

# **AGING AND THE LAW SERIES**

## **What Every Professional Needs to Know**

# WHEN CAPACITY IS IN DOUBT

*Faculty: Laura Watts, LL.B., National Director, CCEL*

# Overview Of Capacity And Related Issues

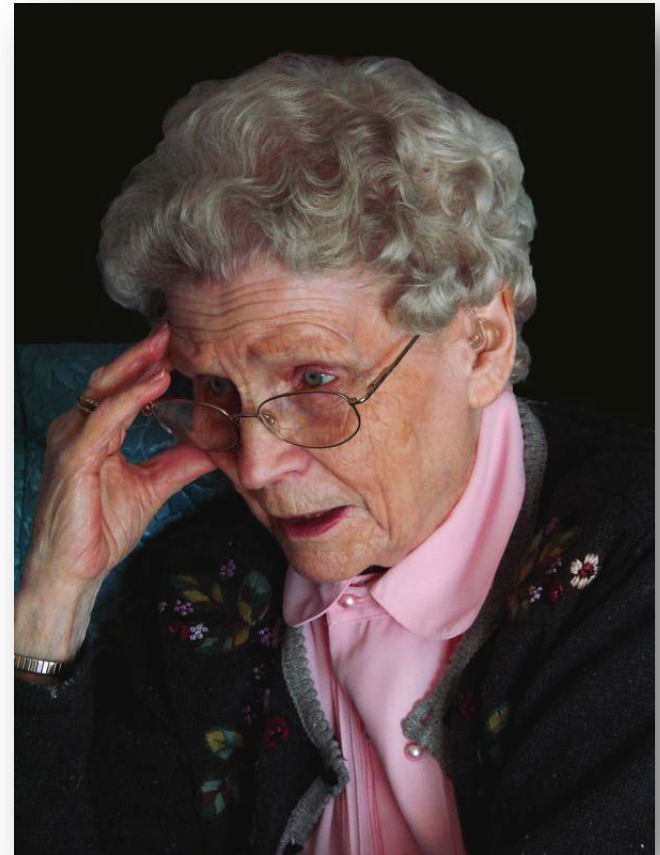
For the purposes of this webinar series, the terms capacity and capability are not distinguished and are thus used interchangeably.

There are different definitions of capacity across the country and even within jurisdictions. There are also different thresholds of capability.

# Overview Of Capacity And Related Issues

Essentially, an individual is capable when he or she understands and appreciates the nature and consequences of a decision he or she is making.

In the context of older adults, financial capacity and health care capacity are especially relevant.



# Nexus Of Capacity / Capability

Often not so clear

Can be a 'grey zone'  
Can fluctuate

CAPABLE	INCAPABLE
CAPABLE ADULT DECIDES	SOMEONE ELSE DECIDES

# Capacity Legislation



Legislation that pertains to capacity is enacted provincially.

Provinces may have guardianship, health care consent, power of attorney, or other substitute decision legislation in force that define capacity and create protocols for assessing and dealing with incapable persons.

# Capacity Is Not Black And White

*Originally, capacity was considered a binary concept: an individual was either capable or incapable.*

Early mental health legislation reflects the binary model – patients had all or none of their rights.

Modern substitute decision legislation (particularly guardianship legislation) is moving toward a continuum model.

# Capacity Is Not Black And White

*There are shades of capability:* persons only lose certain rights that they are no longer capable of exercising.

The continuum model reflects the different thresholds of capacity (*e.g. threshold for making a will is not the same as for marriage*).



# Ethics and Obligations

Who is your client?

- What are their best interests?

Lawyers and other professionals have certain obligations with respect to clients who exhibit signs of incapability.

*Consult your professional Code of Ethics.*

# Signs Of Incapability

A client may exhibit obvious signs of incapability, such as not knowing why they are or not understanding what or why they are signing a document.

