

# The cost of compromising on procedure: A case study of Manitoba's *The Vulnerable Persons Living with a Mental Disability Act*

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J O N A T H A N   A N D R E W S \*

## INTRODUCTION

**A**utonomy is a fundamental value in Canadian law. A concern for autonomy and dignity underlies our constitutional rights to liberty and security of the person enshrined in section 7 of the *Canadian Charter of Rights and Freedoms*:

Liberty protects the right to make fundamental personal choices free from state interference. Security of the person encompasses a notion of personal autonomy involving control over one's bodily integrity free from state interference.<sup>1</sup> [Citations omitted.]

Our right to autonomy is not absolute, however, and personal autonomy may be restricted for the sake of the government's goals.<sup>2</sup> For example, autonomy may be restricted where an individual is unwilling or unable to make decisions that align with acceptable standards. This is the case with substitute decision making, where legal decision-making powers are taken from individuals with mental disabilities who are deemed

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\* Jonathan Andrews is presently an articulated student at Lawson Lundell LLP in Vancouver. He graduated from law school at the University of Manitoba in 2020.

<sup>1</sup> *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [Charter]; *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 64 [Carter].

<sup>2</sup> Charter rights and freedoms are guaranteed subject to reasonable and justifiable limits prescribed by law: *Charter*, *supra* note 1 at s 1.

incapable of making decisions on their own. The imposition of substitute decision making is one of the greatest restrictions of personal autonomy in Canadian society.<sup>3</sup>

Imagine that you have a mental disability and are facing a hearing to determine whether you are capable of making your own decisions. How would you design the hearing and, more specifically, which procedural protections would you want in place? Under Canadian law, such a hearing would be protected by a duty of procedural fairness, but this duty ensures only a minimum of procedural protections.<sup>4</sup> Which protections would you be willing to forgo for the sake of administrative efficiency?

This paper considers the procedure for the appointment of a substitute decision maker (“SDM”) under Manitoba’s *The Vulnerable Persons Living with a Mental Disability Act* (the “VPA”).<sup>5</sup> In Part I of this paper, I review the relevant principles of procedural fairness; in Part II, I describe the procedure under the VPA. In Part III, I explain the importance of the SDM decision, and in Part IV, I present the shortcomings of the procedure, and I consider their consequences. Ultimately, I argue that shortcomings in the VPA procedure have significant consequences for the fairness of the process, and I ask how we justify these consequences.

My research for this paper was largely based on a review of the VPA, case law, and the academic literature. I also refer to a 2007 report on the implementation and impact of the VPA, and my personal experience as counsel in a contested VPA hearing that took place in 2019.<sup>6</sup>

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<sup>3</sup> This is discussed in much greater detail below.

<sup>4</sup> See, for example, Grant Huscroft, “From Natural Justice to Fairness: Thresholds, Content, and the Role of Judicial Review” in Colleen Flood & Lorne Sossin eds, *Administrative Law in Context*, 2nd ed (Toronto: Emond Montgomery Publications, 2013) at 162-170.

<sup>5</sup> CCSM, c V90 [VPA].

<sup>6</sup> See Zana Marie Lutfiyya et al, “Report on the Examination of the Implementation and Impact of *The Vulnerable Persons Living with a Mental Disability Act (VPA)*” (2007).

## PART I: BALANCING PROCEDURAL FAIRNESS AND ADMINISTRATIVE EFFICIENCY

We live in an administrative state and administrative bodies are empowered to make a host of decisions that affect our rights, privileges, and interests.<sup>7</sup> Happily, administrative bodies cannot make these decisions unilaterally as it is now settled law that such decisions are protected by a duty of procedural fairness.<sup>8</sup> This duty exists at common law and is constitutionally recognized as a component of the principles of fundamental justice referred to in section 7 of the *Charter*.<sup>9</sup>

The duty of procedural fairness reflects the important role of procedure in administrative decision-making. Procedure may have significant consequences for the correctness of a decision, the dignitary interests of those affected by the decision, and the rule of law. First, the availability of processes for ascertaining the relevant facts and law, and their proper application, can affect the correctness of the result.<sup>10</sup> Second, the degree of respect and fairness provided by the process may engage the personal dignity of those affected by the decision.<sup>11</sup> Third, the transparency, independence, and impartiality of the process and the congruence between the procedure, the decision, and the governing law are each relevant to the rule of law.<sup>12</sup>

In an ideal world, procedures would provide the maximum protection for the correct result, personal dignity, and the rule of law. However, in

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<sup>7</sup> See, for example, Gus Van Harten et al, *Administrative Law: Cases, Text, and Materials*, 7th ed (Toronto: Emond Montgomery Publications Ltd, 2015) at ch 3.

<sup>8</sup> See, for example, *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at para 14, 1985 CanLII 23; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 [*Baker*]. For a thorough discussion of the recognition of the common law duty see Van Harten et al, *supra* note 5 at chs 3-4.

<sup>9</sup> See *Charter*, *supra* note 1 at s 7; *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 777, 1985 CanLII 65; *Charkaoui v Canada (Citizenship and Immigration)*, 2008 SCC 38.

<sup>10</sup> See, for example, Huscroft, *supra* note 4 at 148-153; Lawrence Solum, "Procedural Justice" (2004) 78 S Cal L Rev 181 at 183-184; *Osborn v The Parole Board*, [2013] UKSC 61 at paras 66-71.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

the real world, considerations such as cost, efficiency, and institutional capacity create limitations and barriers for procedural design.<sup>13</sup> The Canadian courts have accepted the need to balance fairness with these competing considerations and the duty of procedural fairness thus requires only a minimum level of procedural protections rather than the best procedures conceivable.<sup>14</sup> As explained by the Supreme Court of Canada (“SCC”) in its 2011 decision in *Canada (Attorney General) v Mavi*:

In determining the content of procedural fairness a balance must be struck. Administering a “fair” process inevitably slows matters down and costs the taxpayer money. On the other hand, the public also suffers a cost if government is perceived to act unfairly, or administrative action is based on “erroneous, incomplete or ill-considered findings of fact, conclusions of law, or exercises of discretion”.<sup>15</sup> [Citations omitted.]

In sum, the duty of fairness requires a minimum level of procedural protection that adequately balances the “twin goals” of administrative efficiency and procedural fairness.<sup>16</sup>

How should those responsible for creating procedures balance procedural fairness and administrative efficiency? More specifically, how should protections for the correct result, personal dignity, and the rule of law be weighed against time, money, and other administrative considerations? These are vexing questions and the analytical approach used by the Canadian courts provides limited guidance.<sup>17</sup> The courts’ current analytical framework for procedural fairness is based upon the approach set out by the SCC in 1999 in *Baker v Canada (Minister of Citizenship and Immigration)*. In *Baker*, the SCC presented a non-exhaustive list of the following five factors “relevant to determining what is required by the common law duty of procedural fairness in a given set of circumstances”:

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<sup>13</sup> See, for example, *Solum*, *supra* note 10 at 185-186; *Van Harten et al*, *supra* note 7 at 254-265.

