



LAW COMMISSION OF ONTARIO  
COMMISSION DU DROIT DE L'ONTARIO

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

## **DISCUSSION PAPER SUMMARY**

December 2013

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## 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.

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## I. INTRODUCTION

### A. About this Summary

The Ontario government asked the Law Commission of Ontario (LCO) to look at how adults with mental disabilities can be able to participate better in the Registered Disability Savings Plan (RDSP).<sup>1</sup>

The LCO has finished projects on the principles to follow in drafting or putting in place laws that affect persons with disabilities and older adults. At the moment, we have a large project on Ontario's laws about capacity, decision-making and guardianship.<sup>2</sup>

The RDSP project is a separate project. We have released a large Discussion Paper in this project. This paper is a Summary of that Discussion Paper.

The *Income Tax Act* says that adults must have capacity to open an RDSP.<sup>3</sup> Guardians and individuals appointed by power of attorney documents (called "attorneys") can open an RDSP and make decisions about RDSP money for adults who do not have capacity under the law to do it themselves. However, some people say the rules to name a guardian or attorney are too expensive, complex or difficult when an adult only needs help with an RDSP. We are looking in the RDSP project at changes that could be made to make the processes easier.

The LCO's project is about creating a process in Ontario that is only for naming a legal representative for RDSP beneficiaries.

This is a summary of a longer discussion paper for the project.

This summary is meant for adults with mental disabilities and their family and friends, and also other people who may not be familiar with the issues.

We want your opinion on information in this summary and the discussion paper. Using information that you give us, and what we learn in our consultations and through our research, we will write a Final Report.

The Final Report will have suggestions about changes that could be made in Ontario.

- ✚ This summary has less information than the discussion paper. It does not change anything in the larger discussion paper. The discussion paper and background information on the project are on our website here: <http://www.lco-cdo.org/en/rdsp>
- ✚ Information about the LCO's larger project on *Legal Capacity, Decision-Making and Guardianship* is on our website here: <http://www.lco-cdo.org/en/capacity-guardianship>

## B. Words We Use in the Summary

We try to use words that are easy to understand in this summary. We also use words that have a special meaning when an easier word does not work.

Here is a list of some words that might be new to you:

### **Law Commission of Ontario (LCO):**

The LCO is an independent organization that studies issues and makes suggestions about how the law can be accessible to communities in Ontario.

- ✚ For more information, see our website: [www.lco-cdo.org](http://www.lco-cdo.org).

### **Adults with Mental Disabilities:**

We use this to mean the individuals who are affected the most by this project. It includes adults with different types of mental disabilities who have difficulties or are thought to have difficulties making their own decisions about the RDSP.

- ✚ For more information, see: Discussion Paper, page 3.

### **RDSP Beneficiary or Beneficiary:**

Beneficiaries are the persons who receive payments from an RDSP. The LCO's project focuses only on adults with mental disabilities who are eligible to be an RDSP beneficiary. When we use the words "RDSP beneficiary" or "beneficiary" we mean adults with mental disabilities who are already a beneficiary as well as those who could become a beneficiary.

The federal government says who is eligible to be an RDSP beneficiary. Persons who qualify for the Disability Tax Credit

(DTC) are eligible. They must be age 59 or under and resident in Canada when the RDSP is opened and payments are made into the RDSP.<sup>4</sup>

✚ For more information, see: Discussion Paper, page 3.

#### **Guardian:**

Guardians are persons who can make decisions for adults who have been found incapable of making their own decisions. We discuss guardians more in this summary.

✚ For more information, see Discussion Paper, Ch. III.B & V.C.

#### **Power of Attorney:**

Adults can make a power of attorney to choose a person (called an attorney) to make decisions for them. Although the term “attorney” is used, an attorney named in a power of attorney does not have to be a lawyer. We discuss powers of attorney more in this summary.

✚ For more information, see Discussion Paper, Ch. III.B, V.C

#### **Legal Representative:**

When we write about a “legal representative” we mean a person or organization that can help a beneficiary make decisions about an RDSP. This project is about creating a process in Ontario specifically to name a legal representative for RDSP beneficiaries.

✚ For more information see Discussion Paper, page 3.

#### **Financial Institution**

RDSPs are offered at financial institutions. A financial institution is a bank, credit union, trust company or other business that offers services to manage money. Only some financial institutions offer RDSPs.

✚ For more information see Discussion Paper, page 15.

### Plan Holder

Every RDSP needs a plan holder. Plan holders are the persons who open an RDSP at a financial institution. After opening an RDSP, they may be able to make important decisions about managing money in an RDSP, such as deciding who can make payments into an RDSP and making investment choices. We discuss plan holders more in this summary.

✚ For more information see Discussion Paper, pages 17 to 19.

### Capacity

Capacity is about who is able to make decisions for themselves under the law. Every person has unique abilities. Adults may be able to make decisions about some things but not others. Their abilities may also change over time. In this project, we look at decisions that need to be made for RDSPs only.

✚ For more information, see page 10 of this Summary, What Does “Capacity” Mean?

### The Office of the Public Guardian and Trustee

The Office of the Public Guardian and Trustee is a government office that protects adults who are alleged or found to be incapable in a number of ways. One of the ways is by managing money for adults who have been found to be incapable and who have no one else who is authorized to help them.

✚ For more information see Discussion Paper, page 47.

### Supported Decision-Making Authorizations

Some adults need support making decisions but do not need a guardian or attorney to make decisions for them. In parts of Canada, adults can formally name another person to help them make their own decisions in a supported decision-making authorization. Supporters can participate in activities such as giving advice and communicating decisions. But they cannot make adults’ decisions for them.

✚ For more information see Discussion Paper, pages 56 to 57.



