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Conceptualizing Capacity: Interpreting Canada's Qualified Ratification of Article 12 of the UN Disability Rights Convention

Nicholas Caivano

Faculty of Law, McGill University, nicholas.caivano@mail.mcgill.ca

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Conceptualizing Capacity: Interpreting Canada's Qualified Ratification of Article 12 of the UN Disability Rights Convention

Abstract

During the negotiations leading up to the United Nations Convention on the Rights of Persons with Disabilities (CRPD), States Parties vigorously debated the scope of Article 12, which establishes legal capacity for persons with disabilities "on an equal basis with others in all aspects of life." The ambiguity of Article 12 has led to many interpretations that have been the subject of debate among human rights activists and academics. Developments in the jurisprudence and legislative reforms across several jurisdictions indicate that governments and courts have begun to grapple with what recognizing the right to legal capacity for persons with disabilities requires. The purpose of this paper is to examine whether Article 12 imposes an obligation on States Parties to use supported decision-making as an alternative to substituted decision-making, the system in place in most jurisdictions throughout the world. It is argued that the drafters of Article 12 intended to set out a strong presumption of capacity and to permit substituted decision-making only in rare circumstances. This paper uses Canada as an example of a jurisdiction that will need to contend with the legislative implications of Article 12 in light of its existing domestic laws.

Keywords

disability, health, capacity, united nations, convention, human rights, canada, united kingdom

Cover Page Footnote

Nicholas Caivano is a Rathlyn Fellow at the Centre for Human Rights and Legal Pluralism and will graduate with a B.C.L./LL.B. from the Faculty of Law, McGill University in 2014. The author would like to thank Róisín Hennessy for her guidance in helping craft this article and Shantha Rau Barriga for her invaluable insights on the article's topic.

CONCEPTUALIZING CAPACITY: INTERPRETING CANADA'S QUALIFIED RATIFICATION OF ARTICLE 12 OF THE UN DISABILITY RIGHTS CONVENTION

NICHOLAS CAIVANO*

INTRODUCTION

During the negotiations leading up to the United Nations Convention on the Rights of Persons with Disabilities (CRPD), States Parties vigorously debated whether to include a footnote that would have limited the scope of one of its most divisive provisions.¹ Article 12 establishes legal capacity for persons with disabilities “on an equal basis with others in all aspects of life.”² The footnote would have restricted the meaning of “legal capacity” in several UN languages to “capacity for rights,” excluding

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* Nicholas Caivano is a third year McGill University law student and Rathlyn Fellow at the McGill Centre for Human Rights and Legal Pluralism. The author would like to thank Róisín Hennessy for her guidance in helping craft this article and Shantha Rau Barriga for her invaluable insights on the article's topic.

¹ Tina Minkowitz, “The United Nations Convention on the Rights of Persons with Disabilities and the Right to be Free from Nonconsensual Psychiatric Interventions” (2007) 34:2 *Syracuse J Int'l L & Com* 405 at 411 [Minkowitz, “Psychiatric Interventions”] at 411; Amita Dhanda, “Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?” (2007) 34:2 *Syracuse J Int'l L & Com* 429 at 451-52, 455-56.

² *Convention on the Rights of Persons with Disabilities*, 30 March 2007, UN GAOR, 61st Sess, Annex I, UN Doc A/RES/61/106, 46 ILM 443 [CRPD], art 12. Article 12 reads as follows:

Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

“capacity to act.”³ Used in this sense, legal capacity would refer to the law’s recognition of an individual’s ability to make decisions and would serve as the threshold of autonomy, dividing the autonomous from the non-autonomous.⁴ The Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (the Ad Hoc Committee) ultimately deleted the footnote on the final day of discussions after extensive negotiations with the Arab Group and the European Union.⁵ The right to legal capacity in Article 12 was one of the most hotly contested issues during the drafting process of the CRPD. Its ambiguity has led to many interpretations that have been the subject of debate among human rights activists and academics, despite its “deceptively simple language.”⁶ Developments in the jurisprudence and legislative reforms across several jurisdictions indicate that governments and courts have begun to grapple with what recognizing the right to legal capacity for persons with disabilities requires.⁷ In this article, I analyze the drafts and working text of Article 12 and argue that they support an interpretation of the CRPD as establishing a paradigm of presumed legal capacity.

People with disabilities, particularly those with intellectual and psychosocial disabilities, have long been subject to limitations on their right to legal capacity.⁸ They have endured arbitrary detention and have been deprived of access to basic health

³ Minkowitz, “Psychiatric Interventions,” *supra* note 1 at 411.

⁴ Written Comments by the European Group of National Institutions, *DD v Lithuania*, No 13469/06, 11 April 2008 at 1 [Written Comments by the European Group of National Institutions]; John Chesterman & Barbara Carter, *Supported Decision-Making: Background and Discussion Paper*, online: Office of the Public Advocate <<http://www.publicadvocate.vic.gov.au>>; Margaret Isabel Hall, “Mental Capacity and the (Civil) Law: Capacity, Autonomy, and Vulnerability” (2012) 58:1 McGill LJ 1 at 6.

⁵ The footnote read as follows: “In Arabic, Chinese and Russian, the term ‘legal capacity’ refers to ‘legal capacity for rights’, rather than ‘legal capacity to act’.” UN Ad Hoc Committee on Convention on Persons with Disabilities, 2006, 21st Mtg (AM & PM), UN GA/SOC/4720.

⁶ Dhanda, *supra* note 1 at 455-456; Robert D Dinerstein, “Implementing Legal Capacity under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road From Guardianship to Supported Decision-Making” (2012) 19:2 Human Rights Brief 8 at 8. See also Centre for Disability Law & Policy – NUI Galway, *Submission on Legal Capacity to the Oireachtas Committee on Justice, Defence & Equality* (August 2011), online: NUI Galway <<http://www.nuigalway.ie>>; Nandini Devi et al, “Moving Towards Substituted or Supported Decision-Making? Article 12 of the Convention on the Rights of Persons with Disabilities” (2011) 5 European Journal of Disability Research 249 at 250-51.

⁷ Michael Bach & Lana Kerzner, *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity*, online: Law Commission of Ontario <<http://www.lco-cdo.org>> at 9.

⁸ United Nations Office of the High Commissioner for Human Rights, *Information Note No. 4: Persons with Disabilities*, online: United Nations <<http://www.ohchr.org>>. See also Ulrike Buschbacher Connelly, “Disability Rights in Cambodia: Using the Convention on the Rights of People with Disabilities to Expose Human Rights Violations” (2009) 18:1 Pac Rim L & Pol’y J 123 at 135; Michael L Perlin, “International Human Rights Law and Comparative Mental Disability Law: The Universal Factors” (2007) 34 Syracuse J Int’l L & Com 333 at 335-36; James W Ellis, “Decisions by and for People with Mental Retardation: Balancing Considerations of Autonomy and Protection Symposium” (1992) 37:6 Vill L Rev 1779 at 1780; Philip Roos, “Law and Mentally Retarded People: An Uncertain Future” (1978) 31:4 Stan L Rev 613 at 614.

interventions. They have faced cruel, inhumane, and degrading treatment, including physical abuse, confinement in squalid institutions, and subjection to restraint and seclusion.⁹ Due to stigma and discrimination, people with disabilities in many parts of the world continue to be deprived of legal capacity despite being able to make and communicate decisions, either by themselves or with support.¹⁰ The loss of legal capacity can prevent individuals from having a say in what health care interventions to accept, how their assets should be managed, where to live, and what day-to-day activities to undertake. Given the fundamental nature of legal capacity to the fulfillment of other rights, the recognition of people with disabilities as persons under the law has particular significance for this sub-population.¹¹ The convention has been referred to as “revolutionary” by commentators for its rejection of the traditional physical and medical models of disability, and for its adoption of a holistic, social approach that recognizes disability as a construct used to compare individuals against the “able-bodied” norm.¹² The CRPD represents the success of the disability rights movement’s forty-year struggle against the assumption that people with disabilities “must remain outside the mainstream of society [...] unable to participate in education or employment [and] dependent on welfare and charity” for survival unless the source of the disadvantage can be cured or corrected.¹³

