Untangling Capacity and Communication in the Law

A Practical Guide to Assessing Capacity for Lawyers

seniors first BC

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Research and writing by lawyer Sara Pon. Edits by Ryan Hardy, lawyer and the Seniors First BC legal team.

Note: The information in this guide should not be taken as legal advice. This material contains information and guidance for older adults seeking or receiving care and advocates and others who support them. We have made every effort to accurately reflect the law, policy and practice in this complex area of law as of December 2024. However, this is not a comprehensive legal guide. This area of law is constantly changing. For assistance with a specific legal issue, it is advisable to speak to an advocate or lawyer.

Seniors First BC can provide information, legal advice, and referrals to appropriate resources. If you need help with an issue that affects your well-being or the well-being of an older adult in British Columbia, contact the Seniors Abuse and Information Line (SAIL). Call toll-free at 1-866-437-1940 on weekdays from 8 am to 8 pm and weekends from 10 am to 5:30 pm, excluding statutory holidays. Language interpretation is available.

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Introduction

This guide is a resource for legal practitioners in British Columbia ("BC") delving into the world of client capacity.

Capacity is an often-misunderstood topic. This guide outlines what capacity is and what it is not in Chapter 1.

Lawyers have responsibilities under the Code of Professional Conduct and in human rights legislation when dealing with clients who may have reduced capacity. This guide sets out these responsibilities in Chapter 2.

Assessing capacity can be complicated, and there is no simple checklist to determine whether a client lacks capacity. There are client privacy and consent concerns. Medical capacity assessments may be needed, but must be weighed appropriately in the circumstances. This guide discusses the process of assessing capacity and some of the red flags to look out for in Chapter 3.

Lawyers must always be assessing their client's capacity to instruct them and to conduct the legal task at issue. This guide sets out some of the most common capacity tests a client may need to meet in Chapter 4.

There is a complicated relationship between communication and capacity. The law sets out that how a person communicates is not grounds alone to find them incapable. This guide sets out some ways to deal with communication barriers in Chapter 5.

Capacity can be enhanced or capacity can be reduced, depending on the circumstances. This guide will set out ways to improve capacity in Chapter 5.

Despite a lawyer's best efforts to enhance their client's capacity and ability to communicate, a client may be incapable of instructing their lawyer or completing the legal task. This guide discusses what to do when a client lacks capacity, including the different types of substitute decision-makers, in Chapter 6.

Chapter 1: Capacity

1.1 Introduction

This chapter outlines the basics of capacity. Capacity is also known as mental capacity, capability, or competence. This guide will use the term 'Capacity'.

This chapter will discuss the following:

- Defining capacity;
- Dispelling capacity myths;
- Discussing types of capacity;
- Differentiating between capacity and communication; and
- Discussing incapacity.

1.2 What is Capacity

1.2.1 Definition of Capacity

Capacity is a client's ability to make decisions about their life. Capacity applies to all types of decisions a client makes, from major legal, financial, and health care decisions to day-to-day decisions such as what to eat, how to dress, and what medications to take.[1]

There is no one definition of capacity. The definition changes, depending on what decision is being made and the jurisdiction. The common thread in the definitions of capacity is that it is functional, focusing on the ability to go through the decision-making process. It does not matter what decision is made, as capacity is neutral to the outcome of the decision. Generally, a client needs to be able to understand relevant information, evaluate the information, and appreciate the consequences of the decision.[2]

1.2.2 Capacity is Specific to the Decision, Time, and Situation

Capacity is decision specific. For each decision, a client's capacity must be assessed. Each decision a client makes requires a different level of capacity. From a legal perspective, each type of legal action has its own capacity test. Some decisions require more capacity, and some require less. However, capacity tests are not ranked on a list. Each type of capacity requires different elements, so it is not a simple sliding scale. If a

client is incapable of making one type of decision, they could still be capable of making different types of decisions.[3]

Capacity is time specific. Capacity must be assessed at the time the decision is being made. A client's capacity fluctuates over time, even from day to day or hour to hour. For example, a client with dementia may be better able to process information in the morning.[4]

Capacity is situation specific. Capacity differs based on the situation a client is in. Capacity can be impacted by a variety of things. Capacity can be increased or decreased by altering the situation. Capacity should be assessed when the situation is optimal to maximize the client's capacity.[5]

1.2.3 Increasing or Decreasing Capacity

Capacity is not static. Capacity changes over time. When a client has a medical condition that impacts their capacity, typically capacity decreases over time. However, a person's capacity could be impacted by temporary factors.[6] A client's capacity can be increased or decreased by a variety of factors. Things that can decrease capacity include:

- Medications;
- Health issues;
- Inadequate sleep;
- Hearing or vision loss;
- Grief;
- Depression and anxiety;
- Stress;
- The dying process;
- Lack of support;
- High sensory environments; and
- Long appointments with extensive information.[7]

A client's capacity can be increased or maximized. Chapter 5 will discuss ways to maximize a client's capacity and communication.

1.2.4 Dispelling Capacity Myths

There are many myths about capacity. This section will dispel some of these common capacity myths.

Capacity is not about best interests or correctness. A client does not have to make a good decision. A client can make decisions that will have a negative impact on them, and still be capable. A client does not have to make what others may see as the correct decision. While making bad decisions may be a red flag for incapacity, it is not alone enough to find a client incapable. Capacity is about being able to go through the decision-making process, not the outcome of the process.[8]

Capacity is not about risk. If a client is capable, they can choose to live at risk. All capable clients have the right to make risky decisions, and do so. Examples of risky decisions are a client not taking medication recommended by their doctor, living in unsafe conditions, and not eating regularly. While making risky decisions could be a sign of incapacity, living at risk is not sufficient alone to find a client is incapable. Capability is about being able to choose how to live.[9]

Capacity is not about rationally considering the decision. A client does not have to actually go through a rational decision-making process. Capable clients are allowed to make rash, unconsidered decisions. Capability is only about the ability to go through the decision-making process, not actually going through it.[10]

Capacity (and incapacity) are not global. If a client is incapable of making some decisions, they can still be capable of making other decisions. A client would typically lose capacity of making complicated decisions first, such as making financial investment decisions and considering major health care treatments. A client would still likely be capable of making minor decisions such as personal care decisions for quite a long time. Examples of minor decisions include deciding what to wear and who to visit with. Lawyers also cannot assume a client who is capable of making some decisions is capable of making all decisions. Capacity is about the specific decision at issue.[11]

Capacity is not about appearances. A client may not communicate well, may not behave as expected, or look unkempt. A client might be in their 90s or have many disabilities. These clients may still be capable. Lawyers cannot assume a client is incapable just because they present badly. Conversely, a client may be incapable but may present quite well. The client may look very well dressed and groomed, and may be able to engage in everyday conversations, but may lack capacity. Some people with reduced capacity have adapted very well and found ways to appear capable. Capacity is about assessing each client's capacity individually, despite how a client presents.[12]

Capacity is not about vulnerability. A client is not incapable simply because they have a disability or illness. A client can be vulnerable and still be capable. Capacity is about assessing a client's current decision-making abilities, not the potential negative factors. The Supreme Court of Canada made it clear in *Starson v Swayze* that a

person is not incapable just because they have a mental disorder. Capacity is about the ability to go through the decision-making process.[13]

A diagnosis of dementia does not mean a client is incapable. A client can still have decision-making capacity after being diagnosed with dementia, especially in the early and middle stages. Even a client with late-stage dementia can express wishes, values, and preferences. Additionally, there are many different types of dementia, all with different impacts on a client's capacity. A client with dementia still is presumed capable until there are signs that the client is incapable, and they are assessed as being incapable of making the specific decision at issue.[14]

1.3 Types of Capacity

Capacity applies to all decisions a client has to make. This guide focuses on capacity to make specific legal decisions. In the legal context, a client not only needs capacity to hire and instruct a lawyer, but also the legal task. Each of these legal tasks has its own capacity test that the client needs to meet. Legal capacity tests may come from the common law or from legislation. Legislated capacity tests include making a power of attorney, making a representation agreement, and consenting to health care. Common law capacity tests include entering into a contract, making a will, making an inter vivos gift, getting married, and getting divorced. Chapter 4 outlines each capacity test.

Capacity may become an issue in a variety of contexts. The most common type of decision where capacity comes up is medical decisions. A client needs capacity to consent or refuse medical tests and medical treatment. For each medical decision, a client's capacity must be assessed within the current circumstances.

Financial decisions require consent. A client need to consent to financial transactions on a regular basis to conduct their everyday lives. A client may also need to make bigger decisions, such as investing their money, running a business, or buying or selling a home. A client can be capable of some daily financial decisions, even when they are incapable of making decisions about their investments or real estate.

In a client's personal life, they need to consent to many things, such as having intimate relationships, deciding who to visit with, deciding what to wear, and participating in research. Personal care decisions also include where to live, such as in assisted living or long-term care. Most daily personal care decisions do not require a high level of capacity. Most clients, even those with reduced capacity, are still capable of making these decisions.

1.4 Capacity and Communication

How a client communicates and their capacity can seem at first glance to be intertwined. However, capacity is not about how clients communicate. Just because a client has a different method of communicating does not mean they are incapable.