### Co-Decision Making

In some Canadian provinces, a court can name a co-decision maker for adults who need support making certain types of decisions but who do not need a guardian to make decisions for them. Adults and co-decision makers share the power to make decisions. This means that they must make decisions together and decisions made by either person alone might not be valid.

✚ For more information, see Discussion Paper, pages 64 to 65.

### Trusts

Trusts can be used to assist persons with disabilities to manage their money. When money is put into a trust, a person called a “trustee” must manage the money in a way that benefits the person for whom the trust was created.

✚ For more information, see Discussion Paper, pages 70 to 76.

## C. What is the RDSP?

The RDSP is a savings plan for persons with disabilities created by the federal government. An RDSP can be opened at a financial institution, such as a bank or credit union.

Families, friends or anyone else can put money into an RDSP for the beneficiary if they have permission. The federal government will contribute money to the RDSP for eligible beneficiaries. Money in an RDSP can also be invested, so that it can grow over time.

Money in an RDSP does not make people ineligible for most provincial disability and income support programs, such as the Ontario Disability Support Program (ODSP). People on ODSP can take money out of an RDSP without affecting their ODSP benefits.<sup>5</sup> There are also special rules about what happens when money is taken out of an RDSP for income taxes.<sup>6</sup>

✚ Background on the RDSP is found in the Discussion Paper, Ch. II.A, Understanding the Federal RDSP.

✚ For detailed information on the RDSP, please see the Canada Revenue Agency (CRA) website “Registered Disability Savings Plan (RDSP)” at [www.cra-arc.gc.ca/rdsp/](http://www.cra-arc.gc.ca/rdsp/)

## D. Why the LCO is Doing this Project

We are doing this project because some adults who want an RDSP but need help making decisions about the RDSP (or their family or friends) have had difficulties naming a legal representative.

Without a legal representative, they may not be able to open an RDSP or make some decisions about RDSP money.

Ontario does not have a process in place that is only for naming a legal representative for RDSP beneficiaries.

Guardians and attorneys can open an RDSP and make decisions for a beneficiary. Some people say they have concerns that the process to name a guardian or attorney for an adult with mental disabilities who only needs help with an RDSP is more difficult than it needs to be.

For example, adults have to be declared incapable of managing their finances to have a guardian to help with decisions about an RDSP. Sometimes the process of getting a guardian can also take a long time and be expensive.

The LCO's project looks at changes in Ontario that could create a new process that is only for naming a legal representative for RDSP beneficiaries.

We think that any new process should be affordable, easy to use and it should address other challenges that some people say are connected to the rules in place.

- ✚ The federal government has put in place a process to allow a parent, spouse or common-law partner to open and make some decisions about RDSPs. But it will end after December 2016. See: Canada Revenue Agency "Opening an RDSP" online: <http://www.cra-arc.gc.ca/tx/ndvdl/tpcs/rdsp-reei/pln-eng.html>.
- ✚ It is important to remember that this project is only about making decisions for RDSPs – it is not about other types of decisions. It also does not study other RDSP issues.
- ✚ Background information on the reasons for the LCO's project is found in the Discussion Paper, Ch. I, "Introduction".

## E. Steps in the Project

The discussion paper (and this summary) is the result of research and interviews that the LCO did from May to November 2013.

We have formed an Advisory Group with experts who helped us by reviewing the discussion paper and giving us advice. The Advisory Group will help us for the rest of the project.

In December 2013, we started consultations so that we can hear from the public about what they think of the information in the discussion paper.

We will consider information from our consultations when we make suggestions in our Final Report. The Final Report should be available in spring 2014.

## F. Issues We Look at in this Summary

This summary looks at issues listed in the box below that are important for our project that were presented in the full discussion paper.

<b>Pages 8 to 9:</b>	When does a beneficiary need a legal representative for the RDSP?
<b>Page 10:</b>	Who can be a legal representative for an RDSP beneficiary?
<b>Pages 11 to 13:</b>	What are the rules in place in Ontario to choose a legal representative for RDSP beneficiaries?
<b>Pages 14 to 16:</b>	What are peoples' concerns with the rules in place in Ontario?
<b>Page 17:</b>	What are the goals for a process in Ontario that is only for naming a legal representative for RDSP beneficiaries?
<b>Pages 19 to 27:</b>	What changes could be put in place in Ontario?
<b>Page 28:</b>	How can you give the LCO your comments?

## II. ABOUT LEGAL REPRESENTATIVES FOR RDSP BENEFICIARIES

### A. When Does an RDSP Beneficiary Need a Legal Representative?

#### 1. *Every RDSP Needs a “Plan Holder”*

The *Income Tax Act* says who can open and make decisions about money in an RDSP.

To open an RDSP, a person called a “plan holder” signs a contract with a financial institution.<sup>7</sup>

After opening an RDSP, plan holders may be able to make other decisions, such as applying for government grants and bonds, making investments and asking for some money to be paid to the beneficiary.

The plan holder’s powers depend on the contract with the financial institution. Plan holders often make important decisions about managing money in the RDSP.

When beneficiaries are adults, they can be the plan holder.<sup>8</sup>

Some adults who need help making decisions may not be able to be the plan holder because they have been assessed under the law as being incapable of entering into a contract. In these cases, someone else must be the plan holder.<sup>9</sup>

Banks, credit unions or other financial institutions can refuse to open RDSPs for beneficiaries who are not able to enter into a contract under the law because they do not believe that the person is capable of doing so.

Beneficiaries and other persons (such as a family member) may also want to name a legal representative because they believe that the beneficiary requires someone else’s help to open and make decisions about RDSP money.

✚ We look at what capacity means in this summary at page 10.

