



LAW COMMISSION OF ONTARIO  
COMMISSION DU DROIT DE L'ONTARIO

# **CAPACITY OF ADULTS WITH MENTAL DISABILITIES AND THE FEDERAL RDSP**

## **DISCUSSION PAPER**

October 2013

Available online at [www.lco-cdo.org](http://www.lco-cdo.org)

Le résumé du rapport est actuellement disponible en français.  
Le rapport complet sera disponible en français au début de 2014.

ISBN: 978-1-926661-62-9

This publication may be cited as follows:  
Law Commission of Ontario, *Capacity of Adults with Mental Disabilities  
and the Federal RDSP: Discussion Paper* (Toronto: October 2013)

## ABOUT THE LAW COMMISSION OF ONTARIO

The Law Commission of Ontario (LCO) was created by an Agreement among the Law Foundation of Ontario, the Ontario Ministry of the Attorney General, Osgoode Hall Law School and the Law Society of Upper Canada, all of whom provide funding for the LCO, and the Law Deans of Ontario's law schools. York University also provides funding and in-kind support. It is situated in the Ignat Kaneff Building, the home of Osgoode Hall Law School at York University.

The mandate of the LCO is to recommend law reform measures to enhance the legal system's relevance, effectiveness and accessibility; improve the administration of justice through the clarification and simplification of the law; consider the use of technology to enhance access to justice; stimulate critical legal debate; and support scholarly research. The LCO is independent of government and selects projects that are of interest to and reflective of the diverse communities in Ontario. It has committed to engage in multi-disciplinary research and analysis and make holistic recommendations as well as to collaborate with other bodies and consult with affected groups and the public more generally.

### LAW COMMISSION OF ONTARIO FINAL REPORTS

Review of the *Forestry Workers Lien for Wages Act* (September 2013)  
Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity (February 2013)  
Vulnerable Workers and Precarious Work (December 2012)  
A Framework for the Law as It Affects Persons with Disabilities (September 2012)  
Curriculum Modules in Ontario Law Schools:  
A Framework for Teaching about Violence Against Women (August 2012)  
A Framework for the Law as It Affects Older Adults (April 2012)  
Modernization of the *Provincial Offences Act* (August 2011)  
Joint and Several Liability Under the Ontario *Business Corporations Act* (February 2011)  
Division of Pensions Upon Marriage Breakdown (December 2008)  
Fees for Cashing Government Cheques (November 2008)

### DISCLAIMER

The opinions or points of view expressed in our research, findings and recommendations do not necessarily represent the views of our funders, the Law Foundation of Ontario, the Ministry of the Attorney General, Osgoode Hall Law School, and the Law Society of Upper Canada or of our supporters, the Law Deans of Ontario, or of York University.

Law Commission of Ontario  
2032 Ignat Kaneff Building,  
Osgoode Hall Law School, York University  
4700 Keele Street  
Toronto, Ontario, Canada  
M3J 1P3

Tel: (416) 650-8406  
TTY: 1-877-650-8082  
Fax: (416) 650-8418  
General E-mail: [LawCommission@lco-cdo.org](mailto:LawCommission@lco-cdo.org)  
[www.lco-cdo.org](http://www.lco-cdo.org)

## TABLE OF CONTENTS

EXECUTIVE SUMMARY .....	vi
<b>I. INTRODUCTION.....</b>	<b>1</b>
<b>A. The LCO's Project on Capacity of Adults with Mental Disabilities and the Federal RDSP .....</b>	<b>1</b>
<b>B. About the Discussion Paper .....</b>	<b>2</b>
1. Purpose and Next Steps .....	2
2. Terminology Used in the Discussion Paper .....	3
<b>C. Approaches to the Project Process .....</b>	<b>4</b>
1. A Principles-Based Approach .....	4
2. Benchmarks for Reform .....	5
3. Research and Consultations .....	7
<b>D. Structure of the Discussion Paper .....</b>	<b>8</b>
<b>II. ACCESSING THE RDSP AND ISSUES OF CAPACITY FOR ONTARIANS WITH MENTAL DISABILITIES.....</b>	<b>10</b>
<b>A. Understanding the Federal RDSP .....</b>	<b>10</b>
1. A Long-Term Savings Vehicle for Persons with Disabilities.....	10
2. RDSP Policy Objectives: Poverty Alleviation, Contribution and Autonomy .....	10
3. Who are RDSP Beneficiaries and How Do They Access the RDSP? .....	13
4. Individuals and Organizations Involved in the RDSP Design and Delivery.....	15
<b>B. The Importance of Capacity When Adults Seek to Access the RDSP .....</b>	<b>17</b>
1. Capacity Laws as a Barrier to Accessing the RDSP .....	17
2. Critical Times for Decision-Making: Opening the RDSP, Deciding Plan Terms and Managing Funds that Have Been Paid Out of the RDSP .....	18
3. What is Capacity? Foundational Concepts and Tensions.....	19
4. Provincial Jurisdiction to Enact Capacity Laws that are Recognized for the Federal RDSP .....	27
<b>III. ONTARIO'S CURRENT FRAMEWORK TO ESTABLISH A LEGAL REPRESENTATIVE FOR RDSP BENEFICIARIES .....</b>	<b>29</b>
<b>A. Introduction .....</b>	<b>29</b>
<b>B. Property Management under the <i>Substitute Decisions Act, 1992</i> .....</b>	<b>29</b>
1. The Personal Appointment Process: Continuing Powers of Attorney .....	29
2. Court Ordered Guardianship.....	31
3. Statutory Guardianship Appointments .....	33

<b>C. Challenges Posed by Ontario’s Current Framework .....</b>	<b>35</b>
1. Challenges for Beneficiaries and their Families .....	35
2. Challenges for Other Interested Parties.....	39
<b>D. Goals for Reform Identified by Stakeholders .....</b>	<b>40</b>
<b>IV. ONTARIO’S COMMITMENTS TO PERSONS WITH MENTAL DISABILITIES.....</b>	<b>42</b>
<b>A. Introduction .....</b>	<b>42</b>
<b>B. Foundational Human Rights Documents.....</b>	<b>42</b>
1. Canadian Charter of Rights and Freedoms .....	42
2. Ontario Human Rights Code.....	43
3. Accessibility for Ontarians with Disabilities Act .....	44
4. Convention on the Rights of Persons with Disabilities .....	45
<b>C. Substitute Decision-Making Supports .....</b>	<b>47</b>
1. The Office of the Public Guardian and Trustee .....	47
2. Consent and Capacity Board .....	47
<b>D. Income Support and Social Benefits .....</b>	<b>48</b>
1. Ontario Disability Support Program and Ontario Works .....	48
2. Community and Developmental Services .....	48
<b>V. DEVELOPING AN ALTERNATIVE PROCESS TO ESTABLISH A LEGAL REPRESENTATIVE FOR RDSP BENEFICIARIES .....</b>	<b>50</b>
<b>A. Introduction .....</b>	<b>50</b>
<b>B. Choice of Arrangements to Establish a Legal Representative for RDSP     Beneficiaries.....</b>	<b>50</b>
1. Introduction.....	50
2. Canadian Provinces with a Process Specific to the RDSP .....	51
3. Decision-Making Laws: Alternatives to Ontario’s Framework.....	55
4. The Law of Trusts.....	70
5. Laws in the Income Support and Social Benefits Sectors .....	76
6. Summary of Options in the Choice of Arrangements .....	82
<b>C. Roles and Responsibilities of the Adult, Legal Representatives and     Third Parties .....</b>	<b>92</b>
1. Introduction.....	92
2. The Activity of Decision-Making.....	92
3. Liability and Third Parties that Rely on Decisions .....	98
4. The Scope of a Legal Representative’s Authority.....	101
5. Summary of Options in the Roles and Responsibilities of the RDSP Beneficiary, Legal Representatives and Third Parties .....	105

<b>D. Eligibility and Availability of Legal Representatives .....</b>	<b>107</b>
1. Introduction.....	107
2. The Lack of Eligible Substitute Decision-Makers.....	107
3. Is There a Role for Community Networks? .....	109
4. Summary of Options in the Eligibility and Availability of Legal Representatives.....	111
<b>E. Safeguards against Abuse and the Misuse of a Legal Representative's Powers</b>	<b>112</b>
1. Introduction.....	112
2. Areas of Vulnerability in RDSP Transactions .....	114
3. Ontario's Current Framework to Ensure the Security of Adults with Mental Disabilities .....	115
4. Possible Additional Safeguards for RDSP Beneficiaries .....	120
5. Summary of Options for Reform in the Safeguards against Financial Abuse and the Misuse of a Legal Representative's Authority .....	127
<b>VI. OPTIONS FOR REFORM .....</b>	<b>130</b>
<b>A. Introduction .....</b>	<b>130</b>
<b>B. An Alternative Process to Establish a Legal Representative for RDSP         Beneficiaries.....</b>	<b>131</b>
1. Overview of the Options for Reform and Types of Appointment Processes .....	131
2. Options for Reform by the Type of Appointment Process.....	133
<b>C. Safeguards, Roles and Responsibilities and Eligibility .....</b>	<b>139</b>
<b>D. Important Issues for Implementation .....</b>	<b>140</b>
1. Sources of Government Support.....	140
2. Provision of Information to Increase Accessibility .....	141
3. Coherence with Other Areas of the Law .....	142
<b>VII. HOW TO PARTICIPATE AND NEXT STEPS.....</b>	<b>144</b>
<b>APPENDIX A: INDIVIDUALS AND ORGANIZATIONS CONTRIBUTING TO     THE PROJECT .....</b>	<b>145</b>
<b>APPENDIX B: THE LCO'S FRAMEWORK PRINCIPLES .....</b>	<b>148</b>
<b>APPENDIX C: QUESTIONS FOR DISCUSSION .....</b>	<b>150</b>
<b>ENDNOTES.....</b>	<b>154</b>

## LIST OF ACRONYMS

AODA - *Accessibility for Ontarians with Disabilities Act, 2005*, S.O. 2005, c.11  
CCB – Consent and Capacity Board  
CPP – Canada Pension Plan  
CRA – Canada Revenue Agency  
CRPD – *Convention on the Rights of Persons with Disabilities*  
CSDA – *Canada Disability Savings Act*, S.C. 2007, c.35, s.136  
ESDC – Employment and Social Development Canada (formerly Human Resources and Skills Development Canada)  
HCCA – *Health Care Consent Act, 1996*, S.O. 1996, Ch.2, Schedule A  
HRTO – Human Rights Tribunal of Ontario  
ITA – *Income Tax Act*, R.S.C. 1985, c.1  
LCO – Law Commission of Ontario  
MAG—Ministry of the Attorney General  
MCSS – Ministry of Community and Social Services  
NDIS – National Disability Insurance Scheme  
OAS – Old Age Security  
ODSP – Ontario Disability Support Program  
OPGT – Office of the Public Guardian and Trustee for Ontario  
OW – Ontario Works  
POA – Power of attorney  
RA – Representation agreement  
RDSP – Registered Disability Savings Plan  
RESP – Registered Education Savings Plan  
RRSP – Registered Retirement Savings Plan  
SDA – *Substitute Decisions Act, 1992*, S.O. 1992, c.30  
SIPDDA – *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008*, S.O. 2008, c.14

## EXECUTIVE SUMMARY

### I. INTRODUCTION

The Ontario government has requested that the Law Commission of Ontario (LCO) undertake a review of how adults with mental disabilities might be better enabled to participate in the Registered Disability Savings Plan (RDSP). The LCO Board of Governors approved this project on *Capacity of Adults with Mental Disabilities and the Federal RDSP* in April 2013. The Ontario government announced its request and the LCO's agreement to undertake the project in the 2013 Ontario Budget, *A Prosperous and Fair Ontario*, in May 2013.

Persons with disabilities tend to experience a lower standard of living than other Canadians due to factors such as barriers in the labour force and unmet needs for supports. The RDSP is a savings vehicle created by the federal government to assist persons with disabilities with long-term financial security. Financial institutions offer RDSPs to eligible members of the public. Beneficiaries and their family and friends can make private contributions to an RDSP. Beneficiaries can also receive government grants to match contributions and those with a low income may be eligible for government bonds.

The RDSP has distinctive policy objectives that include poverty alleviation, encouraging self-sufficiency and promoting the active involvement of persons with disabilities in making decisions that affect them. Under the *Income Tax Act* (ITA), adults can establish an RDSP for themselves and decide the plan terms as the “plan holder”. The ITA provides that where an adult is not “contractually competent to enter into a disability savings plan” with a financial institution, another “qualifying person” must act as a plan holder on his or her behalf.

A financial institution may decline to enter into an RDSP arrangement with a beneficiary who does not meet the common law test of capacity to enter into a contract. An adult or another interested person, such as a family member, may also believe that an adult has diminished capacity and wish to appoint a qualifying person before approaching a financial institution.

However, adults and their families have expressed concerns to the federal government with respect to provincial and territorial laws that govern how a qualifying person can be appointed. Many of these laws require that an adult be declared legally incapable and receive assistance from a guardian. This process can be expensive, time consuming and have significant repercussions for an adult's well-being. In Ontario, qualifying persons include guardians and attorneys for property, who can be appointed under the *Substitute Decisions Act, 1992* (SDA).

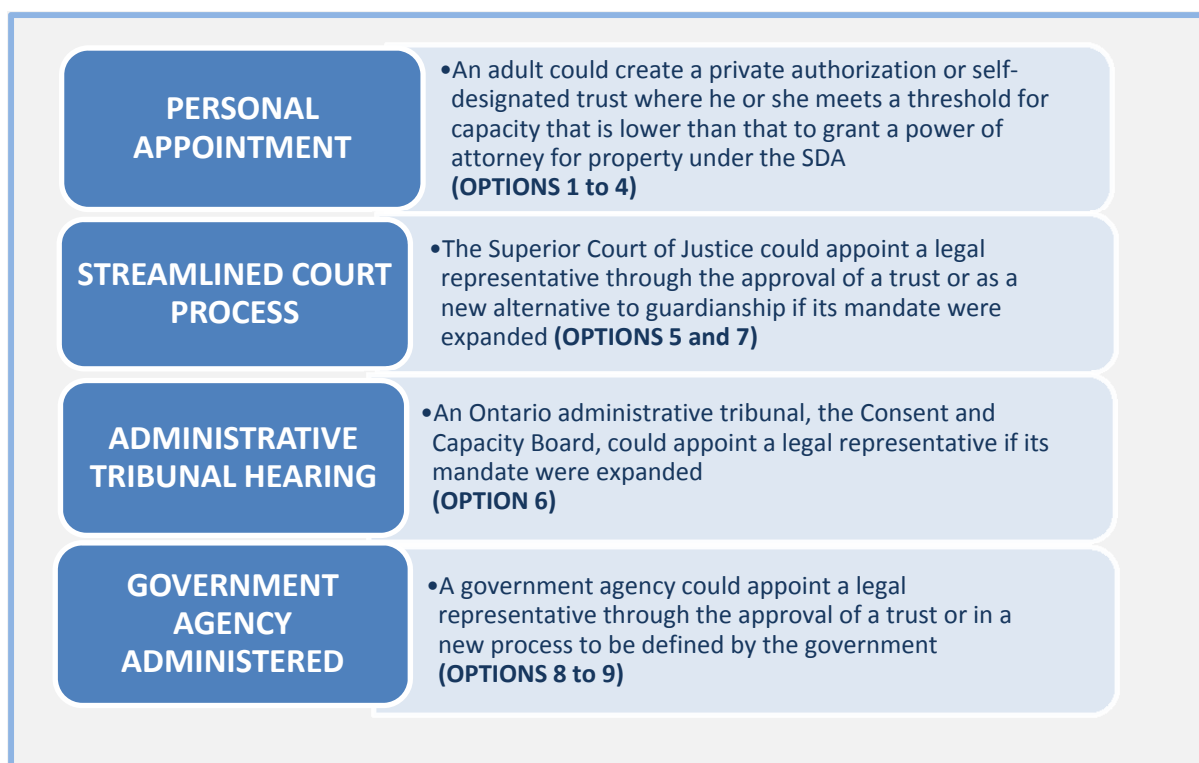
The Government of Ontario has recognized these concerns and has requested that the LCO undertake a review of how adults with mental disabilities might be better enabled to participate in the RDSP. The LCO's project will recommend a process to establish a legal representative for RDSP beneficiaries that creates a streamlined alternative to Ontario's current framework.

The purpose of this discussion paper is to synthesize the results of our preliminary research and consultations, and to identify several options for reform. **Responses that we receive to this discussion paper will be considered for a Final Report with detailed recommendations.**

The discussion paper identifies nine options for reform. The options draw on our review of Ontario's framework under the SDA as well as other laws in Canada and abroad. They incorporate elements of existing laws that could meet evaluative criteria – or benchmarks – that the LCO has developed. We propose that an effective alternative process for Ontario would meet the following benchmarks:

1. Responds to Individual Needs for RDSP Decision-Making
2. Promotes Meaningful Inclusion in the Decision-Making Process
3. Ensures that Necessary Protections for RDSP Beneficiaries are in Place
4. Achieves Administrative Feasibility, Cost-Effectiveness and Ease of Use
5. Provides Certainty to Legal Representatives and Third Parties

The options for reform are summarized further below in the Executive Summary. In total, we have proposed nine options that could be administered through the following overall types of processes to appoint a legal representative. We welcome comments on these types of appointment processes and the specific options for reform.



The options for reform in this discussion paper are a tailored response to the specific context of the RDSP. The LCO has reserved more comprehensive analysis of Ontario's decision-making laws to its ongoing, multi-year project on *Legal Capacity, Decision-Making and Guardianship*. Our project concerning the RDSP is being delivered separately, on a priority basis, and it should not be construed as precluding any options in our larger project. For more information on the LCO's project on *Legal Capacity, Decision-Making and Guardianship*, please visit the LCO's website at [www.lco-cdo.org](http://www.lco-cdo.org).

## **II. ACCESSING THE RDSP AND ISSUES OF CAPACITY FOR ONTARIANS WITH MENTAL DISABILITIES**

Chapter II provides an overview of the RDSP and explains the importance of capacity when adults seek to access it. The first section in the chapter reviews contextual information on the RDSP that is relevant to the LCO's project (Section A, Understanding the Federal RDSP). All persons who are entitled to the Disability Tax Credit (DTC) are eligible to become an RDSP beneficiary, if they are age 59 or under and resident in Canada when the RDSP is opened. RDSP beneficiaries come from diverse circumstances and they include persons with developmental, psychosocial and cognitive disabilities in all age groups.

The second section of Chapter II presents basic concepts and tensions that are relevant to defining capacity (Section B, The Importance of Capacity When Adults Seek to Access the RDSP). As mentioned above, opening an RDSP requires a plan holder to enter into a contract with a financial institution. Where an adult beneficiary is not “contractually competent to enter into a disability savings plan”, the ITA allows a qualifying person to be the plan holder. Qualifying persons can be a guardian or other person “who is legally authorized to act on behalf of the beneficiary”. Should Ontario create a new process to appoint a legal representative for RDSP beneficiaries, he or she would likely need to be accepted by the federal government as “legally authorized” under provincial law, consistent with the language of the ITA.

Definitions of capacity vary across issue area and jurisdiction. In many jurisdictions, all human beings are presumed to be capable and are entitled to make decisions for themselves, unless it is believed that they are in need of protection. Although Ontario does not recognize “supported decision-making” formally in legislation as some jurisdictions do (see page xvi below), it has acknowledged that decision-making is a social and contextual activity, and that an adult’s capacity can be strengthened with services and supports.

An adult may have the capacity to make decisions relating to daily purchases but not, for instance, investing in a mutual fund. This is because capacity is specific to the issue at hand and it can fluctuate over time. There are various methods to determine if an adult has sufficient capacity to make a decision. The predominant method is the so-called “cognitive approach”, which focuses on assessing a person’s process of reasoning in coming to a particular decision. Another method that is accepted in some Canadian provinces is to consider non-cognitive factors, such as an adult’s ability to communicate wishes and preferences. This method reflects an express social policy objective to accommodate adults with significant mental disabilities who may have different ways of reaching and expressing their choices.

There are serious repercussions that result from a finding of incapacity, including restrictions on autonomy as well as stigma associated with the label of incapacity. Where a guardian is established through an external appointment process, such as a court proceeding, an adult may be found to be *incapable* of managing property. In Ontario, adults can personally appoint an attorney to act on their behalves without being found incapable, as long as they meet a standard for *capacity* to do so. In addition, certain external appoints do not require a finding of incapacity. For instance, an authorized person may be appointed where an adult has a demonstrated *need for assistance* in managing his or her finances.

Decision-making for the RDSP continues to be important throughout the RDSP life cycle. Depending on the RDSP plan terms, a plan holder may have authority to open the RDSP;

authorize contributions; apply for government grants and bonds; decide terms for the investment of savings; and decide the availability, timing and amount of certain payments.

Plan holders do not automatically have authority to assist beneficiaries with all areas of RDSP decision-making. In particular, they are not authorized to assist a beneficiary in managing funds that have been paid out of the RDSP. The LCO heard in our preliminary consultations that some beneficiaries may also have a need for assistance with spending funds paid out of the RDSP. One issue that is addressed in this project is whether a legal representative's scope of authority should be restricted to that of a full or partial plan holder, or extended beyond that of a plan holder to include managing RDSP payments made to the beneficiary.

### **III. ONTARIO'S CURRENT FRAMEWORK TO ESTABLISH A LEGAL REPRESENTATIVE FOR RDSP BENEFICIARIES**

The SDA governs the establishment of general substitute decision-makers for property management, including through the execution of a power of attorney (POA) or the appointment of a guardian. Chapter III summarizes the SDA provisions that can be used to establish a legal representative for RDSP beneficiaries, although they are intended for broader application.

Under the SDA, an adult can execute a POA to appoint a person as a legal representative for the RDSP. The definition of capacity to grant a POA in Ontario is more stringent than in many other Canadian provinces. It is premised on a highly detailed, cognitive approach. If an adult does not have a valid POA and is not capable of granting one, a guardian can be appointed through court-based and statutory processes for an adult who is found to be incapable.

The LCO has received information on common challenges for beneficiaries and their families in establishing a legal representative for RDSP beneficiaries through available processes in Ontario and similar jurisdictions. These challenges are summarized immediately below and are discussed in Section III.C, Challenges Posed by Ontario's Current Framework.

<b>POWER OF ATTORNEY:</b>	Adults with mental disabilities may not be able to meet the threshold for capacity to execute a POA for property under the SDA.
<b>COURT APPOINTMENT:</b>	The court-ordered guardianship process can be complex to navigate and may involve legal costs. It also requires that a person be found incapable of property management.

**STATUTORY APPOINTMENT:** Statutory guardianship can be easy to use and inexpensive. However, if there are complicating factors, it can become lengthy or finish before a judge. It also requires that a person be found incapable of property management.

**GENERAL CONCERNS:** Adults may have concerns about the degree to which they can be involved in decision-making activities once a substitute decision-maker is appointed under the SDA. Some adults also may not have access to a trusted family member or friend who can act as a guardian or attorney.

The LCO also received information from stakeholders with respect to various goals for reform that could respond to these challenges. The goals for reform are listed in Section D, Goals for Reform Identified by Stakeholders, and they have been integrated into our proposed benchmarks. We welcome your feedback on what you believe to be the challenges for RDSP beneficiaries and other interested parties, and the goals for reform for this project.

#### **IV. ONTARIO'S COMMITMENTS TO PERSONS WITH MENTAL DISABILITIES**

Ontario's commitments to persons with mental disabilities are found in laws, policies and programs. The most important domestic laws include the *Canadian Charter of Rights and Freedoms*, *Ontario Human Rights Code*, and *Accessibility for Ontarians with Disabilities Act, 2005*. In addition, Canada has ratified the *Convention on the Rights of Persons with Disabilities* (CRPD), subject to a Declaration and Reservation that it has submitted. The Government of Ontario has also created programs to deliver supports to persons with mental disabilities, including adults with diminished capacity. The service providers presented in Chapter IV consist of the Office of the Public Guardian and Trustee, Consent and Capacity Board, Ontario Disability Support Program (ODSP), and Community and Developmental Services.

We considered these laws, policies and programs in developing the benchmarks. Furthermore, existing service providers are considered for the role that they might play in the options for reform throughout the discussion paper.

## **V. DEVELOPING AN ALTERNATIVE PROCESS TO ESTABLISH A LEGAL REPRESENTATIVE FOR RDSP BENEFICIARIES**

Chapter V reviews and critically analyses laws in Ontario and other jurisdictions that provide insights into the development of an alternative process. Many of these are laws in Canadian provinces and territories that the federal government recognized in the Economic Action Plan 2012 as having instituted streamlined or other arrangements that could possibly address the concerns of RDSP beneficiaries.

The focus of Chapter V is on **key issues** that were identified repeatedly in our preliminary research and consultations. The key issues are found in Sections B through E, as indicated below. The first key issue, the choice of arrangements to establish a legal representative for RDSP beneficiaries, is the core issue for this project. It considers the general arrangement to designate a legal representative or to have one appointed. The other key issues consider aspects of any choice of arrangement that merit in-depth analysis. A summary of the options for reform for the key issues is contained at the end of each section.

**Section B:** Choice of Arrangements to Establish a Legal Representative for RDSP Beneficiaries

**Section C:** Roles and Responsibilities of the Adult, Legal Representative and Third Parties

**Section D:** Eligibility and Availability of Legal Representatives

**Section E:** Safeguards against Abuse and the Misuse of Legal Representative's Powers

Section B examines *existing* arrangements in Canada and abroad, beginning with two provinces that have a specific process for the RDSP. We then consider laws in the areas of decision-making, trusts and the income support and social benefits sectors. The SDA is an example of a decision-making law. Other decision-making laws that we review provide for “special limited” POAs, supported decision-making, representation and designation agreements, co-decision making, streamlined court proceedings and administrative tribunal hearings. Trusts are a well-established method of assisting persons with disabilities in managing their assets. Under the law of trusts, we raise the question of whether an adult could designate a trustee to act as a legal representative for the RDSP or if a court could appoint a trustee on an adult's behalf. Finally, we review arrangements that are embedded into income support and social benefits

programs in order to enable a person to manage a recipient's payments. Examples include what are commonly called "trustees" for the Canada Pension Plan (CPP) and ODSP.

Section B concludes with a discussion of nine options for reform. The options draw on elements contained in existing arrangements but also take into account the benchmarks that a streamlined process in Ontario must meet to be effective.

**Figure 2, Options for Reform in the Choice of Arrangements, provides a visual aid for readers and can be used as a point of reference for the key issue addressed in Section B (see pages 90 to 91).**

The RDSP is a hybrid public and private initiative that requires the cooperation of multiple actors, including RDSP beneficiaries, their legal representatives and third parties, such as financial institutions. Section C examines the roles and responsibilities of these various actors with a focus on measures to ensure an RDSP beneficiary's meaningful participation in decision-making, the liability of respective parties and the scope of a legal representative's authority. The question of whether the scope of a legal representative's authority should be restricted to that of a full or partial plan holder, or extended beyond that of a plan holder is an important issue for this project (see Section C.4, The Scope of a Legal Representative's Authority).

Section D asks if organizations should be allowed to act as legal representatives for RDSP beneficiaries who do not have access to trusted family members or friends. In Section E, we review the risks of financial abuse in the context of the RDSP and measures to ensure that protections for beneficiaries are in place. Ontario's framework to safeguard adults against financial abuse and the misuse of substitute decision-makers' powers is relatively comprehensive when compared to other Canadian jurisdictions. Nonetheless, stakeholders have raised concerns that existing mechanisms are not sufficiently effective. Given that the RDSP attracts significant wealth, the LCO believes that supplemental measures may be desirable.

**You are invited to consult Figure 3 for a summary of existing and possible additional safeguards reviewed in Section E (see page 129).**

## **VI. OPTIONS FOR REFORM**

The discussion paper's concluding Chapter VI brings together the options for reform identified at the end of each preceding chapter. It summarizes these options and discusses how they can

be combined as well as implications for implementation. We also provide illustrative examples, so that readers can reflect on what the options might look like in practice.

The benefits and challenges that could flow from the options for reform are considered in Chapter VI and throughout the discussion paper. Only select observations are made here. If you would like to access more detailed information that is still summary in nature, you are invited to consult Figure 2, Options for Reform in the Choice of Arrangements, at pages 90 to 91.

Options 1 through 9, listed below, pertain to the core issue for this project, which is the choice of arrangements to establish a legal representative. The options can also be envisioned to incorporate features of the remaining key issues, including safeguards against abuse, and the roles and responsibilities of interested parties (see Chapter V).

- OPTION 1:** A private authorization granted by an adult who meets the common law threshold for capacity.
- OPTION 2:** A private authorization granted by an adult who meets non-cognitive criteria, such as the communication of desire and preferences.
- OPTION 3:** A private authorization granted by an adult who meets the common law threshold for capacity and who only needs support to make decisions for him or herself.
- OPTION 4:** A self-designated trust created by an adult who meets the common law threshold for capacity.
- OPTION 5:** An appointment made by the Superior Court of Justice if its mandate were expanded to facilitate an “alternative course of action” to guardianship.
- OPTION 6:** An appointment made by an administrative tribunal, the Consent and Capacity Board, if its mandate were expanded.
- OPTION 7:** An appointment made under the Superior Court of Justice’s jurisdiction over trusts.
- OPTION 8:** An appointment made at a government agency through the approval of a deed of trust.
- OPTION 9:** An appointment made at a government agency in a new process as defined by the government.

The figure on page ix of the Executive Summary is reproduced from Figure 4 in Chapter VI. It shows the overall types of appointment processes through which the nine options for reform could be delivered. In Ontario, both personal and external appointments are types of processes that exist under the SDA. Offering these two avenues to establish a legal representative for RDSP beneficiaries should be considered as a possible combination in the options for reform.

Personal appointments (Options 1 to 4) are generally perceived as preferable to external appointments because they are private, do not remove adults' legal status as capable persons and allow them to proactively choose who they would like to assist them and how. Most of the personal appointments presented in the options for reform would require the acceptance of a less stringent threshold for capacity than that currently required in Ontario. This is because the LCO heard that the existing threshold for capacity to execute a POA for property under the SDA has been unattainable for many adults with mental disabilities wishing to access the RDSP. At this juncture in the project, the LCO has not received adequate information to determine if any one threshold would enable adults to overcome this barrier. Consequently, more evidence is required to understand if the options based on a new threshold for capacity would effectively meet the needs of RDSP beneficiaries.

The thresholds for capacity for personal appointments in the options for reform include cognitive (common law) and non-cognitive approaches. These two methods of determining capacity are discussed above in this Executive Summary (Section II). Option 3 is different from the other options that refer to the common law standard and requires explanation. It is modeled on supported decision-making arrangements in the Yukon and Alberta. Supported decision-making arrangements are available to adults who are capable of making decisions for themselves when they receive help. Unlike substitute decision-makers, such as an attorney or guardian, supporters are prohibited from making decisions on an adult's behalf. They may undertake activities, such as accessing confidential information, giving advice and communicating an adult's decision. In the Yukon, supported decision-making is available for personal care and financial matters. In Alberta, it is limited to personal care because of concerns that it could cause confusion and uncertainty in the context of financial transactions.

All arrangements that are established through a personal appointment could possibly also be established through an external appointment process, including substitute and supported decision-making (Options 5 to 9). Co-decision making is a further arrangement that has only been created through external appointments. Co-decision making is similar to supported decision-making insofar as it is available only to adults who can make decisions for themselves with assistance. However, co-decision making has an added degree of formality because the legal authority to make decisions is shared between the adult and co-decision maker. In

transactions with third parties, a co-decision maker's role may include signing documents jointly with the adult. In Saskatchewan, a court can appoint a co-decision maker for personal care and financial matters. Again, in Alberta, co-decision making does not apply to financial matters because of concerns that it could cause confusion and uncertainty in the context of financial transactions.

As shown above, an external appointment could be based on a new definition of capacity. An external appointment might also be premised on Ontario's definition for incapacity to manage property under the SDA or on the determination of an adult's need for assistance. In the discussion paper, we review laws in the income support and social benefits sectors that have a process to appoint a person to manage an adult's payments where the adult has a demonstrated need for assistance. The LCO has heard that responding to an adult's need for assistance could be less intrusive than an assessment for incapacity.

Streamlined court appointments are included among the types of processes in the options for reform (Options 5 and 7). The LCO recognizes that court proceedings tend to involve legal costs that could be prohibitive for adults and their families. We propose in the discussion paper that summary disposition applications that do not require a hearing before a judge could reduce legal costs. Enhanced support at the front-end of any court-based process from a government agency or community organization would be essential to make the process user-friendly and to secure an adult's rights of due process.

Aside from the type of appointment process, the different areas of the law that the LCO has examined in the discussion paper also have particular benefits and challenges. In recent years, decision-making laws have received increased attention with the adoption of the CRPD and substantial law reform efforts in Canada and abroad. The LCO itself has an ongoing project on *Legal Capacity, Decision-Making and Guardianship* that comprehensively reviews decision-making laws in Ontario. Reforms to decision-making laws – including to the thresholds for capacity referred to above – would no doubt have normative value for the disability community. Moreover, they could involve creative solutions that expand on the mandates of the Superior Court of Justice or, if additional resources were provided, the Consent and Capacity Board (Options 5 and 6). However, an RDSP-specific process that is anchored in decision-making laws could create a disparity in entitlements to an alternative process that leaves out adults with diminished capacity for financial management who are not RDSP beneficiaries. Given the evolving state of the law, the ease with which the options in this area could be implemented in a timely manner is also an issue that merits attention. (Options 1, 2, 3, 5 and 6)

The law of trusts is valued for its adaptability to changing social objectives. In Ontario, trustees are held to standards that somewhat resemble those for substitute decision-makers. An adult can appoint a trustee where he or she can meet the common law threshold for capacity. Additionally, the courts have experience supervising the administration of trusts under the common law and statutes, such as the *Trustee Act*, *Rules of Civil Procedure* and *Variation of Trusts Act*. Trusts are, however, a complex area of the law. Funds in an RDSP may include mixed contributions from public and private sources, and it is unclear who would have legal authority to create a trust for the RDSP and to transfer the funds into trust. Furthermore, in order to achieve the benchmarks for reform proposed in this discussion paper, the adoption of minimum criteria relating to the key issues would be desirable. Clarity on these and other issues of implementation would be required for a trust mechanism to work. (Options 4, 7 and 8)

Options for reform that are modeled on the income support and social benefits sectors would provide RDSP beneficiaries with a streamlined process that is administered by staff members at a government agency. Similar to existing arrangements for ODSP and CPP recipients, an adult or another person could contact a designated government agency to initiate the appointment process. The government agency would then be charged with screening the legal representative, overseeing compliance and resolving disputes. Experiences with government agency administered arrangements in Canada and abroad demonstrate that they are resource intensive. The options for reform in this area of the law would necessarily entail the allocation of additional funding that the province may not have at present. (Options 8 and 9)

Following our summary of the options for reform in Chapter VI, we address several issues for implementation, which consist of the sources of government support, the provision of information to increase accessibility and coherence with other areas of the law (Section D, Important Issues for Implementation). One topic that we raise is whether the various options for reform might be grounded in legislation or implemented as a program or policy direction from the Government of Ontario. During the consultation phase for the project, the LCO would like to receive more information from the public on the preconditions to implement the options for reform and the opportunities for creative solutions.

We emphasize that the purpose of this discussion paper is to set a foundation for productive dialogue in the consultation phase for the project. The LCO has formulated the options for reform based on our preliminary research and consultations; however, they may not be exhaustive of the ways in which Ontario could respond to the challenges that beneficiaries face in establishing a legal representative for the RDSP. Therefore, in addition to the options raised in the discussion paper, we encourage your comments on further options that you believe will reasonably achieve the benchmarks for reform.

## VII. HOW TO PARTICIPATE AND NEXT STEPS

Many of you have something of value to contribute to the LCO's work. The LCO has prepared a list of questions for discussion on which we would like to hear your views. These questions are distributed throughout the discussion paper at the end of relevant sections and listed together in **Appendix C, Questions for Discussion**. We also invite you to give us your feedback on any other issues of interest through the means indicated in Chapter VII.

Based on the results of our consultation phase and the LCO's ongoing research, the LCO will prepare a Final Report, which is anticipated to be released in Spring 2014.

## **I. INTRODUCTION**

### **A. The LCO's Project on Capacity of Adults with Mental Disabilities and the Federal RDSP**

The Registered Disability Savings Plan (RDSP) is a savings vehicle created by the federal government to assist persons with disabilities with long-term financial security. Similar to other registered savings plans, RDSP beneficiaries may benefit from private contributions, government grants and bonds, investment income and special tax rules. Participating financial institutions, such as banks and credit unions, offer the RDSP to eligible members of the public alongside mainstream investment services.<sup>1</sup>

Nevertheless, the RDSP is distinct from other registered savings plans: it was designed as a social benefit for persons with disabilities, including adults whose mental disabilities may affect their capacity for financial management. Under the *Income Tax Act* (ITA), parents or guardians can open an RDSP and decide the plan terms for a child.<sup>2</sup> Beneficiaries who have reached the age of majority may also do so themselves. However, where an adult is not “contractually competent to enter into a disability savings plan” with a financial institution, a “qualifying person” must do so on his or her behalf.<sup>3</sup> A “qualifying person” can be “a guardian, tutor, curator” or a person “that is legal authorized to act on behalf of the beneficiary”.<sup>4</sup> In Ontario, qualifying persons include substitute decision-makers, such as guardians and attorneys for property, who can be appointed under the *Substitute Decisions Act, 1992* (SDA).<sup>5</sup>

In 2011, the federal government undertook a review of the RDSP program. During that review, adults and their families voiced concerns to the federal government with respect to existing processes within provincial and territorial jurisdictions to designate a qualifying person for the RDSP. As the federal government reported in the Economic Action Plan 2012, many of these processes require “the individual to be declared legally incompetent and have someone else named as their legal guardian”.<sup>6</sup> Specific concerns included that such processes “can involve a considerable amount of time and expense” and “may have significant repercussions for the individual”.<sup>7</sup>

The federal government has put in place a process to address this issue under the ITA by permitting an adult's parent, spouse or common-law partner to act as a qualifying person where, in a financial institution's opinion, the beneficiary's capacity to enter into a contract to open an RDSP “is in doubt”.<sup>8</sup> An adult or other interested person could initiate the process to appoint a qualifying person, if he or she believes that an adult has diminished capacity to enter into a contract with a financial institution.

However, this process is only temporary and does not address related issues of how RDSP funds are managed once they have been paid out of the RDSP. In the Economic Action Plan 2012, the federal government stated that questions of legal representation for the RDSP are a matter of provincial and territorial responsibility. It suggested that the provinces and territories develop “more appropriate, long-term solutions to address RDSP legal representation issues”.<sup>9</sup> It also encouraged some provinces and territories, including Ontario, to “examine whether streamlined processes would be suitable for their jurisdiction”.<sup>10</sup>

Acknowledging this challenge, the Government of Ontario has requested that the LCO undertake a review of how adults with mental disabilities might be better enabled to participate in the RDSP.<sup>11</sup> The LCO Board of Governors approved the project in April 2013. The purpose of the project is to recommend a process to establish a legal representative for RDSP beneficiaries that is an accessible alternative to Ontario’s current framework to appoint a guardian or attorney for property.

## **B. About the Discussion Paper**

### ***1. Purpose and Next Steps***

The purpose of this discussion paper is to synthesize the results of research and consultations that the LCO has completed to date, and to identify several broad options for reform. Based on the responses to this discussion paper and on the LCO’s further research, the LCO will prepare a Final Report with detailed recommendations.

The discussion paper reviews Ontario’s current framework under the *Substitute Decisions Act, 1992* in light of the challenges that RDSP beneficiaries, their families and other interested parties have identified. In seeking to address those challenges, the LCO has analyzed a range of alternative processes that are available in Ontario and other jurisdictions.

The focus is on key issues for reform that fit within the narrow scope of this project. Debates on legislative frameworks for defining capacity and on forms of legal representation are abundant. However, the RDSP involves decision-making that is issue-specific, and the LCO has reserved more comprehensive analysis of Ontario’s decision-making laws to its ongoing, multi-year project on *Legal Capacity, Decision-Making and Guardianship*.<sup>12</sup> For more information on that project, you are invited to visit the LCO’s website at [www.lco-cdo.org](http://www.lco-cdo.org).

The scope of this project is also restricted in terms of its review of the RDSP. The RDSP is a recent program, which the federal government formally reviewed shortly before the

commencement of the LCO's project. Consultations and submissions to the federal government in that process identified a number of areas for reform. In response, the federal government amended elements of the RDSP. These changes, and others that may not have been made, are still fresh in the minds of stakeholders. However, the LCO's project cannot address all of the issues that may impede access to the RDSP, and is limited to recommending a process to establish a legal representative for beneficiaries who have diminished capacity to make decisions on the RDSP.

## ***2. Terminology Used in the Discussion Paper***

For the purposes of this discussion paper, the LCO has defined certain terminology that will be commonly used throughout, as indicated below.

**“Adults with Mental Disabilities:”** The LCO uses the term “adults with mental disabilities” to identify the individuals most directly affected by the subject matter of the project.<sup>13</sup> This term is to be given a broad definition that includes adults with mental disabilities who experience significant challenges in making or executing decisions that are essential to the operation of the RDSP. Because this project concerns the establishment of a legal representative, we presume that it primarily impacts adults with mental disabilities who do not have a guardian or attorney for property management.<sup>14</sup>

**“RDSP Beneficiary” or “Beneficiary:”** Eligibility to be an RDSP beneficiary requires that a person has a “severe and prolonged impairment in physical or mental functions” as defined in the ITA.<sup>15</sup> The LCO's project focuses only on those eligible RDSP beneficiaries who have a mental disability, as defined above, and not a physical disability where it is unaccompanied by a mental disability. This term is used to denote actual and potential beneficiaries, unless otherwise indicated.

**“Legal Representative:”** This term is used to denote an individual or organization that is established to act on behalf of, or to assist, a beneficiary in opening an RDSP, deciding plan terms or managing funds that have been paid out of an RDSP, or all of these activities, through a legally valid arrangement. A legal representative could be a statutory or court appointed guardian, a parent who qualifies under the ITA or a person lawfully designated by the beneficiary, among others. Depending on the source of the legal representative's authority, he or she may be subject to different eligibility criteria, roles and responsibilities. This term is used only to denote a legal representative in the context of the RDSP. It does not include other meanings, such as legal counsel, a voting proxy or a litigation guardian.

## C. Approaches to the Project Process

### 1. A Principles-Based Approach

The LCO has adopted a principles-based approach to this project in order to integrate a comprehensive understanding of access to justice into our own process. The LCO's mandate includes recommending law reform measures to enhance the relevance, effectiveness and accessibility of the law, and to improve the administration of justice through clarification and simplification of the law. Therefore, the LCO's mandate includes seeking to increase access to justice.

There is no one definition of access to justice. It is often equated with access to courts and tribunals, which may be hindered by barriers of complexity, delay and costs.<sup>16</sup> This conception of access to justice is important and it is relevant to this project insofar as our goal is to recommend alternatives to existing court and administrative processes, which have been prohibitively cumbersome and costly.

However, access to justice also includes "substantive conceptions of social justice" and implicates other "sites where the law is created, contested, and dispensed".<sup>17</sup> Where these sites are located depends on the contextual circumstances of persons who are affected by barriers of various kinds. For example, a person with a physical disability may be impeded from taking a bus, where his or her abilities have not been taken into account in designing the vehicle's entrance. Another person may be unable to apply for pension benefits because the information provided is not in plain language.

The LCO recognizes that "[a] more comprehensive understanding of access to justice goes beyond the legal system to encompass efforts to assess and respond to ways in which law impedes or promotes economic or social justice".<sup>18</sup> In the context of this project, improving access to justice will involve articulating what we mean by the concept of *justice* in addition to the role of the law in creating *access*.<sup>19</sup> Not only will the options for reform address procedural efficiencies but also substantive concepts of capacity and the rights of persons with mental disabilities.

For this purpose, the LCO has drawn on work in two prior projects in which it has released final reports, its *Framework for the Law as it Affects Older Adults* and its *Framework for the Law as it Affects Persons with Disabilities*.<sup>20</sup> Those projects define a set of principles to guide the development and evaluation of laws, policies and practices to take into account the realities and experiences of older adults and persons with disabilities, and promote positive outcomes for these members of society.<sup>21</sup> The "Framework Principles" are directly relevant to issues of

capacity and access to the RDSP for adults with mental disabilities. They recognize autonomy and independence and the right to live in safety, which have underpinned much of the debate in this area of the law. They also include other principles, which have significantly shaped the LCO's analysis, including participation and inclusion, diversity in human abilities and dignity and worth. A full list of the Framework Principles is provided at Appendix B.

## **2. Benchmarks for Reform**

The LCO has articulated benchmarks or evaluative criteria based on objectives that the options for reform must meet to be effective. The LCO's Framework Principles can be applied to a broad range of laws, policies and practices that affect persons with disabilities and older adults. In the course of the LCO's preliminary consultations, we learned from RDSP beneficiaries, advocacy organizations and other interested parties that they have goals for reform that are specific to this area of the law. Additionally, there are existing sources of law and policy that are directly relevant to issues of capacity and legal representation for RDSP beneficiaries, which shape and constrain the options for reform. These include the policy objectives underlying the RDSP as well as the commitments that Ontario has made to persons with mental disabilities. Ontario's commitments are located in government supports and services, and foundational documents, such as the *Canadian Charter of Rights and Freedoms*<sup>22</sup> and *Convention on the Rights of Persons with Disabilities*.<sup>23</sup> The benchmarks connect these sources to create an analytical framework that is tailored to the subject matter of this project. They are intended to be flexible enough to evaluate the full range of options.

You are invited to consult the following sections in the discussion paper for more information on the sources from which the benchmarks were derived:

- Appendix B: The LCO's Framework Principles
- RDSP Policy Objectives: Poverty Alleviation, Contribution and Autonomy (Chapter II.A.2)
- What is Capacity? Foundational Concepts and Tensions (Chapter II.B.3)
- Goals for Reform Identified by Stakeholders (Chapter III.D), and
- Ontario's Commitments to Persons with Mental Disabilities (Chapter IV)

The LCO has used the benchmarks, first, as a filter through which to consider the myriad ways in which legal representatives are established in various sectors in Canada and abroad. Individuals can authorize another to interact with third parties on their behalves in many circumstances. This is quite common when government services are concerned. For instance, taxpayers can consent to the Canada Revenue Agency (CRA) dealing with another person on

their behalf for income tax matters.<sup>24</sup> As discussed below, the Human Rights Tribunal of Ontario (HRTO) also allows claimants to consent to an applicant assisting with his or her claim.

Despite the existence of a variety of processes, they do not always arise in contexts that are analogous to the RDSP or, on their face, they do not adequately respond to the objectives for reform. For example, a streamlined process to establish a guardian with plenary powers over an RDSP beneficiary's finances would not respond, *prima facie*, to the policy objectives underlying the RDSP or the goals identified by stakeholders. Beneficiaries may not have a need for formal assistance with their finances outside of the RDSP and their self-determination in making decisions for themselves in these areas should be protected, as much as possible. Likewise, arrangements that are contingent on publicly funded support workers who provide adults with decision-making assistance in the tasks of daily living will not be considered because they are not economically viable at present in Ontario. The use of benchmarks has assisted us in differentiating alternatives that deserve attention in this discussion paper from those that do not. We also use the benchmarks to assess the options for reform that are promising.

An effective process to establish a legal representative for RDSP beneficiaries would meet the following benchmarks:

- 1. Responds to Individual Needs for RDSP Decision-Making:** The process must be specific to the RDSP and should limit the extent to which it spills over into other areas of decision-making. The scope of a legal representative's authority should be tailored to meet a beneficiary's need for assistance. The presumption of capacity should be retained as much as possible. Strong values of human dignity, autonomy and independence should be protected with the understanding that services and supports can improve decision-making capacity because it is social and dynamic.
- 2. Promotes Meaningful Inclusion in the Decision-Making Process:** Adults must be able to make choices that affect their lives and do as much for themselves as possible with appropriate supports. All people exist along a continuum of abilities. The process should encourage each adult's unique contributions and take into account how fluctuating and issue-specific capacity can be accommodated. An adult's wishes about a suitable legal representative should be respected.
- 3. Ensures that Necessary Protections for RDSP Beneficiaries are in Place:** Legal representation in financial matters is a powerful tool that can be brandished for improper purposes. However, the absence of formal arrangements to assist adults with diminished capacity can also increase their vulnerability. Every person has the

right to live without fear of abuse and to receive support to protect that right. The process should include measures for sustained protection from preventative “checks and balances” to intervention, where appropriate.

- 4. Achieves Administrative Feasibility, Cost-Effectiveness and Ease of Use:** The process must be practical. It must be implementable on the ground in transactions between adults with mental disabilities and their families and friends, financial institutions, the government and community organizations. It must be easy for consumers to understand and use, cost-effective for all stakeholders, including the Government of Ontario, and take into account existing operational constraints.
- 5. Provides Certainty to Legal Representatives and Third Parties:** Third parties involved in delivering the RDSP to the public should have certainty, finality and protection from liability in an arrangement for a legal representative. Legal representatives should also be secured against the risk of liability when complying with an expected standard of care. Securing these parties against risks could encourage their participation.

We welcome comments on the identification of the benchmarks and on how they are being applied.

### **3. Research and Consultations**

This discussion paper was drafted following considerable research and consultations, which began in May 2013. The consultations consisted of a series of in-person and telephone interviews with individuals and organizations representing a wide range of perspectives. Research for the project has been conducted internally; however, it has benefited from the LCO’s past commissioned research papers, and may benefit from those that are ongoing in the *Legal Capacity, Decision-Making and Guardianship* project. A list of organizations and individuals consulted, and LCO commissioned research, is found at Appendix A, Organizations and Individuals Contributing to the Project.

In June 2013, the LCO formed an *ad hoc* project Advisory Group. Advisory Group members include representatives of government from Ontario and British Columbia, from the federal government, financial institutions, the private bar, legal clinics, community advocacy organizations and a research institute. The purpose of the Advisory Group is to provide the LCO with advice on public consultations and the substance of the project. The Advisory Group has

provided the LCO with expert input on the structure and content of this discussion paper. The LCO is very grateful for the Advisory Group members' commitment.

Public input is an essential part of this reform process. The LCO is proactively soliciting input from key stakeholders in the context of organized consultations. The LCO also encourages comments or submissions that address issues raised in the project and the options for reform. More information on how to be part of the consultation process is included in the final Chapter.

## **D. Structure of the Discussion Paper**

As mentioned above, this discussion paper reviews the challenges posed by Ontario's current framework to establish a legal representative for RDSP beneficiaries and presents options for reform. Following this Introduction, Chapters II to IV consider the challenges that Ontarians with diminished capacity have experienced in attempting to access the RDSP. Chapter II provides essential background on the history of the RDSP, and its content and administration. It considers the diversity of RDSP beneficiaries and how they come to know about, or seek access to, the RDSP through discrete entry points. Chapter II also explains how issues of capacity have acted as a barrier to RDSP uptake by exploring basic concepts of capacity. Chapter III reviews Ontario's current legislative framework under the SDA, including the challenges and goals for reform identified by stakeholders. Chapter IV discusses Ontario's commitments to persons with mental disabilities, which affect the need for, and recommendation of, reforms.

Chapter V is concerned with developing options for reform. It focuses on several key issues that must be decided in developing an alternative process, such as the choice of arrangements to establish a legal representative and safeguards against financial abuse. Each of those key issues is considered through a critical review of alternative approaches adopted in Canada and abroad. Figure 2 presents the options for reform in the choice of arrangements to establish a legal representative for RDSP beneficiaries, which is the core issue for this project. We invite you to use it as a visual aid throughout the review of the discussion paper. Figure 2, Options for Reform in the Choice of Arrangements, is located at pages 90 to 91.

Finally, Chapter VI brings together all of the options for reform identified in previous discussion paper chapters. It presents a comprehensive summary of those options, including if and how different options can be combined as well as implications for implementation.

Many of the sections contained in this discussion paper end with enumerated questions for discussion, such as the one found immediately below. A complete list of these questions is located at Appendix C, Questions for Discussion.

**QUESTION FOR DISCUSSION**

1. *Do the benchmarks for reform accurately reflect the objectives that the options for reform in this project must meet to be effective?*

## **II. ACCESSING THE RDSP AND ISSUES OF CAPACITY FOR ONTARIANS WITH MENTAL DISABILITIES**

### **A. Understanding the Federal RDSP**

#### ***1. A Long-Term Savings Vehicle for Persons with Disabilities***

The RDSP was established after several years of advocacy activities led by families of persons with disabilities and affiliated organizations. The Planned Lifetime Advocacy Network (PLAN), an organization founded by parents of children with disabilities, was instrumental in mobilizing broad-based discussions on how to secure the future well-being of children with severe disabilities, who would require funds as adults when their families would no longer be able to support them. With funding from the Law Foundation of British Columbia, PLAN commissioned two research studies to examine the viability of a savings plan for that purpose.<sup>25</sup> Following the submission of those studies to the federal government, the Minister of Finance appointed an Expert Panel that reviewed them and made further recommendations in its report *A New Beginning*.<sup>26</sup> These recommendations were largely adopted into the design of the RDSP, including that all persons entitled to the Disability Tax Credit (DTC) would be eligible to become an RDSP beneficiary, both children and adults, age 59 and under.<sup>27</sup>

The introduction of the RDSP was announced in the 2007 federal Budget, and it became available in December 2008.<sup>28</sup> The rules governing the RDSP, including eligibility criteria, plan terms, accountability measures and other issues are set out in the ITA, the *Canada Disability Savings Act* (CDSA)<sup>29</sup> and related Regulations. In October 2011, the federal government launched a review of the RDSP. In the course of that review, it raised the matter at issue in the LCO's project. The federal government introduced a number of measures in the Economic Action Plan 2012, in response to feedback received during the review.<sup>30</sup> Parliament subsequently enacted several amendments to the ITA, including temporary provisions that are directly relevant to establishing a legal representative for RDSP beneficiaries.<sup>31</sup> Further consideration of the federal government's review and legislative amendments is given later in this discussion paper in Chapter II.B, The Importance of Capacity When Adults Seek to Access the RDSP.

#### ***2. RDSP Policy Objectives: Poverty Alleviation, Contribution and Autonomy***

The RDSP has distinctive policy objectives that are material to understanding its design and administration as well as adults' expectations when they seek to access it. Although the LCO will

not evaluate the RDSP policy objectives, or their implementation, we take them into account in defining the goals for reform.

The RDSP is unique to Canada. The Minister of Finance's Expert Panel surveyed a number of jurisdictions but "failed to turn up a form of tax assisted Disability Savings Plan that was in use in other countries".<sup>32</sup> Without the benefit of an analogous example, the RDSP was modelled on other registered savings plans offered in Canada, such as the Registered Retirement Savings Plan (RRSP) and Registered Education Savings Plan (RESP).<sup>33</sup> This approach was consistent with PLAN's earlier proposals, which had concluded that a tax-assisted savings plan would be the appropriate mechanism to achieve several policy objectives for the RDSP.<sup>34</sup> Financial security for those who bear the high costs of disability was one such policy objective.<sup>35</sup> Other policy objectives included encouraging self-sufficiency through a contributory benefit structure,<sup>36</sup> promoting active citizenship as consumers of mainstream financial services, and developing a partnership among families, the government and the private sector "to share the responsibility for securing a good life for people with disabilities".<sup>37</sup> These are discussed briefly below.

Families and governments often share responsibility to provide assistance to persons with disabilities. Family contributions may include caregiving in the tasks of daily living as well as financial assistance.<sup>38</sup> These exist as informal supports within the naturally dynamic relationships that characterize family units and they complement government benefits.<sup>39</sup> Governments administer special programming for persons with disabilities, which is typically comprised of income supports and social services.<sup>40</sup> Social services include care and other assistance delivered by government, voluntary and professional providers in areas such as homecare, equipment, therapy and employment training.<sup>41</sup>

In Canada, as elsewhere, income supports and social services have changed significantly over the last fifty years alongside a shift in the way that "disability" is conceptualized.<sup>42</sup> Services provided under earlier, wholly medical models of disability frequently entailed placing persons with disabilities in institutions that were removed from society in order to treat perceived impairments or for protection.<sup>43</sup> Beginning in the 1960s, social movements to deinstitutionalize persons with disabilities have emphasized participation and inclusion in community life. "Rather than seeing disability as inherent in an individual, these new approaches see disability resulting from attitudes and conditions within society".<sup>44</sup> Public funds have been progressively reallocated away from institutions to income supports and community-based services.<sup>45</sup>

Many Canadians with disabilities now rely on income supports as their primary, if not only, source of income.<sup>46</sup> However, income support is intended only to cover the basic costs of living and supplemental benefits for disability-related services are often pre-determined.<sup>47</sup> Moreover, income supports in Canada have been found to disincentivize the contributions that adults can

make to achieve varying levels of self-sufficiency.<sup>48</sup> The income support that Canada's provinces administer to persons with disabilities is generally allocated as a monthly flat-rate and is "means-tested": eligibility for income support requires that an adult has little independent income and for each payment, there is a ceiling beyond which income that an adult generates, or the value of gifts, may be deducted.<sup>49</sup> In 2012, the Commission for the Review of Social Assistance in Ontario found that persons with disabilities, especially, "get trapped in the system and face diminishing opportunities...They are not receiving the support they need to stabilize their lives and move toward greater independence and resiliency".<sup>50</sup>

The RDSP was conceived as a way to bridge the gap between the income support ceiling and the financial security required for an adult's well-being, and it is exempted from means-testing under most provincial income support regulations, including in Ontario. An RDSP beneficiary can receive federal grants and bonds up to a maximum of \$90,000 and accumulate additional savings of up to \$200,000, before investments, without being subject to income support deductions.<sup>51</sup> As Professor Andrew Power *et al* explain, "[t]his is especially important because people with disabilities can now accumulate savings without jeopardising disability benefits".<sup>52</sup>

The RDSP was also intended to enhance adults' autonomy and equal citizenship as consumers of private sector products.<sup>53</sup> Recent reforms of government supports for persons with disabilities have increasingly tended toward establishing delivery mechanisms that empower adults to choose the assistance that they need for themselves.<sup>54</sup> This "personalisation of support"<sup>55</sup> has taken different forms across jurisdictions and may include "individual budgets, direct payments, consumer directed care, flexible funding and self-managed supports".<sup>56</sup> The RDSP policy objectives are consistent with these recent reforms: "there are no restrictions on when [RDSP] funds can be used or for what purpose".<sup>57</sup> RDSP funds are not limited to fulfilling basic needs, or to covering pre-determined services, which can "often take [on a] life of their own".<sup>58</sup> Moreover, RDSP beneficiaries and their families are encouraged to make active contributions through the Canada Disability Savings Grant, which matches private deposits at rates of up to 300 per cent, depending on the amount of the deposit and the beneficiary's family income (up to \$3,500 annually). For those with low incomes, the Canada Disability Savings Bond provides government supports of up to \$1,000 annually, even if no contributions are made to the plan. As with all contributions, these government supports can grow if the RDSP investments are fruitful.

