



Capacity and Legal Representation for the Federal RDSP

Final Report Summary
June 2014



LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO



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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 disability can better participate in the Registered Disability Savings Plan (RDSP).¹

The LCO has finished projects on the principles to follow in making or putting in place laws that affect persons with disability and older adults.² At the moment, we have a large project on Ontario's laws about capacity, decision-making and guardianship.³

The RDSP project is a separate project. We have released a large final report in this project.⁴ This paper is a summary of the Final Report. The summary is meant for adults with disability, and their family and friends.

B. The LCO's RDSP Project

The *Income Tax Act* says that adults must have capacity to open an RDSP.⁵ 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 to do it themselves.

However, some people say the rules to name a guardian or attorney are more difficult than they need to be if the only issue is opening an RDSP. The final report for the RDSP project makes suggestions for changes that could be made in Ontario to make the process easier.

What does the LCO's Final Report say?

The LCO's Final Report makes suggestions about a simpler process for adults to name someone to open an RDSP and make decisions about money in the RDSP for them.

We call this other person the "RDSP legal representative".

An adult could name a family member, friend or community organization as an RDSP legal representative.

The Final Report also suggests changes that are important for a simpler process.

- ✚ This summary has less information than the Final Report. It does not change anything in the larger Final Report. The Final Report 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>

C. Words We Use in the Summary

We try to avoid technical words in this summary. Sometimes, though, we have to use words that have a special meaning when an everyday 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 recommendations about how the law can be accessible to communities in Ontario.

Attorney:

Adults can name any person, called an “attorney”, to make decisions for them in a document, called a “power of attorney”. Although the term “attorney” is used, an attorney named in a power of attorney does not have to be a lawyer.

Beneficiary or RDSP Beneficiary:

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

The federal government says who is eligible to be an RDSP beneficiary. Only 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.⁶

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.
Common Law:	The common law is a type of law that is decided in court judgements.
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.
Guardian:	Guardians are persons who can make decisions for adults who have been found incapable of making their own decisions.
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 can help them.
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. However, plan holders cannot make decisions about money after it comes out of the RDSP.
Power of Attorney:	Adults can make a power of attorney document to name another person, called an “attorney”, to make decisions for them.

RDSP Legal Representative:

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

D. What is the RDSP?

The RDSP is a savings plan for persons with disability 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.

Having money in an RDSP does not mean people are not eligible 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.⁷ There are also special rules about what happens when money is taken out of an RDSP for income taxes.⁸

✚ Background on the RDSP is found in the Final Report, Chapter II, “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/

E. Steps in the Project

The Final Report (and this summary) is the result of research and consultations that the LCO did from May 2013 to June 2014.

Early in the project, we formed an Advisory Group with experts who helped us by reviewing documents, such as the Final Report, and by giving us advice.

We also organized consultations to hear from the public about their concerns and goals. Most of our consultations took place after we released a large discussion paper. The discussion paper reviewed a number of different changes that could be made in Ontario.

For our consultations, we held eight group meetings with adults with disability and their family and friends, community organizations, lawyers and financial institutions. The LCO also held interviews and received written comments from the public.

We considered information from all of our research and consultations when we decided which suggestions to make in the Final Report.

The LCO Board of Governors approved the Final Report in June 2014.

 For more information on our research and consultations, see the Final Report, Chapter I.E.1. “Research and Consultations”.

F. Issues We Look at in this Summary

This summary looks at issues listed in the box below that were presented in the full Final Report. The page numbers refer to this summary.

Pages 6 to 10:	What are the reasons for the LCO’s RDSP Project?
Page 7:	Who can open and manage money in an RDSP for adults in Ontario?
Pages 7 to 9:	What are peoples’ concerns with the rules in place in Ontario?
Page 10:	What are the goals for a simpler process in Ontario?
Pages 11 to 20:	What changes does the LCO recommend?
Page 21:	Where can you get more information?

II. WHAT ARE THE REASONS FOR THE RDSP PROJECT?

A. 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.⁹

After opening an RDSP, plan holders make important decisions about managing money inside the RDSP. For instance, they may be able to apply for government grants and bonds, make investments and ask for some money to be paid to the beneficiary.