✚ More information on plan holders is found in the Discussion Paper, Ch. II.B.2, Capacity Laws as a Barrier to Accessing the RDSP.

## **2. Some Adults May Need Help Spending Money Taken Out of an RDSP**

A plan holder makes decisions about money when it is still in an RDSP. But when beneficiaries receive money out of an RDSP, they can spend it on anything that they want.

The LCO has heard that some beneficiaries may have difficulties making decisions about how to spend money that they get from an RDSP. A plan holder does not automatically have powers to help a beneficiary with these types of decisions.

One of the issues we look at in our project is what powers legal representatives should have.

For example, should legal representatives have all or some of the plan holder's powers? Should they have more powers to help beneficiaries with spending the money they get from an RDSP?

- ✚ We look at this issue again in the summary at pages 21 to 22.
- ✚ For more information on the types of decisions that can be made for an RDSP, see Discussion Paper, Ch.II.B.2, Critical Times for Decision-Making: Opening the RDSP, Deciding Plan Terms and Managing Funds that Have Been Paid Out of the RDSP.

### **Question 1**

Have you tried to open or make decisions about an RDSP but were told that you were not able to because of your capacity?

### **Question 2**

Do you think that you could have difficulties spending money that you get from an RDSP?

## **B. Who Can Be a Legal Representative for RDSP Beneficiaries?**

The *Income Tax Act* says that someone who wants to be a plan holder for an adult beneficiary must be a “qualifying person”.<sup>10</sup>

Qualifying persons can be guardians and other persons who are authorized by law to make decisions for an RDSP beneficiary.<sup>11</sup>

In Ontario, the *Substitute Decisions Act, 1992* explains how to get a guardian or attorney.<sup>12</sup>

If Ontario had a new process only for naming a legal representative for RDSP beneficiaries, the legal representative would need to be accepted as a person who is authorized by law under the *Income Tax Act*.

- ✚ The Discussion Paper looks at parts of the *Income Tax Act* that say who can be a “qualifying person” (and also a plan holder) in Ch. II.B.1, Capacity Laws as a Barrier to Accessing the RDSP.

## C. What Does “Capacity” Mean?

In the definitions section, we explained that capacity is about who is able to make decisions for themselves under the law. In Ontario, adults are assumed to be able to make decisions for themselves unless tests show that they cannot.

The tests for capacity are different for different types of decisions; for example, the tests may be about the ability to decide where to live or about managing money. There are also tests to show that adults can name someone else to make decisions for them in a power of attorney.

The tests for capacity are different because each person has unique abilities. Adults may be able to make some decisions for themselves but may require someone else’s help for other decisions. These abilities can also change from day to day and over an adult’s lifetime.

The LCO believes that an adult’s ability to make decisions can become stronger with the support of other people. We also believe that adults must be able to make choices that affect their lives and do as much for themselves as possible with the supports that they need. These are principles that we use in this project.

- ✚ The LCO’s project is only about RDSP decisions. We explain Ontario’s tests for capacity that are related to the RDSP in the next section, How Can a Person Name a Guardian or Attorney for the RDSP in Ontario?
- ✚ For more detailed information on what capacity means see the Discussion Paper, Ch. II.B, The Importance of Capacity When Adults Seeks to Access the RDSP.

## D. How Can a Person Name a Guardian or Attorney for the RDSP in Ontario?

There are different ways in Ontario for adults to name a person to take care of their money for them. Here we explain how this can be done.

### 1. *Continuing Powers of Attorney for Property*

Adults who have capacity to do so can choose who will make decisions for them in the future when they are not able to make their own decisions by naming one or more than one person in a continuing power of attorney for property.

They can ask the attorney to help them manage their money at any time. Because it is “continuing”, the power of attorney will continue to be valid when the adult no longer has capacity and it will not be necessary to find a guardian to do what the attorney can do.

An individual is assumed to have capacity to make his or her own decisions about financial and other matters unless tests show he or she does not.

There are tests to show that an adult has capacity under the law to choose someone to make decisions about money for them.

In Ontario, the *Substitute Decisions Act, 1992* has a detailed test to choose someone to make decisions for you about money in a power of attorney. That test is found in **Appendix B** of this summary. It has been described as requiring that you must

- know what property you have and its approximate value;
- be aware of your obligations to the people who depend on you financially;
- know what you are giving your attorney the authority to do;
- know that your attorney is required to account for the decisions they make about your property;
- know that, as long as you are mentally capable, you can revoke (cancel) this power of attorney;
- understand that if your attorney does not manage your property well its value may decrease; and
- understand that there is always a chance that your attorney could misuse their authority.<sup>13</sup>

✚ The test for capacity to make a continuing power of attorney in Ontario is found in Appendix B of this summary.

- ✚ For more information on continuing powers of attorney, see Discussion Paper, Ch. III.B.1, The Personal Appointment Process: Continuing Powers of Attorney.

## 2. Guardianship

There is a process for naming someone to be a guardian for adults who do not have a continuing power of attorney and who do not have capacity to name someone for themselves.

To get a guardian, adults must be found to be incapable of managing property. The *Substitute Decisions Act, 1992* defines what incapable of managing property means. The test for incapacity to manage property is found in **Appendix B** of this summary. It has been described this way:

The [*Substitute Decisions Act, 1992*] sets out a two-part definition of mental capacity in that the person must have the ability to understand information relevant for making decisions, and in addition, show the ability to appreciate the consequences of a decision or lack of a decision.<sup>14</sup>

There are two ways that a person can ask for a guardian to be chosen to make decisions for an RDSP beneficiary: capacity assessments for statutory guardianship and court orders.

### **Capacity Assessments for Statutory Guardianship**

One way to get a guardian is to ask to have a capacity assessment. When a guardian is named without a court order because of a capacity assessment, it is called “statutory guardianship”.