In her study on the RDSP administration and uptake, Jeanette Moss summarizes these policy objectives as follows:

The RDSP signals an important shift away from a welfare-based approach to helping people with disabilities and moves towards an investment-based approach. Rather than increasing the amount of short-term disability benefits, the RDSP has the overarching purpose to

provide a long-term sheltered savings vehicle. People with disabilities take an active role in their own income generation and future financial stability...Rather than imposing a limit or ceiling on what people with disabilities can own or save, the RDSP establishes a foundation or starting place for people with disabilities to save money.<sup>59</sup>

### ***3. Who are RDSP Beneficiaries and How Do They Access the RDSP?***

There are over 70,000 people in Canada with an RDSP.<sup>60</sup> RDSP beneficiaries must meet basic eligibility requirements set by the federal government, including that they must be a “DTC-eligible individual”.<sup>61</sup> Within the bounds of these requirements, there is substantial diversity in the persons seeking to participate in the RDSP. Specific and actual beneficiaries identified in the LCO’s preliminary consultations and in submissions made to the federal government include persons with developmental, psychosocial and cognitive disabilities.<sup>62</sup> Some RDSP beneficiaries have lived with disability since birth, such as those persons with fetal alcohol spectrum disorder (FASD), autism or Down syndrome. For others, changes in their abilities may have occurred later in life, such as those persons with schizophrenia, HIV/AIDS, acquired brain injuries (ABI) and Alzheimer’s disease.

The onset of disability may be abrupt or may develop gradually; abilities may be stable or they may fluctuate. The LCO heard from one RDSP beneficiary who said that not only does the RDSP help him save for when his family is no longer present, but it is also a contingency plan in the event that his abilities, services or support networks change: a “safety net” for the uncertainties that could “snowball” from his current situation.<sup>63</sup> We also heard that beneficiaries with degenerative conditions, such as HIV/AIDS, multiple sclerosis and developmental disabilities, may age at an accelerated rate and experience conditions normally associated with older adults, including dementia.<sup>64</sup> These accounts point to the need to consider the lived-experience of RDSP beneficiaries, including those who use the RDSP for reasons other than for long-term savings because they face barriers in very different ways throughout their lives.

The effect of differing abilities on relationships, the nature of stigma associated with them, and the resources that are provided to separate communities all have a profound effect on how each individual accesses the RDSP. Accordingly, this project has adopted “life course” and “person-centered” approaches to reviewing options for reform.<sup>65</sup> It is important that the project recognize and respect differences in abilities, gender, age, place of residence, income, culture, Aboriginal status, language proficiency and literacy, among intersecting identities, as well as identify the common experiences and challenges of RDSP beneficiaries.

In addition to disability, other common experiences and challenges are known. Both younger and older adults currently access the RDSP. RDSP funds are intended to be distributed primarily

as mandatory lifetime disability assistance payments (LDAPs) that are released periodically once a beneficiary turns 60. Although there are few older adults receiving LDAPs at present, this will increasingly be the case as beneficiaries age. In Ontario, and the rest of Canada, persons over the age of 50 have withdrawn almost four times the number payments than all other persons, totaling over \$4 million in the five years since the RDSP was established.<sup>66</sup> Younger people may also face their own challenges when they transition into adulthood and become entitled to make decisions independent of a parent or guardian. The transition to adulthood may be felt acutely as young people take on new responsibilities. This has raised particular difficulties for children in state care who have had an RDSP opened on their behalf and who may need a legal representative to assist them when they transition away from child protection services.<sup>67</sup>

Adults learn about the RDSP at financial institutions and through various intermediaries. These entry points can involve the provision of information as well as advocacy assistance, such as professional financial advice or preparing applications for eligibility. Families and friends, including caregivers, are one of the foremost entry points to the RDSP. Parents, spouses and common-law partners can temporarily qualify to open an RDSP on their loved one's behalf through streamlined processes under the ITA, and often engage beneficiaries in informal shared decision-making on the plan terms.<sup>68</sup> Legal clinics habitually advise clients applying for, or receiving, ODSP about the RDSP, both individually and during educational workshops.<sup>69</sup> ODSP personnel have also directly informed recipients about the RDSP.<sup>70</sup> Eligibility criteria for the RDSP are not the same as for ODSP and the application processes are separate.<sup>71</sup> However, some adults may meet the eligibility criteria for both. Private trusts and estates lawyers also assist their clients in opening RDSPs in order to “shelter” funds from personal injury settlements, life insurance and inheritances from taxation and to maintain ODSP eligibility by taking advantage of income and asset exemptions for the RDSP.<sup>72</sup> Community and advocacy organizations are active in raising awareness and assisting individuals seeking to access the RDSP.<sup>73</sup> Finally, adults have been targeted by companies whose core business is to prepare benefit applications for a fee.<sup>74</sup> Figure 1, *Individuals and Organizations Involved in the RDSP Design and Delivery*, situates entry points with other key individuals and organizations involved in the RDSP design and delivery.

These entry points are as spread out as the services that adults use in their daily lives and they are more or less accessible, depending on the context. To the extent that entry points facilitate access to the RDSP, they are crucial to its delivery. For instance, only 10.8 per cent of RDSPs are registered in rural areas of Canada,<sup>75</sup> where services are more remote. Chapter VI, *Options for Reform*, of this discussion paper addresses how entry points could be leveraged to increase the accessibility of a process to establish a legal representative.

#### ***4. Individuals and Organizations Involved in the RDSP Design and Delivery***

The RDSP is a hybrid public and private initiative that requires the cooperation of actors across multiple sectors and levels. The federal government employed its fiscal powers to implement the RDSP under the ITA. The grants and bonds that are available to eligible beneficiaries as government contributions to the RDSP are regulated under the CDSA. Together, the ITA, CDSA and related Regulations, comprehensively address the RDSP eligibility criteria, plan conditions, accountability measures and other rules respecting administration under federal jurisdiction.

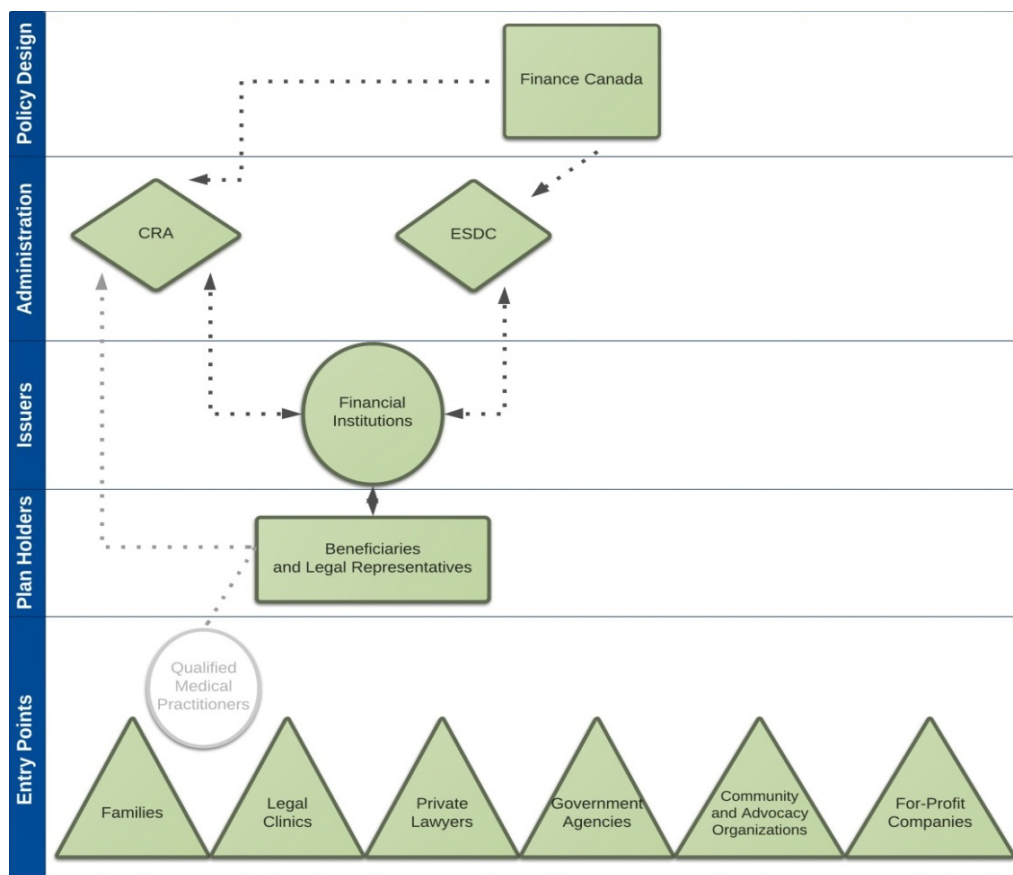
The Department of Finance Canada (Finance Canada) is responsible for developing the overall policy design of the RDSP. The Canada Revenue Agency (CRA) and Employment and Social Development Canada (ESDC) are charged with administering the RDSP.<sup>76</sup> Both CRA and ESDC actively collaborate with financial institutions to register and monitor individual plans and they make policy recommendations to Finance Canada based on information gained in their respective roles. Overall, there is a high degree of information sharing among the federal departments and with financial institutions, all of whom are represented on an RDSP Advisory Committee that meets regularly.

An RDSP can be opened at a participating financial institution by a “plan holder”, who may be the beneficiary, or an entity legally authorized to act on his or her behalf. Once an RDSP is opened, plan holders have authority to determine important terms, such as the investment of RDSP funds, and the timing and amount of withdrawals.

Financial institutions are third parties who issue the RDSP and provide a point of contact in the relationship between beneficiaries, plan holders and the federal government. The RDSP is complex and involves high set-up costs; constant amendments also require extensive upgrades to financial institutions’ operations.<sup>77</sup> Financial institutions offer the RDSP voluntarily. Without them, the RDSP would not be available. Financial institutions offer the RDSP according to “specimen plans” that are approved by CRA. Specimen plans must conform to the statutory RDSP rules but vary according to each financial institutions’ terms.<sup>78</sup> Financial institutions are required to report data on individual RDSPs to ESDC and CRA, including monthly accountings of savings, withdrawals and investment activity.<sup>79</sup>

To be DTC-eligible, every RDSP beneficiary must undergo a medical assessment. As a result, each adult will encounter a practitioner qualified to conduct an assessment. “Qualified practitioners” include medical doctors, audiologists, occupational therapists, and other medical and paramedical professionals, who fill in a DTC Certificate as prescribed under the ITA.<sup>80</sup> Similar to financial institutions, they embody an axis point that all beneficiaries must pass, or have passed, through when applying for the RDSP.

**FIGURE 1: INDIVIDUALS AND ORGANIZATIONS INVOLVED IN THE RDSP DESIGN AND DELIVERY**



CRA: Canada Revenue Agency

ESDC: Employment and Social Development Canada

Figure 1 illustrates the interaction of individuals and organizations involved in the design and delivery of the RDSP along the left bar by: 1. entry points, 2. plan holders, 3. issuers, 4. administrators and 5. policy designers. Qualified medical practitioners are set apart because eligibility for the DTC is determined separately from activities in the RDSP administration.

Relationships among the actors involved in the RDSP design and delivery are complex and highly regulated. For this reason, any options for reform must respond to existing operational and policy constraints that lie beyond the ambit of the LCO's review. Because of the limited scope of this project, this discussion paper primarily addresses the roles and responsibilities of individuals and organizations represented in the bottom three tiers of Figure 1 in addition to those of the Government of Ontario.

## **B. The Importance of Capacity When Adults Seek to Access the RDSP**

### ***1. Capacity Laws as a Barrier to Accessing the RDSP***

Opening an RDSP requires a plan holder to enter into a contract with a financial institution.<sup>81</sup> During its 2011 review of the RDSP, the federal government reported that “a number of adults with disabilities have experienced problems in establishing a plan as the nature of their disability precludes them from entering into a contract”.<sup>82</sup> If a beneficiary is an adult when the RDSP is being opened for the first time, the beneficiary is the plan holder unless he or she is not legally capable of entering into a contract with a financial institution.<sup>83</sup> A financial institution may decline to enter into an RDSP arrangement with a beneficiary who does not meet the common law test of capacity to enter into a contract.<sup>84</sup> An adult or another interested person, such as a family member, may also believe that an adult has diminished capacity to enter into an RDSP arrangement and wish to appoint a person to assist even before approaching a financial institution.

Where an adult beneficiary is not “contractually competent to enter into a disability savings plan” with a financial institution, the ITA allows another “qualifying person” to be the plan holder.<sup>85</sup> Qualifying persons can be a guardian or other person “who is legally authorized to act on behalf of the beneficiary”.<sup>86</sup> The ITA does not provide for a process to appoint a guardian or other person who is legally authorized to act on behalf of the RDSP beneficiary. The federal government has stated that “[q]uestions of appropriate legal representation in these cases are a matter of provincial and territorial responsibility”.<sup>87</sup> In Ontario, guardians and attorneys for property are qualifying persons who can be appointed under the SDA.

In the course of its 2011 review of the RDSP, beneficiaries and their families voiced concerns to the federal government with respect to existing frameworks within provincial jurisdictions, many of which require “the individual to be declared legally incompetent and have someone named as their legal guardian”.<sup>88</sup> In the Economic Action Plan 2012, the federal government also reported specific concerns that such “a process...can involve a considerable amount of time and expense on the part of concerned family members, and...may have significant repercussions for the individual”.<sup>89</sup>

The federal government amended the ITA in response to these concerns, albeit temporarily and to a limited extent. The amendments to the ITA expand the definition of qualifying persons to include a “qualifying family member”, who can act on behalf of the adult beneficiary where “in the [financial institution’s] opinion after reasonable inquiry, the beneficiary’s contractual competence to enter into a disability savings plan at that time is in doubt”.<sup>90</sup> Qualifying family members, who can act as plan holders, are restricted to a small class of persons, namely,

spouses, common-law partners and legal parents. The federal government's temporary measure will expire at the end of 2016.

Under the ITA, a beneficiary can replace a qualifying person as a plan holder where the beneficiary so chooses and he or she has been determined to be "contractually competent" by a "competent tribunal or other authority" under provincial law or if, in the financial institution's opinion, the beneficiary's capacity is no longer in doubt.<sup>91</sup> In Ontario, an adult could refute a financial institution's opinion regarding his or her capacity to enter into a contract by requesting an assessment by a certified capacity assessor. The capacity assessment process, including costs and possible implications, is reviewed in Chapter III.B.3, Statutory Guardianship Appointments.

The purpose of this project is to recommend a process to establish a legal representative for RDSP beneficiaries who experience diminished capacity that is an accessible alternative to Ontario's current framework to appoint a guardian or attorney for property. Should Ontario adopt a new process to appoint a legal representative for RDSP beneficiaries, it must be consistent with the provisions of the ITA. As a result, a legal representative would likely need to be accepted by the federal government as a person "who is legally authorized to act on behalf of the beneficiary" under provincial law, as described above.<sup>92</sup>

## ***2. Critical Times for Decision-Making: Opening the RDSP, Deciding Plan Terms and Managing Funds that Have Been Paid Out of the RDSP***

The RDSP is a financial vehicle that calls on plan holders to make educated decisions through traditional investment instruments, such as mutual funds. Even for individuals who do not face challenges with property management, financial literacy may require specialized support from professionals, like investment advisors. The public regularly receives these supports for other types of registered plans, such as RRSPs and RESPs. However, in addition to such investment decisions, the LCO heard from stakeholders that the structure of the RDSP is complex and decision-making for the RDSP is demanding.<sup>93</sup>

The temporary amendments to the ITA create only a small category of legal representatives – spouses, common-law partners and parents – whose scope of authority is limited to being an RDSP plan holder. A plan holder has authority to do all the following:

- open the RDSP at a financial institution
- authorize contributions from private sources
- apply for government grants and bonds

- decide terms for the investment of savings; and
- depending on the plan terms, decide the availability, timing and amount of payments

A plan holder has authority to decide how to invest the RDSP when it is first opened, and can change investments throughout the RDSP life cycle. A plan holder can also authorize private contributions to the RDSP, and apply for government grants and bonds. The timing of contributions is crucial to eligibility for the Canada Disability Saving Grant because the grant is awarded to match contributions made within a calendar year.

Depending on the plan terms, a plan holder also has authority to decide whether and when a beneficiary can receive one-time payments (called disability assistance payments or “DAPs”) and whether to start LDAP payments prior to their mandatory commencement date. The rules regarding the timing and calculation of withdrawals are highly detailed. They also carry serious consequences: although the government offers grants and bonds to beneficiaries, should withdrawals occur during certain periods of time, government support must be paid back, which can significantly diminish RDSP funds.<sup>94</sup>

The plan holder is not automatically authorized to assist a beneficiary in managing his or her DAP or LDAP funds once they are dispersed from the plan. Funds paid out of an RDSP can be used for any purpose. A beneficiary could equally apply an RDSP payment to meet his or her basic needs, to purchase an assistive device, or to buy a movie ticket. This means that the RDSP is an asset, like any other asset, and that the range of decisions that can be made to spend RDSP funds is wide.

Because plan holders are not authorized to assist in making decisions once funds are dispersed, if a beneficiary lacks capacity, she or he may be required to receive additional assistance from a guardian or other substitute decision-maker established under provincial or territorial statute, such as Ontario’s SDA. That legal representative could be the plan holder or another individual or organization, but must be appointed to this role in a separate process. One key issue in the LCO’s project is to consider whether a legal representative’s scope of authority should be limited to that of a full or partial plan holder, or extended beyond that of a plan holder to also include managing RDSP payments made to the beneficiary (see Chapter V.C.4, *The Scope of a Legal Representative’s Authority*).

### ***3. What is Capacity? Foundational Concepts and Tensions***

#### **a. Introduction**

The history of capacity laws is long, complex and still evolving, and it cannot be comprehensively reviewed here.<sup>95</sup> This discussion paper is squarely concerned with the

importance of capacity when adults with mental disabilities seek to access the RDSP. This section presents basic concepts and tensions that are relevant to defining capacity for RDSP decision-making.

### **b. Capacity as a Socio-Legal Concept**

Capacity is a socio-legal concept that has a significant impact on our lives because it determines who is entitled to make decisions that the law recognizes as valid. Capacity laws create a threshold beyond which a person may be restricted from making essential decisions independently, such as deciding where to live, consenting to healthcare or opening an RDSP.

However, capacity laws do not always negate rights and can empower them instead. In Ontario, we are presumed to be capable in our interactions with others and can enter into arrangements without coercion.<sup>96</sup> Moreover, we access various services in our daily lives that assist us in reaching decisions without being found to be incapable, as where we receive investment advice from a financial planner. In this sense, the law recognizes both protections and supports, and we are all affected by how it defines capacity.

Legal definitions of capacity vary widely across issue area and jurisdiction. The capacity to execute a will, to consent to marriage or to manage one's property may be defined according to different standards as between or, even, within particular jurisdictions. In the case of the RDSP, the current legal framework counts more than one source to define capacity and more than one assessment standard.

While some regard capacity – particularly the related term “mental competency”<sup>97</sup> – as a medical certitude, others have argued that “incapacity exists only after we define it”;<sup>98</sup> that it is fundamentally a “legal fiction”.<sup>99</sup> Consistent with past approaches in the expert literature and commissioned enquiries, including in Ontario, the LCO recognizes that capacity is fundamentally a “socio-legal concept”.<sup>100</sup> This is to say that laws regulate the meaning of capacity to achieve goals that are informed by prevailing social needs and values.

It is important to appreciate the nature of capacity as reflecting social needs and values because it explains why it changes over issue area, time and place, and can continue to do so.<sup>101</sup> However, definitions of capacity are often “treated as fact” in implementing the law and, in any given place or time in history, capacity does not lack consequences for those who are affected.<sup>102</sup>

### **c. Social Needs and Values Underlying Definitions of Capacity**

As discussed later in this subsection, the LCO Framework Principles recognize a nuanced understanding of the social needs and values underlying the concept of capacity, and the social

nature of the decision-making process. The predominant characterization of these social needs and values, however, is as a balance between autonomy and protection.<sup>103</sup> The presumption of capacity accepts that all human beings are equally entitled to make decisions for themselves as autonomous actors, unless it is believed that they cannot exercise autonomy and are in need of protection.<sup>104</sup> Contemporary accounts largely describe autonomy as self-determination, independence and freedom from coercion. As such, it relates to “the process of self-rule making, rather than the content of the rules made, [and] avoids assigning social values to particular choices and ways of living....”<sup>105</sup> Autonomy concerns agency in the exercise of one’s choices, and is thus connected to concepts of personal integrity and the right to take risks, even if others believe them to be imprudent.<sup>106</sup>

The strong value assigned to autonomy is enshrined in international human rights treaties, such as those that succeeded the atrocities of World War II, as well as in constitutional and human rights laws at the domestic level, and it can be traced back to libertarian ideals that arose out of the “more status oriented structures which were dominant in pre-literate, feudal societies”.<sup>107</sup> In the area of decision-making law, the value of autonomy has been central to disentangling assumptions that correlate disability status with incapacity in favour of understanding the functional process that adults undertake to make particular decisions. Margaret Hall explains the relationship between autonomy and capacity as follows:

Capacity, in law, serves as the effective threshold of autonomy, dividing the autonomy, on the one side, from the “non-autonomous” persons, “on the basis of an individual’s ability to engage in the process of rational (and therefore autonomous) thought, explained as the ability to exercise one’s own will to reflect upon, and choose between desires, and to adopt those chosen as one’s “own”.<sup>108</sup>

On the other end of the continuum of social needs and values is protection through intervention. Protection is a form of risk management for adults who face challenges in decision-making as well as the greater community affected by their actions.<sup>109</sup> Whereas autonomy is said to be value-neutral on the substance of decisions, protection is premised on the perception of risk to the well-being of decision-makers and those around them.

Where it is the adult who is being protected, at least two broad justifications have been used to negate the preference for autonomy. Interventions have been justified where it is believed that an adult is unable to act in his or her own “best interests”.<sup>110</sup> Interventions have also been justified on the basis that an adult faces challenges in his or her ability to rationally comprehend and communicate choices.<sup>111</sup> Underlying both these justifications is the perception that an adult may suffer harm from self-neglect or increased vulnerability to potential mistreatment, abuse and exploitation. The LCO heard from stakeholders that protecting adults from harm is a

real and pressing need and that neglecting to do so could seriously undermine the dignity of adults who are unable to care for themselves.

Where the greater community is being protected, interventions are justified by a number of social needs and values. Beyond the threat of injury to other persons – which is the domain of criminal and mental health laws not considered in this project – at least two community interests are relevant here. Third parties who engage in legal arrangements have an interest in ensuring that they are valid. For example, financial institutions can suffer losses where they enter into a contract with an adult who is legally incapable because the common law protects the adult from unfair transactions by making the contract voidable.<sup>112</sup> Along the same lines, protecting third parties from invalid legal arrangements is a way to promote autonomy for those same third parties because it frees them from doubts about the enforceability of their choices.<sup>113</sup> Additionally, the government has an interest in defining legal capacity to safeguard relationships among its citizens so as to lower transaction costs, promote efficiencies and maintain an “administratively workable community”.<sup>114</sup>

The predominant characterization of capacity as a balance between autonomy and protection has been subject to the critique that it dichotomizes a more nuanced picture of social needs and values.<sup>115</sup> For example, some say that protection can actually serve to facilitate, rather than inhibit, autonomy through the provision of accommodations. In such cases, interventions based on incapacity could be avoided if the assistance provided enables adults to overcome barriers to decision-making to sufficiently reduce the risk of harm.<sup>116</sup>

At the root of this critique is the reimagining of autonomy as something other than one individual’s ability to make decisions independently.<sup>117</sup> Many theorists, community organizations and governments have come to value decision-making as a social and contextual process, drawing on a theory that feminist critical thinkers call “relational autonomy”.<sup>118</sup> The Office of the Public Advocate for Victoria, Australia observes that

Most people in the community seek the support of others in making significant decisions about their lives. In modern society there is a high level of dependence on the expertise and knowledge of those with special qualifications, skill and talents depending on the sorts of decisions that a person is faced with. In addition, people talk about their choices with others and on the advice of others and few decisions, especially about important matters, are made in isolation. In our society, relying on the advice of others is not seen as an indication that a person lacks the mental capacity to make his or her own decisions.

It is therefore argued that the idea of the independent, autonomous decision-maker, at least as far as the process of decision-making is concerned, is a myth and that *interdependent* decision making is the way in which most of us operate. The amount of

support and assistance people seek and receive to make decisions varies, depending on a person's ability, personality and life circumstances and on the particular decision.<sup>119</sup>

Relational autonomy is also connected to other ways of conceptualizing social needs and values that underlie definitions of capacity, including the developmental (rather than static and fixed) nature of autonomy;<sup>120</sup> culturally appropriate decision-making;<sup>121</sup> a deeper understanding of personhood beyond rational thinking<sup>122</sup> and respect for human dignity.<sup>123</sup> Laws in certain jurisdictions and recent law reform reports on decision-making indicate an acceptance of nuanced social needs and values, for instance, in adopting detailed sets of principles.<sup>124</sup>

The LCO's Framework Principles recognize the social and contextual nature of the decision-making process (see Appendix B). In *A Framework for the Law as it Affects Persons with Disabilities*, the principle of "Fostering Autonomy and Independence" refers to the creation of conditions to ensure that persons with disabilities are "able to make choices that affect their lives and to do as much for themselves as possible or as they desire, *with appropriate and adequate supports as required* [emphasis added]". The Framework Principles also recognize "Facilitating the Right to Live in Safety", which consists of "the right of persons with disabilities to live without fear of abuse or exploitation and where appropriate to receive support in making decisions that could have an impact on safety". In addition, the LCO acknowledges "that other members of society also have entitlements and responsibilities" under the principle of "Recognizing That We All Live in Society". The remaining Framework Principles include "Promoting Social Inclusion and Participation", "Responding to Diversity in Human Abilities and Other Characteristics" and "Respecting the Dignity and Worth of Persons with Disabilities".<sup>125</sup>

#### **d. Methods to Determine an Adult's Capacity or Incapacity**

Methods to determine an adult's capacity or incapacity are heavily influenced by the social needs and values that underpin the concept of capacity, such as those mentioned above. The predominant contemporary method to determine capacity or incapacity has evolved over time with a view to enhancing an adult's autonomy, reducing paternalism while safeguarding against harm, and protecting the competing interests of affected third parties. This so-called "cognitive approach" typically involves assessing the adult's process of reasoning in coming to a particular decision. Thus, it focuses on "a person's ability to perform a specified function, such as understanding the nature of a contract".<sup>126</sup> The Queensland Law Reform Commission has described the approach as follows:

The functional approach is based on cognitive (functional) ability to make a specific decision, including a specific type of decision, at the time the decision is to be made. It focuses on the reasoning process involved in making decisions. This encapsulates the abilities to understand, retain and evaluate the information relevant to the decision

(including its likely consequences) and to weigh that information in the balance to reach a decision.<sup>127</sup>

The cognitive approach is considered to be “consistent with the principle of least restriction for an adult in making decisions because it involves proportionate and minimal intrusion on decision-making autonomy”.<sup>128</sup> In contrast to historical approaches, it rejects the bright-line assumption that persons with disabilities do not have the capacity to act autonomously and are in need of protection. It allows persons to make risky decisions that some might view as imprudent based on opinion. Moreover, it accommodates issue-specific and fluctuating abilities by restricting the attribution of incapacity to particular areas of decision-making, for instance through the separation of property management and personal care.<sup>129</sup>

Despite commonly perceived gains made to promote autonomy under the cognitive approach, some argue that testing an adult’s cognitive ability is discriminatory because it disproportionality disadvantages persons with mental disabilities, who may have different ways of reaching and expressing choices.<sup>130</sup> Bach and Kerzner suggest that this approach should be reformed to encourage a “more inclusive concept of personhood than that defined by the criteria of rationality so pervasive in legal incapacity law”.<sup>131</sup> Their suggested threshold for what they call “decision-making ability” is comprised of two criteria: the capacity to express one’s will and/or intentions; and the ability for one’s life story of values, aims, needs and challenges to be understood by others, who can then help give effect to one’s will and/or intentions. They claim that behaviour and communications, such as utterances and gestures, can be used to interpret a person’s decision under this method.<sup>132</sup>

Bach and Kerzner’s proposal resembles methods to determine capacity in two Canadian provinces, Newfoundland and Labrador and British Columbia. It is also common across jurisdictions for an adult’s non-cognitive expressions of preference, wishes, emotion and values to be considered valid indicators of choice in guiding substitute decision-makers after they have been established.<sup>133</sup> The LCO will consider methods to determine capacity in the provinces named above along with the predominant functional approach in Chapter V.B, Choice of Arrangements to Establish a Legal Representative for the RDSP.

#### **e. Using the Language of Capacity or Incapacity: Qualifiers and Disqualifiers**

The social needs and values that are promoted in capacity laws can be met through a finding of *incapacity* or the recognition of a specified level of *capacity*. For instance, a court may appoint a guardian after finding an adult to be *incapable* of managing property. An adult may also appoint an attorney to give effect to his or her wishes as long as he or she meets a standard for *capacity* to do so.

There are normative and practical consequences that result from determining capacity instead of incapacity. Canada, joined by 157 countries in the international community, has recognized the tremendous significance that adults with disabilities attribute to being accepted as capable persons under the law.<sup>134</sup> The *Convention on the Rights of Persons with Disabilities* guarantees them the enjoyment of legal capacity on an equal basis with all others. It enumerates prescribed rights to supports and accommodations with a view to empowering persons with diminished capacity, and adopts principles of minimal intrusion. These advances must be understood in the context of how the concept of capacity has been used historically to exclude various groups from entitlements to basic civil rights, including women.<sup>135</sup> Although capacity laws have evolved to accept the presumption of capacity and to prioritize a functional approach to interventions, the stigma attached to the label of incapacity, and the real consequences that flow from it, continue to be highly contentious.

In its report on *Vulnerable Adults and the Law*, the Ireland Law Reform Commission (IRLC) has recommended using positive language, which promotes the recognition of capacity consistent with the CRPD and domestic human rights legislation.<sup>136</sup> Under this model, the IRLC's proposed legislation would include a statutory definition of capacity as opposed to incapacity that encapsulates the cognitive approach. In practical terms, a person would be assessed as lacking capacity, rather than being found to be incapable.<sup>137</sup> Other jurisdictions, including Ontario, presume that all adults are capable and create positive qualifiers for personal appointments and negative disqualifiers to remove capacity after an assessment. Positive qualifiers do not result in a finding that an adult is incapable, even if a substitute decision-maker's duties take immediate effect. The represented adult's legal status of capacity is retained and he or she may, or may not, continue to make valid decisions, depending on the nature of the arrangement. Personal appointments are widely perceived as preferable to external appointments for these reasons and, also, because they allow the adult to proactively choose who they would like to assist them and in what way.<sup>138</sup>

The objective of some statutory personal appointments, such as enduring POAs, is to allow individuals to arrange for another person to manage their affairs in the event that they become incapable of doing so themselves.<sup>139</sup> Some statutes explicitly state that the capacity necessary to execute a personal appointment is lower than that which is necessary to manage one's own property or personal affairs, and that an adult can make a personal appointment even after having been found incapable of the latter.<sup>140</sup> As with all methods to determine an adult's capacity or incapacity, the specific criteria required to execute a personal appointment vary widely by issue-area and jurisdiction.

In recent years, alternative decision-making arrangements have received increased attention with the adoption of the CRPD, and law reform activity in Canada and abroad.<sup>141</sup> A range of personal appointments that do not require a finding of incapacity have been accepted as less restrictive options to attorneys and guardians for property. These are reviewed in Chapter V.

#### **f. Alternatives to Capacity: Determining a Need for Assistance**

One way that decision-making laws have incorporated the relational or social aspects of decision-making into determining capacity has been to restrict findings of incapacity to circumstances where the adult *needs* a guardian. In many jurisdictions, it is considered invasive and undesirable to introduce an adult into the guardianship system if his or her needs are met with assistance or if there is a less restrictive course of action available.<sup>142</sup> For example, courts may be prohibited from finding a person incapable until alternative decision-making arrangements have been exhausted.<sup>143</sup> These alternatives could include POAs or informal services, such as financial accounting or assisted living. A POA may also specify that it comes into effect on the fulfillment of a contingency other than incapacity,<sup>144</sup> such as missed rent payments or a purchase that is uncharacteristic of the adult. Ann Soden of the Centre for Law and Aging elaborates,

[T]here may be incapacity but no risk or need for formal legal representation, or there may be an easily-controlled risk which need not infringe on legal rights. Protective measures which are least restrictive of civil rights and autonomy may be as simple as making banking arrangements for bill payment, hiring an accountant or executing a banking or general power of attorney which names a trusted representative to handle one's property and financial matters.<sup>145</sup>

Apart from decision-making laws, interventions are permitted in sectoral laws based on factors such as vulnerability and the need for assistance. Professor Margaret Hall claims that decision-making laws are in effect a response to vulnerability, albeit couched in the language of capacity, and that vulnerability could provide a more workable foundation for intervention while retaining an adult's sense of personhood.<sup>146</sup> Vulnerability and the need for assistance have been used as a means to trigger the provision of programmatic health, social and other services that respond to systemic disadvantages associated with the circumstances of particular communities.<sup>147</sup> Relevant sectors include disability services, income supports and adult protection. In some sectors, these laws are considered to create positive entitlements for the special needs of a target client group, such as persons with developmental disabilities.<sup>148</sup> In others, they have been criticized as overly paternalistic, for instance where interventions are made to protect older adults from suspected self-neglect.<sup>149</sup> In this discussion paper, the LCO examines laws in the income support and social benefits sectors that create a process to establish a legal representative without requiring that an adult be found incapable, where there

is a need to assist the adult in managing his or her funding (see Chapter V.B.5, Laws in the Income Support and Social Benefits Sectors).

#### **4. Provincial Jurisdiction to Enact Capacity Laws that are Recognized for the Federal RDSP**

The provinces regulate issues of capacity and legal representation for property management. The *Constitution Act, 1867* does not enumerate capacity as an area of exclusive jurisdiction; it is subsumed under the provinces' jurisdiction over "property and civil rights in the province" and "matters of a local or private nature".<sup>150</sup> These powers, together with the responsibility for hospitals, "have been read by the courts as granting the provinces primary constitutional authority over matters of public and individual health".<sup>151</sup> Mental health legislation exists in all of the provinces, and capacity and consent laws have been adopted in most.<sup>152</sup>

Some stakeholders have asked the federal government to amend the ITA permanently to address the subject matter of this project out of concern that, as a federal benefit, the RDSP should be treated uniformly across the country. They claim that the federal government has constitutional jurisdiction to regulate the issue of legal representation for the RDSP because it is essential to an effective, national legislative scheme.<sup>153</sup> Federal social benefits, such as the Canada Pension Plan (CPP) and Old Age Security (OAS) regulate payments to persons other than the recipient for reasons of incapacity. During the 2011 RDSP review, the federal government held extensive consultations with the provinces and territories to consider this proposal. However, the federal government has stated that it considers this issue to fall within provincial and territorial responsibility.

In the Economic Action Plan 2012, the federal government called upon the provinces and territories to examine whether a streamlined process to simplify access would be suitable for their jurisdictions. It recognized some provinces and territories as having instituted streamlined processes or other arrangements that could address the concerns of RDSP beneficiaries, including British Columbia, Saskatchewan, Manitoba, Newfoundland and Labrador, and the Yukon. The temporary federal rules under the ITA are intended to provide provinces and territories sufficient time to develop an appropriate, long-term solution.<sup>154</sup>

The federal and Ontario governments share the desire to improve access to the RDSP. The two jurisdictions have cooperated in the past in amending Ontario's social benefit laws to create exemptions for the RDSP. The Ontario government has requested that the LCO review this matter with a view to making recommendations for reform. Therefore, although the LCO acknowledges the fact of stakeholders' proposals, we consider our mandate to apply to Ontario laws, policies and practices and do not make recommendations specifically to the federal

government. The LCO will review how other jurisdictions have dealt with the issue, but will adopt an approach that is consistent with Ontario's needs and values. The LCO will also consider measures for the recognition of legal representatives across jurisdictions in Chapter VI.

### **III. ONTARIO'S CURRENT FRAMEWORK TO ESTABLISH A LEGAL REPRESENTATIVE FOR RDSP BENEFICIARIES**

#### **A. Introduction**

Ontario does not have a process to establish a legal representative *specifically* for RDSP beneficiaries. The *Substitute Decisions Act, 1992* governs the establishment of general substitute decision-makers for property management, including through the execution of a POA or the appointment of a guardian. The SDA was enacted in 1992 following a robust law reform process involving commissioned expert reports and extensive consultations with stakeholders, who played a substantial role in framing much of the legislation that was eventually adopted.<sup>155</sup> It incorporates a sophisticated cognitive approach with standards that are tailored to personal and external appointments, and that are divided between property management and personal care. A person is entitled to rely on the presumption that an adult is capable unless he or she “has reasonable grounds to believe that the other person is incapable of entering into the contract...”<sup>156</sup> The threshold for *capacity* to give a POA for personal care is at the low end and that for the *incapacity* to manage property is at the high end.<sup>157</sup> This demonstrates a flexible understanding of capacity as specific to the decision being made.

We limit our discussion in this section to a summary of the SDA provisions that could be used to establish a legal representative for RDSP beneficiaries, although they are intended for broader application.<sup>158</sup> The LCO will also review stakeholder reports that accessing the RDSP through these avenues has had negative repercussions for RDSP beneficiaries as well as their goals for reform. Further details on how Ontario's current framework addresses key issues raised by stakeholders are provided under corresponding sections in Chapter V, for instance the eligibility of legal representatives and safeguards against abuse.

#### **B. Property Management under the *Substitute Decisions Act, 1992***

##### ***1. The Personal Appointment Process: Continuing Powers of Attorney***

An adult can execute a POA to authorize a person to “do on the grantor's behalf anything in respect of property that the grantor could do if capable, except make a will”.<sup>159</sup> Authority over property management under the SDA includes “any type of financial decision or transaction that a person would make in the course of managing his or her income, spending, assets, and debts. For example, it could include budgeting expenses and paying bills, doing tax returns, safeguarding valuables, selling real estate, or making loans”.<sup>160</sup> Opening an RDSP, deciding plan

terms and managing funds once they have been paid to an RDSP beneficiary clearly fall within this broad scope of authority. An adult can, however, limit an attorney's authority by setting out specific areas for substitute decision-making, instructions, conditions and restrictions.<sup>161</sup> As will be seen in Chapter V, at least one Canadian province has recommended the use of a "special limited" POA for RDSP beneficiaries wishing to designate a plan holder.<sup>162</sup>

A POA takes effect immediately or upon the occurrence of a specified event and, if it is a continuing or enduring POA, it will continue to be effective during the adult's incapacity to manage property.<sup>163</sup> Indeed, the event that triggers a so-called springing POA could be a finding of incapacity that is determined according to a method provided for in the POA. The default method to determine incapacity for the commencement of a springing POA is a capacity assessment, described in Section 3 below. This is a flexible requirement: if the adult specifies that another person assess his or her incapacity, "such as a family member or friend, that other method of assessment would need to be followed".<sup>164</sup>

The threshold for capacity to execute a POA for property is low relative to the test for incapacity to manage property, and "a continuing power of attorney is valid if the grantor, at the time of executing it, is capable of giving it, even if he or she is incapable of managing property".<sup>165</sup> However, the definition of capacity to give a POA in Ontario is more rigorous than in many other Canadian provinces, being premised on a highly detailed cognitive approach.<sup>166</sup> It requires that an adult,

- a) knows what kind of property he or she has and its approximate value;
- b) is aware of obligations owed to his or her dependents;
- c) knows that the attorney will be able to do on the person's behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;
- d) knows that the attorney must account for his or her dealings with the person's property;
- e) knows that he or she may, if capable, revoke the continuing power of attorney;
- f) appreciates that unless the attorney manages the property prudently its value may decline; and
- g) appreciates the possibility that the attorney could misuse the authority given to him or her.<sup>167</sup>

The threshold for capacity to give a POA for personal care does not apply to RDSP decision-making. However, the threshold for capacity to give a POA for personal care is illustrative of the relative stringency of the threshold for property management. It only requires an adult,

- a) has the ability to understand whether the proposed attorney has a genuine concern for the person's welfare; and
- b) appreciates that the person may need to have the proposed attorney make decisions for the person.<sup>168</sup>

An adult can appoint one or more persons as attorneys. If more than one person is appointed, the attorneys must make decisions jointly unless the POA says that their responsibilities should be separated. Giving attorneys the opportunity to make decisions separately guards against interruptions in representation that can be expected from temporary absences, such as sickness or vacations, or for unexpected reasons.<sup>169</sup> A substitute attorney can also be named to avoid an adult being "left with no one to manage [his or her] financial affairs"<sup>170</sup> if the primary attorneys are unavailable. Having multiple attorneys, or a substitute, can also safeguard against the POA being automatically terminated where an attorney dies, becomes incapable of managing property or resigns.<sup>171</sup> Moreover, adults can execute multiple POAs to cover different areas of decision-making or to come into effect upon the termination of another POA.<sup>172</sup>

If a POA is not a continuing POA, it is terminated when the adult becomes incapable. A continuing POA is terminated in various situations, as where there are no longer attorneys under the POA who are available and willing to act, a capable adult revokes the POA or the court appoints a guardian of property through the avenues described below.<sup>173</sup>

## **2. Court Ordered Guardianship**

Guardianship is an avenue of last resort that is generally reserved for circumstances where adults' informal supports cannot meet their needs for assistance and they do not have, or are not capable of granting, a POA. Any person can apply to the Superior Court of Justice to appoint one or more guardians for an adult who a judge finds incapable of managing property. The judge can dispose of the application with a hearing or through summary disposition. An application for summary disposition must be accompanied by documents including an assessment that the adult is incapable of property management.<sup>174</sup> The summary disposition of guardianship applications is considered more comprehensively in Chapter V.B.3 of this discussion paper.

An adult is incapable if she or he is "not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision".<sup>175</sup> The test for incapacity, thus, adopts a cognitive approach that includes "factually grasp[ing] and retaining information", realistically appraising outcomes, and justifying and communicating choices.<sup>176</sup>

Ontario has limited guardianship to a measure of last resort that can be ordered for an adult only where “it is *necessary* for decisions to be made on his or her behalf...”<sup>177</sup> One purpose of guardianship is to protect adults who “are unable to look after their own welfare by attending to the basic financial transactions that adults normally carry out for themselves”.<sup>178</sup> Should an “alternative course of action” meet an adult’s decision-making needs in a manner that does not require a finding of incapacity and “is less restrictive of the person’s decision-making rights”, the court is prohibited from appointing a guardian.<sup>179</sup>

Although the term “alternative course of action” is not defined in the legislation, a review of the case law has shown it to include formal alternatives to guardianship, such as POAs, as well as informal supports, such as care facility services.<sup>180</sup> Courts have found that “mental capacity *exists* if the [person] is able to carry out her decisions with the help of others”<sup>181</sup> and that,

[The SDA] contemplates that where alternatives to the appointment of a guardian will allow for decisions to be made concerning an individual’s personal care, this is to be preferred to a guardianship order, which requires a finding that the person is incapable of personal care...[A] process short of full or partial guardianship is preferable in many cases, as it best recognizes the autonomy and dignity of the individual and the inclusiveness of the decision-making process.<sup>182</sup>

This has led some to remark that the SDA “does provide for the consideration of the role of supports” with these specific provisions having been “designed to promote autonomy”.<sup>183</sup>

The statutory language referring to the “need” for a guardian is likewise undefined in the legislation and is anomalous to the court appointment process. Nevertheless, a capacity assessor may provide a judge with what is commonly called a “needs statement” to inform his or her deliberations.<sup>184</sup> The *Guidelines for Conducting Capacity Assessments* (Guidelines) describe what should be taken into account in developing a needs statement, including the “the person’s risk exposure; the likelihood and severity of actual and imminent harm; and the scope of the impact for the person, with and without a guardian”.<sup>185</sup> The Guidelines suggest that the analysis should incorporate recommendations as to how an adult’s supports could be adapted to meet his or her needs, and how the court might ensure those recommendations are implemented before deciding upon guardianship.<sup>186</sup>

Little is known about what alternative courses of action are acceptable under the SDA and what the court’s authority is to facilitate them. The LCO has commissioned a forthcoming research paper for the *Legal Capacity, Decision-Making and Guardianship* project that will shed light on what alternative arrangements could fit within the existing legislative framework.<sup>187</sup> Should the

Ontario government create a process to establish a legal representative for the RDSP that falls short of guardianship, it would be an alternative course of action that could, presumably, be recognized as such under the SDA.

For the purposes of this project, however, it is important to note that the procedure that engages the court's jurisdiction to consider alternative courses of action is an application for *guardianship* and not for alternative relief.<sup>188</sup> As a result, if a process to establish a legal representative for RDSP beneficiaries were to proceed through the courts as an alternative course of action, clear direction through an amendment to the SDA or a standalone statute could likely be required.

The SDA guarantees measures of due process, such as notice of an application for guardianship to the adult, his or her attorney, the Office of the Public Guardian and Trustee (OPGT), and the adult's family.<sup>189</sup> The OPGT may be appointed as a litigation guardian to make decisions on behalf of an adult who lacks capacity to instruct a lawyer or decide significant issues in a lawsuit. The OPGT may also locate a lawyer to act for people who are subject to a proceeding under the SDA.<sup>190</sup> A right to appeal the judge's finding lies with the Court of Appeal for Ontario or an application can be brought at a later date to the Superior Court of Justice to terminate or vary the guardianship order.<sup>191</sup>

### **3. Statutory Guardianship Appointments**

Ontario's statutory guardianship appointment process is a novel decision-making arrangement. According to the *Report of the Advisory Committee on Substitute Decision-making for Mentally Incapable Persons* (commonly referred to as the "Fram Report"), which recommended it, statutory appointments were intended to "allow families to avoid unnecessary applications to court in situations where there is no doubt about an individual's incapacity, and the person does not object to having a [guardian]".<sup>192</sup> A statutory guardian for property is appointed following an assessment of an adult's capacity. Capacity assessments are voluntary, take place in the community and tend to be less expensive than the court appointment process.

Any person may request that a capacity assessor perform an assessment if he or she has reason to believe that an adult is incapable of property management. Similar to the court appointment process, a capacity assessment can be requested to determine whether the adult should have a *guardian*. As a result, no assessment can be performed unless the person requesting it states that he or she has made reasonable inquiries and has no knowledge of a valid attorney or a court application.<sup>193</sup> Following a finding of incapacity, the capacity assessor must advise the OPGT, who automatically becomes the adult's guardian. Certain individuals can then apply to

the OPGT to become the adult's guardian, including a spouse or partner, family member, attorney with limited powers and trust company that has a spouse or partner's consent. In appointing its replacement, the OPGT must be "satisfied that the applicant is suitable" and that there is a management plan that is "appropriate".<sup>194</sup>

Unlike others who may have jurisdiction to determine an adult's capacity, such as a judge, capacity assessors for statutory guardianship are certified professionals who must adhere to the *Guidelines*. They must also undergo periodic training and use prescribed forms.<sup>195</sup> The *Guidelines* recognize that capacity is contextual and that relational decision-making, including services and supports, should be taken into account by capacity assessors in weighing the risks arising from an adult's decision-making. They state,

Ideally, vulnerable individuals will have access to a multiplicity of services and social supports, which optimize functioning and assist with decision-making. Guardianship, as a legal option, should only be used as a last resort when existing supports become inadequate or a legally authorized intervention would bring substantial benefits to the incapable person.<sup>196</sup>

The *Guidelines* accentuate that "[t]he goal of a well-crafted capacity assessment is to elucidate the degree of 'person-environment fit'", which includes whether a person's decision-making capacity "matches the demands of the specific situation with which they are faced" giving full consideration to "whether the person...has considered the merits of obtaining appropriate assistance to meet his or her decision-making needs".<sup>197</sup>

Capacity assessments can be "an intrusive and demeaning process".<sup>198</sup> Ontario guarantees certain measures of due process to guard an adult's rights against this intrusion into their privacy. A capacity assessor must provide basic information to the adult about the purpose and effect of the assessment and the adult is entitled to refuse the assessment.<sup>199</sup> An appeal of a finding of incapacity can be brought to a specialized independent tribunal called the Consent and Capacity Board (CCB) or the finding can be reversed upon a reassessment that the adult can request.<sup>200</sup> Statutory guardianship can also be terminated upon proof that the adult gave a continuing POA for all property matters before the certificate of incapacity was issued and the attorney is willing to act, or the court appoints a guardian.<sup>201</sup>

## **C. Challenges Posed by Ontario's Current Framework**

### ***1. Challenges for Beneficiaries and their Families***

When the federal government asked the public for feedback during its review of the RDSP, it received hundreds of submissions, which have provided an information base for the LCO's project.<sup>202</sup> Many identified common challenges for beneficiaries and their families in accessing the RDSP through existing provincial and territorial frameworks across Canada. The LCO heard from advocacy organizations, families, financial institutions and government representatives who confirmed these and other challenges in the context of Ontario's decision-making laws. The challenges posed by Ontario's current framework are discussed in turn below, including,

- level of capacity required to execute a POA
- potential impacts of substitute decision-making on an adult's well-being
- complexity and costs of statutory and court appointment processes, and
- lack of available substitute decision-makers

As a private, expedient and self-determined process, executing a POA would be the first avenue of recourse for potential RDSP beneficiaries wishing to establish a legal representative. However, the intended consumers of the RDSP include adults whose mental disabilities may affect their capacity to execute a POA. The threshold for capacity in Ontario is highly detailed and stringent. Regardless of Ontario's standards, however, the capacity to execute a POA for financial management ordinarily requires the grantor has the ability to understand and appreciate basic information about the purpose of attorney's powers. Stakeholders reported that this threshold could be unattainable for the adults most directly affected by the LCO's project because it is acknowledged that they experience difficulties in navigating the complex rules surrounding the RDSP. As a consequence, they may be unable to personally designate another to act on their behalf. Stakeholders proposed that some adults could be capable of a personal appointment, if Ontario were to adopt a more lenient standard such as that for personal care under the SDA or one that relies on non-cognitive criteria, such as the expression of will and preference or the existence of trusting relationship.<sup>203</sup>

Participants in the LCO's consultations also vigorously stressed the need to reduce the negative impacts of substitute decision-making on an adult's well-being. The target users of any options for reform are adults who do not have a substitute decision-maker. Advocacy organizations reported that many of these adults never have had a need for such a formal arrangement before attempting to access the RDSP. Some adults manage their finances with a degree of self-sufficiency, such as everyday banking, while others benefit more from supports at home or in networks of community service providers. For these adults, the *plenary* deprivation of authority

that tends to follow a guardianship appointment is stigmatizing and disproportionate to the need for assistance.<sup>204</sup> They say that an alternative process should be framed carefully so as not to spill over into other areas of decision-making; it should be specific to the RDSP.<sup>205</sup>

However, RDSP funds are an asset, like any other asset. The LCO heard that where an adult faces challenges not only in opening an RDSP and deciding plan terms but also managing funds that have been paid out of the RDSP, it could indicate a need for assistance with *general* financial management.<sup>206</sup> One key issue in the LCO's project is to consider whether a legal representative's scope of authority should extend beyond that of a plan holder to also include managing payments made out of the RDSP. Although the federal RDSP Review focused on opening RDSPs, ESDC reports that payments have already been made, totaling approximately \$6.5 million across Canada.<sup>207</sup> As beneficiaries age to become recipients of LDAPs, managing funds that have been paid out of the RDSP will become increasingly important.

Many stakeholders asserted that a future process should be comprehensive. If an RDSP is opened by a legal representative who cannot assist with managing funds that have been paid out of the RDSP, beneficiaries with impaired capacity may be required to receive additional representation from a guardian through the very same process that they have declined to follow to date. This could result in a piecemeal solution that does not meet the adult's needs and increased vulnerability to financial abuse, should a guardian not be appointed. Joanne Taylor, Executive Director of Nidus Personal Planning Resource Centre and Registry comments,

I do not think it would be 'safe' to only provide a mechanism for authority to act as a plan holder of an RDSP. Building up funds in an RDSP could in fact increase an adult's vulnerability unless there is a mechanism to ensure support for all life areas (health care, personal care, financial, legal) as these areas overlap and intertwine in real life. Compartmentalizing one aspect of financial benefit doesn't address the needs of a whole person.<sup>208</sup>

Be that as it may, extending the reach of a legal representative's authority beyond that of a plan holder could have other repercussions. It could lead to fragmentation across sectors, depending on a beneficiary's assets. For instance, an older adult could require assistance for OAS payments in addition to the RDSP. More importantly, it would intrude upon an adult's self-determination in choosing how to spend RDSP funds contrary to the policy objectives underlying the RDSP.<sup>209</sup> Furthermore, stakeholders acknowledged that it would necessitate additional safeguards to protect against the potential misuse of a legal representative's powers. Incidents of abuse and other forms of financial mismanagement by attorneys and guardians of persons with diminished capacity were confirmed during the LCO's consultation process. The Advocacy Centre for the Elderly (ACE), OPGT and Ombudsman for Banking Services and Investments (OBSI) regularly receive complaints about guardians and attorneys misusing an

adult's funds to detrimental effect or disputing expenditures. In the case of the RDSP, the province is interested in a simplified procedure; however, it is also concerned about the potential for financial abuse under such a scheme. The LCO heard that safeguards should address both intentional abuse and the resolution of differences in opinion about expenditures.<sup>210</sup> Interviewees also noted that while safeguards are important, they should not outweigh a beneficiary's need for assistance or undermine procedural accessibility.<sup>211</sup>

Still on the question of an adult's well-being, advocacy organizations expressed dissatisfaction with existing requirements to engage adults in the activity of decision-making. Ontario has recognized that capacity is specific to decisions as they are made and they say that any options for reform must respond to the lived-experience of beneficiaries whose abilities vary by issue area and fluctuate over time. Participants in the LCO's consultations emphasized that this is particularly important for beneficiaries as they become recipients of LDAPS at age 60, and for those with degenerative conditions and psychosocial disabilities.<sup>212</sup> Although the SDA requires that a guardian encourage an adult's participation, a finding of incapacity does not formally accommodate changes in his or her abilities because the seat of legal authority rests with a guardian, who is not bound to follow instructions, however reasonable. Associations for Community Living claim that shifting the law's focus from incapacity to need and supports better reflects how decision-making takes place – as a personal, social and dynamic activity – and it would maximize capacity, promote full citizenship, participation and inclusion for persons with mental disabilities.<sup>213</sup> They suggested the LCO look for guidance in this respect to the CRPD, which is reviewed in Chapter IV below.

The results of a community consultation held by the Peterborough Poverty Reduction Network Income Security Working Group (Ontario) illustrate some of the above challenges:

Participants thought that requiring a person who cannot enter into a contract to be declared legally incompetent so that a legal guardian can open an RDSP for them strips people of dignity and autonomy. Some people haven't opened an RDSP because they do not want to be declared legally incompetent or their families do not want to do this to their loved one. Several participants recommended using a power of attorney to cover situations where a beneficiary's disabilities prevent them from entering into a contract. Others found the power of attorney process bizarre or were concerned that it could be abused.

...

The first fundamental principle of any solution for legal representation is that people with disabilities should have the right to make decisions about the RDSP to the extent that they are able. Peoples' abilities need to be recognized and facilitated in any solution. The second principle identified by participants is a solution that offers flexibility because every family is different, and every situation and disability is unique.<sup>214</sup>

There are other very practical challenges for beneficiaries and their families. The review of Ontario's current framework in the preceding section reveals how complex it can be to establish a substitute decision-maker. The statutory appointment process was intended to be more affordable and accessible than the courts. Capacity assessors charge hourly rates for their services. These generally range between \$70 and \$160 per hour; however, some assessors charge higher rates and the total fees "may range anywhere from \$300 to fairly substantial sums...."<sup>215</sup> The requesting person is responsible for paying these fees, but where a guardian is appointed for the adult, payment can be drawn from the adult's estate. There is also a Financial Assistance Program that will cover these costs based on financial and other criteria.<sup>216</sup> Fees to replace the OPGT as the statutory guardian for property are set at \$382 plus HST in the amount of \$49.66. Typically this is payable by the adult; however, financial hardship may result in a waiver of these fees in individual cases. Many statutory appointments can be straightforward. However, where there are complicating factors, such as family disputes or difficulties preparing an application to replace the OPGT, statutory appointments have the potential to become lengthy or, ultimately, finish before a judge.<sup>217</sup>

Court proceedings in the Superior Court of Justice can be a complex process for unrepresented litigants and are expensive for those with a lawyer. The LCO heard that lawyers' fees in guardianship applications can range from \$9,000 to \$10,000 for uncontested appointments, \$12,000 to \$20,000 for uncontested appointments with complicating factors (such as language barriers), and \$20,000 and up for contested appointments, in urban centres, such as Toronto.<sup>218</sup> These costs could be prohibitive for adults and their families, who may be seeking an RDSP because they have diminished financial resources. Moreover, the many incremental stages involved in establishing a guardian in Ontario inside or outside of the courts could contribute to a sense of initiative fatigue, since the application process for the RDSP is itself labour intensive.

The final challenge for RDSP beneficiaries that was identified was the lack of eligible persons who could act as legal representatives. Ontario's statutory guardianship process strictly limits the persons who can replace the OPGT to family members, attorneys, spouses and trust companies with a spouse's consent. A judge has authority to appoint a guardian from beyond these classes but common to both processes is the requirement that a substitute be a natural person, except where it is the OPGT or a trust company.<sup>219</sup> However, the RDSP is available to a range of persons with mental disabilities, some of whom may be socially isolated and rely on a network of service providers for supports. Participants in the LCO's consultations identified older adults, immigrants and persons with psychosocial disabilities as individuals with disproportionately low access to close family and friends, who may be in need of a wider range of legal representatives.<sup>220</sup> Interviewees expressed that persons who experience social isolation should not be further marginalized by the unavailability of legal representatives. Some urged

the LCO to consider whether eligibility could be extended to involve institutions, such as advocacy or community organizations, where an adult does not wish to rely on the OPGT but does not have contact with a trusted person.<sup>221</sup> Appropriate protection from liability based on a standard of care would be an important prerequisite for all legal representatives.

