

A Summary Brief on the

Reform of Adult Decision-Making Laws in New Brunswick



JANUARY 2022



A Summary Brief on the
**Reform of Adult Decision-Making
Laws in New Brunswick**

Contents

Introduction 3

What is “Legal Capacity”? 4

What is “Mental Capacity” and How is it Different from Legal Capacity? 4

Impact on People Who Lose their Right to Exercise Legal Capacity 5

Problems with Adult Decision-Making Laws in New Brunswick 5

NBACL’s Recommendations for Reform 6

Legal Capacity and the Decision-Making Capability Approach 7

Independent Decision Making 7

Supported Decision Making 8

Substitute Decision Making 10

Additional Recommendations 11

Conclusion 12



Introduction

The government of New Brunswick has committed to reforming current legislation that addresses decision making for adults who have difficulty making decisions related to their financial and personal affairs. Currently, this is called the *Infirm Persons Act*. This document summarizes NBACL's recommendations for new legislation that is based on a human rights approach to decision making and that supports the right for people with a disability to exercise their legal capacity.

Our full brief on this topic can be found [online](#)¹.

¹<https://nbacl.nb.ca/brief-on-the-reform-of-the-infirm-persons-act-and-the-establishment-of-a-legal-capacity-and-supported-decision-making-framework-for-new-brunswick/>.

What is “Legal Capacity”?

Legal capacity is the capacity to “hold a right” and to exercise the right. It is the power to make decisions about your life and to have those decisions respected in law and by others. A person who has legal capacity can decide about things that affect them. They can make big and small decisions for themselves and those decisions must be respected by legal systems and by other individuals and organizations such as landlords, banks, and healthcare providers.

People with legal capacity can enter into a legal contract, they can open a bank account, they can decide where to live, and they can make decisions about their own healthcare. Other people must respect these decisions, even if they do not agree with them.

What is “Mental Capacity” and How is it Different from Legal Capacity?

Mental capacity refers to an individual’s own abilities to make decisions that impact their life.

In New Brunswick, it is presumed in law that all adults have mental capacity, or the ability to make their own legally binding decisions.

The current test in New Brunswick for mental capacity is whether a person is able to understand and appreciate the information that is relevant to a decision and its foreseeable consequences. This is known as the “understand and appreciate” test.

Despite the presumption of mental capacity, if an individual is considered by others as not having the ability to understand and appreciate information that is relevant to a decision and its foreseeable consequences then they may not be able to do many things that individuals need to do to function in everyday life. For example, they might not be able to sign a lease, open a bank account, or instruct their healthcare provider. In these circumstances, the individual would not be prohibited from making their own decisions by law, but practically speaking they may not be able to act on their own behalf if the other party (for example the bank or a landlord) will not accept their decision as legally binding.

In New Brunswick, a judge may determine that an individual does not have mental capacity and may appoint another person to be a substitute decision maker. When this happens, that person loses the right to make their own decisions (legal capacity).

The legal test for decision-making capacity applied by the New Brunswick Courts relies heavily on an assessment of an individual’s mental ability to make decisions on their own. **In this respect, the current law equates an individual’s own ability to make decisions (mental capacity) with their right to make decisions affecting their lives (legal capacity).** The current legal framework does not take into account the fact that someone might have difficulty understanding and appreciating information relevant to a decision independently, but might be able to do so with accommodations, assistance, or support.



Impact on People Who Lose their Right to Exercise Legal Capacity

An individual who is denied the right to exercise their legal capacity loses the opportunity to make or be involved in decisions that affect their life. In New Brunswick, a person who is denied the right to exercise their legal capacity will have a substitute decision maker appointed to make decisions for them. While substitute decision making may be necessary in exceptional circumstances, there are many potential negative impacts that can occur when an individual loses the right to make their own decisions. These are:

- **Loss of Rights:** Once a substitute decision-making arrangement is in place, an individual loses the right to make their own decisions. The substitute decision maker needs to act in the “best interest” of the individual but they do not necessarily need to take the individual’s wishes and preferences into account.
- **Misuse of Power:** Once substitute decision-making arrangements are created there is usually minimal monitoring or oversight of the decisions made by the substitute decision maker, even if those decisions result in misuse of power or even abuse. Substitute decision-making powers may be misused without intent, simply due to the complexity of the law or misunderstanding between the parties.
- **Barriers to Challenging Substitute Decision-Making Appointments:** Once a substitute decision making appointment is put in place by a court it is difficult to challenge or revoke. The only effective recourse is through the court system and this is costly and intimidating.
- **Negative Impacts on Physical and Mental Health:** Research indicates that substitute decision-making mechanisms can have negative impacts on the individual for whom the decisions are being made including:
 - » diminished functional ability, health and well-being;
 - » social isolation;
 - » loss of self-esteem and feelings of hopelessness and incompetency;
 - » feelings of being demeaned and socially stigmatized; and
 - » financial abuse, overbroad application of substitute decision-making powers, physical abuse and neglect, restriction on voting rights, and restricting people on enjoying their sexuality and sexual identity.²

Problems with Adult Decision-Making Laws in New Brunswick

Since the right to exercise legal capacity is linked to a person’s own ability to make decisions, the current laws arguably discriminate against people with a disability. People are denied rights that many of us take for granted to make decisions about our lives. This can happen if a person has a legally appointed substitute decision maker or simply in practice if a person’s wishes and preferences are not considered. Discrimination also occurs because a person’s decisions are not treated as legally effective in many circumstances. **Simply put, the law does not recognize that some people with a disability require various accommodations and supports to make decisions and to have their decisions (wishes and preferences) legally recognized.**

Although no court has considered it, it is likely that New Brunswick’s *Infirm Person’s Act* is contrary to the *Canadian Charter of Rights and Freedoms*. The *Charter* established the right to personal autonomy and equal recognition before the law for all Canadians. In 2016, Nova Scotia’s *Incompetent Persons Act*, which is quite similar to the *Infirm Persons Act*, was declared unconstitutional by the Nova Scotia Supreme Court on the basis that it violated the *Charter*.

In addition to potential *Charter* violations, the *Infirm Persons Act*, is also contrary to the *United Nations Convention on the Rights of Persons with a Disability* (UNCRPD), which was ratified by Canada in March 2010. Article 12 of the UNCRPD requires state parties to the Convention to recognize that individuals with a disability who have impaired decision-making skills still have the right to maintain legal capacity and to make decisions which affect their lives.

State parties who ratified the Convention committed to providing support to individuals with disabilities who need it so that they can exercise their right to legal capacity. Canada made this commitment when it ratified the convention in March 2010. However, New Brunswick has not yet implemented laws which provide these supports.

²Brendan Pooran, Stephanie Dickson and Saquiba Rahman, “Guardianship as Last Resort”. *Estates, Trusts and Pensions Journal*, Volume 40, Number 2, February 2021 at pages 243-245.

NBACL's Recommendations for Reform

In a brief submitted to the New Brunswick government in November 2021, NBACL set out a number of key recommendations for law reform. These recommendations call for a new legal capacity and adult decision-making act that clearly recognizes the right of persons with disabilities to make decisions and to have access to the accommodations and supports required to exercise this right on an equal basis with others.

How Should A New Brunswick Legal Capacity and Adult Decision-Making Law Function?