B. Adults Must Have Capacity to Be the Plan Holder

When beneficiaries are adults, they can be the plan holder. However, adults cannot be the plan holder when there are concerns about their capacity under the law to enter into a contract with a financial institution.¹⁰

Capacity to be a plan holder means being able to understand facts about the RDSP and the consequences of making (or not making) decisions about the RDSP.

The RDSP is a complex savings plan and there are adults who are unable to understand and make decisions about the RDSP. In these cases, someone else must be the plan holder.¹¹

Banks, credit unions or other financial institutions can refuse to open an RDSP for an adult whom they believe does not have capacity under the law to enter into a contract.

Adults may also want to name another person to be the plan holder if they believe that they do not have capacity to open an RDSP and make decisions about money in an RDSP.

 More information on plan holders is found in the Final Report, Chapter II.D, “Opening and Managing an RDSP”.

C. Naming Another Person to Be the Plan Holder

The *Income Tax Act* does not have a process to name another person to be a plan holder for adults who cannot be their own plan holder. Plan holders must be named under laws in Canadian provinces and territories that relate to issues of capacity.

In Ontario, an RDSP plan holder could be an attorney or a guardian for property. The *Substitute Decisions Act, 1992* explains how to get an attorney or a guardian.¹²

Adults can name an attorney to make decisions for them when they do not have capacity to make their own decisions in a power of attorney document.

Adults who do not have an attorney to make decisions about the RDSP and who cannot make a power of attorney for property can apply for a guardian. Family members and other interested persons can also apply to have a guardian named for an adult.

The LCO heard that some adults find it difficult to get an attorney or a guardian to be their RDSP plan holder in Ontario. In the next sections, we explain what we learned about these difficulties and the goals for a simpler process.

In Ontario, a plan holder for the RDSP could be an attorney or a guardian.

Some adults find it difficult to name an attorney or guardian to be their plan holder under the rules in place in Ontario.

The LCO's project is about a simpler process to name an RDSP legal representative who can be the plan holder for adults who do not have an attorney or guardian.

D. Difficulties Naming a Plan Holder for Adults in Ontario

1. Naming a Plan Holder in a Power of Attorney

Powers of attorney can be made quickly and in private. Adults can choose the person who will make decisions for them in the power of attorney document. They can also put their wishes in the document and the attorney must respect those wishes.¹³

However, some adults with disability have not been able to make a power of attorney for the RDSP because it is too difficult for them.

There is a test to show that an adult has capacity under the law to make a power of attorney. The test is different from the test for capacity to be a plan holder because choosing an attorney involves different decisions. (We explain the test for capacity to be a plan holder on page 6.)

The full test for capacity to make a power of attorney under the *Substitute Decisions Act, 1992* is found in **Appendix A** 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) [the] 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.¹⁴

The test for capacity to make a power of attorney was made to cover all of an adult's property, not only the RDSP. We learned that some adults with disability in Ontario may experience challenges making a power of attorney for the RDSP because they may be unable to meet this test for capacity.

2. Applying for Guardianship

Adults who cannot make a power of attorney may wish to get a guardian to be their plan holder. However, the LCO heard that the process of applying for guardianship can be difficult when it is only used for naming a plan holder for an RDSP.

There are two places to apply for guardianship in Ontario:

1. The Superior Court of Justice (by asking for a court order) or
2. The Office of the Public Guardian and Trustee (after asking for a Certificate of Incapacity from a professional “capacity assessor”).

In both cases, adults must be assessed and found to be incapable of managing property. The *Substitute Decisions Act, 1992* defines what incapable of managing property means. The full test is found in **Appendix A** 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.¹⁵

This test requires adults to be able to understand facts about their property and different ways of managing it, and to be able to appreciate the possible consequences of making (or not making) decisions about their property.¹⁶

Some people told the LCO that they do not want to apply for guardianship if the only issue is opening an RDSP because they do not want adults to have to be found incapable of managing property. The main concerns that we heard, however, were about the costs and time involved in applying for guardianship when the purpose is only to name a plan holder for the RDSP.

Like powers of attorney (see above), the process to get a guardian in Ontario was made to cover many types of property and situations. There are multiple steps in the process, which can take time and cost money. As a result, applying for guardianship can be difficult for adults and their family and friends who want to open an RDSP right away to begin saving for the future.

