Decision-making supporters are denied access to a person's information because of privacy concerns and so cannot effectively assist.

D. Legal issues and barriers:

1. Legislation evidences a fragmented approach and gaps in regulating legal capacity to make different types of decisions, i.e., property, personal and health care;
2. Legislation evidences inconsistent requirements for exercising, and approaches to, legal capacity;
3. Supports and accommodations are only minimally recognized in law;
4. Legislation primarily reflects a bio-medical approach to disability; and
5. Some, but inconsistent, recognition of less/least restrictive alternatives to guardianship exists.

Examined against the *Canadian Charter of Rights and Freedoms*, the legal research finds three main issues with Newfoundland and Labrador's legal capacity laws:

1. Legislation based on the mainstream approaches to legal capacity results in discrimination, contrary to s.15 of the *Charter*;
2. Legislation which restricts legal capacity results in deprivations of liberty and security of the person, and are suspect for violations of people's s. 7 *Charter* Rights;
3. The manner in which the legislation balances values of autonomy and equality against protection from harm must be re-examined to ensure *Charter* compliance.

Assessment of Options for Meeting Constitutional Imperatives for Reform

The *Canadian Charter of Rights and Freedoms*, along with evolving domestic and international human rights obligations, establish an imperative to reform the current legal capacity regime in Newfoundland and Labrador. Three main options for community stakeholders, the provincial government, and legislators to consider are:

- ***Option A – Phased in fully inclusive decision-making capability approach to legal capacity, enabled by full recognition of supports and accommodations in law and policy:*** Would adopt a comprehensive approach to legally recognizing *both* independent and interdependent decision-making capability with supports and accommodations as required, and develop policy, guidelines, training, and community-based capacity to support implementation.
- ***Option B – Supported cognitive/functional approach to legal capacity, where law and policy recognize the role of supports and accommodations in enabling a person to meet cognitive tests of legal capacity in all circumstances:*** Would establish consistent cognitive/functional tests for legal capacity across main statutes in the legal capacity regime and recognize supports and accommodations to enable people to exercise legal

capacity on that basis. Provincial policy and guidelines would be developed to support implementation.

- ***Option C – Status quo legal regime but with an enhanced focus on decision-making supports and accommodations:*** Would not change the legal capacity regime, but would introduce policy and practice guidelines, information resources and training to maximize provision of supports and accommodations for decision making to meet legal requirements to exercise legal capacity within the current framework of the law.

Nine criteria were selected to assess the three main options, as follows:

1. Meets Canada’s obligations consistent with the CRPD;
2. Is *Charter* compliant, according to *Charter* informed principles ensuring a right to equality in the exercise of legal capacity;
3. Recognizes and enables access to supports and accommodations for decision making;
4. Addresses fragmentation and inconsistency in the regime for regulating legal capacity;
5. Safeguards integrity of the decision-making process to maximize legal capacity;
6. Maximizes beneficiaries;
7. Provides a cost-effective approach to meeting support needs;
8. Meets disability, mental health and seniors’ communities’ concerns; and
9. Is a feasible option to implement.

The assessment concluded that option A best meets these criteria and addresses the concerns motivating this consultation and research, because it:

- is the only option that addresses the current exclusion of people with more significant intellectual, developmental, and cognitive disabilities and people living with mental health issues from exercising and enjoying legal capacity;
- best fulfills *Charter* informed principles for an inclusive legal capacity regime;
- is best able to meet community concerns and calls to ensure people with more significant disabilities are supported to exercise legal capacity; and
- would introduce more consistency to the legal regime.

In comparison, options B and C would not meet the criteria, or motivating concerns, to the same extent:

- Options B and C would exclude a large and growing group from the benefits of exercising legal capacity.
 - While they would recognize supports and accommodations for decision making to some extent, they would exclude people who are unable to meet a cognitive test of legal capacity even with supports and accommodations.
- Thus, these options would not be *Charter* compliant.
- The options would not address community concerns identified in a “community response” (in Appendix I) to a draft of this report, which rejects such options because

they exclude those with more significant disabilities, “those for whom legal reform is most necessary” their report states.

Recommendations and Roadmap for Reform

Based on the analysis we identify eleven main recommendations for an initial 5-year reform strategy to implement option A, and to deal with the complex and intersecting issues identified:

1. Establish a Joint Government-Community Legal Capacity Reform Steering Committee and inter-departmental leadership to steer the initiative;
2. Provide coordination through the Disability Policy Office;
3. Initiate a proactive approach to ensure Charter-compliance and consistency and clarity in the province’s legal capacity regime;
4. Adopt the decision-making capability approach to guide law reform;
5. Begin the legislative reform process by reforming the Mentally Disabled Persons’ Estates Act to provide a platform from which to build consistency and clarity in the province’s legal capacity regime;
6. Establish a policy and guidelines for reasonable accommodation as it applies to the exercise of legal capacity;
7. Mandate a proactive process for exploring least restrictive alternatives;
8. Review capacity of the community-based health and social services sector to deliver independent planning and community navigation supports;
9. Pilot initiatives for implementing supports for decision making at all decision-making points in health care and other settings where a need for guardianship or substitute decision making is considered;
10. Deliver information resources and training on the meaning of liberty and equality in the exercise of legal capacity; and,
11. Develop a data collection strategy to track and document the use of guardianship and substitute decision making in all sectors.

Conclusion

The reforms recommended in this report would better align the province’s legal, policy and program framework with Constitutional and human rights obligations, and government priorities to enable people to live independently and contribute to inclusive and supportive communities in Newfoundland and Labrador.

Taking these steps would respond to calls from the disability community to address longstanding barriers to liberty and equality in the exercise of legal capacity, especially for people with intellectual, developmental or cognitive disabilities, and mental health issues.

List of Acronyms/Short Forms

Charter	<i>Canadian Charter of Rights and Freedoms</i>
CRPD	<i>Convention on the Rights of Persons with Disabilities</i>
UN	United Nations
UN Committee	United Nations Committee on the Rights of Persons with Disabilities

Note to Readers on:

‘Decision making’ and ‘decision-making’

- This term is used in two ways: as a noun to describe the process of making a health care, financial or personal decision that a person goes through; and as an adjective to describe types of arrangements or processes for decision making. Consistent with editing guidelines, when used as a noun, the term is not hyphenated. When used as an adjective it is hyphenated, for example ‘supported decision-making arrangements’ or ‘decision-making processes.’

‘Cognitive tests’ of legal capacity

- This report uses the phrase ‘cognitive tests’ to refer to those tests of legal capacity which establish that a person must be able to demonstrate certain cognitive abilities as a requirement for exercising legal capacity. A common cognitive test is the ‘understand and appreciate’ test which is often stated more fully as follows:

An adult is capable to make a decision where that adult

- a. is able to understand the information that is relevant to making the decision; and
- b. is able to appreciate the reasonably foreseeable consequences of that decision.