Beneficiaries can ask for a capacity assessment or someone else can ask for them.<sup>15</sup>

Capacity assessments take place in the community and everyone has the right to refuse to be assessed. Capacity assessors are specially trained professionals who follow guidelines.<sup>16</sup>

The Public Guardian and Trustee automatically becomes the guardian for adults who are found to be incapable by a capacity assessor.<sup>17</sup>

Some persons can apply to the Public Guardian and Trustee to take over from the Public Guardian and Trustee as the guardian. They are a spouse or partner, a family member, an attorney (who does not already have powers over all of a person’s property) and a trust company (with a spouse or partner’s consent).<sup>18</sup>



- ✚ For more information on capacity assessments (also called “statutory guardianship”), see Discussion Paper, Ch. III.B.3, Statutory Guardianship Appointments.

### **Court Orders**

Another way to get a guardian is to apply to the Superior Court of Justice.

Beneficiaries can apply to the Superior Court of Justice or another person can apply for them.<sup>19</sup>

Sometimes a person can get a court order without going before a judge in-person (this is called “summary disposition”). This way of getting a court order requires more documents. It is not available in all courts in Ontario.<sup>20</sup>

Judges are allowed to name a guardian only if an adult is incapable of managing property and needs decisions to be made by someone else. Judges cannot name a guardian if there is another way of helping the person manage their property that

- means the adult does not need to be found incapable of managing property, and
- interferes less with the adult’s decision-making rights.<sup>21</sup>

The Office of the Public Guardian and Trustee can help find a lawyer for adults when an application for guardianship is made that affects them.<sup>22</sup>

- ✚ For more information on court ordered guardianship, see Discussion Paper, Ch. III.B.2, Court Ordered Guardianship.

### III. WHAT CONCERNS HAVE WE HEARD ABOUT?

The LCO did research and interviews in the first stages of our project to learn about concerns that people might have with the rules about assessing capacity and naming a legal representative that are in place in Ontario.

For detailed information on these concerns, see Discussion Paper, Ch. III.C, Challenges Posed by Ontario's Current Framework.

#### A. Concerns of Beneficiaries and Their Families

##### 1. Powers of Attorney

Powers of attorney can reflect an adult's wishes. They can be made quickly and they are private.

The test for capacity to make a power of attorney to manage money is stricter in Ontario than in most Canadian provinces and territories.<sup>23</sup>

We learned that some adults with mental disabilities may experience challenges making a power of attorney for RDSP decision-making because they may be unable to meet the test for capacity under the *Substitute Decisions Act, 1992*.

##### 2. Capacity Assessments

The capacity assessment process can be easy to use and affordable.

However, the LCO heard that if there are problems with an application when someone wants to become a guardian, it can take more time or end up in court and then would be less affordable.

For example, family members may not agree about who should be the guardian. The application to the Office of the Public Guardian and Trustee may also not be filled in properly.

### **3. Court Orders**

We heard that the process of applying to get a court order can be difficult for some people to understand. It may also involve hiring a lawyer, which can sometimes be expensive.

Applying for a court order without an in-person hearing before a judge can lower lawyers' fees. But it can sometimes be expensive to pay for the extra documents.

This process is also not used very much because of concerns about how to protect an adult's rights when there is no hearing.

### **4. Impacts of the Process on an Adult's Well-Being**

The LCO heard about a number of ways that the rules in place might impact the well-being of adults who need help making decisions for RDSPs.

These are some examples:

Some adults who want an RDSP can manage their other money alone or with a little help. This means that even though they might need help with RDSPs, they might not need a guardian to make decisions about their other money. Some people we heard from thought that legal representatives should only be allowed to make decisions about RDSP money – not other types of financial or personal decisions.

Another concern was how much adults can participate in making decisions with a guardian or attorney (when they have been found to be incapable). Some people told the LCO that RDSP beneficiaries should be able to participate more meaningfully in decision-making. They said that a new process for beneficiaries should focus on their needs for support instead of on incapacity.

Financial abuse is another problem that can happen after a guardian or attorney is chosen. We heard that legal representatives could also handle a beneficiary's money in a way that harms them. As a result, a new process to name a legal representative for RDSP beneficiaries needs to include rules to prevent and respond to this type of abuse.

### **5. Finding a Person to be a Legal Representative**

The LCO heard that some adults who want an RDSP may not have a trusted family member or friend who can act as a guardian or an attorney under the *Substitute Decisions Act, 1992*.

Some adults rely on service providers for help with everyday living, such as community organizations. Where adults do not have a trusted family member or friend, they might also want organizations to be able to help them with decision-making for an RDSP.

But under the rules in place, most organizations are not allowed to be guardians or attorneys.<sup>24</sup>

### **B. Concerns of Other Individuals and Organizations**

The main concerns that other individuals and organizations expressed to us were about practical issues.

For example, we heard that a new process should be easy to use. It should also be affordable for everyone, including users (such as beneficiaries) and those who put the rules in place (such as the Ontario government).

Financial institutions that offer RDSPs also want to feel secure that under any new rules, they can rely on the decisions that legal representatives make.

#### **Question 3**

Have you faced challenges with naming an attorney or guardian to help you (or another person) open or make decisions about an RDSP?

#### **Question 4**

What do you think about the concerns that the LCO has heard about? Are there other concerns that we should know about?

## IV. WHAT ARE THE GOALS FOR CHANGE?

The LCO believes that a process that is only for naming a legal representative for RDSP beneficiaries should achieve certain goals for beneficiaries, their family and friends, and other individuals or organizations.

The LCO asked people what the goals should be when we did interviews in the first steps of the project. In the discussion paper, we also look at Ontario's laws and programs to see how the province already supports persons with mental disabilities.