- ✚ We review difficulties with getting an attorney or a guardian to be a plan holder in the Final Report, Chapter III.A, “Rationale for a Streamlined Process in Ontario”.
- ✚ This project is specifically and only about a simpler process to name an RDSP legal representative in Ontario. The LCO’s larger project on *Legal Capacity, Decision-Making and Guardianship* reviews ways to simplify guardianship applications more generally.

E. Goals for Change

When we did our consultations, we asked people what the goals for change should be. Many people said that they want a way to name a trusted person as a plan holder that is easy to use, affordable and private.

We also looked at the goals of laws and programs that affect persons with disability in Ontario. For instance, we looked at the *Canadian Charter of Rights and Freedoms* and the *Convention on the Rights of Persons with Disabilities*.¹⁷

Based on our research and consultations, we created a list of goals for change. These goals helped us with our recommendations.

The LCO believes that a simpler process to name an RDSP legal representative should achieve these goals:

1. Meets beneficiaries' needs for RDSP decision-making.
2. Makes sure that beneficiaries can participate in decisions about their RDSP, even after an RDSP legal representative has been named.
3. Protects beneficiaries from RDSP legal representatives misusing their authority.
4. Is practical, easy to use and affordable.
5. Makes other individuals and organizations (such as financial institutions) feel secure about risks that may affect them.

✚ Descriptions of the goals for change (we call them “benchmarks for reform”) are found in the Final Report, Chapter I.E.2, “Benchmarks for Reform”.

III. THE LCO'S RECOMMENDATIONS

A. A Simpler Process for Adults to Name an RDSP Legal Representative

The LCO's recommendations are about what changes would be needed to create a simpler process to name a plan holder in Ontario, called an RDSP legal representative.

We recommend that adults be allowed to name a family member, friend or community organization as their RDSP legal representative. This would give adults the autonomy to choose whom they would like to represent them for the RDSP in a document that is like a power of attorney. It could be done at home or with the help of someone else, such as a lawyer.

We also recommend changes that would be needed to make a simpler process work.

It is important to know that the LCO's recommendations take into account our larger project on *Legal Capacity, Decision-Making and Guardianship*.

There are certain issues that came up in the RDSP project that the larger project will decide. We tried not to decide issues in the RDSP project that could limit the options for change that we are reviewing in the larger project.

- ✚ You can see the full list of our ten recommendations in the Final Report, Chapter V, "List of Recommendations".
- ✚ The LCO's discussion paper in the larger *Legal Capacity, Decision-Making and Guardianship* project is available online here: <http://lco-cdo.org/en/capacity-guardianship-discussion-paper>.

1. When Can the Simpler Process Be Used?

The simpler process that we recommend is meant for situations where there are concerns about an adult's capacity to be a plan holder and the adult does not have a guardian or attorney.

Capacity to be a plan holder means being able to understand facts about the RDSP and the consequences of making (or not making) decisions about the RDSP.

Adults themselves might believe that they do not have capacity to be a plan holder. A financial institution employee, such as a bank advisor, might also believe that an adult does not have capacity and refuse to open an RDSP, unless there is another legally authorized person in place. In these situations, adults could use the simpler process to name an RDSP legal representative.

The simpler process to name an RDSP legal representative is meant for situations where

- there are concerns about an adult’s capacity to be a plan holder and
- the adult does not have a guardian or attorney.

2. Who Can Use the Simpler Process?

Similar to what is needed to make a power of attorney, adults who are able to meet a legal test for capacity could name an RDSP legal representative under the simpler process.

Because we heard that the test to make a power of attorney has been too difficult for some adults with disability to name a plan holder, we recommend an easier test.

In the Final Report, we discuss two tests: the common law test and the British Columbia test under the *Representation Agreement Act*.¹⁸ Our preference is for a test that is based on the common law. But if the Ontario government wants an even more flexible test, it could choose the test from British Columbia.

The Common Law Test

The common law is a type of law that comes from court decisions. There are tests for capacity under the common law that are already used in Ontario for certain decisions. The common law was also the original source for the tests in the *Substitute Decisions Act, 1992*.