See, for example, Newfoundland and Labrador’s *Advance Health Care Directives Act*, s. 14, and Newfoundland and Labrador’s *Adult Protection Act*, s. 6(2).

The ‘understand and appreciate’ requirement for legally valid decisions

- The ‘understand and appreciate’ test is often used in legislation for two purposes simultaneously. One is to describe a set of cognitive criteria that must be met for the law to consider an individual capable. In doing so, it also defines requirements for a legally valid decision. These are usually conflated and seen as one in the same. However, they are, in fact, two distinct, but interconnected, requirements. One relates to an individual’s own cognitive abilities and the other relates to what is required to validate a decision, which may or may not depend exclusively on the cognitive abilities of the individual. In current law these are the same.

- However, in section II of the report we discuss the ‘decision-making capability approach’ to defining the requirements of legal capacity. In this approach the two requirements are separated: ‘understanding and appreciation’ are required to create a legally valid decision, but the cognitive abilities required for understanding and appreciation can be provided by a person on their own or directed by the person who is provided with the assistance of decision-making supporters who are guided by the person’s will and preferences in making a decision in the circumstances.

INTRODUCTION

For the past decade, the disability community in Newfoundland and Labrador has called on the provincial government to address the systematic restrictions people with disabilities experience in exercising their legal capacity.

IRIS – Institute for Research and Development on Inclusion and Society – was engaged by the Newfoundland and Labrador Association for Community Living, on behalf of the provincial ‘Securing Citizenship and Legal Capacity for All’ Steering Committee, to study why these restrictions happen and to point to needed reforms.

This report is a summary of the Final Report and provides an overview of the study findings and recommended directions for reform.

Background to the Study

The Newfoundland and Labrador disability community began calling for an end to disability-based restrictions on decision-making for the past decade, following Canada’s ratified the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD)¹

Since 2011, provincial political parties and successive governments have committed to recognizing supports for decision making. The Newfoundland and Labrador Minister of Justice and Public Safety up to the May 2019 provincial election was mandated to work with stakeholders and colleagues “to develop measures to encourage supported decision making.”

Most recently, consultations for the anticipated provincial accessibility legislation identified “barriers to supported decision making” as one of seven main barriers to accessibility.

Terms of Reference for this Report

The terms of reference called for IRIS to consult with community representatives and government stakeholders to:

- Identify key issues in implementing law, policy, and community systems reform to enable legal capacity and supported decision making for people with disabilities and mental health issues;
- Determine a set of preferred options for reform to address these issues; and
- Outline a ‘Roadmap for Reform’ – including a time frame and needed processes to guide and manage the reform process.

I. APPROACH TO THE CONSULTATION AND RESEARCH

There were four phases to consultation and research process:

- Focus groups were convened with government departmental officials and community stakeholders to identify the range of issues to be considered:
 - Two focus groups (approximately 40 participants) were conducted with government officials, and with representatives of the ‘Steering Committee on Citizenship and Legal Capacity for All.’
- Key informant interviews were conducted with thirteen senior government officials and ten community service provider representatives to identify legal, policy and program barriers to legal capacity, and promising approaches to decision-making support.
- Extensive legal research was undertaken, including a review of international, federal, and provincial/territorial sources of law regulating exercise of legal capacity in the province, including provincial statutes and case law.
- Report preparation included presentation of a draft report to both government officials and community representatives, and preparation of a final report incorporating their feedback.

II. KEY TERMS AND CONCEPTS

A. Defining Disability

Groups disproportionately affected by restrictions on legal capacity include people with:²

- An **intellectual disability** – who have greater difficulty than most people with intellectual or adaptive functioning present at birth or before the age of eighteen.
- **Developmental disability** – which includes ‘intellectual disability’ but may also include people with cerebral palsy, autism spectrum disorder, or fetal alcohol syndrome.
- **Cognitive disability** – which includes brain injury, stroke, Alzheimer’s disease or other dementias, and cognitive decline associated with aging.
- **Mental health issues** – including those who identify as ‘mental health consumers’, ‘psychiatric survivors,’ or ‘mad.’

B. Legal Capacity – Mainstream Approaches

Legal capacity is the power to make and direct decisions with legal consequences – about one’s life, relationships, health care and property. Article 12 of the CRPD recognizes that people with disabilities have a right to enjoy legal capacity on an equal basis.³

Laws evidence three ‘mainstream approaches’ to regulating the exercise of legal capacity:

- Status approach – uses a status (e.g., age or ‘mental disorder’) as a condition for restricting legal capacity and does so in the name of protecting a person;
- Outcome approach – restricts legal capacity based on the harm that may result, or is resulting, from the person’s behavior, seen to be a consequence of a “mental disorder;”
- Cognitive/Functional approach – legal capacity denied to those who cannot demonstrate the cognitive/functional abilities to make a decision in the circumstances.

The UN Committee on the Rights of Persons with Disabilities finds all these approaches to be discriminatory because they restrict legal capacity based on disability-related factors.⁴

C. Decision-making Capability Approach to Legal Capacity

The decision-making capability approach addresses the discriminatory features of the mainstream approaches by recognizing two main ways to meet the understand and appreciate requirements for exercising legal capacity:

- **Independent** decision-making capability
 - The person demonstrates that with the appropriate supports and accommodations they have the capacity to understand information and appreciate consequences of a particular decision, and thus decide on their own; and,

- **Interdependent** decision-making capability
 - Together, the person and recognized decision-making supporters have the capacity to understand information and appreciate consequences of a particular decision, guided by the principle of the ‘best interpretation of the person’s will and preferences in the circumstances.’

The legal basis in Canadian law for this approach is discussed in Appendix C of the Final Report. Appendix D of that report provides examples of its implementation in law, policy, and practice. There are three main features of the decision-making capability approach:

- **“Supports” for Decision Making** – any measure to assist a person to have power over their decisions, including: trusted others who assist; information assistance; communication technologies; and accessibility to buildings and services.⁵
- **“Supported Decision Making”** – involves decision-making supporters who assist a person to understand, make and communicate a decision, or interpret their will and preferences and help make and execute plans needed to give them effect.⁶
- **“Reasonable Accommodation”** – is “any necessary modifications or adjustments to allow persons with disabilities to exercise their legal capacity, unless it is a disproportionate or undue burden.”⁷

D. Guardianship and Substitute Decision Making (Formal and Informal)

Guardianship refers to an appointment, usually by a court, of a substitute decision maker who is given authority to make property and/or personal care decisions for a person who is determined to be incapable, at law, to make those decisions.

Substitute decision making refers to the process whereby a person or entity makes decisions on behalf of a person who is believed to be incapable. This may be on a formal (legal) or informal basis.

E. Legal Capacity Regime

This report uses the term ‘legal capacity regime’ or ‘legal regime regulating the exercise of legal capacity’ to mean the set of provisions established under statute, regulation, or through jurisprudence which together constitute the requirements for exercising legal capacity and making legally valid decisions.