Some of the laws we look at are the *Canadian Charter of Rights and Freedoms*, *Ontario Human Rights Code*, *Accessibility for Ontarians with Disabilities Act, 2005*.<sup>25</sup> Some of the programs we look at are the Office of the Public Guardian and Trustee, ODSP and Consent and Capacity Board (CCB). We also consider the *Convention on the Rights of Persons with Disabilities*.<sup>26</sup>

We say that for a new process to work, it should achieve these goals:

1. Gives beneficiaries the help that they need with decisions about RDSP money
2. Makes sure that beneficiaries can participate in making decisions about an RDSP, even after a legal representative has been named
3. Protects beneficiaries from legal representatives misusing their powers and financial abuse
4. Is practical, easy to use and affordable
5. Makes legal representatives and other individuals and organizations (such as financial institutions) feel secure about different risks that could affect them

### Question 5

What do you think about the goals for change in the LCO's project?

- ✚ Descriptions of the goals for change (we call them "benchmarks") are found in the Discussion Paper, Chapter I.C.2, Benchmarks for Reform.
- ✚ We look at Ontario's laws and programs that support persons with mental disabilities in the Discussion Paper, Chapter IV, Ontario's Commitments to Persons with Mental Disabilities.

- ✚ A list of goals that people told us about in our interviews is found in the Discussion Paper, Chapter III.D, Goals for Reform Identified by Stakeholders.

## V. WHAT CHANGES HAVE WE LOOKED AT SO FAR?

### A. Introduction to the “Options for Reform”


#### 1. *What Do We Mean by “Options for Reform”?*

The full discussion paper looks at different changes to the rules in place in Ontario to create a process that is only for naming a legal representative for RDSP beneficiaries and does not affect how they deal with any other property they may have.

We call these changes the “options for reform”.

The options for reform are only *possibilities* at this stage in the LCO’s project. Some might work better to achieve the goals for change than others. The LCO has not decided which option or options would be best. This summary of the Discussion Paper is part of our process of consulting people who have something to say about which options for reform could work best in Ontario.

We would also like to know if there are any other options that could meet the goals for change.

 For general background information on the options for reform, see Discussion Paper, page 82, Summary of Options in the Choice of Arrangements.

#### 2. *Where Did the Options for Reform Come From?*

The full discussion paper reviews laws in Ontario and other places so that we can understand what the possibilities for change are.

We review laws in Ontario, British Columbia, Newfoundland and Labrador, Saskatchewan, Alberta, Manitoba and the Yukon as well as other places in Canada and other countries.

Many of the laws are from Canadian provinces and territories that the federal government recognized as having processes that might address some of the concerns of RDSP beneficiaries.<sup>27</sup>

Under those laws, we consider these different ways to name a person to help adults make decisions about money:

<b>“Special limited” powers of attorney</b>	Pages 51 to 53
<b>Designation agreements</b>	Pages 53 to 55
<b>Supported decision-making authorizations</b>	Pages 56 to 57
<b>Representation agreements</b>	Pages 57 to 62
<b>Co-decision making</b>	Pages 64 to 65
<b>Court applications</b>	Pages 66 to 67
<b>Administrative tribunal hearings</b>	Pages 68 to 69
<b>Trusts</b>	Pages 70 to 76
<b>Representative payees for income and social benefits</b>	Pages 77 to 81

### ***3. Focusing on Key Issues***

The options for reform focus on key issues that we heard are the most important ones for this project. These are the key issues and where they are found in the full discussion paper:

- Chapter V.B** Possible processes to name a legal representative for RDSP beneficiaries
- Chapter V.C** The roles of beneficiaries and legal representatives, and other individuals and organizations
- Chapter V.D** Whether organizations should be allowed as legal representatives
- Chapter V.E** Protections against financial abuse and legal representatives misusing their powers

The first key issue is the main issue for the LCO’s project. It is about the general arrangement to name a legal representative. The other key issues are areas that need special attention.



- ✚ For more information on why we look at these key issues, please see the section in this summary on “What Concerns Have We Heard About?” at page 14.