The common law test requires that adults have the ability to understand facts about naming an RDSP legal representative and the possible consequences.

A test used in Saskatchewan that is similar to the common law test has been described as setting a low requirement. For instance, in that province, adults just need to understand that

they are naming a parent or other person to set up a savings account.¹⁹ The common law test can also be changed in different ways to make it more flexible.

The British Columbia *Representation Agreement Act* Test

The British Columbia test for capacity under the *Representation Agreement Act* is the most flexible test in Canada. It is very different from tests that are used in Ontario.

The LCO heard that the factors listed in this test can be confusing and create risks of financial abuse. Therefore, we recommend that the Ontario government choose the British Columbia test only if it thinks that the common law test is not flexible enough for beneficiaries to use.

The British Columbia test has four factors. The full test is found in **Appendix A** of this summary. The factors include the communication of a desire to have a representative and the existence of a trusting relationship with the representative.²⁰

- ✚ For more information on who we recommend should be able to use the simpler process, see the Final Report at pages 33 to 38.
- ✚ We explain the tests for capacity under the common law and the British Columbia *Representation Agreement Act* in the Final Report, Chapter IV.C.3, “Capacity Criteria to Grant a Personal Appointment”.

3. *What if Adults Disagree with an Opinion about their Capacity to Be a Plan Holder?*

If an adult disagrees with a financial institution employee’s opinion that he or she is incapable of being a plan holder, the adult could ask for a letter of opinion from a “capacity assessor”. A letter of opinion from a capacity assessor that says an adult is capable of being a plan holder for the RDSP might change a financial institution employee’s mind. However, it is not guaranteed that it will change the financial institution employee’s mind.

Capacity assessors are professionals who give capacity assessments for different reasons. Capacity assessors charge fees that are less expensive than going to court. The capacity assessment can take place in the community; for instance, it can take place at the adult’s home.

Adults wishing to disagree with a financial institution employee’s opinion about RDSP decision-making would need to **ask for a letter of opinion only about the capacity to be a plan holder for the RDSP.**

It would be very important to be clear with the capacity assessor about the purpose of the letter of opinion to prevent a possible finding of incapacity that is not related to the RDSP and that might affect the person’s ability to deal with other types of property.

✚ For more information, see the Final Report Chapter IV.C.1, “Determining the Beneficiary’s Capacity to Be the Plan Holder”.

B. Who Can Be an RDSP Legal Representative

In our consultations, people said that adults should be able to choose from a wide-range of RDSP legal representatives as long as there are protections from financial abuse.

Normally, adults can name a family member or friend in a power of attorney. In the RDSP project, we recommend that community organizations be added to this list.

There are many adults who may not have a trusted family member or friend to be their RDSP legal representative and who rely on service providers. Some community organizations told the LCO that they already help adults with money, such as ODSP payments, and that they would be willing to be RDSP legal representatives.

Community organizations have different responsibilities than individuals and there is a risk that they may not use their authority properly. Therefore, we say that community organizations should be approved by a government office to be an RDSP legal representative.

If an adult names a community organization, we also recommend that the community organization have special duties, such as keeping separate records of each beneficiary’s RDSP and regularly reviewing these records.

An RDSP legal representative could be a

- family member,
- friend, or
- a community organization that is approved by a government office.

- ✚ We recommend two ways that community organizations could be approved by a government office. For more information on these recommendations, see the Final Report, Chapter IV.C.7, “Who May Act as an RDSP Legal Representative”.

C. The RDSP Legal Representative’s Responsibilities

1. Opening an RDSP and Making Decision about Money in the RDSP

The LCO recommends that RDSP legal representatives have authority to do everything that a plan holder can do, including opening an RDSP and making decisions about money in the RDSP.

When RDSP legal representatives make decisions, they should have the same duties as a person named in a power of attorney who makes decisions for an adult who is found to be incapable of managing property. These duties include encouraging the adult’s participation in decision-making, to the best of his or her abilities, and consulting with supportive family members and friends.²¹

RDSP legal representatives should be required to make decisions about the RDSP that are based on decisions made by the adult about personal care (or another person with legal authority to make decisions about the adult’s personal care). If their decisions will have an effect on the adult’s personal comfort or well-being, they should also consider that effect and determine whether a decision is for the adult’s benefit.²²

The RDSP legal representatives’ duties need to be performed diligently, with honesty and integrity and in good faith, for the adult’s benefit.²³

We recommend that RDSP legal representatives have authority to

- open an RDSP,
- consent to money being put into the RDSP,
- make investment choices, and
- ask for payments to be made to the beneficiary.