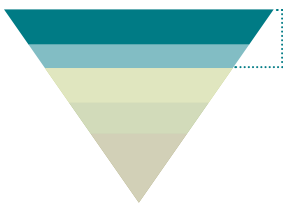
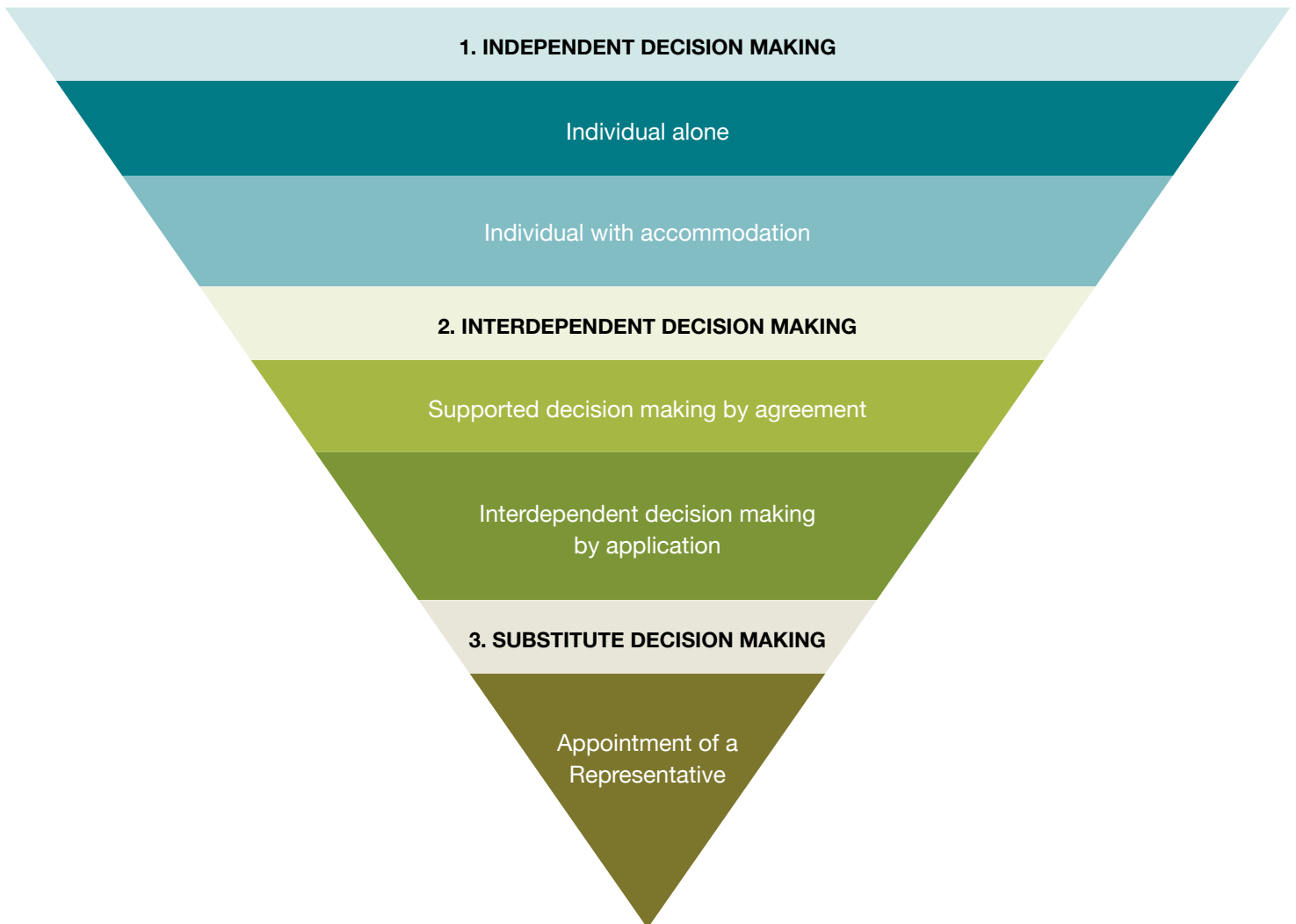
NBACL believes that any new legislation adopted and implemented by the government of New Brunswick should recognize and provide for three types of decision making:

1. **Independent Decision Making** (including independent decision making with accommodations);
2. **Supported Decision Making** (with appointment by agreement or application); and
3. **Substitute Decision Making** (this should only occur as a last resort when supported or independent decision making is not possible).



Legal Capacity and the Decision-Making Capability Approach

This graphic represents NBACL's proposed new adult decision-making model. Each type of decision making is described further below.



1. Independent Decision Making

An individual has the ability to make decisions independently if they are able to understand and appreciate the information that is relevant to the decision and its foreseeable consequences.