## B. What are the Options for Reform?

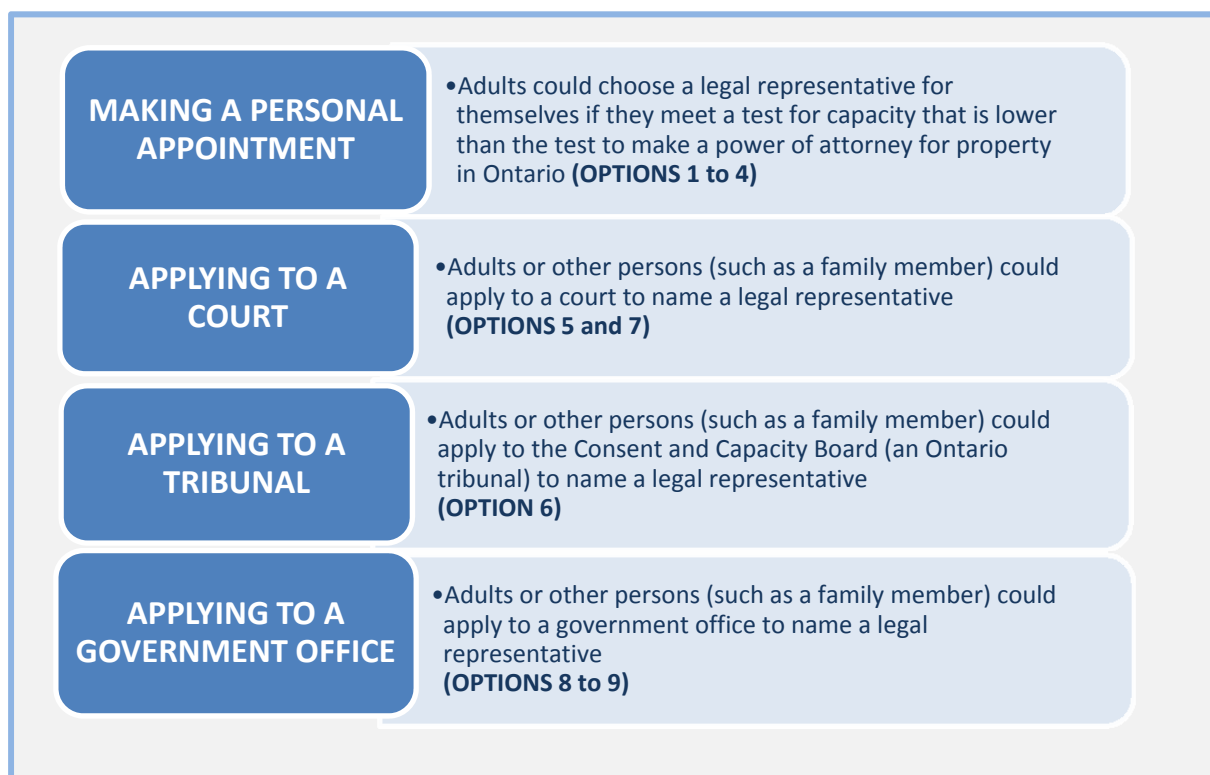
### 1. Possible Processes to Name a Legal Representative for RDSP Beneficiaries

We have proposed nine options for reform for this key issue.

They include some processes that are similar to a power of attorney because they allow adults to choose who they want as a legal representative. We call these “personal appointments”.

The options for reform also include processes that allow an adult or another person (such as a family member or friend) to apply to a court, tribunal or government agency.

These are the types of processes that could be used for the different options for reform:



- ✚ In Ontario, we have three different processes: powers of attorney, court orders and capacity assessments (see pages 11 to 13). A new process to name a legal representative for RDSP beneficiaries could include a personal appointment as well as a process through a court, tribunal or government agency.

- ✚ We give examples of how a beneficiary or another person (such as a family member or friend) might use these processes in the Discussion Paper at pages 133 to 138.

These are the options for reform in the processes to name a legal representative:

- OPTION 1:** Adults could choose someone to be their legal representative if they meet the common law test for capacity. This test is less strict than the test to make a power of attorney for property in Ontario.
- OPTION 2:** Adults could choose someone to be their legal representative if they meet a test for capacity that involves factors, such as the communication of desire and preferences. This test is less strict than the test to make a power of attorney for property in Ontario and it is based on different ways of expressing choices.
- OPTION 3:** Adults could choose someone to be their legal representative if they meet the common law test for capacity and if they only need support to make decisions for themselves. This option would be available to adults who can make their own decisions with some help.
- OPTION 4:** Adults could name a trustee as a legal representative if they meet the common law test for capacity. This test is less strict than the test to make a power of attorney for property in Ontario and it is based in trust laws.
- OPTION 5:** Adults or other persons (such as a family member) could apply to the Superior Court of Justice to name a legal representative who is not a guardian. This could require changes to the Court's powers under the *Substitute Decisions Act, 1992* or another law.
- OPTION 6:** Adults or other persons (such as a family member) could apply to the Consent and Capacity Board (an Ontario tribunal). This would require changes to the Consent and Capacity Board's powers.
- OPTION 7:** Adults or other persons (such as a family member) could apply to the Superior Court of Justice to name a trustee as a legal representative. This could require changes to the Court's powers over trust laws.
- OPTION 8:** Adults or other persons (such as a family member) could apply to a government office to name a trustee as a legal representative. This option would mean choosing a government office. It would be based in trust laws.

**OPTION 9:** Adults or other persons (such as a family member) could apply to a government office to name a legal representative. This option would mean choosing a government office. It would be similar to programs that are in place for ODSP and the Canada Pension Plan.

The options for reform are explained in the discussion paper. In this summary, we cannot look at them in detail. Instead, we show you where to go for more information.

Here is where you can find information on the options for this key issue in the discussion paper:

**Chapter VI, Options for Reform** is the first place to look. It explains the options, and their benefits and challenges.

**Figure 2** is a chart showing the options with details about how they might be put in place (pages 90 to 91). A summary of the options for reform comes before Figure 2 (beginning at page 82).

The **Executive Summary** also describes the options for reform (pages xiv to xviii).

There are some important things to remember about these options when you are reading about them in the discussion paper. Here are a few examples:

- The options for personal appointments have **tests for capacity that are less strict** than the test to make a power of attorney for property in Ontario under the *Substitute Decisions Act, 1992*. This is because we heard that beneficiaries might have difficulties naming a legal representative under the rules that are in place. (Options 1 to 4)
- Option 3 is based on supported decision-making arrangements. These are only available to adults **who can make their own decisions with some help**.
- Court, tribunal and government agency processes could be based on assessing an adult's **capacity** or an adult's **need for assistance**. (Options 5 to 9)
- A court, tribunal and government agency could give legal representatives **powers to make decisions for beneficiaries** who cannot make decisions for themselves. They could also involve **supported decision-making** (see above) or **co-decision making** (where adults and co-decision makers share the power to make decisions). (Options 5, 6 and 9)

- Trusts are often used to assist persons with disabilities manage their money. Some of the options propose that a **trustee could be a legal representative**. (Options 4, 7 and 8)
- A beneficiary or another person could **apply to a government agency** to have a legal representative named. This would be similar to processes that are used for programs like ODSP and the Canada Pension Plan. (Options 8 and 9)

**Question 6**

What options in the choice of arrangements do you think would achieve the goals for reform?

