Forwarding the Public Trust in Hard Times, 2008-2026

Christian Whalen
NB Legal Aid Services Commission
Fredericton

... Last scene of all

That ends this strange eventful history.

Is second childishness and mere oblivion,

Sans teeth, sans eyes, sans taste, sans everything.

William Shakespeare, 1623

The Seven Ages of Man, As You Like It, Act II, scene vii

The melancholy Jaque's "All the World's a Stage" monologue in Shakespeare's comedy ends with a famously bleak and brief description of the seventh stage of life, when devoid of all sensory perception we revert to childhood and move on, less hopefully, to "mere oblivion". As Public Trustee for the Province of New Brunswick, over the past 18 months, I have had many opportunities to take a more hopeful look at how we support citizens' experience with advancing age, cognitive decline, or intellectual disabilities in general. I have been encouraged by the quality of care that is available to Public Trustee clients, but this has done very little to overcome the deep consternation that I have felt reading the stories of complete destitution and abandonment of very frail members of our communities; these stories too often lead to hospitalization and court applications for the Public Trustee's involvement. Too often the 'sans everything' that Shakespeare refers to in the passage above encompasses all of us. We look away from the isolation, neglect and abandonment to which our elders fall prey. And in this looking away, we condemn them to 'mere oblivion'.

Today, because of our ageing demographics, the challenge in providing reliable long-term care supports to all in need of it in the province looms larger than ever. In 1599, when Shakespeare was writing his tale, set in Flanders' Ardennes Forest, the average adult life expectancy was less than forty years, and long-term care looked very different. Fast forward three centuries to when Charles Dickens wrote Hard Times, his celebrated novel chronicling the inequities of the early industrial age. Again adult life expectancy had risen to only about 57 years, but institutionalized care for the elderly was still largely non-existent.

In New Brunswick, as in much of Canada, it was only in the mid to late 19th century that laws and institutions started to develop to provide state supports to those who were too frail or lacking the cognitive capacity to be able to support themselves. On March 27, 1849, the New Brunswick Legislature adopted *An Act to provide for the Management of the Provincial Lunatic Asylum*, after first having passed a law for the erection of the Asylum in 1847. A few years later Dicken's would write Hard Times as an indictment of the dehumanizing effects of industrialization. He wanted to strike the hardest blow he could muster against a utilitarian ethos that claimed that industrial success would create prosperity for all and that assumed that prosperity ran parallel to morality.

Hard Times is therefore an apt reference for this retrospective on the impact of the New Brunswick Public Trustee's Office since its inception to today. Less than twenty years old, the Public Trustee's Office was created in 2008[1]. Its work to date is therefore bookended by the beginning of 2008's Great Recession and Prime Minister Carney's stark observation in Davos this year that the "the rules-based order is fading" and the "old world order is not coming back"[2]. We are again living in hard times. The affordability crisis is perhaps the defining headline of the past year. Homelessness is increasing. The wealth gap is deepening. In these hard times Adam Smith's unseen hand of the market seems for some to offer the solutions many seek. Business barons are elected to high office. Oligarchs align with political power and take advantage. Trade wars are back and industrial development and expansion of trade is the *mot d'ordre* and government's new trump card. Programs for greater diversity, equity and inclusion are under attack. Nearer to home, environmental protection processes and the duty to consult are fast-tracked in order to promote trade diversification.

It is difficult in these times to make the case for improved aid to the frail, to make new investments to lift persons with disabilities out of poverty, to improve early investments that promote the full inclusion of children with disabilities, to meet the demographic challenge of caring for an ageing population. And yet, in Canada today adult life expectancy is just under 84 years of age, in the top 20 countries in the world in terms of longevity[3]. Next to Newfoundland, New Brunswick has the oldest population in the country, with over 23% of our population already being over 65 years of age. Baby boomers are only now entering their twilight years which will see the peak onset of dementia and need for decision-making supports and reliable long-term care services. This reality will be with us for the next twenty years at least.

The timing of the economic crisis unleashed by the US trade war thus coincides unfortunately with a social crisis that has been staring us down since the

En bref ...