The fact that capacity is not about communication is enshrined in legislation. There are 4 pieces of legislation that enshrine this – the *Adult Guardianship Act,*[15] the *Health Care (Consent) and Care Facility (Admission) Act,*[16] the *Representation Agreement Act,*[17] and the *Power of Attorney Act.*[18] The Acts specify that how a client communicates is not grounds to find that a client is incapable.

Ultimately, a client does need to communicate in order to instruct a lawyer. If a client cannot communicate in any way that the lawyer can understand, including through non-verbal communication, then the client cannot be found capable.

Lawyers should be making every effort to modify their communication techniques to maximize their client's ability to communicate. Clients living with a communication disability will need a different method of communicating. However, even clients without a communication disability may need communication supports to help them maximize their ability to communicate and demonstrate their capacity. For example, a client living with dementia may need a reduced amount of information, broken up into multiple sessions, with written material summarizing the main points to understand all the information and communicate their instructions.[19] Chapter 5 will discuss ways to improve communication and capacity.

1.5 Incapacity

All clients are presumed to be capable. There must be a finding of incapacity. A client is usually not found to be globally incapable. A client may be found to be incapable of making a type of decision, such as major financial decisions or legal matters. The client may still be capable of making other decisions, such as minor health care, personal care, or drafting a section 7 Representation Agreement.[20]

A finding of incapacity can be done in many ways, ranging from an informal to formal process. A doctor may find the client is not capable of making major health care decisions. A lawyer may find their client is incapable of making a will. A health authority may order an incapacity assessment when a client is being abused or neglected and a designated agency is investigating the allegations. In the most extreme case, a court may declare that the client is incapable and make a guardianship order.[21]

Chapter 2: Responsibilities as a Legal Professional

2.1 Introduction

This chapter discusses a lawyer's professional obligations and the human rights frameworks that guide a lawyer's ethical obligations to provide accommodations.

2.2 Professional Code of Conduct

The Law Society Code of Professional Conduct for British Columbia (the "BC Code") provides some guidance on when a client may lack capacity. Lawyers must assess whether their client has capacity. The Code requires that lawyers maintain a normal lawyer-client relationship to the best of their abilities if the client has impaired capacity.[22]

The BC Code states:

> **Clients with diminished capacity**
>
> 3.2-9 When a client's ability to make decisions is impaired because of minority or mental disability, or for some other reason, the lawyer must, as far as reasonably possible, maintain a normal lawyer and client relationship.[23]

The commentary for section 3.2-9 begins by outlining some of the basics of what capacity is.[24] See chapter 1 for a discussion of what capacity is.

The commentary states lawyers should not act for a client who is incapable. However, if the client has no substitute decision-maker and the client would experience imminent and irreparable harm, lawyers can act to protect the client's interests until a substitute decision-maker is appointed.[25]

If a client loses capacity after the lawyer-client relationship has already been established, lawyers have an ethical obligation to protect their client's interests until a substitute decision-maker is appointed. Lawyers may take steps to get a substitute decision-maker appointed, such as contacting the Public Guardian and Trustee.[26]

The BC Code allows lawyers to disclose confidential information if it is necessary to protect an incapable client's interests.[27] The commentary states:

> [10] The client's authority for the lawyer to disclose confidential information to the extent necessary to protect the client's interest may also be inferred in some situations where the lawyer is taking action on behalf of the person lacking capacity to protect the person until a legal representative can be appointed. In determining whether a lawyer may disclose such information, the lawyer should consider all circumstances, including the reasonableness of the lawyer's belief the person lacks capacity, the potential harm that may come to the client if no action is taken, and any instructions the client may have given the lawyer when capable of giving instructions about the authority to disclose information. Similar considerations apply to confidential information given to the lawyer by a person who lacks the capacity to become a client but nevertheless requires protection.[28]

2.3 Human Rights Legislation

BC's *Human Rights Code* states that no person can discriminate against or deny service to someone based on age or physical or mental disability.[29] Human rights legislation requires service providers to attempt to accommodate a person with a disability to enable them to access services.[30]

2.4 UN Convention on the Rights of Persons with Disabilities

Canada is a signatory to the United Nations Convention on the Rights of Persons with Disabilities (CRPD).[31] The CRPD contains important articles on the rights of people with disabilities that are relevant to lawyers.

Article 5 states:

1. State Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit before the law.
2. ….
3. In order to promote equality and eliminate discrimination, State parties shall take all appropriate steps to ensure that reasonable accommodation is provided.[32]

2.5 Enhancing Capacity

The CRPD and human rights legislation highlight the importance of recognizing the legal status of all people, even those with a disability that may affect their capacity. As was discussed in Chapter 1, capacity can fluctuate, and there are ways to increase a person's capacity. Lawyers must always be alert to a client's capacity, but must also be alive to how they can maximize a client's capacity and accommodate disabilities

their clients may have. If a client truly does not have capacity after the lawyer has tried to maximize capacity and accommodate disabilities, lawyers cannot act for that client. However, there is a lot that can be done to assist a client to maximize their capacity and recognize their legal status.[33] See Chapter 5 for how to enhance capacity and communication.

Chapter 3: Assessing Capacity

3.1 Introduction

This chapter gives an overview of the process of assessing capacity. This chapter will discuss:

- Red flags you should watch out for when assessing a client;
- Obtaining medical capacity assessments;
- Privacy concerns; and
- Final determinations on capacity.

3.2 The Presumption of Capacity

At law, all clients are presumed capable. This means that, when assessing capacity, lawyers assume a client is capable until lawyers have evidence to the contrary.

The presumption of capacity is enshrined into several pieces of legislation – the *Adult Guardianship Act,*[34] the *Health Care (Consent) and Care Facility (Admission) Act,*[35] the *Representation Agreement Act,*[36] and the *Power of Attorney Act.*[37] These Acts state that clients are presumed capable of making decisions. Additionally, the Acts state that a client's way of communicating is not grounds for finding the client is incapable. Some common law tests of capacity also presume capacity, including retaining counsel, making a will, and making a contract.[38]

3.3 Process of Assessing Capacity

Capacity is assessed for many things, including consenting to health care treatment or making financial decisions. When it comes to legal decision-making, lawyers are the ones deciding if their client has capacity to retain them and to complete the legal task at-issue. Even if a lawyer seeks a medical capacity assessment, the decision remains with the lawyer. A capacity assessment is a tool in assessing capacity, not the final determination.[39]

Lawyers should assess capacity at the time they are taking instructions. Any medical capacity assessment should also be within the same time frame as the lawyer is assessing capacity, as capacity can fluctuate. Lawyers should interview the client

alone even if there is a joint retainer, such as making mirror wills, so that each person's capacity can be assessed.[40]

When assessing a client's capacity, lawyers should use open ended questions. Lawyers should avoid using yes/no questions or leading questions as these questions do not get reliable answers or allow lawyers to delve into their client's capacity. Clients with reduced capacity may be well practiced in answering yes/no questions or leading questions to appear to have more capacity than they do.[41]

Lawyers must always consider whether their client is capable, regardless of who the client is, how the client appears, or what disabilities the client may be facing. Lawyers presume the client is capable, but watch for red flags that would put the client's capacity in doubt. Lawyers would then probe the red flags to see if they can be resolved by supporting the client, or whether the capacity concerns remain.[42]

3.4 Capacity Red Flags

There is no definitive list of what should raise lawyers' suspicion that a client lacks capacity. Lawyers must assess a client's capacity in the present circumstances for the specific legal task at issue on that day. However, there are some red flags that would raise lawyers' suspicions and lead them to examine a client's capacity more deeply.

Red flags can include functional difficulties:

- The client appears disoriented.
- The client has poor attention.
- The client has poor memory.
- The client lacks mental flexibility.
- The client struggles to make decisions.
- The client struggles to name their family members or what assets they have.[43]

Red flags can include certain behaviours:

- The client has limited ability to interact with the lawyer.
- The client does not respond to questions as expected.
- The client is acting overly emotional or erratic, and this is out of character.
- The client is experiencing delusions or hallucinations.
- The client appears very dependent on another person.
- The client is accompanied by another person and is letting the other person speak for them.
- The client has changed lawyers frequently.[44]

Red flags can include changes over time:

- The client is experiencing a major change to their functional abilities.
- The client is not acting according to their known values and beliefs.
- The client struggles with financial management when they previously were competent at it.
- The client is exhibiting inappropriate social behaviour when they previously did not.
- The client appears to have poor grooming or hygiene and they did not previously.
- The client's instructions are significantly different than previous instructions.
- The client has experienced a recent medical event or hospitalization.
- The client has recently been diagnosed with dementia.[45]

3.5 Medical Capacity Assessments

A medical capacity assessment is when a health care professional uses their medical lens to assess a person's capacity. The health care professional may use a screening test. There are a great multitude of capacity screening tests available, and they all differ on what type of functioning and cognition they are assessing.

Lawyers should not always get a medical capacity assessment just because a client is older, has a disability, or there are red flags. Lawyers should get a capacity assessment when lawyers cannot determine on their own whether the client has capacity, and this third-party assessment would help the lawyer draw a conclusion. Doing a medical capacity assessment can have major implications on a client's life if they are found incapable. The client may end up having to get a committee appointed, and this removes all of a client's decision-making rights.[46] See Chapter 6 for a discussion of when a client lacks capacity, including committees.

