




Empowering Choice: The Supported Decision Making and Representation Act

Inclusion New Brunswick – March 2024




Inclusion NB

- Formerly the NB Association for Community Living
 - Established in 1957 as a provincial non-profit
 - Promote the rights, opportunities and full inclusion of people with an intellectual or developmental disability in all areas of life
 - Have a strong track record of involvement in law and policy reform
 - Also operate a number of programs to support individuals and families
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Supported Decision Making and Representation Act

- ▶ Act received Royal Assent on December 16, 2022. The Act was proclaimed to be in effect on January 1, 2024.
 - ▶ SDMRA represents a paradigm shift in how we think about decision making rights, self determination and legal mechanisms for assisting people who may require help with making decisions.
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Supported Decision Making and Representation Act

- It is grounded in the UN Convention on the Rights of Persons with Disabilities (specifically Article 12 on “equal recognition before the law” and enjoyment of “legal capacity” in all aspects of life).
 - The purpose of the Act is to protect the autonomy and dignity of persons who require support in relation to decision-making in accordance with the principle that persons should receive the support they need to make or to participate in decisions about their lives to the greatest extent possible
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Paradigm shift in decision-making laws

FROM SUBSTITUTE TO SUPPORTED DECISION-MAKING

A Paradigm Shift in New Brunswick

Mid to late 20th century

Substitute decision-making/guardianship. Traditional test of “mental competency” and focus on protection of people.



With **Charter of Rights and Freedoms (1982)**, substitute decision-making still exists, but with recognition that people may have capacity to make decisions in some areas but not in others. Law reform in some jurisdictions to limit impact on rights.

Early 21st century

UN **Convention on the Rights of Persons with Disabilities** signed in 2006 and ratified by Canada in 2010.



Emphasizes legal capacity & supported decision-making that fulfills the will and preferences of persons with disabilities and recognizes them as equal before the law. Evolving concepts of legal capacity and mental capacity. Law reform in Canada begins to recognize supported decision-making.

2022

Supported Decision-Making and Representation Act (SDMRA) in New Brunswick.



Recognition of evolving rights. Most comprehensive supported decision-making regime in Canada to date. Substitute decision-making is a last resort, with a focus on less intrusive measures and supported decision-making.

2024 and Beyond


Ongoing need for effective SDMRA education & implementation.



SDMRA requires use of least intrusive measures and the implementation of supported decision-making options. Other NB statutes may need to adapt.




Distinguishing Substitute and Supported Decision-Making

- ▶ **Substitute decision-making:**
 - ▶ Legally recognized arrangement that involves someone making decisions on behalf of another person who is deemed not able to make decisions for themselves
 - ▶ Traditionally, a substitute decision-maker makes decisions that are deemed to be in the person's best interests
 - ▶ A substitute decision-maker may not always know the person's specific wishes, values, or preferences (e.g., Public Trustee)
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Distinguishing Substitute and Supported Decision-Making

- ▶ **Supported decision-making**

- ▶ People are supported to make their own decisions through the help of people known to them (and who they likely trust)
 - ▶ Legally recognized arrangements where certain people are designated as decision-making assistants/supporters
 - ▶ A person's wishes and preferences are at the centre of all decisions that concern them
 - ▶ In some circumstances, decisions are made through an interdependent decision-making process
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Evolving Concept of Capacity

- ▶ The Act reframes and expands the concept of capacity to include the provision of assistance – a person can meet the test with assistance that is available.
- ▶ Section 3 (3) further identifies that a person has capacity to make a decision even if the person:
 - ▶ Makes a decision that others consider risky or unwise
 - ▶ Lacked capacity to make a similar decision in the past
 - ▶ Lacks the capacity to make other decisions
 - ▶ Requires assistance to communicate



Key Principles

- The presumption of capacity
 - Access to support for decision-making
 - Less Intrusive Means
 - Wishes and preferences guide decision-making
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Decision-Making Options – New Act