The delegates who participated in drafting the CRPD agreed that traditional guardianship systems have often failed to protect the rights of persons with disabilities. However, the delegates disagreed on the need for stronger safeguards and oversight mechanisms for substituted decision-making systems, and debated whether to abandon the guardianship model altogether.¹⁴ As such, the final text of Article 12 does not lay out specific measures that should be taken to assist persons with disabilities with making decisions. Questions surrounding the interpretation of Article 12 remain. For instance, does legal capacity include the capacity to have rights as well as the capacity to act? Does the CRPD extend legal capacity to all persons with disabilities, or does it exclude some of them? Can a State Party to the CRPD enter reservations regarding the parts of Article 12 that protect legal capacity? If so, should limits be imposed on the

⁹ Clarence J Sundram, *A Discussion of Legal Capacity in the Draft Convention on Disability* (Dublin: National Disability Authority, 2006).

¹⁰ Human Rights Watch, *‘Once You Enter, You Never Leave’: Deinstitutionalization of Persons with Intellectual or Mental Disabilities in Croatia*, online: Human Rights Watch <http://www.hrw.org> [Human Rights Watch].

¹¹ The World Bank reported in 2011 that approximately 650 million people, or 15 percent of the world’s population, live with disabilities. World Health Organization/World Bank, *World Report on Disability*, online: World Health Organization <<http://www.who.int>> at 27.

¹² Association of the Bar of the City of New York Committee on Legal Issues Affecting People with Disabilities, *The United Nations Convention on the Rights of Persons With Disabilities*, online: Record of the Association of the Bar of the City of New York <<http://www.nycbar.org/>>.

¹³ Anna Lawson, *Disability and Equality Law in Britain: The Role of Reasonable Adjustment* (Oxford: Hart Publishing, 2008) at 18 [Lawson].

¹⁴ Sundram, *supra* note 9 at 19.

nature and scope of these reservations? What supports are required for people with severe intellectual or psychosocial disabilities to maximize their ability to exercise their right to legal capacity?¹⁵

The purpose of this paper is to examine whether the final version of Article 12 imposes an obligation on States Parties to use supported decision-making as an alternative to substituted decision-making, the system in place in most jurisdictions throughout the world.¹⁶ My contention is that the drafters of the CRPD intended the text of Article 12 to set out a strong presumption of capacity and to permit substituted decision-making only in rare circumstances, such as when the use of supported decision-making fails to reveal the will of the person with disabilities. This paper uses Canada as an example of a jurisdiction that will need to contend with the legislative implications of Article 12 in light of its existing domestic laws. Part I analyzes the text of Article 12 in the context of other CRPD provisions in order to determine the article's intended scope as well as its larger role within the convention. Part II examines the admissibility of reservations to Article 12 that limit the provision of legal capacity for persons with disabilities and compares Canada's declaration and reservation with those of the United Kingdom and Northern Ireland, the only other States Parties to qualify its ratification.¹⁷ Part III looks at how the legal capacity of persons with disabilities is constructed in Canadian legislation and discusses the extent to which these laws comply with Article 12.

Before proceeding, it is useful to set out the difference between "substituted decision-making" and "supported decision-making." Substituted decision-making refers to the process by which decisions are made for a person with disabilities who has been

¹⁵ This article uses the term "psychosocial disability" to mean people labeled or living with mental health problems (as opposed to intellectual disabilities), while the CRPD uses the term "mental." The global disability community fought to have the phrase "psychosocial" instead of "mental" used, but the latter prevailed. There is a significant difference in the terminology used by the Convention and that used by disability communities and other human rights instruments. Oliver Lewis, "The Expressive Educational and Proactive Roles of Human Rights: An Analysis of the United Nations Convention on the Rights of Persons with Disabilities" in Bernadette McSherry & Penelope Weller, eds, *Rethinking Rights-Based Mental Health Laws* (Oxford: Hart Publishing, 2010) 97 at 97-98, n 3.

¹⁶ Kim Forrester & Debra Griffiths, *Essentials of Law for Health Professionals*, 3d ed (Sydney: Mosby, 2010) at 180.

¹⁷ The Vienna Convention on the Law of Treaties, which sets out the rules governing legal instruments, defines a reservation as "a unilateral statement, however phrased or named, made by a State, when [consenting] to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." The Convention does not define 'interpretative declaration.' By using the language "however phrased or named," however, the definition of 'reservation' seems to recognize the possibility that statements entitled 'interpretative declarations' are more than non-binding unilateral interpretations by the State, but are reservations. The purpose of an 'interpretative declaration' has been recognized as a statement that States parties use to influence the process of treaty ratification, without committing other States to that interpretation. *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, Can TS 1980 No 37 (entered into force 27 January 1980) art 2(1)(d) [*Vienna Convention*]; Richard W Edwards Jr, "Reservations to Treaties: The Belilos Case and the Work of the International Law Commission" (2000) 31 U Tol L Rev 195 at 199 (QL).

deemed to lack capacity.¹⁸ Among other factors, this system requires the substitute decision-maker to take into account the best interests of his or her ward.¹⁹ However, the substitute decision-maker is not required to obtain consent from his or her ward in order to act.²⁰ The legal tests used to determine decision-making capacity vary by jurisdiction, but they often focus on a person's cognitive abilities. This approach is consistent with the medical model of disability, which emphasizes ways to "cure" people with disabilities so that they can conform to normative modes of functioning. This model is at odds with the fact that some people with intellectual or psychosocial disabilities use emotions and intuition as the main basis for making decisions.²¹ Recognizing these individual differences would be consistent with the social model and would oppose the sweeping dismissal of all forms of decision-making that do not conform to what is medically "normal."

In contrast, supported decision-making relies on a network of friends, family, or other allies who help the person with disabilities make and express his or her decisions.²² The support person can explain the issues relevant to making the decision and assist in interpreting the disabled person's preferences.²³ The decision-making capacity of the individual is assumed; it is not evaluated professionally using formal tests.²⁴ In some cases, as a safeguard against abuse, the decision is subject to review.²⁵ Even in extreme circumstances, where someone is completely unable to communicate a decision, a supported decision-making system attempts to discern the person's intentions in various ways. Close family members, for example, can often communicate with an individual in a way that others cannot due to their alertness to more subtle cues and their experience with that person. If communications are indeterminate, the system requires following the person's previously expressed wishes, abiding values, and experience in similar situations. In essence, supported decision-making "calls for . . .

¹⁸ Michael C Dunn et al, "Living 'A Life Like Ours': Support Workers' Accounts of Substitute Decision Making in Residential Care Homes for Adults with Intellectual Disabilities" (2010) 54 *Journal of Intellectual Disability Research* 144 at 144.

¹⁹ *Ibid* at 145.

²⁰ *Ibid*.

²¹ Edwina Brietzke, *Submission to the Attorney General on the Need for a Review of the Law and Practice in Relation to Legal Capacity*, online: Office of the Public Advocate <<http://www.publicadvocate.vic.gov.au/>> at 13; Sue McGaw & Sue Candy, "Supported Decision Making for Women with Intellectual Disabilities" in Gwynnyth Llewellyn et al, eds, *Parents with Intellectual Disabilities: Past, Present and Futures* (Oxford: John Wiley & Sons Ltd, 2010) 137 at 137-38.

²² Sundram, *supra* note 9 at 16.

²³ United Nations Office of the High Commissioner for Human Rights, *From Exclusion to Equality: Realizing the Rights of Persons with Disabilities* (New York: Division for Social Policy and Development, 2007) at 89 [United Nations].