2. What Happens to Money Paid From the RDSP?

Beneficiaries must begin to get money from an RDSP starting at the age of 60. Their money comes out on scheduled dates in amounts that are set by the federal government. But plan holders can sometimes ask for extra, one-time payments to go to beneficiaries.

Under the *Income Tax Act*, plan holders can make decisions about money while it is still inside the RDSP at the financial institution. However, plan holders cannot make decisions for beneficiaries about how they spend their money after it comes out of the RDSP.

We recommend that RDSP legal representatives have the same responsibilities and limitations as plan holders. We do not recommend that they have authority to control an adult's spending money because it could increase opportunities for abuse. We are also concerned that giving RDSP legal representatives more authority would create confusion about their responsibilities.

Adults with legal capacity who get payments from the RDSP can manage their money alone or with support from family and friends, depending on their choice. Otherwise, if an adult is not legally capable of managing his or her payments, the rules in place under the SDA would apply.

As an added protection against financial abuse, we believe that when RDSP legal representatives want to make a special request for a payment to go to the adult, they should first consider whether the adult is legally capable of managing the payment, and then follow certain rules based on their opinion.

Adults who get payments from the RDSP can manage their money alone or with support from family and friends.

If an adult is not legally capable of managing money, the rules in place under the SDA apply.

RDSP legal representatives who want to ask for money to go to an adult should have to consider if the adult is legally capable of managing the money and to take protective steps based on their opinion.

- ✚ Our reasons for suggesting that an RDSP legal representative have the same responsibilities as a plan holder are reviewed in the Final Report, pages 41 to 47.

- ✚ We recommend that RDSP legal representatives have special duties before asking for one-time payments in Chapter IV.C.4, “Countering the Increased Opportunities for Financial Abuse”.

D. Protecting Adults against Financial Abuse

Giving another person the responsibility to make decisions about an adult’s money creates an opportunity for financial abuse. In our Final Report, we recommend that a number of protections be put in place to secure beneficiaries against this risk.

We believe that beneficiaries should have the same protections they would have under the *Substitute Decisions Act, 1992* for regular powers of attorney. These protections include that

- the document naming the RDSP legal representative must be witnessed by two people who sign the document,
- some people cannot witness the document being made because there might be a conflict of interest,
- RDSP legal representatives must keep records about their decisions, and
- the Office of the Public Guardian and Trustee must investigate complaints that an adult is incapable of managing property and that serious harm is happening or could happen.²⁴

In the last section, we reviewed other special protections that the LCO recommends. For instance, we recommend that RDSP legal representatives be prohibited from controlling an adult’s spending money after it comes out of the RDSP.

It is important to know that all beneficiaries have protections under the *Income Tax Act*, for the money that is kept inside the RDSP at a financial institution.

Protections under the *Income Tax Act* include limits on the timing and amount of payments. Financial institutions must also contact the federal government if they are aware that the RDSP is not being or is likely not to be managed entirely for the adult’s benefit.²⁵

The LCO recommends that adults have the same protections they would have under the *Substitute Decisions Act, 1992* for regular powers of attorney.

All beneficiaries have important protections under the *Income Tax Act* for money while it is inside the RDSP.

We also recommend that RDSP legal representatives have special responsibilities to protect RDSP beneficiaries.

- ✚ More information on protections against financial abuse can be found in the Final Report, Chapter IV.C.4, “Countering the Increased Opportunities for Financial Abuse”.

E. Ending the RDSP Legal Representative’s Responsibilities

We suggest that the RDSP legal representative’s responsibilities end if a guardian or attorney is named who has authority to be a plan holder.

There are also other situations where a power of attorney will end under the *Substitute Decisions Act, 1992* that we think should be the same for RDSP legal representatives.