SUPPORTED DECISION-MAKING AND REPRESENTATION ACT

| Informal Supports | Decision-Making Assistants | Decision-Making Supporters | Representatives |
|--|---|---|--|
| ← Least intrusive | | Most intrusive → | |
| <ul style="list-style-type: none"> • Not addressed in the SDMRA. • Used when someone has the capacity to make their own decisions but requires accommodations to do so (e.g. information in plain language, more time to decide, sign language interpretation for Deaf persons). • No capacity assessment required. | <ul style="list-style-type: none"> • Used when someone has the capacity to make their own decisions but would like a legally recognized assistant to help with decision-making, obtaining information, and/or communicating decisions. • Appointment is made by the person who requires assistance (“the assisted person”) through a decision-making assistance form, with the help of a lawyer. • Appointment cannot be made if the person lacks capacity to make the authorization. A lawyer determines if the person has capacity. • Appointment requires the consent of both the assisted person and the assistant. • Decisions are made by the assisted person (with assistance if needed). • Decisions made by the assisted person with assistance are considered decisions of the assisted person (as long as the assistant acted properly). | <ul style="list-style-type: none"> • Used when someone lacks the capacity to make all of their own decisions but can make decisions together with a decision-making supporter through supported decision-making. • Appointment is made by the court following an application by the proposed supporter. • Appointment cannot be made if the person has the capacity to make a decision-making assistance authorization and this would meet their needs. • Appointment requires the consent of the supporter but not the consent of the person who requires consent, though their views are considered. • Capacity assessment is done by an assessor. • Decisions are made through a supported decision-making process in which decisions are guided by the wishes and preferences of the supported person. • Decisions made through this process are considered decisions of the supported person (as long as the supporter acted properly). | <ul style="list-style-type: none"> • Used when someone lacks the capacity to make all of their own decisions and cannot make the decisions through supported decision-making (e.g. because there is no suitable supporter or because the decisions would likely cause serious harm). • Appointment is made by the court following an application by the proposed representative. • Appointment cannot be made if a supported decision-making order is available and would meet the person’s needs. • Appointment requires the consent of the representative but not consent of the person who requires representation, though their views are considered. • Capacity assessment is done by an assessor. • Decisions are made by the representative on behalf of the represented person (generally on the basis of the person’s wishes and preferences). • Decisions made by the representative are considered decisions of the represented person (as long as the representative acted properly). |



Two Tracks to Achieve Supported Decision Making

- ▶ The Act provides two main avenues for establishing Supported Decision-Making arrangements:
 - ▶ Authorization of a Decision-Making Assistant
 - ▶ Appointment of a Decision-Making Supporter

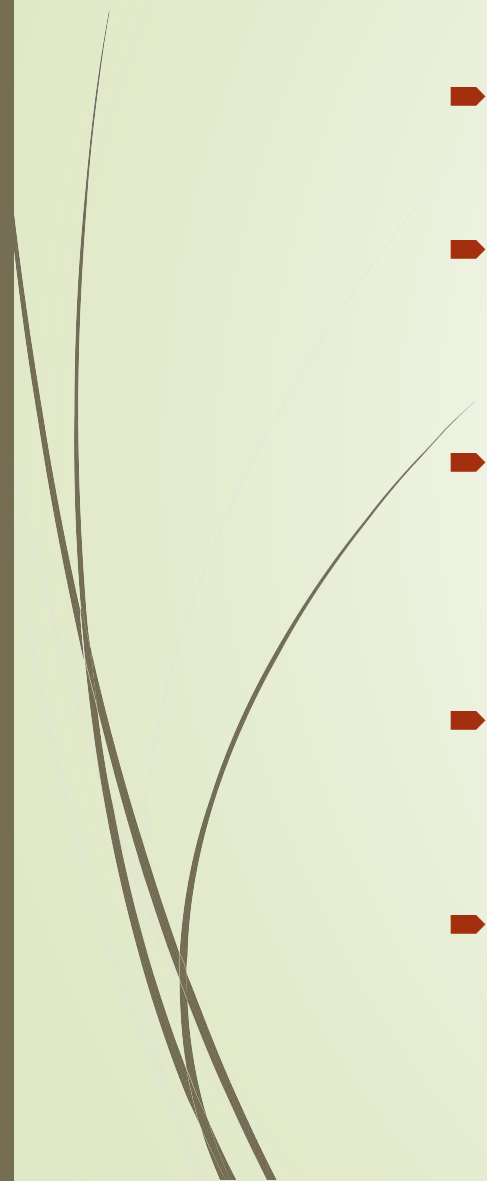


Track 1: Decision-Making Assistants

- ▶ Appointed by a person using a Standard Form that will be available under the Regulations
- ▶ A person (19 or older) will have to meet a test of capacity
- ▶ Lawyers will need to be involved and provide a statement that they have reviewed the provisions of the DMA authorization with the person and are of the opinion that the person has the capacity to make the authorization
- ▶ DMA authorization can relate to both personal and financial matters
- ▶ An assistant will need to consent to the appointment and sign the form
- ▶ An assistant cannot be a person who is paid to provide health or other services to the person unless they are a spouse, common-law partner or relative of the assisted person