La *Loi sur la prise de décision accompagnée et la représentation* (LPDAR) est en vigueur depuis deux ans mais fait appel à un changement de culture profond en faveur des droits des personnes handicapées et des personnes âgées. Le but de la loi est de promouvoir l'autonomie et la dignité des personnes ayant besoin d'accompagnement dans la prise de décisions dans toute la mesure possible. La loi met en œuvre en droit interne au Nouveau-Brunswick l'article 12 de la Convention sur les droits des personnes handicapées et constitue une avancée importante de la reconnaissance de ce droit au Canada et à travers le monde. La loi remplace des lois antérieures qui étaient beaucoup plus paternalistes, mais une lecture plus attentive du corpus législatif révèle que le Nouveau-Brunswick est tout le temps restée à l'avant-garde du droit dans ce secteur. Dans les prochaines années le monde se dotera d'un nouvel instrument de droit international protégeant les droits humains des personnes âgées. L'intersectionalité entre l'handicap et le vieillissement fait ressurgir l'importance de ces développements pour bien informer l'application du droit au Nouveau-Brunswick. Pour que le changement de culture que la loi invite soit réalisé, il faudra que les membres du barreau se fassent les défenseurs de la nouvelle loi en veillant à ce que les approches les moins intrusives soient toujours favorisées dans chaque cas d'espèce et que les vieux recours, tels les procurations durables soient mises en œuvre avec un consentement éclairé sur l'utilité de ces recours en comparaison avec ceux de la nouvelle LPDAR.

baby boom and the founding of the UN and its promised new world order eighty years ago; a world order founded upon the rule of law, the prohibition of recourse to the use of force and the commitment of all nations to resolve differences and advance common interests through the progressive implementation and realization of equal human rights for all[4]. The challenge in these times, as our Prime Minister reminded the world in Davos, is how to act pragmatically while remaining principled. One undeniable truth remains, however, and offers a more important guidepost today than ever. It is, as Jefferson stated, that the true measure of any society lies in how it treats its weakest members.

This promise of equal opportunity has served as a foundational value in New Brunswick for well over half a century. The work of the Public Trustee's Office is best understood as providing equal opportunities for society's weakest members. The *Supported Decision Making and Representation Act* (SDMRA), proclaimed in force just two years ago,[5] recommits the Province to this human rights promise and the goal of promoting the autonomy and human dignity of persons needing decision-making support to the greatest extent possible in every case. This essay seeks to present this bold legislative framework in historical perspective and in the context of the practical reality of the hard times in which the current law has come into force. It looks at the Public Trustee's core mandate under the SDMRA, as well as under other legislative instruments and seeks to draw the legal practitioner's attention to the foundational values that inform recent law reform, and to the practitioner's role in upholding these values and human rights in hard times, as an important aspect of the rule of law.

The first asylum for mental health patients in British North America was established in Saint John in 1835[6]. A few years later the legislative assembly enacted a law for the establishment of a new provincial asylum in Saint John which opened in late 1848. The *Act to provide for the Management of the Provincial Lunatic Asylum*[7] was therefore the first law of its kind in Canada. It received several revisions and was substantively revised in 1903, as the *Respecting the Provincial Lunatic Asylum and its Management Act*[8], and this law therefore served as our legislative guide to the provision of services to persons living with a mental incapacity for almost a century, until it was repealed and replaced by the *Infirm Persons Act* in 1943.

The *Infirm Persons Act* in turn was the governing legislation in the field of mental incapacity for the following sixty years[9]. Often when I present to New Brunswick audiences on the impact of the new SDMRA, I remind participants that all they need in order to understand the thrust of the reform over the past century and a half is take a hard look at the names of the three governing pieces of legislation. We no longer speak of lunatics, or infirmity, or incompetence, but have adopted instead a new legislative framework that posits the equality of all members of the human family and recognizes that we are all born with distinct gifts and abilities, and all need varying levels of decision-making supports at various stages of our lives. As Shakespeare reminds us, we very often end our life's journey in as great a state of dependence as that into which we are born "mewling and puking in the nurse's arms". We have virtually no decision-making capacity at birth and are completely reliant upon our parents or others to make decisions in our best interests. From this vantage point, decision-making capacity is just a human characteristic or trait like so many others that varies widely from one individual to the next. The law does not permit any discriminatory treatment on the basis of any such traits, unless they are reasonably and demonstrably necessary. People with cognitive and intellectual disabilities cannot be shunned or locked away but are entitled under our laws to as full and autonomous a life in community as possible, respectful of their equal human dignity.