Various types of medical professionals can conduct a capacity assessment. Most are conducted by physicians. Lawyers may be able to find a geriatric psychiatrist to assess their client. The benefit of using a geriatric psychiatrist is they are experts in assessing capacity in older clients. But finding a geriatrician or psychiatrist is not necessary. Family physicians can also conduct capacity assessments. The advantage of using the client's own family physician is that the family physician usually has known the client a long time and has a view of a client's capacity over time. A capacity assessment may be conducted by other health care professionals such as social workers or nurse practitioners.[47]

When lawyers ask a medical professional to assess their client's capacity, lawyers should include a thorough letter detailing what they are looking for the medical professional to do. This would include:

- The purpose of the assessment;
- What the legal task is (i.e., making a will);
- What the legal capacity test is;
- Relevant facts about the client;
- The red flags about the client's capacity;
- Any evidence gathered about the client's capacity, history, and medical history;
- What capacity and communication supports were given the client; and
- Any other information that would be helpful.[48]

Lawyers would use the capacity reports when concluding about their client's capacity. Lawyers should be cautions about how much weight they give these medical capacity assessments. These medical capacity assessments are not the deciding factor in determining a client's capacity. Screening tests are only looking at one specific aspects of cognitive functioning. This may not correlate with the legal capacity test at issue. Additionally, capacity assessments may not be accurate when a client has a communication barrier, speaks English as a second language, or has a different cultural background.[49]

3.6 Client Privacy and Consent

There are some important privacy and consent concerns when assessing a client's capacity.

When assessing a client's capacity, lawyers should give their client information about what they are doing and why. Lawyers should let the client know if the lawyer has any concerns about the client's capacity.

If lawyers would like to obtain a medical capacity assessment, they need to obtain their client's consent, even lawyers are having suspicions about their capacity. If the client has a substitute decision-maker appointed and the client does not have capacity to consent to the capacity assessment, lawyers need to obtain the substitute decision-maker's consent. Even if a substitute decision-maker is consenting, the client needs to assent to the assessment. The assessment will not work if the client refuses to cooperate with the medical capacity assessment.[50]

A capacity assessment can be very invasive. Lawyers or the medical professionals may want to seek information from friends, family, or other medical professionals. Lawyers must be aware of who their client is. Lawyers must obtain the client's consent before

obtaining information from third parties. Lawyers must not share more than is necessary to obtain the needed information.[51]

3.7 Final Determination

Lawyers must make the final determination if their client has capacity to retain them, instruct them, and complete the legal task. Information gathered from friends, family, and medical professionals can help lawyers in their task, but these are not determinative.[52]

If lawyers decide the client has capacity, they can proceed to assist the client. If lawyers still question a client's capacity or conclude the client does not have capacity, lawyers cannot act for the client. As discussed in Chapter 2, lawyers may have some obligations to protect their client's interests and start the process to get a substitute decision-maker involved. Lawyers should consider whether they need to take any of these steps. See Chapter 6 for more details on what to do if a client lacks capacity, including the different types of substitute decision-makers.[53]

Regardless of whether lawyers conclude the client has capacity, lawyers should take thorough contemporaneous notes on the client's capacity.[54] Lawyers should include the following information in their notes:

- The questions asked;
- The client's answers;
- Any strategies used to enhance the client's capacity and communication;
- The client's appearance, mood, and behaviour;
- Other evidence collected about the client's capacity, such as medical capacity assessments;
- Any third parties spoken to;
- Anyone accompanying the client to the meeting;
- Anyone present during the appointment;
- The final conclusion on the client's capacity; and
- The reasons for coming to this conclusion.

Chapter 4: Legal Capacity Tests

4.1 Introduction

This chapter will outline some of the legal capacity tests that a client would have to meet. Legislated capacity tests include making a power of attorney, making a representation agreement, and consenting to health care treatment. Common law capacity tests include retaining and instructing counsel, making a will, making an inter vivos gift, entering into a contract, marrying, and divorcing.

4.2 Legislated Capacity Tests

4.2.1 Making a Power of Attorney

The *Power of Attorney Act*[55] specifies the capacity test a client needs to meet to make an Enduring Power of Attorney. To be capable of making an Enduring Power of Attorney, the client must understand the nature and consequences of the Enduring Power of Attorney.[56] The Act details what a client needs to understand:

- What property the client has;
- The approximate value of their property;
- The obligations they have to their dependents;
- The fact that the attorney is able to make any financial decisions that the client could make;
- The possibility that a client's assets could decline in value;
- The fact that the attorney could abuse their powers; and
- The fact that the client can revoke the Enduring Power of Attorney if capable.[57]

All clients are presumed capable of making an Enduring Power of Attorney, unless there is evidence to the contrary. The client's way of communicating is not grounds for finding someone incapable.[58]

4.2.2 Making a Representation Agreement

The *Representation Agreement Act*[59] specifies the capacity tests a client needs to meet to make a section 9 Representation Agreement and a section 7 Representation Agreement. See Chapter 5 for details on Representation Agreements.

A section 9 Representation Agreement requires a higher level of capacity than a section 7 Representation Agreement. To make a section 9 Representation Agreement, a client needs to understand the nature and consequences of an Representation Agreement.[60]

To make a section 7 Representation Agreement, a client does not need to have capacity to enter into a contract, manage their financial affairs, or manage their health care.[61] The client needs to be able to express their preferences, and want a person to help them make decisions. To assess capacity, the lawyer must assess all the relevant factors.[62] The *Representation Agreement Act* lists several factors that should be considered:

> (a)whether the adult communicates a desire to have a representative make, help make, or stop making decisions;
>
> (b)whether the adult demonstrates choices and preferences and can express feelings of approval or disapproval of others;
>
> (c)whether the adult is aware that making the representation agreement or changing or revoking any of the provisions means that the representative may make, or stop making, decisions or choices that affect the adult;
>
> (d)whether the adult has a relationship with the representative that is characterized by trust.[63]

All clients are presumed capable of making, changing, and revoking an Representation Agreement until there is evidence to the contrary. A client's method of communicating is not grounds for finding them incapable.[64]

4.2.3 Consenting to Health Care

The *Health Care (Consent) and Care Facility (Admission) Act*[65] sets out the requirements to consent to health care. First, a client needs to be able to understand the information that a medical professional is required to give the client. Second, a client needs to be able to apply this information to their situation.[66]

The medical professional is required to give the client information in order to make the decision. The medical professional must give the information a reasonable person would need to make a decision, including the client's health care condition, what treatment the health professional recommends, the risks and benefits of the recommended treatment, and the other treatment options.[67]

When seeking consent, medical professionals must communicate with the client "in a manner appropriate to the adult's skills and abilities".[68] Additionally, a client has a right to have a relative or friend assist them in understanding the information and how the information applies to their situation.[69]

All clients are presumed capable of giving, refusing, or revoking consent to health care or admission to a care facility, until there is evidence to the contrary. A client's method of communicating is not grounds for finding them incapable.[70]

4.3 Common Law Capacity Tests

4.3.1 Retaining and Instructing Counsel

The capacity for retaining and instructing counsel is broken up into two parts – a client must have capacity for retaining the lawyer, and have capacity for the specific legal task the client is hiring the lawyer for. For example, if a client is hiring a lawyer to make a will, the client needs to have both the capacity to retain the lawyer, and have testamentary capacity.[71]

The common law does not have a defined legal test for retaining counsel. Having capacity requires two things – having capacity to enter into a contract and having capacity to appoint an agent. The client generally needs to understand the information the lawyer is giving, their options, and the advice their lawyer gives. The client needs to be able to evaluate their options.[72]

First, a retainer is a contract, so a client needs to have capacity to enter into a contract. See section 4.3.4 below for the capacity to enter into a contract.

Second, the client has an ongoing relationship with the lawyer where the lawyer is acting as an agent. Therefore, the client must have capacity to appoint an agent. This requires the person to understand the nature and effect of making an appointment.[73]

A client is presumed to have capacity to retain counsel until there is evidence to the contrary.[74]

4.3.2 Making a Will

To be capable of making a will, a client must meet the *Banks v Goodfellow*[75] test. The capacity test requires a client to be of sound and disposing mind.[76] To be of sound and disposing mind, the client must know:

- The nature and effect of making a will;
- The nature and extent of their property;
- Who is set to inherit under the will;
- Who has a moral claim on their estate, including those who are excluded; and
- How their estate will be distributed under the will.[77]

Additionally, the client must be free of specific delusions that affect the subject matter of the will, and not subject to undue influence.[78] For more information on detecting undue influence, see the British Columbia Law Institute's Undue Influence Recognition & Prevention: A Guide for Legal Practitioners.[79]

For a properly executed will, a client is presumed to have been capable of making a will, until there is evidence to the contrary.[80]

4.3.3 Making an Inter Vivos Gift

There is no definitive capacity test for making an *inter vivos* gift. Generally, to be capable of making an inter vivos gift, a client must be able to understand the nature and effect of making the gift.[81]

The *Adult Guardianship Act* provides instruction on when a transfer of property can be voided. If the client making the transfer is incapable, the gift is voidable.[82] The transfer will not be voided if:

> (a)the interest was transferred for full and valuable consideration, and that consideration was actually paid or secured to the adult, or
>
> (b)at the time of the transfer, a reasonable person would not have known that the adult was incapable.[83]

4.3.4 Entering into a Contract

To be capable of making a contract, a client needs to understand the terms of the contract, and be able to consider the effect of the contract on their interests.[84]

There is a presumption that all clients are capable of making a contract. The contract is voidable if the other party knew or have ought to have known that the client was not capable of making a contract.[85]

Every client is presumed to be capable of making a contract. The burden to prove incapacity is on the person alleging incapacity.[86]

4.3.5 Marrying

To be capable of marrying, a client needs to understand the nature of the marriage contract, and the duties and responsibilities involved in a marriage. Marriage is considered a simple contract and does not require a high level of capacity.[87]

If a client lacked capacity to marry, the marriage would be void from the start. Capacity is considered at the time of the marriage ceremony. Just because a client has a substitute decision-maker appointed or is not capable of managing their financial affairs does not automatically mean that the client is incapable of marrying.[88]

4.3.6 Divorcing

The federal *Divorce Act* sets out the requirements for divorce, which include living separate and apart for at least a year, adultery, or cruelty. To be living separate and apart, only one of the spouses needed to have the intention to live separate and apart.[89]

The common law expands on what capacity is needed to divorce. To be capable of living separate and apart, a client needs to understand the nature and consequence of ending the marriage. The client intending to live separate and apart does not need to have capacity for the entire year. The client only needs to have had capacity at the start of the one-year period. A committee or litigation guardian can represent the client during the divorce proceedings.[90]

Chapter 5: Improving Communication and Capacity

5.1 Introduction

This chapter provides tips for maximizing a client's capacity and enhancing communication. These accessibility tips can be helpful for all clients, regardless of ability.