²⁴ Sundram, *supra* note 9 at 16.

²⁵ *Ibid*.

the transposition of the individual's ghost as he or she existed in the past onto his or her present, embodied form."²⁶

The need remains for some residual protocol for immediate life-saving measures when a person is not lucid, and for care when there is no evidence of the individual's preferences. However, proponents of supported decision-making posit that the model should make situations such as these increasingly rare.²⁷

I. CONCEPTUALIZING CAPACITY: ANALYSIS AND INTERPRETATION OF ARTICLE 12

This part analyzes the text of Article 12 and explores possible interpretations of its meaning and content. Analyzing the text alone is insufficient because the process by which the CRPD was negotiated differs from that of previous human rights treaties.²⁸ For the first time, members of civil society participated on an equal basis with government representatives in the process of negotiating a treaty. The Ad Hoc Committee established a working group composed of representatives from government, local NGOs, and international NGOs. These representatives were tasked with writing the first draft of the convention. This draft formed the basis for all further negotiations.²⁹ In this initial phase alone, the working group consulted 222 people with disabilities from twelve countries on what protections they considered relevant to their own lives.³⁰ Therefore, it is necessary to evaluate the text of Article 12 in the context of the overarching objectives of the convention and the process by which it was negotiated.

A. Recognition as Persons Before the Law

The first paragraph of Article 12 sets out "the right to recognition everywhere as

²⁶ Hall, *supra* note 4 at 10.

²⁷ Germany, Sweden, and Denmark have enacted legal capacity regimes that comply with the supported decision-making approach. Germany has replaced its guardianship laws with a regime that appoints a proxy to perform certain duties for someone who has difficulty managing his or her own affairs, without depriving the individual of legal capacity. Sweden has also abolished its guardianship system and replaced it with "mentor" and "trustee" systems of support. Danish law allows for the appointment of guardians or representatives without automatically depriving the individual of legal capacity (guardianship is only used for legal obligations, such as entering into contracts). *Bürgerliches Gesetzbuch* (German Civil Code) (1900) ss 1896-1908; *Föräldrabalk* (Children and Parents Code) Swedish Code of Statutes SFS 1949:381 Ch 11 ss 4,7; *Værgemålsloven* (Danish Guardianship Act) (1995) ss 5, 6; Tina Minkowitz, "Abolishing Mental Health Laws to Comply with the Convention on the Rights of Persons with Disabilities," in Bernadette McSherry & Penelope Weller, eds, *Rethinking Rights-Based Mental Health Laws* (Oxford: Hart Publishing, 2010) 151 at 157-158, 161.

²⁸ Dhanda, *supra* note 1 at 429.

²⁹ Debbie Jolly, *The UN Convention on the Rights of Persons with Disabilities*, online: European Network on Independent Living, University of Leeds <<http://www.leeds.ac.uk>>.

³⁰ Mohamed Saidu Kamara et al, "The United Nations Convention on the Rights of Persons with Disabilities: From The Perspective of Young People" (2009) 29:1 Disability Studies Quarterly 17 at 17.

persons before the law,” signifying that people with disabilities should be accorded the same rights as their nondisabled peers.³¹ The right of everyone to be recognized as persons before the law was first recognized under Article 16 of the *International Covenant on Civil and Political Rights*, which granted “everyone . . . the right to recognition everywhere as a person before the law.”³² This provision was included in the ICCPR to address the fact that “colonizing countries had often denied colonized people recognition before the law.”³³ Although the term “everyone” suggests that Article 16 includes people with disabilities, treaty bodies did not question the provision’s implications for laws that allow for the deprivation of legal capacity. This is likely because people with disabilities “were not within the contemplation of the treaty body monitoring the implementation of the ICCPR.”³⁴ Article 12 of the CRPD was thus needed to explicitly “[accord] identity to persons with disabilities, which is a significant precondition for recognizing the legal capacity of persons with disabilities.”³⁵

The CRPD represents a stark contrast to the approach previously taken by the UN General Assembly, which decided in both 1971 and 1991 that people with mental disabilities were incapable of exercising some rights on their own.³⁶ The UN stated that a convention that specifically addressed the rights of people with disabilities was needed because they are still largely viewed as objects of welfare, as opposed to holders of rights.³⁷ The CRPD addresses this issue by avoiding the use of terms like “deprivation” and “protection,” shifting the discourse such that persons with disabilities are presumed to be capable of making life decisions on their own behalf.³⁸ The CRPD’s language suggests that its drafters no longer view persons with disabilities as “burdensome objects of pity or charity, but as human beings who, like their nondisabled counterparts, are entitled to enjoy the fundamental human rights granted to all.”³⁹

The failure to recognize that persons with disabilities could be subject to human rights law partially explains why universally conferred human rights accorded through conventions including the ICCPR and the International Covenant on Economic, Social and Cultural rights (ICESCR) have not improved the exclusion and neglect that persons

³¹ CRPD, *supra* note 2, art 12(1).

³² GA Res 2200 (XXI), UNGAOR, 21st Sess, Supp No 4, UN Doc A/6546, (1966).

³³ Michael Dudley, Derrick Silove & Fran Gale, eds, “Mental Health and Human Rights: Vision, Praxis, and Courage” (Oxford: Oxford University Press, 2012) at 179.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Supra* note 10. See *Declaration on the Rights of Mentally Retarded Persons*, GA Res 2856, UNGAOR, 26th Sess, Supp No 29, UN Doc A/8429, (1971); *Principles for the Protection of Persons With Mental Illness and the Improvement of Mental Health Care*, GA Res 46/119, UNGAOR, 46th Sess, Supp No 49, UN Doc A/Res/46/119, (1991) at 189 [*MI Principles*].

³⁷ United Nations, *supra* note 23 at 4.

³⁸ Human Rights Watch, *supra* note 10.

³⁹ Lawson, *supra* note 13.

with disabilities continue to face.⁴⁰ Legal scholar Anna Lawson attributes this failure to physical and social barriers that prevent people with disabilities from accessing mainstream facilities, resulting in a disparity between persons with disabilities and society's mainstream.⁴¹ This marginalization is compounded by the entrenched belief that a person with disabilities is excluded because he or she is "impaired," rather than because society has failed to take disability—a component of human diversity—into account in designing mainstream facilities.

Read in light of the principles laid out in Article 3 of the CRPD, Article 12(1) has initiated what some refer to as a "paradigm shift" in the law of legal capacity by recognizing people with disabilities as rights-bearers and subjects rather than objects of the law.⁴² The UN High Commissioner for Human Rights has affirmed the CRPD as rejecting the "view of persons with disabilities as objects of charity, medical treatment, and social protection" and as conceptualizing people with disabilities as "subjects of rights, able to claim those rights as active members of society."⁴³ The first principle of Article 3 is "[r]espect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons," and the second is "non-discrimination." Both principles are consistent with the movement away from the traditional approach of treating people with disabilities as objects of social protection that need to be "cured." Instead, these principles suggest that persons with disabilities, as subjects of the law, may claim rights on their own behalf.

B. Identity and Agency

Throughout the negotiations, States Parties disagreed on how "legal capacity" should be defined in the CRPD. Many scholars interpreted the final version of Article 12 as comprising both the capacity to hold rights (identity) and the capacity to act (agency).⁴⁴ Article 12(5) states explicitly that people with disabilities should be able to "own or inherit property," "control their own financial affairs," and "have equal access to bank loans, mortgages and other forms of financial credit." Further, States Parties must "ensure that persons with disabilities are not arbitrarily deprived of their property."⁴⁵ This provision suggests that legal capacity under the CRPD does include

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² Rosemary Kayess & Phillip French, "Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities" (2008) 8:1 Human Rights L Rev 1 at 14, online: <<http://dx.doi.org/10.1093/hrlr/ngm044>>.