While the term ‘regime’ may have negative connotations in some contexts, it is used in legal research and in this report in a purely descriptive sense. Ultimately, legal regimes regulating the exercise of legal capacity can be characterized as more or less inclusive, or more or less discriminatory, based on disability.

III. CONCERNS ABOUT GUARDIANSHIP AND SUBSTITUTE DECISION MAKING

This report was commissioned because of concerns about the impact and the harms that can come when others assume power and control over a person's decision making. This usually happens with the best of intentions: to protect people and safeguard their interests. However, doing so restricts their autonomy and self-determination and, at worst, can be a means by which people become victim to financial and other forms of abuse and neglect.

While there has been no comprehensive study of guardianship in the Canadian context, a recent U.S. study⁸ reports many associated harms, including negative impact on abilities, social isolation, loss of self-esteem, financial and other forms of abuse.

In responding to the draft of this report, community representatives also reported examples in Newfoundland and Labrador of similar kinds of outcomes and harms (see Appendix I in the Final Report).

These concerns have motivated disability community representatives in Newfoundland and Labrador,⁹ across Canada,¹⁰ and internationally¹¹ to call for an end to findings of legal incapacity and to the imposition of guardianship and substitute decision making. They call instead for alternatives that do not strip their right to legal capacity as the cost of getting needed decisions made.

Concerns about the restriction of a person's legal capacity must be balanced against the public interest to ensure that needed decisions are made so that people who are unable to make those decisions are protected from risk of harm to themselves or others. How the current legal regime in Newfoundland and Labrador manages the balance between protecting a person's right to equality in their exercise legal capacity, and protecting people from harm, as well as options to better manage this balance, are examined in Sections VI and VIII of the report.

IV. NEWFOUNDLAND AND LABRADOR'S CURRENT LEGAL REGIME FOR REGULATING LEGAL CAPACITY

There are seven main sources of law that have an impact on or establish requirements for exercising legal capacity in Newfoundland and Labrador. These are:

- International law, including:
 - CRPD, along with Canada's 'declaration and reservation' on Article 12; and
 - General Comment No. 1 on Article 12.
- Constitutional law, including:
 - *Constitution Act, 1867* - distribution of legislative powers; and
 - *Canadian Charter of Rights and Freedoms*, in particular the right to life, liberty and security of the person (s.7) and the right to equality (s.15).
- Provincial Legislation- core statutes:
 - *Mentally Disabled Persons' Estates Act*;
 - *Enduring Powers of Attorney Act*;
 - *Adult Protection Act*;
 - *Advance Health Care Directives Act*;
 - *Mental Health Care and Treatment Act*; and
 - *Judicature Act*
- Human Rights Legislation – *Human Rights Act*.
- Provincial Legislation – statutes that affect legal capacity but not as a primary purpose:
 - e.g., *Income and Employment Support Act*, *Public Trustee Act*, *Wills Act*.
- Federal Legislation – federal statutory provisions impacting the exercise of legal capacity:
 - e.g., *Income Tax Act* provisions re: Registered Disability Savings Plan; *Canada Pension Plan*; and the *Criminal Code*.
- Jurisprudence/Case Law:
 - e.g., Newfoundland and Labrador Court of Appeal decision in *A.A. (Re)*.
- Provincial Policy:
 - e.g., *Adult Protection Act Policy Manual*.

V. PERSONAL/INTER-PERSONAL, PROGRAM, AND POLICY BARRIERS TO EXERCISING LEGAL CAPACITY

The research identified barriers to decision making at the personal and interpersonal level, in programs and in policies. A comprehensive review of all related programs, service delivery systems, and public policies was beyond the scope of this consultation and research.

A “What We Heard” report about these barriers is presented in Appendix F of the Final Report.

Personal and Inter-personal Barriers to Exercising Legal Capacity

Personal and inter-personal barriers	What we heard and why these barriers happen
1. People “relinquish their voice”	<ul style="list-style-type: none"> A lifetime of not being valued, abuse, traumatic experience, low self-esteem, and mistrust of formal systems like police and the courts leads people to “relinquish their voice” as one informant stated.
2. Some “not ready” to make choices on their own	<ul style="list-style-type: none"> Intensive supports are lacking to assist people with complex needs and social and economic marginalization. Capacity to exercise choice can be severely limited by factors such as social rejection, mental health issues, addictions, violence-induced brain injury, being drawn into the sex trade since age 12, for example, chronic homelessness, incarceration and the ongoing effects of trauma.
3. Some individuals make choices that result in severe risk or harm	<ul style="list-style-type: none"> There is a lack of guidance about when and how to intervene in situations where a person’s actions are causing harm to themselves or others, and they refuse support. Informants indicated that lack of clear policy direction and program support make it difficult for providers to navigate these complex situations.
4. Families feeling pressured to apply for guardianship to protect a person’s future	<ul style="list-style-type: none"> Some families experience pressure from financial institutions, health care, education and community and government services to place family members under guardianship in order to manage wealth transfer, future planning and to protect their family member
5. Some perceive that families, support providers and appointed representatives are exercising undue control	<ul style="list-style-type: none"> Lack of awareness about a supported approach to decision making leads some family members to seek legal guardianship to protect the person. In other cases, family members exercise control informally. Some support providers and some appointed under enduring powers of attorney do not always act at the direction of the person/principal who appointed them. Without safeguards many people are being subjected to control and abuse.

Program Barriers to Exercising Legal Capacity

Program barriers	What we heard and why these barriers happen
1. Limited resources and clear direction means programs are “fitting people into boxes”	<ul style="list-style-type: none"> ▪ Some people with disabilities and families report that community providers or Regional Health Authorities (RHAs) are unable or unwilling to fully deliver programs in a person-centered way that enables the exercise of legal capacity. Instead, they fit “people into boxes.”
2. Province-wide capacity to deliver responsive and individualized supports in health care, home support and community services is lacking	<ul style="list-style-type: none"> ▪ Some people with disabilities, families and service providers report: <ul style="list-style-type: none"> • Lack of program resources/funding mean unmet need; • Uneven capacity across the province to deliver needed support; • Inflexible/non-portable home supports; • Lacking capacity to respond to diverse, individual needs; • Over-reliance on informal support of families.
3. Lack of affordable housing options that provide choice, support, safety and inclusion	<ul style="list-style-type: none"> ▪ Without adequate, affordable, and secure housing people are unable to gain control over their lives. “Emergency response [is] the only response” for many individuals in a system that is “addicted to crisis.”
4. Inadequate future planning services are “short-changing” individuals in ensuring a financially secure future;	<ul style="list-style-type: none"> ▪ Many individuals are not accessing income benefits they are eligible for (e.g., insurance benefits, Registered Disability Savings Plans) because they and their families lack financial planning support or fear a substitute decision maker will be appointed as the cost of access.
5. Concern that some Regional Health Authority staff are ineffective in supporting a person to decide	<ul style="list-style-type: none"> ▪ Some people with disabilities, families and service providers report: <ul style="list-style-type: none"> • Lack of awareness about the rights relating to decision making and how to support it; • RHA funding driven by clinical assessment, instead of a person-centred plan of personal goals, needs, and opportunities; • Independence is lacking between assessment and planning functions, which limits the scope for self-direction; • More expertise is needed to develop person-centred approaches; • When a person’s supports come to a “crashing halt,” there seems little capacity to navigate the community and create new options; • Limited in providing effective planning, navigation and community coordination because they are primary gatekeepers to funding.
6. “Institutional mistrust” among some health and community support providers and government departments	<ul style="list-style-type: none"> ▪ Some government, RHA and community stakeholders are not effectively collaborating to address a growing number of complex situations where a person has multiple needs related to housing, health, income, support, and developmental and safety concerns.
7. Community-based health and social service providers not providing needed supports for decision making	<ul style="list-style-type: none"> ▪ People with disabilities, families and service providers report: <ul style="list-style-type: none"> • Supporters are not listened to in the long-term care system; • Being told guardianship is needed to access health care services; • Imposed treatment and lack of options in mental health care; • Providers lack capacity for a person-centred, supported decision-making approach, and the individualized funding to do so.

