

# Lessons Learned from the Canadian Experience: Supported Decision-Making Models

The Supported Decision-Making Webinar Series

Presented by

Quality Trust for Individuals with Disabilities

Burton Blatt Institute

Autistic Self Advocacy Network

March 26, 2014



# Today's Webinar

- *Introduction* – Tina Campanella, Quality Trust
- *Panel*
  - Michael Bach, Canadian Association for Community Living
  - Peter Park, Advocate for Persons with Intellectual Disability
  - Lana Kerzner, Barrister and Solicitor
- *Reactor* – Samantha Crane, Autistic Self Advocacy Network
- *Questions and Answers*

# Supported Decision Making

## *Evolution of an idea and Canadian experience*

Michael Bach

Canadian Association for Community Living

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March 26, 2014

# Outline

- What is the right to decide and why does it matter
- UN Convention and the Right to Decide
- Main idea
  - Legal capacity and mental capacity
  - A new formula for legal capacity
  - Ways of exercising legal capacity
- Supported decision making – what it is, how does it work
- Law reform agenda

# Legal Capacity Defined by the U.N.

legal capacity = the “capacity and power to create, modify or extinguish legal relationships”

What kinds of decisions matter to  
you?



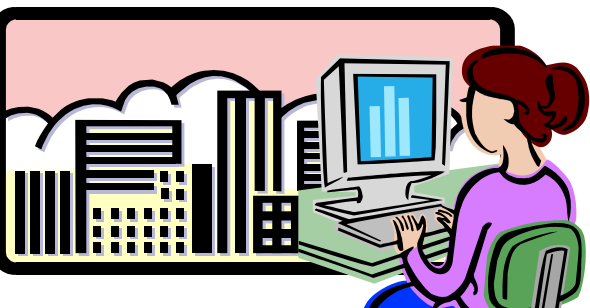
# The law identifies 3 main kinds



Health Care Decisions



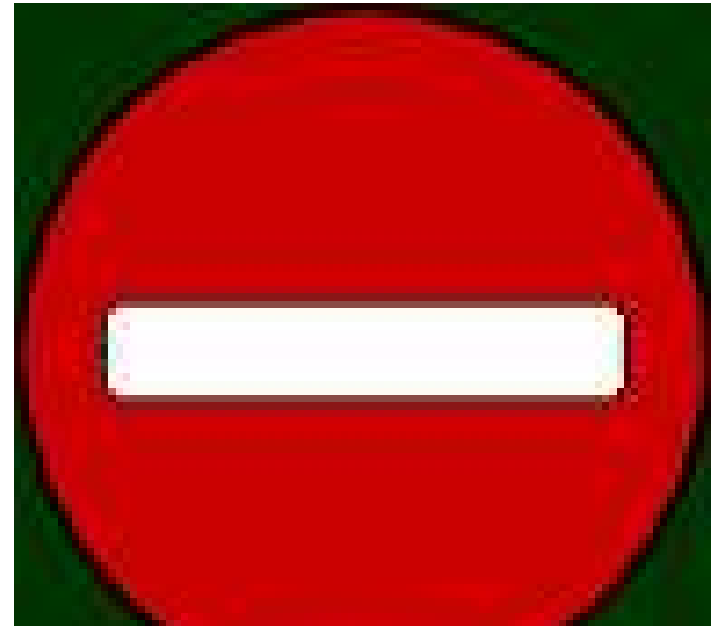
Financial/Property Decisions



Personal Life Decisions (where to live, relationships, participation, access, employment, sexuality, mobility and supports)

# The problem with the law:

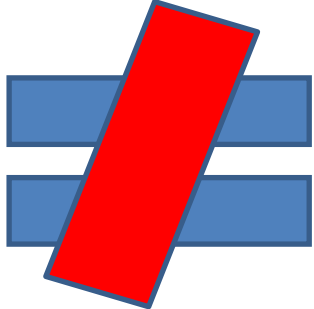
Requires some professionals and courts to make a 'finding of incapacity' and takes away the right to make decisions because of that label





How does the law do that?