This chapter will discuss how lawyers can help their clients in the following areas:

- Scheduling the appointment;
- Conducting appointments;
- Use of language;
- Communicating verbally;
- Modifying the environment;
- Sharing information;
- Communicating non-verbally; and
- Using supported decision-making.

5.2 Scheduling the Appointment

When scheduling the appointment, lawyers can do the following things to help their client:

- Choose the time of day when the client is feeling their most alert, accounting for medication timing.
- Give clients an agenda ahead of time so they can be prepared for what will be discussed.
- If possible, schedule multiple appointments so the client does not have to make sudden decisions.
- Ask the client if they would prefer a longer meeting so they don't feel rushed, or a shorter meeting so they don't get tired.
- If the client has an acute medical condition that can be treated and the appointment can wait, schedule the appointment after the treatment has occurred. If a client is experiencing delirium, identify and manage symptoms to improve cognitive abilities.
- Remind the client to bring any sensory aids they need, such as hearing aids or reading glasses.[91]

5.3 Conducting Appointments

When conducting appointments, lawyers can do the following things to help their client:

- Put the client at ease at the beginning by breaking the ice.
- Ask the client if they have any preferred methods of communication and if there is anything that can be done to enhance communication and capacity.
- Give the client breaks during the meeting.
- Have each meeting cover a limited number of topics.
- Discuss one topic fully before moving on to the next topic.
- Break down information into meaningful chunks.
- Summarize key points covered.
- Ask questions in chronological order.
- Give the client lots of time to consider and respond after asking them a question.
- Give the client plain-language material summarizing what was discussed during the meeting.
- Give the client extra time to read.
- If the client struggles with vision or reading, read written material aloud to the client.
- Be aware of cultural, ethnic, or religious factors that can influence a person's communication style.[92]

5.4 Use of Language

When lawyers are communicating with their client, they can tailor their language to enhance the client's understanding:

- Use simple, straightforward language.
- Use short sentences.
- Use active voice.
- Don't use any technical legal terms; instead, explain them in plain language.
- Don't use abstract language. Keep language literal and straightforward.
- Rephrase important points.[93]

5.5 Communicating Verbally

When communicating verbally, lawyers can do the following things to enhance communication:

- Look at the client when speaking to them.
- Speak at a moderate pace and volume.
- User a lower pitch, as people with hearing loss have difficulty hearing high pitched sounds.
- For someone with hearing loss, use a digital amplifier.[94]

5.6 Modifying the Environment

When meeting with a client in the office, lawyers can make the following modifications to the physical environment to maximize their client's capacity and communication:

- Minimize background noise.
- Remove interruptions, such as ringing phones.
- Choose a location which affords privacy.
- Arrange the seating to sit face to face close together and maintain eye contact.
- Make sure there is adequate lighting for reading but the light is soft and indirect.
- Minimize glare by facing away from windows.
- Keep walking paths clear of obstacles.
- Make walking paths large enough to allow for a walker or wheelchair.[95]

5.7 Sharing Printed Information

When giving clients print information or letters, lawyers can do the following to increase the readability:

- Don't use glossy printed material.
- Don't use small font sizes.
- Avoid italics, as it can be difficult to read.
- Make use of headings and bullets.
- Use black letters on light coloured page.
- Write with a flush left edge and a ragged right edge.
- Don't use long sentences or paragraphs.
- Keep the material brief and on point.
- Use only one column for information.
- Avoid complex diagrams.[96]

5.8 Communicating with Non-Verbal Clients

When communicating with a client who has barriers to communicating verbally, lawyers can do the following things to enhance communication:

- Confirm with the client or their family and friends (with the client's consent) the best way to communicate with the client.
- Have a neutral third-party present who can help aid in communication, such as a speech-language pathologist.
- Make use of communication technology that the client may be using such as computers or letter boards.
- Use gestures to support what is said verbally.
- Use muscle movements, such as squeezing a hand or a thumbs up movement.
- Make sure body language matches what is said.
- Use visual aids, such as pictures of the people involved in the matter or illustrations.
- Use infographics or diagrams that explain information.
- Write or draw important words or concepts.
- Write down the options to help the client find the words they are looking for.
- Be on the lookout for non-verbal changes in behaviour or affect that could signal frustration or confusion.[97]

5.9 Using Supported Decision-Making

Capacity can be increased by having support. Supported decision-making is an important tool in maximizing capacity, and one that is enshrined in law. The *Representation Agreement Act*[98] allows a client to appoint a representative to support them in making personal care, health care, legal, or financial decisions.

Supported decision-making is when a trusted person supports the client to make a decision. The client retains their full decision-making capacity. The supporter assists the adult understand information, consider the decision, communicate their needs, values, and wishes, and take action to put the decision into effect. This is based on the idea that most people normally make decisions in an interdependent and social way – most people consult with friends or family when making important decisions.[99]

Supported decision-making is important for clients living with a disability because it can increase a client's capacity. A client living with dementia may be capable of making a decision with help when they may not have been able to on their own. Supported decision-making helps protect a client's decision-making rights.[100]

Supported decision-making is enshrined in law in BC. The *Representation Agreement Act* allows a person to appoint someone to be their representative to help them make decisions when they are capable, and make decisions for them when they are not capable.[101] There are two types of Representation Agreements (RAs):

- A section 9 RA is the most common RA to be made. This type of RA covers any type of health care and personal care decision that a person may need to make.[102]

- A section 7 RA was created to help people who have reduced capacity, but are still able to express a desire to have someone help them and choose a person. A section 7 RA covers a more limited range of health care, personal care, financial, and legal decisions.[103]

Supported decision-making contrasts with substitute decision-making. Substitute decision-making involves another person making a decision for the client when the client is not capable of making the decision. Even if a client is incapable of making the decision at-hand, they can still be involved in the decision-making process. The client can still express wishes and preferences. Clients should still be consulted even if they have lost capacity. The substitute decision-maker should make decisions based on the pre-expressed wishes, values, and beliefs of the client. Some substitute decision-making legislation has enshrined this requirement. [104] See Chapter 6 for information on the different types of substitute decision-makers.

While supported decision-making is an important and valuable tool for clients living with disabilities, lawyers should exercise their professional judgment. Lawyers need to make sure there is no possibility of undue influence or abuse. Lawyers should make it clear who their client is, and only take instructions from the client. The supporter should not be someone who has an interest in the legal matter. For example, no one who could expect to inherit under a will should be supporting the client. A third-party supporter is best. For example, if someone has barriers to communicating, a speech-language pathologist would be neutral to the matter and can provide communication assistance in an unbiased manner.[105]

Chapter 6: When a Client Lacks Capacity

6.1 Introduction

This chapter discusses the steps lawyers should take if their client lacks capacity. This chapter also discusses the different types of substitute decision-makers:

- An Attorney under a Power of Attorney document;
- A Representative under a Representation Agreement;
- A statutory guardian appointed under a statutory process;
- A committee appointed by the court; and
- A temporary substitute decision-maker for health care chosen by the health care provider.

6.2 What to Do if your Client Lacks Capacity

If a client lacks capacity, lawyers cannot act for the client. Lawyers should determine if the client already has a substitute decision-maker (representative, attorney, guardian, or committee) or a litigation guardian appointed. If the client already has one appointed and that substitute decision-maker can make legal decisions, lawyers can proceed to obtain instructions from the substitute decision-maker.[106]

If the client does not have a substitute decision-maker appointed, lawyers should determine if the client has interests that are in need of protecting until a substitute decision-maker is appointed. If so, lawyers may proceed to take the necessary steps of protecting the client's interests and getting an substitute decision-maker appointed. The next section will discuss the different types of substitute decision-makers and how to get them appointed.[107]

Appointing a substitute decision-maker is a last resort after a client's capacity has been maximized and the client still cannot make decisions for themselves. Appointing a substitute decision-maker takes away the client's right to make decisions for themselves. The least restrictive option should be chosen. A committeeship takes away most of a client's decision-making rights, so this should be a last resort.[108]

6.3 Substitute Decision-Making

6.3.1 What is Substitute Decision-Making?

Substitute decision-making is when a substitute decision-maker makes a decision on behalf of someone else who is not capable of making that decision. A client can write a legal document appointing an SDM. The document typically outlines the types of decisions the substitute decision-maker is allowed to make, such as health care decisions, personal care decisions, financial decisions, or legal decisions. A substitute decision-maker can also be appointed through a statutory or court process.