Taking a closer look at the historical record, it appears that the challenge of dealing with the needs of a vulnerable population impacted by mental health needs has remained fairly constant over time. The proponents of the provincial lunatic asylum were no doubt as well intentioned as we are today. In the early 19th century 'lunacy' was a legal term that didn't have all the weight that a hundred years of institutional usage would laden

it with. Some fifty years later Nellie Bly, an investigative journalist with the New York World, hired by Joseph Pulitzer, would take an undercover assignment for the newspaper, feigning insanity and having herself admitted to New York's Women's Lunatic Asylum on Blackwell Island. Her news report *Ten Days in a Madhouse*[10], published later, following her editors' sustained efforts to secure her release, would go on to become an international sensation. It described the bleak conditions of detention of women in the asylum, and their complete lack of recourse to challenge unfair diagnoses and detention processes, sparking a wave of reform in the US and elsewhere. Interestingly Atlantic Canadian historians remind us[11] that two years before Nelly Bly's undercover reporting assignment, Mary Huestis Pengilly an erstwhile patient in Saint-John's Provincial Lunatic Asylum had published her diary of her time in the asylum and the observations she made there[12]. Following her recovery and release in 1885 she herself embarked on a long career of advocacy for the rights of the disabled, across North America, pioneering, like Dr. Peters before her, the New Brunswick tradition of advocacy and reform in this sector.

The proponents of t*he Infirm Persons Act* were reformers as well and were paving the way for a process of deinstitutionalization that would see less reliance on institutional care and greater reliance on family-based and community-based care. This process of deinstitutionalization would be the defining aspect of program, practice and law reform for the next three decades[13] and would inform the growing demand for constitutional and human rights recognition of the rights of the disabled. Considered in proper historical perspective, therefore it appears that New Brunswick lawmakers have traditionally had a prescient and progressive interest in law reform that supports the needs of persons with disabilities. The tension, however, has always resided in the space between legislative intent and the care practices that arise in community.

New Brunswick's new legislative framework, the *Supported Decision-Making and Representation Act*[14] (SDMRA) is ground-breaking legislation in the Canadian context and offers to date the most robust enforcement of Article 12 of the UN Convention on the Rights of Persons with Disabilities. This Article proclaims the rights of persons with disabilities to enjoy legal capacity on an equal basis with others and requires a shift from substitute decision-making regimes to supported decision-making.[15] Importantly, the very first guidance provided to State Parties ratifying the Convention by the treaty body responsible for its implementation was in relation to Article 12. The Committee on the rights of Persons with Disabilities insists that equality before the law is the basic general principle of human rights protection and that this principle is "indispensable for the exercise of all other human rights"[16]. Reminding State Parties of the harms persons with disabilities are exposed to when they are deprived of their legal personalty and capacity, the Committee concludes that guardianship laws and substitute decision-making regimes are incompatible with article 12 and should be replaced:

> 9. All persons with disabilities, including those with physical, mental, intellectual or sensory impairments, can be affected by denial of legal capacity and substitute decision making. However, persons with cognitive or psychosocial disabilities have been, and still are, disproportionately affected by substitute decision-making regimes and denial of legal capacity. The Committee reaffirms that a person's status as a person with a disability or the existence of an impairment (including a physical or sensory impairment) must never be grounds for denying legal capacity or any of the rights provided for in article 12. All practices that in purpose or effect violate article 12 must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others.[17]

It is not surprising that persons who have been robbed of the right to stand in court in their own name would premise all of their fundamental human rights claims on this basic principle. Interestingly, the legal literature informs us that the genesis of Article 12 of the UNCRPD drew inspiration from Canadian legislative precedent[18] and the supported decision-making laws that started appearing after the adoption of British Columbia's *Representation Agreement Act*19 of 2000, which built upon earlier laws in Manitoba and informed similar legislation in Saskatchewan (2001)[20], the Yukon[21] (2003) and Alberta[22] (2008). However, the adoption of the UNCRPD in 2006 and its ratification by Canada in 2010[23] has significantly moved the adoption of this type of legislation from a forward-looking progressive trend in law reform to a matter of compliance with prevailing global human rights standards. Canada did issue a reservation in relation to Article 12 with its ratification instrument of the Convention in 2010, as it understood that substitute decision-making laws would otherwise not be in compliance with Canada's human rights obligations[24]. It is in this context that we must understand the significance of New Brunswick's adoption of the SDMRA.