The usual formula for legal capacity

**Legal capacity**  **Mental capacity**



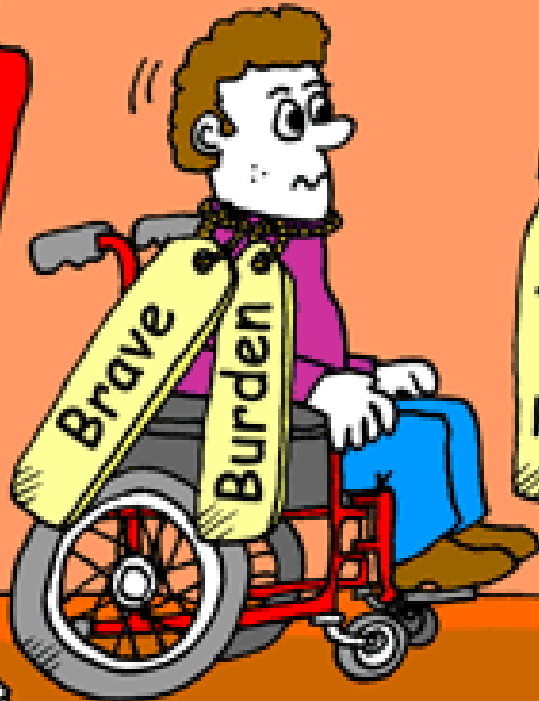
# What is 'Mental capacity':

On his/her own, or 'independently', an adult can:

- Understand information needed to make the decision
- Retain the information
- Appreciate the consequences
- Communicate the decision in ways others understand

Come along now,  
one more label and  
you're ready to  
face the world!

Department of  
Dependency  
and Care



**Crippen**



## 4 important bits



**1**

We have the **right to make our own decisions** (autonomous decision-making)

– Article 12(2) CRPD



# 2

States have an **obligation to provide supports** (where needed) to help someone exercise legal capacity.