**Question 7**

Are there other options in the choice of arrangements that you think would achieve the goals for reform?

- ✚ To find out where to get information in the discussion paper about words used for these options, such as trusts and co-decision making, see this summary at page 16.

***2. The Roles of Beneficiaries and Legal Representatives, and Other Individuals and Organizations***

**Ensuring that Beneficiaries Can Participate in Decision-Making**

Everyone has different abilities. We believe that beneficiaries should be able to make choices that affect them and do as much for themselves as possible with support from other people.

The options for reform for this key issue look at what rules might ensure that beneficiaries can meaningfully participate in making decisions after a legal representative is named.

For example, the law could require that legal representatives have to encourage a beneficiary's participation, consult with family and friends, and respect other choices about personal care. Legal representatives might also have to ask beneficiaries about their wishes and follow their instructions sometimes.

### Question 8

How can RDSP beneficiaries meaningfully participate in decision-making after a legal representative is chosen?

- ✚ We look at different laws about how adults can participate in decision-making in the Discussion Paper, Ch. V.C.2, The Activity of Decision-Making.

### **Legal Representatives' Powers to Make Decisions About RDSP Money**

The options for reform for this key issue also look at what powers legal representatives should have to make decisions about RDSP money.

In this summary, we explain that every RDSP needs a plan holder. Plan holders make decisions about money when it is still in an RDSP. But they do not automatically have powers to help a beneficiary to spend money that they get from an RDSP.

The options for reform ask if a legal representative should have all or some of the plan holder's powers. They also ask if legal representatives should have more powers to help beneficiaries with spending the money they get from an RDSP.

These different options have very important benefits and challenges that are presented in the discussion paper. We would also like to know what you think the benefits and challenges are.

### Question 9

What powers should legal representatives have to make decisions about money inside an RDSP or spending money that is taken out of an RDSP? Why?

- ✚ For more information, see Discussion Paper, Ch. V.C.4, The Scope of a Legal Representative's Authority.

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

Another area of this key issue that is considered in the options for reform is how some persons (who are not RDSP beneficiaries) can be protected from different risks.

If beneficiaries, legal representatives and other people (such a family and friends) can all contribute to decisions about an RDSP, it could be confusing or lead to disputes.

The options for reform ask how legal representatives can be protected when they follow the rules about their responsibilities.

The options also look at how financial institutions can feel secure that the directions they get about what to do with an RDSP are valid after a legal representative has been named.

**Question 10**

How can legal representatives be protected from liability when they follow the rules about their responsibilities?

**Question 11**

How can financial institutions feel secure that they can follow decisions that are made when a legal representative has been chosen?

✚ For more information see Discussion Paper, Ch. V.C.3, Liability and Third Parties that Rely on Decisions.

**3. *Should Organizations Be Allowed as Legal Representatives?***

Legal representatives have to meet certain criteria to be named legal representatives. They also have to be willing to carry out their responsibilities.

Usually guardians and attorneys are individuals. Sometimes trust companies are also guardians and attorneys. We heard, though, that some adults may not have access to a trusted person who could be their guardian or attorney under the rules in place. We are looking at whether organizations should be allowed to be legal representatives for RDSP beneficiaries.

Community organizations are often chosen to help adults manage their money under other laws in Ontario and other places. In the discussion paper, we look at these laws. We also consider some of the difficulties with having organizations play this role. For example, we ask questions about what types of organizations should be allowed.

**Question 12**

Should organizations be allowed to be legal representatives for RDSP beneficiaries?

- ✚ For more information, see the Discussion Paper, Ch. V.D, Eligibility and Availability of Legal Representatives.

**4. *Protections against Legal Representatives Misusing their Powers and Financial Abuse***

Giving a person the power to help manage or make decisions about an adult's money creates an opportunity for financial abuse. For example, legal representatives could use RDSP money for themselves or pressure beneficiaries to spend RDSP money when they do not want to.

The options for reform for this key issue present some rules that could be used to protect beneficiaries against financial abuse and the misuse of a legal representative's powers.

The options include the rules in place in Ontario. They also include other rules that could work well for RDSPs, such as asking a beneficiary before taking money out of an RDSP or having another person named as a monitor.

**Question 13**

What rules could be put in place to protect RDSP beneficiaries against financial abuse and the misuse of a legal representative's powers?

- ✚ Figure 3 in the Discussion Paper shows some of the rules that could be used to protect beneficiaries against financial abuse at page 129.

## VI. SHARING YOUR COMMENTS

We are interested in your comments on this summary and the full discussion paper.

We are hoping to hear from individuals and organizations affected by the project. For example, we would very much like to hear from adults with mental disabilities who want an RDSP and their supporting family, friends and service providers.

We have asked questions in this summary that we would like to hear your views on. The questions are listed together at the end of the summary.

In the discussion paper, there is a longer, more detailed list of questions that we would also like comments on (see Discussion Paper, Appendix A).

✚ You can share your comments until **Friday, February 28, 2014**.

✚ For more information, visit our webpage “Share Your Feedback” at <http://www.lco-cdo.org/en/rdsp-discussion-paper-share-your-feedback>.

You can contact us by mail, fax, email and phone.