<sup>14</sup> See, for example, *Huscroft*, *supra* note 4 at 162-170. See also *Knight v Indian Head School Division No. 19*, [1990] 1 SCR 653 at 685, 1990 CanLII 138 (“the aim is not to create ‘procedural perfection’ but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome”).

<sup>15</sup> *Canada (Attorney General) v Mavi*, 2011 SCC 30 at para 40 [Mavi].

<sup>16</sup> See, for example, *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 at paras 55-58 (“twin goals”); *Therrien (Re)*, 2001 SCC 35 at para 95.

<sup>17</sup> For further discussion on this point, see *Van Harten et al*, *supra* note 7 at 251-66.

- I. The nature of the decision and the process followed in making it.
- II. The nature of the statutory scheme and the terms of the statute pursuant to which the decision-maker operates.
- III. The importance of the decision to the individual or individuals affected.
- IV. The legitimate expectations of the person challenging the decision.
- V. The choice of the procedure made by the agency itself.<sup>18</sup>

The “*Baker* factors” are not exhaustive and other considerations may be relevant depending on the circumstances, but it is fair to say that they dominate the current procedural fairness analysis.<sup>19</sup> The *Baker*-based framework is, of course, designed for judicial review; however, the framework has broader application because lawmakers and administrative bodies designing procedures refer to the framework in order to ensure that the procedures align with judicial requirements.<sup>20</sup>

The *Baker* factors do not explain how administrative efficiency should be weighed against procedural fairness.<sup>21</sup> Instead, I argue that the *Baker* factors help reviewing courts gauge the balance that has been struck between fairness and efficiency and the courts then decide, seemingly by intuition, whether this balance is appropriate.<sup>22</sup> This intuitive approach is not surprising, given that some question whether it is even possible to translate into a common currency the costs of foregoing procedures and the administrative costs of governance.<sup>23</sup> The intuitive approach is problematic, however, as it means that the balancing may be conducted implicitly (and non-transparently) and may be based on the court, legislator, or agency’s subjective assignment of relative value to the factors

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<sup>18</sup> See *Baker*, *supra* note 8 (quoted text from para 23). See also *Mavi*, *supra* note 15 at para 42; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 64 at para 77.

<sup>19</sup> See Van Harten et al, *supra* note 7 at 247-251; Huscroft, *supra* note 4 at 162-170; *Vavilov*, *supra* note 18 at para 77.

<sup>20</sup> See, for example, Van Harten et al, *supra* note 7 at 66, where the authors write that the court-based law of procedural fairness and the values it expresses “tend to shape the procedures of agencies, either because the agencies share the values, or because they wish to stay comfortably far from review.”

<sup>21</sup> See Van Harten et al, *supra* note 7 at 262-66.

<sup>22</sup> See Huscroft, *supra* note 4 at 152, where the author writes that “fairness requires the procedural protections the courts think *ought* to be required before a decision is made in particular circumstances”.

<sup>23</sup> See Van Harten et al, *supra* note 7 at 254 and 264.

at play.<sup>24</sup> Moreover, the approach allows procedures to be designed and fairness to be compromised without a rigorous consideration of administrative costs. As a result, procedure can satisfy the minimum requirements of the duty of procedural fairness without any need for substantive justification.

It is also worth noting that while courts do not give clear guidance to procedure designers as to how to balance fairness and efficiency, they make clear that the balance the designers strike will be deferred to. First, the “choice of the procedure made by the agency itself” is an important *Baker* factor.<sup>25</sup> Second, in some cases courts are treating procedural design as an administrative decision entitled to considerable deference upon review.<sup>26</sup>

In this paper I examine the procedure for the appointment of an SDM under the VPA. The goal of my research is not to determine whether the procedure satisfies the duty of procedural fairness; instead, I proceed under the assumption that it does and I focus on a more substantive analysis. Based on my research, I argue that the procedure’s shortcomings have significant consequences for the correctness of the decision, the dignity interests of those affected by the decision, and the rule of law. My goal is to provoke the reader to wonder, as I do, what administrative costs, if any, justify these consequences and whether we should accept these consequences without insisting upon substantive justification.

## PART II: THE VULNERABLE PERSONS LIVING WITH A MENTAL DISABILITY ACT

The VPA provides for the appointment of an SDM for individuals deemed incapable of personal care and/or property management who are impaired by a mental disability that manifested prior to the age of 18

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<sup>24</sup> *Ibid.*

<sup>25</sup> *Baker, supra* note 8.

<sup>26</sup> See, for example, *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245 at paras 70-73. Note that the standard of review for procedural fairness is not entirely settled and was not addressed by the SCC in *Vavilov, supra* note 18. See, for example, *Lipskaia v Canada (Attorney General)*, 2019 FCA 267 at para 14; *CMRRA-SODRAC Inc v Apple Canada Inc*, 2020 FCA 101 at para 15.

years.<sup>27</sup> The VPA does not apply to individuals in psychiatric institutions nor to individuals whose disability manifested after the age of 18 years; *The Mental Health Act* applies in those circumstances.<sup>28</sup> As I will explain in greater detail, the SDM decision is made by the Vulnerable Persons' Commissioner based on recommendations from a hearing panel.

Under the VPA, decision making is divided into two categories: personal care and property management. Incapacity for personal care and property management are assessed according to the "understand and appreciate" standard, where

a person is incapable of [personal care or managing property] if the person is not able to *understand* information that is relevant to making a decision [concerning personal care or managing property], or is not able to *appreciate* the reasonably foreseeable consequences of a decision or lack of decision.<sup>29</sup> [Emphasis added.]

The VPA defines a "vulnerable person" as "an adult living with a mental disability who is in need of assistance to meet his or her basic needs with regard to personal care or management of his or her property."<sup>30</sup> Any person may apply to the Vulnerable Persons' Commissioner for the appointment of an SDM for personal care or property management for a person the applicant believes to be a vulnerable person and in need of an SDM.<sup>31</sup> The Commissioner will then conduct a preliminary investigation as to

- (a) whether the person for whom the application is made appears to be a vulnerable person;
- (b) whether the person for whom the application is made appears to have a support network and reasonable efforts have been made to involve the support network with the person; and
- (c) whether the person for whom the application is made
  - (i) appears to be incapable of personal care by himself or herself or with the involvement of a support network, and
  - (ii) appears to need decisions to be made on his or her behalf with respect to personal care.<sup>32</sup>

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<sup>27</sup> VPA, *supra* note 5.

<sup>28</sup> CCSM c M110 [MHA].

<sup>29</sup> VPA, *supra* note 5 at ss 46, 81.

<sup>30</sup> *Ibid* at s 1.

<sup>31</sup> *Ibid* at ss 47, 82.

<sup>32</sup> *Ibid* at ss 49, 84.