## ***2. Challenges for Other Interested Parties***

The federal RDSP Review consultation paper recommended that provincial and territorial proposals for an alternative process to appoint a legal representative “would require careful consideration of costs, administrative feasibility, liability issues, oversight, and accountability”.<sup>222</sup> The challenges that the LCO learned about in its own consultations substantiate that these are important issues in Ontario for third parties who facilitate participation in the RDSP, including financial institutions and the Ontario government.

As noted previously, financial institutions offer the RDSP voluntarily, even though it is a complex product.<sup>223</sup> Financial institutions offer the RDSP because it improves their brand reputation but also because non-eligible clients as well as their own employees are the families and friends of persons with disabilities.<sup>224</sup> The time and efforts that financial institutions contribute to delivering the RDSP should be met with solutions to address the challenges that they face. In terms of the LCO’s project, this means that financial institutions must feel secure with an alternative process to establish a legal representative.<sup>225</sup>

Feeling secure for financial institutions includes the certainty that they can rely on a new process as one that is valid under the law, that a legal representative is authorized to act with respect to the RDSP (as a specific area of financial management), and that they will not be held liable for the legal representative’s decisions in the event of loss or dispute.<sup>226</sup> The LCO heard that this might be achieved, in part, by designating the legal representative as the focal point with clear authority to enter into transactions with third parties.<sup>227</sup> This could reassure financial institutions that they could rely on a decision as long as it is communicated by the legal representative. It could also shield them from liability in disagreements between the legal representative and RDSP beneficiary, for instance about the amount of a withdrawal.

Because financial institutions do not have the means to trace how funds are used once they are paid out of the RDSP – and do not feel that they have an obligation to do so – they would also hope to see the scope of a legal representative’s powers include acknowledging that funds have been received by the beneficiary. This would allow them to ensure compliance with the plan conditions, for which they are responsible under the ITA.<sup>228</sup> In the event that they become aware of or suspect abuse, financial institutions have an interest in knowing their rights and

responsibilities to disclose confidential information about the beneficiary's RDSP under provincial rules and federal privacy legislation.

Financial institutions also share the interest of the Ontario government in creating a process that respects operational and resource constraints. Participants in the LCO's consultations highlighted that the subject matter of this project concerns the creation of a practical mechanism that can be used on the ground in transactions between adults with mental disabilities and their families and friends, financial institutions, the government and community organizations, among others. This means that any law reform measures must be easy for consumers to understand and use, cost-effective and administratively feasible.<sup>229</sup> In particular, resource constraints significantly affect the implementation of existing legislation and will continue to affect the system under any law reform. It is unlikely, in the current economic climate, that the Ontario government will have significant resources available to add to the system. It is, therefore, important that this project adopt a "best value" approach.

Stakeholders with a history of participation in law reform efforts in this area also emphasized that the LCO should adopt a "post-creation" approach that builds on what has already been done over the years.<sup>230</sup> As noted previously, the SDA was developed through a robust law reform process involving commissioned reports and extensive consultations. Issues of capacity, guardianship and decision-making have also received increasing attention in recent years. Moreover, debates specifically concerning the subject matter of the LCO's project have been ongoing since the RDSP became available. Stakeholders proposed that in developing creative solutions the LCO could incorporate, and where possible, synthesize insights that were achieved in these initiatives as a foundation for this project.

#### **D. Goals for Reform Identified by Stakeholders**

The goals for reform identified by stakeholders respond to the challenges discussed above. The results of the LCO's preliminary consultations indicate that many stakeholders' core interests, while different, are not necessarily incompatible. There was a history of cooperation during the federal government RDSP Review and their diverse goals for reform are thought-out and intellectually coherent. The goals for reform identified by stakeholders in our preliminary consultations can be summarized as follows:

- A lowered threshold for capacity that is suited to adults with mental disabilities wishing to appoint a legal representative for the RDSP
- A streamlined, external process to appoint a legal representative on an adult's behalf

- Limitation of legal representation to RDSP decision-making
- An implementable framework, whatever it may be, that is easy to understand and use, cost-effective and administratively feasible
- Delineation of a legal representative's scope of authority to match an adult's need for assistance
- Certainty regarding who is entitled to assist the beneficiary with respect to funds paid out of the RDSP
- Effective safeguards against financial abuse
- Reduction of the negative impacts of legal representation on an adult's well-being
- Increased eligibility categories for legal representatives
- Designation of a clear focal point with legal decision-making authority to enter into transactions with third parties
- Appropriate protection from liability for legal representatives and financial institutions

### QUESTIONS FOR DISCUSSION

2. *Have you experienced challenges in establishing a legal representative for the RDSP? If so, what were those challenges?*
3. *Do adults, families and other interested parties face challenges with respect to establishing a legal representative for RDSP beneficiaries in Ontario that have not been identified in this discussion paper?*
4. *What do you believe the goals for reform in this project should be?*

## **IV. ONTARIO'S COMMITMENTS TO PERSONS WITH MENTAL DISABILITIES**

### **A. Introduction**

This Chapter reviews Ontario's commitments to persons with mental disabilities beyond the statutory provisions of the SDA. Ontario's commitments are rooted in foundational human rights documents that are important to formulating options for reform because they shape and constrain Ontario's laws and policies. The most important of the domestic laws are the *Canadian Charter of Rights and Freedoms*, the *Ontario Human Rights Code* (Code), and the *Accessibility for Ontarians with Disabilities Act, 2005* (AODA). The most significant international document is the *Convention on the Rights of Persons with Disabilities* (CRPD). They are very briefly described below.

Also described below are service providers that the Government of Ontario has mandated to administer supports to persons with mental disabilities. There are many types of government assistance. This Chapter focuses on select service providers who assist adults with diminished capacity for financial management, either as a necessary consequence of supports, such as ODSP payments, or as their core business. The service providers reviewed here are the OPGT, Consent and Capacity Board, Ontario Disability Support Program and the Community and Developmental Services Branch of the Ministry of Community and Social Services (MCSS). Throughout the discussion paper, the LCO considers the potential roles that existing service providers could play as a cost-effective means to build on what has been done.

### **B. Foundational Human Rights Documents**

#### **1. *Canadian Charter of Rights and Freedoms***

Ontario's laws affecting adults with mental disabilities are subject to the *Charter*, which guarantees rights and fundamental freedoms under the *Constitution Act, 1867*. Section 15 of the *Charter* guarantees the right to equality before and under the law, and to equal protection and benefit of the law, without discrimination based on, among other grounds, age and mental disability. Section 15(2) protects laws, programs or activities that have as their object the improvement of conditions for individuals or groups that have experienced disadvantage on the same grounds. The *Charter's* equality rights provisions have been very important in advancing the rights of persons with disabilities, articulating the right to inclusion and participation, and advancing the principle of accommodation.

The *Charter* applies to government activity, including legislation and policies, and requires Ontario to provide reasonable accommodations to address inequality for persons with mental disabilities up to the point of undue hardship. The provision of these reasonable accommodations must be individualized and tailored to a person's special needs. The Supreme Court of Canada has recognized that the duty to accommodate can include positive measures to overcome barriers to the equal access to benefits. However, the government's obligation may not always include the creation of new benefits, which is different from ensuring that benefits that have already been awarded are accessed in a non-discriminatory manner.<sup>231</sup> Lana Kerzner has argued that the *Charter* could be interpreted as guaranteeing rights to accommodations and supports for adults who have diminished capacity to make decisions. However, issues of capacity have not yet been considered in the *Charter* jurisprudence.<sup>232</sup>

## **2. Ontario Human Rights Code**

The Ontario *Human Rights Code* protects persons from discrimination in the public and private sectors. The Ontario Human Rights Commission's (OHRC) *Policy and Guidelines on Disability and the Duty to Accommodate* sets standards for how the *Code* should be interpreted for persons with disabilities.<sup>233</sup> It provides guidance on the duty to accommodate to individuals, employers, service providers and policy-makers based on principles of dignity, individualized accommodation, and integration and full participation.<sup>234</sup> The duty to accommodate under the *Code* only applies to the point of undue hardship. It clearly includes "positive steps needed to ensure equal participation for those who have experienced historical disadvantage and exclusion from society's benefits".<sup>235</sup> How the *Code* impacts issues of capacity and legal representation is, however, unclear.

The OHRC is developing a policy on human rights, mental health and addictions, and has released a report of findings on its initial province-wide consultations, *Minds that Matter: Report on the Consultation on Human Rights, Mental Health and Addictions*.<sup>236</sup> Among other topics, the report addresses how income supports, such as ODSP, can create barriers for persons with psychiatric disabilities as a result of their design, policies, procedures, and decision-making processes. The types of accommodations that the OHRC suggests might be required to respond to these barriers include "facilitating or providing support for decision-making".<sup>237</sup> No further direction is provided as to how this might be achieved.

The Human Rights Tribunal of Ontario has dealt with issues of capacity and representation in the context of its proceedings. The decision in *Kacan v. Ontario Public Service Employees Union*,<sup>238</sup> affirms that a claimant may personally appoint an "applicant" to act on his or her

behalf as a less intrusive alternative to a litigation guardian. The HRTO noted that the purpose of these appointments is to “promote accessibility”, and made reference to principles of self-determination, minimal interference, autonomy and dignity in discussing concepts of capacity.<sup>239</sup> The HRTO also made important findings about the roles and responsibilities of representatives and safeguards against abuse. With respect to safeguards, the HRTO stated that the existence of a relationship of “power-dependency” places a fiduciary duty on the representative, and that the HRTO can exercise its powers to remove him or her where there is a conflict of interest or to ensure competent representation.<sup>240</sup> In terms of the roles and responsibilities of a representative, it held,

Where appropriate, decisions should be made by the applicant *together* with the claimant and with respect for his or her wishes...However, the section provides for a general delegation of the power to conduct the application, and the person bringing the application on the claimant’s behalf *takes on the obligations* of the applicant under the Tribunal’s process.<sup>241</sup>

### **3. Accessibility for Ontarians with Disabilities Act**

The purpose of the AODA is to direct the development, implementation and enforcement of accessibility standards in order to achieve accessibility for Ontarians with disabilities.<sup>242</sup> The AODA aims to systematically remove barriers for persons with disabilities with respect to goods, services, facilities, accommodations, employment, buildings, structures and premises by 2025. The AODA does not apply to federally regulated organizations, such as banks. However, it does apply to provincially regulated financial institutions.<sup>243</sup> The AODA applies to the Government of Ontario.

The relationship of the AODA to issues of capacity and legal representation is not yet known. However, financial literacy supports could be important to adults with diminished capacity seeking to access the RDSP, and the *Information and Communication Standards* require that, upon request, organizations arrange for the provision of information in accessible formats and communication supports for persons with disabilities.<sup>244</sup> The *Accessibility Standards for Customer Service* also require service providers to use reasonable efforts to ensure that policies, practices and procedures are consistent with core principles of dignity, independence, integration and equal opportunity.<sup>245</sup>

#### **4. *Convention on the Rights of Persons with Disabilities***

The CRPD came into force in 2008 as the first international human rights treaty to comprehensively address the rights of persons with disabilities.<sup>246</sup> The purpose of the CRPD is “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity”.<sup>247</sup> This purpose guides the remainder of the CRPD, which takes a distinct approach to eliminating discrimination according to the social model of disability and human rights duty to accommodate.<sup>248</sup>

Canada has ratified the CRPD and, subject to the Declaration and Reservation it has submitted, Canada is bound to “undertake...to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the [CRPD]”.<sup>249</sup> There was extensive collaboration between Canada’s federal, and provincial and territorial jurisdictions during the CRPD negotiations and the Declaration and Reservation may clarify how the treaty could be implemented in Ontario. In Canada, the implementation of international treaties is complicated by the division of powers between the federal and provincial or territorial governments. Whereas the federal government negotiates international agreements on behalf of the country as a whole, the provinces and territories are often charged with the task of implementing them. As noted above, the issue of capacity traditionally falls within the jurisdiction of the provinces and territories.<sup>250</sup> Canada’s Declaration and Reservation states that it interprets the CRPD “as accommodating the situation of federal states where the implementation of the Convention will occur at more than one level of government and through a variety of mechanisms, including existing ones”.<sup>251</sup>

The General Principles of the CRPD recognize a nuanced consideration of social needs and values that respect “inherent dignity, individual autonomy, including the freedom to make one’s own choices, and independence of persons” as well as “participation and inclusion in society”, “human diversity”, and “accessibility” through the “elimination of obstacles and barriers”.<sup>252</sup> In implementing those principles, governments are required to use “universal design” as well as “meet the specific needs of a person with disabilities” and “ensure that reasonable accommodation is provided”.<sup>253</sup> The CRPD also includes positive rights to the enjoyment of liberty; “to live in the community, with equal choices to others”; and to develop “mental and physical abilities, to their fullest potential”.<sup>254</sup>

The term “legal capacity” is used explicitly in the CRPD. Article 12 guarantees persons with disabilities the enjoyment of “legal capacity on an equal basis with other in all aspects of life”.<sup>255</sup> However, legal capacity is not defined in the CRPD and the scope of its guarantee was

one of the more contentious issues that was negotiated. Member States were unable to reach agreement on what the term means,<sup>256</sup> and their Declarations and Reservations submitted since the treaty's adoption show that governments intend to implement Article 12 in different ways.

The debates surrounding Article 12 merit a full review that cannot be provided here. The main point of dissent concerns whether the CRPD recognizes an inalienable and non-derogable right for persons with disabilities to be considered legally capable at all times, or whether it protects them from discriminatory determinations of incapacity based on disability status. The consequences arising from these two interpretations would be quite different for the Ontario government. In the first instance, incapacity could not be used as a trigger to protect vulnerable persons from the risk of harm and substitute decision-making would be eliminated. A person would retain the ultimate legal authority to make decisions in all circumstances and the receipt of supports would be premised on consent.<sup>257</sup> In the second instance, governments would be required to design and apply capacity laws in a non-discriminatory manner.<sup>258</sup> It is unclear what this would entail. Interpreted in the context of the CRPD's other provisions, it could possibly include a duty to accommodate, supportive measures and addressing laws that have a disproportionate effect on persons with disabilities.

Canada's Declaration and Reservation on the CRPD states that "Canada recognizes that persons with disabilities are presumed to have legal capacity on an equal basis with others in all aspects of their lives".<sup>259</sup> It declares Canada's understanding that Article 12 permits substitute decision-making arrangements as well as those based on the provision of supports "in appropriate circumstances and in accordance with the law".<sup>260</sup> With respect to substitute decision-making arrangements, specifically, Canada has reserved the right "to continue their use in appropriate circumstances and subject to appropriate and effective safeguards".<sup>261</sup> The CRPD's General Principles and enumerated rights, mentioned above, give some indication of Canada's basic responsibilities in this regard. Additionally, Article 12 places an obligation on governments to ensure access to supports that persons "may require in exercising their legal capacity".<sup>262</sup> It lists specific equality rights that governments must ensure, including controlling financial affairs.<sup>263</sup> Article 12 of the CRPD also requires governments to ensure the "measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review...."<sup>264</sup>

## **C. Substitute Decision-Making Supports**

### ***1. The Office of the Public Guardian and Trustee***

The OPGT delivers a range of services that are essential to educate members of the public about decision-making laws and procedures, support the smooth administration of substitute decision-making arrangements, and protect the interests of persons with diminished capacity from neglect and abuse. The OPGT is a “public safety net”<sup>265</sup> that “manages the financial affairs of incapable people who have no one else who is authorized to do so”.<sup>266</sup> It serves as a guardian of property exclusively for adults who are determined to be incapable under the SDA. The OPGT also has a mandate to safeguard adults who may be incapable of protecting themselves against harm through a number of avenues, including screening applications to replace the OPGT, conducting investigations and reviewing private guardians’ and attorneys’ accounts.<sup>267</sup>

One of the services that the OPGT has delivered as a guardian of property has been to apply for the RDSP on behalf of its clients. The OPGT has also played an important role in RDSP policy development by working “with staff in the Federal and Provincial Governments as well as major financial institutions to create an efficient process to open and contribute to RDSPs for [its] eligible clients”.<sup>268</sup>

### ***2. Consent and Capacity Board***

The CCB is an independent tribunal with a mandate to hear and decide matters related to capacity and substitute decision-making, among other issues. The CCB reviews findings of incapacity in various areas of decision-making, including property management. It considers the appointment, amendment and termination of representatives to make decisions for incapable persons in the area of health care. It also gives directions on disputed decisions and reviews “a substitute decision-maker’s compliance with the rules for substitute decision-making”.<sup>269</sup> Consequently, the CCB has specialized expertise with respect to applying a tribunal process to the appointment of a substitute decision-maker as well as the termination or amendment of the appointment.

In 2011, the CCB had 129 members consisting of lawyers, psychiatrists and public members, as well as a staff complement of 12 persons who assist CCB members.<sup>270</sup> The CCB’s authority to hold hearings arises under several statutes, including the SDA, and is based on its broad jurisdiction to decide matters where the safety of the individual, interests of the community, and dignity and autonomy of the individual are at stake.<sup>271</sup> The CCB also functions under a Memorandum of Understanding with the Minister and Deputy Minister of Health and Long-

Term Care, and it develops its own Rules of Practice. Legislated performance measures ensure that hearings operate expediently across the province. The CCB currently faces serious resource constraints. According to the Board's annual reports the CCB is running a deficit of approximately \$1 million per year.<sup>272</sup>

The CCB's jurisdiction as an administrative tribunal with expertise relevant to this project is considered in Chapter VI, Options for Reform.

## **D. Income Support and Social Benefits**

### ***1. Ontario Disability Support Program and Ontario Works***

Chapter II.A reviewed the Ontario Disability Support Program in part. ODSP provides income support and employment support to enable persons with disabilities and their families to live as independently as possible in their communities. ODSP provides a basic needs amount to help with the cost of food, clothing and other necessary personal items. The amount provided is based on family size and composition. ODSP also provides an amount for shelter based on actual costs up to a maximum set according to family size. Health and non-health related benefits may be provided. Ontario Works (OW) provides financial and employment assistance to help people move towards paid employment and independence. Ontario Works also provides health and non-health related benefits to recipients. ODSP is delivered provincially, while Ontario Works is delivered by the municipalities and by First Nations.<sup>273</sup>

ODSP and OW each have a statutory framework for the appointment of a representative to receive and manage payments on behalf of recipients who are using or are likely to use their income support or financial assistance in a way that is not for the benefit of a member of the benefit unit. This so-called "trusteeship" process is reviewed in Chapter V.B as one example of an alternative to guardianship under the SDA that is limited to decision-making for ODSP or OW payments.

### ***2. Community and Developmental Services***

The Ministry of Community and Social Services funds services and supports for adults with a developmental disability and their families. The *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008* (SIPDDA) was enacted in 2008 to create services and supports that address the unique needs of persons with developmental disabilities. SIPDDA is consistent with recent reforms, which have increasingly tended toward establishing delivery mechanisms that empower persons to choose the supports that they need

for themselves. It is intended to shift the sector away from institutionalized care and towards inclusion, and a “system of services and supports that will enable people with intellectual disabilities to exercise more independence, have greater decision-making power over their day-to-day lives, and ultimately live as full citizens in communities of their choosing”.<sup>274</sup> Services and supports that can be funded under SIPDDA include those that help with activities of daily living, community participation, residential services, caregiving respite and others.<sup>275</sup>

Apart from developmental services, MCSS is responsible for administering ODSP and funding certain programs for vulnerable adults, like persons living with a sensory disability, through the general funding authority for grants and agreements under the *Ministry of Community and Social Services Act*.<sup>276</sup> The Government of Ontario has indicated that MCSS and “other ministries will work with community partners to promote RDSPs and encourage ODSP recipients and other people with disabilities to establish RDSPs”.<sup>277</sup>

#### QUESTION FOR DISCUSSION

5. *How do Ontario’s commitments to adults with mental disabilities affect the need and options for reform in this project?*

## **V. DEVELOPING AN ALTERNATIVE PROCESS TO ESTABLISH A LEGAL REPRESENTATIVE FOR RDSP BENEFICIARIES**

### **A. Introduction**

This Chapter reviews and critically analyzes laws in Ontario and other jurisdictions that provide insights into the development of an alternative process to establish a legal representative for RDSP beneficiaries. The benchmarks for reform are used flexibly throughout the review and analysis (see Chapter I.C, Approaches to the Project Process). One step toward meeting the first of the benchmarks is to build on achievements that have already been made. With that in mind, this discussion paper focuses on key issues that were identified repeatedly in the LCO's research and preliminary consultations.

The first key issue, the Choice of Arrangements to Establish a Legal Representative for RDSP Beneficiaries, is the core issue for this project. It considers the general arrangement to designate a legal representative or to have one appointed. The other key issues consider aspects of any choice of arrangement that merit in-depth analysis. These are reviewed in discrete sections on the roles and responsibilities of stakeholders, the eligibility of legal representatives and safeguards against financial abuse.

Other issues were viewed as beyond the LCO's mandate, not integral to the objectives for reform or overly resource-intensive. They include questions concerning the intricate procedural requirements that normally accompany personal appointments to validate them in law, and issues surrounding redress through the criminal and civil justice systems. Some of these issues will be reviewed in the LCO's ongoing *Legal Capacity, Decision-Making and Guardianship* project.

### **B. Choice of Arrangements to Establish a Legal Representative for RDSP Beneficiaries**

#### **1. Introduction**

This section considers existing arrangements to establish a legal representative for financial management in Canada and abroad, beginning with two Canadian provinces that have created a process specific to the RDSP. It continues to review other arrangements in decision-making laws, the law of trusts and laws in the income support and social benefit sectors. It concludes with a summary of several broad options for reform.

Figure 2, Options for Reform in the Choice of Arrangements, which is located at pages 90 to 91, provides a visual aid for readers considering the options for reform relating to the key issue reviewed in this section. **The LCO invites you to access Figure 2 as a point of reference throughout the remainder of the discussion paper.** The options for reform are discussed again in Chapter VI, Options for Reform, in terms of their relative implications for implementation along with a summary of the other key issues for the project.

Each of the existing arrangements reviewed in this section begins with the common law or statutory presumption of capacity. The establishment of a legal representative may then be contingent on an adult executing a personal appointment, on a finding of incapacity or on the determination that an adult needs assistance. For instance, personal appointments, such as POAs and self-designated trusts, are private arrangements that use positive language to define the level of capacity an adult must have to appoint another person for assistance with decision-making. Personal appointments do not result in a finding that an adult is incapable; however, there may be procedures in place to ensure that an appointment is legally valid, such as the presence of a witness. External appointments, including court and administrative tribunal orders, are public processes that may be based on an assessment of incapacity. It is, however, also quite common for laws to create a means to establish a legal representative without consideration of an adult's capacity, for instance, where he or she has a confirmed need for assistance in managing daily expenses. These concepts and their potential implications for RDSP beneficiaries were discussed at length in Chapter II.B.3, What is Capacity? Foundational Concepts and Tensions.

There is a notable lack of empirical evidence on the practical implications and effectiveness of existing approaches. The LCO has commissioned a research paper in the *Legal Capacity, Decision-Making and Guardianship* project that will evaluate the implementation of some of these alternative arrangements.<sup>278</sup> We also hope to hear from the public in response to the issues raised here.

## **2. Canadian Provinces with a Process Specific to the RDSP**

### **a. Saskatchewan Special Limited Powers of Attorney**

The Saskatchewan Ministry of Justice and Attorney General has released an information booklet that recommends adults use a “special limited” POA to appoint an attorney for the RDSP.<sup>279</sup> The booklet was published prior to the federal RDSP Review and may not directly respond to the detailed challenges that stakeholders reported. Nevertheless, it deals with the overarching issue for this project inasmuch as it recognizes that “some persons with extreme

mental disabilities do not have the capacity to enter into a contract. In this case, the person requires a legal representative appointed to sign the contract to set up an RDSP”.<sup>280</sup> Saskatchewan’s approach is creative and does not require legislative amendment. However, it is based on that province’s POA legislation, which contains a lower threshold for capacity than exists in Ontario.

In Saskatchewan, the threshold for capacity to execute a POA reflects the simplicity of the common law.<sup>281</sup> The *Powers of Attorney Act* reads, “[a]ny adult who has the capacity to understand the nature and effect of an enduring power of attorney may grant an enduring power of attorney”.<sup>282</sup> The explanatory booklet on the RDSP interprets this as a “low threshold” that could be met sufficiently “if a person understands that he or she is signing a paper that appoints a parent as attorney to create a savings account”.<sup>283</sup> A special limited POA for the RDSP that follows the booklet’s recommendation would have a similarly low requirement.<sup>284</sup>

The Saskatchewan Ministry of Justice and Attorney General suggests that a special limited POA be RDSP-specific only, limiting the scope of an attorney’s powers to that of a restricted plan holder, who would not have authority to decide terms for the timing and amount of one-time DAP withdrawals or the management of funds that have been paid out of the RDSP. It suggests that those extended powers would require full property guardianship due to concerns about safeguards against abuse:

It is suggested that the special limited power of attorney would give a parent the power to set up an RDSP, contribute funds, consent to someone else’s contributing funds, or transfer the RDSP to another financial institution, but not the power to withdraw funds or close the RDSP. For someone to have the ability to withdraw funds, he or she would have to apply for full property guardianship. Full guardianship has the protection of annual accountings, bonds and the ability for removal.<sup>285</sup>

The LCO has learned that restricting a plan holder’s authority to request one-time DAP withdrawals, as suggested in the Saskatchewan approach, could conflict with some financial institutions’ operational constraints. Under the ITA, a plan holder does not have authority to manage funds that have been paid out of the RDSP. However, plan holders can request that one-time DAP withdrawals be made from an RDSP on the beneficiary’s behalf prior to, or during, the receipt of mandatory lifetime payments that begin at age 60 (for more information see Chapter II.B).<sup>286</sup> The ITA enables each financial institution to stipulate as a term of contract whether DAPs are permitted.<sup>287</sup> This is one of the areas of flexibility conferred on financial institutions to account for variations in their operational constraints. Most, if not all, financial institutions permit DAPs as a standard term of contract. As a result, if a legal representative were restricted from requesting DAPs, he or she might not be able to agree to the terms of

contract that are necessary to open an RDSP at many financial institutions. Adopting the Saskatchewan approach in Ontario could limit an RDSP beneficiary's choice of service provider. It also appears not to be commercially viable for financial institutions to offer two types of contracts for the RDSP.

An additional possible shortcoming of Saskatchewan's suggested approach is that it disentitles RDSP beneficiaries from making one-time withdrawals, unless they have the capacity to do so independently.<sup>288</sup> Therefore, it cannot serve those adults with diminished capacity who use the RDSP as a contingency plan throughout their lives, rather than for long-term savings. The LCO heard from one such person who regards the RDSP as a safety net in the event that his abilities, services or support networks change.<sup>289</sup>

Where an adult is unable to meet the capacity test for a special limited POA or needs a legal representative for withdrawals, the information booklet notes that Saskatchewan's *The Adult and Co-Decision-Making Act* allows a person to apply to the Court of Queen's Bench (the equivalent of Ontario's Superior Court of Justice) to have a property guardian or co-decision-maker appointed.<sup>290</sup> Appointments can be for specific purposes and "any application could be limited to appointment as a guardian for the purpose of opening and managing the RDSP only, and not all of the adult's property".<sup>291</sup> In Ontario, the SDA stipulates that the court can "impose such other conditions on the appointment as the court considers appropriate", which could also include the appointment of a guardian for RDSP decision-making.<sup>292</sup> However, RDSP beneficiaries and their families have experienced challenges with court-ordered guardianship, as discussed in Chapter III.C, Challenges Posed by Ontario's Current Framework. Saskatchewan's framework for co-decision making is reviewed as a less restrictive alternative to guardianship in Subsection 3(b), below.

Elements of the Saskatchewan special limited POA for the RDSP have been incorporated into Option 1 in Figure 2, Options for Reform in the Choice of Arrangements.

#### **b. Newfoundland and Labrador Designation Agreements**

Shortly after the federal government introduced measures in the Economic Action Plan 2012 to respond to feedback it received during the RDSP review, Newfoundland and Labrador passed a Bill to amend its *Enduring Powers of Attorney Act* to permit an adult to designate two authorized persons or the Public Trustee as his or her representative(s) for the RDSP under a "designation agreement".<sup>293</sup> These amendments are not yet in force. As a result, the effectiveness of Newfoundland and Labrador's response cannot be evaluated. The parameters of the legislation, and the parliamentary debates that led to its adoption, can be discussed in a general manner, as can related commentary from the legal community.

Designation agreements are intended to address the same challenges that RDSP beneficiaries and their families have faced in Ontario, including expense, complexity and the negative repercussions of substitute decision-making on an adult's well-being.<sup>294</sup> The threshold for capacity to execute a designation agreement is a standard that is less restrictive than Newfoundland and Labrador's requirements to execute a POA as well as those in Ontario with respect to property and personal care.<sup>295</sup> It has been described as "laudable in that it empowers persons with disabilities to appoint individuals they trust to administer their RDSPs without the expense and delay of applying to the court for a formal appointment of, in the Ontario context, a guardian of property".<sup>296</sup>

Designation agreements are partially modeled on the British Columbia *Representation Agreement Act*,<sup>297</sup> which adopts a novel functional approach that emphasizes the expression of desire and preferences, and the existence of a relationship of trust with a legal representative.<sup>298</sup> The British Columbia legislation has been in force since 2001. Because there is more evidence of its effectiveness than the new Newfoundland and Labrador legislation, this approach is reviewed below under Subsection 3(a).

If an adult is unable to meet the threshold for a personal appointment, a spouse, cohabiting partner or child who has reached the age of majority can initiate an external appointment of the Public Trustee through the Trial Division Court (equivalent to Ontario's Superior Court of Justice).<sup>299</sup>

In Newfoundland and Labrador, designates can be assigned powers beyond those of a plan holder to enable them to manage RDSP funds that have been paid out of the RDSP. Designates are bound to do so in accordance with set investments or expenses that a court has the power to order under the *Mentally Disabled Persons' Estates Act*.<sup>300</sup> They also have the same responsibilities and standard of care to protect the adult's best interests as an attorney.<sup>301</sup> These provisions circumscribe the designate's powers and guard against financial mismanagement. However, concerns have been expressed that the Newfoundland and Labrador legislation is not adequately explicit about the scope of authority to engage in transactions with third parties when managing funds paid out of the RDSP. Vincent De Angelis has commented that

[w]hile the Act limits the scope of authority of a designate in dealing with the RDSP funds, it leaves more questions than answers. For example, does the Act authorize the designate who receives funds from an RDSP to: open a bank account or to hold the investments in his or her name; to contract for goods and services; or to buy property on behalf of the incapable person? These concerns have been expressed by some of the financial institutions who will be left to interpret the scope of authority of the designate.<sup>302</sup>

Furthermore, the LCO has heard from stakeholders that the safeguards in the Newfoundland and Labrador legislation place a higher degree of responsibility on the Public Trustee than may be implementable in Ontario due to resource constraints. Designates who are plan holders are required to submit an annual statement of accounts and operations to the Public Trustee, the adult and the issuing financial institution. Those who are authorized to receive payments from an RDSP must also submit a report summarizing all payments and expenditures. The Public Trustee is enabled to monitor designates and must also maintain a registry of designation agreements.<sup>303</sup> These and other considerations regarding safeguards against abuse are discussed more comprehensively in Section E below.

Elements of the Newfoundland and Labrador personal and external appointment processes have been incorporated into Options 2 and 5 in Figure 2, Options for Reform in the Choice of Arrangements.

#### QUESTIONS FOR DISCUSSION

6. *Do you have experience with a special limited POA for the RDSP in Saskatchewan?*
7. *Are there lessons to be learned from provinces with a specific process to appoint a legal representative for RDSP beneficiaries?*

### **3. Decision-Making Laws: Alternatives to Ontario's Framework**

#### **a. Personal Appointments**

As noted previously, in recent years, alternative personal appointment processes have received increased attention with the adoption of the CRPD, and substantial law reform activity in Canada and abroad. A range of personal appointments that do not require a finding of incapacity have been accepted as less restrictive options to attorneys and guardians for property. They emphasize “the way in which most adults function in their everyday lives through *interdependent* decision-making which marshals available advice and support”.<sup>304</sup> Canada is internationally recognized as a leader in this regard and the discussion paper focuses on laws in a number of Canadian territories and provinces. Brief mention is also made of the Victorian Law Reform Commission’s (VLRC) endorsement of these arrangements.

### **Supported Decision-Making Arrangements**

The Yukon and Alberta permit adults to execute personal appointments in order to formalize the role of informal supports that adults with diminished capacity habitually access to assist them. These are called supported decision-making agreements or authorizations, respectively. In the Yukon, supported decision-making arrangements are available for personal care and financial matters. In Alberta, they are available for personal care but not financial affairs. The Yukon's *Decision Making, Support and Protection to Adults Act*<sup>305</sup> explains the purpose of supported decision-making agreements as

- (a) to enable trusted friends and relatives to help adults who do not need guardianship and are substantially able to manage their affairs but whose ability to make or communicate decisions with respect to some or all of those affairs is impaired; and
- (b) to give persons providing support to adults...legal status to be with the adult and participate in discussions with others when the adult is making decisions or attempting to obtain information.<sup>306</sup>

Government representatives in the Yukon and Alberta have indicated that the creation of these types of appointments was primarily a response to ideological concerns about definitions of capacity voiced in the disability community.<sup>307</sup> In Alberta, it also responded to a pragmatic need to formalize trusting relationships in the healthcare context in order to grant supporters access to confidential information.<sup>308</sup> Because agreements are not registered in either jurisdiction, their uptake is not known. The Office of the Public Guardian in Alberta has stated that they have been very popular.<sup>309</sup> In contrast, in the Yukon, it is believed that they have received limited use due, in part, to the lack of trusted or available supporters.<sup>310</sup>

It is important to note for the LCO's project, that the scope of a supporter's authority over financial decision-making is constrained. In both jurisdictions, a supporter is prohibited from making decisions on behalf of an adult, and a decision made or communicated with assistance is considered a decision of the adult.<sup>311</sup> An adult's decision-making capacity is explicitly preserved.<sup>312</sup> In Alberta, an adult must have capacity to make his or her own decisions before receiving assistance. The process is recommended only for "capable individuals who face complex decisions, people whose first language is not English and people with mild disabilities".<sup>313</sup> In the Yukon, "[t]hese agreements are for adults who can make their own decisions with some help".<sup>314</sup> In its 2012 final report on *Guardianship*, the VLRC recommended that supported decision-making arrangements could be used where a person does not "clearly lack capacity but...would benefit from support" or "may have questionable capacity to make certain decisions without support, but who would clearly be able to do so with the support of a trusted family member or friend".<sup>315</sup> Therefore, supported decision-making arrangements may

not be suitable for adults who would continue to experience challenges in making decisions about the RDSP, despite receiving assistance.

Concerns have been expressed that “confusion and uncertainty could arise if support arrangements were available to assist people when making financial decisions”.<sup>316</sup> For these reasons, Alberta’s framework applies uniquely to personal care and cannot be used for financial management. The Office of the Public Trustee for Alberta informed the LCO that supported decision-making arrangements could cause confusion because financial transactions necessitate a clear seat of legal authority and, under these arrangements, the person with ultimate authority remains the adult whose capacity is at issue.<sup>317</sup> In the Yukon, a supporter can help an adult make decisions relating to banking, monthly budgeting, dietary expenses and other financial matters. However, the LCO heard from the Yukon Seniors’ Services and Adult Protection Unit that supported decision-making agreements are not used frequently in the banking context.<sup>318</sup>

Supported decision-making arrangements have also been characterized as giving rise to increased opportunities for abuse, including coercion and undue influence.<sup>319</sup> One area of apprehension is that “people dealing with such orders will mistakenly attribute decisional powers and responsibilities to people appointed as supporters, meaning that they operate as de facto guardianship orders without some of the checks and balances of true guardianship”.<sup>320</sup> Less formal arrangements are also associated with “less accountability”<sup>321</sup> and “being more distant from the oversight or purview of public sector bodies and agencies”.<sup>322</sup>

Although the VLRC recommended that supported decision-making agreements be used for financial matters, its recommendations would explicitly prohibit a supporter from communicating decisions about significant financial transactions to third parties, such as banks, government agencies, utility and other service providers, as a safeguard against abuse. The VLRC suggested, “these decisions will need to be communicated by the person themselves or other arrangements will need to be considered to assist them if this is not possible, such as, for example, substitute decision making”.<sup>323</sup>

Supported decision-making arrangements are summarized below under Option 3 in Figure 2, Options for Reform in the Choice of Arrangements.

### **Representation Agreements**

Representation agreements (RAs) in the Yukon and British Columbia are another form of personal appointment but one that permits a “representative” to make legally enforceable decisions on an adult’s behalf with respect to the routine management of financial affairs. RAs

are often characterized in the literature as facilitating supported decision-making<sup>324</sup> or as a less restrictive alternative to POAs and guardianship.<sup>325</sup> As was discussed above, Newfoundland and Labrador partially modeled its designation agreements—its response to the subject matter of this project—on British Columbia’s *Representation Agreement Act*.<sup>326</sup> During the federal RDSP Review, individuals and organizations submitted to the federal government that the British Columbia framework operates well to establish a legal representative for the RDSP.<sup>327</sup> The LCO heard proposals to create a comparable regime in Ontario during our preliminary consultations. The *Representation Agreement Act* is considered here after a review of its counterpart in the Yukon.

RAs in the Yukon sit at a midpoint between supported decision-making agreements and POAs. RAs give a representative authority to make decisions over prescribed financial matters, including signing negotiable instruments, taking steps to obtain benefits, investing and withdrawing funds, receiving and depositing pension or other money, and purchasing goods and services for day-to-day living.<sup>328</sup> The Regulations to the *Adult Protection and Decision-Making Act* that prescribe such areas for financial management do not explicitly list the RDSP.<sup>329</sup>

With a small population of just over 35,000 people, the Yukon has had approximately 30 agreements in place.<sup>330</sup> They have been used to apply for and manage funds on behalf of adults with diminished capacity who were eligible for the Indian Residential School Settlement Agreement common experience payments (CEP).<sup>331</sup> In that context, they were intended as a protective measure for adults who could be vulnerable to financial abuse because their receipt of this funding would likely have been known to the community.<sup>332</sup> The example of the CEP raises concerns analogous to the RDSP, albeit the exigencies of applying for the CEP are not as complex as deciding RDSP terms.

The threshold for capacity to execute an RA in the Yukon is framed in the same manner as for supported decision-making agreements and POAs, requiring an adult understand the nature and effect of the agreement. Because RAs contemplate more complex transactions, the threshold is effectively higher than supported decision-making agreements. Depending on the powers that are awarded to the representative, it can be lower or potentially the same as for a POA. POAs are recognized more readily by banks and across jurisdictions. Therefore, where the purpose of an RA is the same as a POA, the Yukon Seniors’ Services and Adult Protection Unit promotes enduring POAs.<sup>333</sup>

Nonetheless, there are several distinctions between RAs and POAs. One major distinction is that RAs cannot grant plenary powers over financial management.<sup>334</sup> Additionally, RAs were

designed to increase accessibility in terms of costs and validation requirements. Unlike in Ontario, in the Yukon, an adult's lawyer must prepare a POA.<sup>335</sup> The costs of a lawyer's services can be prohibitive for some adults and RAs circumvent that requirement. However, because a lawyer's involvement is perceived as a safeguard against abuse, RAs are cushioned with several measures to mitigate the risks of abuse. The Yukon Seniors' Services and Adult Protection Unit plays an enhanced role in witnessing RAs in screening and approving the suitability of representatives. Other safeguards that depart from Ontario's regime include that RAs expire at the earlier of three years or when an adult's capacity declines. Therefore, they "are not for adults who have a degenerative disease like Alzheimer's" or for those whose decision-making abilities fluctuate.<sup>336</sup>

The LCO heard in our preliminary consultations that these provisions could possibly limit the applicability of the Yukon's approach to the RDSP.<sup>337</sup> The RDSP is a long-term savings vehicle that involves many years of decision-making for a legal representative. Even if the scope of a legal representative's authority is limited to that of a plan holder, he or she may need to approve one-time DAP withdrawals and monitor investments throughout the lifetime of the RDSP. If a process to establish a legal representative for RDSP beneficiaries were restricted to a few years, it would require an adult to execute a new agreement at regular intervals, or seek an external appointment should his or her capacity decline. This could be regarded as a positive safeguard or an added complication.

An RA in British Columbia can endure into an adult's incapacity.<sup>338</sup> Similar to the Yukon, RAs in British Columbia include an extended list of areas for routine financial management. The *Representation Agreement Act* and related Regulations set out an exhaustive definition of what constitutes "routine financial management".<sup>339</sup> Although RRSPs and Registered Retirement Income Funds (RRIFs) are listed as areas of activity, the RDSP is not listed. This is because the legislative framework pre-dates the availability of the RDSP. The LCO confirmed that some financial institutions have accepted RAs in British Columbia to establish a plan holder for RDSPs.<sup>340</sup>

The RDSP is a complex financial vehicle potentially involving substantial funds. It carries a risk of abuse that may be higher than the types of routine financial management currently covered under the law. Consequently, it raises significant policy concerns that the British Columbia government is considering.<sup>341</sup> The LCO heard that financial institutions desire clarity with respect to the application of the legislation to the RDSP, particularly regarding the withdrawal of funds and management of payments, where the risks of financial abuse are higher. This should be kept in mind in weighing the options for reform for this project.

The *Representation Agreement Act* came into force in 2001 after years of “unprecedented broad based community-government collaboration”.<sup>342</sup> With substantial input from the public about their aspirations for an alternative decision-making arrangement, it was positioned as one of several interlocking decision-making laws and was projected to supplant POAs. However, British Columbia’s POA legislation remained in force and, after a review of both regimes commissioned by the Attorney General, the two now operate in parallel.<sup>343</sup>

The *Representation Agreement Act* as it was first enacted permitted an adult to authorize his or her representative for financial affairs to “do, on the adult’s behalf, anything that can be done by an attorney acting under a power of attorney...”<sup>344</sup> In his *Review of Representation Agreements and Enduring Powers of Attorney* (McClean Report), A.J. McClean recommended that the wide scope of a representative’s authority be restricted to the routine management of the adult’s financial affairs and that enduring POAs persist as the chief instrument for property management.<sup>345</sup> In 2007, the *Representation Agreement Act* was modified to remove the option of authorizing a representative to make financial decisions beyond the routine management of an adult’s affairs. A representative’s powers now include such areas of decision-making as the payment of bills, receipt and deposit of pension income, and making investments, among others that are stipulated in the Regulations. The execution process was also streamlined, so that a lawyer is no longer required.<sup>346</sup>

RAs in British Columbia straddle supported and substitute decision-making. The *Representation Agreement Act* reads, “an adult may authorize his or her representative to help the adult make decisions, or to make decisions on behalf of the adult...”<sup>347</sup> While some interpret this as meaning an adult can choose *either* to ask for assistance or to have decisions made on his or her behalf, others say that this provision is meant to be interpreted as a holistic arrangement that captures the dynamics of the decision-making process: an adult may require more or less assistance depending on his or her abilities with respect to the decision at hand.<sup>348</sup> In his review, McClean noted that,

...at a philosophical, but in the end practical, level, it is said that the enduring power is too blunt a mechanism, vesting all decision-making power in the attorney. The representation agreement is more attuned to how decisions are made, and provides for not only joint-decision making and consultation, but also for taking into account the desires, beliefs and values of the adult.

Section 7 [representation agreement over financial affairs] was designed to provide a more flexible arrangement, under which a person could be assisted to make decisions, and have decisions made for him or her only as a last resort.<sup>349</sup>

The decision-making process that is mandated under the *Representation Agreement Act* is, thus, targeted at adults who may have fluctuating, diminishing and issue-specific capacity. The definition of capacity itself reflects this purpose in adopting a set of non-cognitive factors to be considered in determining whether an adult can execute an RA.<sup>350</sup> These factors create a threshold that is not just lower, but also substantively different, from that for a POA. In particular, it reflects a social policy decision to extend personal appointments to adults with significant mental disabilities who may have “unique ways of communicating” that can be understood by a trusted person who has personal knowledge of “what he or she values and wants and what he or she dislikes or rejects”.<sup>351</sup> The factors are the following:

- a) whether the adult communicates a desire to have a representative make, help make, or stop making decisions;
- b) whether the adult demonstrates choices and preferences and can express feelings of approval or disapproval of others;
- c) whether the adult is aware that making the representation agreement or changing or revoking any of the provisions means that the representative may make, or stop making, decisions or choices that affect the adult;
- d) whether the adult has a relationship with the representative that is characterized by trust.<sup>352</sup>

Framing capacity in this manner has been favoured in the disability community as a means to recognize the “shades of grey with respect to capacity”.<sup>353</sup> A study conducted by the Nidus Personal Planning Resource Centre and Registry, a voluntary registration and advocacy support service, found that 989 RAs were made and registered between 2006 and 2009, 70 per cent of which included authority over financial affairs. The majority of adults executing RAs were between the ages of 19 and 29, followed by those between 80 and 89, but people of all ages have accessed these arrangements.<sup>354</sup> The LCO also heard during our preliminary consultations that RAs have been recommended as a tool to assist adults in managing government income supports and social benefits in the developmental disability sector.<sup>355</sup>

However, legal practitioners have been hesitant to embrace representation agreements. RAs originally required a lawyer’s validation and the discrepancy between the statutory threshold for capacity and the common law capacity to instruct counsel has been a source of unease. Despite eliminating a lawyer’s participation in the process of validating an RA, this tension has not been resolved for adults wishing to access legal advice.<sup>356</sup>

Concerns have also been raised about whether there is an increased potential for abuse under RAs because of the liberal test for capacity. The LCO heard from certain stakeholders that the cognitive approach to determining capacity should not be altered in the context of complex

financial transactions, such as the RDSP, where the risk and consequences of abuse are high. In its review of the Victorian guardianship regime, the VLRC declined to adopt the British Columbia approach, recommending instead an external appointment process for adults whose diminished capacity does not meet the traditional cognitive test.<sup>357</sup> Furthermore, the flexibility in the scope of a representative's authority, which includes assisting an adult *and* making decisions on his or her behalf has led some to doubt if there are adequate safeguards to protect an adult's participation.<sup>358</sup>

The *Representation Agreement Act* does contain enhanced safeguards against financial abuse and the misuse of a representative's powers. The safeguard that differs most notably from arrangements in other jurisdictions is the requirement that an adult appoint a monitor in certain circumstances.<sup>359</sup> An adult is not required to appoint a monitor if he or she has at least two representatives who must act unanimously in exercising their powers. If an adult has only one representative who is a spouse, the Public Guardian and Trustee, a trust company or credit union, a monitor is also not compulsory.<sup>360</sup> In its study, Nidus found that even where monitors are not required, adults do appoint them. Overall, 52 per cent of RAs included a monitor and 74 per cent of adults chose to appoint a monitor rather than name more than one representative to act jointly. The majority of monitors are extended family members,<sup>361</sup> friends and siblings. Approximately 20 per cent of RAs include two representatives acting jointly. Few RAs are constituted otherwise.<sup>362</sup>

The Public Guardian and Trustee for British Columbia has confirmed that they have responded to complaints regarding RAs but has also suggested that they are not prevalent.<sup>363</sup> There has not been a "significant case taken to court regarding financial exploitation by a representative" as had "been anticipated by some legal professionals".<sup>364</sup> Nevertheless, as noted previously, the risks of abuse may be higher with the RDSP than matters of routine financial management because of the wealth the RDSP attracts and the complexity of decision-making. This could be a particular concern should the scope of a legal representative's authority extend to requesting withdrawals and managing funds that have been dispersed.

Elements of the Yukon and British Columbia's representation agreements have been incorporated into Options 1 and 2, respectively, in Figure 2, Options for Reform in the Choice of Arrangements.

### QUESTIONS FOR DISCUSSION

8. *Would it be appropriate to lower Ontario's threshold for capacity to grant a POA for property management for the specific purpose of establishing a legal representative for RDSP beneficiaries?*
9. *If a different threshold for capacity to execute a personal authorization for the specific purpose of establishing a legal representative for RDSP beneficiaries were accepted in Ontario, what definition of capacity would be flexible enough to meet the needs of RDSP beneficiaries?*
10. *Would a threshold for capacity based on the common law standard or non-cognitive criteria increase an RDSP beneficiary's risk of vulnerability to financial abuse and misuse of a legal representative's powers?*
11. *How would a supported decision-making arrangement or representation agreement for the specific purpose of establishing a legal representative for RDSP beneficiaries impact third parties?*
12. *How could a personal appointment process for the specific purpose of establishing a legal representative for RDSP beneficiaries be implemented in the Ontario context? Would it require an amendment to the SDA or the enactment of a standalone statute?*

#### **b. Streamlined Court and Administrative Tribunal Appointments**

External appointments generally apply to circumstances where an adult does not have a private arrangement, such as a POA, and the adult's challenges with decision-making are such that he or she cannot meet the threshold of capacity required for a personal appointment. An adult or another person may initiate an external appointment where it is believed that the adult experiences diminished capacity and is in need of assistance. Additionally, external appointments can be used as the first avenue of recourse for arrangements where the oversight of an independent adjudicator is desirable. Court orders for co-decision making are an example. In this section, co-decision making is considered as an alternative decision-making arrangement followed by a review of streamlined court applications and administrative tribunal proceedings.

### **Co-Decision Making**

Alberta and Saskatchewan permit an interested party to request that a judge appoint a co-decision maker to make decisions jointly with an adult with diminished capacity. In Saskatchewan, co-decision making is available for personal care and financial matters. In Alberta, it is available for personal care but not financial affairs. In Saskatchewan, a judge may appoint a co-decision maker as a less restrictive alternative to guardianship, where his or her “capacity is impaired to the extent that the adult requires assistance in decision-making in order to make reasonable decisions...and is in need of a property co-decision maker”.<sup>365</sup> In both jurisdictions, co-decision-making arrangements are intended for adults who can make decisions for themselves with assistance.<sup>366</sup>

Although a co-decision making appointment is established through the courts, it strongly resembles the supported decision-making arrangements discussed above.<sup>367</sup> Co-decision making differs from supported decision-making insofar as a co-decision maker shares legal authority to make decisions with the adult. However, he or she must “acquiesce in a decision made by the adult and shall not refuse to sign a document...if a reasonable person could have made the decision in question and no loss to the adult’s estate is likely to result from the decision”.<sup>368</sup> A co-decision maker’s authority may, therefore, simply consist of advising the adult and giving effect to his or her decision.

In contrast to supported decision-making, co-decision making does also have an added degree of formality for third party service providers. A co-decision maker can sign a contract in the banking context and a contract signed by either person alone may be voidable.<sup>369</sup> Joint signatory arrangements, such as bank accounts, have been used in financial institutions for quite some time. Therefore, according to the VLRC, while it may take time for third parties to become accustomed to co-decision making arrangements, they should “not cause significant legal and commercial problems”.<sup>370</sup> Others perceive the impact of co-decision making on third parties differently. In Alberta, co-decision making does not apply to financial management because it could cause confusion and uncertainty.<sup>371</sup> In their review of alternative decision-making arrangements in Canada and abroad, Terry Carney and Fleur Beaupert remark,

Redolent of the fine distinctions between ownership rights under joint tenancies and tenancies in common (whether co-owners do or do not acquire a ‘share’), these options are among the most problematic in terms of *public* understanding of their social and legal function: they risk failing to pass the ‘corner shopkeeper’s understanding’ test.<sup>372</sup>

Co-decision making only occurs as an external appointment, which in Saskatchewan entails a court proceeding. The VLRC cited two reasons for its belief that it would be inadvisable to establish a co-decision maker through a personal appointment. These include the

acknowledgement that the adult will have impaired capacity, which calls into question the ability to “make a sound choice to enter into a co-decision making arrangement and to appoint a responsible person”.<sup>373</sup> Additionally, the VLRC found that “co-decision making appointments are not an ideal future planning mechanism”.<sup>374</sup>

Co-decision making accepts that an adult’s capacity may change over time and seeks to assist only with needs that are identified at the time of the appointment. At the time of an appointment, the adult might have difficulty making decisions alone but must be able to make them with the assistance of another. As an external arbiter, the court’s role is to provide independent scrutiny and a mechanism for ongoing review. If an adult’s capacity diminishes further, an order for co-decision making may be terminated.<sup>375</sup>

In a recent study on guardianship reform in Saskatchewan, Professor Doug Surtees surmises that concerns about future planning may explain the low usage of co-decision making arrangements to date. Professor Surtees reviewed nearly all court applications over a seven-year period after Saskatchewan’s co-decision making legislation came into effect. He found that an overwhelming number of orders continue to grant virtually plenary guardianship and only 30 out of 446 orders were for co-decision making. Interviews conducted with lawyers involved in the applications indicate that 52 per cent agreed that powers beyond those needed as of the date of the application should be requested where there is a “reasonable likelihood” that an adult will require additional assistance at a later date, “as this will reduce the need for further applications”.<sup>376</sup> Another 38 per cent agreed that supplementary powers should be requested where there is a “possibility” they will be needed in the future.<sup>377</sup>

If the uptake of co-decision making has indeed suffered out of the concern that an adult’s capacity will decline in future, it is unfortunate. It would be inconsistent with the principle of least restriction that is fundamental to Saskatchewan’s legislation.<sup>378</sup> However, it does highlight for the purposes of the LCO’s project on the RDSP that, like supported decision-making agreements, co-decision making is primarily aimed at adults who are able to make decisions with assistance; it may not be suitable for some adults with fluctuating or degenerative conditions. A second plausible explanation that Professor Surtees tenders for the low usage of co-decision making in Saskatchewan “is that the orders that are granted, despite their tendency to be virtually all plenary orders are, in fact, the orders that are needed”.<sup>379</sup>

Saskatchewan’s co-decision making appointments are included below under Options 5 and 6, in Figure 2, Options for Reform in the Choice of Arrangements, which summarize streamlined court processes and administrative tribunal hearings, respectively.

### **Streamlined Court Applications**

The procedural exigencies of court appointments have been associated with increased complexity and legal costs that could be prohibitive for RDSP beneficiaries seeking a legal representative. In Ontario, the SDA allows for the summary disposition of guardianship applications. Summary disposition applications are made by filing required documents with the court for a judge's consideration. They circumvent the default requirement of participating in a hearing and may reduce costs associated with legal services. In other jurisdictions, such as Alberta and Saskatchewan, desk applications that do not require a hearing are also available for substitute and co-decision-making arrangements, which are a less restrictive alternative to guardianship. In Saskatchewan, desk applications for co-decision making are available for personal care and financial matters, while in Alberta they are restricted to personal care.

There is little evidence of how summary dispositions operate in Ontario. The LCO's preliminary consultations confirm that summary disposition applications are used. The LCO heard from one lawyer that in some cases summary disposition applications have worked effectively and expediently as a streamlined process. They minimize the possibility of a court appearance, which makes them more cost-effective. They have particularly worked well in the developmental disability community, when the relationship between the adult and his or her family members is "straightforward" and the application is not contested.<sup>380</sup>

However, summary disposition applications are not used frequently. The LCO has heard that one explanation for the low usage of summary disposition applications in Ontario is that appointing a guardian without a hearing has raised concerns regarding due process.<sup>381</sup> The SDA does contain measures to ensure an adult's rights of due process. For instance, it requires that notice of the application be served with accompanying documents on the adult alleged to be incapable, specified family members and the OPGT, among others.<sup>382</sup> The SDA also requires at least one statement of opinion by a capacity assessor that an adult is incapable and, as a result, the same measures of due process that apply to capacity assessments for statutory guardianship appointments also apply to those for summary disposition applications. These include that a capacity assessor must provide information to the adult about the purpose and effect of the assessment and that the adult is entitled to refuse the assessment.<sup>383</sup> In spite of these measures, it appears that the perception that summary disposition applications do not sufficiently safeguard an adult's rights of due process persists. The Law Society of Upper Canada states the "it should be noted that not all jurisdictions or members of the bench allow guardianship matters to proceed in this fashion, citing that the seriousness of the relief requested requires a hearing".<sup>384</sup>

Concerns regarding due process in the context of streamlined court applications have been noted in other jurisdictions. For instance, Professor Doug Surtees informed the LCO that in Saskatchewan, the majority of court orders are made through an application without a hearing. Although this procedure was designed to be accessible, he believes it does not consistently safeguard an adult's rights. Professor Surtees reports that the process is difficult to navigate, the adults who are the subjects of an application are infrequently consulted with respect to their wishes and they may not be thoroughly apprised of the process.<sup>385</sup>

Alberta's desk applications for guardianship and co-decision making provide an example of a streamlined court process with enhanced oversight and support from a government agency. In Alberta, a self-help kit has been made available to members of the public with forms that have been designed to be user-friendly.<sup>386</sup> Applicants forward the desk application documents to specialized review officers within the Office of the Public Guardian who ensure proper completion of the documents and fulfill other duties including providing notice of the application to appropriate parties, drafting a review officer's report and forwarding the documents to the court. The review officers typically meet with the adult who is subject of the application to consult with them about their wishes. The LCO heard that in Alberta, desk applications have generally been regarded as a success in terms of the number of persons using the process and reducing the need for a lawyer.<sup>387</sup>

Another shortcoming of summary dispositions in Ontario was identified as cost. While legal costs may be reduced because they do not require a hearing, the costs of summary disposition applications can range between approximately \$7,500 and \$10,000 in urban centres. Documentation from capacity assessors makes up a large portion of these costs, possibly \$3,000 to \$4,000.<sup>388</sup> Additionally, if a judge is not satisfied that a proposed appointment is appropriate based on evidence in the application, he or she may order further information or a hearing.<sup>389</sup>

Should an alternative process to establish a legal representative for RDSP beneficiaries proceed through a streamlined court application, such as summary disposition, these expenses would need to be addressed. Every RDSP beneficiary must undergo an assessment to determine his or her eligibility for the DTC. Qualified medical professionals conducting those assessments embody an axis point that all beneficiaries pass through at some point in time before applying for the RDSP. The LCO received suggestions that these qualified medical professionals could create a resourceful and less costly means of determining an adult's capacity.<sup>390</sup> With adequate support and direction, they could also possibly assist in appraising an adult's need for a legal representative, in addition to, or in lieu of a finding of incapacity.