Policy Barriers to Exercising Legal Capacity

Policy Barriers	What we heard and why these barriers happen
1. No mandated approach to create alternatives to guardianship and substitute decision making	<ul style="list-style-type: none"> Substitute decision making and guardianship often result because there is no mandated process for creating less restrictive, decision-making support alternatives. The exception is the Policy Manual for the Adult Protection Act which does mandate a process.
2. Patchwork system of decision-making support and community capacity leave people without needed:	<ul style="list-style-type: none"> There is a recognized need for health care and community services systems to proactively help create alternatives to substitute decision making, but informants pointed to lack of policy direction and community capacity to create alternatives.
a) Independent person-centred planning facilitation;	<ul style="list-style-type: none"> No provincial strategy exists for delivering person-centred planning facilitation, which assists a person to develop and execute personal plans. Some identified community-based “independent” planning support as an important resource.
b) Assistance to arrange and access decision-making supports;	<ul style="list-style-type: none"> The facilitation approach used under the Adult Protection policy has created effective alternatives to guardianship but is not broadly available. Some doubted whether RHAs were best positioned to deliver this support more broadly.
c) Flexible and responsive individualized funding for disability supports;	<ul style="list-style-type: none"> While individualized funding results in greater choice and control for individuals, the existing patchwork of home care and other agencies are not currently mandated, designed or assisted to provide individualized funding and support options.
d) Community navigation support; and	<ul style="list-style-type: none"> Community navigation supports are needed to complement person-centred planning support, to assist the person and their network activate their plans with community support agencies and health care, etc. However, informants advised that no clear policy is in place.
e) Assistance in working with other parties to arrange accommodations.	<ul style="list-style-type: none"> Informants reported that people experience discrimination because others assume they are not capable of making their own decisions (e.g., in health care, banking). There is no clear Human Rights Commission policy or guideline as it applies to decision making in these contexts.
3. There are gaps for youth in care and those with significant support needs;	<ul style="list-style-type: none"> Many youths transitioning from children’s services to the adult disability supports system are in “legal limbo” because they cannot act legally independently or get needed support. The current “age-based” and “IQ-based” eligibility criteria is not responsive to their needs.
Decision-making supporters are denied access to a person’s information and so cannot effectively assist.	<ul style="list-style-type: none"> Informants raised concerns that rules of RHAs and other provincially and federally regulated organizations (like the Canada Revenue Agency) deny a person’s informal decision-making supporters from providing basic assistance like changing a person’s address or filing taxes. This triggers formal guardianship or substitute decision making.

VI. BARRIERS IN LAW TO EXERCISING LEGAL CAPACITY

The barriers people experience in their personal relationships, in health and community services and in existing policy mandates appear to be structured and enabled in many ways by the legal regime regulating legal capacity. The legal research pointed to a number of barriers in this regime.

A. Main Themes

1. Legislation evidences a fragmented approach and gaps in regulating legal capacity to make different types of decisions, i.e., property, personal and health care

The statutory scheme results in gaps whereby some statutes cover only some kinds of decisions, and some kinds of decisions are inadequately addressed. There are limited options for addressing situations of incapacity (as defined in legislation) in relation to personal (non-health care) decisions.

2. Legislation evidences inconsistent requirements and approaches to legal capacity

For example:

- Provisions in the *Mentally Disabled Persons' Estates Act* address legal capacity in a manner which relies heavily upon a status as a person with a particular condition, and also references a level of inability to conduct one's affairs.
- The *Enduring Powers of Attorney Act* contains one provision which interprets "legal incapacity" based on a mix of cognitive function and status as a person with a 'mental disability' (s. 2(1)(c)) and another which interprets "capacity" based on a mix of cognitive and non-cognitive factors (s. 15(2)).
- Both the *Adult Protection Act* (s. 6(2)) and the *Advance Health Care Directives Act* (s. 14) employ the formulation of capacity that is often seen in other Canadian jurisdictions and is sometimes referred to as the 'understand and appreciate' test. This is a pure cognitive test.
- The *Mental Health Care and Treatment Act* removes a person's control over decisions on the basis that the person has a 'mental disorder' (status approach) and meets additional criteria related to harm (outcome approach), cognition (functional approach), and need for treatment or care and supervision (s. 17(1)(b)).

3. Supports and accommodations are only minimally recognized in law

To the extent that there is any recognition in law in Newfoundland and Labrador that people may access supports and accommodations to exercise legal capacity, it does not go so far as to ensure that people have a legal right to do so.

There is some law that tacitly recognizes the role that supports and accommodations play. These include recognition of supports in the *Adult Protection Act* (s. 8 and s. s.20(1)(a)(iv)). Also, the Court of Appeal decision in *A.A.(Re)* gives tacit recognition to supports and accommodations in considering the principles that should guide the Supreme Court's consideration of whether to make a guardianship order. (see para. 82).

We did find one legal provision where the opposite is the case: discrimination against some people with disabilities in the context of contracts is justified under the *Human Rights Act* where a person "does not have the legal capacity to contract" (s. 21(2)).

