Protecting Autonomy
and the Right to Security and Liberty of the Person for All

Submission to the Law Amendments Committee on Bill 16 – *Adult Capacity and Decision making Act*

Submitted by

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

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Introduction

The Nova Scotia Association for Community Living (NSACL) and the Canadian Association for Community Living (CACL), with the technical assistance of IRIS – Institute for Research and Development on Inclusion and Society (IRIS) are dedicated to advancing the full citizenship, human rights and inclusion of persons with intellectual disabilities. Bill 16 as it stands would work to fundamentally harm the autonomy, security of the person and liberty rights of individuals and as such needs substantial revision. Our key concerns with the Bill are as follows:

- The proposed act, like its predecessor, is not in compliance with the Canadian *Charter of Rights and Freedoms,* nor UN *Convention on the Rights of Persons with Disabilities*. Nor does it fulfill the commitments the Government of Nova Scotia made in 2014 to advancing the right to legal capacity, which were widely supported by the community, in *Choice, Equality and Good Lives in Inclusive Communities: A Roadmap to Transforming the Nova Scotia Services to Persons with Disabilities Program*.
- The vagueness and unsuitability of the definition of "capacity" as it stands could be arbitrarily applied to deny people the right to legal capacity and autonomy.
- It violates fundamental human rights to have timely access to the supports and accommodations needed to enhance and exercise their decision-making capabilities.
- Due process is lacking for those who would be 'grandfathered' into new guardianship/representation orders, simply because their rights are currently restricted under the *Incompetent Persons Act,* which the Nova Scotia Supreme Court has already said violates the *Charter*.
- Powers the court affords the representative eliminates the adult's right to make the most basic decisions (i.e. section 10(1); 27(4); 40(1 b)).
- No organized structure or process or legal recognition for arranging the supports for making decisions, that the legislation itself recognizes is needed.
- Lack of oversight and monitoring of representatives/guardians
- The fact that a representative can obtain permission from the court to consent for the adult to undergo invasive procedures/treatments that represent a violation of the adult's human rights (section 34(2d & e).

We organize our recommendations to address these concerns into seven main areas:

1. Address Non-Compliance with the *Charter* and the UN *Convention on the Rights of Persons with Disabilities*
2. Definition of Capacity
3. Duty to Accommodate in Decision making
4. Legal Recognition and Provision for Making Supported Decision-Making Arrangements
5. Proactive Measures for Alternative Courses of Action
6. Prohibition on Measures that Could Harm Mental and Physical Integrity
7. Adequate Time and Process for Ensuring Regulations and Legislation are *Charter* and CRPD compliant

1. **Address Non-Compliance with the *Charter* and the UN *Convention on the Rights of Persons with Disabilities***

In *Webb,* the Nova Scotia Supreme Court clearly stated the requirements that must be met under Section 7 of the *Canadian Charter of Rights and Freedoms* for legislation regulating legal capacity. At paragraph 19 of that decision, the Court states:

> ... A law that provides that someone else is entitled to make all decisions for another clearly infringes the liberty and security of the person. Section 7 of the *Charter* permits interference with liberty and security only where the law does not violate principles of fundamental justice. Laws that do that cannot be arbitrary or overbroad, and cannot have consequences that are grossly disproportionate to their object.

Paragraphs 20-22 of the *Webb* decisions go on to state, in summary, that

- The object of the Incompetent Persons Act is to protect people who are incapable "from infirmity of mind" from managing their own affairs.
- Under the terms of the *Incompetent Persons Act* that protection is provided by the appointment of a guardian, which the Court found "is a rational and reasonable way to help that person".
- However, and critically important, the Court found that that measure is "overbroad".
- Every person with "infirmity of mind" is not incapable of managing their own affairs to the same extent. There is a spectrum of adult "infirmity of mind" that would warrant guardianship in respect of some matters, but not in respect of others. Competency is not an all or nothing thing.
- The Incompetent Persons Act takes an all or nothing approach. It allows for no nuance. It does not allow a court to tailor a guardianship order so that a person subject to that order can retain the ability to makes decisions in respect of those areas in which they are capable.