Furthermore, any possible streamlined court application for RDSP beneficiaries in Ontario would need to respect an adult's rights to due process, including consultation with respect to his or her wishes. The involvement of government staff could better secure rights of due process and increase uptake. Their involvement would, however, require additional resources that the Government of Ontario may not have. It is worth considering whether non-governmental organizations might play a role to minimize stress on government resources. Nevertheless, appropriate guidance and logistical support from the Government of Ontario would be necessary for a streamlined court process to operate smoothly.

The option of a streamlined court process is summarized below under Option 5 in Figure 2, Options for Reform in the Choice of Arrangements.

### **Administrative Tribunal Proceedings**

Administrative tribunals with authority to appoint a legal representative for adults with diminished capacity exist in several jurisdictions. Speaking of such a tribunal in its jurisdiction, the Queensland Law Reform Commission explains that it was intended to provide

an accessible, affordable and simple, but sufficiently flexible way of establishing whether a person has decision-making capacity and of determining issues surrounding the appointment and powers of decision-makers where it is necessary for another person to have legal authority to make decisions for a person whose decision-making capacity is impaired.<sup>391</sup>

The Consent and Capacity Board is Ontario's administrative tribunal with expertise in issues of capacity and decision-making. Chapter IV reviewed the CCB's mandate to create, amend and terminate substitute decision-making arrangements for incapable adults in area of health care. Insofar as this chapter considers alternatives to Ontario's current framework, it is important to note that administrative tribunals in other jurisdictions also appoint substitute decision-makers for property management.<sup>392</sup> Manitoba's process to establish a substitute decision-maker for persons with developmental disabilities under *The Vulnerable Persons with a Mental Disability Act* is a notable example of an administrative proceeding that involves a hearing panel process in another Canadian province.<sup>393</sup> The VLRC has also recommended that the Victorian Civil and Administrative Tribunal extend its mandate to making appointments for supported and co-decision making for financial affairs.<sup>394</sup>

The LCO received suggestions from select stakeholders that the CCB's mandate might be extended as an option for reform. If an external appointment process is desirable, the CCB could play a role as an impartial arbiter that is more accessible than the courts. As noted above, the CCB currently faces serious resource constraints. In the 2012/13 fiscal year the Board

received 6,000 applications and scheduled over 3,100 hearings all while adhering to the Board's legal obligation to schedule hearings within 7 days of receipt. The current staff complement can only handle the existing caseload and will face considerable challenges with any significant increase in volume. According to the Board's annual reports the CCB is running a deficit of approximately \$1 million per year. The Board's current resource constraints must be a factor if considering adding to its mandate.<sup>395</sup>

Beyond resource constraints, the CCB advised the LCO that it would be challenging to reconcile an alternative process to establish a legal representative for RDSP beneficiaries with its mandate and ongoing operations. The CCB determines if an adult is capable or incapable as a matter of law under the SDA and *Health Care Consent Act, 1996*<sup>396</sup> based on evidence presented to it from qualified medical practitioners and capacity assessors. The application of a different standard for capacity for an issue-specific area of decision-making, such as the RDSP, would not be a natural fit with the CCB's current mandate. It would require training and, possibly, reconstituting the CCB membership to better reflect the RDSP context, for instance, through the addition of financial experts.<sup>397</sup> Any change in its operations would need to follow a direction from the province bolstered by appropriate resources. Given that resource constraints exist at all levels in Ontario, it is not clear whether this is feasible.

The possibility of extending the CCB's mandate is summarized below under Option 6 in Figure 2, Options for Reform in the Choice of Arrangements.

### QUESTIONS FOR DISCUSSION

13. *Would a co-decision making arrangement be flexible enough to meet the needs of RDSP beneficiaries?*
14. *How would a co-decision making arrangement for the specific purpose of establishing a legal representative for RDSP beneficiaries impact third parties?*
15. *Could a streamlined court process be used for the specific purpose of establishing a legal representative for RDSP beneficiaries as an "alternative course of action" to guardianship? Would an amendment to the SDA or enactment of a standalone statute be necessary to expand the Superior Court of Justice's mandate?*
16. *What measures would be required to make a streamlined court process for the specific purpose of establishing a legal representative for RDSP beneficiaries fair, cost-effective, speedy and user friendly?*

- 17. Is there a role for community organizations in providing enhanced support at the front-end of a streamlined court process for the specific purpose of establishing a legal representative for RDSP beneficiaries?*
- 18. Would it be feasible to integrate a process for the specific purpose of establishing a legal representative for RDSP beneficiaries into the existing mandate of the Consent and Capacity Board?*
- 19. Should an external appointment process for the specific purpose of establishing a legal representative for RDSP beneficiaries be based on an assessment of capacity or an adult's need for assistance in RDSP decision-making?*

#### **4. The Law of Trusts**

##### **a. Introduction**

Before the introduction of the RDSP, private financial planning for persons with disabilities focused on the law of trusts.<sup>398</sup> Trusts are regulated by the common law and by statute. The RDSP is itself a statutory trust: the ITA stipulates that RDSP funds are to be held in trust by a financial institution, which acts as the trustee.<sup>399</sup> Trusts are a well-established method of assisting persons with disabilities in managing their assets, such as life insurance, inheritances and personal injury settlements.

There have been many comparisons of the advantages of the RDSP and traditional trust mechanisms, and lawyers may advise their clients to set up both, depending on their means and interests.<sup>400</sup> However, the *interaction* of RDSP funds and trusts has not been addressed. Several stakeholders in the LCO's preliminary consultations suggested that a trust could respond appropriately to the challenges of RDSP beneficiaries by permitting a trustee to act as a legal representative.

The law of trusts is very complex and whether a trustee could act as a legal representative for the RDSP is uncertain. Funds in an RDSP may include mixed contributions from public and private sources, and it is unclear who would have legal authority to create a trust for an RDSP beneficiary and to transfer these funds to the trustee. As a result, clarification on the creation of a trust, the legal authority to transfer RDSP funds and the interaction of trustees with financial institutions would require strong guidance from the province.

This section reviews a number of trusts that are available in Canada and abroad to consider whether a trust mechanism could be used as part of the process for establishing a legal representative for RDSP beneficiaries.

### **b. Establishing a Trust for Adults with Diminished Capacity**

Trusts differ considerably according to the type of trust and each trust's conditions, which are particularized in the legal instrument that creates it, variously called, among other things, the deed, agreement or declaration. In addition, the law of trusts is constantly evolving over time.<sup>401</sup> This flexibility is valued as a positive characteristic because trusts are adaptable to social needs; however, commentators have remarked that it makes a strict definition problematic. That said, trusts do have several essential features. One of their essential features is a fiduciary relationship between the trustee and beneficiary. This makes them different from a simple contract and the courts can impose a trust where a relationship warrants it, even in the absence of an express agreement. Another feature is the transfer of a person's property to the trustees who administer it for his or her benefit.<sup>402</sup> Eileen E. Gillese provides a useful description of these features:

In its simplest terms, a trust arises whenever there is a split in legal and beneficial ownership to property – that is, whenever one person holds legal title to property and is legally obliged to manage that property for the benefit of another.<sup>403</sup>

A trustee is a fiduciary who holds, and makes decisions about, property for the benefit of the beneficiary.<sup>404</sup> A substitute decision-maker under the SDA is also a fiduciary who must manage an adult's property for his or her benefit.<sup>405</sup> Under decision-making laws, a trust company can be appointed as a substitute decision-maker or representative.<sup>406</sup> Moreover, trusts that are established by private individuals are regularly used in “innovative and imaginative” ways to “provide for the financial interests of an incapable adult”.<sup>407</sup> Estates and trusts lawyer Harry Beatty explains,

Where there are significant limitations on the ability of a beneficiary to manage money or property, a trust is a means of ensuring that they will be managed prudently.

Where the impact of the disability is episodic, as may occur for example with multiple sclerosis or bipolar disorder...the trust will assist the beneficiary during the most difficult periods in her or his life, when the beneficiary may be temporarily unable to deal with financial issues, or finds it very difficult to do so.<sup>408</sup>

A trust can be used as a future planning mechanism, like a POA, that a capable adult establishes for him or herself in anticipation of declining capacity.<sup>409</sup> The test for capacity to create a trust is not unlike that for a common law POA. It is less stringent than the threshold for capacity to

grant an enduring POA in Ontario under the SDA, requiring only that the adult is able to “understand substantially the nature and effect of the transaction”.<sup>410</sup> As noted previously, this threshold may be too high for some adults with mental disabilities depending on the scope of a legal representative’s authority. The same observations regarding Saskatchewan’s special limited POAs and the Yukon’s representation agreements can be made with respect to self-designated trusts because they adopt a similar definition of capacity (see Sections 2 and 3, above).

Self-designated trusts are considered under Option 4 in Figure 2, Options for Reform in the Choices of Arrangements.

### **c. Types of Trusts: Discretionary and Henson, Court-Ordered and User Controlled**

A trust can also be established by an individual other than the beneficiary or through the courts. There are many types of trusts and this discussion paper cannot review all of them. Three types of trusts that are commonly used in Canada, the United States and the United Kingdom for persons with disabilities are reviewed below.

#### **Discretionary and Henson Trusts**

Discretionary trusts are usually created by one or more relatives of a family member with a mental or physical disability. When used for disability benefits planning purposes, they are referred to as Henson trusts.<sup>411</sup> The trustees who administer a Henson trust have discretion in determining who the beneficiaries are, and authorizing contributions, investments and withdrawals. This makes the role of trustees somewhat analogous to that of a plan holder for the RDSP. The trust terms may provide that payments be made to or for the benefit of the beneficiary. For instance, trustees can direct payments to the beneficiary through a separate bank account in appropriate amounts to give him or her control over day-to-day spending. Payments can also be made directly to individuals and organizations for the benefit of the beneficiary, such as a landlord, a utilities company or a provider of disability services.

Henson trusts are not considered assets under ODSP. Payments from a Henson trust may also be exempt as income under ODSP within specified limits.<sup>412</sup> The treatment of Henson trusts under provincial income support programs, such as ODSP, can be advantageous to many persons with disabilities who rely on government income supports. However, the absolute nature of the discretionary powers of trustees is inconsistent with the RDSP policy objectives, goals for reform and principles for the law as it concerns persons with disabilities, including dignity, participation and autonomy. It also increases the risks of financial abuse.

Several commentators have noted that Henson trusts are particularly prone to conflicts of interest because “[i]f a trustee is also a residual beneficiary, for example, it is relatively easy for the trustee to preserve the trust fund by denying requests for discretionary expenditures on the person with a disability”.<sup>413</sup> These risks related to withholding funds are mitigated in the case of the RDSP, which was purposefully designed to be paid out regularly in set amounts to beneficiaries after the age of 60. Nonetheless, RDSP beneficiaries would have few rights of recourse to challenge a legal representative’s decision with respect to any type of financial management under an arrangement like a Henson trust.

Beyond Henson trusts, Ontario does recognize trusts that allow the beneficiary to participate in decisions regarding the funds in trust. Conditions can also be placed on the trustees’ authority in the trust deed, for example, regarding investments or expenditures. The remainder of the discussion in this section concerns these types of trusts.

### **Court Ordered Trusts**

The Superior Court of Justice has inherent and statutory jurisdiction over trusts. The Court can impose a common law trust where there is a fiduciary relationship that demands the recognition of a trust, even though the parties did not expressly create one. The Court’s authority over these so-called “constructive” trusts is largely limited to a remedy to compensate persons for losses that result from a relationship of unjust enrichment.<sup>414</sup> The Court also has jurisdiction to determine matters concerning the administration of trusts inherently, and under the *Trustee Act* and *Rules of Civil Procedure*.<sup>415</sup> For instance, it can appoint trustees, fix their compensation and preside over an accounting of the trust’s administration.<sup>416</sup>

A judge can create a trust and order that assets be transferred into trust following a court proceeding to safeguard the assets of a successful litigant. For instance, in Ontario, the courts have authority to deal with awards of support to dependents by ordering that they be held or paid in a trust under the *Succession Law Reform Act*. Where any property is held in trust arising from a will, settlement or other disposition, the *Variation of Trusts Act* also permits the Superior Court of Justice to approve any arrangement varying the trust or enlarging the powers of the trustees on behalf of a person who is incapable of assenting.<sup>417</sup> In the United States, courts have jurisdiction under the *United States Code* to create a “special needs trust” for a person with a disability to protect his or her assets from being counted as income and resources for the purposes of Medicaid eligibility. Funds may provide an income stream to the beneficiary or be paid to third parties for goods and services.<sup>418</sup>

In both Canada and the United States, standard safeguards against abuse that can be incorporated into a trust instrument include the appointment of more than one trustee or of a trust protector. A trust protector is a third party who is enabled to exercise independent oversight over the administration of the trust and monitor the performance of the trustee(s). The trust instrument can define the powers of a trust protector, which can resemble those of a monitor under a British Columbia representation agreement.<sup>419</sup>

If a court-ordered trust mechanism is desirable as an option for reform, the procedural exigencies involved in the application process must be fair and accessible. Subsection 3(b), above, addresses streamlined court and administrative tribunal appointments and many of the observations made there are also relevant to this option.

The external establishment of a trust under the supervision of the courts is considered under Option 7 in Figure 2, Options for Reform in the Choices of Arrangements.

### **User Controlled Trusts**

User controlled trusts are an example of a type of trust that is regularly accessed to manage government benefits. In the United Kingdom, the English national Department of Health and local government authorities recommend that recipients of direct payments for government social services, who are unable to manage their finances, get support from a user controlled trust.<sup>420</sup> Since 1996, persons eligible for government benefits for social care, including adults with mental disabilities and older adults, have been able to receive direct payments for services according to individualized budgets. The policy framework for direct payments is national but local government authorities administer them to their constituencies.

Soon after direct payments began, concerns were expressed that certain groups would face challenges in accessing them. The Department of Health's annual returns revealed low uptake among older adults, and persons with developmental and psychosocial disabilities. Research into the low uptake rates indicates that one of the factors was that recipients required support with managing direct payments. User controlled trusts were promoted to address this problem, among other strategies.<sup>421</sup> The National Health Service describes user controlled trusts as "a way for people who don't have capacity or ability to manage their own direct payments to get support from people close to them".<sup>422</sup>

A user controlled trust can be established by three or more trustees "drawn from family members, and wider contacts such as friends and neighbours, or people who have worked with the direct payment recipient and know them well".<sup>423</sup> Once the trust instruments are executed, the trustees must enter into a contract with the government service provider and open a

separate bank account for payments. Depending on the conditions set out in the trust, the user controlled trust can be responsible for managing the beneficiary's budget, employing professional service providers and making purchases.<sup>424</sup>

The beneficiary is the controlling decision-maker of a user-controlled trust and his or her expression of preferences is intended to be the basis for the trustees' decisions, despite issues of capacity.<sup>425</sup> The Department of Health states that "as the person getting the support/services, [the individual] should be central in any planning meetings, and their wishes always consulted".<sup>426</sup> Several government sources recognize that an adult's behavior and communications are sufficient indicators of choice, and that user controlled trusts are suitable for persons with fluctuating abilities. The Kent County Council states,

An Independent Living Trust is **not** the same as one which promotes substitute decision-making. It is a tool to enable people to maintain independent living, choice and control – the individual directs the decisions that such a Trust makes and becomes involved as much as possible in the process e.g. attending trust meeting[s].

A Trust is often used where people make choices and indicate preference through things such as body movement, gestures, vocalization, behavior and emotions. A Trust may also be set up for people who have progressive impairments and may, one day, be less able to manage their support without a Trust e.g. someone with dementia or extended 'crises' periods of mental ill health.<sup>427</sup>

One way in which user controlled trusts differ from other private trusts is in the level of support that is made available to the trustees through local government agencies that approve them. This makes user controlled trusts similar to the arrangements discussed in the section below on laws in the income support and social benefits sectors. In addition, it could lower the expense that is normally associated with setting up a trust privately by retaining a lawyer. As is also discussed below in the same section below, this intense participation of government agencies requires resources that the Government of Ontario may not have at present. Nevertheless, user controlled trusts can incorporate safeguards that are regularly drafted into trusts governance documents, such as holding periodic meetings, reporting and accounting among co-trustees.

There is some empirical evidence on the efficacy of user controlled trusts. Commentators have made positive remarks about how they have increased the uptake of direct payments in the community of persons with learning disabilities.<sup>428</sup> One study that surveyed the implementation of strategies to increase uptake of direct payments in the United Kingdom noted drawbacks, such as the feeling that the beneficiaries' abilities to contribute to decision-making were not always fostered as much as possible.<sup>429</sup> However, it contained an overall positive assessment:

[User controlled trusts] were seen as having the advantages of sharing responsibility, coordinating support to an individual, and giving trust members a clear role where they take their responsibilities seriously. Enabling an individual to have choice and control, even though not passing the 'able and willing test' was given as one of the advantages.

The schemes were seen as hugely beneficial to users, since in many cases they would have been refused a direct payment without them....<sup>430</sup>

The approval of a trust under the supervision of a government agency is considered under Option 8 in Figure 2, Options for Reform in the Choices of Arrangements.

### QUESTIONS FOR DISCUSSION

- 20. Could a trustee act as a legal representative for RDSP beneficiaries in Ontario?*
- 21. Who would have legal authority to create the trust for the specific purpose of establishing a legal representative for RDSP beneficiaries and to transfer the RDSP funds to the trustee?*
- 22. What measures would be required to implement a trust mechanism as an option for reform in Ontario?*
- 23. Would a self-designated trust based on the common law threshold for capacity be flexible enough to meet the needs of RDSP beneficiaries?*
- 24. Could a streamlined court process to appoint a trustee as a legal representative for RDSP beneficiaries be integrated into the Superior Court of Justice's existing jurisdiction over trusts?*
- 25. Could an Ontario government agency be charged with approving a deed of trust for the specific purpose of establishing a legal representative for RDSP beneficiaries? If so, which government agency would be suitable?*

## **5. Laws in the Income Support and Social Benefits Sectors**

### **a. Introduction**

This Chapter reviews processes that are embedded into income support or social benefits programs in order to appoint a person to manage a recipient's funding as a less restrictive option to guardianship. Income supports and social benefits take different forms across

jurisdictions. The RDSP is a unique financial investment vehicle. Much more common are government programs that cover basic living expenses, such as ODSP, and that provide individualized funding based on the recipient's special needs, for instance, direct funding for persons with development disabilities under the *Ministry of Community and Social Services Act*. These forms of income supports and social benefits are discussed throughout this discussion paper, particularly in Chapters II.A and IV.A, and directly above in Section 4 on user controlled trusts.

Where income supports and social benefits are distributed as direct payments to an adult, he or she may experience difficulties in planning and managing the funds. An adult may proactively request assistance from his or her case worker. Alternatively, the adult's case worker or a third party, such as a parent or spouse, may initiate the appointment of another person to manage the adult's payments. The appointment process in these situations depends on rules in the relevant program. Programs can be national or subnational, or specific to a target client group. This chapter reviews select programs in Canada and abroad, making reference to what little empirical evidence there is to evaluate them.

## **b. Income Support Programs**

### **Ontario Disability Support Program**

Approximately 50,000 ODSP recipients obtain assistance from what is commonly referred to as an "ODSP trustee" to manage their income support payments.<sup>431</sup> The *Ontario Disability Support Program Act, 1997* (ODSPA) empowers the Director to appoint such a person to act for a recipient if there is no guardian of property or trustee and the Director is satisfied that the recipient "is using or is likely to use his or her income support in a way that is not for the benefit of [the recipient and his or her dependents]".<sup>432</sup> The roles and responsibilities of a trustee are described in the ODSP Regulations and Income Support Directives (Directives).<sup>433</sup> Together, they provide guidance on issues including how the process is triggered, factors to be taken into consideration in appointing a person to act for the recipient and accountability measures.

Those appointed under the ODSPA are not formal trustees, such as those discussed in Section 4 above, and their authority is not recognized to decide matters for the RDSP or by the CRA for income tax purposes.<sup>434</sup> The appointment process can be initiated at the request of the recipient, his or her dependents or an ODSP staff member. Any person may provide information to an ODSP staff member that triggers a request. In certain cases, a family member accompanying an adult through the application process is appointed from the outset.<sup>435</sup>

The process to appoint a person to act for a recipient does not include a capacity determination; it is based on an informal objective assessment of the recipient's need for assistance in managing his or her income support according to enumerated factors to be taken into consideration. The factors include whether the recipient has asked for assistance, a reliable third party has provided information that the adult requires assistance and/or the adult frequently runs out of money for food or shelter. There is a strong emphasis on making all possible efforts to gain the recipient's cooperation and agreement before appointing an ODSP trustee.<sup>436</sup>

A review of the legislative history of the ODSPA reveals that the determination of an adult's capacity was intentionally omitted from this appointment process. While the Bill to enact the ODSPA was open for public comment, a number of community organizations made submissions against the proposed inclusion of a capacity assessment. Then Director of Policy and Research at ARCH Disability Law Centre suggests that "the reason for removing this provision may well have been a realization that ODSP officials should not make what is essentially a legal determination about a person's capacity".<sup>437</sup> In contrast, for a trustee to be appointed on behalf of an adult recipient of Ontario Works, evidence of incapacity from a medical practitioner may be adduced to determine whether the recipient needs help in managing his or her income support.<sup>438</sup> The local Ontario Works Administrator will take into consideration the medical practitioner's assessment as well as other factors when making a decision.<sup>439</sup>

ODSP has several safeguards in place in relation to trusteeships, including mandatory annual reporting, periodic reviews and the replacement of a trustee. ODSP is creating a template for annual reports in order to improve reporting. One of the purposes of these accounting measures is to assist in determining if a recipient still needs assistance in managing his or her income. Concerns have been expressed and complaints made to ODSP regarding trustees mismanaging a recipient's funds. ODSP investigates these allegations by conducting a review of the appointment, following which it may remove and substitute the trustee.<sup>440</sup> Where warranted, ODSP will make a referral to the OPGT or the police. ODSP can also provide compensation up to a maximum of one month's benefits in cases of mismanagement if satisfied the recipient would be unable to provide for his or her basic needs and shelter without compensation.<sup>441</sup>

### **Canada Pension Plan and Old Age Security**

The Canada Pension Plan is a contributory program that provides pensions and benefits to almost all persons who work in Canada.<sup>442</sup> CPP recipients include persons who are unable to work because of disability.<sup>443</sup> The Old Age Security program provides government funded pensions based on age, residency and income criteria.<sup>444</sup> The LCO heard in our preliminary

consultations that many recipients of CPP and OAS have trustees appointed to manage their funds.<sup>445</sup> The CPP and OAS procedures to appoint a trustee are comparable to those for ODSP, as are the contextual circumstances surrounding the appointment. There are, however, a few significant exceptions that are reviewed in this section.

CPP and OAS integrate a staged approach to decision-making assistance. Where an adult is capable, he or she can consent to name a person to communicate on his or her behalf with Service Canada. This allows Service Canada to disclose and receive personal information through the authorized person but does not provide him or her with powers to apply for or manage an adult's benefits.<sup>446</sup> This first stage of decision-making assistance is the least intrusive. It can be likened to supported decision-making arrangements in the Yukon and Alberta, discussed above. CPP also separates the appointment of a trustee who can apply for benefits on an adult's behalf from a trustee who can manage an adult's payments.<sup>447</sup> This is somewhat similar to the separation of a plan holder from a representative who assists an RDSP beneficiary in managing payments out of the RDSP.

In order to appoint a trustee, an adult must be found "incapable of managing his own affairs" and incapacity must be "by reason of infirmity, illness, insanity or other cause".<sup>448</sup> A licensed medical practitioner is required to evidence an adult's incapacity in a Certificate of Incapability, which lists assessment criteria that differ from the statutory test under the SDA. It asks the medical practitioner to determine if the adult has:

1. Good **general knowledge** of what is happening to his/her money or investments?
2. Sufficient **understanding** of the concept of time, in order to pay bills promptly?
3. Sufficient **memory** to keep track of financial transactions and decisions?
4. Ability to **balance** accounts and bills?
5. Significant **impairment of judgment** due to altered intellectual function?<sup>449</sup>

CPP and OAS use safeguards that are not dissimilar from ODSP, such as maintaining and reporting accounts. A trustee must also sign an agreement with Service Canada, which stipulates his or her roles and responsibilities, and is registered in an ESDC information bank.<sup>450</sup> If members of the public have concerns about fraud, they can notify ESDC, which may refer the case to the Program Integrity unit for investigation.<sup>451</sup>

### **Australia National Disability Insurance Scheme**

Australia's National Disability Insurance Scheme (NDIS) provides individualized financial assistance to persons with disabilities following an assessment of each person's unique needs for supports and services. Individualized funding differs from the types of income supports and

benefits reviewed above in this section, such as ODSP, CPP and OAS, which largely grant fixed, lump sum payments.<sup>452</sup> Similar to the RDSP, individualized funding involves a planning stage – when the amount and timing of payments are decided – and a management stage – when the adult receives direct payments.<sup>453</sup>

The NDIS enabling legislation was enacted after the CRPD came into effect and was subject to robust public consultation. The overarching principles laid down in the *National Disability Insurance Scheme Act, 2013* reflect “the philosophies of supported decision-making, dignity of choice and the least restrictive alternative approach”.<sup>454</sup> These principles are evident in the process to appoint a person to assist a recipient of NDIS benefits, called a “nominee”.<sup>455</sup> For example, the principles recognize that “people with disability should be involved in decision-making processes that affect them, and where possible make decisions for themselves”.<sup>456</sup>

Like CPP and OAS, NDIS adopts a staged approach to decision-making assistance, including correspondence and plan nominees. The role of a correspondence nominee is narrowly limited to the exchange of personal information. Similar to the RDSP, NDIS distinguishes the role of plan nominees between planning and managing funds that have been paid. An adult could have a plan nominee who serves one or both of these functions as well as more than one plan nominee with separate, or joint, decision-making authority.<sup>457</sup>

Under the *National Disability Insurance Scheme (Nominee) Rules, 2013* (Nominee Rules) a plan nominee may be appointed at the request of the adult or on the initiative of the Chief Executive Officer. If a nominee is appointed without a request from the adult, he or she must be consulted and several factors taken into consideration, including “whether the participant would be able to participate effectively in the NDIS without having a nominee appointed”; and “the principle that a nominee should be appointed only when necessary, as a last resort, and subject to appropriate safeguards”.<sup>458</sup> Once appointed, a plan nominee must act on the adult’s behalf, “only if the nominee considers that the participant is not capable of doing the act” and “has a duty to apply their best endeavours to developing the capacity of the participant to make their own decisions....”<sup>459</sup>

NDIS is a very new scheme and there is little empirical evidence of its effectiveness. Positive comments on nominee appointments under Australia’s social security regime, Centrelink, include that “[n]ominee arrangements provide flexibility for individuals to decide who can act as their ‘agent’, and also operate as a useful mechanism in situations where an individual has limited, intermittent or declining capacity”.<sup>460</sup> However, concerns about abuse and the misuse of a nominee’s powers have also been expressed. Centrelink has been critiqued for failing to

implement safeguards to determine a candidate's suitability as a nominee and for its lack of systematic monitoring.<sup>461</sup>

### **United States Social Security Representative Payment Program**

Social security in the United States provides fixed pensions and benefits similar to CPP and OAS. The Representative Payee Program (Program) appointment process shares many features in common with the CPP, OAS and ODSP trustee appointment processes, reviewed above. Consequently, the Program is not reviewed here. However, in the absence of substantial commentary on the Canadian regimes, evidence of the Representative Payee Program's effectiveness is briefly discussed.

It must be noted that the social and economic context for the United States' Program is not analogous to that in Canada. In the United States, there are 8.4 million beneficiaries with representative payees managing \$72 billion in annual benefits – numbers that are expected to grow as the population ages.<sup>462</sup> For the past three years, funding for the Program has been nearly \$1 billion below that requested.<sup>463</sup> A report by the United States Government Accountability Office states that “the SSA [Social Security Administration] has faced challenges identifying, selecting, and monitoring representative payees” and that “Congress and others have expressed concerns that SSA may not be well positioned to administer the Representative Payee Program, as currently structured, in the future”.<sup>464</sup> Reform of the Representative Payee Program has been ongoing for more than a decade at a scale that is hard to compare to Canadian programs.

Nevertheless, research in the United States' context provides general lessons learned. Literature on the appointment of representative payees for persons with psychosocial disabilities has linked the Program to several positive outcomes. Payeeships have been perceived as instrumental in ensuring that adults' basic needs are met, covering medical bills, decreasing hospitalization, reducing homelessness and improving overall living stability.<sup>465</sup> As for the challenges, payees and adults identified a lack of education about, and assistance with, budgeting as well as inadequate opportunities for an adult's input and involvement in daily money management.<sup>466</sup>

The overwhelming critique of the Program is financial abuse. Many efforts have been made to address these concerns, including through the creation of a National Research Council Committee and the enactment of the *Social Security Protection Act of 2004*.<sup>467</sup> Notwithstanding these efforts, the prevention and detection of financial abuse remains a strong challenge.<sup>468</sup> The United States' experience demonstrates that implementing safeguards in a wholly government-run program is resource intensive. Without adequate resources, financial abuse

may go undetected. More information gained from research in the United States on the subject of financial abuse is presented in Section E, below, including proposals for reform.

An external appointment process that is administered by a government agency is considered under Option 9 in Figure 2, Options for Reform in the Choice of Arrangements.

### QUESTIONS FOR DISCUSSION

*26. Could an Ontario government agency administer an appointment process for the specific purpose of establishing a legal representative for RDSP beneficiaries? If so, which government agency would be suitable?*

*27. How would a government agency administered process for the specific purpose of establishing a legal representative for RDSP beneficiaries operate? Could it draw on knowledge of existing programs, such as ODSP trustee appointments?*

*28. Should a government agency appointment process for the specific purpose of establishing a legal representative for RDSP beneficiaries be based on an assessment of capacity or an adult's need for assistance in RDSP decision-making?*

## **6. Summary of Options in the Choice of Arrangements**

### **a. Introduction**

This section presents several broad options for reform in the choice of arrangements to establish a legal representative for the RDSP. Each option is summarized briefly based on the review and analysis above and is represented in Figure 2, Options for Reform in the Choice of Arrangements.

As noted previously, our task in this section was not to select between one existing arrangement and another; rather it was to understand the combination of diverse features they contain, how effective they are and whether they can contribute to a process to establish a legal representative for RDSP beneficiaries. Figure 2 presents options that mirror the existing arrangements discussed above with some amendments. They integrate cursory findings made with respect to how a given option would need to be implemented to meet the benchmarks for reform identified in Chapter I.C.

By way of example, a streamlined court process that builds on what we know of the summary disposition provisions in the SDA could be used to approve a trust deed that has been drafted in advance with the support of a government agency or community organization. The trustee could then be a person authorized to act as a legal representative for the RDSP beneficiary (Option 7). A personal appointment could be executed based on the common law definition of capacity to establish a legal representative in a process that is bolstered by enhanced safeguards (Option 1).

Options 1 through 9 can also be reimagined to incorporate more detailed features that will be discussed in the next sections on the remaining key issues, for instance, particular safeguards against financial abuse. In the concluding Chapter VI, Options for Reform, the options are discussed again according to four types of overall appointment processes, which consist of personal appointments, streamlined court processes, administrative tribunal hearings and government administered processes. Illustrative examples are provided in that chapter as well as a visual aid at Figure 4, Options for Reform by the Type of Appointment Process. You are invited to consult Chapter VI for a reframed and simplified description of the options for reform.

Above all, it must be recalled that the options presented in this and other parts of this discussion paper are not exhaustive: they are intended to stimulate public debate and generate feedback that the LCO can incorporate into recommendations in our Final Report. In addition, because these options are a tailored response to the specific context of the RDSP and are based on the benchmarks for reform, they should not be read to preclude any options in the LCO's larger *Legal Capacity, Decision-Making and Guardianship* project.

#### **b. Decision-Making Laws (Options 1, 2, 3, 5 and 6)**

Decision-making laws assist adults "who are unable to make, or have difficulty making, important decisions about their lives".<sup>469</sup> The *Substitute Decisions Act, 1992* governs the establishment of a general substitute decision-maker for property management, including through the execution of a POA or the appointment of a guardian. Issues of legal capacity, guardianship and decision-making have received considerable attention in recent years. Numerous projects have been completed or are underway to examine developments in this area of the law, including major law reform projects in Canadian provinces and foreign jurisdictions. The LCO's current *Legal Capacity, Decision-Making and Guardianship* project is one example.

There are several observations that pertain to many options under decision-making laws. One of the goals for reform that stakeholders have identified is the acceptance of a threshold for

capacity that is lower than that which is provided for in Ontario under the *Substitute Decisions Act, 1992*. Stakeholders reported that this threshold is unattainable for some adults with mental disabilities seeking access to the RDSP. The options in Figure 2 present several thresholds for capacity that are less stringent, including the common law standard and non-cognitive factors accepted in British Columbia, and Newfoundland and Labrador. Furthermore, depending on the powers that are awarded to a legal representative, and relative complexity of financial transactions, these thresholds can, in effect, be more or less stringent. For instance, whereas the LCO has heard that the common law standard could be unattainable for RDSP beneficiaries, Saskatchewan has suggested that adults with mental disabilities could grant a special limited POA that awards an attorney limited authority.

Accepting a new threshold for capacity to establish a legal representative for RDSP beneficiaries would no doubt have great normative value. For this project, however, it is also a practical issue: any future recommendations for reform must reflect the lived experience of RDSP beneficiaries to be implementable. As noted above, there is substantial diversity in the persons seeking to participate in the RDSP, including persons with developmental, psychosocial and cognitive disabilities. The onset of disability may be abrupt or may develop gradually; abilities may be stable, they may fluctuate or they may decline. At this juncture, there does not appear to be sufficient evidence to demonstrate that one threshold for capacity, in particular, would clearly be flexible enough to meet the needs of RDSP beneficiaries. Nor is there evidence to demonstrate what safeguards would be necessary to counterbalance the risks of financial abuse. Consequently, if it is established in the LCO's consultation phase that a new threshold for capacity is an appropriate response in this project, more information will be required to understand where to draw the line in a principled manner.

A new threshold for capacity would also have implications for adults subject to other decision-making laws that currently operate in Ontario. The second benchmark for reform recognizes that "the process must be specific to the RDSP and should limit the extent to which it spills over into other areas of decision-making" (see Chapter I.C.2 above). This is a worthy goal for RDSP beneficiaries who do not need a legal representative to assist them in making decisions in other areas of their lives. However, an RDSP-specific process that is anchored in decision-making laws could create a disparity in entitlements to an alternative process that leaves out adults who are *not* RDSP beneficiaries. This disparity would be most acute if the scope of a legal representative's authority extended to the management of RDSP funds that have been paid, since they are fundamentally an asset, similar to an asset that adults without an RDSP might have managed for them under guardianship.

These observations do not detract from the appreciation of capacity as a socio-legal concept – one that has been evolving substantially in recent years. However, it may impact the ease with which the options for reform could be debated, settled and implemented during the priority timeline for this project. The LCO welcomes comments on the implications of accepting a new threshold for capacity as an option for reform.

Aside from issues of capacity, the review of alternative arrangements in decision-making laws shows that there is a continuum of options across and within jurisdictions. At one end of the continuum, the appointment of a legal representative is largely intended as a signal to third parties that they can disclose information about the adult without the risk of being held liable under privacy laws and also consider the adult's decisions to be legally enforceable, when they are made with assistance. The legal representative may be entitled to undertake several activities in supporting the adult, including accessing confidential information, giving advice, communicating his or her wishes and endeavoring to ensure that an adult's decisions are implemented. However, the ultimate seat of decision-making authority remains with the adult. At the other end of the continuum, an adult can assign decision-making authority to a legal representative, who then has duties and powers to assist the adult and to make decisions on his or her behalf. In between, an adult may be able to make decisions with assistance but be bound to share legal authority with a co-decision maker.

Options 1 and 2 present two personal appointment processes that would permit a legal representative to assist an adult and to make decisions on his or her behalf. Option 1 would allow an adult to appoint a legal representative based on a cognitive threshold for capacity that is less stringent than exists in Ontario. Both Saskatchewan's special limited POAs for the RDSP and the Yukon's representation agreements adopt a threshold for capacity that is comparable to the common law standard for a POA. The common law capacity to execute a POA for financial management ordinarily requires the grantor has the ability to understand and appreciate basic information about the object of the attorney's powers.

Saskatchewan's approach restricts the scope of powers of an attorney to that of a plan holder who cannot make decisions respecting withdrawals. Because the rules surrounding RDSP withdrawals are more complex than those regarding opening the RDSP and deciding basic terms, such as contributions, this could effectively lower the threshold for capacity. An important shortcoming of Saskatchewan's special limited POA is that it disentitles RDSP beneficiaries from making one-time withdrawals, unless they have capacity to do so independently. Therefore, it cannot serve those adults with diminished capacity who use the RDSP as a contingency plan throughout their lives, rather than for long-term savings. The LCO has also learned that restricting a plan holder's authority from requesting one-time withdrawals

could conflict with some financial institutions' operational constraints and limit an RDSP beneficiary's choice of service provider.

Where an adult needs assistance in making withdrawals and managing funds that have been paid, Saskatchewan suggests that full guardianship is preferable to safeguard against financial abuse. In contrast, the Yukon representation agreements incorporate safeguards to ensure an adult seeks out additional assistance where a greater level of support is needed. An adult can authorize a representative to make decisions in various areas of routine financial management. However, representation agreements expire when an adult no longer has the level of capacity required to execute the agreement and they are time-limited. Option 1 attempts to capture a combination of the Yukon and Saskatchewan approaches.

Option 2 is modeled on the British Columbia *Representation Agreement Act*, which adopts a non-cognitive approach to defining capacity that emphasizes the expression of desire and preferences, and the existence of a relationship of trust with the representative. Newfoundland and Labrador enacted legislation recently to permit this type of appointment, specifically for the RDSP; however, it is not yet in force. The principal concern that commentators have expressed regarding representation agreements is the increased risk of financial abuse, arising from the more liberal test for capacity. The opportunities for financial abuse could be even greater in the case of the RDSP because it is a complex financial vehicle that may attract substantial wealth. As indicated in Option 2, enhanced safeguards would be a prerequisite for any such appointment process.

Option 3 is based on supported decision-making arrangements in the Yukon and Alberta. Supported decision-making arrangements are available to adults who can make decisions for themselves with assistance and a supporter is prohibited from making decisions on an adult's behalf. Therefore, the seat of legal authority remains with the adult whose capacity is at issue. Several jurisdictions have noted that this assignment of authority could cause confusion and uncertainty for third party service providers in the context of complex financial transactions. The LCO recognizes that an adult's decision-making capacity can be enhanced with the assistance of others. If supported decision-making arrangements were made available for the RDSP in Ontario, a supporter's help would need to be sufficient to enable the adult to enter into a contract with a financial institution him or herself. This would not relieve financial institutions of the onus to determine whether, in a given case, an adult has the capacity to enter into a contract.

Although similar concerns arise in the context of co-decision making arrangements, the added degree of formality of the court appointment process and the assignment of joint decision-

making authority could foster an increased sense of security for third parties. Joint signatory arrangements, such as bank accounts, have been used in financial institutions for quite some time. However, some commentators have remarked that co-decision making arrangements could still be confusing for third parties. Moreover, like supported decision-making arrangements, co-decision making is not an ideal future planning mechanism. It seeks to assist adults only with a need for assistance that is identified at the time of the appointment and may not be suitable for adults with fluctuating or degenerative conditions. As external appointment processes, Options 5 to 9 should be read to include co-decision making.

Options 5 and 6 present avenues for the external appointment of a legal representative. Ontario's current framework provides for court appointments of guardians for property, including through summary disposition, as well as hearings before the Consent and Capacity Board with respect to various capacity and decision-making matters. Given that Ontario does not have significant resources to add to the system, Options 5 and 6 raise the question of whether the mandate of these existing resources could be expanded to include a process specifically for RDSP beneficiaries as a creative solution.

Option 5 proposes a streamlined court process that would be based on the recognition of a legal representative for RDSP beneficiaries as an alternative course of action to guardianship. Reducing legal costs in any streamlined court process in Ontario would be required to make the option cost-effective. Option 5 could build on Ontario's summary disposition provisions that have been used effectively to reduce legal costs, where there are no complicating factors. In Alberta, a government agency provides enhanced support in preparing prescribed forms before they are filed with the court for a judge's approval. Ontario could consider the role that community organizations could play to minimize the stress on government resources that Alberta's approach would demand. Option 5 would require clear direction from the Government of Ontario to the Superior Court of Justice. It could also require an amendment to the SDA or the enactment of a new scheme under a standalone statute.

As an administrative tribunal, the Consent and Capacity Board offers a speedy and more affordable alternative to the courts. Option 6 suggests that the mandate of the CCB could be expanded to include the appointment of a legal representative for the RDSP. However, the CCB faces serious resource constraints and any change in its operations would require a direct mandate from the province bolstered by appropriate resources. Given that resource constraints exist at all levels in Ontario, it is not clear whether this would be feasible.

The LCO received suggestions that qualified medical professionals who assess RDSP beneficiaries for DTC eligibility could create a resourceful means of determining an adult's

capacity. If an external appointment process is desirable as an option for reform, with adequate support and direction, they could also possibly assist in appraising an adult's need for a legal representative, in addition to, or in lieu of a finding of incapacity.

### **c. The Law of Trusts (Options 4,7 and 8)**

The law of trusts offers innovative financial planning instruments that are used in Ontario and abroad for adults with diminished capacity. Several stakeholders in the LCO's preliminary consultations suggested that a trustee could act as a legal representative for an RDSP beneficiary. The LCO agrees that this should be considered as an option for reform. Trusts are, however, a very complex area of the law. Funds in an RDSP may include mixed contributions from public and private sources, and it is unclear who would have legal authority to create a trust for an RDSP beneficiary and to transfer these funds to the trustee. As a result, questions surrounding the creation of a trust, the legal authority to transfer RDSP funds and the interaction of trustees with financial institutions would require clarification. Additionally, the LCO believes that, in order to meet the benchmarks, a trustee in these circumstances might also need to adhere to minimum criteria relating to the key issues in this discussion paper, including the trustee's roles and responsibilities and safeguards against abuse.

Options 4, 7 and 8 present personal and external processes for the creation of a trust. The threshold for capacity to execute a self-designated trust reflects the common law capacity to enter into a contract. Therefore, the same observations made above with respect to Options 1 and 3 apply. Option 7 would leverage the courts' existing jurisdiction over trusts in a streamlined process that could resemble Option 5. For instance, a summary application could be used to approve a trust deed that has been drafted in advance with support from a government agency or community organization. Option 8 is modeled on the process to establish a user controlled trust in the United Kingdom, which relies on government staff members to guide the parties in coming to a suitable and legally valid arrangement. As a government administered process, the same qualifications discussed immediately below regarding Option 9 would apply.

### **d. Laws in the Income Support and Social Benefits Sectors (Option 9)**

Option 9 reflects processes to establish a legal representative that are embedded into income support and social benefits programs. These appointment processes are used in Canada for both provincial and federal benefits, including ODSP, CPP and OAS. An adult or another person could initiate such an appointment process based on the need for a legal representative and/or medical evidence that an adult is incapable of making decisions for the RDSP. In Ontario, the Ministry of Community and Social Services has expertise in administering processes to appoint a trustee exclusively for recipients of ODSP and Ontario Works. It will also be funding direct

funding agreements between Developmental Services Ontario and persons with developmental disabilities in the future.

As with other arrangements to establish a legal representative, the overwhelming critique of this option has been the risk of financial abuse. Notwithstanding that existing programs integrate robust reporting and monitoring provisions, the prevention and detection of financial abuse remains a strong challenge. One reason for this challenge is that programming, which relies entirely on public administration is resource intensive and, without adequate resources, financial abuse may go undetected. Consequently, Option 9 would necessarily entail the allocation of additional funding to a government agency, which might not be feasible in Ontario at present.

### QUESTIONS FOR DISCUSSION

- 29. How would the options for reform in the choice of arrangements meet the benchmarks for reform in this project (see Chapter I.C.2, Benchmarks for Reform, beginning page 5)?*
- 30. Are there options for reform in the choice of arrangements that are to be preferred over others? If so, why?*
- 31. Are there other options for reform in the choice of arrangements that were not identified in this discussion paper?*

**FIGURE 2: OPTIONS FOR REFORM IN THE CHOICE OF ARRANGEMENTS**

AREA OF LAW	PERSONAL APPOINTMENT	
DECISION-MAKING	<p><b>OPTION 1</b></p> <p><b>Authorization – Common Law Definition of Capacity</b></p> <p>A private authorization granted by an adult who meets the common law threshold for capacity.</p>	<p><b>Could Require:</b></p> <ul style="list-style-type: none"> <li>• Evidence that the definition of capacity would be flexible enough to meet the needs of RDSP beneficiaries</li> <li>• Acceptance of a threshold for capacity lower than that for a POA for property under the SDA</li> <li>• Possible amendment to the SDA or enactment of a standalone statute</li> <li>• Enhanced safeguards</li> </ul>
	<p><b>OPTION 2</b></p> <p><b>Authorization – Non-Cognitive Definition of Capacity</b></p> <p>A private authorization granted by an adult who meets non-criteria, such as the communication of desire and preferences.</p>	<p><b>Could Require:</b></p> <ul style="list-style-type: none"> <li>• Evidence that the definition of capacity would be flexible enough to meet the needs of RDSP beneficiaries</li> <li>• Acceptance of a threshold for capacity lower and substantively different than that for a POA for property under the SDA</li> <li>• Possible amendment to the SDA or enactment of a standalone statute</li> <li>• Enhanced safeguards</li> </ul>
	<p><b>OPTION 3</b></p> <p><b>Authorization – Common Law Definition of Capacity</b></p> <p>A private authorization granted by an adult who meets the common law threshold for capacity and who only needs support to make decisions for him or herself.</p>	<p><b>Could Require:</b></p> <ul style="list-style-type: none"> <li>• Evidence that the definition of capacity would be flexible enough to meet the needs of RDSP beneficiaries</li> <li>• Acceptance of a threshold for capacity lower and substantively different than that for a POA for property under the SDA</li> <li>• Possible amendment to the SDA or enactment of a standalone statute</li> <li>• Enhanced safeguards</li> </ul>
TRUSTS	<p><b>OPTION 4</b></p> <p><b>Deed – Common Law Definition of Capacity</b></p> <p>A self-designated trust created by an adult who meets the common law threshold for capacity.</p>	<p><b>Could Require:</b></p> <ul style="list-style-type: none"> <li>• Evidence that the definition of capacity would be flexible enough to meet the needs of RDSP beneficiaries</li> <li>• Clarification on the creation of the trust, transfer of assets and interaction of trustees with financial institutions, possibly to be grounded in legislation</li> <li>• Enhanced safeguards</li> </ul>

**FIGURE 2: OPTIONS FOR REFORM IN THE CHOICE OF ARRANGEMENTS**

AREA OF LAW	EXTERNAL APPOINTMENT	
<b>DECISION-MAKING</b>	<p><b>OPTION 5</b></p> <p><b>Streamlined Court Process</b></p> <p>An appointment made by the Superior Court of Justice if its mandate were expanded to facilitate an “alternative course of action” to guardianship.</p>	<p><b>Could Require:</b></p> <ul style="list-style-type: none"> <li>• Possible amendment to the SDA or enactment of a standalone statute</li> <li>• Enhanced support from a government or community organization at the front-end to reduce legal costs</li> </ul>
	<p><b>OPTION 6</b></p> <p><b>Administrative Tribunal Hearing</b></p> <p>An appointment made by the Consent and Capacity Board if its mandate were expanded.</p>	<p><b>Could Require:</b></p> <ul style="list-style-type: none"> <li>• Expansion of the mandate of the Consent and Capacity Board to appoint a legal representative for the RDSP</li> <li>• Additional resources for training and operational changes</li> </ul>
<b>TRUSTS</b>	<p><b>OPTION 7</b></p> <p><b>Streamlined Court Process</b></p> <p>An appointment made under the Superior Court of Justice’s jurisdiction over trusts.</p>	<p><b>Could Require:</b></p> <ul style="list-style-type: none"> <li>• Clarification on the creation of the trust, transfer of assets and interaction of trustees with financial institutions, possibly to be grounded in legislation</li> <li>• Enhanced support from a government or community organization at the front-end to reduce legal costs</li> </ul>
	<p><b>OPTION 8</b></p> <p><b>Government Agency Administered</b></p> <p>An appointment made at a government agency through the approval of a trust.</p>	<p><b>Could Require:</b></p> <ul style="list-style-type: none"> <li>• Designation of a government agency</li> <li>• Clarification on the creation of the trust, transfer of assets and interaction of trustees with financial institutions, possibly to be grounded in legislation</li> <li>• Continuous support from the government agency or community organization</li> </ul>
<b>INCOME SUPPORTS AND SOCIAL BENEFITS</b>	<p><b>OPTION 9</b></p> <p><b>Government Agency Administered</b></p> <p>An appointment made at a government agency in a new process as defined by the government.</p>	<p><b>Could Require:</b></p> <ul style="list-style-type: none"> <li>• Designation of a government agency</li> <li>• Establishment of a new process to appoint a legal representative, possibly based on existing processes for ODSP and CPP, among others</li> <li>• Continuous support from the government agency or community organization</li> </ul>

## **C. Roles and Responsibilities of the Adult, Legal Representatives and Third Parties**

### ***1. Introduction***

This RDSP is a hybrid public and private initiative that requires the cooperation of multiple actors, including RDSP beneficiaries, their legal representatives, financial institutions, and the federal and provincial governments. This section reviews the roles and responsibilities of these various actors with a focus on measures to ensure an RDSP beneficiary's participation in decision-making, the liability of respective parties and whether a legal representative's authority should extend beyond that of a plan holder.

### ***2. The Activity of Decision-Making***

#### **a. Introduction**

Including adults in decision-making activities that affect them can have a positive effect on their sense of personhood, human dignity and quality of life. A substitute decision-maker has legal authority to make decisions on an adult's behalf. Ontario has recognized that capacity is specific to individual decisions as they are made and the SDA requires that, once a substitute decision-maker is appointed, he or she must encourage an adult's participation, to the best of his or her abilities. However, during the LCO's preliminary consultations, advocacy organizations expressed dissatisfaction with existing requirements to engage adults in the activity of decision-making. Some claim that shifting the law's focus from incapacity to the need for support would maximize capacity and promote full citizenship for persons with mental disabilities.<sup>470</sup> Legislation in other jurisdictions suggests that this could be achieved through measures such as mandatory consultation to ascertain an adult's wishes and preferences, and requiring a legal representative to follow an adult's instructions, unless they are unreasonable.

This section considers a legal representative's role and responsibilities in assisting an RDSP beneficiary in the decision-making process. Following a review of Ontario's current framework under the SDA, it presents standards for engaging RDSP beneficiaries in decision-making activities in other jurisdictions.

#### **b. Ontario's Current Framework under the *Substitute Decisions Act, 1992***

The SDA accommodates issue-specific and fluctuating capacity by restricting the attribution of incapacity to particular areas of decision-making. For instance, an adult can give instructions in a POA to circumscribe an attorney's powers by time and issue area. The OPGT and the courts

can also impose conditions on a guardian that they consider to be appropriate.<sup>471</sup> However, once a substitute decision-maker's powers come into effect, he or she has the power to make decisions on an adult's behalf as well as the legal authority to execute them. As a result, substitute decision-makers under the SDA can be described as a "proxy"<sup>472</sup> or "surrogate".<sup>473</sup> A substitute decision-maker has duties to encourage an adult's participation, consult with family and friends, and manage an adult's finances in a manner that is compatible with decisions concerning personal care.<sup>474</sup> These duties are consistent with the standard of substituted judgment, which directs a substitute decision-maker to act according to choices that an adult would have made for him or herself.<sup>475</sup> The SDA provisions setting out these duties are discussed further below.

The SDA details the role and responsibilities of substitute decision-makers. Guardians are established through external appointments, including statutory and court-based processes, and they must follow an approved management plan.<sup>476</sup> Both guardians and attorneys are also required to manage the finances of an adult who has been found to be incapable according to a hierarchy of expenditures that are deemed to be for his or her benefit.<sup>477</sup> They must first make expenditures that are "reasonably necessary for the person's support, education and care".<sup>478</sup> Where the property is and will remain sufficient for that purpose, other expenses can be made to support dependents, satisfy legal obligations and give gifts and loans. The SDA has detailed rules as to how these types of expenditures are to be authorized.<sup>479</sup>

Substitute decision-makers for incapable adults are fiduciaries "whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit".<sup>480</sup> The Office of the Public Guardian and Trustee's information booklet on *Duties and Powers of a Guardian of Property*, explains that "the most important goal in performing [the role of a substitute decision-maker] is to maximize the quality of life of the incapable person".<sup>481</sup> Substitute decision-makers must encourage an adult to participate in decision-making, to the best of his or her abilities, and foster regular contact between an adult and supportive family members and friends. Substitute decision-makers must also themselves consult periodically with an adult's family, friends and caregivers.<sup>482</sup> Making decisions together with an adult and with the benefit of information gained from close contacts can make a substitute decision-maker's choices more reflective of what an adult wants.

An important aspect of a substitute decision-maker's responsibilities is the duty to take an adult's comfort and well-being into account, and to manage his or her finances in a manner that is consistent with personal care decisions.<sup>483</sup> An adult's choice of residence, desire to purchase clothing and food or even take a vacation are all personal care decisions. The role of a substitute decision-maker for property is to realize these personal preferences by arranging to

pay for them. The OPGT's information booklet describes this relationship between personal care and financial management as follows:

You must manage the property in a way that accommodates the decisions made about the incapable person's personal care. For example, if the person wants to live in a certain place and can afford it, it would be your duty to arrange to pay for this choice of residence. If the person wants to take a vacation and can afford it, it would be your duty to make arrangements to pay for it. However, there is one exception to this obligation. You may make a financial decision that overrides a personal care decision **only if** to do otherwise would result in negative consequences with respect to property that **heavily outweigh** the personal care benefits of the decision. For example, the person may want to remain living in his or her own house, but may require 24 hour care and not have enough money to pay for it without selling the house and moving to another residence. In that case, the need to sell the house in order to have enough money to pay for the person's care may heavily outweigh the person's wish to remain living in the house.<sup>484</sup>

These duties must be met according to the standard of care that a person of ordinary prudence would adhere to in exercising the care, diligence and skill with respect to his or her own affairs, or that of a professional, where the substitute decision-maker receives compensation.<sup>485</sup>

### **c. Making Participation and Inclusion Meaningful**

Consistent with the LCO's *A Framework for the Law as it Affects Persons with Disabilities* we propose in the benchmarks for this project that an effective process to establish a legal representative for the RDSP would be one that "Promotes Meaningful Inclusion in the Decision-Making Process". The benchmarks for reform accept that all people exist along a continuum of abilities and that decision-making capacity is social and dynamic. Adults must be able to make choices that affect their lives and do as much for themselves as possible with appropriate supports. Strong values of human dignity, autonomy and independence should be protected with the understanding that support from a legal representative can serve to strengthen an adult's capacity. Therefore, an alternative process should encourage each adult's unique contributions and take into account how fluctuating and issue-specific capacity can be accommodated (see Chapter I.C.2, Benchmarks for Reform).

The duties of substitute decision-makers in Ontario demonstrate a sophisticated understanding that capacity is social and dynamic, and that an adult can actively contribute to the decision-making process.<sup>486</sup> However, substitute decision-makers have broad discretion in fulfilling their duties. The SDA contains little guidance on how substitute decision-makers should engage an adult in the activity of decision-making, including the extent to which an adult's abilities to make decisions should be fostered, and if and when an adult's decisions should be obeyed.

This lack of clarity is not unique to Ontario. As in other jurisdictions, the lack of clarity could possibly be a means to “create space for greater flexibility, creativity, and informality in decision-making processes, which may in turn result in decisions that are highly context-appropriate”.<sup>487</sup> It may reflect beliefs that trusting relationships are reliable. It could also result from honest difficulties in understanding what processes should be used to reach decisions, especially when complex family dynamics are at play.<sup>488</sup> Nevertheless, some commentators have suggested that decision-making laws should impose detailed obligations regarding consultation, explicitly permit adults to make decisions for themselves where they are able to do so or codify the common law duty to obey an adult’s instructions. These are discussed briefly below.

At common law, a POA is an instrument that a principal can use to empower an agent to act on his or her behalf. Agents have a duty of obedience that obliges them to follow a principal’s instructions.<sup>489</sup> Indeed, common law POAs expire when an adult no longer has the capacity to direct the attorney because the decision of the agent is considered to be that of the principal.<sup>490</sup> Enduring or continuing POA legislation was enacted to allow a POA to endure into an adult’s incapacity.<sup>491</sup> While there is a duty of obedience between an adult and an attorney at common law, in the case of guardianship or a continuing POA this duty must be stipulated in legislation.

Professor Nina Kohn argues that “the duty of obedience does not evaporate when the principal loses capacity because the agent remains bound by the principles of agency”.<sup>492</sup> Kohn concedes that following all directions may not be feasible where an adult has diminished capacity. However, she recommends that the duty of obedience be adapted to include mandatory requirements for communication, consultation and advance notification of “fundamental transactions”.<sup>493</sup> Recognizing that it could be overly burdensome and unrealistic to require communication about every routine transaction, Kohn defines a “fundamental transaction” as “one of such importance that it can significantly alter the principal’s lifestyle”.<sup>494</sup> She suggests that decisions constituting fundamental transactions should be set out in legislation and in each appointment document to achieve “transparency and clarity”.<sup>495</sup>

Others propose a more dramatic shift in the focus of legal representation from substitute decision-making to support and advocacy. Director for the Centre for Law and Aging Ann Soden proposes that despite the appointment of a substitute decision-maker, where adults are capable of undertaking tasks for themselves, they should be authorized to do so: “[t]o the extent that a person retains any residual capacity, this capacity to decide, and not merely to express wishes, should be recognized and asserted”.<sup>496</sup> Where a person is unable to make or communicate such a decision, she claims that the role of the legal representative should be to give effect to the adult’s prior expressed wishes or the person’s life values. For Soden, this

would ensure that “[e]ven where the person represented is unable to make or communicate a decision, the decision is conceptually still his”.<sup>497</sup> Finally, if an adult’s wishes and values are unknown, decisions could be made on a “best interests” standard,<sup>498</sup> which asks what a reasonable person would do in the adult’s circumstances.<sup>499</sup> Soden’s proposal adds definition to the duties of substitute decision-makers under the SDA. Whereas the SDA requires that a substitute decision-maker for property encourage an adult’s participation, Soden suggests a detailed and staged approach that begins with adults making decisions for themselves to the extent of their abilities and ends with applying the best interests standard.