4. Legislation reflects a bio-medical approach to disability

Terms used in legislation include: "mental infirmity arising from disease, age, habitual drunkenness, the use of drugs or other cause..." (*Mentally Disabled Persons' Estates Act* s. 17 and 18); "mental disorder" (*Mental Health Care and Treatment Act*, s.2(1)(k)) and "mentally disabled person" (*Mentally Disabled Persons' Estates Act*, s. 2(f)). Terms such as these are inconsistent with the social model and human rights approach to disability which has been affirmed by the Supreme Court of Canada¹² and articulated in the CRPD.¹³

5. Some, but inconsistent, recognition of less/least restrictive alternatives to guardianship/substitute decision making exists

Provisions which recognize less/least restrictive alternatives to guardianship/substitute decision-making are important mechanisms for preserving a person's legal capacity. These types of provisions are evident to a very limited extent in some legislation. Examples include the *Adult Protection Act* and, to a much lesser extent, the *Mentally Disabled Persons' Estates Act*, and the recent Newfoundland and Labrador Court of Appeal decision in *A.A. (Re)*.¹⁴ In that decision, the Court stated that the Court should consider "whether guardianship is the best way in the circumstances to provide the protection and assistance the person concerned needs."¹⁵

B. Considerations for Assessing Compliance with the Canadian Charter of Rights and Freedoms

That Canada's legal capacity laws, including those of Newfoundland and Labrador, are inconsistent with the CRPD, most notably Article 12, has been well documented.¹⁶ Our research and analysis of Newfoundland and Labrador's legal capacity laws against the *Charter* are described in the full report. Below is a summary of our findings.

1. Legislation based on the mainstream approaches to legal capacity results in discrimination, contrary to s.15 of the Charter

If the law denies legal capacity on the same basis for everyone regardless of disability it does not amount to discrimination.¹⁷ However, restrictions based on disability, as currently exist in

the Newfoundland and Labrador regime, can be characterized as discriminatory, contrary to the equality provision, s.15, of the *Charter*.¹⁸ How that conclusion is arrived at is summarized as follows:¹⁹

- Legal capacity tests which apply only to people who have mental disabilities²⁰ are discriminatory on their face. This amounts to direct discrimination.
- Even legal capacity tests which, on their face, apply equally to all, can in practice, impose unequal burdens on people with disabilities, thus amounting to adverse effect discrimination.²¹ The cognitive test embedded in Newfoundland and Labrador's statutory regime for legal capacity amounts to adverse effect discrimination against people with mental disabilities.
- The cognitive test of capacity²² creates a distinction between people who meet the test and people who do not meet it. Most people who do not meet the test are members of an enumerated class of Canadians that the equality provision in the *Charter* protects: people with 'mental disabilities.' The test results in a distinction based on disability.
- The distinction found in the test draws a discriminatory distinction that has the effect of perpetuating arbitrary disadvantage based on a person's mental disability. The cognitive test of capacity does not respond to the needs and actual capacities of people with mental disabilities. The basic formulation does not allow for an evaluation of each person's decision-making capability, which may well be constituted through non-cognitive means. People with mental disabilities are adversely impacted by the cognitive test of capacity in such a way as to entrench their historic disadvantage and, by excluding them from being able to make decisions and engage in transactions, widens the gap between them and the rest of society.
- This conclusion is reinforced by the interpretation by the Committee on the Rights of Persons with Disabilities about the approaches to capacity, all of which are found in Newfoundland and Labrador legislation.²³

2. *Legislation which restricts legal capacity results in deprivations of liberty and security of the person, and are suspect for violations of people's s. 7 Charter Rights*

- Section 7 of the *Charter* enshrines the right to "life, liberty and security of the person." To establish a s. 7 violation, it must be established that the right to life, liberty or security of the person was denied in a manner which is contrary to the principles of fundamental justice.²⁴
- Newfoundland and Labrador's substitute decision-making provisions found in the *Mentally Disabled Persons' Estates Act, Advance Health Care Directives Act, Mental Health Care and Treatment Act, Adult Protection Act* and *Judicature Act* remove the right to make decisions in certain circumstances as set out in the legislation and

described above in section VI.A. and Appendix B of the Final Report. As such, they interfere with both autonomy and dignity.

- Legal capacity laws in Newfoundland and Labrador are thus suspect for s. 7 violations. Because they are diverse, some more clearly engage liberty and security of the person interests, and/or are more inconsistent with the principles of fundamental justice than others.
- The analysis undertaken in Newfoundland and Labrador must take place against the backdrop of the Supreme Court of Nova Scotia's decision in *Webb (Litigation guardian of) v. Webb*.²⁵ In that decision guardianship provisions in the *Incompetent Persons Act*,²⁶ were found to be unconstitutional: they violated the liberty and security of the person interests of s. 7 of the *Charter* in a manner not in accordance with the principles of fundamental justice, and could not be justified as a reasonable limit in a free and democratic society pursuant to s. 1 of the *Charter*.

3. *The manner in which the legislation balances values of autonomy and equality against protection from harm must be re-examined to ensure Charter compliance*

- The balancing underlying legal capacity laws involves consideration of two factors:
 - society's role in ensuring that people who are vulnerable are protected from harm (societal interests);
 - The principle that everyone should enjoy the right to autonomy, able to live their lives without state interference, and to do so on an equal basis with others (individual rights).
- The balancing of rights and interests is evidenced in the *Charter* in two key provisions, namely s.1, and the principles of fundamental justice component of s. 7.
- It appears that legislative approaches in Newfoundland and Labrador place disproportionate weight on protection against harm in a manner that sacrifices equality and autonomy interests more than is necessary. Alternative approaches to regulating legal capacity, including supports and accommodations, would provide protection from harm in a manner which gives greater respect for equality and autonomy.

C. Summary of Legal Analysis

Significant aspects of the legal regime appear to be inconsistent with the *Charter*. A critical component of a re-design is the need to ensure that statutes evidence balancing of rights to autonomy and equality against harm prevention and response, in a manner that places greater emphasis than currently exists on respect for autonomy and equality, while sufficiently safeguarding against harm. The decision-making capability approach described above, we suggest, can successfully achieve the re-balancing required for *Charter* compliance.

VII. GUARDIANSHIP AND SUBSTITUTE DECISION MAKING: DO DATA LIMITATIONS HIDE THE PROBLEM?

How many people are affected by the legal, policy, program and personal and inter-personal barriers to exercising legal capacity in their lives, which the research and consultation identified? While there are some indications, the limitations of available data prevent us from drawing a clear picture of the scale of this issue.

While estimating the number of people who experience restrictions on their decision-making power was beyond the scope of our research, we did obtain the following information:

- As of November 2, 2020, the Public Trustee was acting as guardian of finances/estate for 269 persons. Forty of these cases were for persons identified as involuntarily psychiatric patients committed to hospital. Of these 269 “open files,” 63 had passed.²⁷
- Since January 2015, the Supreme Court of Newfoundland and Labrador has issued just over 500 guardianship orders (“letters of guardianship”) appointing private individuals as guardians of property or the person.²⁸

However, there are many other situations where data is not available, collected or publicly reported, including for situations where:

- a health care professional finds that a person lacks competency to make a health care decision and a substitute decision maker acts on behalf of that person under the *Advance Health Care Directives Act*;
- a provincial government officer directs that income support payments be made to a Trustee because the applicant/recipient is determined to be incapable of managing their financial affairs under the *Income and Employment Support Act*;
- a person is subject to substitute decision-making provisions under other provincial and federal legislation (see Table 1 for examples); or
- informal substitute decision making is imposed.