Bill 16 now before the Nova Scotia Legislature makes significant headway in addressing the ways in which Bill 16 violated s. 7 *Charter* rights:

- The statutory objects in Section 2 are expanded beyond the objects of the *Incompetent Persons Act* to also promise to "promote the dignity, autonomy, independence, social inclusion and freedom of decision-making" of these individuals, and to "ensure that the least restrictive and least intrusive supports and interventions are considered before an application is made or a representation order is granted" under the *Act.* As such, the bar for justifying the interference in section 7 *Charter* rights is arguably higher.
- Section 3.1(a) begins to recognize in the definition of capacity the 'nuance' in understanding what it means to be capable, that the Court called for in its decision in *Webb*, by providing that a person may meet the test of capacity "with or without support".

- Section 5.1 (c) sets a very high bar for the appointment of a guardian through a representation order by requiring that the court must be satisfied that any less intrusive and less restrictive measures available have been considered and would not likely be, or have been implemented and have not been, effective to protect and promote the adult's well-being and interests in financial matters.

In these ways, Bill 16 has got it right:

- It promises to promote the autonomy, independence, dignity, social inclusion and freedom of decision making of those who may lack capacity on their own to make their own decisions.
- It promises to make sure that the least restrictive supports and interventions are considered before imposing guardianship through a representation order
- It promises that in considering whether a person's impairments leave them incapable of exercising power over their own lives, that capacity will, for the first time in Nova Scotia, be recognized as a quantity that includes decision-making support. This is a breakthrough in recognizing equality rights of Nova Scotians with intellectual and other disabilities.
- It promises that the court can only impose guardianship through a representation order if it is satisfied that *in fact* less restrictive measures have been considered and were not available.

These are ground-breaking promises for people with intellectual and other disabilities, who for so long in this province have had their basic autonomy rights abused under the law, and who because of provincial policy and program measures have been left without the very supports they need to make and have power over their own personal, health care and financial decisions. This, the very hallmark of a free and democratic society, has been denied this group.

We applaud the government for making these promises to the people of Nova Scotia.

The problem is that the legislation as currently designed does not provide the measures that would make it possible to fulfill these promises. If implemented as drafted, the legislation sets up for failure people with intellectual and other disabilities, their families, the community support agencies and government disability support programs dedicated to advancing autonomy and inclusion for people with disabilities.

What is the main reason the bill fails to deliver on its promises? While it recognizes how essential decision-making support is to the exercise of capacity, to exercising autonomy, being included having freedom over decision making, it does not put into place the measures that would embed legal recognition of, and access to, supports that are essential.

We believe, that with some key amendments to this legislation this gap could be addressed. Without these support measures built into the legislation, however, the current provisions for finding people incapable are, by definition, arbitrary. They are overbroad and grossly

disproportionate to the objective to balance right to protection in the interests of one's life with the requirement to ensure autonomy and freedom in decision making. Without additional measures, there is simply no effective way to balance and guard against the interference in liberty that guardianship causes.

In addition to the violations of the *Charter,* the Bill also directly violates Article 12 of the UN *Convention on the Rights of Persons with Disabilities* by failing to ensure access to the supports persons with disabilities may require to exercise their right to legal capacity on an equal basis with others.

To address the imbalance in rights protections in the current draft, and to guard against non-compliance with the *Charter* and the CRPD we recommend the following changes to the draft Bill.

2. Definition of Capacity

The bill recognizes that supports can enable a person to become capable in decision making. However, it must be more clearly recognized and specified. As currently drafted it is vague and could be applied in arbitrary ways to deny a person's right to legal capacity, especially for those with more significant intellectual, cognitive and psychosocial disabilities. There is a significant body of research that shows the types of supports required:

- Personal planning – to envision the future and plan for needed decisions
- Independent rights advice and advocacy
- Personal relationship building – to assist in developing a network of decision-making supporters.
- Interpretive and translation provided by a support network for people with more significant disabilities

We recommend that the definition:

- Recognize that the understanding of the information relevant to the decision to be made and the appreciation of the reasonably foreseeable consequences of such decision or lack of such decision, may rest either,
  (a) within the adult herself or himself, and with decision-making supports and accommodations as needed for this purpose; or alternatively,
  (b) within the understanding, appreciation and fiduciary duty of the person(s) duly appointed to support the adult in exercising his or her legal capacity.