There are five types of substitute decision-makers in BC. The rest of this chapter will outline the details of the substitute decision-making mechanism, including how they are appointed, what decisions they can make, and how decisions must be made.

6.3.2 Power of Attorney

A Power of Attorney is a document where a client can appoint an substitute decision-maker to make financial and legal decisions on their behalf. The document sets out who the Attorney is and what powers they have. A Power of Attorney can start immediately, or be springing to a certain date or event occurring (typically to when a person becomes incapable). An Enduring Power of Attorney continues after the client is incapable.[109]

A Power of Attorney gives the Attorney significant power over the client's life. An Attorney can make decisions for a client even when that client is still capable. The Attorney can potentially have significant control over a client's finances, being able to do anything the client could do for financial decision making. This includes the Attorney controlling the client's business or selling their property.[110]

See section 4.2.1 for the capacity test for making a Power of Attorney document.

An Attorney must make their decisions based on the client's best interests, considering the client's wishes, values, and beliefs. The Attorney must follow any directions in the Power of Attorney document. The attorney does not have to obtain the consent or assent of the client before acting, but they do have a duty to encourage the client to be independent and be involved in decision-making as much as possible.[111]

6.3.3 Representation Agreements

A Representation Agreement is a document where a client can appoint a supported and substitute decision-maker to make health care, personal care, financial, and legal decisions. A section 9 Representation Agreement covers all types of health care and personal care. A section 7 Representation Agreement requires a lower level of capacity, and can cover major and minor health care, personal care, routine financial decisions, and some legal decisions. Because it requires a lower level of capacity, a section 7 Representation Agreement covers fewer decisions.[112]

See section 4.2.2 for the capacity test for making a Representation Agreement.

While a client is capable, the Representative can only act with the client's direction and consent. See section 5.7 for more details on supported decision-making. Once the client loses capacity for making the specific decision, the Representative can act on the client's behalf.[113]

When making decisions on behalf of the client, the Representative must make decisions in the following way:

- Act on the client's current wishes, if those are reasonable.
- If the client's current wishes are not known or are not reasonable, act on the client's instructions and expressed wishes made when the client was capable.
- If instructions and expressed wishes are not known, act on the client's known beliefs and values.
- If values and beliefs are not known, act based on the client's best interests.[114]

6.3.4 Committeeship

If a client is incapable and has not appointed an Attorney or Representative, the court can appoint a Committee of the Person (for personal and health care decisions) or a Committee of the Estate (for financial and legal decisions). A committee can make any decision that the client would have been able to when capable.[115]

Anyone can make an application to the court to declare the client incapable and appoint a committee.[116]

A committee must act based on the client's best interests. The committee has a duty to encourage the client to be independent and be involved in decision-making as much as possible.[117]

A person can nominate who they would like to be their committee while they are still capable.[118] However, this is very rare. If a person has enough capacity, they typically make a Power of Attorney and Representation Agreement instead.

The Public Guardian and Trustee can be appointed as committee if there is no one else available or suitable.

6.3.5 Statutory Property Guardianship

The *Adult Guardianship Act* allows the Public Guardian and Trustee to be appointed as Statutory Property Guardian through a statutory process. The process starts with a person contacting the Public Guardian and Trustee or a Designated Agency to let them know they are concerned a vulnerable client is not able to manage their own finances or may be experiencing abuse, neglect, or self-neglect. An incapacity assessment will be conducted by a health care provider. The client would then be declared incapable through a Certificate of Incapability. The Public Guardian and Trustee would become the Statutory Property Guardian. No court application or order is needed.[119]

If the Public Guardian and Trustee is appointed as Statutory Property Guardian, the Public Guardian and Trustee can make any financial or legal decisions the client could have made when capable.[120]

A Statutory Property Guardian must act based on the client's best interests. The Statutory Property Guardian has a duty to encourage the client to be independent and be involved in decision-making as much as possible.[121]

6.3.6 Temporary Substitute Decision-Maker for Health Care

A person may not have a Representative, committee, or guardian in place. If a health care decision needs to be made and there is no SDM in place, the *Health Care (Consent) and Care Facility (Admission) Act*[122] has a temporary process for finding a substitute decision-maker.

A health care provider would choose a substitute decision-maker from a ranked list, looking for the highest ranked person who is available and qualified. The list is as follows:

> (a)the adult's spouse;
> (b)the adult's child;
> (c)the adult's parent;
> (d)the adult's sibling;
> (d.1)the adult's grandparent;
> (d.2)the adult's grandchild;
> (e)anyone else related by birth or adoption to the adult;
> (f)a close friend of the adult;

(g)a person immediately related to the adult by marriage.[123]

A person is eligible if they are an adult, they have been in contact with the client in the last 12 months, they are not in a conflict with the client, and they are themselves capable of giving substitute consent. If no one from the ranked list can be found, the Public Guardian and Trustee would be appointed as Temporary Substitute Decision-Maker.[124]

The Temporary Substitute Decision-Maker only acts for the immediate time when a decision needs to be made. That person does not remain the Temporary Substitute Decision-Maker. For each different event when decisions need to be made, the health care professional will choose the highest ranked available and eligible person.

When the Temporary Substitute Decision-Maker is making a decision, they must consult with the client as much as possible. The Temporary Substitute Decision-Maker must act based on the instructions the client made when capable. If their wishes or instructions are not known, the Temporary Substitute Decision-Maker must make decisions based on the client's best interests. In considering the client's best interests, the Temporary Substitute Decision-Maker must consider the client's current wishes and known beliefs and values.[125]

[1] Whaley Estate Litigation Partners, *Whaley Estate Litigation Partners on Elder Law* (Toronto: Whaley Estate Litigation Partners, 2020) at 16-20, online: <welpartners.com/resources/WEL-on-elder-law.pdf> [WEL Partners]; Canadian Centre for Elder Law, *Conversations about Care: The Law and Practice of Health Care Consent for People Living with Dementia in British Columbia*, Report 10 (Vancouver: British Columbia Law Institute, 2019) at 74-97, online: <www.bcli.org/project/health-care-consent-aging-and-dementia-mapping-law-and-practice-in-british-columbia> [CCEL Conversations About Care]; West Coast LEAF and Canadian Centre for Elder Law, *Roads to Safety: Legal Information for Older Women in BC* (Vancouver, BC: West Coast LEAF, March 2017) at 18-29, online: West Coast LEAF <www.westcoastleaf.org/roads/> [WCL, Roads to Safety].

[2] WEL Partners, *Ibid* at 16-20; CCEL, Conversations About Care, *ibid* at 74-97 *;* WCL, Roads to Safety, *ibid* at 18-29*;* British Columbia Law Institute, *Report on Common-Law Tests of Capacity* Report 73 (Vancouver, BC: British Columbia Law Institute, 2013), online: <www.bcli.org/publication/report-on-common-law-tests-of-capacity> [BCLI Common-Law Capacity Report]; Kimberly A Whaley, "Capacity Considerations and Your Client" (4 December 2015), online: *Ontario Bar Association* <www.oba.org/just/archives_list/2015/fall_2015/capacity-considerations-and-your-client> [OBA]; Christine Vanderschoot, "Client Capacity – On the Rise in Family Law Cases" *Toronto Law Journal* (February 2020); Law Society of Alberta, "The Client with Questionable or Limited Capacity" (16 August 2023), online: <learningcentre.lawsociety.ab.ca/mod/page/view.php?id=205>; Kimberly A Whaley & Kate Stephens, "A Lawyer's Duties and Obligations Where Capacity, Undue Influence, and Vulnerability Are at Issue in a Retainer" (2018) 48:4 Advoc Q 385 at 390; Kimberly A Whaley & Ameena Sultan, "Capacity and the Estate Lawyer: Comparing the Various Standards of Decisional Capacity" (2013) 32:3 Est Tr & Pensions J 215 at 216; Lonny J Rosen & Eric Dobbelsteyn, "A Capacity Law Primer for the Family Law Lawyer" (2017) 47:4 Advoc Q 439 at 440; Kenneth I Shulman, Carmelle Pesiah, Robin Jacoby, Jeremia Heinik, & Sanford Finkel for the IPA Task Force on Testamentary Capacity and Undue Influence, "Contemporaneous assessment of testamentary capacity" (2009) 21:3 International Psychogeriatrics 433 at 343.

[3] WEL Partners, *ibid;* CCEL, Conversations About Care, *ibid;* WCL, Roads to Safety, *ibid;* BCLI Common-Law Capacity Report, *ibid*; OBA, *ibid*; Kimberly A Whaley & Albert H Oosterhoff, "Predatory Marriages" (2018) 48:3 Advoc Q 253 at 255; Kimberly A Whaley, Kenneth I Shulman, & Kerri L Crawford, "The Myth of Hierarchy of Decisional Capacity: A Medico-Legal Perspective" (2016) 45:4 Advoc Q 395 at 401-403; Whaley & Sultan, *ibid* at 218; Kenneth I Shulman, Susan G Himel, Ian M Hull, Carmelle Peisah, Sean Amodeo, & Courtney Barnes, "Banks v Goodfellow (1870): Time to Update the Test for Testamentary Capacity" (2017) 95 Can Bar Rev 251 at para 16; Ann Soden, "Beyond Incapacity" (2011) 5:2 MJLH 295 at para 4; Law Society of Ontario, "Guide to navigating client capacity concerns" (14 August 2024), online: <lso.ca/lawyers/practice-supports-and-resources/topics/the-lawyer-client-relationship/guide-to-navigating-client-capacity-concerns>.