- Article 12(3) CRPD



# 3

Safeguards - **Article 12(4)**

Protection against  
**exploitation, violence and  
abuse - Article 16 CRPD**



# 4

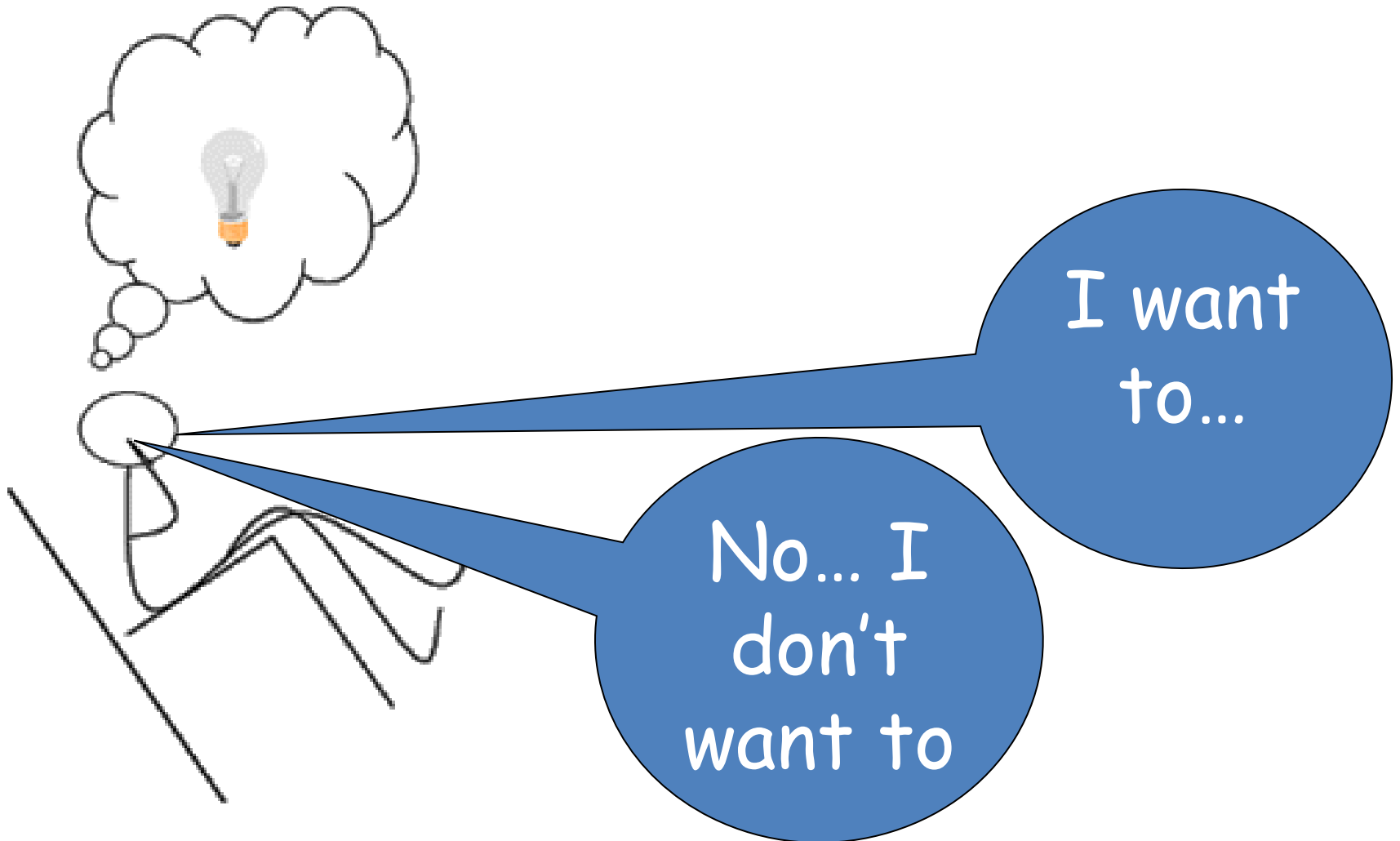
“Accommodations”  
(adjustments) – Article 5(3)

Article 12 says we need other  
ways to recognize and support  
the right to  
legal capacity:

Not just 'mental capacity'



# Can Express Will and Preferences to Others





# Being known by others as a full person

— people you trust and who are committed to you

SCHOOL OF DISABILITY STUDIES



Rebecca Miller, 2011  
Rebecca Miller, 2011  
Rebecca Miller, 2011  
Rebecca Miller, 2011  
Rebecca Miller, 2011  
Rebecca Miller, 2011  
Rebecca Miller, 2011  
Rebecca Miller, 2011  
Rebecca Miller, 2011  
Rebecca Miller, 2011

VISION  
PASSION  
ACTION

Medical disability: the condition  
the world of students, artists and scholars  
who have been against stereotypes and  
are passionate and challenge the world  
that excludes, devalues and oppresses.  
Accessibility education: the built from  
your experience of college & work and

