

Capacity of Adults with Mental Disabilities and the Federal RDSP

Project Scope: Summary

I Background

This project was commenced following a request from the Ontario government that the Law Commission of Ontario (LCO) undertake a review of how adults with developmental or mental disabilities might be better enabled to participate in the Registered Disability Savings Plan (RDSP) program. The matter at issue in this project is the creation of a process to establish a legal representative for adults whose capacity to open an RDSP, decide plan terms and/or manage payments is challenged. The Board of Governors approved the project in April 2013. The Ontario government announced its request and the LCO's agreement to undertake the project in the Provincial Budget, tabled on May 2, 2013.

The scoping stage for the project took place in May and June 2013. It involved considerable background research as well as approximately 25 interviews with individuals and organizations representing a wide range of perspectives, including the private bar, legal clinics, community and advocacy organizations, government ministries and agencies, financial institutions and others. The Advisory Group membership was confirmed in June 2013, and their first meeting took place in July 2013. Shortly after the first Advisory Group meeting, major research for the project was completed and drafting began for the discussion paper. A consultation strategy and related planning began in August 2013. Questions on the project stages, activities, timeline estimates and terminology used in this Project Scope Summary can be directed to the LCO at LawCommission@lco-cdo.org.

II Relationship to other LCO Projects

In delivering this project, the LCO will draw 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*. The project will also benefit from the LCO's ongoing legal capacity, guardianship and decision-making project. The relationship of these two projects has been highly coordinated to maximize information sharing. However, the RDSP project is being delivered separately because the Ontario government asked us to address this specific issue. There are many overlapping issues between the two projects and the priority timeline of the RDSP project may require the LCO to determine some for the RDSP project without precluding options in the larger project. This is a challenge that the LCO is meeting through measures such as the RDSP project Advisory Group composition, LCO staff meetings, and a coordinated Research Agenda, bringing together people working on both projects.

III Opportunities, Risks and Constraints

Preliminary research and interviews in this project identified a number of opportunities, risks and constraints, including:

1. Strong enthusiasm for the RDSP across almost all stakeholders, including a desire to reduce barriers to the RDSP, has created an opportunity for consultative support for the project.
2. There are divergent views about the goals and approaches for reform; however, many stakeholders' core interests are not incompatible, which has given rise to a 'problem-solving' rather than an adversarial environment.
3. The communities of affected stakeholders are organized to differing degrees. The LCO has attempted to ensure balanced representation on its Advisory Group, and will continue to do so in the consultation process.
4. The project timeline and resources require that the LCO work quickly, rely on internal research and deliver a condensed consultation process, without compromising fairness and excellence.
5. There is little research on capacity and the RDSP, specifically, but considerable existing information on broader aspects of the key issues identified for the project. However, there is a general lack of empirical information on these issues.
6. Resource constraints that impact key stakeholders will inform the project recommendations.
7. Issues related to legal capacity, decision-making and legal representation are complex and extensive. The LCO will aim to develop a practical approach to law reform on the key issues identified in the scoping stage and only issues specifically related to the RDSP will be addressed.
8. This project will consider arrangements for the establishment of legal representatives for RDSP beneficiaries. However, there is a potential for financial abuse of RDSP beneficiaries by such legal representatives or by others. The LCO will evaluate and recommend relevant safeguards against financial abuse and the misuse of legal representatives' powers.
9. There is concern for consistency across the provinces in the arrangements to establish a legal representative for the RDSP because the RDSP is a federal benefit. The LCO will take into account how other jurisdictions have dealt with the issue but may adopt a different approach that is consistent with Ontario's needs and values. The LCO will also consider measures for the recognition of legal representatives across jurisdictions.

IV Themes and Contexts for the Project

The LCO will take the following themes and contexts into account in shaping its approach to the project and its recommendations:

1. The RDSP was established as a means to support the long-term financial security of persons with disabilities, which persons include adults with mental disabilities that may affect their capacity to establish and manage an RDSP.
2. Uptake of the RDSP is currently low for a variety of reasons, but if barriers are reduced, it has potential to increasingly benefit persons with disabilities.
3. The federal and Ontario governments' shared desire to reduce complexity, fragmentation, cumbersomeness and costliness of the system surrounding the determination of legal capacity, and the establishment of legal representatives for the RDSP.
4. The need to reduce the negative impacts of legal representation on a person's quality of life, including through the promotion of a person's full citizenship, and participation and inclusion in the decision-making process.
5. The expectations for and roles of families and close personal relationships.
6. The public/private divide and the appropriate role of individuals, community organizations, legal professionals, financial institutions and the government with respect to providing supports and/or interventions.
7. The lack of information on and understanding of issues of legal capacity, decision-making and the RDSP, across all sectors.
8. The need to consider the role of advocacy and supports in increasing access to justice in this area for individuals who may be vulnerable or marginalized in a variety of ways, including through a lack of close supporting family currently authorized to act as RDSP plan holders.
9. The potential for financial abuse by those exercising powers as a legal representative of an RDSP beneficiary, and the strong need for effective safeguards.
10. The attitudinal barriers that marginalize persons whose decision-making capacity is challenged.
11. The role technology might play in increasing access to justice in this area.
12. Complex issues associated with privacy, particularly when paired with the desire for greater transparency, monitoring and accountability.
13. The diversity of persons seeking to establish, manage or withdraw from RSDPs who face challenges in making, and executing, decisions on the same.

V Key Issues Identified for the Project

The following broadly defined issues were identified repeatedly in both the preliminary research and consultations. It should be noted that they are all linked and contain multiple sub-issues.

1. The choice of arrangements to establish a legal representative for adults with mental disabilities in opening, managing and/or withdrawing from an RDSP. This will include a review of Ontario's current framework under the SDA and an assessment of alternative, streamlined or other processes in various jurisdictions.

2. The relationship of any arrangement to establish a legal representative to existing statutory and common law frameworks specifically concerning the RDSP, and concerning the capacity to enter into a contract and to manage property.
3. The roles and responsibilities of RDSP beneficiaries, legal representatives, financial institutions and the government in decision-making, including the scope of legal representatives' authority, factors to be considered by legal representatives in the process of decision-making, beneficiaries' participation in decision-making and the liability of respective parties for decisions that have been made.
4. The eligibility and availability of legal representatives, including a review of the availability of close family and friends to act as legal representatives, and the eligibility criteria for private and public individuals and organizations that could act as legal representatives.
5. Safeguarding beneficiaries of the RDSP against financial abuse and the misuse of a legal representative's powers, including the assessment of existing and possible safeguards, and complaint and enforcement mechanisms.
6. The provision of information on the RDSP and on any government adopted method to establish a legal representative with a view to increasing accessibility, including consideration of how this might be done and by whom.

VI Limitations on the Project Scope

Through this process, the LCO has identified the following limitations on the project scope:

1. The project will focus squarely on capacity of adults with mental disabilities and the RDSP and will not consider other concerns or barriers that have been raised with respect to access to the RDSP.
2. The LCO acknowledges the fact that certain stakeholders have asked the federal government to amend the ITA permanently to address the issues raised in this project out of concern that the RDSP should be treated uniformly across the country. However, the LCO will restrict its recommendations to reforms within Ontario's constitutional jurisdiction.
3. The focus of this project on 'capacity' will pertain solely to the context of the RDSP, and not to other issues of capacity, such as executing a will.
4. This project will be tailored to the special context of the RDSP in a manner intended to avoid precluding options in the LCO's legal capacity, guardianship and decision-making project.
5. While the project will take into account issues of liability and various forms of redress for financial abuse, it will not specifically address the criminal or civil justice systems.