⁴³ Louise Arbour, "Statement by the UN High Commissioner for Human Rights" (Address delivered at the Ad Hoc Committee's adoption of the International Convention on the Rights of Persons with Disabilities, 5 December 2006) [unpublished].

⁴⁴ International Disability Alliance, *Legal Opinion on Article 12 of the CRPD*, online: International Disability Alliance <<http://www.internationaldisabilityalliance.org/>> [International Disability Alliance].

⁴⁵ *Convention on the Elimination of All Forms of Discrimination Against Women*, 1 March 1980, 1249 UNTS 13, Can TS 1982 No 31 (entered into force 03 September 1981, ratification by Canada 10 Dec

the capacity to act. However, when the term “legal capacity” is translated into the native languages of States Parties, its various interpretations are inconsistent. Some translations of the term suggest that legal capacity limited to the capacity to hold rights, while others refer to the capacity to act, with one definition even incorporating both of these possible interpretations.⁴⁶

There is precedent for the notion that legal capacity includes the capacity to act. This is exhibited in the Committee on the Elimination of All Forms of Discrimination against Women’s interpretation of “legal capacity” in article 15(2) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).⁴⁷ The Committee states that “when a woman cannot enter into a contract at all, or have access to financial credit, or can do so only with her husband’s or male relative’s concurrence or guarantee, she is denied legal autonomy.”⁴⁸ Amita Dhanda, a scholar and activist in the field of disability rights, has argued that once this composite formulation of legal capacity that included the capacity to act was accepted by the CEDAW, it could not be derogated from by the CRPD. Such a departure would introduce a division between nondisabled women and women with disabilities.⁴⁹ An *amicus* brief by the European Group of National Human Rights Institutions adopted a similar view, concluding that Article 12 must include the capacity to exercise rights.⁵⁰

C. Universality

Does the guarantee of legal capacity under Article 12 apply to all people with disabilities without exception? I contend that the way that “disability” is defined in the convention suggests that the drafters intended Article 12 to set out a strong presumption of capacity. While the authors of the CRPD were unable to agree on a definition of the term due to philosophical differences, they compromised by offering a parenthetical definition in the preamble, and a non-exhaustive list in article 1.⁵¹ The preamble states, in part: “Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and

1981) art 15.

⁴⁶ “Legal capacity” translates to “ahlia al qanounia” in Arabic, incorporating both the capacity to act and the capacity for rights; the Chinese is “falv quanli nengli” means “capacity for rights”; “capacité juridique” in French translates to “capacity to act”; “pravosposobnost” in Russian denotes capacity for rights; the Spanish is “capacidad jurídica” translates to “capacity for rights.” The term in English in the original text means “capacity to act.” International Disability Caucus, *Communication on the Translation of Legal Capacity*, online: UN Enable <<http://www.un.org>>.

⁴⁷ Committee on the Elimination of Discrimination against Women, *Report of the Committee on Elimination of Discrimination against Women*, 13th Session, UNGAOR, 49th Sess, Supp No 38, UN Doc A/49/38, (1994).

⁴⁸ *Ibid.*

⁴⁹ Dhanda, *supra* note 1 at 443.

⁵⁰ Written Comments by the European Group of National Institutions, *supra* note 4 at 3.

⁵¹ Association of the Bar of the City of New York Committee on Legal Issues Affecting People with Disabilities, *supra* note 12.

environmental barriers that hinders their full and effective participation in society. . . .” This description suggests that the drafters of the CRPD acknowledged that disability is partly a result of labels that the able-bodied population imposes on persons with disabilities.⁵² Article 1 explicitly names certain types of disabilities, perhaps to highlight groups that have been particularly marginalized.⁵³ It states that “[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments.”⁵⁴ The fact that the convention does not distinguish between particular types of disability suggests that the legal capacity of all people with disabilities was presumed.

The working text of Article 12 from the seventh session of the ad hoc committee suggests that the drafters of the CRPD envisioned a strong presumption of capacity for people with disabilities, but also contemplated situations where a very severe disability might prevent an individual from exercising his or her rights without assistance. The working text of Article 12(2)(a) states:

The assistance provided is proportional to the degree of support required and tailored to the person’s circumstances, that such support does not undermine the legal rights of the person, respects the will and preferences of the person and is free from conflict of interest and undue influence. Such support shall be subject to regular and independent review.⁵⁵

The requirement that assistance be provided in proportion to an individual’s unique circumstances suggests that the drafters contemplated substituted decision-making for persons living with disabilities that render communications with them indeterminate. However, the working text also states that such support would not undermine a person’s legal rights. The system set out by this text does not represent traditional guardianship systems, but rather a system of supported decision-making intended to respect the will of the person with disabilities. This version of Article 12 reveals that the drafters considered providing legal capacity even for people with high support needs while recognizing that an individual may need to rely heavily on another person for decision-making assistance in some circumstances.

⁵² Gerard Quinn & Theresia Degener, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (Geneva: UN, 2002) [Quinn, *Human Rights*] at 15; Claire H Liachowitz, *Disability as a Social Construct: Legislative Roots* (Philadelphia: University of Pennsylvania Press, 1988) at 1.

⁵³ International Disability Alliance, *supra* note 44 at 3.

⁵⁴ Association of the Bar of the City of New York Committee on Legal Issues Affecting People with Disabilities, *supra* note 12.

⁵⁵ United Nations Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, *Background Documents: Working Text of Article 12*, online: <http://www.un.org/esa/socdev/enable/rights/ahcstatachtxtart12.htm> [Ad Hoc Committee, *Working Text*].

The working text's contemplation of substituted decision-making also suggests that the drafters recognized that the provision of universal legal capacity without exception involves some conceptual challenges. The main dilemma is applying the notion of "full equality" in the disability context. The principle of non-discrimination is based on the premise that it is unacceptable to treat "certain individuals or groups less favourably than others in circumstances where they are similarly situated."⁵⁶ Article 2 defines "discrimination on the basis of disability" as "any distinction, exclusion or restriction . . . which has the purpose or effect of impairing or nullifying the recognition . . . of all human rights and fundamental freedoms."⁵⁷ It also states that it "includes all forms of discrimination."⁵⁸ The conceptual problem, however, is that people with disabilities are not always similarly situated with others. Though often exaggerated through stereotypes, the differences between a nondisabled person and a person with disabilities are often real.⁵⁹ The CRPD's preparatory papers indicate that "the adoption of the paradigm of universal legal capacity was questioned because it was feared that it did not adequately address the concerns of persons with high support needs."⁶⁰ This suggests that the drafters of the convention sought to maximize the circumstances in which persons with disabilities would be able to retain their legal capacity, but they also contemplated circumstances in which an individual may be heavily dependent on support.

A decision by the European Court of Human Rights indicates that even a person with a psychosocial disability who requires 24-hour care can retain the right to legal capacity with respect to managing his or her own property. In *Winterwerp v the Netherlands*, Mr. Winterwerp automatically lost his legal capacity to administer his property because he was admitted to a psychiatric hospital.⁶¹ The state appointed a guardian to manage Mr. Winterwerp's property.⁶² The court rejected the argument made by the government of the Netherlands that this deprivation of legal capacity safeguards the rights of a person of "unsound mind" who, by reason of his mental condition, should

⁵⁶ Oddný Mjöll Arnardóttir & Gerard Quinn, eds, *United Nations Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Leiden: IDC Publishers, 2009) [Arnardóttir].

⁵⁷ CRPD, *supra* note 2, art 2.

⁵⁸ *Ibid.*

⁵⁹ Arnardóttir, *supra* note 56.