The duties of substitute decision-makers for *personal care* under the SDA and under Ontario’s *Health Care Consent Act* resemble Ann Soden’s proposal. Ontario’s personal and health care laws delineate a hierarchy of activities that substitute decision-makers must undertake in making decisions, beginning with the identification of an adult’s wishes and instructions as expressed before a finding of incapacity.<sup>500</sup> Bach and Kerzner submit that these elements of Ontario’s framework as well as the British Columbia *Representation Agreement Act* provide a good starting point for the tasks that they say a supporting person should carry out.<sup>501</sup> In contrast to these provisions in Ontario’s personal and health care laws, because an adult who executes a representation agreement in British Columbia retains legal capacity, the *Representation Agreement Act* extends the duty to follow an adult’s wishes to his or her *current* circumstances. It reads,

When helping the adult to make decisions or when making decisions on behalf of the adult, a representative must

- (a) consult, to the extent reasonable, with the adult to determine his or her current wishes, and
- (b) comply with those wishes if it is reasonable to do so.<sup>502</sup>

The Yukon *Decision Making Support and Protection to Adults Act* frames a representative’s duties in the same manner.<sup>503</sup> Each of these statutory frameworks also sets out a list of considerations for legal representatives to make decisions where the adult’s instructions or wishes cannot be ascertained.<sup>504</sup>

Bach and Kerzner adapt the legislative requirements in these jurisdictions by omitting the qualification that a representative need only comply adult’s *reasonable* wishes. They say that a supporter should always be “bound to be guided by the wishes and instructions of the individual”.<sup>505</sup> To the extent that the ultimate seat of decision-making authority remains with the adult, Bach and Kerzner’s proposal resembles supported decision-making arrangements in the Yukon and Alberta.<sup>506</sup> Co-decision making in Alberta and Saskatchewan differs from supported decision-making arrangements insofar as a co-decision maker shares legal authority

to make decisions jointly with the adult. However, a co-decision maker's authority may simply consist of advising the adult and implementing decisions because a co-decision maker must acquiesce in a decision if a reasonable person could have reached it and damage is unlikely.<sup>507</sup>

Comparable provisions have been recognized in jurisdictions outside Canada. For instance, in Australia, the National Disability Insurance Scheme, discussed in Chapter V.B.5, permits a nominee appointed to manage an adult's direct payments "to do an act on behalf of the participant only if the nominee considers that the participant is not capable of doing the act".<sup>508</sup> A nominee also has a duty to ascertain the adult's wishes and "act in a manner that promotes the personal and social well-being of the participant".<sup>509</sup> In England, the *Mental Capacity Act 2005* provides that "a person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success".<sup>510</sup> Furthermore, in its report on *Adult Social Care*, the Law Commission of England stated,

...[T]he need to follow the individual's views, wishes and feelings is a broader principle that would extend to those who lack capacity. Even if the person lacks capacity, their views, wishes and feelings should still be taken fully into account – whether expressed in the past or now – and followed, subject to the general caveat of wherever *practical and appropriate*, which would allow decision makers to take into account wider concerns such as safeguarding and resource issues.<sup>511</sup>

There is little empirical evidence on the impacts of these alternative ways of framing a legal representative's duties on an adult's actual well-being. A number of studies have been undertaken to evaluate different models. However, they use inconsistent analytical criteria, making it a challenge to draw conclusions about comparative advantage.<sup>512</sup> In a 2013 study that comprehensively reviews available research on the implementation of alternative arrangements in Canada and abroad, including most of the above, Nina Kohn *et al* found,

...[A]lthough supported decision-making presents an appealing alternative to guardianship and therefore policymakers in the United States should give serious consideration as to how it might be incorporated into public policy, there is currently insufficient empirical evidence to know the extent to which (or conditions under which) it can remedy the problems posed by surrogate decision-making processes. Specifically, we find that, despite years of use, there is almost no evidence as to how decisions are actually made in supported decision-making relationships; the effect of such relationships on persons in need of decision-making assistance; or the quality of the decisions that result. Without more information, it is impossible to know whether supported decision-making actually empowers persons with cognitive and intellectual disabilities.<sup>513</sup>

The LCO believes that limitations in the information evaluating these alternative arrangements frustrate a thorough assessment as to whether they would improve upon existing standards in

Ontario. This is particularly so because the SDA does already contain duties to engage adults in decision-making activities, consult with family and friends, and to accommodate personal care decisions. The OPGT's information booklet explains that these duties include arranging to pay for an adult's expressed lifestyle choices, such as his or her place of residence or a vacation – with very few exceptions. The LCO has commissioned a research paper in the *Legal Capacity, Decision-Making and Guardianship* project that will evaluate the implementation of alternative arrangements in Canada.<sup>514</sup>

### QUESTIONS FOR DISCUSSION

32. *How can an RDSP beneficiary's meaningful inclusion in decision-making activities be ensured once a legal representative is appointed?*
33. *Should an RDSP beneficiary with a legal representative be entitled to make decisions for him or herself, where possible?*
34. *To what extent should a legal representative be required to consult with an RDSP beneficiary to determine his or her wishes and to obey an RDSP beneficiary's instructions?*

### 3. *Liability and Third Parties that Rely on Decisions*

As discussed above, the activity of decision-making is a social process that should foster an adult's contributions as much as possible. Achieving meaningful participation and inclusion in the activity of decision-making requires that a legal representative engage with a variety of individuals in order to identify an adult's preferences. It may also include encouraging adults to make and act on decisions for themselves. Having multiple persons participate in decision-making activities could, however, cause confusion for third parties who must be able to easily pinpoint those persons who are authorized to enter into legally binding transactions. Third parties must feel secure that they can reasonably rely on a decision-making arrangement as one that is valid under the law. Legal representatives should also be protected from liability in the event of loss or disputes where they meet an accepted standard of care.

In reviewing the legal framework for representation agreements and POAs in British Columbia, the McClean Report explains the protection of legal representatives and third parties as follows:

Attorneys should of course be expected to carry out the obligations which are imposed upon them, and third parties with whom they deal should not in general be able to rely on acts that are outside agents' authority. Nonetheless, neither group should be unfairly exposed to liability. That is undesirable in itself. It may also operate to the disadvantage of donors, for, if they fear unfair treatment, people may become unwilling to act as attorney, and third parties may be unwilling to deal with attorney, or they may take precautions that make transactions expensive and time-consuming.<sup>515</sup>

Express relief from liability for legal representatives acting in accordance with a standard of care is commonplace in decision-making and trusts laws.<sup>516</sup> For instance, the *Substitute Decisions Act, 1992* provides that substitute decision-makers acting for adults who have been found to be incapable are liable for damages resulting from a breach of their duties but exempts them from all or part of this liability if they have "acted honestly, reasonably and diligently".<sup>517</sup> The LCO believes that similar protections should be integrated into an alternative arrangement for the RDSP.

The LCO heard in its preliminary consultations that financial institutions that issue the RDSP also desire certainty, finality and protection from liability. In particular, they would like to be able to reasonably rely on a new process to establish a legal representative for beneficiaries as one that permits them to enter into RDSP transactions that are legally valid. This might be achieved by designating a focal point under the law with clear authority to enter into transactions. It could also be achieved by explicitly exonerating third parties who follow directions that are made pursuant to a decision-making arrangement.

In this discussion paper we have presented a range of existing alternative arrangements that specify where the ultimate seat of decision-making authority is located. Under supported decision-making agreements, legislation in the Yukon and Alberta clearly states that a legal representative is not entitled to make decisions on an adult's behalf, that it is the adult him or herself who remains the person with whom third parties must enter into an agreement.<sup>518</sup> In the case of co-decision-making, both a legal representative and the adult must sign a contract jointly, and a contract signed by either person alone may be voidable.<sup>519</sup> These arrangements have been perceived as potentially causing confusion and uncertainty for third parties because the adult, whose capacity is at issue, continues to hold some degree of legal authority to make decisions. They apply only to those adults who are capable of making decisions with assistance and their application has generally been limited to situations that do not involve complex financial transactions (see Chapter V.B, Choice of Arrangements to Establish a Legal Representative for the RDSP).

Representation agreements, trusts and arrangements in the income security and social benefits sectors permit a legal representative to make decisions on an adult's behalf. However, some of these arrangements do not require a finding that an adult is incapable and it may not always be obvious whether an adult can continue to make and execute decisions independently. For instance, in British Columbia, where a representative has authority to "help the adult make decisions, or to make decisions on behalf of the adult", the Public Guardian and Trustee advises that an adult "can continue to make decisions until [he or she is] incapable of making those decisions".<sup>520</sup> This implies that an adult could continue to give directions to a financial institution, which would not relieve them of the onus of protecting themselves against voidable contracts by assessing the adult's capacity under the common law.

Commercial certainty requires that third parties know who they can rely on as having legal authority to act with respect to an adult's property. Arguably, the *communication* of a decision by a legal representative would not derogate substantially from an adult's meaningful inclusion in the activity of decision-making: a legal representative could undertake consultations with family and friends, even follow an adult's instructions, and still be charged with implementing the decision. Alongside the alternative arrangements discussed above with respect to the activity of decision-making, the LCO believes that awarding a legal representative the sole authority to enter into transactions with third parties should be considered as an option for reform.

Explicit reference to an exemption from liability for third parties who reasonably rely on a legal representative's decisions could also be incorporated into an alternative process for the RDSP. Many decision-making laws protect third parties where they are unaware that an instrument appointing a legal representative is defective or has been terminated.<sup>521</sup> For instance, under the SDA, when a POA is terminated or becomes invalid, any subsequent exercise of power by the attorney in entering into a transaction with a third party is valid if he or she acted in good faith and without knowledge of the termination or invalidity.<sup>522</sup> The Saskatchewan *Powers of Attorney Act, 2002* also stipulates that third parties are not required to inquire into or ascertain the existence of defects or the termination of a POA.<sup>523</sup> Comparable provisions could serve to reassure third parties that they will not be held liable for accepting a legal representative's instructions with respect to the RDSP.

### QUESTIONS FOR DISCUSSION

35. *How can legal representatives for RDSP beneficiaries be protected from liability where they have adhered to an expected standard of care?*

*36. What measures could provide third parties with the certainty that they can reasonably rely on a decision-making arrangement for RDSP beneficiaries as one that is legally valid?*

*37. Could awarding a legal representative the sole responsibility to enter into RDSP transactions promote certainty, finality and protection from liability for third parties?*

#### **4. The Scope of a Legal Representative's Authority**

##### **a. Introduction**

One of the benchmarks for reform in this project proposes that a process to establish a legal representative would be one that “Responds to Individual Needs for RDSP Decision-Making”. There are several critical times for RDSP decision-making. The first critical time is simply when the RDSP is opened. From that moment, decisions must be made on the RDSP terms throughout its life cycle, including authorizing contributions, applying for government grants and bonds, investing savings, and deciding whether and when a beneficiary can receive one-time DAP payments, prior to the commencement of mandatory LDAPs. Depending on the plan terms at a financial institution, a plan holder may have authority to make all of these decisions. However, a plan holder does not have authority to assist a beneficiary in managing his or her DAP or LDAP funds once they are dispensed from the plan. This is another critical time for RDSP decision-making when a beneficiary may have a need for assistance. One key issue in this project is to consider whether a legal representative's scope of authority should be restricted to a plan holder with full or partial powers, or extended beyond that of a plan holder to also include managing RDSP payments made to the beneficiary (see Chapter II.C.1, Challenges for Beneficiaries and their Families).

##### **b. The *Income Tax Act***

The *Income Tax Act* requires that an RDSP be “operated exclusively for the benefit of the beneficiary” and prohibits the surrender or assignment of payments to a person other than the beneficiary.<sup>524</sup> However, it is silent as to how RDSP funds can be used once they have been paid to the beneficiary. This is consistent with the policy objectives underlying the RDSP, which include enhancing an adult's autonomy and equal citizenship as a consumer of private sector products. Nevertheless, legally authorized individuals or institutions, such as guardians and attorneys, are permitted to receive and manage funds on a beneficiary's behalf, unless this is specifically disallowed by provincial laws.<sup>525</sup> Consequently, should a process to establish a legal representative for RDSP beneficiaries in Ontario extend his or her powers to receiving and

managing funds, it would not conflict with the manner in which the RDSP is currently administered.

### **c. Implications of Extending the Scope of a Legal Representative's Authority**

The structure of the RDSP is complex and decision-making for the RDSP is demanding. Participants in the LCO's preliminary consultations reported that, prior to attempting to access the RDSP, many of the adults affected by this project may never have had a need for a formal arrangement to assist them with decision-making. Mainstream financial tools to manage daily expenses, such as automatic bill payments, are available to all members of the public and they have been used by older adults and persons with disabilities as source of informal support.<sup>526</sup> Some adults might hold a bank account and manage funds for daily living self-sufficiently or access assistance from family, friends and community networks. Therefore, adults who have a need for assistance in selecting a mutual fund for the RDSP may not have a parallel need in purchasing food, assistive devices or paying rent. RDSP decision-making is fundamentally different from day-to-day financial management.

The LCO believes that adults with mental disabilities are entitled to rely on professional advice, electronic banking and other informal supports to strengthen their capacity for financial management on an equal basis with others. Where informal supports are inadequate to meet an adult's need for assistance, however, real and serious consequences may arise. The LCO heard that not all but some beneficiaries may face challenges in managing funds that have been paid from an RDSP.

Similar to opening an RDSP and deciding plan terms, managing funds paid out of an RDSP requires a beneficiary to enter into transactions with a financial institution. The LCO heard from financial institutions that where they have reason to believe that an adult lacks sufficient capacity to give a valid discharge or receipt of the funds, they would seek a receipt and discharge from the beneficiary's authorized legal representative. Consequently, financial institutions would hope to see the scope of a legal representative's powers include the authority to receive funds for the beneficiary and give a binding discharge. This would allow them to fulfill their statutory responsibility to ensure compliance with plan conditions under the ITA.<sup>527</sup>

Additionally, some community advocates asserted that the scope of a legal representative's authority should comprehensively address an RDSP beneficiary's needs, including for *general* financial management. If the scope of a legal representative's authority is restricted to that of a full or partial plan holder, should a beneficiary need additional formal assistance, he or she would be required to have a guardian appointed under the SDA. A guardian could be the plan holder or another individual or organization, but would have to be appointed through a

separate process – the very same process that RDSP beneficiaries have declined to follow to date. This procedural duplication would be counterproductive to this project's benchmarks for reform, which include administrative feasibility and ease of use. It is also possible that it would not be cost-effective or respond to the concerns that stakeholders have raised with respect to reducing the impacts of substitute decision-making on an adult's well-being. Moreover, should a guardian not be appointed, the absence of a formal decision-making arrangement could increase an adult's vulnerability to financial abuse.

However, formal arrangements are powerful tools that can also create new opportunities for abuse or the misuse of a legal representative's powers. The Saskatchewan Ministry of Justice and Attorney General has suggested that a special limited POA be RDSP-specific only, and limit the scope of an attorney's powers to that of a restricted plan holder, who would not have authority to decide terms for the timing and amount of one-time DAP withdrawals. It suggested that extended powers would require the protections of full guardianship available in that province.<sup>528</sup> As mentioned previously, the LCO learned that restricting a plan holder's authority in requesting DAPs could conflict with some financial institutions' operational constraints and might not be workable. Nevertheless, the LCO agrees with the Saskatchewan Ministry of Justice and Attorney General's concern for robust safeguards.

Stakeholders in the LCO's preliminary discussions acknowledged that extending the reach of a legal representative's authority would necessitate additional safeguards to protect against financial abuse. In Newfoundland and Labrador, where designates can be assigned powers to manage RDSP payments, designates are bound to discharge their duties in accordance with set investments and expenses. They must also submit an annual report to the Public Trustee "summarizing all payments from the RDSP and the application of funds from those payments".<sup>529</sup> Under the Australia National Disability Insurance Scheme, a similar distinction to the RDSP exists between a nominee who assists an adult in planning and one who assists in managing individualized funding payments. Where a nominee is appointed to manage the funding for supports under the adult's plan, safeguards can be implemented, including setting a time period for review of the plan, establishing regular contact with government staff members, and funding budgeting training to strengthen the adult's own skills.<sup>530</sup>

As mentioned previously, there is a lack of empirical evidence as to the effectiveness of approaches in these jurisdictions because they have not yet been implemented (see Sections B.2 and B.5, above). They do, however, highlight the importance of matching safeguards to the risk of abuse and misuse of a legal representative's powers. Additionally, they show that mitigation strategies necessarily impose a burden on third parties – whether public or private – to supervise their implementation. Safeguards against abuse and the misuse of a legal representative's authority are specifically reviewed in Section E below.

Another factor that must be taken into account in considering the scope of a legal representative's authority is the potential impact on an adult's self-determination. Certain stakeholders submitted to the LCO that appointing a legal representative with powers beyond those of a plan holder would unduly intrude on a beneficiary's autonomy. They remarked that RDSP beneficiaries should not be treated differently from beneficiaries of other government-assisted registered plans that can be established by another authorized person, such as RESPs.<sup>531</sup> As discussed above, advocacy organizations have also expressed dissatisfaction with existing requirements to engage adults in the activity of decision-making. Because the nature of spending funds from an RDSP is much more personal than choosing an investment, the duties of a legal representative with extended powers to include an adult in the decision-making process in a meaningful way would be considerably more demanding than they would be for a plan holder.

The final concern that stakeholders expressed during the LCO's preliminary consultation was that of fragmentation. Numerous avenues to authorize a person to assist an adult with financial decision-making already exist in Ontario, under the SDA and the *Ontario Disability Support Program Act*, among others. The creation of a new process for the RDSP would add one more. An ODSP recipient could have access to both a trustee for his or her benefits as well as a representative for the RDSP. Ontarians with mental disabilities would be left to navigate a multiplicity of rules that could look quite different in each case.

Fragmentation should be avoided where it results in conflict, inefficiencies or other negative repercussions. However, fragmentation is not in itself problematic. Ontario's commitments to adults with mental disabilities are fragmented across sources of support, including the ODSP, AODA and individualized funding under the *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008* (SIPDDA). Tailored responses to issues of decision-making capacity are embedded into many programs as a means to ensure that guardianship is accessed only as a last resort. The introduction of a process to establish a legal representative specifically for RDSP beneficiaries inevitably causes more fragmentation, even where the scope of his or her authority is limited to that of a plan holder. The extent to which the scope of a legal representative's authority could cause confusion or result in conflicts or inefficiencies is an important consideration that the LCO welcomes comments on.

### QUESTIONS FOR DISCUSSION

38. *Should the scope of a legal representative's authority be restricted to that of a plan holder with full or partial powers, or should it extend to assisting beneficiaries manage payments out of the RDSP?*

- 39. What are the implications of extending the scope of a legal representative's authority beyond that of a plan holder?*
- 40. Could the scope of a legal representative's authority affect the timely implementation of reforms in Ontario?*

## **5. Summary of Options in the Roles and Responsibilities of the RDSP Beneficiary, Legal Representatives and Third Parties**

### **a. Introduction**

This section presents several broad options for reform in the roles and responsibilities of RDSP beneficiaries, their legal representatives and third parties. The appointment of a legal representative for RDSP beneficiaries will require the cooperation of all of these actors in order to operate smoothly. Their respective duties, powers and accountability must address legitimate concerns and be clear for an alternative process to be workable.

### **b. The Activity of Decision-Making**

In Ontario, a substitute decision-maker for property must encourage an adult's participation in the activity of decision-making to the best of his or her abilities; consult with family, friends and caregivers; and accommodate personal care decisions, among other duties. However, substitute decision-makers have broad discretion in fulfilling their duties. The OPGT has published an information booklet with guidance on how this might be done. Still, there is little information on how to engage an adult in the activity of decision-making in day-to-day transactions, including if and when an adult should be consulted and obeyed.

This lack of clarity could be a means to promote flexibility and creativity, since decisions are highly context-specific. Nevertheless, during the LCO's preliminary consultations, advocacy organizations expressed dissatisfaction with existing requirements to engage adults in the activity of decision-making. They, as have some commentators, suggest that decision-making laws incorporate different obligations in order to make an adult's participation and inclusion meaningful. In particular, they suggest a shift in the focus of a legal representative's role from one of substitute decision-making to support and advocacy.

Substitute decision-makers for adults who have been found to be incapable in the areas of personal and health care in Ontario must consider a hierarchy of factors in making decisions, beginning with the wishes or instructions that an adult expressed while capable. Some jurisdictions incorporate detailed guidelines for legal representatives to consult with an adult

and to comply with his or her instructions, if it is reasonable to do so. Where an adult's current wishes cannot be ascertained, a legal representative is required to take other factors into account, such as an adult's prior expressed wishes. Only as a last resort can a legal representative make decisions on a "best interests" standard, which asks what a reasonable person would do in the adult's circumstances. Other jurisdictions entirely prohibit legal representatives from acting on an adult's behalf unless he or she considers that the adult is not capable. There is, however, little empirical evidence on the impacts of these alternative ways of framing a legal representative's duties on an adult's actual well-being. It is also unclear whether they would improve upon existing standards in Ontario.

The LCO believes that both Ontario's existing duties under the SDA as well as arrangements in other jurisdictions that specify a legal representative's duty to ascertain and comply with an adult's wishes should be considered in the options for reform.

### **c. Liability and Third Parties that Rely on Decisions**

Having multiple persons participate in decision making activities – such as an RDSP beneficiary, a legal representative, and family and friends – could cause confusion for third parties who must be able to easily identify who is authorized to enter into legally binding transactions. Third parties must feel secure that they can rely on a decision-making arrangement as one that is valid under the law. Legal representatives must also be protected from liability that could arise from disputed transactions where they meet a standard of care.

With respect to the potential liability of legal representatives, the LCO believes that the options for reform should include protections similar to those under the SDA, which exempt substitute decision-makers for adults who have been found incapable from liability if they have acted honestly, reasonably and diligently. Questions of liability for third parties are more complex. The options for reform could include an explicit exoneration for third parties who follow directions that are made pursuant to a decision-making arrangement for RDSP beneficiaries. They could also include the designation of a focal point under the law with clear legal authority to enter into transactions.

### **d. The Scope of a Legal Representative's Authority**

The scope of a legal representative's authority could be restricted to that of a plan holder with full or limited powers, or extend to assisting an adult with RDSP funds that have been paid out of the RDSP. Some RDSP beneficiaries could have a need for assistance in making decisions on the RDSP, such as authorizing contributions or investments, but be able to manage daily expenses without a formal decision-making arrangement. Others may have a greater need for general financial management of RDSP payments.

The implications of extending the scope of a legal representative's authority include the potential impact on an adult's self-determination and fragmentation in the legislative landscape. The chief concern is that it would create new opportunities for financial abuse that necessitate additional safeguards to ensure that an RDSP beneficiary's right to live in safety is upheld. These safeguards would unavoidably impose a burden on third parties – whether public or private – to supervise their implementation. On the other hand, if adults have a need for formal assistance with general financial management and are unable to access it, their vulnerability to the risk of financial abuse could increase.

The LCO believes that a process specifically for the purpose of establishing a legal representative for RDSP beneficiaries should be flexible enough to address each individual beneficiary's needs, as much as possible. We would like to hear from RDSP beneficiaries and other interested parties about the implications of restricting or extending the scope of a legal representative's powers relative to those of a plan holder.

## **D. Eligibility and Availability of Legal Representatives**

### ***1. Introduction***

A legal representative must be eligible, available and willing to carry out the duties assigned to him or her. This section briefly considers the eligibility criteria for private, public and professional organizations that could act as legal representatives. It begins by reviewing the eligibility criteria to become a substitute decision-maker under the ITA and SDA and the challenges this could pose to adults with mental disabilities seeking to access the RDSP. It then reviews whether the availability of legal representatives could be improved by extending eligibility to community organizations.

Matters concerning eligibility that overlap with other key issues are discussed in the relevant sections, such as safeguards against abuse (Section E).

### ***2. The Lack of Eligible Substitute Decision-Makers***

The federal government's temporary amendments to the ITA allow a "qualifying family member" to become a plan holder where in a financial institution's opinion a beneficiary's capacity to enter into a contract is in doubt. Qualifying family members are limited to a narrow class of persons consisting of a beneficiary's parents, spouse or common-law partner.<sup>532</sup>

Under the *Substitute Decisions Act, 1992*, a guardian or attorney for property can include a much wider range of private and public individuals and organizations. The eligibility criteria for substitute decision-makers differ across the SDA appointment processes. An adult can name any person as an attorney in a POA. However, a judge and the OPGT are restricted to appointing particular classes of substitutes.<sup>533</sup> Eligibility criteria to become a substitute decision-maker under the SDA were discussed above in Chapter III.B, Property Management under the *Substitute Decisions Act, 1992*, and they are discussed again in Section E below on safeguards against abuse. Common to all appointments, however, is the requirement that the substitute be a *person*. The SDA does not stipulate that a substitute decision-maker must be a natural person; however, it is generally accepted that this must be the case, except where the substitute is the OPGT or a trust company.<sup>534</sup>

The SDA restrictions on the eligibility of substitute decision-makers reflect the desire to maximize an adult's wishes as well as relationships that are marked by trust. The Fram Report strongly emphasized the importance of appointing substitutes who have a continuing and close relationship with an adult in order to ensure that the decision-making process is true to his or her viewpoints and lifestyle. It explains that "[t]his personal contact in a relationship of mutual trust and affection promotes 'authentic' substitute decisions".<sup>535</sup> The Fram Report also envisioned that friends, in addition to spouses and parents, who "live with or are very close to the incapable person, and who, in many cases, know them best" could be suitable substitutes and that their inclusion would be "important and necessary".<sup>536</sup> Under the SDA, a friend can be appointed under POA or through the courts but not through the statutory guardianship process.<sup>537</sup>

The role of families and friends in supporting RDSP beneficiaries has been, and remains, essential. The RDSP was established after years of advocacy activities led by families of persons with disabilities and affiliated organizations. It was primarily conceptualized as a "nest egg" for children with developmental disabilities, who would require financial security at an older age. At a more general level, persons with disabilities often rely heavily on the contributions of family members. Families regularly assist each other in making decisions "even when they have not been appointed as a substitute decision maker".<sup>538</sup> They act as informal supports that government service providers often accept for their role in relational decision-making through their policies and practices.<sup>539</sup>

However, the RDSP is available to a range of persons with mental disabilities, some of whom are socially isolated and rely on a network of community service providers. During the LCO's preliminary consultations, advocacy organizations, and trusts and estates lawyers, among others, identified the SDA eligibility restrictions as a substantial barrier to accessing the RDSP.<sup>540</sup>

They identified older adults, immigrants and persons with psychosocial disabilities as individuals with disproportionately low access to close family and friends, who may be in need of a wider range of legal representatives.

The LCO also heard that where family supports are available, they can be unsustainable. As RDSP beneficiaries age to become recipients of mandatory lifetime payments, their friends and family age along with them. Although age alone is not correlated with diminished capacity, the incidence of Alzheimer's and dementia increases with age.<sup>541</sup> The parents of an RDSP beneficiary may experience difficulties in making financial decisions on their own behalves or they may pass away before an RDSP beneficiary's payments are exhausted. After all, the RDSP was intended as a means to provide financial security in the *absence* of family supports.

The OPGT is a safety net that could provide support to adults who are assessed as incapable and are unable to locate an eligible and willing family member or friend.<sup>542</sup> In Ontario, a continuing POA may even name the Public Guardian and Trustee as an attorney on consent.<sup>543</sup> However, the mandate of the OPGT is strictly to assist adults who have been found incapable and for whom the OPGT is appointed. Based on its mandate, the OPGT may turn away adults who are capable but vulnerable and those who may be capable of giving a POA but have nobody they trust to act as an attorney.<sup>544</sup> The OPGT is funded to fulfill its particular mandate and, as with all government agencies, resource limitations are significant in the current economic climate. Moreover, adults may not wish to rely on the OPGT to manage their private, day-to-day financial affairs and it is conceivable that some might simply decline to open an RDSP instead. Interviewees in the LCO's preliminary consultations expressed that persons who experience social isolation should not be further marginalized by the unavailability of legal representatives, where they do not wish to or cannot rely on the OPGT but do not have contact with a trusted person.

### ***3. Is There a Role for Community Networks?***

The LCO has been urged to consider whether the eligibility criteria of legal representatives could be extended to involve institutions, such as community organizations, where an adult does not wish to rely on the OPGT but does not have contact with a trusted person. Although only natural persons can act as a substitute under the SDA, organizations are routinely appointed to assist in managing an adult's financial affairs in other jurisdictions and sectors.

Organizations are commonly appointed as trustees for the ODSP, CPP and OAS, including community agencies, religious organizations and long-term care homes.<sup>545</sup> In Saskatchewan, non-governmental organizations, such as the Saskatchewan Association for Community Living,

have been appointed on occasion as substitute or co-decision makers under *The Guardianship and Co-Decision-Making Act*.<sup>546</sup> Individualized funding programs, such as Community Living British Columbia, also customarily authorize organizations to assist adults in managing direct payments.<sup>547</sup> Direct payments for services and supports can involve large sums of money and may place an adult in the position of an employer vis-à-vis his or her service providers, who must comply with statutory employment obligations. Because this can be onerous for any individual, the option of receiving support from an organization has increasingly been favoured at CLBC.<sup>548</sup> In the United States' Representative Payee Program, organizations constitute approximately 38,500 representative payees, some of which collect a fee for their services, including government agencies and non-for-profit organizations.<sup>549</sup> Given projected growth in the population of older adults, the Program is expected to be challenged to locate more payees and the United States Government Accountability Office has suggested to Congress that a broader range of organizations should be permitted.<sup>550</sup>

The appointment of an organization as a legal representative is, however, more complex than that of a person. Organizations may assist more than one adult at a time and may be motivated by economic incentives that could pervert the quality of support they provide. For instance, if a for-profit organization is compensated as a legal representative for multiple adults, profitmaking could be prioritized over delivering quality services. Policies in the income supports and social benefits sectors, where organizational appointments are most common, tend to include detailed rules to qualify organizations and demanding accountability requirements. For instance, under the ODSP Directives, an agency that receives compensation for acting as a trustee must “not be in a conflict of interest position by being appointed”, “maintain separate records for each ODSP recipient” and “enter into a contractual relationship with MCSS Regional Offices agreeing to carry out [specified] responsibilities”.<sup>551</sup> Like ODSP, Community Living British Columbia and Developmental Services Ontario have quality assurance and reporting standards to which organizations must adhere.<sup>552</sup>

Turnover in the workforce may also mean that organizations cannot guarantee that any single employee will be present to provide an adult with a familiar face over the many years of decision-making that the RDSP involves. As a matter of practicality, turnover in the workforce requires organizations to develop policies to address the delegation of signing authority to staff members interacting with financial institutions, including procedures to inform them if there is a transfer in authority to another staff member.<sup>553</sup> As with any legal representative acting for an RDSP beneficiary, third parties must be able to rely on the legal authority of an organization as well as that of an organization's representatives.

Furthermore, if extending the eligibility criteria for a legal representative is appropriate as an option for reform, the organizations that would be permitted to act would need to be considered carefully. Conflicts of interest leading to incidents of financial abuse have been identified under the United States Representative Payee Program where organizations have consisted of employers, and operators of group and care homes, including representative payees providing food, shelter and services while controlling an adult's benefits.<sup>554</sup> Where there is a risk that an organization's interests conflict with the RDSP beneficiary's, it should be prohibited from being appointed as a legal representative. This could be achieved through screening on a case-by-case basis, or by approving or excluding certain types of organizations according to their mandate or relationship to RDSP beneficiaries.<sup>555</sup> Conflicts of interest are a concern that equally applies to the appointment of persons and are considered more generally in Section E below.

Collaborations with government funded-professionals who are authorized to provide services under statutes such as SIPDDA and not-for-profit organizations that serve the communities to which many RDSP beneficiaries belong could be considered for eligibility, as a first start. Information gained in submissions to the federal government during the RDSP Review and in the LCO's preliminary consultations shows that some not-for-profit organizations would be willing to act.<sup>556</sup> Government-funded service providers have also previously acted as trustees for income supports. Ontario's Adult Protective Service Worker (APSW) Program is an example. APSWs assist adults with developmental disabilities who are living in the community to strengthen their skills in managing the tasks of daily living, including helping with day-to-day finances. APSWs can be appointed as trustees for the receipt of ODSP benefits, albeit only as a temporary measure while alternatives are pursued.<sup>557</sup>

#### ***4. Summary of Options in the Eligibility and Availability of Legal Representatives***

This section discussed the extension of eligibility for legal representatives qualified to act for RDSP beneficiaries to organizations. The RDSP is available to a range of persons with mental disabilities. Some beneficiaries experience social isolation and do not have a trusted person to whom they can turn for assistance. Currently, the SDA does not permit organizations to act as substitute decision-makers, except where a substitute decision-maker is the OPGT or a trust company. In other jurisdictions and sectors, organizations are routinely appointed to assist in managing an adult's financial affairs.

The appointment of organizations does introduce a higher level of complexity into a process to establish a legal representative. Existing processes tend to include detailed rules to qualify organizations and demanding accountability requirements. Turnover in the workforce may also

mean that organizations cannot guarantee that any single employee will be present to provide an adult with support over the years of decision-making that the RDSP involves. Furthermore, the types of organizations that would be permitted to act as a legal representative would have to be selected carefully. The LCO's preliminary research confirms that not-for-profit organizations would likely be willing to accept these responsibilities.

The LCO believes the extension of eligibility to qualifying organizations should be considered as an option for reform.

### QUESTION FOR DISCUSSION

*41. Should eligibility to act as a legal representative for RDSP beneficiaries be extended to organizations? If so, what types of organizations would be suitable?*

## E. Safeguards against Abuse and the Misuse of a Legal Representative's Powers

### 1. Introduction

Authorizing a person to assist or make decisions on behalf of an RDSP beneficiary creates an opportunity for mistreatment because "[t]he corollary of trust and power is that it always creates a potential for abuse".<sup>558</sup> Financial abuse can occur through a range of activities, such as withholding funds, cashing investments without consent, pressuring an adult to make expenditures<sup>559</sup> and, generally, making decisions in a manner that has detrimental consequences for the person who is entitled to benefit from the RDSP. The Canadian Centre for Elder Law observes that "[o]ne of the challenges of the financial sector is that many of the legitimate tools that are used for financial and personal planning, financial management, and monetary transactions are precisely those same tools that are commonly used to financially abuse seniors".<sup>560</sup> This challenge is one that any options for reform in the LCO's project must address in facilitating an RDSP beneficiary's right to live in safety.

Definitions of financial abuse vary considerably. One plain language definition of financial abuse relating to older adults explains that it occurs "where someone tricks, threatens or persuades older adults out of their money, property or possessions".<sup>561</sup> The Victorian Law Reform Commission provides a more nuanced definition. It describes what it believes should be prohibited conduct toward a person with diminished capacity in terms of abuse, neglect and exploitation. Financial abuse could mean "taking a person's money without their valid consent".<sup>562</sup> Neglect could constitute "not taking adequate care of their finances or

property”.<sup>563</sup> Exploitation could include “the use of another person’s finances principally for one’s own benefit”.<sup>564</sup> The LCO accepts the VLRC’s definitions of abuse, neglect and exploitation as encompassed by the single term “financial abuse” for the purposes of this discussion paper.

Financial abuse can involve subtle dynamics, particularly where adults are in a relationship of dependency with trusted family members and friends. For instance, it could arise in “circumstances where a senior is financially supporting other family members and/or allowing them to live in his or her home, due to pressure or where this dynamic is causing harm to the senior”.<sup>565</sup> Financial abuse “often occurs in connection with other types of abuse”; it cannot be separated entirely from behaviour such as physical, psychological and sexual mistreatment.<sup>566</sup> Any options for reform in this project must be formulated with the knowledge that abuse “is not a single phenomenon and does not lend itself to understanding through a single unified theory; rather, different types of abuse denote different kinds of problems impacted by diverse social dynamics that are key to how we understand effective response”.<sup>567</sup>

The LCO has used terminology in this discussion paper to distinguish “financial abuse” from the “misuse of a legal representative’s powers”. While financial abuse could encompass the definitions discussed above, the misuse of a legal representative’s powers may take place where an individual is well-intentioned but misunderstands or misapplies his or her roles and responsibilities. For instance, a legal representative could fail to consult adequately with an adult, mistakenly use his or her powers beyond those that are permissible or may not take important considerations into account in coming to a decision. The LCO heard in our preliminary consultations that this type of misuse occurs and the outcomes may be detrimental. The mechanisms that have been employed to remedy resulting problems can be quite different from addressing financial abuse. However, many of the safeguards that are discussed here can be helpful in both situations.

There is a dearth of literature on the prevalence of financial abuse in Canada. In a 2011 study by the National Initiative for the Care of the Elderly (NICE) surveying 267 older adults living in the community across Canada, 9.7 per cent of respondents reported having experienced financial abuse. Of those who experienced financial abuse in the preceding 12 months, 7.7 per cent reported experiencing it every or almost every day, and 34.6 per cent reported experiencing it many times. The abuser who financially mistreated the older adults lived with 16.1 per cent of them for at least one experience. Although NICE’s questions focused on the past 12 months, respondents said that they had experienced abuse throughout the life course.<sup>568</sup> Where an adult experiences diminished capacity, there is an added concern that financial abuse could arise because the adult cannot effectively supervise a legal representative<sup>569</sup> or informal supporter. Cognitive impairment has been found to be an especially potent predictor of elder

abuse<sup>570</sup> and incidents of abuse and other forms of financial mismanagement by attorneys and guardians of persons with diminished capacity are well-known to take place.<sup>571</sup>

This section reviews possible safeguards against financial abuse and the misuse of a legal representative's powers. It begins by presenting the areas of vulnerability to abuse in RDSP transactions. Next, it reviews Ontario's existing commitments to secure the safety of adults with mental disabilities. It concludes with a summary review of additional safeguards that are used across jurisdictions for prevention, monitoring and detection, and intervention.

## ***2. Areas of Vulnerability in RDSP Transactions***

The RDSP can attract significant wealth. Before investment income, private contributions to an RDSP can total \$200,000 and the federal government's grants and bonds can total \$70,000 and \$20,000 per beneficiary, respectively, depending on factors such as income and contributions. An RDSP is to be operated for the benefit of the beneficiary alone.<sup>572</sup> Acknowledging the potential for financial abuse and mismanagement, the RDSP was designed to incorporate safeguards. Payments from the RDSP are mandatory beginning at age 60. The Minister of Finance's Expert Panel recommended that LDAPs commence at a certain point in time due to the "legitimate concern that the tax deferral benefit of [the RDSP] not be abused by permitting a multi-generational transfer of tax deferred income".<sup>573</sup> This could occur if the plan holder restricts or the beneficiary foregoes payments so that another person receives a refund of contributions after the beneficiary's death.<sup>574</sup> When an RDSP beneficiary dies all government grants and bonds from the preceding 10 years must be repaid and any remaining funds are to be paid out according to the beneficiary's own instructions in a will or intestacy rules.<sup>575</sup>

Additionally, LDAPs are to be calculated on a strict formula that is intended to distribute the beneficiary's funding evenly over the course of his or her remaining lifetime.<sup>576</sup> In recommending this safeguard, the Expert Panel explicitly took into account that "permitting the Beneficiary or Guardian unlimited access to the [RDSP] might result in the Plan being exhausted long before the Beneficiary's lifetime needs had been fulfilled".<sup>577</sup> Other safeguards include a prohibition on returning private contributions once they are deposited into an RDSP and the requirement to notify the beneficiary when a qualifying family member is appointed as a plan holder.<sup>578</sup>

The RDSP also contains safeguards to ensure that a plan is in compliance with the ITA. Financial institutions must notify ESDC and the CRA if they are aware that the RDSP is or is likely to become non-compliant.<sup>579</sup> An RDSP does not comply with plan conditions if it is not "operated exclusively for the benefit of the beneficiary under the plan" or if it is not operated in

accordance with its terms.<sup>580</sup> One of those terms is that DAPs must be paid to the beneficiary.<sup>581</sup> As mentioned above, unless the beneficiary or a person who is legally authorized to act for the beneficiary gives a valid receipt and discharge for payment, the RDSP issuer cannot be certain it has complied with the plan and the ITA. An RDSP would also be non-compliant if a plan holder who is not the beneficiary is not a qualifying person under the ITA.<sup>582</sup> If there is a dispute as to the eligibility of a plan holder, the holder must use best efforts to avoid a reduction in the fair market value of the RDSP until the dispute is resolved.<sup>583</sup> The CRA's Registered Plans Directorate has a Compliance Division that conducts random audits and follows up with financial institutions to address any discrepancies that are uncovered or reported. However, it does not have the resources to monitor every RDSP financial transaction, nor is it the division's mandate.<sup>584</sup>

The greatest areas of vulnerability in RDSP transactions are by far when a plan holder requests one-time DAP withdrawals and in the management of funds that have been paid to the RDSP beneficiary. As mentioned previously, withdrawing funds from an RDSP before mandatory lifetime payments begin carries penalties that can significantly reduce the amount of government grants and bonds in the RDSP. Furthermore, should the scope of a legal representative's powers extend to assisting an RDSP beneficiary with payments, the risks of financial abuse and mismanagement could be substantial. Should the scope of a legal representative's authority not be extended in this manner, however, the absence of a formal arrangement to assist adults with diminished capacity for general financial management could likewise impact their vulnerability. Addressing these major areas of vulnerability – requesting DAPs and managing payments – should be remembered as the object of the following discussion on safeguards against abuse.

### ***3. Ontario's Current Framework to Ensure the Security of Adults with Mental Disabilities***

#### **a. Introduction**

There are a number of federal and provincial laws and policies that could safeguard the interests of RDSP beneficiaries in Ontario. This section briefly summarizes the broader legislative and policy framework of the *Criminal Code* and privacy legislation, among others, followed by a thorough review of existing safeguards under the SDA.

#### **b. The Broader Legislative and Policy Framework**

##### **The Criminal Code**

The *Criminal Code*<sup>585</sup> makes financially abusive behaviour an offence. Relevant provisions include those addressing theft by a person holding a POA, misappropriation of money held

under direction, criminal breach of trust, extortion and fraud.<sup>586</sup> The sentencing provisions of the *Criminal Code* also deem aggravating factors to include evidence that an offence was motivated by bias, hate or prejudice based on age or disability as well as abuse of a position of trust or authority in relation to the victim.<sup>587</sup>

However, many commentators have noted that the criminal justice system does not provide a comprehensive response to issues of abuse.<sup>588</sup> Survivors of abuse may be reluctant to report an offense, particularly if the abuser is a family member who could face criminal penalties. Delays in the administration of justice can mean that survivors may not see results in a timely fashion.<sup>589</sup> Furthermore, persons with disabilities face barriers in accessing the criminal justice system, despite a number of initiatives intended to improve access, such as victim services agencies.<sup>590</sup> Although the *Criminal Code* can have a deterrent effect, many efforts to address financial abuse concentrate on checks and balances to prevent and detect abuse.

### **Ontario's Strategy to Combat Elder Abuse**

The Ontario Seniors' Secretariat has developed a *Strategy to Combat Elder Abuse*, which is being implemented in partnership with the Ontario Victims Services Secretariat, Ministry of the Attorney General, and the Ontario Network for the Prevention of Elder Abuse. The Strategy is a comprehensive, non-legislative scheme that focuses on the coordination of community services, training for front-line staff and public education. Elements of the Strategy include a province-wide, toll-free victim support line and a network of Elder Abuse Regional Consultants, providing resources for community and justice system service providers and local elder abuse networks.<sup>591</sup>

### **Long-Term Care Homes Act, 2007**

Many older adults who are living with disabilities may be residents of long-term care facilities. The *Long-Term Care Homes Act, 2007* contains important protections to detect and intervene in cases of financial abuse. Long-term care homes are required to adopt a zero tolerance policy and ensure that it is complied with through a program for preventing abuse and neglect; procedures for investigating and responding to alleged, suspected or witnessed abuse; and consequences for those who abuse or neglect residents, among other measures. Any person who has reasonable grounds to suspect harm or a risk of harm from abuse or improper or incompetent treatment of a resident must report them same. This mandatory reporting also includes suspected misuse or misappropriation of a resident's funds. The *Long-Term Care Homes Act, 2007* contains provisions for inspections following such a report as well as whistleblower protections.<sup>592</sup>

### **Privacy Laws**

In Ontario, the collection, use and disclosure of personal information is regulated by federal, provincial and municipal statutes. Which statute applies can be a complex issue that depends on factors, including the nature of information and types of organizations involved.<sup>593</sup> The federal *Personal Information Protection and Electronic Documents Act* (PIPEDA)<sup>594</sup> applies to banks in Ontario. Provincially regulated financial institutions include credit unions. In Ontario, credit unions are regulated by the *Credit Unions and Caisses Populaires Act, 1994* (CUCPA).<sup>595</sup>

Generally, a person's consent is required to disclose personal information that is in someone else's control. However, there are exceptions where a financial sector representative suspects financial abuse.<sup>596</sup> PIPEDA specifically permits disclosure "to an investigative body, a government institution or a part of a government institution" where "the organization has reasonable grounds to believe that the information relates to a breach of an agreement or a contravention of the laws of Canada, a province or a foreign jurisdiction that has been, is being or is about to be committed".<sup>597</sup> This language "captures circumstances where a crime has been committed or is about to be committed. The broad language does not include circumstances where an organization believes a crime *may* be committed and there is no notion of risk imbedded into the subsection".<sup>598</sup>

Disclosure may be permitted under PIPEDA when "required by law" or when a person needs the information "because of an emergency that threatens the life, health or security of an individual".<sup>599</sup> CUCPA also includes an exception to confidentiality that allows the disclosure of information to a person who is entitled to information by law.<sup>600</sup> As discussed below in this section, the SDA expressly allows the OPGT to access records in the custody or control of a range of individuals and organizations, including a bank, credit union or other financial institution, where it is investigating an allegation that an adult is incapable of managing property and that serious adverse effects are occurring or may occur.<sup>601</sup>

### **Financial Sector Practices**

Financial institutions encounter issues of financial abuse and the misuse of a legal representative's powers with some regularity. Some banks have developed internal training programs to assist staff in detecting and responding to abuse. For instance, the Royal Bank of Canada has training materials to identify the inappropriate use of a POA. The materials advise staff of potential responses including blocking transactions, cancelling credit cards and, as a last resort, informing the police, the OPGT or other third parties.<sup>602</sup>

Complaints that are made against financial institutions with respect to transactions entered into with legal representatives may be resolved internally or elevated to external agencies, such

as the Ombudsman for Banking Services and Investments. The OBSI often hears complaints regarding financial abuse. Cases have included circumstances where an adult has multiple POAs or a family member misappropriates an adult's funds through informal supports, such as co-signing for a mortgage or loan.<sup>603</sup> However, the OBSI strictly arbitrates disputes between financial institutions and customers. Disputes between an RDSP beneficiary and his or her legal representative that do not involve a breach of a financial institution's procedures or industry standards do not qualify for relief.<sup>604</sup>

### **c. Ontario's Current Framework under the *Substitute Decisions Act, 1992***

#### **Formalities in the Appointment Process**

The SDA contains robust safeguards against financial abuse at the stages of prevention, monitoring, detection and intervention. Formalities in the process to appoint an attorney or a guardian for property include several preventative measures. In the case of external appointments, the courts and the OPGT play an important supervisory role in screening and approving appointments. In determining the suitability of a proposed guardian, the courts and the OPGT must approve the proposed guardian's plan to manage the adult's finances, and consider his or her closeness to the adult as well as the adult's wishes.<sup>605</sup> They may impose conditions on the guardian as they see fit, which can include a requirement to post security.<sup>606</sup>

Powers of attorney are personal appointments that are executed privately. Without the benefit of the OPGT or court oversight, the SDA requires other formalities to create a POA. The threshold for capacity to give a continuing POA for property is itself a safeguard against financial abuse and, in Ontario, the threshold for capacity is stringent relative to certain other Canadian provinces. A POA must also be executed in the presence of two witnesses, each of whom must sign the POA. The SDA prohibits certain persons from acting as witnesses, including minors, an adult's child and a spouse or partner of the adult or the attorney.<sup>607</sup> An adult can stipulate conditions and restrictions in the POA, including that it should come into effect upon a specified event.<sup>608</sup>

An adult can name any person as an attorney in a POA. However, a judge and the OPGT are restricted in whom they can appoint as a guardian of property. A judge is prohibited from appointing a person who could have a conflict of interest in managing the adult's property because he or she "provides health care or residential, social, training or support services to an incapable person for compensation", unless such a person is the adult's spouse, partner or relative, among others.<sup>609</sup> The OPGT can appoint the adult's spouse or partner, relative, attorney under a limited POA or a trust company if the adult's spouse or partner consents.<sup>610</sup>

A court, the OPGT or the adult can name one or more substitute decision-makers.<sup>611</sup> If more than one person is appointed, they can make decisions jointly or their responsibilities can be separated. The OPGT's *Power of Attorney Kit*, explains that giving attorneys the opportunity to make decisions separately guards against interruptions in representation that can be expected from temporary absences, such as sickness or vacations, or for unexpected reasons.<sup>612</sup> A substitute attorney can be named in a POA to avoid an adult being "left with no one to manage [his or her] financial affairs".<sup>613</sup> Having multiple attorneys in a POA can also safeguard against it being automatically terminated where an attorney is removed by allowing for a successor to continue to act.<sup>614</sup>

### **Roles and Responsibilities of Substitute Decision-Makers**

Once a substitute decision-maker is appointed for an adult who has been found to be incapable, he or she must fulfill the duties set out in the SDA that were discussed above in Section C, subject to any specified conditions. These duties include various activities to be undertaken in the decision-making process, such as encouraging an adult's participation and making authorized expenditures. If substitute decision-makers breach these duties, they can be held liable for damages, unless the court is satisfied that they acted honestly, reasonably and diligently, and decides to relieve them from all or part of the liability.<sup>615</sup>

The OPGT has published several information booklets on the duties and powers of substitute decision-makers, which it has made available to the public on the Ministry of the Attorney General's website.<sup>616</sup> The OPGT and the courts also provide an ongoing source of support to substitute decision-makers seeking guidance about fulfilling their role. A substitute decision-maker, dependent, the OPGT or any other person with leave, may apply to the court for directions on any question arising in connection with a decision-making arrangement.<sup>617</sup> The OPGT also has authority to mediate a dispute that arises between substitute decision-makers relating to the performance of their duties.<sup>618</sup>

### **Accountability, Detection and Intervention**

Substitute decision-makers must maintain accounts of all transactions involving the adult's property according to detailed requirements in the Regulations on *Accounts and Records of Attorneys and Guardians*.<sup>619</sup> An application may be made to the courts to "pass" the substitute decision-maker's accounts in order to permit those who are concerned about the administration of the adult's property to have it reviewed by an external arbiter.<sup>620</sup> An adult and a substitute decision-maker are entitled to make such an application, as are substitute decision-makers for personal care, an adult's dependent, the OPGT, the Children's Lawyer, a judgment creditor or any other person granted leave of the court.<sup>621</sup>

The court has broad powers to safeguard an adult's property during the passing of accounts, including suspending the powers of a substitute decision-maker, appointing the OPGT or another person pending the determination of the application and ordering that a POA be terminated.<sup>622</sup> A court may also terminate, suspend or vary a substitute decision-making arrangement through a variety of other means.<sup>623</sup> For instance, an adult who is subject to a statutory appointment can apply to the court to terminate the arrangement.<sup>624</sup>

The OPGT has an obligation to investigate all allegations made by any person that an adult is incapable of managing property and that serious adverse effects are occurring or may occur.<sup>625</sup> A member of the public, a bank employee, a government agency or any other individual or organization could make such an allegation. "Serious adverse effects" include the "[l]oss of a significant part of a person's property, or a person's failure to provide necessities of life for himself or herself or for dependents".<sup>626</sup> If the results of the investigation demonstrate reasonable grounds that an adult is incapable and that a temporary guardian of property is required to prevent serious adverse effects, the OPGT must apply to the court to be named as a temporary guardian. The court can suspend the powers of an attorney under a continuing POA during the term of the temporary guardianship.<sup>627</sup> The SDA gives the OPGT significant discretion in taking steps to conduct its investigation. During the investigation, the OPGT is entitled to access any records relating to the adult in the custody or control of a range of individuals and organizations, including a bank, credit union or other financial institution.<sup>628</sup>

The OPGT maintains a Register of all statutory and court appointed guardians. Information that must be recorded for each guardian includes the contact information of the adult and guardian, restrictions on the guardian's authority and the date the guardianship took effect, changed or was terminated.<sup>629</sup> The OPGT does not have a register for other types of legal representatives for financial management, including POAs and trusteeships established in the income support and social benefits sectors.

#### ***4. Possible Additional Safeguards for RDSP Beneficiaries***

##### **a. Introduction**

Ontario's existing safeguards against financial abuse and the misuse of a substitute decision-maker's powers are relatively comprehensive when compared to other Canadian jurisdictions. Nevertheless, in the context of the LCO's larger project on *Legal Capacity, Decision-Making and Guardianship*, many stakeholders raised concerns that existing mechanisms have not been sufficiently effective to protect vulnerable adults. In particular, the LCO learned of a widespread perception that the current framework has not been adequately implemented. For instance, court-based mechanisms to oversee the fulfillment of a legal representative's duties, including

requesting directions or passing accounts, may be too costly to access for many individuals. Additionally, the LCO learned in this project that there may be limitations on the OPGT's mediation services, which are restricted by resources and cannot solve disputes unless the substitute decision-makers agree to do so voluntarily. As the guardian of last resort, the OPGT also cannot mediate disputes if there is a risk that it will be called upon to act for the adult who is at the centre of the dispute.<sup>630</sup>

However, the LCO has not yet had the benefit of thorough research and consultations for the purposes of this discussion paper to assess the overall effectiveness of Ontario's current framework. The LCO has commissioned a research paper in the larger project that analyzes mechanisms for monitoring and accountability for substitute decision-making.<sup>631</sup> We will review relevant substantive provisions in the SDA and their implementation in the course of our larger project but cannot do so here. We also will not consider proposals for reform that are currently before the Ontario legislature in this discussion paper.<sup>632</sup>

Certain existing provisions in the SDA protect members of the public, generally, such as the OPGT's powers of investigation. The OPGT would be required to investigate any allegation that an RDSP beneficiary is incapable of managing property and that serious adverse effects are occurring or may occur. Other safeguards contained in the SDA could be incorporated into an alternative process to appoint a legal representative for RDSP beneficiaries by referring to the SDA directly or adapting them. This will depend on how an alternative process is established and implemented. Our review of possible safeguards in this section is limited to supplemental measures that could complement Ontario's existing framework.

With respect to the possible additional safeguards presented below, only those that could meet the benchmarks for reform in the special context of the RDSP are discussed, excluding options that would not be cost-effective or would be difficult to use. They are guided by the basic policy objective that "a safeguard should be adopted only if it is thought there is a clear justification for it, that it will be likely to achieve the purpose for which it is adopted and that it will not have unacceptable side effects".<sup>633</sup>

The possible additional safeguards for RDSP beneficiaries are categorized in terms of formalities in the appointment process; roles and responsibilities of legal representatives; and accountability, detection and intervention. There is some overlap in these categories and they should be considered in relation to each other. For example, a requirement that legal representatives sign an acknowledgement accepting an appointment with information on their duties, as a formality, may improve compliance because a better understanding of the law could reduce unintentional misuse of an appointment.

The categories of safeguards must also be balanced with each other. Some degree of formality in the appointment process is necessary, such as screening by witnesses, the courts, the OPGT or another government agency. Formalities in the appointment process serve to ensure that an appointment was not made in circumstances of fraud or undue influence, confirm an adult's wishes and increase knowledge of the implications of an appointment for the adult, his or her legal representative and other interested parties.<sup>634</sup> However, formalities can be costly and cumbersome, and they may not address the potential that an appointment can be abused once it is in effect, for instance, where there is a conscious choice to divert funds. As explained in the McClean Report, "[i]f safeguards are needed to prevent this type of misuse of authority, it will require the setting up of mechanisms to supervise the agent".<sup>635</sup> The LCO's focus here is on balanced measures for sustained protection during and after the appointment process from preventative checks and balances to intervention, where appropriate.

## **b. Possible Additional Safeguards for RDSP Beneficiaries**

### **Formalities in the Appointment Process**

**Provision of Mandatory Information:** Information about guardianship and POAs is fairly accessible for those who seek it out. The Ministry of the Attorney General and the Office of the Public Guardian and Trustee are a significant source of information for members of the public. Public legal education on these issues has also been undertaken by organizations such as the Advocacy Centre for the Elderly and the Ontario Network for the Prevention of Elder Abuse. However, the provision of information on substitute decision-making arrangements is not mandatory and may not be accessed equally by all persons affected by an appointment.

Mandatory forms and information can provide a minimum level of public legal education. There is no prescribed form for a POA in Ontario. The OPGT has disseminated a POA kit that adults can use as a template as have other organizations and financial institutions.<sup>636</sup> These POA kits can contain different information and some have been critiqued as inaccurately representing the law. For external appointments, there are standard forms that must be used in the courts and to apply to replace the OPGT as a statutory guardian.<sup>637</sup> However, these forms contain scant information on the requirements, implications and risks of an appointment.

Some jurisdictions have mandatory forms containing explanatory notes that must be accessed in order to validate an appointment. For instance, in the Northwest Territories, a standard form POA includes explanatory notes that must be read before signing the document.<sup>638</sup> Forms can also be included in a package with more comprehensive information.<sup>639</sup> This is the approach taken in Ontario's POA kit published by the Ministry of the Attorney General, although it is optional. The major concern with mandatory information is that it may not be adaptable to all

situations. Forms, in particular, could reduce flexibility to place conditions on an appointment.<sup>640</sup> In the case of the RDSP, this would be most evident if the scope of a legal representative's authority were expanded beyond that of a plan holder because any form would need to adapt to the wide range of decisions that could be made.

**Acknowledgement and Acceptance by the Legal Representative:** In Ontario's court and statutory appointment processes, proposed guardians are effectively screened by third parties, including through the submission of a management plan for an adult's finances. However, an attorney does not have to be notified of or consent to his or her appointment to validate a POA. Provinces, such as the Yukon and British Columbia, require that an attorney sign an acknowledgement of his or her acceptance of the appointment.<sup>641</sup> Other provinces include a section for attorneys to sign in their non-mandatory standard POA forms.<sup>642</sup> Requiring a legal representative for the RDSP to sign an acknowledgement of his or her appointment, whether through a personal or external appointment, could be a way to deliver mandatory information on his or her roles and responsibilities, including the scope of authority to act, duties to include the adult in decision-making activities and the standard of care.