Powers of Decision-Making Assistants

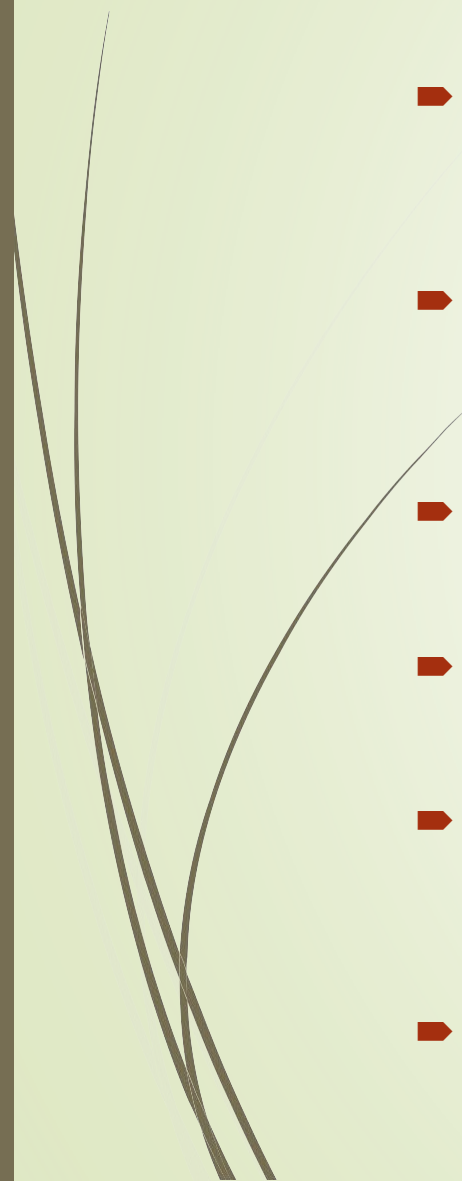
- ▶ Obtain or assist the person to obtain information that is relevant to a decision
 - ▶ Communicate a decision or to assist the person in communicating their decision
 - ▶ Cannot exercise any power in relation to a decision if they are of the opinion that the person does not have capacity to make the decision even with assistance
 - ▶ Shall not exercise any power in relation to a decision without the consent of the person
 - ▶ Can refuse to communicate a decision if the decision would cause serious harm to the person
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Decision-Making Assistant-Example (Taylor)







Track 2: Decision-Making Supporters

- ▶ A person in a relationship of trust can apply to a court to become a decision-making supporter.
 - ▶ Whether there is a relationship of trust is determined on the basis of evidence provided.
 - ▶ The Public Trustee cannot be a decision-making supporter.
 - ▶ A capacity assessment report will be required.
 - ▶ The person does not have to give explicit consent but their views must be considered.
 - ▶ Can cover personal care matters and financial matters.
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Powers of Decision-Making Supporters

- ▶ Powers of supporters are determined by a court order
 - ▶ Obtain or assist the person to obtain information from any person that is relevant to a decision of the supported person
 - ▶ Communicate or assist the person in communicating a decision of the supported person
 - ▶ Do anything necessary to give effect to a decision of the supported person
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Powers of Decision-Making Supporters

- ▶ **Restrictions on Powers:** In the health context, a decision-making supporter cannot exercise powers in relation to sterilization of a supported person, the removal of tissue for implantation in another person or for medical research or education, or for the participation of the supported person in medical research – without express authorization in a court order.
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Supported Decision-Making Process





Under section 27 of the Act, a supported decision-making process includes:

- ▶ discussing information and reasonably foreseeable consequences of options in a way that the supported person “is likely to best understand”;
 - ▶ assessing options with the supported person based on that person's “wishes and preferences” (those expressed and those otherwise known by the decision-making supporter); and
 - ▶ ensuring that decisions are guided by the supported person's wishes and preferences.
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Decision-Making Support Orders