⁶⁰ People with high support needs are those with chronic and complex health issues, requiring specialist health supports and interventions. They may also be people with severe intellectual disabilities whose cognitive functioning places them among the lowest ranges applicable to them. People with high support needs often require 24-hour, lifelong support in most areas of their daily lives. Norman L Cantor, *Making Medical Decisions for the Profoundly Mentally Disabled* (Cambridge: Massachusetts Institute of Technology Press, 2005) at 1; Disability Enterprises, *People with High Support Needs*, online: Disability Enterprises <<http://www.disabilityenterprises.com.au>>; International Disability Alliance, *supra* note 44 at 3.

⁶¹ *Winterwerp v Netherlands* (1981), 7 ECHR, 4 EHRR 228.

⁶² *Ibid.*, para 73.

be “protected against his own inability to manage his affairs.”⁶³ It held that mental illness “cannot warrant the total absence of a person’s civil rights.”⁶⁴ The court’s decision suggests that even the existence of a mental disability that requires a person to be under constant supervision should not automatically lead to the deprivation of legal capacity in all matters.

D. Decision-Making Support and Safeguards

Paragraph (3) of Article 12 obliges States Parties to provide support, while paragraph (4) mandates the provision of safeguards against abuse, suggesting that the drafters of the CRPD recognized that some methods of supported decision-making could leave people with disabilities susceptible to exploitation.⁶⁵ Historically, some guardians of people with disabilities have used their authority to: dispose of property; permit institutions to treat the individuals in their care with neuroleptic drugs and electroconvulsive therapy; and provide consent to sterilization, organ donation, and do-not-resuscitate orders on behalf of the person under their guardianship.⁶⁶ Public guardians often face the challenge of large caseloads and have sometimes failed to seek input from the person with disabilities under their care when making decisions on his or her behalf.⁶⁷

Many guardianship systems have inadequate or nonexistent accountability mechanisms and processes for periodic review.⁶⁸ For these reasons, the provision of support and safeguards was a critical issue for NGOs and disability rights activists throughout the CRPD negotiation process. The working text of Article 12 from the seventh session of the ad hoc committee suggests that the drafters of the CRPD intended guardianship systems to be used as a last resort and only in the event that supported decision-making failed to discern the will of the person with disabilities. The draft of Article 12(2) describes two ways in which support may be provided. First, sub-article 12(2)(a) sets out supported decision-making. In contrast to the final text, sub-article 12(2)(b) makes explicit reference to a form of substituted decision-making. It states:

Where States Parties provide for a procedure, which shall be established by law, for the appointment of personal representation as a matter of last resort, such a law shall provide appropriate safeguards [. . .]. The appointment and conduct of

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *CRPD*, *supra* note 2, art 12(3), 12(4).

⁶⁶ Sundram, *supra* note 9 at 9.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

the personal representative shall be guided by principles consistent with the present Convention and international human rights law.⁶⁹

The term “as a matter of last resort” indicates that the drafters viewed substituted decision-making as a secondary option to be used only if the convention’s preferred approach of supported decision-making failed to allow the person with disabilities to exercise their legal capacity. The final text of Article 12(3), which eliminates the draft language discussing guardianship, could be interpreted as prohibiting substituted decision-making.⁷⁰ The drafters, however, did not replace the language permitting substituted decision-making with language that explicitly prohibits it altogether. Instead, the final text was left more ambiguous than the working text from the seventh session with respect to whether or when guardianship is permitted. The final version of the CRPD provides for legal capacity “on an equal basis with others in all aspects of life,” with Article 12(3) not precluding any mechanism whereby a person makes decisions with the assistance of another person in order to exercise that capacity. The extent of that assistance is not specified. For these reasons, the lexical changes to the working text of Article 12 suggest that the drafters of the CRPD moved towards a stronger presumption of capacity in composing the final text of the article.

II. QUALIFIED RATIFICATION

Can a State Party enter reservations on the parts of Article 12 that set out legal capacity for persons with disabilities? The CRPD does not completely prohibit reservations. Article 46 of the CRPD, however, does not permit reservations that are incompatible with the object and purpose of the convention, effectively repeating Article 19 of the Vienna Convention on the Law of Treaties.⁷¹ Similarly, the International Law Commission’s “Guide to Practice on Reservations to Treaties” states that “[a] reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general tenor, in such a way that the reservation impairs the *raison d’être* of the treaty.”⁷² Given the close link between legal capacity and the exercise of numerous other rights in the convention, it seems possible that a reservation that severely limits the protections set out in Article 12 might interfere with the object and purpose of the CRPD and be inconsistent with its general tenor.

⁶⁹ Ad Hoc Committee, *Working Text*, *supra* note 55.

⁷⁰ Association of the Bar of the City of New York Committee on Legal Issues Affecting People with Disabilities, *supra* note 12.

⁷¹ *Vienna Convention*, *supra* note 17.

⁷² International Law Commission, *Guide to Practice on Reservations to Treaties*, 63d Sess, A/66/10, (2011) s 3.1.5.

To determine the object and purpose of a convention, recourse may be had to “the terms of the treaty in their context,” “the preparatory work of the treaty,” and the preamble of the treaty.⁷³ The CRPD sets out its objective in sweeping language in Article 1: “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”⁷⁴ We gain further insight about the purpose of the CRPD by examining the range of factors identified in the preamble, which originally underscored the need for a human rights treaty to address disability rights specifically. These factors include: the need to improve living conditions for persons with disabilities around the world; the importance of autonomy and self-determination; the unique hurdles faced by women and children with disabilities; the high poverty rate of persons with disabilities; and the need to make all spheres of life accessible to persons with disabilities.⁷⁵ For these reasons, a reservation to Article 12 could be inconsistent with the CRPD’s general tenor; legal capacity for persons with disabilities is a critical part of the structure of the CRPD and underpins its efficacy due to its close link to several other provisions.

A reservation to Article 12 could, for example, undermine the protection of liberty and security of the person in Article 14. There have been accounts of individuals who have been placed in institutions against their will without any mechanism for appealing the decision because of their complete deprivation of legal capacity.⁷⁶ Similarly, a reservation to Article 12 could be used to limit the right of people with disabilities to political participation under Article 29 by allowing judges to decide on a case-by-case basis whether a person has the legal capacity to participate in an electoral process.⁷⁷ Article 25 explicitly requires that persons with disabilities give their full and informed consent to medical treatment. This provision is directly linked to respecting the right to legal capacity. Reports have documented that even people with mild disabilities that do not impair cognitive function have been denied the right to decide whether to accept certain health interventions after having their legal capacity stripped away.⁷⁸ These examples provide support for the statement made by the European Group

⁷³ *Ibid*, s 3.1.5.1.

⁷⁴ CRPD, *supra* note 2, art 1; Michael Ashley Stein & Janet E Lord, “Future Prospects for the United Nations Convention on the Rights of Persons with Disabilities” in Arnardóttir, *supra* note 56 at 24.

⁷⁵ CRPD, *supra* note 2, preamble.

⁷⁶ See e.g. *Case of Shtukurov v Russia*, No 44009/05, [2008] ECHR 2008, 7, where the European Court of Human Rights held that Russia violated the European Convention on Human Rights and Fundamental Freedoms by depriving an individual with mental disabilities of his legal capacity, including placing him in an institution without his consent. See also Human Rights Watch, *supra* note 10.

⁷⁷ In *Kiss v. Hungary*, the Court found that Hungary was in violation of Article 3, Protocol 1 of the ECHR by enforcing a blanket provision in its domestic law that stripped voting rights from people with disabilities under partial guardianship. *Alajos Kiss v Hungary*, No 38832/06, [2010] ECHR 20; *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 at 223, Eur TS 5 [ECHR] art 1.