An individual is considered to have capacity to make independent decisions even if they require accommodations to make decisions. For example, an individual making a healthcare decision might need an accommodation of extra time to speak with their doctor. However, if they can understand and appreciate the information with an accommodation they do not require a supported decision-making arrangement.

NBACL believes that any new legislation enacted by the government of New Brunswick to replace the *Infirm Persons Act* should include provisions requiring service providers such as healthcare providers and financial institutions to provide decision making accommodations such as extra time and plain language resources when they are required.



2. Supported Decision Making

What Is Supported Decision Making?

Supported decision making is an arrangement where-by someone who might not be considered to have full legal capacity under the New Brunswick test for mental capacity can retain their legal capacity through the appointment of a supporter.

The role of the supporter in a supported decision-making arrangement is to help the individual who is making the decision gather information about the potential options and to help them understand the potential consequences of the decision. However, the decision is always to be made by the individual who is being supported and is to be based upon their wishes and preference.

In situations where the decision maker cannot communicate their wishes and preferences in a way that most people can understand, the supporter can also communicate the individual's decision.

Supported decision-making arrangements may specify which types of decisions the individual will be supported in (for example, an individual might choose to be supported in complex financial decisions but they might not need support in decisions related to personal care).

Supported decision making provides an avenue for individuals with an intellectual, developmental, or cognitive disability who may not meet the test to be considered legally capable in Canada to retain the ability to make decisions about their lives.

Supported decision making is also an important tool for individuals who are aging and who may want to include another individual in their decision-making processes.

NBACL is recommending that a new law provide two avenues for supported decision-making arrangements. These are 1) Supported Decision-Making Arrangements by Agreement and 2) Supported Decision-Making Arrangements by Application.

Both types of decision-making arrangements would enable the individuals involved to retain legal capacity to make decisions as long as they, together with their identified supporters, are able to understand and appreciate the information that is relevant to the decision and its foreseeable consequences.

Under this model, certain decisions related to the fundamental personal integrity of the person (such as non-therapeutic sterilization procedures and Medical Assistance in Dying) would still require meeting the test of capacity of an independent decision maker and consent to these procedures would not be considered valid under a supported decision-making arrangement.



A. Supported Decision-Making Agreements

Under a Supported Decision-Making Arrangement by Agreement, an individual can appoint their own supporters. An individual is considered to have the capacity to appoint their own supporters if the individual is able to:

- communicate a desire to have the decision-making supporter(s) help make decisions;
- understand that decision-making supporter(s) have a duty to act according to the will and preference of the individual; and
- appreciate that the decision-making supporter(s) will assist them to make decisions as specified in the supported decision-making agreement.

An individual can appoint a decision-making supporter by voluntary agreement which is witnessed by a lawyer. The lawyer must speak with the individual and the supporter separately prior to the signing of the agreement to explain each individual's rights and responsibilities.

The obligations of a supporter under a Supported Decision-Making Agreement are to:

- act in good faith to support the individual;
- provide the information required by the decision maker to understand the decision and the reasonably foreseeable consequences of the decision; and
- to act according to the will and preference of the decision maker.

B. Supported Decision-Making Arrangements by Application

Supported Decision-Making Arrangements by Application are appropriate in circumstances where the individual does not meet the test of capacity to appoint a supporter through a supported decision-making agreement.

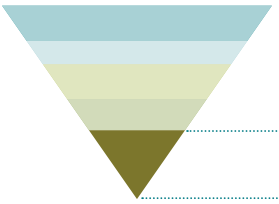
NBACL is proposing that supported decision making by application is appropriate in situations where:

- the individual does not meet the test of capacity to appoint a supporter through a Supported Decision-Making Agreement;
- the individual may be able to express their will and preference that the applicant supporter be their supporter;
- in situations where the individual cannot express their will and preference that the applicant become a supporter, the applicant supporter provides proof that they are in a trusting relationship with the individual and that they have a history with the individual that enables them to ascertain the individual's will and preference; and
- a third party or a regulatory body validates the needs for support.