If the Commissioner determines that these criteria have been met, the Commissioner is to establish a hearing panel for the purpose of making recommendations to the Commissioner with respect to the application.<sup>33</sup> The VPA states that “where possible” each hearing panel “shall be composed of (i) a parent or family member of a vulnerable person, (ii) a lawyer, and (iii) a person who does not fall within (i) or (ii).”<sup>34</sup> I could not find any publicly available list of the hearing panel roster nor any further criteria outlining how panel members are selected.<sup>35</sup> Once it is established by the Commissioner, the hearing panel holds a hearing for the purpose of making recommendations as to whether the criteria set out above have been met and as to who an appropriate SDM could be, the powers the SDM should be granted, and the duration and any terms and conditions of the appointment.<sup>36</sup>

The Commissioner will appoint a substitute decision maker if, after considering the recommendations of the hearing panel (and after making any further inquiries necessary<sup>37</sup>) the Commissioner determines that:

- (a) the person for whom the application is made
  - (i) is a vulnerable person,
  - (ii) is incapable of personal care or managing property by himself or herself or with the involvement of a support network, and
  - (iii) needs decisions to be made on his or her behalf with respect to personal care or managing property; and
- (b) the appointment of a substitute decision maker is reasonable in the circumstances.<sup>38</sup>

The Commissioner is thus the ultimate decision-maker. That said, the Commissioner interviewed for the 2007 report on the VPA stated that he agrees with “well over 90%” of the recommendations from hearing panels.<sup>39</sup>

The Commissioner may appoint as SDM any consenting adult the Commissioner finds to be capable, suitable, and able, or, if there is no

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<sup>33</sup> *Ibid* at ss 35, 50(3), 85(3).

<sup>34</sup> *Ibid* at s 36(2).

<sup>35</sup> On this point see Lutfiyya et al, *supra* note 6 at 106.

<sup>36</sup> VPA, *supra* note 5 at ss 52, 87.

<sup>37</sup> *Ibid* at ss 44(1)44(2).

<sup>38</sup> *Ibid* at ss 53(1), 88(1).

<sup>39</sup> Lutfiyya et al, *supra* note 6 at 101.



such individual, the Public Guardian and Trustee.<sup>40</sup> The Manitoba Court of Queen’s Bench has suggested that family members are the preferred SDMs and the Public Guardian and Trustee is the SDM of last resort.<sup>41</sup>

An SDM may be appointed for up to five years.<sup>42</sup> The SDM can be appointed for both personal care and property management, or just one.<sup>43</sup> Decision making in personal care and property management are divided into a number of “powers” and an SDM may be granted all or only a subset of these powers. The powers for personal care include, for example: Deciding where, with whom, and under what conditions the vulnerable person is to live, and giving, refusing, or withdrawing consent to health care on the vulnerable person’s behalf.<sup>44</sup> The powers for property management include, for example: to receive, deposit, and invest money, and to purchase, sell, dispose of, encumber, or transfer personal property.<sup>45</sup>

In this paper, I will use the term “SDM hearing” to refer to the entirety of the process from the application stage to the Commissioner’s final decision, I will refer to the hearing before the hearing panel as simply the hearing, and I will refer to the decision whether or not to appoint an SDM as the “SDM decision”. The key details of the procedure for the SDM hearing (and the relevant sections of the VPA) are as follows:

- i. The application must be in writing (sections 47(2), 82(2)), and the Commissioner is to give a copy of the application to the individual for whom the application is made (sections 47(4), 82(4)).
- ii. The Commissioner must give notice of a hearing before a hearing panel (sections 38(1) and (2)).
- iii. The Commissioner may determine the procedures for hearing panels (section 40(1)).
- iv. The hearing panel is not bound by the rules of law respecting evidence applicable to judicial proceedings (section 40(2)).

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<sup>40</sup> VPA, *supra* note 5 at ss 54(1), 89(1).

<sup>41</sup> *Manitoba (Public Trustee) v Hansen*, 2000 MBQB 133 at paras 23, 26.

<sup>42</sup> VPA, *supra* note 5 at ss 57(4), 92(6), 139(1), 144(6).

<sup>43</sup> *Ibid* at ss 47(3), 82(3).

<sup>44</sup> *Ibid* at s 57(2).

<sup>45</sup> *Ibid* at s 92(2).

- v. The individual who will be the subject of the SDM decision is entitled to be present at the hearing (section 40(3)).
- vi. The hearing panel must give the following people the opportunity to present information and to make representations: the persons given notice of the hearing and any other person with the consent of the vulnerable person or the hearing panel (section 40(4)). The vulnerable person may be represented in this function by another person (sections 40(5)).
- vii. The Commissioner in making his or her decision, is to consider the recommendations of the hearing panel and is also empowered to make direct inquiries of any person; if inquiries are made, notice and opportunity for response must be provided (sections 44(2), 53(1), 88(1)). The Commissioner is to give notice of his or her decision and must provide written reasons upon request (sections 53(4), 88(4)).
- viii. The Commissioner's decision may be appealed to the Court of Queen's Bench and the appeal must be a fresh hearing (sections 147-155).

As I mentioned above, the procedure for the hearing itself is not provided for in the VPA and is instead at the discretion of the Commissioner.<sup>46</sup> The Government of Manitoba provides some information about the procedure that has been selected but it is far from comprehensive.<sup>47</sup> A "Hearing Panel Coordinator" is responsible for organizing the hearing but the Coordinator's role, if any, at the hearing itself is not made clear.<sup>48</sup> The 2007 report on the VPA suggests that the hearing procedure varies considerably depending on the panel and the circumstances.<sup>49</sup> At the hearing I attended in 2019, the procedure was as follows: the Hearing Panel Coordinator attended the hearing and

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<sup>46</sup> *Ibid* at s 40(1). See also Lutfiyya et al, *supra* note 6 at 105-06.

<sup>47</sup> See "The Hearing Panel Process" (no date), online: *Government of Manitoba* <[https://www.gov.mb.ca/fs/vpco/hearing\\_panel.html](https://www.gov.mb.ca/fs/vpco/hearing_panel.html)> [https://perma.cc/67VS-VZCJ]. See also "A Fact Sheet on the Hearing Process" (no date), online: *Government of Manitoba* <[https://www.gov.mb.ca/fs/vpco/pubs/hearing\\_process.pdf](https://www.gov.mb.ca/fs/vpco/pubs/hearing_process.pdf)> [https://perma.cc/9JTP-PU4V].

<sup>48</sup> *Ibid.*

<sup>49</sup> See Lutfiyya et al, *supra* note 6 at 78.

appeared to advise the panel on aspects of the procedure, the panel played an inquisitorial role and asked a considerable number of questions, participants took turns speaking and responding to questions from the panel, and participants were asked to address all comments to the panel and were asked not to address one another directly.