With respect to informal substitute decision making, the examples from the community response report (in Appendix I of the Final Report) and those gathered through the consultation and key informant interviews for this report indicate widespread concern about this practice.

Along with demographic trends signaling an increasing prevalence of disability and dementia,²⁹ the magnitude of need for decision-making assistance is growing. This means a growing proportion of Canadians at risk of losing legal capacity formally or informally due to their reliance on others for assistance with decision making. Without a clearer picture of the numbers of people being restricted or denied in exercising legal capacity, the full scale of this growing problem remains hidden. Future policy development will need to address this critical data gap.

VIII. OPTIONS FOR MEETING CONSTITUTIONAL IMPERATIVES FOR REFORM

A. Overview of Options for Reform

The research and consultation point to three main options to consider in ensuring the enjoyment of legal capacity on an equal basis. They each offer an enhanced focus on, and recognition of, the role that supports and accommodations play in exercising legal capacity.

Option A: Phased-in fully inclusive ‘decision-making capability’ approach to legal capacity, enabled by full recognition of supports and accommodations in law and policy

Main Features:

- Comprehensively adopt the decision-making capability approach in the legal regime, expanding legal recognition of both independent and interdependent decision-making capability, with supports and accommodations as required.
- Adopt enabling policies and guidelines to promote a decision-making capability approach, supports for decision making, and the duty to accommodate.
- Invest in needed service delivery reform to maximize development and delivery of supports for decision making.
- Develop policy, guidelines, information and training for health care, justice, social service and financial sectors to implement this approach in practice.

Option B: Supported cognitive/functional approach to legal capacity, where law and policy recognize the role of supports and accommodations enabling a person to meet cognitive tests of legal capacity in all circumstances.

Main Features:

- Adopt the ‘understand and appreciate’ test for legal capacity across core and secondary statutes of the regime.
- Ensure consistency across tests of capacity so that they each recognize the role of supports and accommodations for demonstrating that a person meets the test of capacity.
- Ensure that laws recognize the role of supports and accommodations in all decision-making contexts and circumstances, in addition to the role they would play for meeting the cognitive test.
- Develop guidelines for the duty to accommodate in decision making..
- Develop policy, guidelines, information and training for health care, justice, social service and financial sectors to implement this approach in practice.

This option would not be as comprehensive as option A, but it would require the laws to recognize supports and accommodations more fully and consistently than they do now.

Option C: Status quo legal regime but with an enhanced focus on decision-making supports and accommodations

Main Features:

- Maintain the legal regime as it currently exists with a mix of status, outcome, cognitive/functional and emergent decision-making capability approaches to legal capacity.
- Develop guidelines for the duty to accommodate in decision making, within the current legal capacity regime.
- Develop policy, guidelines, information and training for health care, justice, social service and financial sectors to maximize decision-making supports and accommodations in practice within current legal parameters.

This option would not alter the legal framework regulating legal capacity but would achieve some progress over the current situation with a focus on policy, program and practice reforms.

B. Criteria for Assessing Options

The following nine criteria were used to assess the three options. A discussion of these criteria, and their rationale, is provided in the Final Report:

1. Meets Canada's obligations under the CRPD
2. Is *Charter* compliant, according to *Charter* informed principles ensuring a right to equality in the exercise of legal capacity;
3. Recognizes and enables access to supports and accommodations for decision making;
4. Addresses fragmentation and inconsistency in the regime for regulating legal capacity;
5. Safeguards integrity of the decision-making process to maximize legal capacity;
6. Maximizes beneficiaries;
7. Provides a cost-effective approach to meeting support needs;
8. Meets disability, mental health and seniors' communities' concerns; and
9. Is a feasible option to implement.

C. Assessment of Options

Appendix G of the Final Report provides a chart assessing these options according to the criteria above. The assessment concluded that option A best meets these criteria and addresses the concerns motivating this consultation and research, for the following reasons:

- Only option A addresses the current exclusion of many people with more significant intellectual, developmental, and cognitive disabilities and people living with mental health issues from exercising and enjoying legal capacity, by recognizing supported decision-making arrangements for people to act ‘legally interdependently.’
- Option A appears to best fulfill *Charter* informed principles for an inclusive legal capacity regime. Neither option B nor C would be *Charter* compliant, as defined in this report.
- Option A is best able to meet community concerns and calls to ensure people with more significant disabilities are supported to exercise legal capacity.
- Option A would introduce more consistency to the legal regime.

In comparison, options B and C would not meet the criteria, or motivating concerns, to the same extent:

- Options B and C would exclude a large and growing group from the benefits of exercising legal capacity.
 - While they would recognize supports and accommodations for decision making to some extent, they would exclude people who are unable to meet a cognitive test of legal capacity even with supports and accommodations.
- Thus, these options would not be *Charter* compliant.
- The options would not address community concerns identified in a “community response” (in Appendix I) to a draft of this report. The report rejects such options because they exclude those with more significant disabilities, “those for whom legal reform is most necessary” their report states.

IX. RECOMMENDED DIRECTIONS: A PHASED-IN FULLY INCLUSIVE APPROACH TO LEGAL CAPACITY

Recommendations for a 5-year reform strategy to begin implementation of option A include:

1. *A Joint Government-Community Legal Capacity Reform Steering Committee and inter-departmental leadership*

- Implementing option A will require a multi-dimensional and multi-year reform process. It should be led by a joint table where cross-government and community representatives can bring multiple perspectives, supported by an interdepartmental leadership team.

2. *Provide coordination through the Disability Policy Office*

- The Disability Policy Office of the Department of Children, Seniors and Social Development is well-positioned to provide sustained coordination within government, and in collaborating with community sectors.

3. *Initiate a proactive approach to ensure Charter-compliance, and consistency and clarity in the province's legal capacity regime, based on Charter-informed principles*

- In order to achieve *Charter* compliance, a systematic review is needed of the core legislation regulating legal capacity to identify key gaps and barriers and priorities for reform, including:
 - *Mentally Disabled Persons' Estates Act*;
 - *Enduring Powers of Attorney Act*;
 - *Adult Protection Act*;
 - *Advance Health Care Directives Act*;
 - *Mental Health Care and Treatment Act*; and,
 - *Judicature Act*
- The '*Charter-informed Principles for Legal Capacity*' presented in Section VIII.B.2 of the Final Report are proposed to assist in this exercise.

4. *Adopt the decision-making capability approach to guide law reform*

- The core statutes of the legal regime should incorporate the decision-making capability approach to promote *Charter* compliance, including: recognition of both independent and inter-dependent decision making; decision-making supports and accommodations; formal supported decision-making arrangements; mandatory exploration of alternatives prior to guardianship or substitute decision making; safeguards; and disputes resolution.

- 5. *Reform the Mentally Disabled Persons' Estates Act to provide a platform from which to build consistency and clarity in the province's legal capacity regime***
 - It will likely be necessary to take a phased approach to adopting in law the decision-making capability approach. Initial adoption should focus on reforming the *Mentally Disabled Persons' Estates Act*, as it is the core of the regime for legal capacity regime.