⁷⁸ See e.g., Human Rights Watch, *Illusions of Care: Lack of Accountability for Reproductive Rights in Argentina*, online: Human Rights Watch <<http://www.hrw.org>>.

of National Human Rights Institutions in an *amicus* brief before the European Court of Human Rights, where it was argued that “without legal capacity it is not possible to obtain the rights guaranteed under the CRPD.”⁷⁹

Given the close connection between legal capacity and other rights enshrined in the CRPD, States Parties should consider whether the effects of any reservation to Article 12 are consistent with the convention’s general tenor. A reservation that allows States Parties to escape obligations imposed by Article 12 would appear to undermine the effective implementation of other critical provisions in the convention, and could fail the “object and purpose” test set out under Article 46 of the CRPD and in the Vienna Convention.

A. Reservations to Article 12: Canada and the United Kingdom

When Canada ratified the CRPD on November 3, 2010, it issued a declaration and reservation pursuant to Article 46 that specifically addressed legal capacity and Article 12.⁸⁰ Canada is not unique in its concerns regarding this provision.⁸¹ The United Kingdom also issued a declaration and reservation when it ratified the CRPD.⁸² In the

⁷⁹ Written Comments by the European Group of National Institutions, *supra* note 4 at 3.

⁸⁰ United Nations, *Convention and Optional Protocol Signatures and Ratifications*, online: UN Enable <<http://www.un.org>>.

⁸¹ As of December 2011, 107 countries have ratified the CRPD, 5 countries have issued interpretative declarations of article 12 (Canada, Egypt, France, Mexico, Syrian Arab Republic, United Kingdom of Great Britain and Northern Ireland) and 2 have made reservations (Canada, United Kingdom of Great Britain and Northern Ireland). United Nations, *Convention on the Rights of Persons with Disabilities*, online: UN Treaty Collection <<http://treaties.un.org>>. Canada’s declaration and reservations reads as follows:

Canada recognizes that persons with disabilities are presumed to have legal capacity on an equal basis with others in all aspects of their lives. Canada declares its understanding that Article 12 permits supported and substitute decision-making arrangements in appropriate circumstances and in accordance with the law.

To the extent Article 12 may be interpreted as requiring the elimination of all substitute decision-making arrangements, Canada reserves the right to continue their use in appropriate circumstances and subject to appropriate and effective safeguards. With respect to Article 12 (4), Canada reserves the right not to subject all such measures to regular review by an independent authority, where such measures are already subject to review or appeal.

Canada interprets Article 33 (2) as accommodating the situation of federal states where the implementation of the Convention will occur at more than one level of government and through a variety of mechanisms, including existing ones.

⁸² In the UK, the mechanism for making decisions on behalf of adults is set out by the *Mental Capacity Act 2005*. The *Act* first requires asking whether the person has an impairment of the mind or brain, and second, whether the person can make the specific decision in question at the time it needs to be made. *Mental Capacity Act 2005* (UK), 2005, c 9; Lord Falconer of Thoroton, *Mental Capacity Act 2005: Code of Practice* (London: Department for Constitutional Affairs, 2007) at 19. The United Kingdom of Great Britain and Northern Ireland’s declaration and reservation reads as follows:

Reservations

“Work and Employment – Convention Article 27 mainly

English common law tradition, a person who had been deprived of legal capacity could not enter into contracts and could not commence litigation before the courts. A person who was found to lack capacity over property and affairs was also prevented “from making all decisions in that realm.”⁸³ A person who was found to be incapable of managing their investments, for example, would also be prevented from managing their daily spending, even if they remained capable of doing so.⁸⁴ While the *Mental Capacity Act 2005* reduced the courts’ ability to remove legal capacity to this extent, this power continues in many former colonies.⁸⁵

The declarations and reservations issued by Canada and the UK demonstrate that both countries anticipated that their domestic laws were incompatible with Article 12. Specifically, these were likely domestic laws establishing guardianship systems without emphasizing supported decision-making systems as preferable to guardianship. I argue that both reservations suggest an interpretation of Article 12 as setting out a rebuttable

The United Kingdom accepts the provisions of the Convention, subject to the understanding that none of its obligations relating to equal treatment in employment and occupation, shall apply to the admission into or service in any of the naval, military or air forces of the Crown.

Education – Convention Article 24 Clause 2 (a) and 2 (b)

The United Kingdom reserves the right for disabled children to be educated outside their local community where more appropriate education provision is available elsewhere. Nevertheless, parents of disabled children have the same opportunity as other parents to state a preference for the school at which they wish their child to be educated.

Liberty of Movement

The United Kingdom reserves the right to apply such legislation, insofar as it relates to the entry into, stay in and departure from the United Kingdom of those who do not have the right under the law of the United Kingdom to enter and remain in the United Kingdom, as it may deem necessary from time to time.

Equal Recognition Before the Law – Convention Article 12.4

The United Kingdom’s arrangements, whereby the Secretary of State may appoint a person to exercise rights in relation to social security claims and payments on behalf of an individual who is for the time being unable to act, are not at present subject to the safeguard of regular review, as required by Article 12.4 of the Convention and the UK reserves the right to apply those arrangements. The UK is therefore working towards a proportionate system of review.”

Declaration

“Education – Convention Article 24 Clause 2 (a) and (b)

The United Kingdom Government is committed to continuing to develop an inclusive system where parents of disabled children have increasing access to mainstream schools and staff, which have the capacity to meet the needs of disabled children.

The General Education System in the United Kingdom includes mainstream, and special schools, which the UK Government understands is allowed under the Convention.”

⁸³ Felicity Callard et al, *Mental Illness, Discrimination and the Law: Fighting for Social Justice* (Chichester, West Sussex, UK: Wiley-Blackwell, 2012) at 72 [Callard].

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

presumption of capacity but that the countries depart in their willingness to accept the CRPD's provision of safeguards against abuse.

B. The “Rebuttable Presumption” Model of Capacity

The reservations of Canada and the UK suggest that the two countries have interpreted the phrase “equal basis with others” as a rebuttable presumption. Canada says so explicitly. The first sentence of its declaration and reservation clarifies the country's understanding that Article 12 reflects a presumption of legal capacity. It then states, however, that Canada interprets Article 12 as permitting substituted decision-making systems (such as guardianship). Canada reserves its right to use these arrangements “in appropriate circumstances and in accordance with the law.” A national stakeholder consultations report commissioned by the Canadian government describes that before Canada ratified the CRPD, “[t]here was a sense that the federal government, along with the provinces and territories, may not be in 100% compliance with the Convention.”⁸⁶ By explicitly protecting the domestic laws that provide for substituted decision-making systems in the event of a potential inconsistency, Canada's reservation suggests that Article 12 might set out a more rigid presumption of capacity that its existing laws call for.

The UK addresses Article 12(2) in a declaration rather than in a reservation, signifying a firmer stance on how it believes Article 12 should be interpreted by States Parties. An early draft of the government's initial report on its implementation of the CRPD, the UK reaffirms its belief that it is appropriate in some circumstances to deprive individuals of their legal capacity:

There may be circumstances in which a disabled person needs support to exercise [decision-making] capacity, or where they lack the mental capacity to make decisions for themselves, and decisions may be made on their behalf. In such circumstances, strict safeguards are in place to protect the individual in the way that such decisions are made.⁸⁷

The report clearly provides for supported decision-making. However, it does not seem to view a system in which the court may appoint a substitute decision-maker upon finding that a person with disabilities cannot “successfully” make or communicate a decision as *prima facie* incompatible with Article 12. In doing so, it too adopts the “rebuttable presumption” approach to legal capacity.

⁸⁶ Human Resources and Skills Development Canada (HRSDC), *National Stakeholder Consultations Report* (Gatineau, QB: HRSDC, 2011), online: HRSDC <<http://www.hrsdc.gc.ca>>.

⁸⁷ UK, Office for Disability Issues (ODI), *Draft UK Initial Report: On the UN Convention on the Rights of Persons with Disabilities* (London: Her Majesty's ODI, 2011), online: ODI <<http://odi.dwp.gov.uk>>.