The obligation of supporters in a Supported Decision-Making Arrangement by Application is to:

- act in good faith to support the individual;
- provide the information required by the decision maker to understand the decision and the reasonably foreseeable consequences of the decision;
- interpret the will and preference of the decision-maker (when necessary);
- act according to the will and preference of the decision maker; and
- communicate the will and preference of the decision maker (when necessary).

The application for a Supported Decision-Making Arrangement by Application would be made to an administrative decision-making body regulating the supported decision-making process.



3. Substitute Decision Making

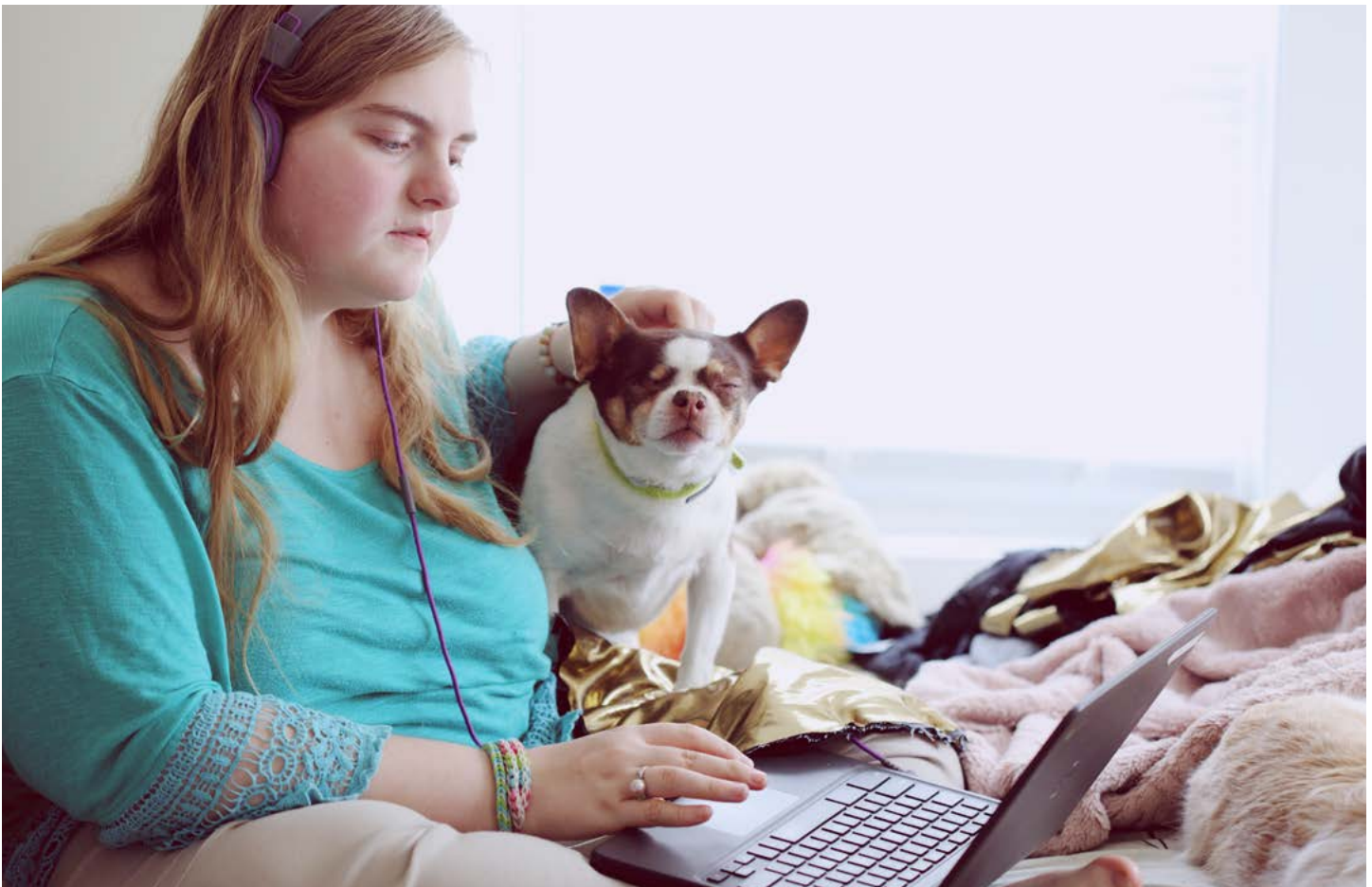
Substitute decision making (or appointment of a guardian) would only be considered appropriate in situations where less restrictive measures were not appropriate and the individual did not have:

- capacity to appoint a representative (Power of Attorney);
- capacity to appoint a decision-making supporter by agreement; and
- there was no available decision-making supporter who met the criteria to apply to become a decision-making supporter.