- 6. *Establish a policy and associated guidelines for reasonable accommodation in the exercise of legal capacity***
 - The Newfoundland and Labrador Human Rights Commission should develop a policy which articulates how the duty to accommodate applies to exercising legal capacity and should provide practical guidelines for all parties to meet their obligations in this regard.

- 7. *Mandate a proactive process for exploring least restrictive alternatives***
 - There should be a legislatively-mandated exploration of least restrictive alternatives. It should apply to any person who is the subject of an application for substitute decision making in mental health, health care decision making, personal or property/financial decision-making. It could be modelled on the *Adult Protection Act* policy.

- 8. *Review capacity of the community-based health and social services sector to deliver independent planning and community navigation supports***
 - There is a need to develop community-based infrastructure to enable people to access and develop the supports they require to exercise their legal capacity in transactions in their daily lives. A review of the capacity of the sector to deliver independent planning and navigation support, including assistance with arranging needed supports to exercise legal capacity, is needed for this purpose.

- 9. *Pilot initiatives for implementing supports for decision making***
 - Community-based pilots should be developed to model effective practices for fostering decision-making support networks. They should pilot delivery of a range of decision-making supports at all decision-making points in health care and other settings where legal capacity is questioned. Primary focus should be on people with intellectual, developmental, or cognitive disabilities or mental health issues.

- 10. *Deliver information resources and training on the right to liberty and equality in exercising legal capacity***
 - A resource and training strategy should be targeted to the health care and social services sector, policing, justice system, and financial services industry to inform about the right to equality in legal capacity, the barriers people with disabilities experience,

and steps that can be taken in the current regime, and as the regime changes, to address these barriers.

11. *Develop a data collection strategy to track use of guardianship and substitute decision making in all sectors*

- The research points to significant data gaps about the numbers of people affected by guardianship and substitute decision making. An audit of existing data sources should be undertaken in light of the different ways in which guardianship and formal and informal substitute decision making is imposed.

X. IMPLEMENTING RECOMMENDATIONS: AN INITIAL FIVE-YEAR ROADMAP

Implementing the proposed recommendations will require strong leadership by government and multiple stakeholders in the disability community, health, social services, and justice sectors. Success will depend on various government departments examining the issues and together developing comprehensive, coordinated, and practical approaches to change. It will require significant collaboration across government and community sectors, and a sustained reform effort.

Many provincial government-community initiatives already underway align well with the recommend directions. A strategic, comprehensive, and multi-dimensional reform effort should build upon these strategic directions. Related government policy reports and commitments all emphasize that the province listened to and heard the disability and broader community's concerns and is committed to a shared responsibility approach to addressing them. Government commitments and initiatives outlined in Appendix H of the Final Report are strongly aligned with the proposed directions. They provide a framework of shared principles to guide implementation, and complementary initiatives to build upon.

Terms of reference for the consultation and research called for outlining a 'roadmap' for implementing recommended directions. A detailed roadmap would require further consideration and input by government and community stakeholders. To assist this process, we plot the eleven recommendations within a strategic framework of key tasks over an initial five-year period. This is presented in a table format which follows.

Table 1: Roadmap to the Right to Equality in the Exercise Legal Capacity in Newfoundland and Labrador

Milestones	Key Tasks				
	Year 1	Year 2	Year 3	Year 4	Year 5
1. Joint Government-Community Legal Capacity Reform Steering Committee and inter-departmental leadership	Government commits to the process, mandates and appoints the Steering Committee with representation from across government and community sectors. Government establishes an interdepartmental committee to ensure cross-government coordination. In Year 1 committee develops terms of reference, action plan and launches implementation.	Leadership continues with Joint Government-Community Steering Committee and the interdepartmental committee 			
2. Policy leadership and coordination from Disability Policy Office	Disability Policy Office appointed to provide policy development and process coordination				
3. Initiate proactive approach to achieve Charter compliance	Proposed principles adopted to guide legislative reform and policy development Principles applied to analyze existing regime and guide all law reform and policy proposals				

Milestones	Key Tasks				
	Year 1	Year 2	Year 3	Year 4	Year 5
4. A decision-making capability approach adopted into the legal regime	Guidelines based on the proposed approach are developed to steer legislative proposals and ensure a fully inclusive, non-discriminatory statutory and policy framework	Review all elements of the statutory regime for legal capacity to consider how best to introduce this approach (review of the APA is currently underway). Needed law reforms consulted upon, proposed, introduced and adopted.			
5. Reforming the <i>Mentally Disabled Persons' Estates Act</i>	Consultation launched on reform of the <i>Mentally Disabled Persons' Estates Act</i> , including introduction of the decision-making capability approach. Law reform proposals introduced into legislature in Year 1	Law reforms adopted, and regulatory development completed, and regulations adopted			
6. Policy and guidelines for reasonable accommodation in legal capacity	Human Rights Commission launches consultation to develop guidelines	Proposed guidelines developed, reviewed and adopted by the Commission	The Commission produces and delivers information resources and training materials on the Guidelines		
7. A mandated proactive process for	Disability Policy Office launches consultation with	Legislative proposals developed and	Legislative changes	Needed information	



Milestones	Key Tasks				
	Year 1	Year 2	Year 3	Year 4	Year 5
exploring least restrictive alternatives that maximize decision-making capability	<p>government and community stakeholders, in collaboration with Director of Adults in Need of Protective Intervention, to consider how to expand the current process to other situations where substitute decision making is being considered (e.g., health care decisions, mental health care admission and treatment, personal and property guardianship.</p> <p>Legislative implications and options considered.</p>	<p>introduced for mandating proactive processes for exploring least restrictive alternatives where restriction of legal capacity is at risk.</p>	<p>adopted</p> <p>Regulatory framework and policy guidelines developed.</p>	<p>and training materials developed</p> <p>Ongoing Training and monitoring</p>	
8. Review of capacity of community-based health and social services sector to deliver independent planning and community navigation supports	<p>Review launched with consultations across province, through a joint government-community stakeholder advisory committee. Aim is to consider ways of enhancing community capacity to ensure persons with disabilities have access to the supports required to exercise power, choice and control in their lives</p>	<p>Recommendations produced and considered by government. Budget proposals for new investments considered</p>	<p>Policy and investment framework implemented</p>	<p>Capacity development underway</p>	
9. Pilot initiatives for	<p>Government commits to and</p>	<p>Pilot projects launched</p>	<p>Interim</p>	<p>Training and</p>	<p>Pilot capacity</p>