# A new formula for legal capacity

individual will and preferences

+

unique decision-making abilities

+

supports

=

+

accommodation

+

equal legal recognition

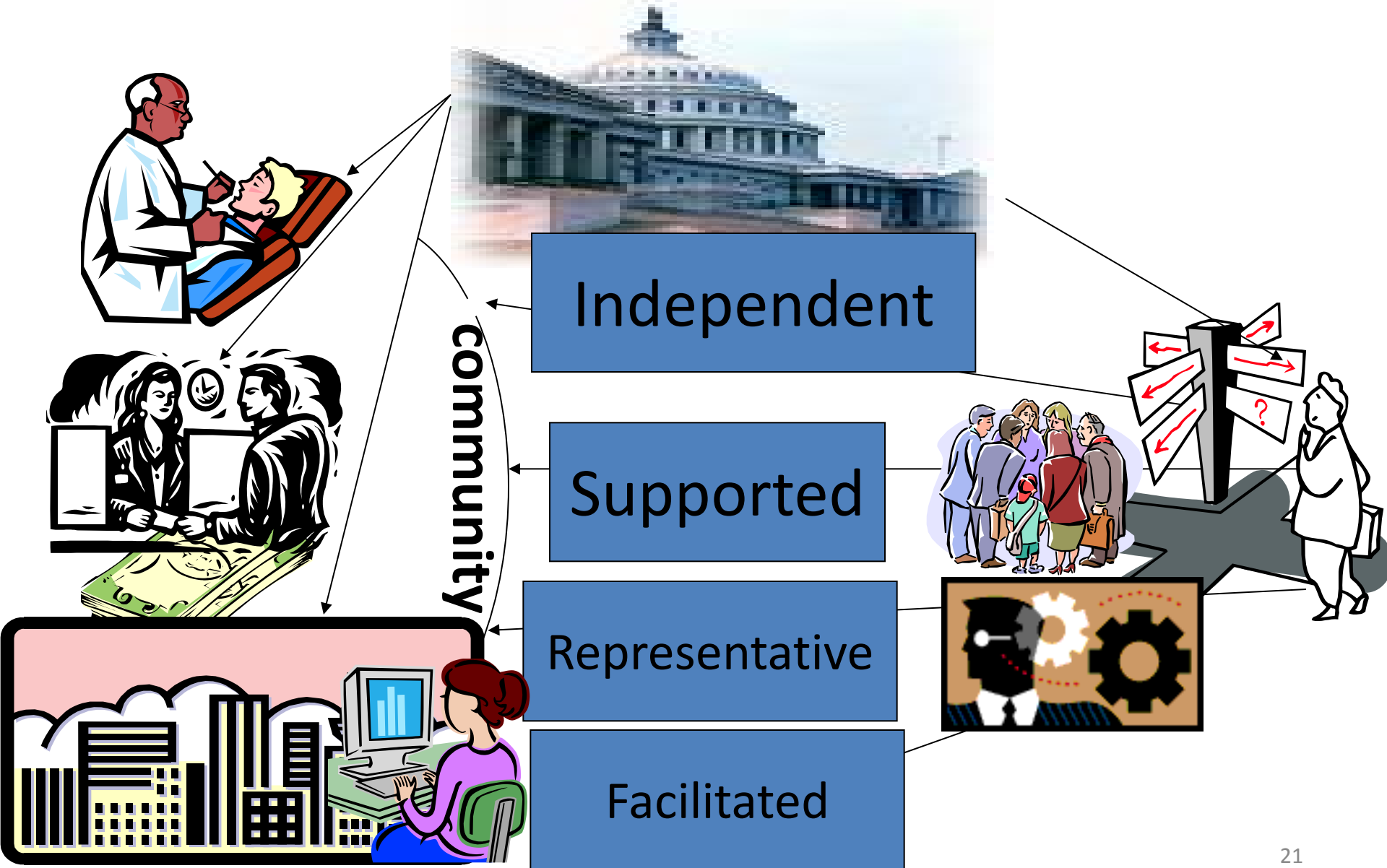
Capability to make decisions



# In the formula...

- Legal capacity  $\neq$  'mental capacity'
- What a person wants, their hopes and plans is at the centre
- Focus is on supports and accommodation
- When people have different ideas about what a person might want, they talk to figure out the 'best interpretation of your will and preference' , not 'best interests'

# Ways to Exercise Legal Capacity



# Supported decision making Network...

- A group of trusted others to assist in:
  - Expressing will and preferences
  - Making and acting on decisions



# Appointing supporters

- By myself
- When I am not able, others apply to be my supporters on the basis of trust, personal knowledge and commitment