The procedure for the SDM hearing does not amount to “full procedure”, as it does not include all of the procedural protections that may be included in a decision-making process.<sup>50</sup> The following procedural protections are not present:

- i. The hearing panel procedure is not available to the participants prior to the hearing.
- ii. No advocate is provided for the person for whom the application has been made and no funding is provided to help indigent individuals pay for legal representation.<sup>51</sup>
- iii. There is limited pre-hearing disclosure and no discovery.
- iv. The rules of evidence do not apply at the hearing.
- v. There is no cross-examination of those providing information at the hearing.
- vi. The hearing is not open to the public.
- vii. The Commissioner’s prior decisions are not publicly available.

### **PART III: THE IMPORTANCE OF THE SDM DECISION**

In order to understand the consequences of the shortcomings in the procedure for the SDM hearing it is necessary to understand the importance of the SDM decision, both for individuals who are the subject of the decision and for society more generally. Below, I outline four considerations fundamental to understanding the importance of the SDM decision.

First, who may be the subject of the decision? The VPA applies to adults with mental disabilities that manifested before the age of 18 who

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<sup>50</sup> See, for example, Huscroft, *supra* note 4 at 171-180. For an in-depth review, see Van Harten et al, *supra* note 7 at 278-437.

<sup>51</sup> The Manitoba *Legal Aid Regulation* (Man Reg 225/91) states that legal aid may be provided to a person who is eligible in respect of a proceeding before a quasi-judicial or administrative board or commission (section 11(1)(b)). However, there is nothing in my research of the public record to suggest that aid is provided for SDM hearings.

are not in psychiatric facilities.<sup>52</sup> “Mental disability” is defined to mean “significantly impaired intellectual functioning”.<sup>53</sup> The test for admission into a psychiatric facility is largely based upon whether a person “is likely to cause serious harm to himself or herself or to another person, or to suffer substantial mental or physical deterioration if not detained in a facility.”<sup>54</sup> Taking these two definitions together, we can conclude that the individuals governed by the VPA who may be the subjects of an SDM decision are those with significantly impaired intellectual functioning who are not likely to cause serious harm to themselves or to others.

Second, why is substitute decision making necessary? Substitute decision making is predicated on the assumption that there are people capable of living in society who are not capable of making their own decisions. How valid is this assumption and how broadly should it be applied? There is a school of thinking wherein incapacity for personal care or property management should be viewed as the result of insufficient support and accommodation, not insufficient mental capacity, in the great majority of cases.<sup>55</sup> In this paradigm, *substitute* decision making is called for only in the rarest and most-narrowly defined of circumstances, once the ability of *supported* decision making has been exhausted.<sup>56</sup> This line of reasoning is recognized in the preamble to the VPA itself.<sup>57</sup>

Third, what is the source or cause of disability? The traditional view attributes disability to medical impairment; this is referred to as the medical or bio-medical model of disability.<sup>58</sup> A more modern view

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<sup>52</sup> VPA, *supra* note 5 at ss 1, 3.

<sup>53</sup> *Ibid.*

<sup>54</sup> MHA, *supra* note 28 at s 17(1).

<sup>55</sup> See Michael Bach & Lana Kerzner, “A New Paradigm for Protecting Autonomy and the Right to Legal Capacity” (2010) Law Commission of Ontario Working Paper at 19-26, 38-44, online: <<https://www.lco-cdo.org/wp-content/uploads/2010/11/disabilities-commissioned-paper-bach-kerzner.pdf>> [<https://perma.cc/S8ND-ZL62>].

<sup>56</sup> *Ibid.* See also Bruce Winick, “On Autonomy: Legal and Psychological Perspectives” (1992) 37 Vill L Rev 1705 at 1776 [Winick, “On Autonomy”].

<sup>57</sup> VPA, *supra* note 5 at preamble.

<sup>58</sup> Doron Dorfman, “Re-Claiming Disability: Identity, Procedural Justice, and the Disability Determination Process” (2017) 42:1 Law & Soc Inquiry 195 at 199-202; See also Bach & Kerzner, *supra* note 55.

acknowledges that disability is caused, to some degree, by social, economic, and legal barriers; this is referred to as the social model of disability.<sup>59</sup> The 2007 United Nations Convention on the Rights of Persons with Disabilities (“CRPD”) rejects the medical model of disability and affirms the social model. The preamble to the CRPD states that parties to the convention recognize

that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.<sup>60</sup>

Substitute decision making is a response to disability that requires accommodation on the part of the individual, rather than society. There is risk, therefore, that substitute decision making will reinforce the perception that the cause of disability lies with the individual and not society.

The fourth consideration is the impact of an SDM appointment on an individual’s autonomy. As I mentioned in the introduction, autonomy is a fundamental value in Canadian law and is protected under section 7 of the *Charter*. Further, one of the guiding principles of the CRPD is “respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons.”<sup>61</sup> The importance of autonomy is also recognized in the preamble to the VPA and in the VPA’s emphasis on supported decision making.<sup>62</sup>

Depriving an individual of the right to make their own decisions is a significant limitation of their autonomy, even where the deprivation is rationalized as being in the individual’s best interests.<sup>63</sup> The following

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<sup>59</sup> *Ibid.* See also Kristin Glen, “Changing Paradigms: Mental Capacity, Legal Capacity Guardianship, and Beyond” (2012) 44 *Colum Hum Rts L Rev* 93.

<sup>60</sup> Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106 (2007) at 33 (Preamble) [CRPD].

<sup>61</sup> *Ibid* at 37 (Article 3).

<sup>62</sup> Under the VPA, substitute decision making may only be pursued once supported decision making has failed. See sections 49, 53(1), 84, 88(1). For a discussion of the merits of supported decision making vis-à-vis substitute decision making see, for example, Leslie Salzman, “Guardianship for Persons with Mental Illness - A Legal and Appropriate Alternative” (2011) 4 *St. Louis U J Health L & Pol’y* 279; Bach & Kerzner, *supra* note 55.

<sup>63</sup> See, for example, Bruce Winick, “On Autonomy”, *supra* note 56.

passage written by Michael Bach & Lana Kerzner in a report commissioned by the Law Commission of Ontario speaks directly to this point:

Determining a person as incapable or incompetent to manage his or her affairs in some respects removes a person's authority over their own lives and vests this authority in another. While usually done in the name of protection, such removal of an individual's legal personhood is increasingly seen from a disability rights perspective as a violation that brings social and legal harm to individuals. The concern is that individuals are no longer addressed as persons in their own right when their legal capacity to act is restricted, and thus their moral and legal status is more likely to be diminished in the eyes of those in close personal relationships, caregivers, community members, health and human services, and public institutions. This diminishment contributes to the risk of stereotyping, objectification, negative attitudes and other forms of exclusion which people with disabilities disproportionately face, and which increase powerlessness and vulnerability to abuse, neglect and exploitation.<sup>64</sup>

The VPA does contain elements which could mitigate some of the impact of substitute decision making on a person's autonomy. For example:

- i. The appointment of an SDM is not an all-or-nothing concern, at least in theory. As described above, an SDM may only be appointed for up to five years and can be granted all or only a subset of decision making "powers" related to personal care and managing property.
- ii. The VPA bestows a number of duties upon SDMs. These include, for example, a duty of good faith (for personal care) or a fiduciary duty (for property management), and duties to provide explanations, foster independence, and encourage participation.<sup>65</sup>
- iii. In making decisions, an SDM must be guided by the vulnerable person's wishes, values, and beliefs and must act in the person's best interests.<sup>66</sup>

It is important not to confuse mitigation with negation, however. The mitigating provisions do not change the fact that substitute decision making under the VPA deprives a person of their legal power to make

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<sup>64</sup> Bach & Kerzner, *supra* note 55 at 7-8.