The SDMRA is the first Canadian law adopted following General Comment 1 from the UNCRPD and offers a legislative scheme that implements the current global human rights guidance for persons with disabilities at the domestic level in Canada. It also offers a good legislative practice for the rest of the world. The law creates a tiered approach to decision-making supports that preserve autonomy and human dignity of persons needing such supports to the greatest extent possible, at all times. The statute's unambiguous legislative purpose, set out in a substantive provision of the Act, not in a preamble, makes this clear:

> 4The purpose of this Act is to protect and promote 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.[25]

The first level of decision-making support is the decision-making assistance authorization. An authorization does not require a court order supported by a clinical capacity assessment report. Any person in need of this support can appoint an assistant by seeking this authorization in proper form from their lawyer. The authorization allows the appointed decision-making assistant to obtain information or assist the assisted-person in obtaining information to inform a given decision, or to communicate or assist the assisted-person in communicating a decision. The decision-making authority remains squarely with the assisted person, but assistants may be appointed in relation to personal care and health care decisions, or in relation to financial decisions or both.

The second level of assistance is the decision-making support order. This allows a supported person to obtain an order appointing someone as their decision-making supporter. The order will only be granted if the court is satisfied that the proposed decision-making supporter is consenting, eligible and suitable for appointment; that the supported person does not have the capacity to make all or some of the decisions that are likely to arise in relation to their personal care, financial care, or both; that the supported person and the decision-making supporter could make the relevant decisions together through a supported decision making process and that a less intrusive measure of supported decision-making would not meet the needs of the supported person.

In determining the suitability of a proposed decision-making supporter the court must consider the relationship between the supporter and the supported person and whether the relationship is one characterized by trust, the views of the supported person, the ability and availability of the decision-making supporter to carry out their powers and duties, and any other factor the court deems relevant. A decision-making supporter can obtain information and communicate decisions on behalf of the supported person, as can a decision-making assistant, but they have additional authority to help the supported person reach a required decision through a supported decision-making process and to do anything necessary to give effect to the decision of the supported person. In a supported decision-making process, a decision-making supporter can discuss the relevant information and foreseeable consequences of available options with the supported person in a manner to best help them understand the decision, assess the available options on the basis on the supported persons expressed wishes and preferences and ensure a decision that is guided by the supported persons wishes and preferences. The decision-making supporter cannot, however, make a decision for the supported person[26].

The Public Trustee cannot be named as a decision-making assistant or as a decision-making supporter. The Public Trustee can only be named as a last resort as a representative, if no other person is willing and suitable to do so. A representation order is the most invasive type of order under the SDMRA. The Court will only grant such an order where it is satisfied that a less intrusive measure will not suffice to meet the represented person's needs[27]. The requirements for making a representation order are generally the same in terms of the representative's suitability and availability and consent to act[28] and again the capacity assessment report must confirm that less intrusive support measures would not suffice. The powers of a representative, however, encompass the authority to make decisions and act on behalf of the represented person . A representative can also obtain from any person any information relevant to their order[30]. But the representative must not make any decision for a represented person if they are satisfied that the person can make the decision for themselves[31]. Representatives (like decision-making supporters) must consult with the represented person to explain the decisions needed to be made as clearly as possible and seek and be guided by the person's wishes and preferences; if the person's wishes cannot be determined the representative must act in the manner that they believe would best advance the represented person's well-being[32]. The representative's role is therefore distinct from a substitute decision-making role; it is instead part of the continuum of supported decision-making and the autonomy and human dignity of the represented person must be advanced as much as possible at every decision-point.

Living through this fundamental human rights commitment to persons with disabilities should occasion a rethinking of our many processes. Within Public Trustee Services, even before the law reform, we were always acting consultatively in accordance with clients wishes whenever possible so as to advance their autonomy and respect their human dignity. But the law reform offers an important opportunity for reflection on how to fully live out the legislative intent and the spirit of this reform. We are now questioning whether the delegates tasked with providing decision-making supports for personal care and health care under representation orders should continue to be referred to as Guardianship Officers or Trust Officers? Should we be pushing back against representation orders in cases where substantial decision-making capacity may be left or where non-family or state supported caregivers could be appointed to serve as decision-making supporters? How do we ensure that representation orders are accessed only when necessary and revoked diligently if cognition remarkably improves?