C. Safeguard of Regular Review

Both Canada and the UK chose to respond to the provision in Article 12 for “regular review by a competent, independent and impartial authority or judicial body,” suggesting an acknowledgment that the countries' respective laws may be inconsistent with the CRPD. The UK and Canada approach the potential incompatibility differently, with Canada reserving the right “not to subject all such measures to regular review by an independent authority, where such measures are already subject to review or appeal.” The UK describes a law where “the Secretary of State may appoint a person to exercise rights in relation to social security claims and payments on behalf of an individual who is for the time being unable to act,” noting that this process is not currently subject to regular review. It states that the UK is “working towards a proportionate system of review” to ensure compliance. These responses show the UK is willing, where it anticipates an incompatibility, to make changes in order to meet its obligations under the CRPD. Canada, however, acknowledges the divergence between its obligations under the convention and its domestic laws with respect to safeguards but reserves the right to make no changes to its existing regime.

The regime set out in the UK's *Mental Capacity Act 2005* demonstrates a “rebuttable presumption” approach to legal capacity but does not set out the monitoring systems required by Article 12. Section 1 of the act provides five interpretive principles, stating that every adult must be assumed to have capacity unless proven otherwise. Further, an individual must not be presumed to lack capacity if he or she makes what may otherwise be perceived as an unwise decision. Despite this new protection, however, the act has been described as “strong on substance [but] light on process,” given that it does not set out strong reporting systems in order to monitor whether the provisions in the law are being followed.⁸⁸

III. CANADA'S OBLIGATIONS UNDER THE CRPD

Having examined the aspects of Article 12 that have proven most contentious for States Parties when ratifying the CRPD, I now turn to examine the extent to which Canada's domestic laws that establish approaches to assisting persons with disabilities in making decisions are consistent with the CRPD. This part examines Canada's federal and provincial laws relating to legal incapacity in order to determine whether its laws are indeed inconsistent with the obligations imposed by the CRPD and, specifically, compatible with Article 12.

A. Testing for Decision-Making Capacity

⁸⁸ Callard, *supra* note 85 at 75.

Many of the tests for capacity currently in operation in Canada focus on two main factors: a person's ability to comprehend the information at hand that is relevant to making a decision and a person's ability to appreciate the reasonably foreseeable consequences of his or her decision.⁸⁹ Variations of this test have been incorporated into Canadian laws, including Ontario's *Substitute Decisions Act, 1992* and *Health Care Consent Act, 1996*, Saskatchewan's *Adult Guardianship and Co-decision-making Act*, and Manitoba's *The Vulnerable Persons Living with a Mental Disability Act*.⁹⁰ The applicable test of mental capacity differs based on the level of decision-making ability needed in a particular situation. A person might be deemed to have the mental capacity to make a basic decision, but not to make a more complex one.⁹¹ For example, in *Calvert (Litigation Guardian of) v Calvert*, the judge held that Mrs. Calvert had the capacity to decide whether to continue a personal relationship, which was not considered to be a complex decision, and she was therefore allowed to divorce her spouse. She was found to lack the capacity, however, to instruct counsel.⁹²

The UN has stated that "an individual cannot lose [his or her] legal capacity to act simply because of a disability."⁹³ Article 5(2) of the CRPD requires States Parties to "prohibit discrimination on the basis of disability." The CRPD's principle of non-discrimination should thus be interpreted as mandating that the mere existence of an intellectual or psychosocial disability per se does not constitute evidence that a person lacks capacity. There must be other proof that the person requires support to make the decision. It follows that legislation could be incompatible with the CRPD if a person is tested for incapacity on the basis of his or her disability as opposed to some manifested behaviour or other factor. For this reason, the tests for capacity set out in some Canadian laws could be problematic with respect to Article 12 and the general principle of non-discrimination in article 3(b) of the convention. Under Ontario's *SDA*, for example, a person may request that an assessment be performed on an individual if "the person requesting the assessment has reason to believe that the other person may be incapable of managing property."⁹⁴ This provision seems to be incompatible with the CRPD because it does not specify that an assessment may not be requested merely because a person is afflicted with a disability. Further, the provision does not suggest what factors should be used to guide a person's decision to request such an assessment.

B. Substituted Decision-Making Systems

⁸⁹ Bach & Kerzner, *supra* note 7 at 48.

⁹⁰ *Substitute Decisions Act, 1992*, SO 1992, c 30, ss 6, 45 [*SDA*]; *Health Care Consent Act, 1996*, SO 1996, c 2, Schedule A, s 4(1); *Adult Guardianship and Co-decision-making Act*, SS 2000, c A-5.3, s 2(c); *The Vulnerable Persons Living with a Mental Disability Act*, CCSM c V90.

⁹¹ (1997), 32 OR (3d) 281 (Gen Div) at 294.

⁹² *Ibid*; Bach & Kerzner, *supra* note 7 at 47.

⁹³ United Nations, *supra* note 23 at 89.

⁹⁴ *SDA*, *supra* note 90, s 16(1) and (2)(a).

While some forms of supported decision-making have been operating in Canada for over twenty years, Article 12 seems to contain a more robust vision of how people with disabilities should be supported in exercising their right to legal capacity than that contained in most Canadian legislation.⁹⁵ Laws in Canada that directly address legal capacity often set out systems of substituted decision-making, or guardianship. A person who has been deemed to lack the legal capacity to make decisions can be made the subject of a guardianship order.⁹⁶ Plenary guardianship is the traditional form, whereby a guardian may be given full authority to make decisions for an adult. A court may also grant a partial or limited guardianship order to give specific powers to the guardian.⁹⁷ Chief Justice McLachlin, albeit in dissent, has stated that even a decision made by someone capable of expressing his or her will can be overruled if the individual is deemed to lack capacity: “Ordinarily at law, the value of autonomy prevails over the value of effective medical treatment. [. . .] However, where the individual is incompetent, or lacks the capacity to make the decision, the law may override his or her wishes.”⁹⁸

All jurisdictions in Canada have laws that use substituted decision-making to govern situations where people are deemed to be mentally incapable.⁹⁹ One example is Ontario’s *SDA*, which allows a third party to make decisions on behalf of an individual who has been deemed to lack capacity. In this context, Bach and Kerzner have noted that substituted decision-making occurs in two forms. It either allows a person to choose a substitute decision-maker in advance of incapacity, or it gives effect to a guardianship system in which a court appoints an individual to make the decisions for the incapable person.¹⁰⁰

The *SDA* contains several areas of potential inconsistency with Article 12 of the CRPD. It grants broad discretion to “capacity assessors” to decide whether an individual should be considered legally incapable. It does not account for situations where a person’s decision-making capacity fluctuates on a day-to-day and decision-by-decision basis due to the nature of the specific disability or medical condition. Indeed, this is one of the main reasons why disability rights advocates favour supported decision-making approaches.¹⁰¹ Reports of exploitation as a result of section 40(1), which allows a guardian to take “compensation” from the person with disabilities on a “monthly,

⁹⁵ Dinerstein, *supra* note 6 at 11.

⁹⁶ *SDA*, *supra* note 90; *HCCA*, *supra* note 90. For a discussion of similar laws in England and Wales, see Genevra Richardson, “Autonomy, Guardianship and Mental Disorder: One Problem, Two Solutions” (2002) 65 Mod L Rev 702 at 702.

⁹⁷ Sarah Burningham, “Developments in Canadian Adult Guardianship and Co-Decision-Making Law” (2009) 18 Dal J Leg Stud 119 at 121.

⁹⁸ *Starson v Swayze*, 2003 SCC 32 at para 7 [*Starson*].

⁹⁹ Bach & Kerzner, *supra* note 7 at 46.

¹⁰⁰ *Ibid.* See also *SDA*, *supra* note 90.