# Types of support

- Decision-making supporters
- Peer support
- Communication assistance – interpreters
- Plain language, alternate formats
- Independent advocates



# Types of accommodation

For example:

- More time (by a doctor or financial institution) to make a decision
- Duty to provide information, plain language
- Including your supporters in the decision-making process

# A new approach

From	To
A 'presumption of capacity'	A presumption to act independently
Capacity assessment	Assessing need for supports and 'alternative course of action'
Detention	Exploration of alternatives
Finding of incapacity	Finding of need for support
Substitute decision making	Supported decision making and power to appoint
Best interest test	Best interpretation of will and preference

# What are we calling for?

- Recognize right to supports in decision making and government duty to establish
- **Prohibition** on findings of incapacity, substitute decision making and detention where alternatives exist
- **Legal Obligation** to explore alternatives
- Duty of ‘third parties’ – doctors, banks to accommodate
- Rights advisors in mental health system
- Government duty to establish supports

# Supported Decision-Making in Canada: Legislative Approaches and Lessons Learned

Prepared For Supported Decision-Making Webinar  
March 26, 2014

Lana Kerzner  
Barrister and Solicitor

# Decision-Making 'Players'

- Individual decision-maker
- Supporters of individual
- Third parties – individuals who interact with the decision-maker
  - Example: health care providers; financial institutions; parties to contracts
- State

# Legal Recognition - Requirements

For Supported decision-making to be a reality,  
laws must address the roles of each of the 4  
players

# Canada's Laws

- Legal recognition of:
  - Supporters
  - Role for third parties
- Alternative Course of Action to Guardianship

# Canada's Laws

- Legal recognition is not full nor the same across all of Canada
- Canada's guardianship and decision-making laws differ in each jurisdiction (province/territory)
- Not all jurisdictions recognize supporters



# Legal Recognition of Supported Decision-Making

- Contained in decision-making legislation
- Only in some jurisdictions
- Mechanisms are not the same in each jurisdiction
- Some form of such recognition in :
  - Alberta, British Columbia; Manitoba; Saskatchewan; Yukon

# Legal Recognition of Supporters - Types

1. Supported Decision-Making Planning Documents
  - Individual chooses and appoints supporters
  
2. Co-Decision-Making
  - Supporters appointed by court

# Legal Duties of Third Parties: Duty to Accommodate

- Contained in human rights laws
- Not specific to decision-making
- Duty to accommodate
  - Duty to take proactive steps to ensure that services are provided without discrimination to people with disabilities

# Duty to Accommodate

- Duties on service providers such as health professionals, financial institutions and lawyers
- No finite list
- Individualized to person
- Examples: plain language material; extra time to process information; accepting role of support people in decision-making process

# Alternative Course of Action to Guardianship

- In Guardianship legislation in many Canadian jurisdictions
- Court prohibited from appointing a guardian if an alternative course exists
- Alternative course may include
  - Supports and supported decision-making arrangements
  - Powers of attorney

# Lessons from Canadian Experience

## Essential Features to transform Law to Reality

- Broad education and awareness
- Comprehensive coverage – to take account of different ways in which people make decisions
- Guiding principles
- State role – address needs of people who don't have supports
- safeguards

# A Few Resources

- Michael Bach and Lana Kerzner, “A New Paradigm for Protecting Autonomy and the Right to Legal Capacity”, prepared for the Law Commission of Ontario, 2010, online: <http://www.lco-cdo.org/disabilities-commissioned-paper-bach-kerzner.pdf>
- Mental Disability Advocacy Centre, “Supported decision-making: An alternative to guardianship”, online: [http://mdac.info/sites/mdac.info/files/English Supported Decision-making An Alternative to Guardianship.pdf](http://mdac.info/sites/mdac.info/files/English_Supported_Ddecision-making_An_Alternative_to_Guardianship.pdf)
- United Nations Enable, information on the United Nations website on the Convention on the Rights of Persons with Disabilities, online: <http://www.un.org/disabilities/>