Lawyers in private practice should be proactively promoting the use of decision-making authorizations and decision-making support orders in preference to representation orders when those less intrusive measures may suffice. Similarly, when lawyers are approached to prepare a power of attorney, they should explain the SDMRA model to their clients and discuss the risks of one intervention or support over the other, including an assessment of the risk of financial fraud or abuse. If powers of attorney remain the preferred option, are discussions held with clients to advise on the possibility of appointing a monitor? Monitors can also be directed

to the Public Trustee if ever there was a client eligible for a representation order who was at risk of being financially abused.

How can we better track as a province the uptake of the SDMRA and monitor how many decision-making assistant authorizations are granted annually? How many decision-making support orders and representation orders are granted? In mid-2024 the Public Trustee Service initiated a Legal Aid program to assist families in obtaining a representation order or a decision-making support order. How can we make the program better known? How can we further assist families in stepping forward into these roles so that Public Trustee Services remain a last resort and that family and community-based supports are preserved as mechanisms that are more respectful of personal autonomy and an inclusive life in community?

In the coming years New Brunswick's health care system will help baby boomers approach and manage the ages 80 years and over, which see the peak onset of dementia. Faced with this sort of cognitive decline, we know that older persons want to age in place in their own homes for as long as possible. What must be done in the implementation of the SDMRA to help families navigate that challenge and provide decision-making supports to their loved ones without engaging last resort public services such as the Public Trustee?

In April 2025 the UN system initiated the process of development and drafting of a new global Human Rights Treaty, one specifically focused on the rights of older persons[33]. In July 2026 the Working group will meet to consider the responses to the call for inputs on the Convention's general framework and guiding principles. A regional human rights instrument within the Organization of American States has existed since 2017[34], but Canada has taken no steps towards its ratification. As the world better defines the human rights of older persons, guidance will emerge that should better inform the administration of the SDMRA in New Brunswick, given the complex intersectionality of aging and disability.

This cursory historical view confirms that the challenge of dealing fairly and respectfully with the impact of disability in our communities has been with us for centuries but that our laws over time have evolved to help us make transformative change. The changes made possible by the adoption of the SDMRA in New Brunswick, of the UNCRPD globally, and of human rights treaties on the rights of older persons regionally in the Americas, are mechanisms that will allow us not only to improve the conditions of those experiencing cognitive decline or challenges, but also strengthen and maintain the rule of law and build the world order that we want. Committing to that change at the local level will require a significant culture shift that individual members of the bar can help sustain and accelerate. By doing so, especially in hard times like the ones we now find ourselves, we can not only improve individual lives, but we can catalyze community growth through fuller inclusion and in ways that are in keeping with the best of our tradition.

NOTES

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4. UN Charter, United Nations Charter (full text) | United Nations, Art. 1.
5. SNB 2022, c 60 | Supported Decision-Making and Representation Act | CanLII, c.i.f. January 1, 2024
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16. Ibid, para. 1.
17. Ibid. para. 9
18. James K., and Watts, L. "Understanding the Lived Experiences of Supported Decision-making Laws in Canada: Legal Capacity, Decision-making and Guardianship", 2014, Law Commission of Ontario. 91 pp., p. 14. Understanding the Lived Experiences of Supported Decision-making in Canada - Commissioned Study
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20. SS 2000, c A-5.3 | The Adult Guardianship and Co-decision-making Act | CanLII
21. SY 2003, c 21 | Decision Making, Support and Protection to Adults Act | CanLII
22. SA 2008, c A-4.2 | Adult Guardianship and Trusteeship Act | CanLII
23. tbinternet.ohchr.org/_layouts/15/ TreatyBodyExternal/Treaty. aspx?Treaty=CRPD
24. In March 2025 the Committee's Concluding Observations to Canada recommend that Canada lift its reservation in relation to Article 12: ohchr UNCRPD Concluding Observations to Canada March 2025
25. SNB 2022, c 60 | Supported Decision-Making and Representation Act | CanLII, s. 4.
26. SDMRA, para. 24(2) b)
27. SDMRA, para. 37(1)c)
28. Ibid. s. 37
29. Ibid. ss. 41(2)
30. Ibid. s. 42
31. Ibid., ss. 41(3)
32. Ibid., s. 44
33. Intergovernmental Working Group on older persons | OHCHR
34. OAS :: SLA :: Department of International Law (DIL) :: Inter-American Treaties