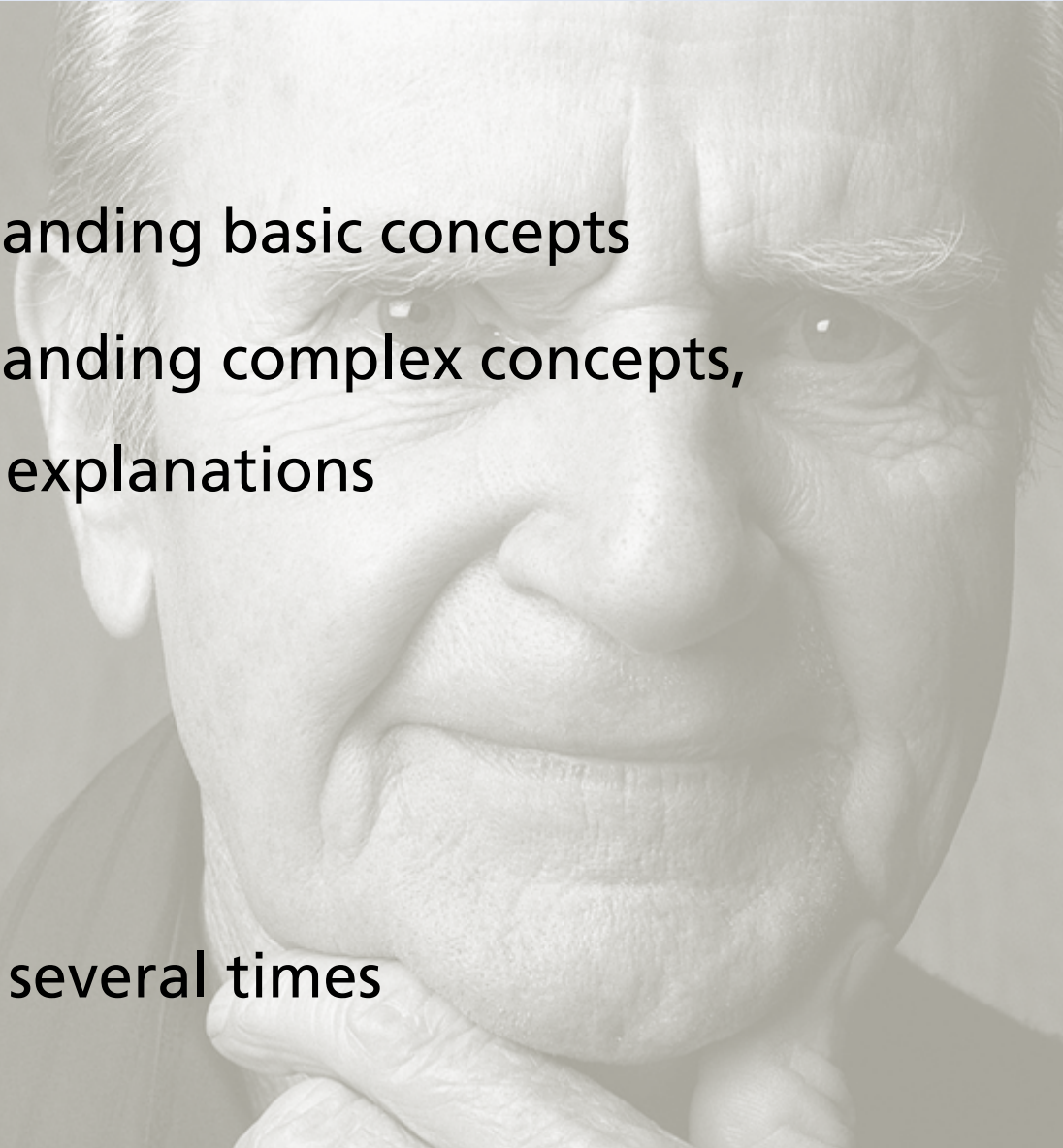


*Some characteristics may signal incapacity, but only a proper assessment can determine legal incapacity.*

# Signs Of Incapability

*Things to watch for:*

- Difficulty understanding basic concepts
- Difficulty understanding complex concepts, despite repeated explanations
- Memory loss
- Confusion
- Incoherence
- Repeating things several times



# Myths About Older Adults And Capacity

Not all older adults have hearing problems, mobility challenges, and dementia. Moreover, age itself is not a debilitating factor.

Older clients may require more time or more explanation; this does not mean they are not intelligent or incapable.

Treat older adults with respect and patience.  
Recognize inter-generational differences and be supportive.

# Accommodating Clients With Capacity Issues

*Be sensitive to physical challenges clients may have and anticipate their needs...*

- hearing or vision impairments
- mobility challenges
- language barriers
- cognitive difficulties



# Accommodating Clients With Capacity Issues

- Use clear language – rephrase and reframe information.
- Ask questions to gauge understanding.
- Be an empathetic listener – you may glean important information from seemingly irrelevant topics.
- Use a variety of presentation tools to demonstrate information.



# Best Practices



- Always presume capacity.
- Always be clear on who your client is and what is in their best interests.
- Meet with your client alone – helpers or family members accompanying the client may be abusers.

# Best Practices

- Take thorough notes to protect yourself and your client.
- Be aware of potential abuse or exploitation of vulnerable or incapable clients.
- Note that a client may choose to live with abuse or in a dangerous situation.
- Always refer abused clients to proper community and protective resources.



# Best Practices

- Remember that capacity is not black and white, but shades of grey – it can also come and go (e.g. drug abuse, treated mental disorders)
- Delusion and dementia are not one and the same: delusions are temporary periods of incapability triggered by certain events (e.g. wrong medication)
- Do not confuse cultural or religious practices with incapability

# Summary

# References And Resources

British Columbia Law Institute, "Law Reform Report on Abuse and Neglect and Capacity Issues in Canada : Canadian Legislation and Juristic Literature," April 2007.

Canadian Centre for Elder Law, "Provincial Strategy Document : Vulnerability and Capability Issues in British Columbia," 2009. <http://www.bcli.org/ccel>

# Additional Resources

For information about how you can become a Certified Professional Consultant on Aging (CPCA) visit us at our website [www.agefriendlybusiness.com](http://www.agefriendlybusiness.com)

For information about the Canadian Centre for Elder Law visit us at our website [www.bcli.org](http://www.bcli.org)

# THANK YOU!

For more information, please contact us at:

Email: [info@agefriendlybusiness.com](mailto:info@agefriendlybusiness.com)

Telephone: 1-877-272-9066

Fax: 604-648-9647

Mailing Address:

**Age Friendly Business**  
907-6540 Hastings Street,  
Burnaby, British Columbia,  
Canada, V5B 4Z5





© 2010 - 2011 The Academy of Age Friendly Business (AAFB). All rights reserved.

This presentation is for informational purposes only. AAFB makes no warranties, express or implied.  
Aging and the Law is a proud member of the Age-Friendly Business™ International Group of Companies.