<sup>65</sup> VPA, *supra* note 5 at ss 70-75, 98-103.

<sup>66</sup> *Ibid* at ss 76(1), 104.

fundamental decisions in the areas of personal care and property management. Further, the academic literature indicates that there are reasons to doubt the efficacy of the foregoing mitigation provisions. In the words of one academic, “because of the difficulty of parsing out various decision-making competencies, the [entity responsible for ordering substitute decision making] may make more global assessments of incapacity than are actually justified.”<sup>67</sup> Also, even where only a limited order for substitute decision making has been granted, the individual “has been found to be incapacitated in at least some area of decision making, and as a result, may be treated as broadly incapacitated by individuals and entities within the community.”<sup>68</sup>

Several important observations in the 2007 report on the VPA provide a strong basis for doubting the efficacy of the mitigating provisions: First, many SDM hearing participants, including those completing the SDM applications, do not have a good understanding of the meaning of the different decision-making powers.<sup>69</sup> Second, SDMs “often do not seem to be cognizant of their powers and assume that if they have been appointed as substitute decision maker, it is all encompassing.”<sup>70</sup> Third, “once an appointment of substitute decision making is granted, vulnerable people are often left out of the consultation process and decisions are not guided by the vulnerable person’s wishes and best interests.”<sup>71</sup> It is worth noting that the VPA and the surrounding materials provided by the government do not present any built-in mechanisms for ensuring that SDMs are in observance of the mitigating provisions.

Taken together, the four considerations above illustrate the great importance of the SDM decision. These considerations also reveal important goals for the SDM decision: On an individual level, substitute decision makers should not be appointed for a person who does not truly need one. As stated by the SCC in 2003 in *Starson v Swayze*, “unwarranted findings of incapacity severely infringe upon a person’s right to self-

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<sup>67</sup> Salzman, *supra* note 62 at 300.

<sup>68</sup> *Ibid* at 296.

<sup>69</sup> Lutfiyya, *supra* note 6 at 76.

<sup>70</sup> *Ibid* at 82.

<sup>71</sup> *Ibid*; see also *ibid* at 66.

determination.”<sup>72</sup> On a societal level, substitute decision making should be a last resort in circumstances where further support and accommodation are impossible and it must be conducted in a way that does not reinforce the medical model of disability. These goals reflect the “correct” result for the SDM decision.

I have not been able to determine how many SDM hearings occur each year nor in what proportion of SDM hearings the vulnerable person opposes the appointment of an SDM. To be clear, the procedure for the SDM hearing does not vary depending on whether or not the vulnerable person opposes the appointment of an SDM. Moreover, I argue that the importance of procedure does not change if the SDM hearing is not opposed. Consent is not a criterion in the SDM decision. Nor should it be, given the high potential for coercion in these circumstances. Regardless of consent, the appointment of an SDM may bear the same consequences for the individual and society. Since the importance of the decision does not change, the Commissioner must conduct the same inquiry, and the procedures must provide the same function.

#### **PART IV: PROCEDURAL SHORTCOMINGS OF THE SDM HEARING AND THEIR CONSEQUENCES**

The ideal procedure for the SDM hearing would insure that an SDM is only appointed where warranted by the facts and the law, in keeping with the social model of disability adopted by the VPA; would engender a sense of fairness and respect that protects the dignity of the individual affected by the decision; and would be sufficiently transparent, free of bias, and in line with the governing law to satisfy the rule of law. However, as I explained in part one, the duty of procedural fairness does not require the ideal procedure and protections may be compromised for the sake of administrative efficiency. In this part, I identify shortcomings in the procedure for the SDM hearing in an effort to demonstrate the costs of the compromise.

I argue that the shortcomings in the SDM hearing include:

- A. The lack of transparency with the hearing procedure.
- B. The composition and training of the hearing panel.

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<sup>72</sup> *Starson v Swayze*, 2003 SCC 32 at para 75 [Starson].



- C. The absence of legal counsel.
- D. The absence of full disclosure and discovery.
- E. The non-application of the rules of evidence.
- F. The absence of cross-examination at the hearing.

I consider the consequences of these shortcomings in the paragraphs below. I recognize that many of the shortcomings I have listed involve the absence of components of a traditional adversarial system, whereas the SDM hearing is a cross between adversarial and inquisitorial. I wish to emphasize that my arguments are not based on a preference for adversarial procedures for their own sake, but rather are based on the consequences of their absence in this context. As I will explain in greater detail, my arguments in this regard are supported by the academic literature, which generally suggests that an adversarial-style legal hearing is the best procedure for determining mental capacity.<sup>73</sup>

Two further points are worth mentioning before discussing the procedural shortcomings of the SDM hearing in detail. First, in addition to the specific consequences caused by particular procedural shortcomings, which I identify below, it is important to keep in mind the more general therapeutic consequences. Studies in therapeutic jurisprudence suggest that procedure has a considerable psychological impact upon individuals within a decision-making process.<sup>74</sup> For example, where an individual with a mental disability feels that a hearing to determine their legal status is lacking in due process or fairness “these feelings can undermine their sense of self-esteem and self-efficacy, which can exacerbate their mental illness and foster a form of learned helplessness.”<sup>75</sup> Further, an individual’s perception of the fairness of a legal process can affect their perception and

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<sup>73</sup> See, for example, Donald N. Bersoff, “Judicial Deference to Nonlegal Decisionmakers: Imposing Simplistic Solutions on Problems of Cognitive Complexity in Mental Disability Law” (1992) 46 SMU L Rev 329 at 362-367; Douglas S. Stransky, “Civil Commitment and the Right to Refuse Treatment: Resolving Disputes from a Due Process Perspective” (1996) 50 U Miami L Rev 413 at 438-442; Bruce J Winick, “A Therapeutic Jurisprudence Model for Civil Commitment” in Kate Diesfield ed, *Involuntary Detention and Therapeutic Jurisprudence*, 1st ed (London: Rutledge, 2003) at 24-25 [Winick, “Therapeutic Jurisprudence”].

<sup>74</sup> See, e.g., Winick, “Therapeutic Jurisprudence”, *ibid* at 33; Bersoff, *ibid*; Tom Tyler, “The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings” (1992) 46 SMU L Rev 433.