¹⁰¹ *SDA*, *ibid.*, s 3(a).

quarterly or [annual]" basis, suggest that the *SDA* does not provide for the appropriate "safeguards to prevent abuse" mandated by the CRPD.¹⁰² The *SDA* provides for an "alternative course of action" where guardianship is unnecessary but does not explicitly refer to supported decision-making.¹⁰³ Canada's reservation to Article 12 of the CRPD allows Ontario to continue using the guardianship system set out under the *SDA*, a statute drafted almost twenty years ago, and avoid the obligations that would be imposed by Article 12(4) to establish appropriate safeguards against abuse.

Despite its need to reform laws regarding legal capacity on the provincial level, Canada has made progress at the federal level by recognizing that supported decision-making should be the dominant form of assistance. The Supreme Court recognized that personal autonomy with respect to decisions "intimately affecting [one's] private [life]" is guaranteed under the right to life, liberty, and security of the person by Section 7 of the *Canadian Charter of Rights and Freedoms*.¹⁰⁴ Section 15 of the *Charter* protects the right to equal treatment under the law, but this guarantee was not afforded for persons with disabilities when the provision was first drafted. Rather, protection was recognized only after relentless lobbying by activists and their allies.¹⁰⁵ The Supreme Court of Canada stated that the equality guarantee "is concerned with the realization of personal autonomy and self-determination. Human dignity means that an individual or group feels self-respect and self-worth."¹⁰⁶ With respect to legal capacity, the Supreme Court has recognized the autonomy interest of people with disabilities in stating that "[u]nwarranted findings of incapacity severely infringe upon a person's right to self-determination."¹⁰⁷ In *Nova Scotia (Minister of Health) v JJ*, the court described how legislation that limits legal capacity should be interpreted in a way that minimizes the intrusiveness of state intervention.¹⁰⁸ These concerns are consistent with the "right [of persons with disabilities] to recognition everywhere as persons under the law" under Article 12, as well as the general principles of respect for individual autonomy, non-discrimination, and equal opportunity in Article 3 of the CRPD.

Bach and Kerzner note two significant cases that have recognized supported decision-making and the role of specific supports to assist persons with disabilities in making decisions in Ontario.¹⁰⁹ In *Clark v Clark*, a judge held that Justin Clark was "mentally competent" and that, despite his intellectual disability and inability to speak,

¹⁰² Susan Pigg, "It's unseemly how eager some are to inherit", *The Toronto Star* (13 March 2010) online: The Toronto Star <<http://www.thestar.com>>.

¹⁰³ *SDA*, *supra* note 90, ss 22(3), 55(2).

¹⁰⁴ *R v Morgentaler*, [1988] 1 SCR 30 at para 240; Hall, *supra* note 4 at 6.

¹⁰⁵ Liza Vanhala, *Making Rights a Reality? Disability Rights Activists and Legal Mobilization* (New York: Cambridge University Press, 2011) at 48-49.

¹⁰⁶ *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 53.

¹⁰⁷ *Starson*, *supra* note 98 at para 75.

¹⁰⁸ 2005 SCC 12 at para 23.

¹⁰⁹ Bach & Kerzner, *supra* note 7 at 51.

he could make and communicate his decisions by using Blissymbols (a symbolic, graphical language).¹¹⁰ In *Koch (Re)*, a judge recognized the role and importance of supports in stating that “mental capacity exists if the appellant is able to carry out her decisions with the help of others.”¹¹¹ These judgments, in principle, are consistent with Article 12 of the CRPD in that they recognize that persons with disabilities who are unable to communicate their decisions in the same way as people without disabilities should not be deprived of legal capacity, and instead should be given the appropriate supports to exercise their rights.

One example of a supported decision-making system that has received praise by the disability community is British Columbia’s *Representation Agreement Act*.¹¹² A representation agreement is similar to granting a power of attorney, but it is not limited to financial and legal decisions, and it can extend to medical and personal care. Under many substituted decision-making systems, if challenged, an individual is required to prove legal competency by demonstrating the ability to understand information, appreciate possible consequences, and communicate the decision without aid. In British Columbia, however, an individual who wishes to enter into a representation agreement is not forced to prove that they are competent before a court. Instead, the person need only communicate a desire to have a representative, be able to demonstrate choices, and have a relationship of trust with the representative. Under this system, a person who requires a great deal of support, and who may not be able to communicate in conventional ways, is allowed to enter into a representation agreement by demonstrating trust in another individual. The BC legislation provides a “simple, inexpensive means for individuals to formally recognize one or more persons as their representatives for routine health, personal care, financial decision making and legal affairs.”¹¹³

The representation agreement system utilized in British Columbia also has a well-developed system of protection against abuse. Each individual entering into a representation agreement has the option of appointing not only a representative but also a monitor. In cases where a representation agreement is made regarding management of the individual’s financial affairs, a monitor must be appointed to ensure that the representative is properly carrying out his or her responsibilities. A significant drawback of this system is that the representative is given the authority to make decisions for the person with disabilities. The representative is only required to comply with the wishes of the individual “if it is reasonable to do so.”¹¹⁴ This qualification

¹¹⁰ (1983), 40 OR (2d) 383 (Co Ct).

¹¹¹ (1997), 33 OR (3d) 485 (Gen Div) at 521.

¹¹² *Representation Agreement Act*, RSBC 1996, c 405, s 7(1) [RAA]; Bach & Kerzner, *supra* note 7 at 53.

¹¹³ Tim Stainton, “Empowerment and the Architecture of Rights Based Social Policy” (2005) 9 J

Intellectual Disabilities 287 at 294.

¹¹⁴ RAA, *supra* note 112, s 16(2)(b).

allows the representative to substitute his or her wishes for those of the person with disabilities.

CONCLUSION

In 2011, the CRPD's treaty body, the Committee on the Rights of Persons with Disabilities, issued a call for submissions on the practical and theoretical measures for the implementation of Article 12. This suggested that the committee was carefully considering the exact content of this provision as it was preparing its general comments and was looking to civil society for assistance once again. I have argued that the drafters of the CRPD intended Article 12 to set out a strong presumption of legal capacity for all persons with disabilities. I have also argued that supported decision-making was meant to be the dominant approach to helping people with disabilities to make decisions. Further, substituted decision-making should only be used in rare cases, such as when communications with the individual are indeterminate. This interpretation requires many States Parties to initiate changes in their domestic laws and policies to move towards supported decision-making approaches. Measures used to assist people with disabilities in their decision making should acknowledge gradations of capacity and should be proportional to individuals' unique circumstances. These measures must be accompanied by robust safeguards to protect people with disabilities from exploitation and abuse. Finally, read in light of the general principle of non-discrimination under article 3(b) of the CRPD, tests for capacity should not be imposed on individuals simply due to the existence of a disability.

Canada's reservation to Article 12 allows it to avoid reforming any laws and policies that do not set out supported decision-making approaches and that lack appropriate safeguards against abuse. All States Parties, including Canada, should see reservations, even valid ones, as temporary in character to be withdrawn as soon as possible in order to maintain the normative integrity of the CRPD.¹¹⁵ Canada should consider withdrawing or modifying its reservation to show that it is genuinely committed to advancing the rights of people with disabilities and is willing to reform domestic laws that are incompatible with Article 12. Provinces such as British Columbia may be looked to for guidance. To fulfill Canada's commitment to the principles of inclusion, non-discrimination, and equality, which have been enshrined in the CRPD, law and policy across the provinces should be organized around the premise of presumed legal capacity.

¹¹⁵ Gerard Quinn, "Resisting the 'Temptation of Elegance': Can the Convention on the Rights of Persons with Disabilities Socialise States to Right Behaviour?" in Oddný Mjöll Arnardóttir & Gerard Quinn, eds, *United Nations Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Leiden: IDC Publishers, 2009) 216 at 244-45.