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## **APPENDIX A: LIST OF QUESTIONS FOR DISCUSSION**

1. Have you tried to open or make decisions about an RDSP but were told that you were not able to because of your capacity?
2. Do you think that you could have difficulties spending money that you get from an RDSP?
3. Have you faced challenges with naming an attorney or guardian to help you (or another person) open or make decisions about an RDSP?
4. What do you think about the concerns that the LCO has heard about? Are there other concerns that we should know about?
5. What do you think about the goals for change in the LCO's project?
6. What options in the choice of arrangements do you think would achieve the goals for reform?
7. Are there other options in the choice of arrangements that you think would achieve the goals for reform?
8. How can RDSP beneficiaries meaningfully participate in decision-making after a legal representative is chosen?
9. What powers should legal representatives have to make decisions about money inside an RDSP or spending money that is taken out of an RDSP? Why?
10. How can legal representatives be protected from liability when they follow the rules about their responsibilities?
11. How can financial institutions feel secure that they can follow decisions that are made when a legal representative has been named?
12. Should organizations be allowed to be legal representatives for RDSP beneficiaries?
13. What rules could be put in place to protect RDSP beneficiaries against financial abuse and the misuse of a legal representative's powers?

## **APPENDIX B: SECTIONS FROM THE SUBSTITUTE DECISIONS ACT, 1992**

### **Incapacity to manage property**

6. A person is incapable of managing property if the person 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.

### **Capacity to give continuing power of attorney**

8. (1) A person is capable of giving a continuing power of attorney if he or she,
- (a) knows what kind of property he or she has and its approximate value;
  - (b) is aware of obligations owed to his or her dependants;
  - (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.

## ENDNOTES

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<sup>1</sup> Government of Ontario, *A Prosperous and Fair Ontario: 2013 Ontario Budget* (Toronto: May 2013), 98-99.

<sup>2</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); 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). For more information on the LCO's project on *Legal Capacity, Decision-Making and Guardianship*, please see our website: <http://www.lco-cdo.org/en/capacity-guardianship>.

<sup>3</sup> *Income Tax Act*, R.S.C. 1985, c.1, 5<sup>th</sup> Supp. [ITA], "qualifying person", "holder".

<sup>4</sup> Canada Revenue Agency, "Who Can Become a Beneficiary of an RDSP?" online: <http://www.cra-arc.gc.ca/tx/ndvdl/tpcs/rdsp-reei/ctrbtn-eng.html> (last accessed 20 December 2013).

<sup>5</sup> Ministry of Community and Social Services, "About Registered Disability Savings Plans" online: <http://www.mcscs.gov.on.ca/en/mcscs/programs/social/what/rdsp.aspx> (last accessed 10 December 2013); *General*, O.Reg. 222/98, ss.28, 43.

<sup>6</sup> Canada Revenue Agency, "Tax Payable" online: <http://www.cra-arc.gc.ca/tx/ndvdl/tpcs/rdsp-reei/pybl/menu-eng.html> (last accessed 10 December 2013); ITA, note 3, ss.146.4(5), 146.4(6), 146.4(7).

<sup>7</sup> ITA, note 3, s.146.4(1) "holder".

<sup>8</sup> ITA, note 3, s.146.4(1) "qualifying person", "holder".

<sup>9</sup> ITA, note 3, s.146.4(1) "qualifying person", "holder".

<sup>10</sup> ITA, note 3, s.146.4(1) "qualifying person", "holder".

<sup>11</sup> ITA, note 3, s.146.4(1) "qualifying person".

<sup>12</sup> *Substitute Decisions Act, 1992*, S.O. 1992, c. 30 [SDA].

<sup>13</sup> Community Legal Education Ontario, "Can Anyone Give a Continuing Power of Attorney for Property?" online: <http://www.cleo.on.ca/en/publications/continuing/can-anyone-give-continuing-power-attorney-property> (last accessed 20 December 2013). See also the SDA, note 12, s.8(1).

<sup>14</sup> Capacity Assessment Office, Ontario Ministry of the Attorney General, *Guidelines for Conducting Assessments of Capacity* (Capacity Assessment Office, Ontario Ministry of the Attorney General, May 2005), II.2. See also: SDA, note 12, s.6.

<sup>15</sup> SDA, note 12, s.16.

<sup>16</sup> SDA, note 12, s.78; *Capacity Assessment*, O.Reg. 460/05; Capacity Assessment Office, note 14.

<sup>17</sup> SDA, note 12, s.16(5).

<sup>18</sup> SDA, note 12, s.17.

<sup>19</sup> SDA, note 12, s. 22.

<sup>20</sup> SDA, note 12, s.72; The 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 17 December 2013).

<sup>21</sup> SDA, note 12, ss.22(1), 22(3).

<sup>22</sup> SDA, note 12, s.3.

<sup>23</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>24</sup> The *Substitute Decisions Act, 1992* does not say that a guardian or attorney must be a natural person but it is generally accepted that this must be the case, except where the guardian is the OPGT or a trust company. Under a power of attorney, an adult could name any person to be their attorney. Courts can also name any person as a

guardian, except a person who provides health care or residential, social, training or support services for compensation (unless they are a spouse, partner or relative, attorney for personal care or attorney under a continuing power of attorney). The Office of the Public Guardian and Trustee can only allow certain persons to replace it as the guardian. These persons include a spouse or partner, a family member, an attorney (who does not already have powers over all of a person's property), and a trust company (with a spouse or partner's consent). SDA, note 12, ss.7,17, 24.

<sup>25</sup> *The Constitution Act, 1982*, Schedule B to the *Canada Act, 1982*, (U.K.) 1982 c.11; *Human Rights Code*, R.S.O. 1990, Ch. H.19; *Accessibility for Ontarians with Disabilities Act*, S.O. 2005, Ch. 11.

<sup>26</sup> *Convention on the Rights of Persons with Disabilities*, online: <http://www.un.org/disabilities/convention/conventionfull.shtml> (last accessed: July 4, 2013).

<sup>27</sup> Government of Canada, *Jobs, Growth and Long-Term Prosperity: Economic Action Plan 2012* (Ottawa: March 29, 2012), 182.