<sup>75</sup> Winick, “Therapeutic Jurisprudence”, *supra* note 73 at 33.

acceptance of the decision that is rendered through the process.<sup>76</sup> Some studies even suggest that the perception of fairness (or unfairness) may have a greater psychological impact than the decision itself.<sup>77</sup> These therapeutic (or antitherapeutic) consequences of procedure relate to the concern for personal dignity underlying the duty of procedural fairness but may not be entirely captured by the more specific discussion of particular procedural shortcomings below.

Second, it should be noted that the “understand and appreciate” test – the crux of the SDM decision (presented in Part II above) – can be difficult to apply. The distinctions and emphases of the test are subtle, and understanding and appreciation are nebulous concepts which may be difficult to assess precisely. This is illustrated, for example, by the disagreement amongst the various decision makers applying the test in *Starson*.<sup>78</sup> It is important to keep in mind the difficult and nuanced inquiry required by the understand and appreciate test when considering the procedures for the SDM hearing.

### A. The lack of transparency with the hearing procedure

As I mentioned above, the procedure for the hearing is at the discretion of the Commissioner and very little information about the procedure is publicly available. The 2007 report on the VPA suggests that the procedure varies widely according to the circumstances and the discretion of the panel.<sup>79</sup> The report quotes the following description of the procedure from a Community Services Worker:

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<sup>76</sup> See Tyler, *supra* note 75; Bersoff, *supra* note 73 at 367.

<sup>77</sup> Tyler, *ibid* at 437-39.

<sup>78</sup> *Starson*, *supra* note 72. The issue in *Starson* was Professor Swayze’s legal capacity to decide whether or not to take psychiatric medication. An initial physician found Swayze was not capable, the Ontario Consent and Capacity Board agreed, the decision was overturned by the Ontario Superior Court of Justice and this was upheld by the Ontario Court of Appeal. At the Supreme Court, six justices upheld the decision of the courts below and three justices found that Swayze was not legally capable of the decision. For a review of how the “understand and appreciate” test was applied in the years following *Starson*, and for further evidence of the variable interpretations the test can support, see Monique Dull, “*Starson v Swayze*, 2003-2008: Appreciating the Judicial Consequences” (2009) 17 Health L J 51. See also *Salzman*, *supra* note 62 at 300-305.

<sup>79</sup> See Lutfiyya et al, *supra* note 6 at 78, 143.

I must say that the hearing panels are all different. They are all unique to their own makeup and so sometimes you get grilled, and sometimes it's just a walk in the park, so you never know what's coming.<sup>80</sup>

The report also criticized the lack of accessible information on the VPA and recommended the “elucidation of the hearing panel policies and procedures.”<sup>81</sup>

The lack of transparency and the variability of the hearing procedure are highly problematic for several reasons: First, it means that participants are less able to prepare for the meeting and are more likely to be surprised. The compromised ability to prepare means that useful information may not be aired at the hearing, while a surprise at the hearing could produce stress and anxiety for hearing participants. Second, the lack of transparency with the procedure, in combination with the fact that hearings are not open to the public, shields the procedure from legal scrutiny. Third, the suggestion that the procedure varies substantially depending on the composition of the hearing panel raises concerns about arbitrariness and bias.

The role of the Hearing Panel Coordinator provides an example of the way that a lack of transparency can shield the procedure from legal scrutiny. There are reasons to be concerned about the Coordinator's role. The 2007 report on the VPA notes that the Coordinator was often responsible for establishing hearing panels (by delegation from the Commissioner) and was habitually drafting the hearing panels' reports for the Commissioner.<sup>82</sup> Further, in the hearing I attended the Coordinator sat with the panel, spoke with the participants, and provided advice on the hearing procedure and the VPA. This role is not provided for in the VPA and does not appear to be in keeping with the role of the hearing panel set out in the VPA. However, it is difficult to form a conclusion without any publicly available information about the appointment of the Coordinator, their role as prescribed by the Commissioner, and the general practice in the years since the 2007 report.

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<sup>80</sup> *Ibid* at 78.

<sup>81</sup> *Ibid*.

<sup>82</sup> *Ibid* at 78, 105-06.

## B. The composition and training of the hearing panel

As I mentioned above, the VPA states that “where possible” each hearing panel of three should be composed of a parent or family member of the vulnerable person, a lawyer, and person who is neither of these two.<sup>83</sup> The hearing panel roster is not publicly available, nor is any further criteria used for the selection of hearing panel members. Here again there is a lack of transparency that shields the procedure from scrutiny. Also, the 2007 report on the VPA explains that panelists are provided with some training about the VPA but suggests that panelists did not feel “really comfortable” with the VPA until about two years after their appointment.<sup>84</sup> Even more importantly, the report records that some of the panelists interviewed struggled to explain the difference between capacity and ability (a critical distinction for the SDM decision).<sup>85</sup>

## C. The absence of legal counsel

The VPA allows an individual for whom an application has been made to be represented by legal counsel. Further, the VPA states that the individual “shall be deemed to have capacity to retain and instruct counsel.”<sup>86</sup> However, as I described above, no counsel is provided under the VPA nor by Legal Aid Manitoba. This leaves the individual to find and pay for counsel on their own, and one can imagine the financial and practical barriers that might get in the way. Nothing in my research of the public record indicates that individuals are regularly represented by counsel in the SDM hearing. This is problematic, because the SDM hearing is a complicated legal process of great importance and individuals facing an SDM decision are, by definition, vulnerable people with significantly impaired intellectual functioning.

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<sup>83</sup> VPA, *supra* note 5 at s 36(2).

<sup>84</sup> Lutfiyya et al, *supra* note 6 at 107.

<sup>85</sup> *Ibid.*

<sup>86</sup> VPA, *supra* note 5 at s 2.

The important role of legal counsel for individuals with disabilities is quite thoroughly discussed in the academic literature.<sup>87</sup> Article 12 of the CRPD mandates that “States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.”<sup>88</sup> Writing in 2013, scholar Michael Perlin argued that the most critical determining factor for whether the CRPD would be “as emancipatory as its potential suggest[ed]” was the availability and presence of “dedicated and committed counsel” to provide representation for individuals with disabilities.<sup>89</sup> He further argued, with regard to the guardianship process in the United States, that “the legislative and judicial creation of rights is illusory unless there is a parallel mandate of counsel that is (1) free and (2) regularized and organized.”<sup>90</sup> In the Canadian context, Bach & Kerzner listed access to counsel and formal advocates as necessary features of a system to safeguard the integrity of the decision-making processes for SDM hearings.<sup>91</sup>

Counsel, either acting directly for the individual subject to the SDM decision or in the form of a formal advocate attached to the SDM hearing, could provide an invaluable role. First, counsel would be an information resource for the individual: counsel could explain the process and the potential ramifications of the decision. The academic literature suggests that this could substantially improve the experience for the individual.<sup>92</sup> This is supported by the 2007 report on the VPA, which notes that many hearing panel participants find the process intimidating and confusing.<sup>93</sup>

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<sup>87</sup> See, for example, Michael L. Perlin, “Striking for the Guardians and Protectors of the Mind: The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law” (2013) 117 Penn St L Rev 1159; Alison Lynch and Michael Perlin, “Life’s hurried tangled road’: A therapeutic jurisprudence analysis of why dedicated counsel must be assigned to represent persons with mental disabilities in community settings” (2017) 35 Behav Sci Law 353.