A substitute decision maker would need to be appointed through the New Brunswick Court system. The Representation order would need to state which aspects of the individual's life the order applied to. Once a Representative was appointed, the individual would not have legal capacity in relation to the areas covered in the substitute decision-making agreement.

The Representative, once appointed, would have an obligation to:

- to the extent possible, act in a manner that represents the will and preference of the individual; and
- where it was not possible to ascertain the will and preference of the individual, act in the individual's best interest.



Additional Recommendations

In addition to the proposed new laws described above, NBACL is recommending several actions that will strengthen a modernized decision-making framework in New Brunswick. These recommendations are briefly outlined here. More information can be found in our full brief through the hyperlink provided at the beginning of this document.

1. Ensure Validity of Decisions and Protection of Third Parties

The new legislation should clearly state that decisions made under a supported decision-making arrangement are valid and that third parties are entitled to rely upon a decision made by an individual under a supported decision-making arrangement.

2. Establish a New Brunswick Legal Capacity and Adult Decision-Making Office

NBACL recommends the province establish a New Brunswick Legal Capacity and Adult Decision-Making Office to oversee the implementation of the new legislation, provide public education, and provide guidance on accommodations for independent decision making and requirements for supported decision-making arrangements. NBACL believes that the role of the Legal Capacity and Adult Decision-Making Office will be critical for the successful operation of supported decision-making legislation.

3. Create Safeguards to Prevent Abuse

The new legislation should establish procedures for addressing abuse or neglect. To do this, the legislation should mandate that:

- all supporters act in good faith and in accordance with the principles of supported decision making set out in the legislation;
- every supported decision-making arrangement specify exactly what type of decisions require the involvement of a supporter; and
- an individual under a supported decision-making arrangement is able to withdraw from the arrangement at any time if they chose to do so.

NBACL also believes that the province of New Brunswick should create a mechanism for oversight and reporting of complaints relating to supported decision-making arrangements. NBACL recommends the following powers be given to the New Brunswick Legal Capacity and Adult Decision-Making Office for oversight of supported decision-making arrangements:

- the power to accept complaints by decision makers, supporters, or third parties;
- the power to modify or terminate supported decision-making arrangements; and
- the power to appoint a third party to monitor a supported decision-making arrangement.

4. Mandate Education and Training

Supported decision-making legislation would be a dramatic change to the existing legal framework in New Brunswick. Public education will be required for this new legislation to be successful.

NBACL believes the new legislation should include provisions which require that decision-making supporters complete a mandatory training program on how to provide support to adults in supported decision-making arrangements. Lawyers, judges, medical professionals, and other professionals who will be interacting with individuals using supported decision making should also receive training.

Conclusion

NBACL urges the government of New Brunswick to adopt new laws that recognize the right to legal capacity for persons with a disability and to the accommodations and supports that people may need to make decisions and have them legally recognized.

Supported decision making provides an avenue for individuals with an intellectual, developmental, or cognitive disability to retain the ability to make decisions about their lives.

Supported decision making is also an important tool for individuals who are aging and who may want to include another individual in their decision-making processes.

Adoption of new legal capacity and adult decision-making legislation will ensure that individuals are able to retain legal capacity to make decisions based on their wishes and preferences, even if they need some support to make these decisions.

Adoption of new legal capacity and adult decision-making legislation will also enable the government of New Brunswick to meet its commitment to recognize that individuals who have a disability still have the right to maintain legal capacity and to make decisions which effect their lives under Article 12 of the *United Nations Convention on the Rights of Persons with a Disability*.