Milestones	Key Tasks				
	Year 1	Year 2	Year 3	Year 4	Year 5
implementing supports for decision making	invests in pilot project development. Design underway of an initial pilot project in each of the four Regional Health Authority areas.		evaluation. Community forums held on designing and implementing pilot initiatives	learning tools developed. Sustainability and scaling plan developed and implemented to expand pilot sites	significantly expanded across province.
10. Information resources and a training strategy	A Legal Capacity Learning and Training Advisory Group is established. A scan of information and training needs in key sectors is undertaken. Initial information resources developed to support internal and external consultative exercises.	Report of consultation of information and training needs produced and considered by Advisory Committee, which leads development of recommendations and strategy. Additional information resources developed as law and policy reforms introduced.	information materials for each sector developed, and training strategy implemented.	Ongoing information and training strategy	
11. Develop a data collection strategy	Develop and undertake an audit of information sources Consider options for data collection	Launch data collection strategy	Report Continue data collection		



CONCLUSION

People with intellectual, developmental and cognitive disabilities, or mental health issues who are living in Newfoundland and Labrador face discriminatory restrictions in the enjoyment and exercise of their legal capacity – the power to make personal, health care and financial decisions about their own lives. Whether viewed from the perspective of the *Canadian Charter of Rights and Freedoms* or the United Nations *Convention on the Rights of Persons with Disabilities*, these restrictions violate fundamental rights in Canada to equality and liberty.

Chief among the challenges to address are the barriers identified in the framework of laws that constitute the province's legal capacity regime, in particular: the *Mentally Disabled Persons' Estates Act*; *Advance Health Care Directives Act*; *Adult Protection Act*; *Enduring Powers of Attorney Act*; *Judicature Act*; and the *Mental Health Care and Treatment Act*.

Launching a reform process to implement recommended directions for law, policy, program, and practice reform will require proactive leadership and collaboration by both community stakeholders and the provincial government. This collaboration will need to sustain robust efforts to address the longstanding barriers still preventing people with disabilities and mental health issues from taking their rightful place as full citizens of the province.

ENDNOTES

¹ United Nations, *Convention on the Rights of Persons with Disabilities*, G.A. Res. 61/106 [adopted by consensus at the UN on Dec. 13, 2006] [CRPD], Article 12, online:

<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/convention-on-the-rights-of-persons-with-disabilities-2.html>.

² These characterizations are drawn largely from Michael Bach and Lana Kerzner, “A New Paradigm for Protecting Autonomy and the Right to Self Determination” (Toronto: Law Commission of Ontario, 2010) [Michael Bach and Lana Kerzner], 14-15, online: <https://www.lco-cdo.org/wp-content/uploads/2010/11/disabilities-commissioned-paper-bach-kerzner.pdf>. However, that background research paper used ‘intellectual disability’ instead of ‘developmental disability.’ This report uses the term intellectual and developmental disability because it is more inclusive of those who face decision-making difficulties and is also used by Statistics Canada for data collection and reporting purposes. The definition is adapted accordingly.

³ CRPD, note 1, Article 12.

⁴ UN Committee on the Rights of Persons with Disabilities, “General Comment No. 1 – Article 12: Equal Recognition Before the Law,” UN Doc. No. CRPD/C/GC/1 (April 2014) [General Comment No. 1], para. 15, online: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>.

⁵ General Comment No. 1, note 4, para. 35.

⁶ General Comment No. 1, note 4, para. 29.

⁷ General Comment No. 1, note 4, para. 34.

⁸ National Council on Disability, *Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination for People with Disabilities* (Washington, 2018), online: <https://ncd.gov/publications/2018/beyond-guardianship-toward-alternatives> pgs. 118-123.

⁹ See Newfoundland and Labrador Association for Community Living, Children and Adolescents with Neurological Disability Organization (CANDO) and Consumers Health Awareness Newfoundland and Labrador (CHANNAL), “Securing Citizenship and Legal Capacity for All International Symposium June 20-22, 2011: Summary Report and Key Learnings” (St. John’s, NL: Newfoundland and Labrador Association for Community Living, 2011).

¹⁰ See 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 (Toronto: Canadian Association for Community Living, 2015).

¹¹ See Inclusion International, *Independent But Not Alone: A Global Report on the Right to Decide* (London: Inclusion International, 2014), online: <https://inclusion-international.org/independent-alone/>.

¹² *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Québec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] 1 S.C.R. 665, 2000 SCC 27, paras. 79 to 81.

¹³ CRPD, note 1, Preamble and Article 1.

¹⁴ *A.A. (Re)*, 2019 NLCA 7.

¹⁵ *A.A. (Re)*, 2019 NLCA 7, para. 82.

¹⁶ See Committee on the Rights of Persons with Disabilities, “Concluding observations on the initial report to Canada,” note 5, para. 28; Lana Kerzner, “Supported Decision-Making Innovations: The Canadian Experience” in Charles O’Mahony and Gerard Quinn, eds., *Disability Law and Policy: An Analysis of the UN Convention*, (Dublin: Clarus Press Ltd, 2017), 111-113.

¹⁷ General Comment No. 1, note 4, para. 32.

¹⁸ The s. 15 *Charter* analysis is based on current s. 15 Supreme Court of Canada jurisprudence, including the following cases: *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la sante dt des services sociaux*, 2018 SCC 17; *Kahkewistahaw First Nations v. Taypotat* 2015 SCC 30; and *Quebec (Attorney General) v. A*, 2013 SCC 5.

¹⁹ For a fuller analysis of how cognitive tests in legal capacity laws in Canada are not *Charter*-compliant, see Lana Kerzner, “Canada’s Legal Capacity Laws: An Equality Rights Analysis in Light of the Canadian Charter of Rights and Freedoms and the Convention on the Rights of Persons with Disabilities” (Toronto: IRIS – Institute for Research and Development on Inclusion and Society, 2020).

²⁰ See e.g., *Mentally Disabled Persons' Estates Act*, R.S.N.L. 1990, c. M-10, s. 20(4).

²¹ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624. para. 77.

²² See e.g., *Adult Protection Act*, S.N.L. 2011, c. A-4.01, s. 6(2), and *Advance Health Care Directives Act*, S.N.L. 1995, c. A-4.1, s. 14.

²³ General comment No. 1, note 4, para. 15.

²⁴ Section 7 of the *Charter* provides as follows: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

²⁵ 2016 NSSC 180, 1182 A.P.R. 284.

²⁶ R.S.N.S. 1989, c. 218, as amended, was repealed and replaced by the *Adult Capacity and Decision-making Act*, S.N.S. 2017, c. 4, on December 28, 2017.

²⁷ Data provided by John Goodland, Public Trustee of Newfoundland and Labrador, in personal communication with Michael Bach and Lana Kerzner, November 2, 2020.

²⁸ Data provided by "Inquiries," Supreme Court of Newfoundland and Labrador, via email communication with Michael Bach, November 12, 2020.

²⁹ P. Smetanin, P. Kobak, C. Briante, D. Stiff, G. Sherman, G. and S. Ahmad, *Rising Tide: The Impact of Dementia in Canada 2008 to 2038* (Toronto: Alzheimer Society of Canada).