The Canadian Association for Community Living has drafted language for this purpose, in the draft model statute provided in Appendix B, section 3.

3. **Duty to Accommodate in Decision making**

The law must recognize a duty on other parties to accommodate a person in the decision-making process. This is needed to prevent non-discrimination based on disability, in the context of longstanding legal, bio-medical, and social assumptions that persons with intellectual, cognitive and psychosocial disabilities are unable to exercise capacity. The law should also require the Minister to develop guidelines for this purpose as part of the regulatory process.

4. **Legal Recognition and Provision for Making Supported Decision-Making Arrangements**

The legislation provides no 'second to last resort' to guardianship, and thus fails to meet the test for *Charter* compliance laid out by the Court in *Webb*. There is now a large body of evidence that supported decision making works. It has been implemented in other parts of Canada and around the world. It involves the appointment of decision making supporters to assist a person who, because of their impairment means they are unable to translate their will and preferences into specific decisions. To ensure full inclusion in this measure, the legislation should provide:

a) That a person can make this appointment on their own – an example of which is in the BC Representation Act, and also in the provisions for appointing powers of attorney for personal care in the Ontario legislation; or,
b) That decision-making supporters can apply to the Court or to the Public Trustee to be appointed in this capacity, where a person is unable to make this appointment on their own.
c) Safeguards would be needed, including: specified duties of decision-making supporters; a complaints system where supporters are not fulfilling duties; and provision for appointing monitors where support arrangements may be weak. Examples of these safeguards are in the BC Representation Agreement Act.

Draft provisions for all these purposes are in the CACL draft statute in Appendix A, in Parts 3, 4, 5 and 10.

5. **Proactive Measures for Alternative Courses of Action**

If the legislation is to deliver on the promise for making sure that the least restrictive supports and interventions are considered, then a process for exploring and arranging these supports is required. We recommend three main components to this process:

a) Empower the Minister of Community Services to designate community agencies to provide the planning and facilitation support individuals may require for establishing and maintaining a personal support network to assist in decision making. This is already the mandate of many existing community services providers in Nova Scotia. Decision-making support need not be a paid service. Family and community

members are already playing this role. However, they do not have legal recognition or a place to go to get back up support as needed for this purpose.

b) Require that as part of the capacity assessment process, that capacity assessors examine alternatives to a representation order. While the objects of the legislation promise that an individual's needs for support will be addressed, and alternatives must be considered in assessing their capacity, there is no requirement that this be considered in capacity assessment. Specifically:

- Assessment of alternatives and evidence of the exploration of alternatives to support a person's decision-making capacity should be required as part of capacity assessments under section 19(1).
- Development of guidelines for this purpose should be mandated as required under section 71 (1) (f) related to regulations.
- The Court should be required to consider evidence of alternative courses of action prior to making a representation order, and be required to impose strict time lines on the representative for developing alternative courses of action to enable decision-making supports to be developed sufficient to foster a person's decision-making capability.

6. Prohibition on Measures that Could Harm Mental and Physical Integrity

Provisions for the court to authorize a representative/guardian to consent for the adult to undergo aversive conditioning and invasive procedures/treatments including the removal of tissue and participation in research that is of no benefit to the person, represents a profound violation of the adult's human rights (section 34(2d & e), and must be removed.

7. Adequate Time and Process to Ensure Regulations and Legislation are *Charter* and CRPD compliant

We suggest that the changes needed to make the legislation *Charter* and *CRPD* compliant cannot be done within the time frame the government currently has. We urge that the government go back to the Court to ask for additional time to ensure that the legislation can be made *Charter*-compliant as per the Court's requirement.

Moreover, and in this regard, the draft consigns essential protections for human rights and for the machinery of supports for decision making and other fundamental matters to regulatory development. These are measures that should instead be addressed in the statute itself, and this is another reason for requesting additional time.

Given the importance of regulatory development of this legislation to balancing fundamental rights of Nova Scotians to have their autonomy protected, and their right to life protected in situations of vulnerability, the statute should incorporate an obligation for fulsome public consultation in development of regulations.