<sup>88</sup> CRPD, *supra* note 60.

<sup>89</sup> Perlin, *supra* note 88.

<sup>90</sup> *Ibid* at 1180.

<sup>91</sup> Bach & Kerzner, *supra* note 55 at 124-25.

<sup>92</sup> See, for example, Bersoff, *supra* note 73; Tyler, *supra* note 74; Anina Johnson, “The Value of Procedural Fairness in Mental Health Review Tribunal Hearings” (Paper delivered at the Australian Institute of Administrative Law National Conference, 21 July 2016), (2016) Australian International Administrative Law Forum No. 86.

<sup>93</sup> See Lutfiyya et al, *supra* note 6 at 78-79.

Second, counsel would help the individual prepare and present their case. This could include, for example, reviewing the application, helping the individual decide how to respond, developing counter-arguments, organizing evidence in support of the individual's position, critiquing the evidence presented by the applicant, assisting the individual with presenting his or her argument at the hearing itself, and helping the individual respond to information requests after the hearing. By providing these services, counsel could bring to light information, analysis, and perspectives which might not otherwise reach the decision maker and could also help insure that the process adhered to the requirements of the VPA. While it is true that the inquisitorial nature of the hearing panel and the Commissioner's ability to request further information could mitigate some of the consequences of a lack of counsel, this falls well short of supplanting the services I have just described and as a result does little to lessen the potential utility of counsel.

The 2007 report on the VPA states:

[I]t is... evident that presumptions of incompetence by medical, legal, and financial professionals result in the appointment of a substitute decision maker even though the vulnerable person is considered to be capable of making decisions by people who know him or her.<sup>94</sup>

This phenomenon has been noted in the academic literature. Scholars have observed how a preliminary diagnosis tends to flow "quickly and imperceptibly" into a fixed conclusion which then escapes proper critical evaluation.<sup>95</sup> Research suggests that a robust adversarial system is the best way of confronting this issue.<sup>96</sup> Legal counsel would be highly useful in this context.

There is an argument to be made that the *Charter* requires that state-funded legal counsel be made available to individuals in an SDM hearing. This argument is supported by the SCC's decision in 1999 in *New Brunswick (Minister of Health and Community Services) v G. (J.)*.<sup>97</sup> The issue in *G.(J.)* was whether "indigent parents have a constitutional right to be provided with state-funded counsel when a government seeks a judicial

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<sup>94</sup> *Ibid* at 73.

<sup>95</sup> Bersoff, *supra* note 73 at 366.

<sup>96</sup> *Ibid.*

<sup>97</sup> [1999] 3 SCR 46, 1999 CanLII 653 [G (J)].

order suspending such parents' custody of their children."<sup>98</sup> The SCC found that parents' section 7 rights are engaged in such circumstances and that the appellant parent's right to a fair hearing required that she be represented by counsel.<sup>99</sup> This conclusion was based on the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the appellant parent.<sup>100</sup>

Applying *G. (J.)* to the case of the SDM hearing, there can be little doubt that an individual's section 7 rights are engaged, that there are extremely serious interests at stake, and that the capacity of the individual may be a barrier to effective participation in the hearing. Further, the SDM hearing is a complex inquiry involving subtle legal questions and requiring evidence from a range of witness and medical experts. Finally, although the SDM hearing is before an administrative decision-maker, instead of a court, and is not a fully adversarial process, the hearing before the panel can be intimidating and confusing for participants.<sup>101</sup>

#### **D. The absence of full disclosure and discovery**

The individual for whom the SDM application is made receives a copy of the application and any documents provided by the applicant in support of the application. Beyond this, there is no disclosure or discovery prior to the hearing before the hearing panel. Participants can present new information and arguments at the hearing without giving prior notice. This makes it difficult for the individual (or the individual's representative or support network) to prepare for the hearing and means that the individual may have to respond on the fly to new matters raised at the hearing, which could be particularly difficult for some individuals with mental disabilities. This may have two significant consequences: First, the individual may be hampered in their ability to respond and relevant information may not be provided to the hearing panel as a result. Second, the hearing may be more stressful and distressing for the individual,

This procedural shortcoming is mitigated, to some degree, by the Commissioner's ability to make direct inquiries after the hearing. But this

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<sup>98</sup> *Ibid* at para 1.

<sup>99</sup> *Ibid* at para 75.

<sup>100</sup> *Ibid.*

<sup>101</sup> See Lutfiyya et al, *supra* note 6 at 78-79.

mitigation requires that the hearing panel and/or the Commissioner identifies issues where further explanation may be possible and of use. Moreover, I argue that direct inquiries should be used sparingly since it results in information reaching the Commissioner that has not been reviewed and commented upon by the hearing panel.

### **E. The non-application of the rules of evidence**

The rules of evidence do not apply at the hearing. This is not surprising, given that this is common for administrative hearings and that the VPA hearing panel members need not be lawyers.<sup>102</sup> This does not mean, however, that the non-application of the rules of evidence is inconsequential. In order to apply the understand and appreciate test, the hearing panel will almost certainly need to consider medical evidence and this will typically be presented in the form of treatment and care reports written by healthcare professionals. In my opinion the lack of evidentiary rules, particularly the rules against hearsay and opinion evidence, allows treatment and care reports to become more influential than they should be, for several inter-related reasons: First, the reports were not written for the purpose of the SDM hearing and it is unclear how well the conclusions from the report's initial context apply to the considerations of the SDM hearing. Second, the authors of the reports are not required to attend the hearing, thus there is no opportunity for the hearing panel or the hearing participants to ask the authors questions in order to challenge their evidence.<sup>103</sup> Third, reports presenting the opinions of professionals or clinicians could be overly influential for lay tribunal members who do not have the expertise to critically examine the opinions. This concern forms the basis for the rigorous protections surrounding expert evidence in court proceedings, all of which are absent in the SDM hearing.<sup>104</sup> Fourth, there is research to suggest that clinical assessment of mental capacity is highly fallible and should be subject to careful review before a legal decision is taken.<sup>105</sup>

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<sup>102</sup> See Van Harten et al, *supra* note 7 at 411; VPA, *supra* note 5 at s 34(2).

<sup>103</sup> See, for example, Johnson, *supra* note 93 at 15.

<sup>104</sup> With respect to expert evidence for court proceedings, see David Paciocco and Lee Stuesser, *The Law of Evidence*, 7th ed (Toronto: Irwin Law Inc., 2015) at 206.

<sup>105</sup> See Bersoff, *supra* note 72 at 351-363; Johnson, *supra* note 93 at 15.