### **Roles and Responsibilities of Legal Representatives**

**Prohibition on Conflict Transactions:** The SDA provides a set of positive obligations for how guardians must allocate an adult's assets, including a hierarchy of expenditures and guidance on the treatment of gifts and loans. These positive obligations also apply to attorneys under a continuing POA, if the grantor is "incapable of managing property or the attorney has reasonable grounds to believe that the grantor is incapable of managing property".<sup>643</sup> In some jurisdictions, there are also specific limitations on transactions that could give rise to a conflict of interest. For instance, the state of Queensland in Australia imposes a duty on attorneys acting in financial matters to avoid conflict transactions, unless they have been authorized in advance.<sup>644</sup> Conflict transactions could be prohibited through the inclusion of a clause that a legal representative cannot personally benefit from an RDSP beneficiary's funds. Alternatively, conflict transactions could be listed as prohibited expenses.

Conflict transactions can be difficult to define because a legal representative may derive some personal benefit, unavoidably, as an indirect effect of maintaining the adult's lifestyle.<sup>645</sup> For instance, in shared living arrangements between a spouse or child and an adult, an adult's funds could be used to pay for rent, food or household expenses. Regardless of any potential ambiguities, joint interests in a transaction should not be permitted where the consequences are detrimental to the beneficiary. The Queensland Law Reform Commission and the VLRC have recommended the adoption of measures to identify conflict transactions.<sup>646</sup> In Ontario, it is

unclear whether express provisions related to specific types of transactions would add significantly to what is already in place.

**Limits on Withdrawals and Spending:** Limits on the amount of funds spent in a given transaction or over a period of time have been incorporated into some jurisdiction's processes to appoint a legal representative. Community Living British Columbia provides an example. CLBC permits informal "agents" to manage direct payments on behalf of a person receiving individualized funding in an arrangement that is comparable to ODSP trusteeships. However, where a recipient's funding exceeds \$6,000 in a 12 month period, he or she must obtain formal assistance under a representation agreement.<sup>647</sup> Professor Nina Kohn has also proposed that there be mandatory advance notification to an adult at any time a legal representative enters into a "fundamental transaction" that could significantly alter the adult's lifestyle.<sup>648</sup> Requiring advance notice of routine services, such as paying bills, could be overly burdensome on a legal representative and may be of little benefit to the adult. Nevertheless, "in certain situations, communication after the fact may not be sufficient to protect a principal's interests and therefore consultation by the agent prior to undertaking an action should be the norm".<sup>649</sup>

In the case of the RDSP, where disability-related expenses could be quite high, it may not be appropriate to set an absolute limit on the amount of withdrawals or expenditures. However, safeguards could require consultation with the adult or the prior approval of a third party where withdrawals or expenses go beyond a specified limit or would fundamentally affect the beneficiary's interests. For instance, a plan holder could be required to provide notice to the adult and/or a third party in advance of requesting a one-time DAP withdrawal, since each DAP is an exceptional transaction.

### **Accountability, Detection and Intervention**

**Private Monitors:** A number of jurisdictions have adopted or recommended measures to supplement public supervision with private monitors or a duty to account to named individuals, such as family members. Following the recommendations of the Manitoba Law Reform Commission, Manitoba has enacted provisions that oblige attorneys to report their accounts upon the demand of any person named in the POA or to the nearest relative. Similar informal accounting provisions also exist in Saskatchewan, the Northwest Territories and Nunavut.<sup>650</sup> The Alberta Law Reform Institute's report, *Enduring Powers of Attorney: Safeguards Against Abuse*, recommended similar measures as a means to enable ongoing supervision without the necessity to apply to the courts for a formal accounting.<sup>651</sup> Mandatory notification to individuals such as family members or spouses could, however, raise concerns about an adult's rights to have personal information kept confidential.<sup>652</sup>

In British Columbia, there is a comprehensive system of private monitoring for representation agreements. The requirements to designate a monitor were discussed above in Chapter V.B, where it was noted that monitors have been used very frequently, even where they are not compulsory. The duties and powers of a monitor are extensive. Monitors must make reasonable efforts to assure that the representative is acting in good faith within the boundaries of the representation agreement. The monitor can require a representative to produce accounts and records if they suspect that he or she is not acting responsibly. If after reviewing the records, the monitor believes the representative is not in compliance with his or her duties, the monitor must inform the British Columbia Public Guardian and Trustee.<sup>653</sup> The LCO heard in our preliminary consultations that monitors also provide a source of ongoing advocacy support for adults in mediating disputes. Together, the adult, representative and monitor can work as a team in a manner that engages the adult's meaningful participation in decision-making activities.<sup>654</sup> The Queensland Law Reform Commission has stated its belief that private monitors are preferable to options involving the public review of accounts by a public guardian or tribunal, or a system of random audits.<sup>655</sup>

For the reasons stated in Section V.C, Eligibility and Availability of Legal Representatives, the LCO also asks whether organizations could be given a role as monitors, where an adult does not have a trusted personal contact.

**Mandatory Reporting:** In Ontario, guardians and attorneys are required to keep detailed records. However, they are not required to report their records for an accounting, except in situations where they are called upon to do so. In the income support and social benefits sectors, trustees in Canada and representative payees in the United States must report to a government agency annually or biannually.<sup>656</sup> The Newfoundland and Labrador legislation to appoint a designate for RDSP beneficiaries incorporates mandatory reporting to the Public Guardian and Trustee.<sup>657</sup> The LCO believes that if private monitors are a desirable option for reform, as discussed immediately above, reviewing mandatory reports could possibly be considered as one of their duties.

Experience with representative payees in the United States demonstrates that where a government agency is tasked with reviewing accounts, adequate resources must be available to implement that duty. Representative payees for social security funds must maintain and submit itemized records of funds received and purchases at least annually. The Social Security Administration has developed computerized procedures to review reports and they also perform targeted audits through periodic site visits.<sup>658</sup> However, detection of financial abuse remains a challenge:

...[O]btaining these reports, reviewing them, and following-up on delinquent reports is extremely time-consuming for staff...[S]taff expend considerable effort to obtain accountings, which sometimes required multiple mailings, telephone calls, and face-to-face meeting, and, in some instances, took several months to complete.<sup>659</sup>

Instances of financial abuse or misuse may also be difficult to identify in financial reports. As long as the total amount spent and saved equals or exceeds 90 per cent of the amount received, the SSA approves reports submitted by representative payees. The Social Security Advisory Board has found that “[s]ending, collecting, and reviewing this information is a large expenditure that yields little useful result in detecting misuse”.<sup>660</sup> Reid Weisbord has recommended that Congress create a private reporting program “wherein a concerned relative or friend volunteers to serve as a private watchdog without assuming the burdens and liabilities of a representative payee appointment”.<sup>661</sup> The United States Accountability Office has also recommended that outside organizations could volunteer to assist with monitoring.<sup>662</sup>

The Manitoba Law Reform Commission noted that in its own province, the Public Trustee should serve as a recipient of accounts as a last resort in the absence of a named private recipient. Given that the costs of reviewing accounts could be “enormous” for the Public Trustee, the Manitoba Law Reform Commission found “we believe that it would be inappropriate and, possibly, irresponsible for us to make such a recommendation”.<sup>663</sup>

**Periodic Review or Termination:** Under the SDA, a court or the OPGT can impose conditions on a guardianship arrangement.<sup>664</sup> These could include that it be reviewed after a specified period of time. In the Yukon, RAs expire at the earlier of three years or when an adult’s capacity declines as a safeguard against abuse. The LCO heard in its preliminary consultations that these provisions could possibly be limited in terms of their application to the RDSP.<sup>665</sup> The RDSP is a long-term savings vehicle that involves many years of decision-making for a legal representative. Even if the scope of a legal representative’s authority is limited to that of a plan holder, he or she may need to approve one-time DAP withdrawals and monitor investments throughout the lifetime of the RDSP. If a process to establish a legal representative for RDSP beneficiaries were restricted to a few years, it would require an adult to execute a new agreement at regular intervals, or seek an external appointment should his or her capacity decline. Additionally, representation agreements in the Yukon “are not for adults who have a degenerative disease like Alzheimer’s” or for those whose decision-making abilities fluctuate.<sup>666</sup> The Yukon example does, nevertheless, raise the question of whether mandatory periodic *review* of a legal representative’s appointment would be an effective safeguard that goes beyond an accounting of financial records to consider whether the arrangement is operating to the advantage of the beneficiary.

### **5. Summary of Options for Reform in the Safeguards against Financial Abuse and the Misuse of a Legal Representative's Authority**

This section has presented options for reform to safeguard RDSP beneficiaries against financial abuse and the misuse of a legal representative's powers. The RDSP incorporates some safeguards against abuse, but the greatest areas of vulnerability arising from RDSP transactions could be when a plan holder requests one-time DAP withdrawals and in the management of funds that have been paid to the beneficiary.

Ontario's safeguards against financial abuse and the misuse of a substitute decision-maker's powers are relatively comprehensive when compared to other Canadian jurisdictions. The province's broader legislative and policy framework includes the *Criminal Code*, Ontario's *Strategy to Combat Elder Abuse*, privacy laws and informal financial sector practices, such as the arbitration of disputes through the Ombudsman for Banking Services and Investments. The SDA contains robust formalities in the appointment process, provides support for substitute decision-makers in fulfilling their duties, and permits interested parties to hold substitute decision-makers accountable through the OPGT's investigations unit and court interventions. Existing safeguards under the SDA are listed in the left column of Figure 3, below.

The LCO has not yet had the benefit of thorough research and consultations for the purposes of this discussion paper to assess the overall effectiveness of Ontario's current framework. The LCO's larger project on *Legal Capacity, Decision-Making and Guardianship* will review relevant substantive provisions of the SDA and their implementation. Many of the existing safeguards in Ontario could be incorporated into an alternative arrangement to establish a legal representative for RDSP beneficiaries. In the context of our larger project, the LCO has learned from preliminary consultations that there is a widespread perception that the current framework has not been adequately implemented. Given that the RDSP attracts significant wealth, supplemental measures to safeguard RDSP beneficiaries are desirable. Additional possible safeguards are listed in the right column in Figure 3 below.

During the stage when an appointment is being formalized, whether through a personal or external appointment process, additional safeguards could include the provision of mandatory information and the requirement that a legal representative acknowledge and accept his or her duties. Both safeguards could be a way to deliver mandatory public legal education to RDSP beneficiaries and legal representatives on their roles and responsibilities, including the scope of authority to act, duties to include the adult in decision-making and the standard of care. As formalities in the appointment process, they could be incorporated into a mandatory form or informational booklet to be accessed equally by all persons affected by the appointment.

The SDA provides a set of positive obligations for how guardians and attorneys must allocate an adult's assets, including a hierarchy of expenditures. The LCO has proposed here that restrictions could also be placed on transactions that could give rise to a conflict of interest. In addition, limits on the amount of funds spent on a particular transaction or over a period of time could require advance consultation with the adult or a third party. For instance, a plan holder could be required to provide notice to a monitor before requesting a one-time DAP withdrawal, closing an RDSP or changing how the plan is invested.

A number of jurisdictions have adopted or recommended measures to complement public supervision with private monitors or a duty to account to named individuals, such as family members. Mandatory notifications could raise concerns about an adult's right to have personal information kept confidential. These concerns could be mitigated by allowing a beneficiary the opportunity to name the individuals who receive notice or through the appointment of a private monitor. In British Columbia, monitors have extensive duties and powers to oversee a representative, mediate disputes and otherwise advocate on an adult's behalf.

Monitors may also be the recipients of mandatory reporting. Mandatory reporting holds a legal representative accountable to an external party on an ongoing basis and provides a means to detect financial mismanagement. In Ontario, guardians and attorneys are required to keep detailed records. However, they do not report their records, unless the OPGT or the courts require them to do so. Mandatory reporting is quite common in the income support and social benefits sectors and experience in the United States demonstrates that it uses significant resources. The use of public resources could be minimized if a private monitor is delegated the responsibility to review mandatory reports.

The final safeguard against abuse and the misuse of a legal representative's authority considered in this discussion paper is that of periodic review or termination of a decision-making arrangement. Under the SDA, a court or the OPGT could stipulate that a guardianship arrangement be reviewed after a specified period of time. In other jurisdictions, such as the Yukon, alternative arrangements are terminated automatically after a number of years have passed or when an adult's capacity declines. Although automatic termination of an arrangement for the RDSP could pose problems because an adult may need assistance for the lifetime of the RDSP, this example from the Yukon raises the question of whether mandatory, periodic *review* of an appointment could ensure that it is operating to the beneficiary's advantage.

### QUESTIONS FOR DISCUSSION

42. *Are supplementary safeguards that complement Ontario's existing framework under the SDA needed in the context of the RDSP?*
43. *What additional measures should be implemented to safeguard RDSP beneficiaries against financial abuse and the misuse of a legal representative's powers?*

**FIGURE 3: POSSIBLE SAFEGUARDS AGAINST FINANCIAL ABUSE AND THE MISUSE OF A LEGAL REPRESENTATIVE'S POWERS**

EXISTING SAFEGUARDS UNDER THE SDA	POSSIBLE ADDITIONAL SAFEGUARDS
<p><b>Formalities in the Appointment Process</b></p> <ul style="list-style-type: none"> <li>• Third party oversight (court, government agency or witnesses)</li> <li>• Eligibility restrictions on guardians</li> <li>• Ability to appoint more than one substitute decision-maker</li> <li>• Optional conditions, such as time limitations and posting security</li> </ul> <p><b>Roles and Responsibilities of Substitute Decision-Makers</b></p> <ul style="list-style-type: none"> <li>• Specified duties, including consultation and a hierarchy of expenditures</li> <li>• Limited support from the OPGT and the courts on request</li> </ul> <p><b>Accountability, Detection and Intervention</b></p> <ul style="list-style-type: none"> <li>• Mandatory record keeping</li> <li>• Court-based accountings on request</li> <li>• Court-based intervention through suspension, termination or variation</li> <li>• OPGT investigations</li> </ul>	<p><b>Formalities in the Appointment Process</b></p> <ul style="list-style-type: none"> <li>• Provision of mandatory information to adults and legal representatives</li> <li>• Acknowledgement and acceptance of an appointment by the legal representative</li> </ul> <p><b>Roles and Responsibilities of Substitute Decision-Makers</b></p> <ul style="list-style-type: none"> <li>• Prohibitions on transactions that give rise to a conflict of interest</li> <li>• Limitations on withdrawals or spending by amount or significance</li> </ul> <p><b>Accountability, Detection and Intervention</b></p> <ul style="list-style-type: none"> <li>• Private monitors to supervise a legal representative and advocate for an adult</li> <li>• Mandatory reporting</li> <li>• Periodical review or termination</li> </ul>

## **VI. OPTIONS FOR REFORM**

### **A. Introduction**

The purpose of this project is to recommend a process to establish a legal representative for adults who experience diminished capacity to open an RDSP, decide plan terms and/or manage payments out of the RDSP. Making decisions for an RDSP is very demanding. The RDSP is a financial vehicle that is complex and it requires a plan holder to make educated choices through traditional investment instruments, such as mutual funds. Adults with mental disabilities seeking access to the RDSP may have a need for assistance in RDSP decision-making because their capacity to do so for themselves is diminished. Creating a process to establish a legal representative for RDSP beneficiaries would give them a more accessible alternative to Ontario's current framework to appoint a guardian, which can involve a complex, lengthy and expensive process. It would also seek to provide them with a less intrusive means to receive assistance by reducing the negative repercussions of guardianship on their well-being.

This section brings together the options for reform identified in each of the preceding chapters. It summarizes these options and discusses how they can be combined as well as implications for implementation.

Findings from the preceding chapters are referred to throughout this chapter and you are invited to consult them for further detail. Of particular importance are the benchmarks that the LCO has articulated based on objectives that the options for reform must meet to be effective (Chapter I.C.2). We propose that a process to establish a legal representative for RDSP beneficiaries would meet the following benchmarks:

1. Responds to Individual Needs for RDSP Decision-Making
2. Promotes Meaningful Inclusion in the Decision-Making Process
3. Ensures that Necessary Protections for RDSP Beneficiaries are in Place
4. Achieves Administrative Feasibility, Cost Effectiveness and Ease of Use, and
5. Provides Certainty to Legal Representatives and Third Parties.

Our summary of the options for reform, immediately below, also refers back to Figure 2, Options for Reform in the Choice of Arrangements. Figure 2 can be used as a visual aid and is located at the end of Chapter V.B on pages 90 to 91.

## **B. An Alternative Process to Establish a Legal Representative for RDSP Beneficiaries**

### ***1. Overview of the Options for Reform and Types of Appointment Processes***

Chapter V.B., Choice of Arrangements to Establish a Legal Representative for the RDSP, considered how the general arrangement to establish a legal representative for RDSP beneficiaries could be structured. It reviewed existing arrangements in decision-making laws, the law of trusts and the income supports and social benefits sectors. Each of these areas of the law has a process to designate a person or organization to assist adults with diminished capacity in managing their financial affairs. Based on that review, Chapter V.B presented several options that could be adopted in Ontario specifically for RDSP beneficiaries through the following overall appointment processes:

- personal appointments
- streamlined court process
- administrative tribunal hearing
- government agency administered

Personal appointments are widely perceived as preferable to external appointments through a court, administrative tribunal and government or other agency. Personal appointments permit adults who meet a level of capacity to proactively choose whom they would like to assist them and in what way. They are also private arrangements that can be cost-effective for the adult and legal representative, and require less support from government than external appointments.

External appointments generally apply to circumstances where an adult does not have a private arrangement, such as a POA, and the adult's challenges with decision-making are such that he or she cannot meet the threshold of capacity required for a personal appointment. The RDSP beneficiary could initiate an external appointment process him or herself, or another interested party could do so. A court, administrative tribunal or government agency could then appoint a legal representative for the RDSP based on an assessment of incapacity or on an adult's demonstrated need for assistance. Responding to an adult's need for assistance is widely perceived as less intrusive than an assessment for incapacity.

In Ontario, both personal and external appointments exist as options under decision-making laws. Adults can execute a POA or undergo a court-based or statutory capacity assessment if it appears they are in need of a guardian. Offering these two avenues to establish a legal

representative for the RDSP should be viewed as a possible combination in the options for reform.

The LCO analyzed personal and external appointment processes that could potentially meet the benchmarks for reform. Many of these included arrangements available in Canadian provinces and territories that the federal government recognized as having instituted streamlined processes or other arrangements that could address the concerns of RDSP beneficiaries in the Economic Action Plan 2012.<sup>667</sup> The arrangements reviewed in this discussion paper consist of special limited powers of attorney, supported and co-decision making arrangements, representation agreements, trusts and representative payees for income supports (often called “informal trustees”).

It is important to know that many of these arrangements could be established through both a personal and an external appointment process.<sup>668</sup> This should be recalled in reading through the options for reform. Co-decision making arrangements and representative payees for income supports are an exception. They are only established through an external appointment, as discussed below.

The LCO has identified options for reform that mirror the existing arrangements, listed above, with some amendments. We do not make any specific recommendations in this discussion paper. Rather, we outline several options for reform with a view to receiving feedback from the public. The options for reform reflect our cursory findings on how a given process would need to be implemented in the Ontario context.

Bearing in mind these general observations, the options for reform are briefly explained in the next section and presented in Figure 4, Options for Reform by the Type of Appointment Process. They are the following:

- OPTION 1:** A private authorization granted by an adult who meets the common law threshold for capacity.
- OPTION 2:** A private authorization granted by an adult who meets non-cognitive criteria, such as the communication of desire and preferences.
- OPTION 3:** A private authorization granted by an adult who meets the common law threshold for capacity and who only needs support to make decisions for him or herself.

**OPTION 4:** A self-designated trust created by an adult who meets the common law threshold for capacity.

**OPTION 5:** An appointment made by the Superior Court of Justice if its mandate were expanded to facilitate an “alternative course of action” to guardianship.

**OPTION 6:** An appointment made by the Consent and Capacity Board if its mandate were expanded.

**OPTION 7:** An appointment made under the Superior Court of Justice’s jurisdiction over trusts.

**OPTION 8:** An appointment made at a government agency through the approval of a deed of trust.

**OPTION 9:** An appointment made at a government agency in a new process as defined by the government.

## ***2. Options for Reform by the Type of Appointment Process***

### **a. Personal Appointments**

**Example:** Joan experiences challenges with her financial affairs and cannot meet the threshold of capacity necessary to execute a POA for property in Ontario. She can communicate a desire to have her trusted friend Paula assist her and make decisions on her behalf with respect to an RDSP. She can also demonstrate her preference to receive the maximum allowable government grants and bonds. Joan could possibly appoint Paula as her legal representative for the RDSP.

The above example illustrates the kind of circumstances that could be appropriate for one of the options for reform based on a personal appointment process (Option 2). Option 2 would permit an adult to appoint a legal representative based on factors such as the expression of desire and preferences, and the existence of a relationship of trust.

There are also other personal appointments in the options for reform. In the LCO’s preliminary consultations, one of the goals for reform that stakeholders identified is the acceptance of a threshold for capacity that is lower than that which is necessary to grant a POA for property in Ontario under the *Substitute Decisions Act, 1992*. Stakeholders reported that this threshold is unattainable for many adults with mental disabilities seeking access to the RDSP. Therefore, all of the personal appointments considered as options for reform adopt a lower threshold for capacity. These thresholds are defined by either the common law standard or non-cognitive criteria.

Adopting the common law definition of capacity would allow an adult to appoint a legal representative for the RDSP where he or she has the ability to understand the nature and effect of the appointment. A personal appointment using the common law definition could be a decision-making arrangement, such as a POA, as indicated in Option 1. An adult who can meet this threshold for capacity could also create a self-designated trust (Option 4). Trusts are somewhat analogous to a legal representative for property management insofar as the trustee is a fiduciary who makes decision about a person's property. Several stakeholders in the LCO's preliminary consultations suggested that a trust could respond appropriately to the challenges of RDSP beneficiaries.

A process based on the common law definition of capacity could also be available to those adults who can make decisions for themselves with assistance (Option 3). Option 3 is modeled on supported decision-making arrangements. Supported decision-making arrangements formalize the role of informal supports that adults with diminished capacity regularly access to assist them. A supporter may be entitled to undertake several activities, including accessing confidential information, giving advice, communicating an adult's wishes and endeavoring to ensure that his or her decisions are implemented. However, the ultimate seat of decision-making authority remains with the adult, not the supporter. Supported decision-making agreements have not been used or recommended for complex financial transactions. They could cause uncertainty in the context of the RDSP because a supporter's help would need to be sufficient to enable each adult to enter into a contract with a financial institution him or herself.

In our preliminary consultations, the LCO heard that certain RDSP beneficiaries might not be able to meet the common law threshold for capacity. The common law threshold for capacity to execute an arrangement, such as a POA or a self-designated trust, is low relative to the test for capacity to manage property under the SDA. However, it still requires that the grantor is able to understand and appreciate basic information about the nature and consequences of an attorney or trustee's powers. Stakeholders reported that this threshold could be unattainable for the adults most directly affected by the LCO's project because it is acknowledged that they experience difficulties in navigating the complex rules surrounding the RDSP. The common law threshold for capacity could be effectively lowered further if the scope of a legal representative's powers was restricted to that of a partial plan holder, who does not have authority to decide the timing and amount of one-time withdrawals or the management of funds that have been paid out of the RDSP. This is because those two areas of decision-making for the RDSP (requesting one-time withdrawals and managing funds that have been paid out of the RDSP) contemplate more complex transactions than opening a plan, deciding investments and permitting contributions (see Section C below).

As illustrated in the example above, a lower, non-cognitive definition of capacity could be based on an adult's ability to communicate a desire to appoint a legal representative as well as factors such as the demonstration of preferences and the existence of a trusting relationship (Option 2). Framing the definition of capacity in this manner reflects a social policy decision to extend personal appointments to adults with significant mental disabilities who may be able to communicate their wishes and values in a way that a trusted person can understand. However, it raises concerns that there could be an increased risk of financial abuse because the definition of capacity is lower and substantively different from traditional cognitive tests under Ontario's current framework and the common law.

If a process to establish a legal representative for RDSP beneficiaries were created as any of the above personal appointments, it would require the acceptance of a definition of capacity that is less stringent than that required to grant a POA for property under the SDA. This could have great normative value for adults with mental disabilities and those who support them. However, at this stage in the LCO's project, there does not appear to be sufficient evidence to demonstrate that one threshold for capacity, in particular, would clearly be flexible enough to meet the needs of RDSP beneficiaries in Ontario. There is substantial diversity in the persons seeking to participate in the RDSP, including persons with developmental, psychosocial and cognitive disabilities. Any future recommendations for reform must reflect the lived experience of RDSP beneficiaries to be implementable. Consequently, more information will be required to understand whether a personal appointment process would appropriately address the subject matter of this project in the Ontario context.

#### **b. Streamlined Court Process**

**Example:** Joan experiences challenges with her financial affairs and would like Paula to assist her to participate in the RDSP. Together, they discuss drafting a personal appointment but they do not believe that Joan would be able to meet the threshold for capacity necessary to execute a personal appointment. Joan has a demonstrated need for assistance with RDSP decision-making but does not need a guardian to manage all of her property. Joan and Paula meet with a staff member at a community organization who helps them complete an application to establish a trust for Joan's RDSP with Paula acting as her trustee. The community organization assists them in filing the application at the Superior Court of Justice for a judge's approval.

The above example illustrates Option 7, available through a streamlined court process. Under Option 7 a desk application could be used to prepare a deed of trust for a judge's approval at the Superior Court of Justice. The Superior Court of Justice decides matters respecting the administration of trusts under the common law and statutes, such as the *Trustee Act*, *Rules of Civil Procedure* and *Variation of Trusts Act*.

The Superior Court of Justice also has jurisdiction to decide applications for guardianship under the SDA and, for that purpose, they are required to consider whether an alternative course of

action could meet an adult's needs that does not require a finding of incapacity. Appointing a legal representative for the RDSP could be one such alternative (Option 5). However, little is known about what alternative courses of action are acceptable under the SDA. The statutory procedure that engages the court's jurisdiction is an application for *guardianship* and not for alternative relief. Under a strict interpretation of the SDA, the court does not have authority to facilitate alternative courses of action outside of an application for guardianship. As a consequence, a court appointment process under Option 5 would require the expansion of the Superior Court of Justice's jurisdiction, possibly through an amendment to the SDA or the enactment of a standalone statute. Option 5 could also build on the Court's experience with applications for summary disposition under the SDA. Summary disposition allows for an application to be decided without a hearing before a judge.

As mentioned above, an external appointment process could include the establishment of different types of legal representatives. Co-decision making is discussed in this section because it is administered through the courts in two Canadian provinces. It occurs only as an external appointment because it is intended for adults with impaired capacity, which could call into question their ability to personally appoint a responsible person.<sup>669</sup> Co-decision making is a less restrictive alternative to guardianship that is available to adults who can make decisions with assistance. It strongly resembles supported decision-making arrangements, discussed above, but differs insofar as a co-decision maker shares legal authority to make choices together with an adult. If a contract were signed at a bank by either the adult or the co-decision maker alone, it may be voidable. This gives co-decision making an added degree of formality for third parties. Nevertheless, like supported decision-making arrangements, co-decision making could cause confusion and uncertainty if used for complex financial transactions because, although decisions must be made jointly, they are deemed to be that of the adult whose capacity is at issue.

For any of the above court-based processes to be cost-effective, speedy and accessible, enhanced support would be required to assist adults and their proposed representatives in preparing an application at the front end. This could reduce legal costs associated with a hearing and limit the court's role to approving completed documents. A government agency could be charged with administering this support. Empowering community networks to do so could also be a cost-effective and private option, as shown in the example relating to Option 7, above.

### **c. Administrative Tribunal Hearing**

**Example:** Joan experiences challenges with her financial affairs and would like Paula to assist her to participate in the RDSP. Together, they discuss drafting a personal appointment but they do not believe that Joan would be able to meet the threshold for capacity necessary to execute a personal appointment. Instead, they complete an application to the Consent and Capacity

Board to have Paula appointed as Joan's legal representative. They appear at a hearing before the Consent and Capacity Board in-person.

This example illustrates circumstances in which an administrative tribunal could hear an application to appoint a legal representative for the RDSP (Option 6). As with all other external appointments, different types of legal representatives could be appointed through this process and it could be initiated by the adult or another person.

The CCB is Ontario's administrative tribunal with expertise in issues of capacity and decision-making. The CCB's mandate includes creating, amending and terminating substitute decision-making arrangements for incapable adults in the area of health care. This could be extended to the appointment of a legal representative for RDSP beneficiaries as a less costly and more accessible alternative to the courts. However, due to the CCB's resource and operational constraints, this option would be challenging to implement without significant changes to the CCB's mandate and appropriate resources, which the Ontario government may not have at present.

#### **d. Government Agency Administered**

**Example:** Joan experiences challenges with her financial affairs. Paula would like to establish an RDSP for Joan's benefit. Paula contacts a staff member at a government agency to tell them of her desire to assist Joan by acting as a legal representative for the RDSP. The staff member meets with Joan and Paula to determine if it would be appropriate to appoint Joan and to help them with the required documentation.

The example above is based on appointment processes that exist in the income supports and social benefits sectors for programs such as the Ontario Disability Support Program, Canada Pension Plan and Old Age Security. An adult or another person could similarly apply to a government agency to appoint a legal representative for an RDSP beneficiary (Options 8 and 9).

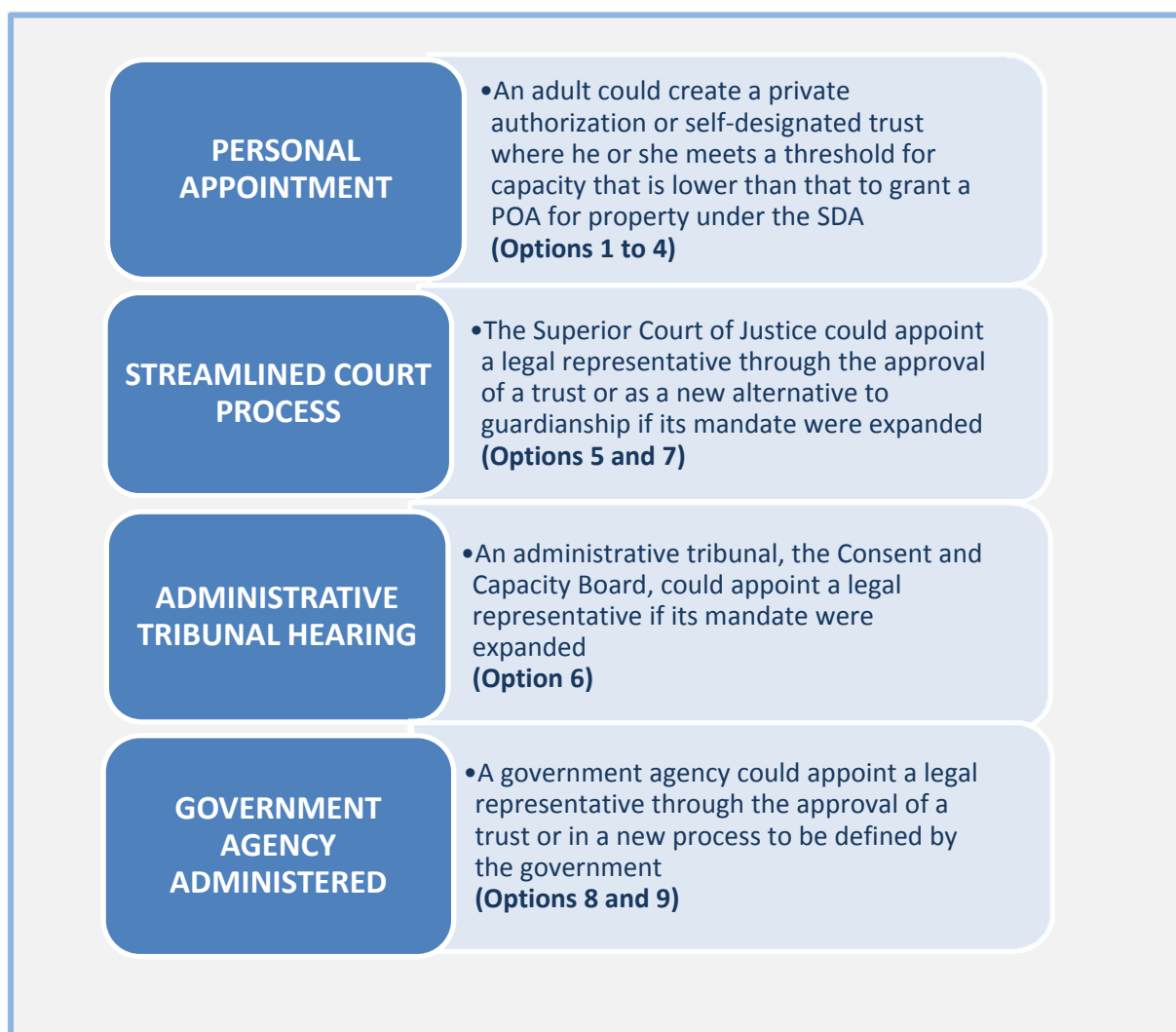
Government agencies are regularly called upon to appoint a person or organization to manage an adult's income supports and social benefits. In Ontario, the Ministry of Community and Social Services has expertise in administering these appointments but only for recipients of the ODSP and Ontario Works. Option 8 would enable a staff member to help draft and approve a deed of trust appointing a legal representative for an RDSP beneficiary. In contrast, Option 9 would be based on a process created by the government, specifically to address the issues raised in this project.

Option 9 could be modeled on existing appointment processes in the income supports and social benefits sectors. For instance, an ODSP trustee can be appointed based on an informal assessment of the adult's need for assistance in managing his or her income support according

to enumerated factors to be taken into consideration. The appointment process for the CPP and OAS requires evidence from a licensed medical practitioner that an adult is incapable. Each of these processes stipulates the roles and responsibilities of trustees, requires annual or biannual accounting, and contains other safeguards against abuse and the misuse of a legal representative's powers. A comparable process could be designed for the RDSP in a manner that is in keeping with the benchmarks for reform.

A government agency administered process would rely entirely on public administration. It would be resource intensive and would necessarily entail the allocation of additional funding, which might not be feasible given the current economic climate in Ontario.

**FIGURE 4: OPTIONS FOR REFORM BY THE TYPE OF APPOINTMENT PROCESS**



### **C. Safeguards, Roles and Responsibilities and Eligibility**

There are several key issues that merit attention regardless of the choice of arrangement to establish a legal representative, discussed above. These include

- safeguards against abuse and the misuse of a legal representative's powers (Chapter V.E)
- ensuring an adult's meaningful inclusion in the activity of decision-making (Chapter V.C.2)
- protections against liability for legal representatives and third parties (Chapter V.C.3)
- the scope of a legal representative's authority to act as a full or partial plan holder, or to assist a beneficiary in managing funds that have been paid out of the RDSP (Chapter V.C.4); and
- whether community organizations could act as legal representatives (Chapter V.D)

Ontario has existing legislation that provides a good foundation for many of these key issues. For instance, the SDA contains safeguards against financial abuse at the stages of monitoring, detection and intervention. It sets out a substitute decision-maker's duties to encourage an adult to participate in decision-making activities. Furthermore, the SDA contains provisions to provide certainty to substitute decision-makers for persons who have been found incapable and third parties in the event of disputes. The treatment of the key issues in this discussion paper is intended to determine if different or complementary standards should be developed in the special context of the RDSP.

The reach of a legal representative's authority is a key issue that impacts the other key issues. Some RDSP beneficiaries may have a need for assistance, not only with opening an RDSP and deciding plan terms, but also with managing RDSP funds once they are paid. Restricting a legal representative's scope of authority to that of a plan holder would ask that RDSP beneficiaries turn to guardianship when they need assistance with general financial management. However, many have declined to use the guardianship process to establish a legal representative specifically for the RDSP to date.

Extending the scope of authority would make changes to Ontario's current framework more relevant. Managing RDSP payments could give rise to new opportunities for financial abuse. Because day-to-day expenses are much more personal than investments, it would also make an

adult's engagement in decision-making activities much more essential. As a consequence, added measures to safeguard RDSP beneficiaries against financial abuse and the roles and responsibilities of actors involved with the RDSP would need to be seriously considered.

The two provinces in Canada that have created processes to establish a legal representative for RDSP beneficiaries have taken different approaches to this issue. Due to concerns about financial abuse, the Saskatchewan Ministry of Justice and Attorney General has suggested that a special limited POA for the RDSP could restrict the scope of an attorney's powers to that of a plan holder who would not have authority to request one-time withdrawals. If an adult requires assistance in requesting withdrawals, the Saskatchewan Ministry of Justice and Attorney General has suggested that full guardianship would be needed because guardianship incorporates additional safeguards against abuse. In contrast, in Newfoundland and Labrador, an adult can authorize designates to act as full plan holders and also receive funds paid out of the RDSP. Safeguards against abuse for RDSP beneficiaries have been integrated directly into the Newfoundland and Labrador legislation, such as the requirement that designates submit annual reports to the Public Trustee.

Depending on how the scope of a legal representative's authority is defined in Ontario, additional possible safeguards against financial abuse and the misuse of a legal representative's powers could include innovative measures, such as the use of mandatory forms and information, limitations on withdrawals or spending after a specified amount, and the appointment of a private monitor to advocate on an adult's behalf. The roles and responsibilities that are currently required under the SDA could also be complemented by a more detailed set of duties for legal representatives to fulfill. These could include requiring legal representatives to consult with adults on transactions that significantly affect them, such as exceptional withdrawals from the RDSP. A legal representative could also be obliged to comply with an adult's choices, unless it would be unreasonable to do so. Furthermore, explicit reference could be made to third parties' ability to reasonably rely on a legal representative's instructions.

## **D. Important Issues for Implementation**

### ***1. Sources of Government Support***

The RDSP was established by the federal government and it is administered by federal government agencies in conjunction with financial institutions. Should the Government of Ontario choose to implement a process to establish a legal representative specifically for RDSP beneficiaries, it could lend its support in a number of ways.

The creation of a personal appointment process would likely have to be grounded in legislation, either as a standalone statute or an amendment to the *Substitute Decisions Act, 1992*. A self-designated trust is a possible exception. If the LCO's consultation phase shows that RDSP beneficiaries would be capable of creating a self-designated trust, legislative changes might not be necessary because a trust deed can be executed under the common law. However, it is not clear whether a beneficiary would have legal authority to transfer RDSP funds into a trust because the RDSP contains mixed contributions from public and private sources. In order to meet the benchmarks for reform proposed in this discussion paper, a trust should also adhere to minimum criteria relating to key issues, such as safeguards against abuse. Moreover, the interaction of the trustees with financial institutions, which already hold RDSP funds in trust, would need to be clarified.

An external appointment process could be grounded in legislation or, as a creative solution, it could build on the jurisdiction of the Superior Court of Justice, Consent and Capacity Board or government agencies, such as the Ministry of Community and Social Services. The respective mandates of these public bodies were discussed at length in Chapters IV and V.B. It is not certain whether a process to establish a legal representative for RDSP beneficiaries could properly fit into their existing mandates, for instance, as a specified area of practice or programming. If it could, the affected public bodies would surely require clear direction from the Government of Ontario on how to incorporate a process for the specific purpose of establishing a legal representative for RDSP beneficiaries into their operations.

Any options for reform must be cost-effective and administratively feasible for the Ontario government as well as RDSP beneficiaries, financial institutions and other interested parties. The LCO has noted throughout this discussion paper that community networks could provide a source of enhanced support in preparing applications to appoint a legal representative. Private individuals and not-for-profit organizations could also act as monitors to oversee that an arrangement is implemented effectively. Nevertheless, community networks and private individuals would still benefit from education delivered by the government, as would RDSP beneficiaries and their supporters. The provision of education is reviewed below.

## ***2. Provision of Information to Increase Accessibility***

The provision of information to increase the accessibility of an alternative process would be an important area for government support. Chapter V.E on safeguards against abuse discussed the advantages of mandatory information to guarantee equal access to a minimum level of

education for those persons most directly affected. Before engaging in the process to establish a legal representative, however, adults and their supporters must first know about the process.

Adults learn about the RDSP at financial institutions and various intermediaries. These entry points were discussed in Chapter II.A.3 and include families and friends, caregivers, legal clinics, private trusts and estates lawyers, ODSP personnel and community organizations. In the LCO's project on *Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity*, we focus on how entry points to the family law system "can play an important role in informing families about their options, referring them to relevant services and advising them on the best way to address legal challenges and family disputes in ways respectful of their religious, cultural, economic and other characteristics or needs".<sup>670</sup> Not unlike the family law system, adults seeking a legal representative for the RDSP are most likely to begin their search for information by talking to their informal supporters and service providers.

The LCO believes that the provision of information in appropriate formats, languages and locations will be crucial to the successful uptake of reforms. It is suggested here that information on an alternative process could be disseminated through entry points that are situated within the community networks that adults with mental disabilities commonly access.

### **3. Coherence with Other Areas of the Law**

As a final matter concerning the implementation of reforms, we believe that an alternative process must be consistent with other areas of law that could be impacted. The federal ITA, common law and Ontario's decision-making laws are all sources of law that presently affect the establishment of a legal representative for the RDSP. Although future reforms may be specific to the RDSP, they could potentially conflict with these laws. Care should be taken in considering which options for reform would least interfere with existing laws and, where possible, measures to promote coherence could be adopted. For instance, an arrangement for the RDSP could be terminated where a guardian is appointed to manage an adult's financial affairs. Decision-making arrangements created in other jurisdictions, such as POAs, could also be recognized under a conflict of laws provision to enable adults traveling from elsewhere in Canada to access the RDSP in Ontario. The SDA contains a conflict of laws provision that could be used as a model.<sup>671</sup> These and other areas that call for measures to achieve coherence will be considered in light of the LCO's recommendations in the Final Report.

### QUESTIONS FOR DISCUSSION

- 44. Are there ways to promote coherence between a process for the specific purpose of establishing a legal representative for RDSP beneficiaries and other laws in Ontario?*
- 45. Are there ways to create consistency in a process for the specific purpose of establishing a legal representative for RDSP beneficiaries across Canada?*
- 46. Do the options for reform raise implications for the implementation of effective reforms in the Ontario context that were not identified in this discussion paper?*
- 47. Do you have any other comments on this discussion paper or on the LCO's project more generally?*

## VII. HOW TO PARTICIPATE AND NEXT STEPS

Many of you have something of value to contribute to the LCO's work. The LCO has included questions throughout the paper on which we would like to receive your views. A complete list of these questions is found in Appendix C. We also invite your comments on one or more of the issues of interest to you in this discussion paper.

You can mail, fax or e-mail your comments to:

Law Commission of Ontario  
Project on Capacity of Adults with mental Disabilities and the Federal RDSP  
2032 Ignat Kaneff Building, Osgoode Hall Law School, York University  
4700 Keele Street  
Toronto, ON M3J 1P3  
Fax: (416) 650-8418  
**E-mail: [LawCommission@lco-cdo.org](mailto:LawCommission@lco-cdo.org)**

You may also use the LCO website comments form at [www.lco-cdo.org](http://www.lco-cdo.org).

Submissions must be received by **February 28, 2014**.

LCO staff would also be pleased to meet to discuss the issues raised in this discussion paper, by telephone or in person. If you wish to set up a consultation meeting with the LCO, you may contact us to discuss possible arrangements. Meetings can take place in person, by conference call or via other interactive technologies.

If you have questions regarding this consultation, please call (416) 650-8406 or e-mail us at [lawcommission@lco-cdo.org](mailto:lawcommission@lco-cdo.org).

Based on the results of our consultation phase and the LCO's ongoing research, the LCO will prepare a Final Report, which is anticipated to be released in Spring 2014.

## **APPENDIX A: INDIVIDUALS AND ORGANIZATIONS CONTRIBUTING TO THE PROJECT**

### **A. Individuals and Organizations**

1. Al Etmanski Co-Founder of Planned Lifetime Advocacy Network (PLAN)
2. ARCH Disability Law Centre (Executive Director Ivana Petricone and Staff Lawyer Edgar-André Montigny)
3. Bank of Montreal (BMO) (Manager Registered Plans and Pensions Laura Addington and VP PCG Compliance, Legal, Corporate and Compliance Group Martin A. Villeneuve)
4. Canadian Association for Community Living (Executive Vice-President Michael Bach)
5. Canadian Centre for Elder Law (National Director Krista James and Senior Fellow Laura Watts)
6. Canada Revenue Agency (Director Registration Division Chantal Paquette, Director Policy and Communications Division Janice Laird, Manager Specialty Products Policy Section Mark Legault, Manager RDSP and RESP Products Lorraine Veilleux, Technical Policy Advisor Speciality Products Policy Section Christina O’Quinn, Technical Policy Advisor Compliance Division Registered Plans Directorate Marc Jolicoeur)
7. Canadian Imperial Bank of Commerce (CIBC) (Senior Counsel Ann Elise Alexander)
8. Centre for Addiction and Mental Health (CAMH) (Senior Legal Counsel Nyranne Martin and Senior Policy Analyst Roslyn Shields)
9. Community Living British Columbia (Vice-President Strategic Initiatives Jack Styan and Manager Policy and Program Development Tamara Kulusic)
10. Community Living Ontario (Legal Counsel Orville Endicott, Director Social Policy and Government Relations Gordon Kyle and Donner Civic Leadership Fund Fellow Dr. Elisa Mangina)
11. Consent and Capacity Board (Acting Counsel Isfahan Merali, Vice-Chair Lora Patton, Registrar Lorissa Sciarra)
12. Curateur public of Quebec (Strategic Planning Officer Strategic Planning and Research Bureau André Bzedera)
13. D’Arcy J. Hiltz Barrister and Solicitor
14. Employment and Social Development Canada (Manager Canada Disability Savings Program Sylvie Heartfield; Senior Policy Analyst Canada Disability Savings Program Russell Deigan; Director Programs Division Etienne-Rene Massie; Senior Analyst Canada Disability Savings Program Lisa Bacon; Manager Seniors, Life Course and Disabilities John Rietschlin; Economist Andrija Popovic; Senior Legislation Officer Canada Pension Plan Policy; Senior Legislation Officer Canada Pension Plan Policy and Legislation Natasha Rende; Manager Litigation and Legislation Old Age Security Policy Kevin Wagdin; and Legislation Officer Litigation and Legislation Old Age Security Policy Julieta Alfinger)
15. Finance Canada (Senior Chief Social Tax Policy Karen Hall and Director Personal Income Tax Division Sean Keenan)
16. Goddard, Gamage and Stephens LLP (Barrister and Solicitor Nimali Gamage)

17. HIV and AIDS Legal Clinic Ontario (Community Legal Worker and Paralegal Jill McNall)
18. Income Security Advocacy Centre (Research and Policy Analyst Jennefer Laidley)
19. Legal Aid Ontario (Jayne Mallin)
20. Lana Kerzner Barrister and Solicitor
21. Laura Metrick Counsel at the Ontario Ministry of the Attorney General
22. Ministry of Health and Social Services (Yukon) (Manager Seniors' Services and Adult Protection Unit Kelly Cooper)
23. Ministry of the Attorney General, Capacity Assessment Office (Program Coordinator Hilary Callin)
24. Ministry of Community and Social Services (Manager Income Support Policy Unit Ontario Disability Support Program Branch Darlene MacDonald Forsyth, Manager Policy Operations and Program Design Ontario Works Branch Gurpreet Sidhu-Dhanoa, Director Community and Developmental Services (former) Carol Latimer, Director Community and Developmental Services (former) Monica Neizert and Manager Policy Coordination Christine Hughes)
25. Mississauga Community Legal Services (Community Legal Worker and RDSP Plan Holder Daniel Amsler)
26. The Newfoundland and Labrador Association for Community Living (Past President Ray McIsaac)
27. Nidus (Executive Director Joanne Taylor)
28. The Office of the Public Trustee for Alberta (Public Trustee Leslie Hills, Assistant Public Trustee Dana Kingbury, Director Legal Services C. Suzanne McAfee)
29. Ombudsman for Banking Services and Institutions (OBSI) (Ombudsman Doug Melville)
30. Ontario Caregiver Coalition (Executive Secretariat Joanne Bertrand)
31. Planned Lifetime Advocacy Network (PLAN) (Director of Policy and Planning Joel Crocker)
32. Pooran Law (Barrister and Solicitor Brendon Pooran)
33. The Public Guardian and Trustee of British Columbia (Public Guardian and Trustee, Catherine Romanko)
34. Risa Stone Legal Counsel at the Ontario Public Guardian and Trustee
35. Royal Bank of Canada, RBC Law Group (Senior Advisory Counsel Suzanne Michaud and Senior Manager Registered Plans and Group Plans Don Osborne)
36. Saara Chetner Legal Counsel at the Ontario Public Guardian and Trustee
37. Schizophrenia Society of Ontario (Manager Policy and Community Relations Irina Sytcheva)
38. University of British Columbia (Professor and Director School of Social Work Tim Stainton)
39. University of Saskatchewan (Associate Dean Academic Doug Surtees)
40. Vincent J. De Angelis Barrister and Solicitor

## **B. Conferences and Roundtables Attended**

1. Roundtable on Financial Abuse of Seniors hosted by the Minister of State (Seniors), Government of Canada, held August 7, 2013.

### C. Prior Relevant LCO Commissioned Research

In major projects, the LCO issues a call for the preparation of research papers in particular subjects relevant to the project. It relies on these papers in the same way as any research. The papers do not necessarily reflect the LCO's views. The following research papers were prepared for the LCO's past projects on *A Framework for the Law as It Affects Older Adults* and *A Framework for the Law as It Affects Persons with Disabilities*.

1. ARCH Disability Law Centre (Kerri Joffe), "Enforcing the Rights of Persons with Disabilities in Ontario's Developmental Services System" (Summer 2010). Available online at <http://www.lco-cdo.org>
2. ARCH Disability Law Centre (Tess Sheldon), "The Shield Becomes the Sword: The Expansion of the Ameliorative Program Defence to Programs that Support Persons with Disabilities" (Summer 2010). Available online at <http://www.lco-cdo.org>
3. Michael Bach and Lana Kerzner, "A New Paradigm for Protecting Autonomy and the Right to Legal Capacity" (Summer 2010). Available online at <http://www.lco-cdo.org>
4. Bakerlaw (Meryl Zisman Gary, Cara Wilkie & David Baker), "A Case Study Paper on the Right to Supports" (Summer 2010). Available online at <http://www.lco-cdo.org>
5. Professor Mona Paré, Professeure adjointe Université d'Ottawa, "La participation des personnes handicapées dans les décisions qui les concernent: L'exemple de l'éducation" (Summer 2010). Available online at <http://www.lco-cdo.org>
6. Lora Patton, Rita Sampson and Brendon Pooran, "A Principled Approach: Considering Eligibility Criteria for Disability-Related Support Programs through a Rights-Outcome Lens" (Summer 2010). Available online at <http://www.lco-cdo.org>

## APPENDIX B: THE LCO'S FRAMEWORK PRINCIPLES

The following is an excerpt from the LCO's *A Framework for the Law as It Affects Persons with Disabilities*. The original can be consulted in the final report for that project, which provides greater explanation for the application of the Framework Principles. Similar principles exist for the sister project *A Framework for the Law as It Affects Older Adults*.

### **Excerpt from *A Framework for the Law as It Affects Persons with Disabilities*:**

The LCO's *Framework* centres on a set of principles for the law as it affects persons with disabilities in order to counteract negative stereotypes and assumptions about persons with disabilities, reaffirm the status of persons with disabilities as equal members of society and bearers of both rights and responsibilities, and also encourage the government to take positive steps to secure the well-being of persons with disabilities.

Each of the principles contributes to an overarching goal of promoting substantive equality for persons with disabilities. There is no hierarchy among the principles, and the principles must be understood in relationship with each other; they may reinforce each other or may be in tension with one another as they apply to concrete situations. The *Report* explains each of the following principles in detail:

1. **Respecting the Dignity and Worth of Persons with Disabilities:** All members of the human family are full persons, with the right to be valued, respected and considered and to have both one's contributions and needs recognized.
2. **Responding to Diversity in Human Abilities and Other Characteristics:** All people exist along a continuum of abilities in many areas, abilities vary along a person's lifecourse and each person with a disability is unique in needs, circumstances and identities. Persons with disabilities also experience multiple and intersecting identities that may act to increase or diminish discrimination and disadvantage.
3. **Fostering Autonomy and Independence:** Persons with disabilities must be able to make choices about issues that affect their lives and to do as much for themselves as possible or as they desire, with appropriate and adequate supports as required.
4. **Promoting Social Inclusion and Participation:** Society should be structured to promote the ability of all persons with disabilities to be actively involved with their community by

removing physical, social, attitudinal and systemic barriers to exercising the incidents of such citizenship and by facilitating their involvement.

5. **Facilitating the Right to Live in Safety:** This principle refers to the right of persons with disabilities to live without fear of abuse or exploitation and where appropriate to receive support in making decisions that could have an impact on safety.
6. **Recognizing That We All Live in Society:** This principle acknowledges that persons with disabilities are members of society, with entitlements and responsibilities, and that other members of society also have entitlements and responsibilities.

The application of the principles must be grounded in the lived experience of persons with disabilities, including attention to how the experiences of persons with disabilities are influenced by their life course, and on viewing persons with disabilities as whole persons rather than as sets of separate issues.

The circumstances of persons with disabilities will continue to change as laws, attitudes, demographics and other aspects of the broader environment change. As well, understandings of the experience of disability continue to evolve, and new perspectives emerge. What might be considered conducive to attainment of the principles at one time may appear unhelpful or inadequate at a later date.

Despite desires to implement all the principles to the fullest extent possible, there may be constraints that limit the ability of law and policy makers to do so, including policy priorities or funding limitations among others. Therefore it may be necessary to take a progressive realization approach to the full implementation of the principles. This involves concrete, deliberate and targeted steps, implemented within a relatively short period of time with a view to ultimately meeting the goal of full implementation. Such an approach mandates a continual, if gradual, movement forward towards the ultimate goal of substantive equality.

As well, attention must be paid to the relationships between principles. Frequently, the principles will support each other; for example, initiatives that increase the inclusion and participation of persons with disabilities will generally also thereby promote respect for their dignity and worth. However, sometimes two or more of the principles may be in tension with each other in a particular case. Careful thought must be given to analyzing and responding to this tension, by being sensitive to the contexts in which these tensions arise, as well as their larger social context, and the overarching value of substantive equality to which the principles were intended to respond.

## APPENDIX C: QUESTIONS FOR DISCUSSION

1. Do the benchmarks for reform accurately reflect the objectives that the options for reform in this project must meet to be effective?
2. Have you experienced challenges in establishing a legal representative for the RDSP? If so, what were those challenges?
3. Do adults, families and other interested parties face challenges with respect to establishing a legal representative for RDSP beneficiaries in Ontario that have not been identified in this discussion paper?
4. What do you believe the goals for reform in this project should be?
5. How do Ontario's commitments to adults with mental disabilities affect the need and options for reform in this project?
6. Do you have experience with a special limited POA for the RDSP in Saskatchewan?
7. Are there lessons to be learned from provinces with a specific process to appoint a legal representative for RDSP beneficiaries?
8. Would it be appropriate to lower Ontario's threshold for capacity to grant a POA for property management for the specific purpose of establishing a legal representative for RDSP beneficiaries?
9. If a different threshold for capacity to execute a personal authorization for the specific purpose of establishing a legal representative for RDSP beneficiaries were accepted in Ontario, what definition of capacity would be flexible enough to meet the needs of RDSP beneficiaries?
10. Would a threshold for capacity based on the common law standard or non-cognitive criteria increase an RDSP beneficiary's risk of vulnerability to financial abuse and misuse of a legal representative's powers?
11. How would a supported decision-making arrangement or representation agreement for the specific purpose of establishing a legal representative for RDSP beneficiaries impact third parties?
12. How could a personal appointment process for the specific purpose of establishing a legal representative for RDSP beneficiaries be implemented in the

Ontario context? Would it require an amendment to the SDA or the enactment of a standalone statute?

13. Would a co-decision making arrangement be flexible enough to meet the needs of RDSP beneficiaries?
14. How would a co-decision making arrangement for the specific purpose of establishing a legal representative for RDSP beneficiaries impact third parties?
15. Could a streamlined court process be used for the specific purpose of establishing a legal representative for RDSP beneficiaries as an “alternative course of action” to guardianship? Would an amendment to the SDA or enactment of a standalone statute be necessary to expand the Superior Court of Justice’s mandate?
16. What measures would be required to make a streamlined court process for the specific purpose of establishing a legal representative for RDSP beneficiaries fair, cost-effective, speedy and user friendly?
17. Is there a role for community organizations in providing enhanced support at the front-end of a streamlined court process for the specific purpose of establishing a legal representative for RDSP beneficiaries?
18. Would it be feasible to integrate a process for the specific purpose of establishing a legal representative for RDSP beneficiaries into the existing mandate of the Consent and Capacity Board?
19. Should an external appointment process for the specific purpose of establishing a legal representative for RDSP beneficiaries be based on an assessment of capacity or an adult’s need for assistance in RDSP decision-making?
20. Could a trustee act as a legal representative for RDSP beneficiaries in Ontario?
21. Who would have legal authority to create a trust for the specific purpose of establishing a legal representative for RDSP beneficiaries and to transfer the RDSP funds to the trustee?
22. What measures would be required to implement a trust mechanism as an option for reform in Ontario?
23. Would a self-designated trust based on the common law threshold for capacity be flexible enough to meet the needs of RDSP beneficiaries in Ontario?

24. Could a streamlined court process to appoint a trustee as a legal representative for RDSP beneficiaries be integrated into the Superior Court of Justice's existing jurisdiction over trusts?
25. Could an Ontario government agency be charged with approving a deed of trust for the specific purpose of establishing a legal representative for RDSP beneficiaries? If so, which government agency would be suitable?
26. Could an Ontario government agency administer an appointment process for the specific purpose of establishing a legal representative for RDSP beneficiaries? If so, which government agency would be suitable?
27. How would a government agency administered process for the specific purpose of establishing a legal representative for RDSP beneficiaries operate? Could it draw on knowledge of existing programs, such as ODSP trustee appointments?
28. Should a government agency appointment process for the specific purpose of establishing a legal representative for RDSP beneficiaries be based on an assessment of capacity or an adult's need for assistance in RDSP decision-making?
29. How would the options for reform in the choice of arrangements meet the benchmarks for reform in this project (see Chapter I.C.2, Benchmarks for Reform, beginning page 5)?
30. Are there options for reform in the choice of arrangements that are to be preferred over others? If so, why?
31. Are there other options for reform in the choice of arrangements that were not identified in this discussion paper?
32. How can an RDSP beneficiary's meaningful inclusion in decision-making activities be ensured once a legal representative is appointed?
33. Should an RDSP beneficiary with a legal representative be entitled to make decisions for him or herself, where possible?
34. To what extent should a legal representative be required to consult with an RDSP beneficiary to determine his or her wishes and to obey an RDSP beneficiary's instructions?
35. How can legal representatives for RDSP beneficiaries be protected from liability where they have adhered to an expected standard of care?