[4] WEL Partners, *ibid;* CCEL, Conversations About Care, *ibid;* WCL, Roads to Safety, *ibid;* BCLI Common-Law Capacity Report, *ibid*; OBA, *ibid*; Whaley & Oosterhoff, *ibid*; Whaley, Shulman & Crawford, *ibid*; Whaley & Sultan, *ibid* at 218; Shulman, Himel, et al., *ibid*; Soden, *ibid;* Shulman, Pesiah, et al., *supra* note 2 at 434-435; Law Society of Ontario, *ibid*.

[5] WEL Partners, *ibid;* CCEL, Conversations About Care, *ibid;* WCL, Roads to Safety, *ibid;* BCLI Common-Law Capacity Report, *ibid*; OBA, *ibid*; Whaley & Oosterhoff, *ibid*; Whaley, Shulman, & Crawford, *ibid*; Whaley & Sultan, *ibid* at 219; Shulman, Himel, et al., *ibid*; Soden, *ibid;* Law Society of Ontario, *ibid*.

[6] OBA, *supra* note 2; WEL Partners, *ibid* at 17; Whaley & Oosterhoff, *ibid*; Shulman, Peisah, et al., *supra* note 2 at 434-435.

[7] WEL Partners, *ibid* at 18; Carmelle Pesiah et al., "Deathbed wills: assessing testamentary capacity in the dying patient" (2014) 26:2 International Psychogeriatrics 209 at 211-212; Kelly Purser & Tuly Rosenfeld, "Too ill to will? Deathbed wills: assessing testamentary capacity near

the end of life" (2016) 45 Age and Ageing 334 at 334; American Bar Association & American Psychological Association, *Assessment of Oler Adults with Diminished Capacities: A Handbook for Lawyers* 2nd ed (Washington, DC: American Bar Association, 2021) at 36-37 [ABA, Assessment Handbook]; American Bar Association, *PRACTICAL Tool for Lawyers: Steps in Supporting Decision-Making* (Chicago: American Bar Association, 2016), online: <www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/practipra_tool/> [ABA, PRACTICAL Tool] at 11-13; The Law Society of New South Wales, *When A Client's Mental Capacity is in Doubt: A Practical Guide for Solicitors* (Sydney: The Law Society of New South Wales, 2016), online: <www.lawsociety.com.au/sites/default/files/2018-03/Clients%20mental%20capacity.pdf> at 17-18.

[8] OBA, *supra* note 2; Vanderschoot, *supra* note 2; WEL Partners, *ibid* at 19; Whaley & Sultan, *supra* note 2 at 219-220; Rosen & Dobbelsteyn, *supra* note 2 at 440, 447; Law Society of Ontario, *supra* note 3.

[9] Soden, *supra* note 3 at para 6.

[10] OBA, *supra* note 2; Vanderschoot, *supra* note 2; Rosen & Dobbelsteyn, *supra* note 2 at 440; Margaret Isabel Hall, "Mental Capacity in the (Civil) Law: Capacity, Autonomy, and Vulnerability" (2012) 58:1 McGill LJ 61 at para 15.

[11] Whaley, Shulman, & Crawford, *supra* note 3 at 401-403; Soden, *supra* note 3 at para 7.

[12] New South Wales Government, *Capacity Toolkit: Information for government and community workers, professionals, families and carers in New South Wales* (Parramatta: New South Wales Department of Communities and Justice, 2020), online: <dcj.nsw.gov.au/resources/capacity-toolkit.html> at 33; Legal Aid ACT, *Capacity Guidelines: A Practical Guide for Legal Practitioners* (Sydney: Law Society of New South Wales, 2020) online: <www.legalaidact.org.au/publication/capacity-guidelines-a-practice-guide-for-legal-practitioners>; Law Society of Ontario, *supra* note 3.

[13] *Starson v Swayze,* 2003 SCC 32 (CanLii), [2003] 1 SCR 722; OBA, *supra* note 2; Vanderschoot, *supra* note 2; WEL Partners, *supra* note 1 at 18-19; Whaley & Sultan, *supra* note 2 at 219-220; Rosen & Dobbelsteyn, *supra* note 2 at 447; Law Society of Ontario, *ibid.*

[14] Whaley & Sultan, *ibid* at 219; Seva Batkin & Valeria Dixon, "Capacity to Instruct Counsel" (2011) 69:1 Advocate (Vancouver) 29 at 35; Soden, *supra* note 3 at para 8; Himaja Aravind, Mark Taylor, & Neeraj Gill, "Evaluation of testamentary capacity: A systemic review" (2024) 93 Int J Law & Psychiatry 1 at 2; Law Society of Ontario, *ibid.*

[15] *Adult Guardianship Act,* RSBC 1996, c 6, online: <canlii.ca/t/84gj> [*AGA*].

[16] *Health Care (Consent) and Care Facility (Admission) Act,* RSBC 1996, c 181, online: <canlii.ca/t/842m> [*HCCCFAA*].

[17] *Representation Agreement Act,* RSBC 1996, c 405, online: <canlii.ca/t/84bw> [*RAA*].

[18] *Power of Attorney Act,* RSBC 1996, c 370, online: <canlii.ca/t/849l> [*POAA*].

[19] Krista James & Kevin Love, "Representing Clients with Capacity Issues", *Bar Talk* (June 2021), online: *CBA British Columbia* <www.cbabc.org/BarTalk/Articles/2021/June/Features/Representing-Clients-with-Capacity-Issues>; Kelly Purser & Jane Lonie, "Mapping dementia and cognitive decline in testamentary capacity" (2019) 66 Int J of Law & Psychiatry 1 at 5.

[20] WEL Partners, *supra* note 1*;* CCEL, Conversations About Care, *supra* note 1*;* WCL, Roads to Safety, *supra* note 1*;* BCLI Common-Law Capacity Report, *supra* note 2.

[21] WEL Partners, *ibid;* CCEL, Conversations About Care, *ibid;* WCL, Roads to Safety, *ibid;* BCLI Common-Law Capacity Report, *ibid*.

[22] The Law Society of British Columbia, *Code of Professional Conduct for British Columbia,* Vancouver: Law Society of British Columbia, 2013, ch 3.2-9 [BC Code].

[23] BC Code, *ibid.*

[24] BC Code, *ibid,* commentary 1.

[25] BC Code, *ibid,* commentary 2.

[26] BC Code, *ibid,* commentary 3.

[27] BC Code, *ibid,* ch 3.3-1, commentary 10.

[28] BC Code, *ibid.*

[29] *Human Rights Code,* RSBC 1996, c 210, s 8 [BC *HRC*].