When considering the appropriate role for medical evidence in the SDM hearing, I think it is useful to ask the following question: Is the SDM decision a medical one or a legal one? The answer, in my opinion, is that the decision is a legal one to be based in part upon medical evidence. Legal capacity is a legal fiction, “necessary to tell us when a state legitimately may intrude into an individual's affairs and take action to limit an individual's rights to make decisions about his or her own person or property.”<sup>106</sup> As scholars David Wexler and Bruce Winick wrote in 1991:

Many of the issues at the heart of mental health law are legal, not clinical, in nature. Legal issues should not be permitted to masquerade as clinical ones; indeed, rather than deference, the law should adopt a healthy skepticism towards claims of clinical expertise.<sup>107</sup>

Following this reasoning, I argue that the Commissioner and the hearing panel should adopt a healthy skepticism towards the evidence presented in treatment and care reports. In my opinion, for the reasons presented in the foregoing paragraph, the current procedure does not empower such skepticism and instead gives the reports centre stage. I do not suggest that all of the protections surrounding expert evidence in judicial proceedings should be transplanted into the SDM hearing. I think there is a middle ground. For example, the procedure could require that clinicians whose reports are being presented as evidence attend the hearing, and/or that only reports written for the specific purposes of the SDM hearing be used.

## F. The absence of cross-examination at the hearing

It is difficult to say whether there is a standard practice for the interactions between participants at the hearing. There is nothing in the VPA in this regard, nor in the publicly available information about the VPA procedure. I think it is unlikely that cross-examination is regularly available. The 2007 report on the VPA observes that the hearing procedure is highly variable but no mention is made of cross-examination nor of the questioning of hearing participants by the individual who is

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<sup>106</sup> Kristin Glen, *supra* note 59 at 95 (quoting writing by Charles Sabatino and Erica Wood).

<sup>107</sup> David Wexler and Bruce Winick, “Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research” (1991) 45:5 U Miami L Rev 979 at 983.

subject to the SDM decision (or their representative).<sup>108</sup> At the hearing I attended in 2019, the hearing panel asked that all participants direct their remarks to the tribunal and no adversarial discussion between participants was permitted. Thus, there was no cross-examination.

Under the VPA, participants at the hearing may include the individual for whom the application was made and any other person they consent to have there; the applicant; the proposed SDM, if any; family members; and any other person who the Commissioner considers appropriate or who is given the consent of the hearing panel.<sup>109</sup> The individual who is subject to the SDM decision is not given notice of who will attend the hearing nor what information they will provide. The lack of cross-examination limits the individual's ability to probe the information and opinions provided by other participants. This may reduce the information and context received by the hearing panel and thus the Commissioner.<sup>110</sup>

Now, I must acknowledge two counterpoints to my argument: First, cross-examination is most useful when it is conducted by skilled counsel and may serve little purpose where the individual who is subject to the SDM decision is self represented, depending on the individual's abilities. Second, the absence of cross-examination is counterbalanced to some degree by the inquisitorial capacity of the tribunal. I agree with both of these points, and therefore suggest that the absence of cross-examination is a secondary consideration to the absence of state-funded counsel; a lesser but still relevant contributor to the procedural shortcomings of the SDM hearing.

## G. Summary

The shortcomings in the procedure for the SDM hearing result in a loss of protections for the correct result, the dignitary interests of the individuals who are the subject of the SDM hearing, and the rule of law:

First, the difficulty of preparing for a hearing with an unknown procedure, the absence of legal counsel and full disclosure and discovery, and the non-application of the rules of evidence mean that valuable factual

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<sup>108</sup> Lutfiyya, *supra* note 6.

<sup>109</sup> VPA, *supra* note 5 at 40(4), 51(1), 86(1).

<sup>110</sup> See, for example, Johnson, *supra* note 93 at 15.

and legal information may not reach the hearing panel and that the information which does reach the panel may not be sufficiently critiqued. This affects the procedure's ability to produce the correct result, increasing the risk of an unwarranted finding of incapacity and a perpetuation of the medical model of disability.

Second, the dignity interests of the individual who is subject to the decision are threatened by the increased risk of an incorrect result; the potential sense of injustice arising from procedural issues such as the lack of due process in the critique of medical diagnoses and witness reports, the possibility of ambush at the hearing, and the confusing nature of the process; and the psychological consequences of navigating confusing and intimidating hearings when already struggling with the challenges of a mental disability, which is exacerbated by the absence of legal counsel.

Third, and finally, the rule of law is affected by the lack of transparency in the hearing procedure and in the selection of the hearing panel; the risk of bias and arbitrariness stemming from the inadequate protections for expert evidence, the discretionary nature of the hearing procedure, and the mysterious role of the Hearing Panel Coordinator; and the risk of deviating from the governing law engendered by the panelists' reported difficulty with key legal distinctions and the absence of legal counsel.

## CONCLUSION

The imposition of a substitute decision maker is one of the greatest restrictions of autonomy permitted in Canadian society. The academic literature, the CRPD, and the VPA itself all agree on the importance of constraining substitute decision making to the narrowest circumstances, to be used only where absolutely necessary. The SDM decision is thus of great importance to the affected individual and to society more generally. Nonetheless, there are significant shortcomings in the procedure for the SDM decision. But the duty of procedural fairness allows such shortcomings in the name of administrative efficiency. Further, the courts' intuitive approach to balancing procedural fairness and administrative efficiency allows fairness to be compromised as it is in the SDM hearing without any need for a substantive cost-benefit analysis.

In this paper, I have attempted to conduct a substantive analysis of the costs of compromising on the procedure for the SDM hearing. This

analysis provides a starting point for considering several important questions, which I leave with the reader:

- i. Is it appropriate to compromise the fairness of the SDM hearing to this degree without making an effort to determine the countervailing administrative costs? What administrative costs, if any, would justify the procedural shortcomings of the SDM hearing?
- ii. Implicit within the balancing of procedural fairness and administrative efficiency is a valuing of the interest that is at stake.<sup>111</sup> What does the balance struck by the VPA suggest about Manitobans' valuing of individuals with mental disabilities?
- iii. Canadians do not accept anything less than full procedure for criminal proceedings and in Manitoba we require that state-funded counsel be made available to all individuals charged with an indictable offence.<sup>112</sup> This far exceeds the protections within the SDM hearing. Is this based purely on an objective assessment of the relative consequences of substitute decision making versus criminal sanction, or does the difference also mean that Manitobans value autonomy for the criminally accused more highly than autonomy for individuals with a mental disability?

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<sup>111</sup> For example, the *Baker* framework requires a consideration of "the importance of the decision to the individual or individuals affected." See *Baker*, *supra* note 8.

<sup>112</sup> The *Legal Aid Regulation* states that legal aid must be provided to a person who is eligible in respect of a proceeding arising from the person's being charged with an indictable offence (*supra* note 43 at s 10(1)(a)).