36. What measures could provide third parties with the certainty that they can reasonably rely on a decision-making arrangement for RDSP beneficiaries as one that is legally valid?
37. Could awarding a legal representative the sole responsibility to enter into RDSP transactions promote certainty, finality and protection from liability for third parties?
38. Should the scope of a legal representative's authority be restricted to that of a plan holder with full or partial powers, or extend to assisting beneficiaries manage payments out of the RDSP?
39. What are the implications of extending the scope of a legal representative's authority beyond that of a plan holder?
40. Could the scope of a legal representative's authority affect the timely implementation of reforms in Ontario?
41. Should eligibility to act as a legal representative for RDSP beneficiaries be extended to organizations? If so, what types of organizations would be suitable?
42. Are supplementary safeguards that complement Ontario's existing framework under the SDA needed in the context of the RDSP?
43. What additional measures should be implemented to safeguard RDSP beneficiaries against financial abuse and the misuse of a legal representative's powers?
44. Are there ways to promote coherence between a process for the specific purpose of establishing a legal representative for RDSP beneficiaries and other laws in Ontario?
45. Are there ways to create consistency in a process for the specific purpose of establishing a legal representative for RDSP beneficiaries across Canada?
46. Do the options for reform raise implications for the implementation of effective reforms in the Ontario context that were not identified in this discussion paper?
47. Do you have any other comments on this discussion paper or on the LCO's project more generally

## ENDNOTES

- <sup>1</sup> For summary information on the RDSP see: Canada Revenue Agency, “Registered Disability Savings Plan (RDSP) Information Sheet RC4460”, online: <http://www.cra-arc.gc.ca/E/pub/tg/rc4460/rc4460-12e.pdf> (last accessed: November 20, 2013) [CRA, RDSP].
- <sup>2</sup> *Income Tax Act*, R.S.C. 1985, c.1 (5<sup>th</sup> Supp) [ITA].
- <sup>3</sup> ITA, note 2, s.146.4(1), “disability savings plan”, “qualifying person” and “holder”.
- <sup>4</sup> ITA, note 2, s.146.4(1), “qualifying person”.
- <sup>5</sup> *Substitute Decisions Act*, 1992, S.O. 1992, Ch. 30 [SDA].
- <sup>6</sup> Government of Canada, *Jobs, Growth and Long-Term Prosperity: Economic Action Plan 2012* (Ottawa: March 29, 2012) [Government of Canada, *Economic Action Plan*], 383.
- <sup>7</sup> Government of Canada, *Economic Action Plan*, note 6, 383.
- <sup>8</sup> ITA, note 2, s.146.4(1), “qualifying family member”, “disability savings plan”, “qualifying person” and “holder”.
- <sup>9</sup> Government of Canada, *Economic Action Plan*, note 6, 182-183.
- <sup>10</sup> Government of Canada, *Economic Action Plan*, note 6, 182-183.
- <sup>11</sup> Government of Ontario, *A Prosperous and Fair Ontario: 2013 Ontario Budget* (Toronto: May 2013) [Government of Ontario, *2013 Ontario Budget*], 98-99.
- <sup>12</sup> There are many issues that overlap between this project and the legal capacity, guardianship and decision-making project. To the extent possible, the LCO has framed its research and analysis in this project in a manner that is restricted to the special context of the RDSP and that does not preclude options in the larger project.
- <sup>13</sup> The LCO recognizes that there is ongoing debate on the language used to discuss persons with particular disabilities and their experiences and that there is a range of views about the most appropriate language. The LCO does not intend its use of particular terms to be construed as definitive and defers to persons with disabilities themselves as to the most appropriate language. During preliminary consultations for this project, stakeholders identified that individuals affected by this project include persons with developmental, cognitive and psychosocial disabilities across multiple demographic populations, which may intersect with other aspects of identity such as age, gender and culture. Sources that provide insights into how related terms are defined in Ontario include: *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act*, 2008, S.O. 2008, Ch. 14 [SIPDDA]; *Accessibility for Ontarians with Disabilities Act*, S.O. 2005, Ch. 11 [AODA]; *Human Rights Code*, R.S.O. 1990, Ch. H.19; *Convention on the Rights of Persons with Disabilities*, online: <http://www.un.org/disabilities/convention/conventionfull.shtml> (last accessed: July 4, 2013) [CRPD].
- <sup>14</sup> The LCO recognizes that there may be cases where an adult has a limited power of attorney that does not extend to the RDSP.
- <sup>15</sup> ITA, note 2, s.118.3.
- <sup>16</sup> Janet Mosher, “Lessons in Access to Justice: Racialized Youths and Ontario’s Safe Schools” (2008) 46 *Osgoode Hall Law Journal* 807, 808.
- <sup>17</sup> Mosher, note 16, 808, 818.
- <sup>18</sup> Law Commission of Ontario, *Increasing Access to Family Justice through Comprehensive Entry Points and Inclusivity* (Toronto: February 2013), 15.
- <sup>19</sup> See: Janice Gross Stein & Adam Cook, “Speaking the Language of Justice: A New Legal Vernacular” in Julia Bass *et al*, eds., *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005), 166.
- <sup>20</sup> Law Commission of Ontario, *A Framework for the Law as It Affects Older Adults: Advancing Substantive Equality for Older Persons through Law, Policy and Practice* (Toronto: April 2012) [LCO, *A Framework for the Law as It Affects Older Adults*]; Law Commission of Ontario, *A Framework for the Law as It Affects Persons with Disabilities: Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice* (Toronto: September 2012) [LCO, *A Framework for the Law as It Affects Persons with Disabilities*].
- <sup>21</sup> Law Commission of Ontario, *The Framework for the Law as It Affects Older Adults, being Appendix A to A Framework for the Law as It Affects Older Adults: Advancing Substantive Equality for Older Persons through Law, Policy and Practice* (Toronto: April 2012), 1.

- <sup>22</sup> *The Constitution Act, 1982*, Schedule B to the *Canada Act, 1982*, (U.K.) 1982 c.11 [Charter].
- <sup>23</sup> CRPD, note 13.
- <sup>24</sup> Canada Revenue Agency, “Authorize or Cancel a Representative”, online: [http://www.cra-arc.gc.ca/tx/ndvds/tpcs/chng\\_rps/menu-eng.html](http://www.cra-arc.gc.ca/tx/ndvds/tpcs/chng_rps/menu-eng.html) (last accessed: November 4, 2013).
- <sup>25</sup> Frances Westley & Nino Antadze, “From Total Innovation to System Change: The Case of the Registered Disability Savings Plan, Canada”, online: [http://sig.uwaterloo.ca/sites/default/files/documents/Westley,%20Antadze%20-%20RDSP%20Case%20Study\\_VMarch1502010.pdf](http://sig.uwaterloo.ca/sites/default/files/documents/Westley,%20Antadze%20-%20RDSP%20Case%20Study_VMarch1502010.pdf) (last accessed: August 13, 2013). The two research studies were: Richard Shillington, *The Disability Savings Plan: Policy Milieu and Model Development* (Ottawa: The Caledonian Institute of Social Policy, 2005) and Keith Horner, *The Disability Savings Plan: Contributory Estimates and Policy Issues* (Ottawa: The Caledonian Institute of Social Policy, 2005).
- <sup>26</sup> Westley & Antadze, note 25; Minister of Finance’s Expert Panel on Financial Security for Children with Severe Disabilities, *A New Beginning: The Report of the Minister of Finance’s Expert Panel on Financial Security for Children with Severe Disabilities* (Ottawa: December 2006) [Minister of Finance’s Expert Panel].
- <sup>27</sup> ITA, note 2, s.118.3. Minister of Finance’s Expert Panel, note 26, 29-32.
- <sup>28</sup> Department of Finance Canada, *Ensuring the Effectiveness of Registered Disability Savings Plans* (Ottawa: October 2011) available online: <http://www.fin.gc.ca/activty/consult/rdsp-reei-eng.asp> (last accessed: November 20, 2013) [Finance Canada, *Ensuring Effectiveness*].
- <sup>29</sup> *Canada Disability Savings Act*, S.C. 2007, c. 35, s.136.
- <sup>30</sup> Department of Finance, *Ensuring Effectiveness*, note 28; Government of Canada, *Economic Action Plan*, note 6, 181-183.
- <sup>31</sup> For an overview of changes introduced in the Economic Action Plan 2012, see: Jack Styan, “Good News for People with Disabilities in the Federal Budget” (Ottawa: Caledon Institute of Social Policy, 2012), online: <http://www.caledoninst.org/Publications/PDF/985ENG.pdf> (last accessed: November 20, 2013).
- <sup>32</sup> Minister of Finance’s Expert Panel, note 26, 14.
- <sup>33</sup> Minister of Finance’s Expert Panel, note 26.
- <sup>34</sup> Shillington, note 25; The Allen Consulting Group, *International Review of Future Planning Options: Final Report* (Final Report to the Department of Families, Housing, Community Services and Indigenous Affairs, January 2009) [Allen Consulting Group], 37-39.
- <sup>35</sup> See: Jeanette Katrin Elise Moss, *Registered Disability Savings Plan: Making the Shift from Welfare to Wealth*, Research Project Submitted in Partial Fulfillment of the Requirements for the Degree of Masters of Arts (Burnaby: Simon Fraser University, 2012); Shillington, note 25; Minister of Finance’s Expert Panel, note 26, 2-7.
- <sup>36</sup> Moss explains that “[i]n Canada, as in most of the Western world, social security systems have been deliberate in distinguishing between contributory (earnings-related) benefits, and non-contributory (means-tested, income-tested) benefits”. Moss, note 35, 9.
- <sup>37</sup> Shillington, note 25, 5; Westley & Antadze, note 25; Moss, 35.
- <sup>38</sup> Shillington, note 25, 9.
- <sup>39</sup> Shillington, note 25. See also: Canadian Caregiver Coalition, online: <http://www.ccc-can.ca/content.php?doc=48> (last accessed: August 12, 2013).
- <sup>40</sup> See: Andrew Power *et al*, *Active Citizenship and Disability: Implementing the Personalisation of Support* (New York: Cambridge University Press, 2013), 5.
- <sup>41</sup> See for instance the definitions of social services in: Power *et al*, note 40; The Law Commission (United Kingdom), *Adult Social Care* (London: May 2011), 2.
- <sup>42</sup> Lora Patton *et al*, *A Principled Approach: Considering Eligibility Criteria for Disability-Related Support Programs through a Rights-Outcome Lens* (Toronto: Law Commission of Ontario, 2010); Power *et al*, note 40.
- <sup>43</sup> Colin Barnes, “Understanding the Social Model of Disability: Past, Present and Future” in Nick Watson *et al*, eds., *Routledge Handbook of Disability Studies* (New York: Routledge, 2012); Kerri Joffe (ARCH Disability Law Centre), *Enforcing the Rights of Persons with Disabilities in Ontario’s Developmental Services System* (Toronto: Law Commission of Ontario, 2010).

- <sup>44</sup> Speaking of “disability activists and theorists” who in the 1960s “began to develop new conceptions of disability, noting that by focusing only on the biological and functional condition of the individual, existing models failed to recognize the role played by society in limiting and enabling people”. Patton *et al*, note 42, 9.
- <sup>45</sup> Power *et al*, note 40, “Introduction”; Barnes, note 43; Joffe, note 43.
- <sup>46</sup> Minister of Finance’s Expert Panel, note 26, 2; Moss, note 35, 10.
- <sup>47</sup> See for instance: *Ontario Disability Support Program Act, 1997*, Ont. Reg. 222/98, Parts V - VI; *Ontario Works Act, 1997*, O. Reg. 134/98, Part VI.
- <sup>48</sup> Commission for the Review of Social Assistance, *Brighter Prospects: Transforming Social Assistance in Ontario* (October 2012) [Commission for the Review of Social Assistance]; Shillington, note 25.
- <sup>49</sup> The treatment of income and assets under provincial and territorial income support programs varies by jurisdiction. For more information see: Shillington, note 25; Power *et al*, note 40, 146-149
- <sup>50</sup> Commission for the Review of Social Assistance, note 48, 10.
- <sup>51</sup> CRA, *RDSP*, note 1; O. Reg. 222/98, note 47, s.28; O. Reg. 134/98, note 47, s.39.
- <sup>52</sup> Power *et al*, note 40, 178.
- <sup>53</sup> Power *et al*, note 40, 177-178; Westley & Antadze, note 25; Publicly available submissions received by the Department of Finance Canada in the context of the Three-Year Review of the RDSP.
- <sup>54</sup> Power *et al*, note 40, 11.
- <sup>55</sup> Power *et al* explain the concept of “personalization” as follows: “[a]t its core, *personalisation* means a more individual approach to the design and delivery of supports which give people more choice over how they best meet their needs”. Power *et al*, note 40, 11.
- <sup>56</sup> Carmel Laragy & Goetz Ottmann, “Towards a Framework for Implementing Individual Funding Based on an Australian Case Study” (2011) 8:1 *Journal of Policy and Practice in Intellectual Disabilities* 18, 19, presenting a case study of an Australian program. See also: Power *et al*, note 40.
- <sup>57</sup> Power *et al*, note 40, 177; Moss, note 35.
- <sup>58</sup> Westley & Antadze, note 25, 3-4, citing Jack Styan.
- <sup>59</sup> Moss, note 35, 8.
- <sup>60</sup> Information provided to the LCO by Employment and Social Development Canada.
- <sup>61</sup> ITA, note 2, s.146.4(1).
- <sup>62</sup> Publicly available submissions received by the Department of Finance Canada in the context of the Three-Year Review of the RDSP.
- <sup>63</sup> Consultation with Daniel Amsler.
- <sup>64</sup> Consultation with HIV and AIDS Legal Clinic Ontario; consultation with the Canadian Centre for Elder Law.
- <sup>65</sup> For more information on these approaches, see: LCO, *A Framework for the Law as It Affects Older Adults*, note 20 and LCO, *A Framework for the Law as It Affects Persons with Disabilities*, note 20.
- <sup>66</sup> Information provided to the LCO by Employment and Social Development Canada.
- <sup>67</sup> This has been a particular challenge in British Columbia, where the Public Guardian and Trustee for British Columbia represents children in care. It may not be as relevant in Ontario, where children in care are not represented by the Public Guardian and Trustee for Ontario. PLAN & RDSP Resource Centre, *Registered Disability Savings Plan: Implications for Children-in-Care* (Vancouver: August 2011).
- <sup>68</sup> ITA, note 2, s. 146.4(1), “qualifying family member”, “qualifying person”.
- <sup>69</sup> Consultation with HIV and AIDS Legal Clinic Ontario; consultation with Legal Aid Ontario; consultation with Mississauga Community Legal Services.
- <sup>70</sup> Consultation with HIV and AIDS Legal Clinic Ontario.
- <sup>71</sup> Canada Revenue Agency, “Disability Tax Credit Certificate” online: <http://www.cra-arc.gc.ca/E/pbg/tf/t2201/t2201-12e.pdf> (last accessed: November 20, 2013 ) [CRA, *DTC Certificate*]; ITA, note 2, s.118.3; Ontario Ministry of Community and Social Services, “Income Support: Disability/Health Eligibility” online: [http://www.mcscs.gov.on.ca/en/mcscs/programs/social/odsp/income\\_support/eligibility/disability\\_Health.aspx](http://www.mcscs.gov.on.ca/en/mcscs/programs/social/odsp/income_support/eligibility/disability_Health.aspx) (last accessed: November 20, 2013); *Ontario Disability Support Program Act, 1997*, S.O. 1997, Ch. 25, Schedule B [ODSPA], s.4.

- 
- <sup>72</sup> Consultation with Pooran Law; Consultation with Goddard, Gamage and Stephens LLP. A recipient may use the RDSP in conjunction with other mechanisms to maximize the amount of funds that are not considered assets or income in determining financial eligibility for income support under ODSP. In Ontario, ODSP has detailed policy rules regarding the treatment of personal injury settlements, inheritances and life insurance proceeds. For example, funds up to \$100,000 held in trust derived from an inheritance or the proceeds of a life insurance policy are not considered assets for the purposes of determining financial eligibility for income support. Interest earned from and re-invested in the trust is not considered income. Payments from such a trust or a life insurance policy used for approved disability related expenses are not included as income. See: Ontario Disability Support Program, Income Support Directives, online: [http://www.mcass.gov.on.ca/en/mcass/programs/social/directives/odsp\\_Incomesupport.aspx](http://www.mcass.gov.on.ca/en/mcass/programs/social/directives/odsp_Incomesupport.aspx) (last accessed: November 24, 2013) [ODSP Directives], 4.6, 4.7, 4.8.
- <sup>73</sup> Consultation with Pooran Law; consultation with Community Living Ontario; consultation with the Schizophrenia Society of Ontario.
- <sup>74</sup> See for instance: The National Benefit Authority, online: <http://www.thenba.ca/about-us.html> (last accessed: September 23, 2013).
- <sup>75</sup> Information provided to the LCO by Employment and Social Development Canada.
- <sup>76</sup> CRA determines an applicant's eligibility for the RDSP based on the DTC eligibility criteria. CRA also registers each plan that conforms to the statutory rules and it monitors and responds to reports of non-compliance with the plan conditions. ESDC's role includes similar activities in administering the federal government's grants and bonds for the RDSP. ESDC also approves financial institutions as "issuers" of the RDSP to the public, funds outreach to increase uptake and commissions expert research on program effectiveness.
- <sup>77</sup> Consultation with CIBC.
- <sup>78</sup> For instance, although the ITA allows there to be multiple plan holders, financial institutions may limit the number to one. Specimen plans are customized into forms and contracts that are used when opening an RDSP at a financial institution. They include an application and a declaration of trust. A pro forma example of a specimen plan is available on the CRA website. Canada Revenue Agency, "Sample Pro Forma Declaration of Trust", online: <http://www.cra-arc.gc.ca/tx/rgstrd/rdsp/prfrm-eng.html> (last accessed: November 20, 2013).
- <sup>79</sup> Consultation with CRA.
- <sup>80</sup> CRA, *DTC Certificate*, note 71.
- <sup>81</sup> ITA, note 2, s.146.4(1), "disability savings plan", "holder".
- <sup>82</sup> Finance Canada, *Ensuring Effectiveness*, note 28.
- <sup>83</sup> Finance Canada, *Ensuring Effectiveness*, note 28; ITA, note 2, s.146.4(1) "disability savings plan", "qualifying person", "holder".
- <sup>84</sup> Under the common law, a transaction could be voidable if it is entered into with an adult who does not meet the threshold for capacity to contract and the other party has actual or constructive knowledge of the adult's incapacity. In its *Report on Common Law Tests of Capacity*, the British Columbia Law Institute explains that the test for capacity to enter into a contract attempts to strike a balance between the interests of persons with diminished capacity as well as "the material interests of the other contracting party and the broader social interest in security of contracts". The British Columbia Law Institute summarizes the basic elements of the common law test of capacity to enter into a contract as follows: "a contracting party must be able to 'understand [the contract's] terms'; this contracting party must also be able '[to form] a rational judgment of its effect upon his interests'; and the other contracting party must not have 'actual or constructive' knowledge of the first contracting party's 'mental incompetency'". British Columbia Law Institute, *Report on Common Law Tests of Capacity* (Vancouver: September 2013) [BCLI], 133-134, 136-137.
- <sup>85</sup> ITA, note 2, s.146.4(1), "disability savings plan", "qualifying person", "holder".
- <sup>86</sup> ITA, note 2, s.146.4(1), "disability savings plan", "qualifying person", "holder".
- <sup>87</sup> Government of Canada, *Economic Action Plan*, note 6, 182, referring to cases where "adults with disabilities have experienced problems in establishing a plan because their capacity to enter into a contract is in doubt".
- <sup>88</sup> Government of Canada, *Ensuring Effectiveness*, note 28; Publicly available submissions received by the Department of Finance Canada in the context of the Three-Year Review of the RDSP; Consultation with Finance Canada.

- 
- <sup>89</sup> Government of Canada, *Economic Action Plan*, note 6, 182.
- <sup>90</sup> ITA, note 2, s. 146.4(1), “disability savings plan”, “qualifying person”, “qualifying family member”.
- <sup>91</sup> ITA, note 2, s. 146.4(1.5).
- <sup>92</sup> ITA, note 2, s. 146.4(1), “qualifying person”.
- <sup>93</sup> For instance: Consultation with CIBC; consultation with Community Living British Columbia; consultation with Mississauga Community Legal Services.
- <sup>94</sup> Generally, DAPs can be withdrawn at any time before LDAPs begin as long as contributions from private sources exceed government contributions. Currently, a withdrawal results in all government assistance paid into the plan in the prior 10 years being paid back to the government. Effective January 1, 2014, the same 10 year period applies, but each withdrawal will cause a payment back of government assistance at a rate of \$3 of government assistance for \$1 of withdrawal. For more information on the RDSP plan conditions, see CRA, *RDSP*, note 1.
- <sup>95</sup> We have used the term “capacity laws” in this discussion paper to refer in a general manner to domestic laws that create entitlements and restrictions based on concepts of capacity. The term is intended to include, but is not restricted to, substitute decision-making laws, the common law and relevant policies in the income support and social benefits sectors.
- <sup>96</sup> SDA, note 5, s.2.
- <sup>97</sup> For a discussion of the term “mental competency” as distinguished from other terms, such as “decision making capacity”, see: David N. Weisstub, Chair, *Enquiry on Mental Competency: Final Report* (Toronto: Queen’s Printer for Ontario, 1990) [Weisstub Report].
- <sup>98</sup> Lawrence A. Frolik, “Commentary: Statutory Definitions of Incapacity: The Need for a Medical Basis” in Marshall B. Kapp *et al*, eds., *Older Adults’ Decision-Making and the Law* (New York: Springer Publishing Company Inc., 1996), 41.
- <sup>99</sup> Charles P. Sabatino & Erica Wood, “The Conceptualization of Legal Capacity of Older Persons in Western Law” in Israel Doron & Ann Sodon, eds., *Beyond Elder Law: New Directions in Law and Aging* (New York: Springer, 2012), 36.
- <sup>100</sup> Weisstub Report, note 97.
- <sup>101</sup> Sabatino & Wood, note 99, 35-37.
- <sup>102</sup> Sabatino & Wood, note 99, 35-37.
- <sup>103</sup> See for instance: Kathleen C. Glass, “Refining Definitions and Devising Instruments: Two Decades of Assessing Mental Competence” (1997) 20:1 International Journal of Law and Psychiatry 5, 10; Kristin Booth Glen, “Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond” (2012) 44 Colum. Hum. Rts. L. Rev. 93; Leslie Salzman, “Guardianship for Persons with Mental Illness – a Legal and Appropriate Alternative?” (2010-2011) 4 St. Louis U.J. Health L. & Pol’y 279, 279; Israel Doron, “From Guardianship to Long-Term Care: Law and Caring for the Elderly” Doctorate of Jurisprudence Thesis (Toronto: Osgoode Hall Law School, October 2000).
- <sup>104</sup> Michael Bach & Lana Kerzner, *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity* (Toronto: Law Commission of Ontario, 2010), 38-39; Margaret Hall, “Mental Capacity in the (Civil) Law: Capacity, Autonomy, and Vulnerability” (2012) 58 McGill L.J. 61, 67.
- <sup>105</sup> Hall, note 104, 66.
- <sup>106</sup> Hall, note 104; Doron, note 103, 22-24; Bach & Kerzner, note 104, 38.
- <sup>107</sup> Weisstub Report, note 97, 48-50.
- <sup>108</sup> Hall, note 104, 65.
- <sup>109</sup> Rather than sitting on a continuum with autonomy, the protection of individual and community interests are occasionally described as separate values. Weisstub Report, note 97, Ch. IV; *Starson v. Swayze*, [2003] 1 S.C.R. 722, para. 6.
- <sup>110</sup> Weisstub Report, note 97, 51-53.
- <sup>111</sup> Capacity Assessment Office, Ministry of the Attorney General, *Guidelines for Conducting Assessments of Capacity* (Toronto: Ministry of the Attorney General, 2005), II.2-II.5.
- <sup>112</sup> BCLI, note 84, Ch. IX.
- <sup>113</sup> Bach & Kerzner, note 104, 38.

<sup>114</sup> Weisstub Report, note 97, 54.

<sup>115</sup> Doron, note 103.

<sup>116</sup> Michael Bach and Lana Kerzner frame this issue in terms of negative and positive liberty. Negative liberty guards individual choice by warding off undesired intrusion, coercion and constraints. On the other hand, positive liberty promotes autonomy through enabling conditions, such as informal care from family, professional advice and government social services. Bach and Kerzner explain that “[i]n a positive liberty view of autonomy we do not exercise our self-determination as isolated, individual selves, but rather ‘relationally,’ interdependently and intersubjectively with others”. Bach and Kerzner argue that negative and positive liberty approaches to autonomy are not mutually exclusive. Instead, they are “entirely interdependent” and “are essential to a full and robust theory of autonomy”. Bach & Kerzner, note 104, 38-44.

<sup>117</sup> The term “reimagining” has been borrowed from Hall, note 104, 86.

<sup>118</sup> See for instance: Catriona Mackenzie & Nathalie Stoljar, eds., *Relational Autonomy, Feminist Perspectives on Autonomy, Agency and the Social Self* (New York: Oxford University Press, 2000); Bach & Kerzner, note 104, 40.

<sup>119</sup> Office of the Public Advocate for Victoria, Australia, *Supported Decision-Making: Background and Discussion Paper* (Victoria, Australia: Office of the Public Advocate, 2009), 3-4, describing supported decision-making.

<sup>120</sup> Hall, note 104, 86.

<sup>121</sup> Wendy Hulko & Louise Stern, “Cultural Safety, Decision-Making and Dementia: Troubling Notions of Autonomy and Personhood” in Deborah O’Connor and Barbara Purves, eds., *Decision-Making, Personhood and Dementia* (London: Jessica Kingsley Publishers, 2009).

<sup>122</sup> Hall, note 104, 68-71. See also: Gerard Quinn, “Personhood and Legal Capacity Perspectives on the Paradigm Shift of Article 12 CRPD” Harvard Law School Project on Disability Conference (20 February, 2010), online: [http://www.nuigalway.ie/cdlp/staff/gerard\\_quinn.html](http://www.nuigalway.ie/cdlp/staff/gerard_quinn.html) (last accessed: November 20, 2013).

<sup>123</sup> Jennifer Wright, “Guardianship for Your Own Good: Improving the Well-Being of Respondents and Wards in the USA” (2010) 33 *International Journal of Law and Psychiatry* 350, 356-357, also referring to Martha Holstein, Keynote speech, the University of Minnesota 2009 Summer Institute “Ethical Issues in an Aging Society: A Critical Look, Ethics and Aging” (June 2, 2009).

<sup>124</sup> Victorian Law Reform Commission, *Guardianship: Final Report* (April 2012) [VLRC], Ch.6. See also: Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Report No 67, (September 2010) [QLRC], Vol. 1, Ch.4.

<sup>125</sup> LCO, *A Framework for the Law as it Affects Persons with Disabilities*, note 20, 4.

<sup>126</sup> Bach & Kerzner, note 104, 19. The term “functional approach” is used synonymously in this discussion paper with the term “cognitive approach”, unless noted otherwise.

<sup>127</sup> QLRC, note 124, Vol. 1, 7.102.

<sup>128</sup> QLRC, note 124, Vol.1, 7.104.

<sup>129</sup> Glen, note 103; Weisstub Report, note 97; Advisory Committee on Substitute Decision Making for Mentally Incapable Persons, *Final Report of the Advisory Committee on Substitute Decision Making for Mentally Incapable Persons* (Toronto: 1987) [Fram Report]; Sarah Burningham, “Developments in Canadian Adult Guardianship and Co-Decision-Making Law” (2009) 18 *Dalhousie J. Legal Stud.* 120.

<sup>130</sup> Michael Bach, *The Right to Legal Capacity under the UN Convention on the Rights of Persons with Disabilities: Key Concepts and Directions from Law Reform* (Toronto: Institute for Research and Development on Inclusion and Society, 2009), 8; Bach & Kerzner, note 104.

<sup>131</sup> Bach & Kerzner, note 104, 60, referring also to Gerard Quinn. Quinn, note 122.

<sup>132</sup> Bach & Kerzner, note 104, 60-66. See also: Michael Bach, “Supported Decision Making: Legal Fiction or Grounded Practice?” (draft), prepared for In From the Margins: New Foundations for Personhood and Legal Capacity in the 21<sup>st</sup> Century (University of British Columbia, April 29 – May 1, 2011); Louis Charland, “Decision-Making Capacity” in *The Stanford Encyclopedia of Philosophy*, Edward N. Zalta, ed., online: <http://plato.stanford.edu/archives/sum2011/entries/decision-capacity/> (last accessed: November 20, 2013).

<sup>133</sup> See for instance SDA, note 5, s.66.

<sup>134</sup> The CRPD has 158 signatories and 138 parties out of 193 UN Member States as at November 6, 2013. United Nations Treaty Collection, “Status of Treaties: Convention on the Rights of Persons with Disabilities,” online:

- 
- [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en) (last accessed: November 20, 2013).
- <sup>135</sup> The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) guarantees that Parties “accord to women equality with men before the law” and “a legal capacity identical to that of men and the same opportunities to exercise that capacity”, online: <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>. (last accessed: November 20, 2013), Arts. 15.1, 15.2. United Nations Office of the High Commissioner for Human Rights, *Legal Capacity*, Background Conference Document (New York & Geneva: OHCHR, 2005).
- <sup>136</sup> Ireland Law Reform Commission, *Report Vulnerable Adults and the Law*, LRC 83-2006 [ILRC], 2.31.
- <sup>137</sup> ILRC, note 136, 2.31 – 2.41.
- <sup>138</sup> Western Canada Law Reform Agencies, *Enduring Powers of Attorney: Areas for Reform*, Final Report 2008 [WCLRA], 2.
- <sup>139</sup> WCLRA, note 138, 2.
- <sup>140</sup> SDA, note 5, s.9; D’Arcy Hiltz and Anita Szigeti, *A Guide to Consent & Capacity Law in Ontario* (Markham, Ontario: LexisNexis Canada Inc., 2012), 27.
- <sup>141</sup> The term “alternative decision-making arrangements” is found in VLRC, note 124, 7.1.
- <sup>142</sup> Sabatino & Wood, note 99, 38; Office of the Public Advocate, note 119; Glen, note 103.
- <sup>143</sup> See for instance: *The Adult Guardianship and Co-Decision-Making Act*, S.S. 2000, Ch. A-5.3, ss.3, 40.
- <sup>144</sup> See for instance: SDA, note 5, s.7(7). The SDA does not limit what can be specified as a contingency to bring a POA into effect.
- <sup>145</sup> Ann Soden, “Beyond Capacity” (2011) 5:2 McGill JL & Health 295, 299.
- <sup>146</sup> Hall, note 104.
- <sup>147</sup> Robert M. Gordon, “Adult Protection Legislation in Canada Models, Issues, and Problems” (2001) 24 International Journal of Law and Psychiatry 117 [Gordon, *Adult Protection*], 118, writing on adult protection legislation.
- <sup>148</sup> See for instance: *The Vulnerable Persons Living with a Mental Disability Act*, C.C.S.M. c.V90; Power *et al*, note 40.
- <sup>149</sup> Adult protection legislation often allows interventions based on suspected abuse and neglect. There is considerable variation in adult protection legislation, which cannot be reviewed here. However, it should be noted that there is extensive critical analysis that has raised concerns about the intrusiveness and “extreme protectionism at the heart of such statutes [as being], odds with the value placed in Canadian society on self-determination”. Manitoba Law Reform Commission, *Adult Protection and Elder Abuse* (Winnipeg: 1999), 38-39. Gordon, *Adult Protection*, note 147, 56-57, 102-106.
- <sup>150</sup> *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in R.S.C. 1985, App II, No 5 [Constitution Act, 1867], ss. 92(13), 92(16).
- <sup>151</sup> *Constitution Act, 1867*, note 150, s. 92(7); Martha Jackman, “Constitutional Jurisdiction Over Health in Canada” (2000) 8 Health LJ 96, 111.
- <sup>152</sup> Jackman, note 151, 112.
- <sup>153</sup> Canadian Association for Community Living, PLAN, RDSP Resource Centre & Pooran Law, “Enabling Legal Capacity of Adults with Severe Disabilities to Open RDSPs: A Brief Prepared for the Honourable Jim Flaherty, Minister of Finance” (Submitted to the RDSP Review, November 2011) [CACL, PLAN, RDSP Resource Centre & Pooran Law, *RDSP Review Brief*] Appendix 2.
- <sup>154</sup> Government of Canada, *Economic Action Plan*, note 6, 180-183. It should be noted that the Minister of Finance has also asked the Senate Committee on Banking, Trade and Commerce to examine and report on the “ability of individuals to establish [an RDSP], with particular emphasis on legal representation and the ability of individuals to enter into a contract”. A motion by the Standing Committee to the Senate to approve the study was adjourned. Standing Senate Committee on Banking, Trade and Commerce, Debate of the Senate, Tuesday April 30, 2013 (Hansard).
- <sup>155</sup> Fram Report, note 129; Weisstub Report, note 97.
- <sup>156</sup> SDA, note 5, s.2(3).
- <sup>157</sup> SDA, note 5, ss.8, 47.

- 
- <sup>158</sup> Laws in the income support and social benefits sectors that provide a means to appoint a person in order to assist recipients in managing their payments are restricted to those programs only; they cannot be used to establish a legal representative for RDSP beneficiaries. This section is limited to a summary of applicable SDA provisions. Laws in the income support and social benefits sectors in Ontario and other jurisdictions are considered separately in Chapter V.B.5.
- <sup>159</sup> SDA, note 5, s. 7(2).
- <sup>160</sup> Ontario Ministry of the Attorney General, *Powers of Attorney* (Queen's Printer for Ontario, 2012), online: <http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/poa.pdf> (last accessed: November 6, 2013) [Ministry of the Attorney General, *Powers of Attorney*].
- <sup>161</sup> Ministry of the Attorney General, *Powers of Attorney*, note 160.
- <sup>162</sup> Saskatchewan Ministry of Justice and Attorney General, *RDSPs and Adults with Mental Disabilities* (March 2011), online: <http://www.justice.gov.sk.ca/RDSPs-and-Adults-with-Mental-Disabilities.pdf> (last accessed: November 20, 2013) [Saskatchewan Ministry of Justice and Attorney General].
- <sup>163</sup> SDA, note 5, ss.7,9; Hiltz and Szgeti, note 140, 27.
- <sup>164</sup> Judith Wahl, "Capacity and Capacity Assessment in Ontario" CBA Elder Law Programme (March 24-25, 2006 Ottawa Ontario), 14; SDA, note 5, s.9(3).
- <sup>165</sup> SDA, note 5, ss. 6,8,9.
- <sup>166</sup> Gerald Robertson, "Enduring Powers of Attorney and Health Care Directives," in Ann Soden, ed, *Advising the Older Client* (Markham: LexisNexis Canada, 2005) 109, 117-118.
- <sup>167</sup> SDA, note 5, s. 8.
- <sup>168</sup> SDA, note 5, s.47.
- <sup>169</sup> SDA, note 5, s.7(4); Ministry of the Attorney General, *Powers of Attorney*, note 160, Part 2.
- <sup>170</sup> Ministry of the Attorney General, *Powers of Attorney*, note 160, Part 3; SDA, note 5, ss. 11, 12.
- <sup>171</sup> SDA, note 5, ss. 7(4), 7(5), 12.
- <sup>172</sup> SDA, note 5, s.12; Hiltz and Szgeti, note 140, 29.
- <sup>173</sup> SDA, note 5, s. 12.
- <sup>174</sup> SDA, note 5, ss.22,72,77.
- <sup>175</sup> SDA, note 5, s.6.
- <sup>176</sup> Capacity Assessment Office, note 111, II.2-II.4.
- <sup>177</sup> SDA, note 5, s.22 [emphasis added].
- <sup>178</sup> The Office of the Public Guardian and Trustee, Ministry of the Attorney General, *Duties and Powers of a Guardian of Property* (Queen's Printer for Ontario, 2013), available online: <http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/guardduties.asp#why> (last accessed: August 28, 2013) [OPGT, *Duties and Powers*].
- <sup>179</sup> Section 22 of the SDA reads:
22. (1) The court may, on any person's application, appoint a guardian of property for a person who is incapable of managing property if, as a result, it is necessary for decisions to be made on his or her behalf by a person who is authorized to do so.
- (2) An application may be made under subsection (1) even though there is a statutory guardian.
- (3) The court shall not appoint a guardian if it is satisfied that the need for decisions to be made will be met by an alternative course of action that,
- (a) does not require the court to find the person to be incapable of managing property; and
- (b) is less restrictive of the person's decision-making rights than the appointment of a guardian.
- <sup>180</sup> See for instance: *Lehtonen v Neill*, [2013] O.J. No. 1178 (S.C.J.); *Deschamps v Deschamps*, [1997] O.J. No. 4894; *Re Koch*, 1997 CanLII 12138 (S.C.J.), para.20.
- <sup>181</sup> *Re Koch*, note 180, para. 20 [emphasis in the original].
- <sup>182</sup> *Gray v Ontario*, 2006 CanLII 1764 (Ont. Div.Ct.), para. 47.
- <sup>183</sup> Bach & Kerzner, note 104, 53. See also Lana Kerzner, *Paving the Way to Full Realization of the CRPD's Rights to Legal Capacity and Supported Decision-Making: A Canadian Perspective*, prepared for In From the Margins: New Foundations for Personhood and Legal Capacity in the 21<sup>st</sup> Century (University of British Columbia, April 29 – May 1, 2011), 45-46; Fram Report, note 129, 113.

- 
- <sup>184</sup> SDA, note 5, ss.72, 74, 77; Capacity Assessment Office, note 111, Part VI: The Needs Statement, VI.1.
- <sup>185</sup> Capacity Assessment Office, note 111, VI.2.
- <sup>186</sup> Capacity Assessment Office, note 111, VI.2-VI.3.
- <sup>187</sup> This commissioned research paper, “‘Alternative Courses of Action’ under the *Substitute Decisions Act*” will be carried out by Lana Kerzner and Michael Bach. For more information see: <http://lco-cdo.org/en/capacity-guardianship-call-for-papers> (last accessed: November 20, 2013).
- <sup>188</sup> SDA, note 5, ss.22, 25.
- <sup>189</sup> SDA, note 5, s. 69.
- <sup>190</sup> Ministry of the Attorney General, *The Role of the Office of the Public Guardian and Trustee* (Queen’s Printer for Ontario, 2006), online: [http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/the\\_role\\_of\\_the\\_office\\_of\\_the\\_opgt.pdf](http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/the_role_of_the_office_of_the_opgt.pdf) (last accessed: November 20, 2013); SDA, note 5, s.3.
- <sup>191</sup> SDA, note 5, ss.26, 28; Hiltz and Szigeti, note 140, 37, 49.
- <sup>192</sup> Fram Report, note 129, 104.
- <sup>193</sup> SDA, note 5, s.16.
- <sup>194</sup> SDA, note 5, s. 17.
- <sup>195</sup> SDA, note 5, ss.78, 90; O. Reg. 460/05.
- <sup>196</sup> Capacity Assessment Office, note 111, Part I “Ethical and Legal Considerations”.
- <sup>197</sup> Capacity Assessment Office, note 111, Part II “Mental Capacity: ‘Understand’ and ‘Appreciate’”.
- <sup>198</sup> *Abrams v. Abrams*, 2008 CanLII 67884 (Ont. S.C.J.), 50, where Strathy J. writes on court-ordered assessments, citing *Flynn et al v. Flynn* (December 18, 2007, unreported, Ont. S.C. J., Court file no. 03-66/07).
- <sup>199</sup> SDA, note 5, s.78. If an adult refuses an assessment, a court proceeding to determine a person’s capacity can still be brought under s.22 of the SDA.
- <sup>200</sup> SDA, note 5, ss.20, 20.1, 20.2.
- <sup>201</sup> SDA, note 5, ss.16,16.1, 20.
- <sup>202</sup> Publicly available submissions received by the Department of Finance Canada in the context of the Three-Year Review of the RDSP.
- <sup>203</sup> Consultation with Community Living Ontario; consultation with Pooran Law; consultation with Vincent De Angelis Barrister and Solicitor; consultation with the Canadian Association for Community Living; consultation with the Planned Lifetime Advocacy Centre (PLAN); CACL, PLAN, RDSP Resource Centre & Pooran Law, *RDSP Review Brief*, note 153.
- <sup>204</sup> Consultation with the Schizophrenia Society of Ontario; consultation with Community Living Ontario.
- <sup>205</sup> Consultation with the Schizophrenia Society of Ontario; consultation with D’Arcy J. Hiltz Barrister and Solicitor.
- <sup>206</sup> Consultation with Community Living Ontario; consultation with ARCH Disability Law Centre; consultation with CIBC; consultation with Finance Canada; consultation with Saara Chetner and Risa Stone (Counsel for the Office of the Public Guardian and Trustee); consultation with Vincent De Angelis Barrister and Solicitor.
- <sup>207</sup> Information provided to the LCO by Employment and Social Development Canada.
- <sup>208</sup> Comment provided to the LCO by Joanne Taylor Executive Director of Nidus.
- <sup>209</sup> Consultation with Pooran Law.
- <sup>210</sup> Consultation with ARCH Disability Law Centre.
- <sup>211</sup> Consultation with Community Living British Columbia; consultation with the Canadian Association for Community Living.
- <sup>212</sup> Consultation with ARCH Disability Law Centre; consultation with the Schizophrenia Society of Ontario.
- <sup>213</sup> Consultation with Community Living Ontario; consultation with the Canadian Association for Community Living; consultation with Lana Kerzner Barrister and Solicitor.
- <sup>214</sup> Peterborough Poverty Reduction Network Income Security Work Group, “Ensuring the Effectiveness of Registered Disability Savings Plans: Issues and Recommendations” (Submitted to the Federal RDSP Review, December 2011), 15, online: <http://www.pprn.ca/income.php> (last accessed: September 3, 2013).
- <sup>215</sup> Wahl, note 164, 15.
- <sup>216</sup> Capacity Assessment Office, note 111.
- <sup>217</sup> Consultation with Goddard, Gamage and Stephens LLP.

- 
- <sup>218</sup> Information provided to the LCO by Nimali Gamage.
- <sup>219</sup> The SDA does not stipulate that a substitute decision-maker must be a natural person; however, it is generally accepted that this must be the case, except where the substitute is the OPGT or a trust company.
- <sup>220</sup> Consultation with Goddard, Gamage and Stephens LLP; consultation with the HIV and AIDS Legal Clinic Ontario; consultation with the Schizophrenia Society of Ontario.
- <sup>221</sup> Consultation with Goddard, Gamage and Stephens LLP.
- <sup>222</sup> Finance Canada, *Ensuring Effectiveness*, note 28.
- <sup>223</sup> Consultation with CIBC.
- <sup>224</sup> Consultation with BMO.
- <sup>225</sup> Consultation with CIBC; consultation with Vincent De Angelis Barrister and Solicitor; consultation with Finance Canada.
- <sup>226</sup> Consultation with CIBC.
- <sup>227</sup> Consultation with the Canadian Association for Community Living.
- <sup>228</sup> Consultation with CIBC.
- <sup>229</sup> Consultation with the Planned Lifetime Advocacy Network (PLAN); consultation with Saara Chetner and Risa Stone (Counsel for the Office of the Public Guardian and Trustee); consultation with Laura Metrick (Counsel for the Ministry of the Attorney General); consultation with BMO; consultation with Goddard, Gamage and Stephens LLP.
- <sup>230</sup> Consultation with Lana Kerzner Barrister and Solicitor.
- <sup>231</sup> Kerzner, note 183, citing *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.
- <sup>232</sup> Kerzner, note 183.
- <sup>233</sup> Ontario Human Rights Commission, *Policy and Guidelines on Disability and the Duty to Accommodate*, online: <http://www.ohrc.on.ca/en/policy-and-guidelines-disability-and-duty-accommodate/4-duty-accommodate> (last accessed: November 20, 2013) [OHRC, *Policy and Guidelines on Disability*], Ch. 4.
- <sup>234</sup> OHRC, *Policy and Guidelines on Disability*, note 233, 3.
- <sup>235</sup> OHRC, *Policy and Guidelines on Disability*, note 233, 5.
- <sup>236</sup> OHRC, *Minds the Matter: Report on the Consultation on Human Rights, Mental Health and Addictions* (Toronto: Ontario Human Rights Commission, 2012), online: [http://www.ohrc.on.ca/sites/default/files/Minds%20that%20matter\\_Report%20on%20the%20consultation%20on%20human%20rights%20and%20mental%20health%20and%20addictions.pdf](http://www.ohrc.on.ca/sites/default/files/Minds%20that%20matter_Report%20on%20the%20consultation%20on%20human%20rights%20and%20mental%20health%20and%20addictions.pdf) (last accessed: November 20, 2013) [OHRC, *Minds that Matter*].
- <sup>237</sup> OHRC, *Minds that Matter*, note 236, 77-79.
- <sup>238</sup> *Kacan v. Ontario Public Service Employees Union* 2010 HRTC 795 [Kacan].
- <sup>239</sup> Kacan, note 238, para.12.
- <sup>240</sup> Kacan, note 238, paras. 24-25.
- <sup>241</sup> Kacan, note 238, para. 14 [emphasis added].
- <sup>242</sup> AODA, note 13; AccessON, *About the Accessibility for Ontarians with Disabilities Act, 2005* (Queen's Printer for Ontario, 2008), online: <http://www.mcass.gov.on.ca/documents/en/mcass/publications/accessibility/AboutAODAWeb20080311EN.pdf> (last accessed: September 4, 2013).
- <sup>243</sup> Ontario Human Rights Commission, *Working Together: The Ontario Human Rights Code and the Accessibility for Ontarians with Disabilities Act, Part 1*, online: <http://www.ohrc.on.ca/en/learning/working-together-ontario-human-rights-code-and-accessibility-ontarians-disabilities-act/part-1-introduction> (last accessed: September 9, 2013).
- <sup>244</sup> *Integrated Accessibility Standards*, O.Reg. 191/11, s.12.
- <sup>245</sup> *Accessibility Standards for Customer Service*, O.Reg. 429/07, s.3.
- <sup>246</sup> Kerzner, note 183, 17.
- <sup>247</sup> CRPD, note 13, Art.1.
- <sup>248</sup> See for instance: Arlene Kanter, "The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities," (2007) 34 Syracuse J. Int'l L. & Com. 287; Glen, note 103; Kerzner, note 183; Michael

- Ashley Stein and Janet E. Lord, "Future Prospects for the United Nations Convention on the Rights of Persons with Disabilities" in Oddný Mjöll Arnardóttir & Gerard Quinn, eds, *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Leiden: Martinus Nijhoff, 2009).
- <sup>249</sup> CRPD, note 13, Art.4.
- <sup>250</sup> Kerzner, note 183, 21-22.
- <sup>251</sup> United Nations Treaty Collection, "Status of Treaties: Convention on the Rights of Persons with Disabilities," online: [http://treaties.un.org/Pages/ViewDetails.aspx?mtldsg\\_no=IV-15&chapter=4&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetails.aspx?mtldsg_no=IV-15&chapter=4&lang=en#EndDec) (last accessed: November 20, 2013), Government of Canada, "Declaration and Reservation". [Government of Canada, *CRPD Declaration and Reservation*]
- <sup>252</sup> CRPD, note 13, Arts.3,9.1; Preamble (a),(m),(n).
- <sup>253</sup> CRPD, note 13, Arts. 2, 4(f), 5.3.
- <sup>254</sup> CRPD, note 13, Arts, 24.1(b), 19,14.
- <sup>255</sup> CRPD, note 13, Art. 12.
- <sup>256</sup> Amita Dhanda, "Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?" (2007) 34 Syracuse J Intl L & Com 429.
- <sup>257</sup> Tina Minkowitz, "Abolishing Mental Health Laws to Comply with the Convention on the Rights of Persons with Disabilities," in Bernadette McSherry & Penelope Weller, eds., *Rethinking Rights-Based Mental Health Laws* (Oxford: Hart Publishing, 2010).
- <sup>258</sup> See for instance: Bach, note 130, 5-6.
- <sup>259</sup> Government of Canada, *CRPD Declaration and Reservation*, note 251.
- <sup>260</sup> Government of Canada, *CRPD Declaration and Reservation*, note 251.
- <sup>261</sup> Government of Canada, *CRPD Declaration and Reservation*, note 251.
- <sup>262</sup> CRPD, note 13, Art.12.
- <sup>263</sup> Those specific equality rights are "subject to the provisions" of Article 12 as a whole and, therefore, may be limited by the interpretation of the term "legal capacity".
- <sup>264</sup> CRPD, note 13, Art.12.
- <sup>265</sup> Fram Report, note 129, 58.
- <sup>266</sup> The Office of the Public Guardian and Trustee, Ministry of the Attorney General, *The Role of the Public Guardian and Trustee* (Queen's Printer for Ontario, 2006), 3 [OPGT, *The Role of the Public Guardian and Trustee*].
- <sup>267</sup> SDA, note 5, ss. 17,27; OPGT, *The Role of the Public Guardian and Trustee*, note 266, 3-4.
- <sup>268</sup> The Office of the Public Guardian and Trustee, *Annual Report of the Public Guardian and Trustee 2009-2010*, online: [www.attorneygeneral.jus.gov.on.ca/english/family/.../MsgFromPGT.pdf](http://www.attorneygeneral.jus.gov.on.ca/english/family/.../MsgFromPGT.pdf) (last accessed: November 7, 2013).
- <sup>269</sup> Consent and Capacity Board, *Annual Report 2010-2011*, online: <http://www.ccboard.on.ca/scripts/english/governance/Annual-Reports.asp> (last accessed: September 5, 2013), 3. [CCB, *Annual Report 2010-2011*]
- <sup>270</sup> CCB, *Annual Report 2010-2011*, note 269, 5.
- <sup>271</sup> CCB, *Annual Report 2010-2011*, note 269.
- <sup>272</sup> Information provided to the LCO by the Consent and Capacity Board.
- <sup>273</sup> Information provided to the LCO by the Ontario Disability Support Program.
- <sup>274</sup> For a brief history of the treatment of persons with intellectual disabilities in Ontario, see Joffe, note 43, 5.
- <sup>275</sup> SIPDDA, note 13, s. 4(1).
- <sup>276</sup> *Ministry of Community and Social Services Act*, R.S.O. 1990, c M.20, s.11; Ministry of Community and Social Services, *Results-Based Plan Briefing Book 2011-2012*, online: [http://www.mcscs.gov.on.ca/en/mcscs/publications/about/planBriefing11/toc\\_planbrief11.aspx](http://www.mcscs.gov.on.ca/en/mcscs/publications/about/planBriefing11/toc_planbrief11.aspx) (last accessed: September 9, 2013).
- <sup>277</sup> Government of Ontario, *2013 Ontario Budget*, note 11, 98.
- <sup>278</sup> The commissioned research paper, "Understanding the Lived Experience of Assisted and Supported Decision-Making in Canada" will be undertaken by the Canadian Centre for Elder Law. For more information see: <http://lco-cdo.org/en/capacity-guardianship-call-for-papers> (last accessed: 20 November 2013).
- <sup>279</sup> Saskatchewan Ministry of Justice and Attorney General, note 162.

- 
- <sup>280</sup> Saskatchewan Ministry of Justice and Attorney General, note 162, 3.
- <sup>281</sup> See: A.J. McClean. *Review of Representation Agreements and Enduring Powers of Attorney* (Undertaken for the Attorney General of the Province of British Columbia, February 2002), 50-51, comparing the test under British Columbia statute to the common law test.
- <sup>282</sup> *Powers of Attorney Act, 2002*, S.S. 2002, c. P-20.3, s.4.
- <sup>283</sup> Saskatchewan Ministry of Justice and Attorney General, note 162, 4.
- <sup>284</sup> The information booklet states “[i]f the adult with a mental disability understands that this document will allow a parent or family member to set up and deal with a savings account, the parties should consider making such a power of attorney”. Saskatchewan Ministry of Justice and Attorney General, note 162, 5.
- <sup>285</sup> Saskatchewan Ministry of Justice and Attorney General, note 162, 5.
- <sup>286</sup> The ITA does not explicitly provide for who can request DAPs or LDAPs prior to the mandatory start date. There is a specific provision allowing a beneficiary who is not a holder of a primarily government assisted plan, aged 27 to 58, to request DAPS within the legislated limits. Financial institutions accept plan holders as those who determine the amount and timing of DAPs and LDAPs, outside the mandatory requirements of the ITA. ITA, note 2, s.146.4(4)(n)(iii).
- <sup>287</sup> ITA, note 2, s. 146.4(4)(m).
- <sup>288</sup> A beneficiary can request DAPs if he or she is a plan holder. The ITA also allows a beneficiary who is not a holder of a primarily government assisted plan, aged 27-58, to request DAPS within the legislated limits. ITA, note 2, s. 146.4(4)(n)(iii).
- <sup>289</sup> Consultation with Daniel Amsler.
- <sup>290</sup> *The Adult and Co-Decision Making Act*, note 143.
- <sup>291</sup> Saskatchewan Ministry of Justice and Attorney General, note 162, 5.
- <sup>292</sup> SDA, note 5, s.77.
- <sup>293</sup> *Enduring Powers of Attorney Act*, R.S.N.L. 1990, c.E-11; *An Act to Amend the Enduring Powers of Attorney Act*, S.N.L. 2012, Ch.4 (assented to June 27, 2012); *An Act to Amend an Act to Amend the Enduring Powers of Attorney Act*, S.N.L. 2012, Ch.45 (assented to December 22, 2012).
- <sup>294</sup> Debates of the House of Assembly (Hansard), 47<sup>th</sup> General Assembly, 1<sup>st</sup> Session 2012, March 20, 2012.
- <sup>295</sup> Vincent De Angelis, “Appointing Designates to Open and Operate RDSPs, Newfoundland and Labrador’s Bill 3: An Act to Amend the Enduring Powers of Attorney Act” *Deadbeat* (August 2012) 30:4 (Ontario Bar Association Trusts & Estates Law Section), 5.
- <sup>296</sup> De Angelis, note 295, 5.
- <sup>297</sup> *Representation Agreement Act*, R.S.B.C. 1996, Ch. 405.
- <sup>298</sup> *Representation Agreement Act*, note 297, s.8.
- <sup>299</sup> *An Act to Amend an Act to Amend the Enduring Powers of Attorney Act*, note 293, s.2.
- <sup>300</sup> *An Act to Amend the Enduring Powers of Attorney Act*, note 293, s.16(12)(a).
- <sup>301</sup> *An Act to Amend the Enduring Powers of Attorney Act*, note 293, s.16(6).
- <sup>302</sup> De Angelis, note 295, 5.
- <sup>303</sup> *An Act to Amend the Enduring Powers of Attorney Act*, note 293, ss. 16,20,
- <sup>304</sup> Terry Carney & Fleur Beaupert, “Public and Private Bricolage – Challenges Balancing Law, Services and Civil Society in Advancing the CRPD Supported Decision-Making” (2013) 36:1 UNSW Law Journal 175, 180, also quoting Robert Gordon, “The Emergence of Assisted (Supported) Decision-Making in the Canadian Law of Adult Guardianship and Substitute Decision-Making” (2000) 23 *International Journal of Law and Psychiatry* 61 [Gordon, *Assisted (Supported) Decision-Making*] 65, writing on what he calls “assisted” decision-making.
- <sup>305</sup> *Decision Making, Support and Protection to Adults Act*, S.Y. 2003, c.21.
- <sup>306</sup> *Decision Making, Support and Protection to Adults Act*, note 305, Schedule A, s. 4.
- <sup>307</sup> Michelle Browning, *Report to Investigate New Models of Guardianship and the Emerging Practice of Supported Decision-Making* (Winston Churchill Memorial Trust of Australia, 2010), 22, 27; Consultation with Seniors’ Services and Adult Protection Unit, Yukon Health and Social Services.
- <sup>308</sup> Browning, note 307, 23.
- <sup>309</sup> VLRC, note 124, 8.18.