[30] James & Love, *supra* note 19;
[31] *Convention on the Rights of Persons with Disabilities,* 12 December 2006 A/RES/61/106 (entered into force 3 May 2008) [CRPD].
[32] CRPD, *ibid,* art 5.
[33] James & Love, *supra* note 19; Ontario Human Rights Commission, "Policy on preventing discrimination based on mental health disabilities and addictions" at 16. Consent and capacity, online: <www3.ohrc.on.ca/en/policy-preventing-discrimination-based-mental-health-disabilities-and-addictions/16-consent-and>; Kimberly A Whaley, "Capacity to Instruct Counsel" (2020) 50(4) Advoc Q 388 at 399; Rosen & Dobbelsteyn, *supra* note 2 at 448-449; Nicholas Caivano, "Conceptualizing Capacity: Interpreting Canada's Qualified Ratification of Article 12 of the UN Disability Rights Convention" (2014) 4:1 UWO J Leg Stud 3 at 10-11; ABA, Assessment Handbook, *supra* note 7 at 6; British Medical Association & The Law Society (England & Wales), *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers,* 5th ed, edited by Alex Ruck Keene (London: The Law Society, 2022) at 60-62; The Law Society (England & Wales), "Meeting the needs of vulnerable clients" (29 November 2022), online: <www.lawsociety.org.uk/topics/client-care/meeting-the-needs-of-vulnerable-clients> [The Law Society (England & Wales), Vulnerable Clients]; United Kingdom, Department for Constitutional Affairs, *Mental Capacity Act 2005 Code of Practice* (London: The Stationery Office, 2007), online: <www.gov.uk/government/publications/mental-capacity-act-code-of-practice>; Law Society of Scotland, "B1.5: Vulnerable Clients Guidance" (2022), online: <www.lawscot.org.uk/members/rules-and-guidance/rules-and-guidance/section-b/rule-b1/guidance/b1-5-vulnerable-clients-guidance/>; Alison Douglass, *Mental Capacity: Updating New Zealand's Law and Practice (Report for the New Zealand Law Foundation)* (Dunedin: New Zealand Law Foundation, July 2016), online: <www.barristerschambers.co.nz/mcap/assets/Full_Report.pdf> at 46-48; Law Society of Ontario, *supra* note 3.
[34] *AGA, supra* note 15.
[35] *HCCCFAA, supra* note 16.
[36] *RAA, supra* note 17.
[37] *POAA, supra* note 18.
[38] BCLI Common-Law Capacity Report, *supra* note 2 at 162; CED (online), *Parties* (Western), "Mentally Incapacitated Persons" (II.A) at § 6; CED (online), *Wills,* "Mental Capacity: Evidence" (III.A.2) at § 21; WEL Partners, *supra* note 1 at 185; Whaley & Oosterhoff, *supra* note 3 at 255; Whaley, Shulman, & Crawford, *supra* note 3 at 401; Whaley & Sultan, *supra* note 2 at 219; Batkin & Dixon, *supra* note 14 at 32; Rosen & Dobbelsteyn, *supra* note 2 at 440; Soden, *supra* note 3 at para 6.
[39] Whaley, Shulman, & Crawford, *ibid* at 401; Law Society of Ontario, *supra* note 3.
[40] WEL Partners, *supra* note 1 at 17; Whaley & Oosterhoff, *supra* note 3 at 256; Whaley & Stephens, *supra* note 2 at 391; Soden, *supra* note 3 at para 9; Shulman, Peisah, et al., *supra* note X at 436; Law Society of Ontario, *ibid*.
[41] Canadian Centre for Elder Law, *Study Paper on Supporting Vulnerable Victims & Witnesses*, Study Paper 12 (Vancouver: British Columbia Law Institute, 2023) at 77, online: <www.bcli.org/wp-content/uploads/CCEL_VulnerableWitnessesPaper.pdf> [CCEL, Supporting Vulnerable Victims]; Whaley, *supra* note 33 at 299; Law Society of Ontario, *ibid*.
[42] WEL Partners, *supra* note 1 at 183-185; Whaley & Oosterhoff, *supra* note 3 at 257; Law Society of Ontario, *ibid*.
[43] Whaley, Shulman, & Crawford, *supra* note 3 at 397-398; Whaley & Sultan, *supra* note 2 at 248; Whaley, *supra* note 33 at 398; Rosen & Dobbelsteyn, *supra* note 2 at 447; ABA, Assessment Handbook, *supra* note 7 at 43; Legal Aid ACT, *supra* note 12 at 7; The Law Society of New South Wales, *supra* note 7 at 7, 16; Queensland Government, *Queensland Capacity Assessment Guidelines 2020* (Brisbane: State of Queensland Department of Justice and Attorney-General, 2020) online: <www.publications.qld.gov.au/dataset/capacity-assessment-guidelines/resource/23e5bde1-40d7-4115-a15d-c15165422020> at 24-25; Queensland Law Society, *Queensland Handbook for Practitioners on Legal Capacity* (Brisbane: Queensland Law

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[45] Whaley, Shulman, & Crawford, *ibid* at 397-398; Whaley & Sultan, *ibid* at 248; Whaley, *supra* note 33 at 398; Rosen & Dobbelsteyn, *ibid* at 447; ABA, Assessment Handbook, *ibid* at 43; Legal Aid ACT, *ibid* at 7; The Law Society of New South Wales, *ibid* at 7, 16; Queensland Government, *ibid* at 24-25; Queensland Law Society, *ibid* at 57-58; Law Institute Victoria, *ibid.*
[46] OBA, *supra* note 2; WEL Partners, *supra* note 1 at 186; Whaley & Stephens, *supra* note 2 at 391; Rosen & Dobbelsteyn, *ibid* at 449; ABA, Assessment Handbook, *ibid* at 10-11; British Medical Association, *supra* note 33 at 257-263.
[47] British Medical Association, *ibid* at 261-263; The Law Society of New South Wales, *supra* note 7 at 9.
[48] Whaley & Sultan, *supra* note 2 at 250; Rosen & Dobbelsteyn, *supra* note 2 at 450; ABA, Assessment Handbook, *supra* note 7 at 52; British Medical Association, *ibid* at 257-258; The Law Society (England & Wales), "Working with clients who may lack mental capacity" (27 June 2023), online: <www.lawsociety.org.uk/topics/client-care/working-with-clients-who-may-lack-mental-capacity> [The Law Society (England & Wales), Working with Clients]; Legal Aid ACT, *supra* note 12 at 11; Law Institute Victoria, *supra* note 43.
[49] Law Commission of Ontario, *Legal Capacity, Decision-making and Guardianship: Final Report* (March 2017, Toronto: Law Commission of Ontario) at V. Assessing Legal Capacity: Improving Quality and Consistency, online: <www.lco-cdo.org/wp-content/uploads/2017/03/CG-Final-Report-EN-online.pdf>; Whaley & Oosterhoff, *supra* note 3 at 257-258; Whaley, Shulman, & Crawford, *supra* note 3 at 398-401; Rosen & Dobbelsteyn, *ibid* at 449; Soden, *supra* note 3 at para 5-6; Queensland Law Society, *supra* note 43 at 33-34.
[50] Whaley & Sultan, *supra* note 2 at 250; Law Society of Ontario, *supra* note 3.
[51] WEL Partners, *supra* note 1 at 179; Law Society of Ontario, *ibid.*
[52] Whaley & Oosterhoff, *supra* note 3 at 257-258; Law Society of Ontario, *ibid.*
[53] OBA, *supra* note 2; Law Society of Ontario, *ibid.*
[54] OBA, *ibid*; James & Love, *supra* note 19; Whaley & Sultan, *supra* note 2 at 249; Rosen & Dobbelsteyn, *supra* note 2 at 448.
[55] *POAA, supra* note 18.
[56] *POAA, ibid,* s 12(1).
[57] *POAA, ibid,* s 12(2).
[58] *POAA, ibid,* s 11.
[59] *RAA, supra* note 17.
[60] *RAA, ibid,* s 10.
[61] *RAA, ibid,* s 8(1)
[62] *RAA, ibid,* s 8(2).
[63] *RAA, ibid,* s 8(2).
[64] *RAA, ibid,* s 3.
[65] *HCCCFAA, supra* note 16.
[66] *HCCCFAA, ibid,* s 7.
[67] *HCCCFAA, ibid,* s 6(e).
[68] *HCCCFAA, ibid,* s 8(a).
[69] *HCCCFAA, ibid,* s 8(b).
[70] *HCCCFAA, ibid,* s 3.
[71] James & Love, *supra* note 19;
[72] BCLI Common-Law Capacity Report, *supra* note 2 at 160-163; James & Love, *ibid*; Whaley, *supra* note 33 at 388-392.
[73] *Ibid.*
[74] BCLI Common-Law Capacity Report, *supra* note 2 at 162.

[75] *Banks v Goodfellow,* (1870), LR 5 QB 549; BCLI Common-Law Capacity Report, *ibid* at 25-28; CED (online), *Wills,* "Sound Disposing Mind and Memory" (III.A.2) at § 17; Halsbury's Laws of Canada (online), *Wills and Estates*, "Soundness of Mind, Memory, and Understanding: Overview" (I.2.(3)(a)) at HWE-19 (2024 Reissue); Shulman, Himel, et al., *supra* note 3 at para 5-13; Law Society of Ontario, *supra* note 3.
[76] *Ibid.*
[77] *Ibid.*
[78] *Ibid.*
[79] British Columbia Law Institute, "Undue Influence Recognition / Prevention Guide Update Project", online: <www.bcli.org/project/undue-influence-recognition-prevention-guide-update-project/>.
[80] CED (online), *Wills,* "Mental Capacity: Evidence" (III.A.2) at § 21; Halsbury's Laws of Canada (online), *Wills and Estates,* "Presumption of Capacity" (I.2(3)(e)(ii)A) at HWE-24 (2024 Reissue).
[81] BCLI Common-law Capacity Report, *supra* note 2 at 94-103; CED (online) *Mental Incapacity* (Western), "Gifts Inter Vivos" (III.B) at § 16.
[82] *AGA, supra* note 15, s 60.2.
[83] *AGA, ibid*, s 60.2(1).
[84] *Bank of Nova Scotia v Kelly* (1973), 1973 CarswellPEI 31 (PEI SC); BCLI Common-Law Capacity Report, *supra* note 2 at 134, 140; CED (online), *Mental Incapacity* (Western), "Contracts: General" (III.A) at § 62; Halsbury's Laws of Canada (online), *Contracts,* "Persons of Unsound Mind" (VII.2(2)) at HCO-101 (2021 Reissue).
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[86] CED (online), *Mental Incapacity* (Western), "Contracts: General" (III.A) at § 62.
[87] *Durham v Durham* (1885), 10 PD 80, [1885] 1 TLR 338 (Eng PDA); BCLI Common-law Capacity Report, *supra* note 2 at 178; CED (online), *Mental Incapacity* (Western), "Capacity to Marry" (III.E.1) at § 78.
[88] *Ibid.*
[89] *Divorce Act,* RSC 1985, c 3 (2nd Supp) at s 8.
[90] BCLI Common-law Capacity Report, *supra* note 2 at 198-199, 201-202.
[91] James & Love, *supra* note 19; CCEL, Supporting Vulnerable Victims, *supra* note 41 at 67; Simon Zuscak, Ian Coyle, Patrick Keyzer, & M Anthony Machin, "The marriage of psychology and law: testamentary capacity" (2019) 26:4 Psychiatry, Psychology and Law 614 at 623; Alison Ferguson, Linda Worrall, John McPhee, Rhonda Buskell, Elizabeth Armstrong, & Leanne Togher, "Testamentary capacity and aphasia: A descriptive case report with implications for clinical practice" (2003) 17:10 Aphasiology 965 at 970; Pesiah et al., *supra* note 7 at 212; Purser & Rosenfeld, *supra* note 7 at 334-336; ABA, Assessment Handbook, *supra* note 7 at 14; British Medical Association, *supra* note 33 at 18-19; The Law Society (England & Wales), Working with Clients, *supra* note 48; United Kingdom, Department of Constitutional Affairs, *supra* note 33 at 36; The Scottish Government, *Communication and Assessing Capacity: A guide for social work and health care staff* (Edinburgh: The Scottish Government, January 2008), online: <www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2008/02/adults-incapacity-scotland-act-2000-communication-assessing-capacity-guide-social-work-health-care-staff/documents/0055759-pdf/0055759-pdf/govscot%253Adocument/0055759.pdf> at 10-11; Douglass, *supra* note 33 at 243-244; Tan Shen Kiat & Tan Kah Wai, "The Client's Mental Capacity to Litigate – A Few Pointers on Practice" *Singapore Law Gazette* (September 2023), online: <lawgazette.com.sg/feature/the-clients-mental-capacity-to-litigate/>; Alvin Chen & Stella Chen, "Risk Factors in Interviewing and Advising Elderly Clients – The 5Cs" *Singapore Law Gazette* (January 2019), online: <lawgazette.com.sg/practice/compass/risk-factors-in-interviewing-and-advising-elderly-clients-the-5cs/>; ABA, PRACTICAL Tool, *supra* note 7 at 10; New South Wales Government, *supra* note 12 at 43; Legal Aid ACT, *supra* note 12 at 8; The Law Society of New South Wales, *supra* note 7 at 19-20; Queensland Government, *supra* note 43 at 32; Queensland Law Society, *supra* note 43 at 27-32; Moss Rehabilitation Research institute, "Facilitating Informed Consent for People with Aphasia and Cognitive Impairment: Breaking through Communication Barriers