REQUIREMENTS & CONTENTS OF DECISION-MAKING SUPPORT ORDERS

Supported Decision-Making and Representation Act


|  APPLICATION FOR ORDER |  REQUIREMENTS FOR MAKING ORDER |  CONTENT OF ORDER |  WHEN ORDER EFFECTIVE |
|--|---|--|--|
| <ul style="list-style-type: none"> • A 19+ interested person may apply to the court to be appointed as a decision-making supporter (DMS) (s. 19(1)). • Application must include: <ul style="list-style-type: none"> ◦ Affidavit of applicant ◦ Affidavit of any other proposed DMS ◦ Capacity assessment report ◦ Financial summary (if applicant seeks order with powers regarding financial matters. ◦ Any other document required by the court (s. 19(2)) | <ul style="list-style-type: none"> • The court may make an order if: <ul style="list-style-type: none"> ◦ Each proposed DMS consents to the appointment, is eligible (see s. 23), and is suitable (see below) ◦ Supported person lacks capacity to make decisions about all or some of their personal care matters, financial matters, or both, but can make those decisions with a supporter through supported decision-making ◦ A less intrusive measure is not available or not sufficient (s. 20(1)) • Factors for determining suitability of proposed DMS include: <ul style="list-style-type: none"> ◦ whether the relationship is characterized by trust ◦ the views of a supported person ◦ the ability and availability of the proposed DMS to exercise powers and duties (s. 20(2)) | <ul style="list-style-type: none"> • Order must: <ul style="list-style-type: none"> ◦ Identify each DMS and their relationship to the supported person ◦ Specify matters in relation to which DMS may exercise powers (all or some personal care matters and/or all or some financial matters). • If more than one DMS, order must identify dispute resolution procedure, allocate powers, etc. (s. 21(3)) • Order <i>May</i> (among other things): <ul style="list-style-type: none"> ◦ Include conditions or restrictions on powers ◦ Authorize DMS to exercise powers that require express authorization (e.g. giving of gifts) ◦ Provide that an agreement is voidable unless signed by both DMS and supported person (s. 21(4)) | <ul style="list-style-type: none"> • Order remains into effect on the date it is made (unless the supported person is not 19, in which case it comes into effect when they turn 19(s.22) • Order remains in effect until: <ul style="list-style-type: none"> ◦ The appointment of each DMS has terminated ◦ The expiry date specified in the order ◦ The court terminates the order ◦ The supported person dies (s. 22(1)) |

Decision-Making Supporter-Example (Sam and Patricia)






Validation of Decisions

- ▶ The Act sets out how decisions made through a supported decision-making arrangement are to be deemed valid decisions of the person.
 - ▶ A decision making assistant or supporter must act in accordance with their powers and duties under the Act.
 - ▶ A third party may refuse to recognize a decision if they have reasonable grounds to believe that a decision making assistant or supporter did not act in accordance with their powers and duties.
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Representatives

- ▶ These are substitute decision-makers who can be appointed if there are no other less intrusive options available.
 - ▶ Decisions must still be guided by the wishes and preferences of the person if these are known. Otherwise, decisions can be made in the person's best interest.
 - ▶ A Representative can include the Public Trustee and trust companies.
 - ▶ A capacity assessment is required.
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Capacity Assessments

- ▶ Required for court applications for order appointing decision-making supporters or representatives
 - ▶ Authorized assessors under the Act are:
 - ▶ Medical practitioner
 - ▶ Nurse practitioner
 - ▶ Psychologist
 - ▶ A person can refuse to undergo or to continue with an assessment. The Act sets out additional rights of people for whom an assessment is sought.
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Capacity Assessments

- ▶ An assessor may conduct an assessment if the person refuses or cannot participate in the assessment if the assessor is satisfied that the assessment can be completed accurately using the information available.
 - ▶ A capacity assessment report will need to be in a standard form (included in Regulations)
 - ▶ No fee schedule or education requirements are currently contemplated
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Other Decision-Making Tools

- ▶ People appointed under the existing **Infirm Persons Act** will be deemed to be validly appointed **representatives** under the new Act if they hold these positions immediately before the proclamation of the Act.
 - ▶ **Enduring Powers of Attorney Act** can still be used. These are covered by different legislation.
 - ▶ A person can also create a **Health Care Directive** to provide information about their health care wishes.
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Questions