- 
- <sup>310</sup> Consultation with Seniors' Services and Adult Protection Unit, Yukon Health and Social Services; Browning, note 307, 28. See also VLRC, note 124, 129.
- <sup>311</sup> VLRC, note 124, 8.17.
- <sup>312</sup> In the Yukon, a third party can make an application to set aside an agreement reached with an adult who did not consult with his or her supporter. For Lecturer Shih-Ning Then this provision creates an uneasy compromise: "[h]ere, a clear tension exists between protecting the adult and allowing that adult to make 'bad' decisions. This is particularly so because decision-making capacity is explicitly preserved by these agreements". Shih-Ning Then, "Evolution and Innovation in Guardianship Laws: Assisted Decision-Making" (2013) 35 Sydney L. Rev. 133, 150.
- <sup>313</sup> Government of Alberta, "Supported Decision-Making Adult Guardianship and Trusteeship Act" online: <http://humanservices.alberta.ca/documents/opg-guardianship-brochure-opg5609.pdf> (last accessed: November 20, 2013).
- <sup>314</sup> Yukon Health and Social Services, "Adult Protection and Decision-Making Act – Supported Decision-Making Agreements" online: [http://www.hss.gov.yk.ca/supported\\_agreements.php](http://www.hss.gov.yk.ca/supported_agreements.php) (last accessed: November 20, 2013)
- <sup>315</sup> VLRC, note 124, 8.60-8.63.
- <sup>316</sup> These concerns were submitted to the VLRC by members of the public in the course of its review of guardianship laws in Victoria, Australia. VLRC, note 124, para. 8.92.
- <sup>317</sup> Consultation with the Office of the Public Trustee for Alberta.
- <sup>318</sup> Consultation with Seniors' Services and Adult Protection Unit, Yukon Health and Social Services; Yukon Health and Social Services, "Supported Decision-Making Agreements: Could this Help Me?" online: [http://www.hss.gov.yk.ca/pdf/supported\\_dm\\_booklet.pdf](http://www.hss.gov.yk.ca/pdf/supported_dm_booklet.pdf) (last accessed: November 26, 2013).
- <sup>319</sup> Nina A. Kohn *et al*, "Supported Decision-Making: A Viable Alternative to Guardianship" (2012-2013) 117 Penn St. L. Rev. 1111, 1137, writing on a range of supported decision-making appointments.
- <sup>320</sup> Carney & Beaupert, note 304, 195.
- <sup>321</sup> Kohn *et al*, note 319, 1137, writing on a range of supported decision-making appointments.
- <sup>322</sup> Carney and Beaupert, note 304, 195, comparing informal and "ordered" supported decision-making arrangements.
- <sup>323</sup> VLRC, note 124, 8.108-8.109.
- <sup>324</sup> United Nations Secretariat for the Convention on the Rights of Persons with Disabilities & Inter-Parliamentarian Union, *From Exclusion to Equality Realizing the Rights of Persons with Disabilities: Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Operational Protocol* (New York & Geneva: UN Secretariat for the CRPD, 2007), 90-91; Gordon, *Assisted (Supported) Decision Making*, note 304, 69.
- <sup>325</sup> McClean Report, note 281; M. Melinda Munro, "Guardianship of Adults: Good Faith and the Philosophy of Mental Disability in British Columbia" (1997) 14 Canadian Journal of Family Law 217. See also: Glen, note 103, 148; VLRC, note 124, 8.31, distinguishing BC's approach from supported decision making.
- <sup>326</sup> Debates of the House of Assembly (Hansard) New L – 47<sup>th</sup> General Assembly 1<sup>st</sup> Session March 8, 2012 Bill 3.
- <sup>327</sup> See for instance: Planned Lifetime Advocacy Network, "A Three Year Review of the RDSP: Ensuring the Effectiveness of the Registered Disability Savings Plan" (December 2011).
- <sup>328</sup> *Adult Protection and Decision-Making Regulation*, Y.O.I.C. 2005/78, s.5. Investing funds is limited to investing funds that are protected by the Canada Deposit Insurance Corporation.
- <sup>329</sup> *Adult Protection and Decision-Making Regulation*, note 328.
- <sup>330</sup> Consultation with Seniors' Services and Adult Protection Unit, Yukon Health and Social Services.
- <sup>331</sup> The CEP awarded former students on average \$19,412 per person across Canada. Aboriginal Affairs and Northern Development Canada, "Statistics on the Implementation of the Indian Residential Schools Settlement Agreement" online: <http://www.aadnc-aandc.gc.ca/eng/1315320539682/1315320692192> (last accessed: September 15, 2013).
- <sup>332</sup> Consultation with Seniors' Services and Adult Protection Unit, Yukon Health and Social Services.

- 
- <sup>333</sup> Consultation with Seniors' Services and Adult Protection Unit, Yukon Health and Social Services; *Decision Making, Support and Protection to Adults Act*, note 305, Schedule A, ss.6, 15; *Enduring Power of Attorney Act*, R.S.Y. 2002 c.73, s.4.
- <sup>334</sup> The *Decision Making, Support and Protection to Adults Act* states that they can be used "to enable to agree to allow two or more trusted friends or relatives to make a *limited range of daily living decisions*...for and on behalf of the adult" where he or she "does not need guardianship" and "is capable of managing most of all of their affairs under some circumstances but has difficulty doing so under other circumstances". *Decision Making, Support and Protection to Adults Act*, note 305, Schedule A, ss.14, 15.
- <sup>335</sup> *Enduring Power of Attorney Act*, note 333, s.3.
- <sup>336</sup> Yukon Health and Social Services, "Representation Agreements: Do I Need One?" online: [www.hss.gov.yk.ca/pdf/rep\\_agreement\\_booklet.pdf](http://www.hss.gov.yk.ca/pdf/rep_agreement_booklet.pdf) (last accessed: November 7, 2013), 2.
- <sup>337</sup> Consultation with Seniors' Services and Adult Protection Unit, Yukon Health and Social Services.
- <sup>338</sup> *Representation Agreement Act*, note 297, ss. 9.1, 15.
- <sup>339</sup> *Representation Agreement Act*, note 297, s.7; *Representation Agreement Regulation*, B.C. Reg 199/2001, s.7.
- <sup>340</sup> See also: Nidus, "Representation Agreements and RDSPs" online: <http://www.nidus.ca/?p=4691> (last accessed: September 18, 2013); RDSP Resource Centre, "RDSP Improvements Announced," online: <http://rdspresource.ca/index.php/2012/04/rdsp-improvements-announced/> (last accessed: September 18, 2013).
- <sup>341</sup> Consultation with the Public Guardian and Trustee for British Columbia.
- <sup>342</sup> McClean Report, note 281.
- <sup>343</sup> British Columbia, Office of the Ombudsperson, *No Longer Your Decision: British Columbia's Process for Appointing the Public Guardian and Trustee to Manage the Financial Affairs of Incapable Adults* (Public Report No. 49 to the Legislative Assembly of British Columbia, February 2013).
- <sup>344</sup> *Representation Agreement Act*, note 297, s.9(g). This version of the *Representation Agreement Act* was amended in 2007. As at September 1, 2011, s.9(g) is no longer available. Robert M. Gordon, *The 2008 Annotated British Columbia Representation Agreement Act, Adult Guardianship Act and Related Statutes* (Toronto: Thomson Carswell Ltd., 2008) [Gordon, *Annotated Representation Agreement Act*], 1; Nidus "Representation Agreement Act Amendments" (March 2012), online: [http://www.nidus.ca/PDFs/Nidus\\_01Sept2011\\_Amendments\\_and\\_RA.pdf](http://www.nidus.ca/PDFs/Nidus_01Sept2011_Amendments_and_RA.pdf) (last accessed: November 20, 2013).
- <sup>345</sup> McClean Report, note 281, 44.
- <sup>346</sup> Gordon, *Annotated Representation Agreement Act*, note 344, vii-viii, 1.
- <sup>347</sup> *Representation Agreement Act*, note, 297, s.7.
- <sup>348</sup> Consultation with Nidus. See also the voluntary form produced by the British Columbia Ministry of Justice that allows an adult to choose one scope of power or both. British Columbia Ministry of Justice, "Representation Agreement (Section 7)" online: [http://www.ag.gov.bc.ca/incapacity-planning/pdf/Representation\\_Agreement\\_S7.pdf](http://www.ag.gov.bc.ca/incapacity-planning/pdf/Representation_Agreement_S7.pdf) (last accessed: November 26, 2013).
- <sup>349</sup> McClean Report, note 281, 20, 22.
- <sup>350</sup> *Representation Agreement Act*, note 297, s.8(2).
- <sup>351</sup> Bach & Kerzner, note 104, 78-79; Munro, note 325, 228-230; Gordon, *Annotated Representation Agreement Act*, note 344, 7.
- <sup>352</sup> *Representation Agreement Act*, note 297, s.8(2); Mona Paré, "Of Minors and the Mentally Ill: Re-Positioning Perspectives on Consent to Health Care" (2011) 29 Windsor Y.B. Access to Just. 107, 122-123.
- <sup>353</sup> Kerzner, note 183, 39; Power *et al*, note 40, 174-175.
- <sup>354</sup> Nidus, "A Study of Personal Planning in British Columbia: Representation Agreements with Standard Powers" (Nidus, 2010). [Nidus, *Study of Personal Planning*] There are few other sources with empirical evidence about representation agreements. Wendy Harrison conducted a detailed study of RAs that provides a wealth of information on non-standard agreements for personal care and advance health care directives. See Wendy Harrison, *Representation Agreements in British Columbia: Who is Using them and Why?* Project Submitted in Partial Fulfillment of the Requirements for the Degree of Master of Gerontology (Simon Fraser University, 2008). See also: Kohn *et al*, note 319.

- <sup>355</sup> See: Community Living British Columbia, “Guide to Individualized Funding” online: <http://www.communitylivingbc.ca/individuals-families/support-for-adults/individualized-funding> (last accessed: November 20, 2013), 7.
- <sup>356</sup> See for instance: Mary B. Hamilton, “Incapacity Planning: The New Law Planning for Personal Care Decisions” Prepared for the Continuing Legal Education Society of British Columbia (June 2011), 3.1.6; Law Society of British Columbia, “The Representation Agreement Act” online: <http://www.lawsociety.bc.ca/page.cfm?cid=1209&t=The-Representation-Agreement-Act> (last accessed: September 18, 2013); Browning, note 307, 31.
- <sup>357</sup> VLRC, note 124, 8.78-8.81.
- <sup>358</sup> Glen, note 103, 148; Kohn *et al*, note 319, 1122, 1137-1138.
- <sup>359</sup> *Representation Agreement Act*, note 297, s.12; Gordon, *Annotated Representation Agreement Act*, note 344, 23.
- <sup>360</sup> *Representation Agreement Act*, note 297, s.12.
- <sup>361</sup> Nidus called these “Other Family”. They exclude parents, children, siblings and spouses. Nidus, *Study of Personal Planning*, note 354, 4.
- <sup>362</sup> Nidus, *Study of Personal Planning*, note 354.
- <sup>363</sup> Browning, note 307, 32; consultation with the Public Guardian and Trustee for British Columbia.
- <sup>364</sup> Browning, note 307, 32.
- <sup>365</sup> *The Adult Guardianship and Co-Decision-Making Act*, note 143, s.40.
- <sup>366</sup> *The Adult Guardianship and Co-Decision-Making Act*, note 143; *Adult Guardianship and Trusteeship Act*, S.A. 2008, c.A4.2, s 13; Alberta Human Services, “Co-Decision Making Brochure” online: <http://humanservices.alberta.ca/documents/opg-guardianship-brochure-opg5610.pdf> (last accessed: November 8, 2013).
- <sup>367</sup> VLRC, note 124, 9.3.
- <sup>368</sup> *The Adult Guardianship and Co-Decision-Making Act*, note 143, s.42. In Alberta, “[a] co-decision-maker shall not refuse to sign a document...if a reasonable person could have made the decision and the decision is not likely to result in harm to the assisted adult”. *Adult Guardianship and Trusteeship Act*, note 366, s.18(5).
- <sup>369</sup> In Saskatchewan, where a decision made by the adult and the property co-decision maker requires the signing of a document, the document is voidable unless the adult and the property co-decision maker co-sign the document. *The Adult Guardianship and Co-Decision-Making Act*, note 143, s.41. In Alberta, the Court may specify whether a contract is voidable if it is not in writing and signed by both parties. *Adult Guardianship and Trusteeship Act*, note 366 s. 17(5).
- <sup>370</sup> VLRC, note 124, 9.73,9.76.
- <sup>371</sup> Consultation with the Public Trustee for Alberta.
- <sup>372</sup> Carney & Beaupert, note 304, 184.
- <sup>373</sup> VLRC, note 124, 9.53-9.54.
- <sup>374</sup> VLRC, note 124, 9.53-9.54.
- <sup>375</sup> VLRC, note 124, 9.53-9.57.
- <sup>376</sup> Doug Surtees, “How Goes the Battle? An Exploration of Guardianship Reform” (2012) 50:1 Alta. L. Rev. 115 [Surtees, *Guardianship Reform*], paras. 20-22, 30.
- <sup>377</sup> Surtees, *Guardianship Reform*, note 376.
- <sup>378</sup> Surtees, *Guardianship Reform*, note 376, para. 30.
- <sup>379</sup> Surtees, *Guardianship Reform*, note 376, para. 31.
- <sup>380</sup> Consultation with Brendon Pooran.
- <sup>381</sup> Consultation with Saara Chetner and Risa Stone (Counsel for the Office of the Public Guardian and Trustee).
- <sup>382</sup> SDA, note 5, s. 69.
- <sup>383</sup> Summary disposition applications require the filing of two pieces of evidence containing an opinion that the adult is incapable. At least one of these must contain an opinion that it is necessary for decisions to be made on the adult’s behalf and at least one must be undertaken by a capacity assessor. SDA, note 5, ss.72,77,78.

- 
- <sup>384</sup> Law Society of Upper Canada, “How to Have a Guardian of Property Appointed through Court Application”, online: <http://www.lsuc.on.ca/For-Lawyers/Manage-Your-Practice/Practice-Area/Trusts-and-Estates-Law/How-to-Have-a-Guardian-of-Property-Appointed-through-Court-Application/> (last accessed: September 25, 2013).
- <sup>385</sup> Consultation with Doug Surtees.
- <sup>386</sup> Alberta Human Services, “Trusteeship Order”, online: <http://humanservices.alberta.ca/guardianship-trusteeship/agta-trusteeship-order.html> (last accessed: September 25, 2013).
- <sup>387</sup> Consultation with the Public Trustee for Alberta.
- <sup>388</sup> Consultation with Brendon Pooran.
- <sup>389</sup> SDA, note 5, s.77(3).
- <sup>390</sup> Consultation with the Saara Chetner and Risa Stone (Counsel for the Office of the Public Guardian and Trustee).
- <sup>391</sup> QLRC, note 124, 20.8, citing Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-Making by and for People with a Decision-Making Disability*, Report No 49 (1996) Vol. 1, 23–7.
- <sup>392</sup> See VLRC, note 124; QLRC, note 124, Vol.3.
- <sup>393</sup> As part of an overarching scheme to provide support services under *The Vulnerable Persons with a Mental Disability Act*, the appointment process includes an initial screening by the Vulnerable Persons Commissioner prior to a hearing. Like the CCB, the hearing panel is constituted of members of the public, including family members and lawyers. The decision to appoint a substitute decision-maker is based on an assessment of capacity and need. However, it can only be made where a person is “incapable of managing his or her property by himself or herself or with the involvement of a support network”. Where it appears that reasonable efforts have not been made to involve a support network prior to the application, the Commissioner must dismiss the application and request that the Executive Director facilitate a support network or individual plan. Otherwise, the application is referred to the hearing panel, which makes a recommendation to the Commissioner, who ultimately determines the appointment of a substitute decision-maker. *The Vulnerable Persons with a Mental Disability Act*, note 148, ss.84, 85, 88; 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)* (September, 2007).
- <sup>394</sup> VLRC, note 124, ss 8.75,9.52.
- <sup>395</sup> Information provided by the Consent and Capacity Board.
- <sup>396</sup> *Health Care Consent Act, 1996*, S.O.1996, Ch.2, Schedule A [HCCA].
- <sup>397</sup> Information provided by the Consent and Capacity Board.
- <sup>398</sup> Jamie Golombek, “Planning with Registered Disability Savings Plans” (2009) 57:2 Canadian Tax Journal 339, 358.
- <sup>399</sup> ITA, note 2, s. 146.4(1).
- <sup>400</sup> See for instance: Golombek, note 398; Rachel Blumenfeld & Leela Hemmings, “The New RDSP: A Comparison to Henson Trusts” (2009) 3 The Conference for Advanced Life Underwriting (CALU) Info Exchange 1.
- <sup>401</sup> Donovan W.M. Waters *et al*, *Waters’ Law of Trusts in Canada*, 4<sup>th</sup> ed. (Toronto: Carswell, 2012), 3, 9; Simon Gardner, *An Introduction to the Law of Trusts* (Oxford: Oxford University Press, 2011), 1; Eileen E. Gillese, *The Law of Trusts* (Concord: Irwin Law, 1997), 5.
- <sup>402</sup> Waters, note 401, 3.
- <sup>403</sup> Gillese, note 401, 5.
- <sup>404</sup> In Ontario, certain duties and entitlements of trustees are prescribed in the *Trustee Act* and other responsibilities can be set forth in the trust instrument. *Trustee Act*, R.S.O. 1990, c.T.23, s.35.
- <sup>405</sup> SDA, note 5, ss.32, 38.
- <sup>406</sup> See SDA, note 5, ss.17, 25(3); *Representation Agreement Act*, note 297, s.5.
- <sup>407</sup> Robert Gordon, “Guardianship of the Person and the Estate” in Ann Soden, ed., *Advising the Older Client* (Markham: LexisNexis Canada Inc., 2005), 105 [Gordon, *Guardianship of the Person and the Estate*].
- <sup>408</sup> Harry Beatty, “Estate Planning for Beneficiaries with Disabilities in Ontario: Inheritances, Trusts and the *Ontario Disability Support Program*”, prepared for the Continuing Legal Education Program “A Disability Law Primer” (27 November 2003), 10.
- <sup>409</sup> Beatty, note 408; The Allen Consulting Group, note 34.
- <sup>410</sup> Note that this is different for a testamentary trust, which reflects the common law test to make a will. Waters, note 401, 119, referring to *Royal Trust Co. v. Diamant*, [1953] 3 DLR 102 (BCSC), 111.

- 
- <sup>411</sup> *Ontario (Director of Income Maintenance) v. Henson* (1989), 36 ETR 192. Golombek, note 398, 358.
- <sup>412</sup> Under ODSP, payments from a Henson trust to or for the benefit of a member of a benefit unit may also be exempt as income, for example, if used for approved disability related items, services, education or training expenses that are not reimbursable or for any purpose up to \$6,000 maximum in a 12 month period. ODSP Directives, note 72, 4.7.
- <sup>413</sup> Beatty, note 408, 19; Donalee Moulton, "Balancing the Pros and Cons of Henson Trusts" 31:45 *The Lawyers Weekly* (April 6, 2012).
- <sup>414</sup> Waters, note 401, 23.
- <sup>415</sup> *Trustee Act*, note 404; *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, s. 14.05(3)(f).
- <sup>416</sup> *Trustee Act*, note 404, ss. 5, 23.
- <sup>417</sup> *Succession Law Reform Act*, R.S.O. 1990, c.S.26, s.63; *Variation of Trusts Act*, R.S.O. 1990, c. V.1, s.1.
- <sup>418</sup> 42 USC § 1396p(d)(4)(A) (West Supp. 2009); U.S. Social Security Administration, Program Operations Manual System, SI 001120.203 "Exceptions to Counting Trusts Established on or after 1/1/00"; Kristen M. Lewis, "Special Needs Trusts: The Cornerstone of Planning for Beneficiaries with Disabilities", prepared for the American Bar Association, online: [http://www.americanbar.org/content/dam/aba/publishing/rpte\\_ereport/te\\_lewis.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/rpte_ereport/te_lewis.authcheckdam.pdf) (last accessed: November 26, 2013). Laws and regulations governing special needs trusts vary by state and they cannot all be reviewed here. The Allen Consulting Group, note 34, 77.
- <sup>419</sup> See for instance: Stewart E. Sterk, "Trust Protectors, Agency Costs, and Fiduciary Duty" (2005-2006) 27 *Cardozo L Rev* 2761; Donovan W. M. Waters, "The Protector: New Wine in Old Bottles?" in A.J. Oakeley ed, *Trends in Contemporary Trust Law* (Oxford: Oxford University Press, 1996); Philip J. Renaud, "Protectors in Domestic Trusts" (2008) 27 *Estates, Trusts and Pensions J* 241; Rebecca Berg & Scott Solkoff, "The Importance of Trust Protectors for Pooled Special Needs Trusts" (2010) 22:1 *Elder Law Report* 1; Jay Adkisson, "Trust Protectors: What They are and Why Probably Every Trust Should Have One" *Forbes* (25 August 2012).
- <sup>420</sup> See for instance: National Health Service, "Direct Payments", online: <http://www.nhs.uk/CarersDirect/guide/practicalsupport/Pages/Directpayments.aspx> (last accessed: November 23, 2013); Department of Health (England), *Guidance on Direct Payments for Community Care, Services for Carers and Children's Services* (Department for Children, Schools and Families, 2009); Kent County Council, *Direct Payments Factsheet #3* (Kent County Council, Adult Social Care, August 2013)[Kent County Council, *Direct Payments*]; Staffordshire County Council Directorate of Social Care and Health Direct Payments Project Board, *Direct Payments in Staffordshire: Setting up a Trust Funds to Manage Your Payments* (April, 2007)[Staffordshire County Council, *Direct Payments*].
- <sup>421</sup> Laura Luckhurst, "Can Intensive Support Widen Access to Direct Payments?" in Joanna Bornat & Janet Leece, eds., *Developments in Direct Payments* (Bristol: The Policy Press, 2006); Melanie Henwood & Bob Hudson, *Keeping it Personal: Supporting People with Multiple and Complex Needs A Report to the Commission for Social Care Inspection* (London: Commission for Social Care Inspection, January 2009).
- <sup>422</sup> National Health Service, *Direct Payments*, note 420.
- <sup>423</sup> Staffordshire County Council, *Direct Payments*, note 420, 2.
- <sup>424</sup> Jo Fitzgerald, *Personal Health Budgets and Independent User Trusts: Using Independent User Trusts to Manage Personal Health Budgets* (Blackburn, England: Mitchell James Ltd., 2011).
- <sup>425</sup> Department of Health (England), note 420.
- <sup>426</sup> Department of Health (England), note 420, 12.
- <sup>427</sup> Kent County Council, *Direct Payments*, note 420, 1 [emphasis in the original].
- <sup>428</sup> Val Williams, *How Can Local Authorities Increase the Take-up of Direct Payment Schemes to Adults with Learning Disabilities?* (Devon: Research in Practice for Adults, 2006). See also: Vanessa Davey et al, *Direct Payments: A National Survey of Direct Payments Policy and Practice* (London: LSE, Personal Social Services Research Unit, May 2007); Luckhurst, note 421.
- <sup>429</sup> Luckhurst, note 421, 232.
- <sup>430</sup> Luckhurst, note 421, 225, 228.
- <sup>431</sup> Consultation with the Ontario Disability Support Program.
- <sup>432</sup> ODSPA, note 71, ss. 2,12(1),(2).

- 
- <sup>433</sup> ODSPA, note 71. O.Reg. 222/98, note 47; ODSP Directives, note 72, 10.2.
- <sup>434</sup> Consultation with the Ontario Disability Support Program; ODSP Directives, note 72, 10.2.
- <sup>435</sup> Consultation with the Ontario Disability Support Program.
- <sup>436</sup> ODSP Directives, note 72, 10.2.
- <sup>437</sup> Harry Beatty, "Ontario Disability Support Program" (1999) 14 J.L. & Soc. Pol'y 1, 49; Standing Committee on Social Development, September 29, 1997, Bill 142, online: Legislative Assembly of Ontario [http://www.ontla.on.ca/web/committee-proceedings/committee\\_transcripts\\_details.do?locale=en&BillID=&ParlCommID=54&Date=1997-09-29&Business=Bill+142%2C+Social+Assistance+Reform+Act%2C+1997&DocumentID=19039](http://www.ontla.on.ca/web/committee-proceedings/committee_transcripts_details.do?locale=en&BillID=&ParlCommID=54&Date=1997-09-29&Business=Bill+142%2C+Social+Assistance+Reform+Act%2C+1997&DocumentID=19039) (last accessed: November 23, 2013); Standing Committee on Social Development, October 20, 1997, Bill 142, online: [http://www.ontla.on.ca/web/committee-proceedings/committee\\_transcripts\\_details.do?locale=en&Date=1997-10-20&ParlCommID=54&BillID=&Business=Bill+142%2C+Social+Assistance+Reform+Act%2C+1997&DocumentID=19025](http://www.ontla.on.ca/web/committee-proceedings/committee_transcripts_details.do?locale=en&Date=1997-10-20&ParlCommID=54&BillID=&Business=Bill+142%2C+Social+Assistance+Reform+Act%2C+1997&DocumentID=19025) (last accessed: November 23, 2013).
- <sup>438</sup> *Ontario Works Program Policy Directives*, online: Ministry of Community and Social Services, online: [http://www.mcscs.gov.on.ca/en/mcss/programs/social/directives/directives/owdirectives/3\\_6\\_OW\\_Directives.aspx](http://www.mcscs.gov.on.ca/en/mcss/programs/social/directives/directives/owdirectives/3_6_OW_Directives.aspx) (last accessed: November 23, 2013), 3.6.
- <sup>439</sup> In Alberta, under the Assured Income for the Severely Handicapped (AISH) program a so-called "financial administrator" may also be appointed when clients lack mental capacity or they have a pattern of using their benefits in a way that puts their health at risk. Alberta Human Services, "Assured Income for the Severely Handicapped (AISH) Online Policy Manual", online: [http://seniors.alberta.ca/AISH/PolicyManual/AISH\\_Online\\_Policy\\_Manual.htm](http://seniors.alberta.ca/AISH/PolicyManual/AISH_Online_Policy_Manual.htm) (last accessed: November 23, 2013).
- <sup>440</sup> Consultation with the Ontario Disability Support Program.
- <sup>441</sup> Consultation with the Ontario Disability Support Program; ODSP Directives, note 72, 10.2.
- <sup>442</sup> Service Canada, "Canada Pension Plan", online: <http://www.servicecanada.gc.ca/eng/services/pensions/cpp/index.shtml/> (last accessed: November 23, 2013).
- <sup>443</sup> Service Canada, Disability Benefit, online: <http://www.servicecanada.gc.ca/eng/services/pensions/cpp/disability/benefit/index.shtml> (last accessed: November 23, 2013).
- <sup>444</sup> Service Canada, "Old Age Security", online: <http://www.servicecanada.gc.ca/eng/services/pensions/oas/index.shtml> (last accessed: November 23, 2013).
- <sup>445</sup> Consultation with the Employment and Social Development Canada (OAS/CPP).
- <sup>446</sup> Service Canada, "Consent to Communicate Information to an Authorized Person", online: <http://www.servicecanada.gc.ca/cgi-bin/search/eforms/index.cgi?app=prfl&frm=isp1603cpp&ln=eng> (last accessed: November 26, 2013).
- <sup>447</sup> *Canada Pension Plan Regulations*, C.R.C. c.385, ss.44, 55.
- <sup>448</sup> *Old Age Security Regulations*, C.R.C. c.1246, s.24. See also: *Canada Pension Plan Regulations*, C.R.C. c.385, s.55.
- <sup>449</sup> Service Canada, "Certificate of Incapacity", online: <http://www.servicecanada.gc.ca/cgi-bin/search/eforms/index.cgi?app=prfl&frm=isp3505cpp&ln=eng> (last accessed: November 23, 2013).
- <sup>450</sup> Service Canada, "Agreement to Administer Benefits under the Old Age Security Act and/or the Canada Pension Plan by a Private Trustee", online: <http://www.servicecanada.gc.ca/cgi-bin/search/eforms/index.cgi?app=prfl&frm=isp3506oas&ln=eng> (last accessed: November 26, 2013).
- <sup>451</sup> Information provided by the Employment and Social Development Canada (OAS/CPP).
- <sup>452</sup> Carney & Beaupert, note 304, 188, speaking of the difference between NDIS and social assistance.
- <sup>453</sup> Although individualized funding exists in Canadian provinces, such as Ontario and British Columbia, NDIS is reviewed here because the process to establish a legal representative for direct payments follows rules that are more detailed. In Ontario, direct funding has not yet been implemented, except under the Passport program, where adults are reimbursed for expenses that have already been incurred. In British Columbia, individualized funding is provided by Community Living British Columbia (CLBC). An "agent" can be appointed in an informal process by CLBC to manage a recipient's payments in certain circumstances. CLBC, note 355.

- 
- <sup>454</sup> Carney & Beaupert, note 304, 189; *National Disability Insurance Scheme Act, 2013* (No. 20, 2013) [NDIS Act].
- <sup>455</sup> NDIS Act, note 454, Part 5.
- <sup>456</sup> NDIS Act, note 454, ss.4(8), 5
- <sup>457</sup> *National Disability Insurance Scheme (Nominee) Rules, 2013*, F2013L01062, 3.6-3.10 [NDIS Nominee Rules].
- <sup>458</sup> NDIS Nominee Rules, note 457, 3.14.
- <sup>459</sup> NDIS Nominee Rules, note 457, 5.5, 5.10
- <sup>460</sup> Australian Law Reform Commission, *Family Violence and Commonwealth Laws: Improving Legal Frameworks* (ALRC Report 117) [ALRC], Ch. 9. See also VLRC, note 124, 8.95.
- <sup>461</sup> ALRC, note 460, Ch. 9. Federation of Community Legal Centres, *Response to the National Human Rights Consultation* (Victoria, Australia: Federation of Community Legal Centres, 2009); Mike Clare *et al*, *Examination of the Extent of Elder Abuse in Western Australia: A Qualitative and Quantitative Investigation of Existing Agency Policy, Service Responses and Recorded Data* (Crawley, WA: The University of Western Australia, 2011).
- <sup>462</sup> The Representative Payee Program includes beneficiaries who are minors, “legally incompetent or mentally incapable of managing benefit payments”, and persons who are “physically incapable of managing or directing the management of their benefit payments”. United States Government Accountability Office, Report to Congressional Requesters, *SSA Representative Payee Program: Addressing the Long-Term Challenges Requires a More Strategic Approach* (Washington: GAO, 2013) [GAO], 1, 3.
- <sup>463</sup> Hearing Before the Committee on Ways and Means Subcommittee on Social Security United States House of Representatives, Statement of LaTina Burse Greene (June 5, 2013) [Hearing Before the Committee on Ways and Means Subcommittee on Social Security United States House of Representatives], 10.
- <sup>464</sup> GAO, note 462, 1, 8.
- <sup>465</sup> Daniel J. Luchins *et al*, “Representative Payeeship and Mental Illness: A Review” (2003) 30:4 Administration and Policy in Mental Health 341; Daniel J. Luchins *et al*, “An Agency-Based Representative Payee Program and Improved Community Tenure of Persons with Mental Illness” (1998) 49 Psychiatric Services 1218; Robert Rosenheck *et al*, “Impact of Representative Payees on Substance Use by Homeless Persons with Serious Mental Illness” 1997 48 Psychiatric Services 800; Elbogen *et al*, “Characteristics of Representative Payeeship Involving Families of Beneficiaries with Psychiatric Disabilities” (2007) 58: 11 Psychiatric Services 1433.
- <sup>466</sup> Elbogen *et al*, note 465.
- <sup>467</sup> *Social Security Protection Act of 2004* (Public Law 108-203); Committee on Social Security Representative Payees, National Research Council, *Improving the Social Security Representative Payee Program: Serving Beneficiaries and Minimizing Misuse* (Washington: The National Academies Press, 2007).
- <sup>468</sup> Reid K. Weisbord, “Social Security Representative Payee Misuse” (2013) 117:4 Penn State Law Rev. 1257.
- <sup>469</sup> VLRC, note 124, 1.2, speaking of Victorian guardianship legislation.
- <sup>470</sup> Consultation with Community Living Ontario.
- <sup>471</sup> SDA, note 5, ss.7(6), 17(10), 25 (2).
- <sup>472</sup> Writing on substitute decision-makers as “proxies” see Nandini Devi *et al*, “Moving Towards Substituted or Supported Decision-Making? Article 12 of the Convention on the Rights of Persons with Disabilities” (2011) 5 European Journal of Disability Research 249, 253. See also: Alberta Law Reform Institute, *Advance Directives and Substitute Decision-Making in Personal Healthcare*, Report No 64 (March 1993), 1, concerning substitute decision-making in the healthcare context.
- <sup>473</sup> Wright, note 123, 350; Robert D. Dinerstein, “Implementing Legal Capacity under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making” (2012) 19:2 Human Rights Brief 8, 2.
- <sup>474</sup> SDA, note 5, s.32.
- <sup>475</sup> For definitions of the substituted judgment standard see: Linda S. Whitton and Lawrence A. Frolik, “Surrogate Decision-Making Standards for Guardians: Theory and Reality” (2012) 3 Utah L. Rev. 1491. See also: Glen, note 103, 116-117.
- <sup>476</sup> SDA, note 5, ss. 17, 32, 70.
- <sup>477</sup> These roles and responsibilities only apply to attorneys acting under a continuing power of attorney if the grantor is incapable of managing property or the attorney has reasonable grounds to believe that the grantor is incapable of managing property. SDA, note 5, s.38.

---

<sup>478</sup> SDA, note 5, s.37.

<sup>479</sup> SDA, note 5, ss.37, 38.

<sup>480</sup> SDA, note 5, ss.32, 38.

<sup>481</sup> OPGT, *Duties and Powers*, note 178, 4.

<sup>482</sup> SDA, note 5, s.32.

<sup>483</sup> SDA, note 5, s.32.

<sup>484</sup> OPGT, *Duties and Powers*, note 178, 4.

<sup>485</sup> SDA, note 5, ss.32(7), 32(8).

<sup>486</sup> Gordon cites Ontario as one example of the following statement: “Recent reforms in some jurisdictions have produced provisions that are considerably more refined and reflect modern adult guardianship principles and ideas, particularly the idea that a guardian has a responsibility to involve the capable adult in decision-making to the greatest extent possible”. Gordon, *Guardianship of the Person and the Estate*, note 407, 101-103.

<sup>487</sup> Nina A. Kohn, “Elder Empowerment as a Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney” (2006) 59:1 Rutgers Law Review 1, 15, describing duties under enduring POAs in the United States.

<sup>488</sup> Kohn, note 487, 15-17, describing duties under enduring POAs in the United States.

<sup>489</sup> Gerald H.L. Fridman, *The Law of Agency* 5<sup>th</sup> ed (London: Butterworths, 1983), 138-139.

<sup>490</sup> F.M.B. Reynolds *et al*, *Bowstead and Reynolds on Agency*, 18th ed. (London: Sweet & Maxwell, 2006), 10-015; McClean Report, note 281; New Zealand Law Commission, *Misuse of Enduring Powers of Attorney, Report No 17* (Wellington, New Zealand: April 2001), 2.

<sup>491</sup> McClean Report, note 281, 2; Carolyn L. Dessin, “Acting as Agent under a Financial Durable Power of Attorney: An Unscripted Role” (1996) 75 Neb. L. Rev. 574.

<sup>492</sup> Kohn, note 487, 41.

<sup>493</sup> Kohn, note 487, 42-49.

<sup>494</sup> Kohn, note 487, 49.

<sup>495</sup> Kohn, note 487, 49.

<sup>496</sup> Ann Soden, “Beyond Incapacity” (2011) 5:2 MJLH 295, 300.

<sup>497</sup> Soden, *Beyond Incapacity*, note 496, 300.

<sup>498</sup> Soden, *Beyond Incapacity*, note 496, 300 – 301.

<sup>499</sup> For definitions of the best interests standard see: Whitton & Frolik, note 475.

<sup>500</sup> HCCA, note 396, s.21; SDA, note 5, s.66.

<sup>501</sup> Bach & Kerzner, note 104, 90.

<sup>502</sup> *Representation Agreement Act*, note 297, s. 16(2).

<sup>503</sup> *Decision Making Support and Protection to Adults Act*, note 305, Schedule A, s.23.

<sup>504</sup> For instance, under the British Columbia *Representation Agreement Act*, the relevant section in full reads:

16 (1) A representative must

- (a) act honestly in good faith,
- (b) exercise the care, diligence and skill of a reasonably prudent person, and
- (c) act within the authority given in the representation agreement.

(2) When helping the adult to make decisions or when making decisions on behalf of the adult, a representative must

- (a) consult, to the extent reasonable, with the adult to determine his or her current wishes, and
- (b) comply with those wishes if it is reasonable to do so.

...

(3) If subsection (2) applies but the adult’s current wishes cannot be determined or it is not reasonable to comply with them, the representative must comply with any instructions or wishes the adult expressed while capable.

(4) If the adult’s instructions or expressed wishes are not known, the representative must act

- (a) On the basis of the adult’s known beliefs and values, or
- (b) In the adult’s best interests, if he or her beliefs and values are not known.

<sup>505</sup> Bach & Kerzner, note 104, 90.

- <sup>506</sup> Bach and Kerzner also accept that a best interests standard can be applied “Where specific decisions are lacking about the transactions required to give the overall intention effect....” They also propose that different supports should be provided by so-called “facilitators” to persons who do not have relationships “where others can reasonably discern their will and/or intention and describe it to others”. Bach and Kerzner’s proposals cannot be reviewed in their entirety in this discussion paper. For more comprehensive information, please consult their paper directly. Bach & Kerzner, note 104, 89, 91-94.
- <sup>507</sup> *The Adult Guardianship and Co-Decision-Making Act*, note 143, s.42. In Alberta, “A co-decision-maker shall not refuse to sign a document...if a reasonable person could have made the decision and the decision is not likely to result in harm to the assisted adult”. *Adult Guardianship and Trusteeship Act*, note 366, s.18(5).
- <sup>508</sup> NDIS Nominee Rules, note 457, 5.5.
- <sup>509</sup> NDIS Nominee Rules, note 457, 5.3. See also: VLRC, 399; QLRC, 105-106.
- <sup>510</sup> *Mental Capacity Act 2005*, ch.9, s.1(3).
- <sup>511</sup> The Law Commission (United Kingdom), note 41, 4.26.
- <sup>512</sup> See for instance: Whitton & Frolik, note 475; Lutfiyya *et al*, note 393; Margaret Wallace, *Evaluation of the Supported Decision Making Project* (Office of the Public Advocate for South Australia, November 2012); Harrison, note 354.
- <sup>513</sup> Kohn *et al*, note 319, 1114.
- <sup>514</sup> The commissioned research paper, “Understanding the Lived Experience of Assisted and Supported Decision-Making in Canada” will be undertaken by the Canadian Centre for Elder Law. For more information see: <http://lco-cdo.org/en/capacity-guardianship-call-for-papers>.
- <sup>515</sup> McClean Report, note 281, 87-88.
- <sup>516</sup> See for instance: WCLRA, note 138; *Trustee Act*, note 404, s.35.
- <sup>517</sup> SDA, note 5, ss.33, 38.
- <sup>518</sup> Although in the Yukon, a third party can make an application to set aside an agreement reached with an adult who did not consult with his or her supporter; *Decision Making, Support and Protection to Adults Act*, note 305, Schedule A, ss.5, 12; *The Adult Guardianship and Co-Decision-Making Act*, note 143, s.6.
- <sup>519</sup> In Saskatchewan, where a decision made by the adult and the property co-decision maker requires the signing of a document, the document is voidable unless the adult and the property co-decision maker co-sign the document. *The Adult Guardianship and Co-Decision-Making Act*, note 143, s.41. In Alberta, the Court may specify whether a contract is voidable if it is not in writing and signed by both parties. *Adult Guardianship and Trusteeship Act*, note 366, s 17(5).
- <sup>520</sup> Public Guardian and Trustee of British Columbia, *It’s Your Choice: Personal Planning Tools* (March 2012), 11.
- <sup>521</sup> McClean Report, note 281, 91-92.
- <sup>522</sup> If a POA is ineffective because an unauthorized person witnessed its execution, the same protections apply. SDA, note 5, s.13.
- <sup>523</sup> *Powers of Attorney Act, 2002*, S.S. 2002, c.P-20.3, s.21.
- <sup>524</sup> ITA, note 2, s.146.4(4)(a).
- <sup>525</sup> Consultation with Finance Canada.
- <sup>526</sup> See for instance: Ontario Seniors’ Secretariat, “What Every Older Canadian Should Know about Managing and Protecting their Assets”, online: [http://www.seniors.gov.on.ca/en/moneymatters/managing\\_protecting\\_assets.php](http://www.seniors.gov.on.ca/en/moneymatters/managing_protecting_assets.php) (last accessed: November 7, 2013).
- <sup>527</sup> Information provided by CIBC.
- <sup>528</sup> Saskatchewan Ministry of Justice and Attorney General, note 162.
- <sup>529</sup> *An Act to Amend the Enduring Powers of Attorney Act*, note 293, s. 20(2).
- <sup>530</sup> Minister for Families, Community Services and Indigenous Affairs and Minister for Disability Reform, *National Disability Insurance Scheme (Plan Management) Rules 2013: Explanatory Statement*, online: <http://www.comlaw.gov.au/Details/F2013L01064> (last accessed: November 26, 2013), Part 3.
- <sup>531</sup> Consultation with Pooran Law. In the case of RESPs, there are few restrictions on who can establish a plan for a beneficiary. Beneficiaries are also generally entitled to receive educational assistance payments directly if they are enrolled in a specified program. Canada Revenue Agency, “Who Can Be a Subscriber?” online:

- 
- <http://www.cra-arc.gc.ca/tx/ndvdl/tpcs/resp-reee/sbscrbr-eng.html> (last accessed: November 23, 2013); Canada Revenue Agency, "Educational Assistance Payments (EAPs), online: <http://www.cra-arc.gc.ca/tx/ndvdl/tpcs/resp-reee/pymnts/p-eng.html> (last accessed: November 23, 2013).
- <sup>532</sup> ITA, s.146.4(1), note 2, "qualifying family member", "qualifying person", "disability savings plan", "holder".
- <sup>533</sup> SDA, note 5, ss.7,17,24.
- <sup>534</sup> Section 17 of the SDA permits a trust corporation to apply to replace the OPGT if the incapable person has a spouse or partner who consents.
- <sup>535</sup> Fram Report, note 129, 107, commenting on the statutory appointment process.
- <sup>536</sup> Fram Report, note 129, 107, commenting on the statutory appointment process.
- <sup>537</sup> SDA, note 5, ss.7,17,24.
- <sup>538</sup> Lutfiyya *et al*, note 393, 25, writing on family members in the context of Manitoba's legislation. See also: A. Hillman *et al*, "Experiencing Rights within Positive, Person-Centred Support Networks of People with Intellectual Disability in Australia" (2012) 56 *Journal of Intellectual Disability Research* 1065.
- <sup>539</sup> Family members can often be involved informally in decision-making about income supports and social benefits for persons with disabilities. For instance, under SIPDDA, a member of a person's family, caregiver or other person can apply on behalf of a person with a developmental disability to receive services and supports. SIPDDA, note 13, s.13.
- <sup>540</sup> Consultation with Goddard, Gamage and Stephens LLP; consultation with the Schizophrenia Society of Ontario.
- <sup>541</sup> GAO, note 462, 13, citing Hebert *et al*, "Alzheimer Disease in the US Population," *Archives of Neurology*, 60 (August 2003); Agarawal *et al*, "The Age of Reason: Financial Decisions over the Life Cycle and Implications for Regulation," *Brookings Papers on Economic Activity* (Washington, D.C.: 2009).
- <sup>542</sup> Fram Report, note 129, 58.
- <sup>543</sup> SDA, note 5, s.7(3).
- <sup>544</sup> Information provided the Saara Chetner and Risa Stone (Counsel for the Office of the Public Guardian and Trustee).
- <sup>545</sup> Consultation with the Ontario Disability Support Program; ODSP Directives, note 72, 10.2; Information provided by Employment and Social Development Canada (CPP/OAS).
- <sup>546</sup> Consultation with Professor Doug Surtees; Doug Surtees, "The Evolution of Co-Decision-Making in Saskatchewan" (2010) *Sask. L. Rev.* 75 [Surtees, *Co-Decision Making*], 87. *The Guardianship and Co-Decision-Making Act* provides that corporations or agencies or categories of the same can be designated by the Minister as eligible applicants to be appointed as a co-decision maker or guardian. *The Guardianship and Co-Decision-Making Act*, note 143, s.30.
- <sup>547</sup> Community Living British Columbia, *Host Agency Funding Policy*, online: <http://www.communitylivingbc.ca/wp-content/uploads/Host-Agency-Funding-Policy.pdf> (last accessed: November 20, 2013) [CLBC, *Host Agency Funding Policy*].
- <sup>548</sup> Consultation with Tim Stainton; Consultation with Community Living British Columbia.
- <sup>549</sup> Hearing Before the Committee on Ways and Means Subcommittee on Social Security United States House of Representatives, note 463, 2; GAO, note 462, 17.
- <sup>550</sup> GAO, note 462, 14, 17.
- <sup>551</sup> ODSP Directives, note 72, 10.2.
- <sup>552</sup> CLBC, *Host Agency Funding Policy*, note 547; *Quality Assurance Measures*, O.Reg. 299/10.
- <sup>553</sup> See for instance: CLBC, *Standards for Unaccredited Service Providers: A Resource Guide* (April 2012), 30.
- <sup>554</sup> Social Security Advisory Board "Disability Programs in the 21<sup>st</sup> Century: The Representative Payee Program" (2010) Social Security Advisory Board Issue Brief Series 2:1, 5; Weisbord, note 468.
- <sup>555</sup> In Saskatchewan, *The Guardianship and Co-Decision-Making Act* provides that corporations or agencies or categories of corporations or agencies can be designated by the Minister as eligible applicants to be appointed as a co-decision maker or guardian. *The Guardianship and Co-Decision-Making Act*, note 143, s.30.
- <sup>556</sup> Publicly available submissions received by the Department of Finance Canada in the context of the Three-Year Review of the RDSP.
- <sup>557</sup> *The Policy Guidelines for the Adult Protective Service Worker Program 2012* explain that "the role of trustee by the APSW should be **temporary** while seeking other service alternatives to assume the role of trustee for

- 
- management of the person's ODSP income support". Ministry of Community and Social Services, *Policy Guidelines for the Adult Protective Service Worker Program 2012* (October 2012), 9, 10, 20.
- <sup>558</sup> Vanguard Project Collaborative, *Vulnerable Adults and Capability Issues in BC: Provincial Strategy Document* (Vanguard Project Collaborative, January 2009), 23.
- <sup>559</sup> Canadian Centre for Elder Law, "Background Paper: Financial Abuse of Seniors: An Overview of Key Legal Issues and Concepts", prepared for the International Federation on Ageing (March, 2013) [CCEL], 4.
- <sup>560</sup> CCEL, note 559, 4.
- <sup>561</sup> CCEL, note 559, 4, citing a definition from Finding Home, online: <http://findinghome.ca>.
- <sup>562</sup> VLRC, note 124, 18.80
- <sup>563</sup> VLRC, note 124, 18.81
- <sup>564</sup> VLRC, note 124, 18.82
- <sup>565</sup> CCEL, note 559, 4.
- <sup>566</sup> CCEL, note 559, 5.
- <sup>567</sup> CCEL, note 559, 5.
- <sup>568</sup> National Initiative for the Care of the Elderly, *Defining and Measuring Elder Abuse and Neglect: Synthesis of Preparatory Work Required to Measure the Prevalence of Abuse and Neglect of Older Adults in Canada* (April 2012), Ch. 5.3.
- <sup>569</sup> Alberta Law Reform Institute, *Enduring Powers of Attorney: Safeguards Against Abuse*, Final Report No.88 (February 2003) [ALRI, *Safeguards Against Abuse*], writing on enduring POAs.
- <sup>570</sup> John B. Bond *et al*, "The Financial Abuse of Mentally Incompetent Older Adults: A Canadian Study" (1999) 11:4 *Journal of Elder Abuse and Neglect*, 23.
- <sup>571</sup> In British Columbia, a study found that 8 per cent of older adults consulted reported experiences of financial abuse. The most common forms of financial abuse were concerted coercion, harassment and misrepresentation, followed by abuse through a POA. Furthermore, a poll of adults under an order of supervision by the Public Guardian of Trustee for Manitoba reported that financial abuse was suspected among subjects over age 60 at a rate of 21.5 per cent. Charmaine Spencer, *Diminishing Returns: An Examination of Financial Abuse of Older Adults in British Columbia* (Gerontology Research Centre, Simon Fraser University, 1998), 27. John B. Bond *et al*, note 570.
- <sup>572</sup> ITA, note 2, s.146.4(4)(a)(i).
- <sup>573</sup> Minister of Finance's Expert Panel, note 26, 39.
- <sup>574</sup> Minister of Finance's Expert Panel, note 26, 39.
- <sup>575</sup> CRA, *RDSP*, note 1; Ann Elise Alexander, "Estate Planning Tips for Tax-Free Savings Accounts (TFSA) and Registered Disability Savings Plans (RDSP)", prepared for the Ontario Bar Association Institute of Continuing Legal Education, Trusts and Estates Section, *Grave Consequences: Traps and Pitfalls in Contemporary Estates Law* (February 16, 2010).
- <sup>576</sup> Golombek, note 398.
- <sup>577</sup> Minister of Finance's Expert Panel, note 26, 40. It should be noted that if an RDSP is not primarily government assisted, and it allows DAPs, RDSP funds could still be depleted before death.
- <sup>578</sup> ITA, note 2, ss.146.4(1), 146.4(13)(e); Alexander, note 575, 15.
- <sup>579</sup> ITA, note 2, ss. 146.4(13)(c); 146.4(11)(a);146.4(11)(b).
- <sup>580</sup> ITA, note 2, s.146.4(4)(a)(i).
- <sup>581</sup> ITA, note 2, s. 146.4(1) "disability assistance payment".
- <sup>582</sup> ITA, note 2, s.146.4(1) "disability savings plan".
- <sup>583</sup> ITA, note 2, s.146.4(1.7).
- <sup>584</sup> Consultation with the Canada Revenue Agency.
- <sup>585</sup> *Criminal Code*, R.S.C. 1985, c.C-46.
- <sup>586</sup> CCEL, note 559, 6; *Criminal Code*, note 585, ss. 331, 332, 336, 346, 380.
- <sup>587</sup> *Criminal Code*, note 585, s.718.2
- <sup>588</sup> Margaret Hall, *Developing an Anti-Ageist Approach Within Law* (Toronto: Law Commission of Ontario, July 2009).

- <sup>589</sup> Selina Lai, *Final Report: Community Mobilization Empowering Seniors Against Victimization to the National Crime Prevention Centre of Canada Public Safety Canada* (United Seniors of Ontario, March 2008); Donald Poirier & Norma Poirier, *Why is it So Difficult to Combat Elder Abuse, and in Particular, Financial Exploitation of the Elderly?* (Ottawa: Law Commission of Canada, July 1999).
- <sup>590</sup> Statistics Canada, *Criminal Victimization and Health: A Profile of Victimization Among Persons with Activity Limitations or Other Health Problems* (Ottawa: Canadian Centre for Justice Statistics, Statistics Canada, 2009), 11.
- <sup>591</sup> Ontario Seniors' Secretariat, online: <http://www.seniors.gov.on.ca/en/elderabuse/strategy.php>.
- <sup>592</sup> *Long-Term Care Homes Act, 2007*, S.O. 2007, c.8, ss. 19- 28.
- <sup>593</sup> CCEL, note 559, 10.
- <sup>594</sup> *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c.5 [PIPEDA].
- <sup>595</sup> CCEL, note 559, 10-12; *Credit Unions and Caisses Populaires Act, 1994*, S.O. 1994, c 11, s.143(3)(g).
- <sup>596</sup> CCEL, note 559, 10.
- <sup>597</sup> CCEL, note 559, 10; PIPEDA, note 594, s.7(3)(d).
- <sup>598</sup> CCEL, note 559, 10.
- <sup>599</sup> PIPEDA, note 594, ss. 7(3)(i), 7(3)(e). Amendments to PIPEDA to create new exceptions to disclose confidential information currently before the Parliament of Canada are not considered here. See Parliament of Canada, "Legislative Summary of Bill C-12: An Act to Amend the Personal Information Protection and Electronic Documents Act", online: [http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills\\_ls.asp?ls=c12&Parl=41&Ses=1#a5](http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=c12&Parl=41&Ses=1#a5) (last accessed: November 26, 2013).
- <sup>600</sup> *Credit Unions and Caisses Populaires Act, 1994*, note 595, s.143(3)(g).
- <sup>601</sup> SDA, note 5, s.83.
- <sup>602</sup> Royal Bank of Canada "Power of Attorney & Financial Abuse", online: [http://www.onpea.org/regionalconferences/presentations/west/download.php?name=RBC\\_Elder\\_Abuse\\_Presentation.pdf](http://www.onpea.org/regionalconferences/presentations/west/download.php?name=RBC_Elder_Abuse_Presentation.pdf).
- <sup>603</sup> See for instance: OBSI, "Case Studies: Financial Transaction – Financial Abuse", online: [http://www.obsi.ca/en/?option=com\\_content&view=article&id=128&Itemid=56&lang=en](http://www.obsi.ca/en/?option=com_content&view=article&id=128&Itemid=56&lang=en) (last accessed: November 26, 2013); OBSI, "Case Studies: Power of Attorney -Multiple POAs", online: [http://www.obsi.ca/en/?option=com\\_content&view=article&id=302&Itemid=56&lang=en](http://www.obsi.ca/en/?option=com_content&view=article&id=302&Itemid=56&lang=en) (last accessed: November 26, 2013).
- <sup>604</sup> See for instance: OBSI, "Case Studies: Power of Attorney – Elder Abuse", online: [http://www.obsi.ca/en/?option=com\\_content&view=article&id=119&Itemid=56&lang=en](http://www.obsi.ca/en/?option=com_content&view=article&id=119&Itemid=56&lang=en) (last accessed: November 26, 2013).
- <sup>605</sup> SDA, note 5, ss.17(5), 24(5).
- <sup>606</sup> SDA, note 5, ss.17(10), 25(2).
- <sup>607</sup> SDA, note 5, ss.10(1), 10(2).
- <sup>608</sup> SDA, note 5, ss.7(6), 7(7).
- <sup>609</sup> SDA, note 5, s.24.
- <sup>610</sup> SDA, note 5, s.17(1).
- <sup>611</sup> SDA, note 5, ss.7(4), 17(11), 24(6).
- <sup>612</sup> Ministry of the Attorney General, *Powers of Attorney*, note 160, Part 2.
- <sup>613</sup> Ministry of the Attorney General, *Powers of Attorney*, note 160, Part 3. See also, SDA, note 5, ss. 11, 12.
- <sup>614</sup> SDA, note 5, ss.7(4), 7(5), 12.
- <sup>615</sup> SDA, note 5, ss. 32,33, 38.
- <sup>616</sup> Ministry of the Attorney General, "Brochures and Forms", online: [http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/brochures\\_and\\_forms.asp](http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/brochures_and_forms.asp) (last accessed: November 26, 2013).
- <sup>617</sup> SDA, note 5, s.39.
- <sup>618</sup> SDA, note 5, s.88.
- <sup>619</sup> *Accounts and Records of Attorneys and Guardians*, O. Reg. 100/96.

- 
- <sup>620</sup> Fram Report, note 129, 230; SDA, note 5, s.42.
- <sup>621</sup> SDA, note 5, s.42.
- <sup>622</sup> SDA, note 5, s.42.
- <sup>623</sup> See for instance: SDA, note 5, ss.12, 20.3, 26, 27, 28, 29.
- <sup>624</sup> SDA, note 5, s.20.3.
- <sup>625</sup> SDA, note 5, s.27.
- <sup>626</sup> SDA, note 5, s.27(1).
- <sup>627</sup> SDA, note 5, ss.27(3.1), 27(8).
- <sup>628</sup> SDA, note 5, s.83.
- <sup>629</sup> *Register*, O.Reg. 99/96.
- <sup>630</sup> Information provided by Saara Chetner (Counsel for the Office of the Public Guardian and Trustee).
- <sup>631</sup> This commissioned research will be undertaken by ARCH Disability Law Centre. For more information see <http://lco-cdo.org/en/capacity-guardianship-call-for-papers>.
- <sup>632</sup> See for example: Legislative Assembly of Ontario, "Bill 9, Protection of Vulnerable and Elderly People from Abuse Act", online: [http://www.ontla.on.ca/web/bills/bills\\_detail.do?locale=en&BillID=2722&detailPage=bills\\_detail\\_status](http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=2722&detailPage=bills_detail_status) (last accessed: November 26, 2013).
- <sup>633</sup> McClean Report, note 281, 18.
- <sup>634</sup> McClean Report, note 281, 10, 12, 13.
- <sup>635</sup> McClean Report, note 281, 14.
- <sup>636</sup> Ministry of the Attorney General, *Powers of Attorney*, note 160.
- <sup>637</sup> *General*, O.Reg. 26/95.
- <sup>638</sup> *Powers of Attorney Regulations*, N.W.T. Reg. 027-2002, Form 2; *Enduring Power of Attorney Act*, R.S.Y. 2002, c.73, Schedule.
- <sup>639</sup> For instance, in its review of guardianship, the Queensland Law Reform Commission recommended that mandatory forms already in use be re-drafted to separate information between forms and an expanded stand-alone booklet. QLRC, note 124, Vol. 3, 165-167.
- <sup>640</sup> Alberta Law Reform Institute, *Enduring Powers of Attorney: Report for Discussion No. 7* (Edmonton: Alberta Law Reform Institute, 1990), 48.
- <sup>641</sup> *Enduring Power of Attorney Act*, note 638, s.3(1)(c); *Power of Attorney Act*, R.S.B.C. 1996, c.370, s. 17.
- <sup>642</sup> *The Powers of Attorney Regulations*, R.R.S. P-20.3, Reg.1, Form B; *Powers of Attorney Regulations*, note 638, Form 2.
- <sup>643</sup> SDA, note 5, ss.32,38.
- <sup>644</sup> QLRC, note 124, Vol. 3; *Powers of Attorney Act 1998* (Queensland), s. 73.
- <sup>645</sup> WCLRA, note 138, 35,37.
- <sup>646</sup> QLRC, note 124, Vol. 3; VLRC, note 124.
- <sup>647</sup> CLBC, note 355, 7.
- <sup>648</sup> Kohn, note 487, 49.
- <sup>649</sup> Kohn, note 487, 49.
- <sup>650</sup> *The Powers of Attorney Act*, C.C.S.M. c.P97, s. 22. *Powers of Attorney Act*, 2002, S.S. 2002, c. P20.3, s 18; *Powers of Attorney Act*, S.N.W.T. 2001, c. 15, s. 23; *Powers of Attorney Act*, S.Nu. 2005, c. 9 s. 25(1).
- <sup>651</sup> ALRI, *Safeguards Against Abuse*, note 569, 10-12.
- <sup>652</sup> New Zealand Law Commission, note 490, 15; QLRC, note 124, Vol. 3, 191.
- <sup>653</sup> *Representation Agreement Act*, note 297, ss.12. 20.
- <sup>654</sup> Consultation with Nidus.
- <sup>655</sup> QLRC, note 124, Vol. 3, 218-219.
- <sup>656</sup> See for instance: ODSP Directives, note 72, 10.2.
- <sup>657</sup> *Act to Amend the Enduring Powers of Attorney Act*, note 293, s.20.
- <sup>658</sup> Weisbord, note 468.
- <sup>659</sup> GAO, note 462, 10.
- <sup>660</sup> Social Security Advisory Board, note 554, 4.

<sup>661</sup> Weisbord, note 468, 1284.

<sup>662</sup> GAO, note 462, 20.

<sup>663</sup> Manitoba Law Reform Commission, *Enduring and Springing Powers of Attorney*, Report No. 83 (March 1994), 19.

<sup>664</sup> SDA, note 5, ss.17(10), 25(2).

<sup>665</sup> Consultation with Seniors' Services and Adult Protection Unit, Yukon Health and Social Services.

<sup>666</sup> Yukon Health and Social Service, note 336, 2.

<sup>667</sup> Government of Canada, *Economic Action Plan*, note 6, 182.

<sup>668</sup> The VLRC has recommended that co-decision making and supported decision-making arrangements be made available through an external appointment process. VLRC, note 124.

<sup>669</sup> VLRC, note 124, 9.53-9.54.

<sup>670</sup> Law Commission of Ontario, *Increasing Access to Family Justice through Comprehensive Entry Points and Inclusivity* (Toronto: February 2013), 9.

<sup>671</sup> SDA, note 5, s.85.