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[92] James & Love, *ibid*; CCEL, Supporting Vulnerable Victims, *ibid* at 78; ABA, Assessment Handbook, *ibid* at 16; British Medical Association, *ibid* at 18-19; The Law Society (England & Wales), Working with Clients, *ibid*; The Law Society (England & Wales), Vulnerable Clients, *supra* note 33; United Kingdom, Department of Constitutional Affairs, *supra* note 33 at 32-33; The Scottish Government, *ibid* at 9-10; Douglass, *ibid* at 244; Kiat & Wai, *ibid*; New South Wales Government, *ibid* at 28-29; Legal Aid ACT, *ibid* at 8; The Law Society of New South Wales, *ibid* at 19-20; Queensland Government, *ibid* at 31; Queensland Law Society, *ibid* at 27-32; Moss Rehabilitation Research Institute, *ibid*; Alzheimer Society of Canada, *ibid* at 10-11; Public Health Agency of Canada, "Age-Friendly Communication: Facts, Tips and Ideas" (2010), online: <www.canada.ca/en/public-health/services/publications/healthy-living/friendly-communication-facts-tips-ideas.html> at 18; National Institute of Health, "Communicating with someone with aphasia" (13 June 2024), online: *MedlinePlus* <medlineplus.gov/ency/patientinstructions/000024.htm>; CDAC, Accessible Communication, *ibid* at 20-21; Law Society of Ontario, *ibid*.

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[94] James & Love, *ibid*; CCEL, Supporting Vulnerable Victims, *ibid* at 73, 78; Ferguson et al., *supra* note 91 at 973; ABA, Assessment Handbook, *ibid* at 15; British Medical Association, *ibid* at 19; United Kingdom, Department of Constitutional Affairs, *supra* note 33 at 32-33; The Scottish Government, *ibid* at 9-10; ABA, PRACTICAL Tool, *ibid* at 16; The Law Society of New South Wales, *supra* note 7 at 20; National Institute of Health, *supra* note 92; National Aphasia Association, *ibid*; Alzheimer's Society (UK), *supra* note 91; CDAC, Accessible Communication, *ibid* at 9.

[95] ABA, Assessment Handbook, *ibid* at 15-16; British Medical Association, *ibid* at 19; The Law Society (England & Wales), Vulnerable Clients, *supra* note 33; United Kingdom, Department for Constitutional Affairs, *supra* note 33 at 35-36; The Scottish Government, *ibid* at 10-11; Douglass, *supra* note 33 at 244; Chen & Chen, *supra* note 91; New South Wales Government, *supra* note 12 at 151-152; Legal Aid ACT, *supra* note 12 at 8; The Law Society of New South Wales, *ibid* at 20; Queensland Law Society, *supra* note 43 at 27-32; Alzheimer Society of Canada, *supra* note 91; Public Health Agency of Canada, *supra* note 92 at 20-21; National Institute of Health, *ibid*; National Aphasia Association, *ibid*; Alzheimer's Society (UK), *ibid*; CDAC, Accessible Communication, *ibid* at 9-10.

[96] Ontario Human Rights Commission, *supra* note 33; ABA, Assessment Handbook, *ibid* at 16; The Law Society (England & Wales), Vulnerable Clients, *ibid*; The Law Society of New South Wales, *ibid* at 20; Queensland Government, *supra* note 43 at 32; Queensland Law Society, *ibid* at 27-32; Moss Rehabilitation Research Institute, *supra* note 91; Alzheimer Society of Canada, *ibid*; Public Health Agency of Canada, *ibid*; CDAC, Accessible Communication, *ibid* at 20-21; Law Society of Ontario, *supra* note 3.
[97] CCEL, Supporting Vulnerable Victims, *supra* note 41 at 68, 72; Zuscak et al., *supra* note 91; Ferguson et al., *supra* note 91 at 967; Daniel Marson, "Topical Issues in Contemporaneous Assessment of Testamentary Capacity" (2022) 15 Psychological Injury and Law 357 at 362; British Medical Association, *supra* note 33 at 18-19; The Law Society (England & Wales), Vulnerable Clients, *ibid*; United Kingdon, Department for Constitutional Affairs, *supra* note X at 32-33; Law Society of Scotland, *supra* note 33; The Scottish Government, *supra* note 91 at 9-10; Douglass, *supra* note 33 at 244; Chen & Chen, *supra* note 91; ABA, PRACTICAL Tool, *supra* note 7 at 14-16; New South Wales Government, *supra* note 12 at 42; Legal Aid ACT, *supra* note 12 at 8; The Law Society of New South Wales, *ibid* at 20; Queensland Government, *ibid* at 31; Queensland Law Society, *ibid* at 27-32; Moss Rehabilitation Research Institute, *ibid*; CDAC, Consent to Treatment, *supra* note 91; Alzheimer Society of Canada, *ibid*; National Institute of Health, *supra* note 92; National Aphasia Association, *supra* note 93; Alzheimer's Society (UK), "Non-verbal communication and dementia" (19 January 2022), online: <www.alzheimers.org.uk/about-dementia/symptoms-and-diagnosis/symptoms/non-verbal-communication-and-dementia>; Alzheimer's Society (UK), *supra* note 91; CDAC, Accessible Communication, *ibid* at 9-10; Law Society of Ontario, *ibid.*
[98] *RAA, supra* note 17.
[99] WEL Partners, *supra* note 1*;* CCEL, Conversations About Care, *supra* note 1*;* WCL, Roads to Safety, *supra* note 1*;* BCLI Common-Law Capacity Report, *supra* note 2.
[100] WEL Partners, *ibid;* CCEL, Conversations About Care, *ibid;* WCL, Roads to Safety, *ibid;* BCLI Common-Law Capacity Report, *ibid*; ABA, Assessment Handbook, *supra* note 7 at 14.
[101] *RAA, supra* note 17.
[102] *RAA, ibid,* s 9.
[103] *RAA, ibid,* s 7.
[104] WEL Partners, *supra* note 1*;* CCEL, Conversations About Care, *supra* note 1*;* WCL, Roads to Safety, *supra* note 1*;* BCLI Common-Law Capacity Report, *supra* note 2.
[105] James & Love, *supra* note 19; Law Society of Ontario, *supra* note 3.
[106] OBA, *supra* note 2; Law Society of Ontario, *ibid.*
[107] OBA, *ibid*; Law Society of Ontario, *ibid.*
[108] OBA, *ibid.*
[109] *POAA, supra* note 18 at ss 13, 14.
[110] *POAA, ibid,* ss 13-15, 19-20.
[111] *POAA, ibid,* s 19.
[112] *RAA, supra* note 17, ss 2, 7, 9.
[113] *RAA, ibid,* s 2-3, 7, 9, 16.
[114] *RAA, ibid,* s 16.
[115] *Patients Property Act*, RSBC 1996, c 349, ss 3, 4, 6, 17.
[116] *PPA, ibid,* s 2.
[117] *PPA, ibid,* s 18.
[118] *PPA, ibid,* s 9.
[119] *AGA, supra* note 15, ss 32-33.
[120] *AGA, ibid.*
[121] *AGA, ibid.*
[122] *HCCCFAA, supra* note 16.
[123] *HCCCFAA, ibid,* s 16(1).
[124] *HCCCFAA, ibid,* s 16.
[125] *HCCCFAA, ibid,* s 19.