For instance, a power of attorney ends if the adult cancels it. Under the *Substitute Decisions Act, 1992* the process to cancel a power of attorney is like the process to make one. The adult must make a document and have it witnessed by two people who sign the document (the people must be allowed to be witnesses).²⁶

The adult must also meet a test for capacity to cancel a power of attorney. The test is the same as the test for capacity to make a power of attorney.²⁷ Depending on what the Ontario government decides, for the RDSP, this might be the test under the common law or the British Columbia *Representation Agreement Act*.

Another example is if an RDSP legal representative wants to resign. Attorneys can resign if they tell certain people in writing, including the adult.²⁸

- ✚ For more information on how to end an RDSP legal representative’s responsibilities, see the Final Report, Chapter IV.C.8, “Terminating the Personal Appointment”.

F. Making Other Individuals and Organizations Feel Secure with a New Process

Individuals and organizations that are not the beneficiary or the RDSP legal representative may be affected by a simpler process. Financial institutions are an example. They told the LCO that they want to feel secure against legal risks that could affect them when they follow an RDSP legal representative's decisions.

The *Substitute Decisions Act, 1992* has protections for other individuals and organizations that rely on an attorney or guardian.²⁹ The LCO suggests that they also be protected against some legal risks when the simpler process is used.

For instance, if the document naming an RDSP legal representative was not made properly but the RDSP legal representative still makes decisions for the beneficiary, others should be able to rely on the decisions as long as they did not know about the problem and act in good faith.

✚ Our suggestions for making others feel secure with a simpler process are discussed in the Final Report, Chapter IV.C.6, "Providing Third Parties with Certainty and Finality".

G. Accessible Information for the Public

It is very important to give information to the public about using the simpler process. Information should be in accessible formats, languages and places.

Adults often learn about the RDSP by talking to their supporters and service providers. Therefore, the LCO suggests that information about the simpler process be sent out through the community networks of adults with disability.

We think that helpful information might cover issues such as how to know if a beneficiary has capacity to be the plan holder and the responsibilities of RDSP legal representatives.

To make this information as clear as possible, we suggest that the Ontario government make an information booklet for adults with disability, RDSP legal representatives and others.

We recommend that the public be given information on how to use the simpler process in accessible formats, languages and places.

H. Recognizing Plan Holders Named in Other Provinces

Plan holders must be named under laws dealing with capacity issues in Canadian provinces and territories. This can create problems if an adult wants to move to Ontario from another place and keep the same plan holder because the laws are different.

The LCO reviewed laws in other provinces and territories to understand how plan holders can be named there. We considered these different laws when we made our recommendations for Ontario. In a number of places a plan holder can be named through processes that are similar to our recommendations (for instance, British Columbia, Newfoundland and Labrador, and Saskatchewan).

Still, if an adult moves to Ontario from another province or territory, we believe that there should be a way to allow a plan holder to continue to represent the adult. The *Substitute Decisions Act, 1992* has a way to recognize attorneys and guardian named in other places.³⁰ We also recommend a similar way to recognize plan holders in Ontario.

Adults could have problems with their RDSP if they move across the country to Ontario because the laws to name a plan holder are different in Canadian provinces and territories.

We recommend a way to recognize plan holders that were named under the law in other places to continue to represent beneficiaries in Ontario.

- ✚ We discuss the issue of recognizing plan holders named in other places in the Final Report, Chapter IV.D.2, “Promoting Coherence across Canada”.

IV. WHERE TO GET MORE INFORMATION

You can get more information on the LCO's RDSP project on our website. All of the documents for the project are available on the project webpage here: <http://www.lco-cdo.org/en/rdsp>.

We have also posted webpages that explain our recommendations. Here are some examples:

Project Background: <http://www.lco-cdo.org/en/rdsp-final-report-project-backgrounder>

RDSP Final Report – Quick Facts: <http://www.lco-cdo.org/en/rdsp-final-report-quick-facts>

RDSP Final Report Overview (available in plain English and other languages): <http://www.lco-cdo.org/en/rdsp-final-report-overviews>

If you have questions or comments that you would like to share with the LCO, you can contact us by mail, fax, email and phone.

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APPENDIX A: SECTIONS FROM LAWS REVIEWED IN THE SUMMARY

Substitute Decisions Act, 1992, S.O. 1992, c.30

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.
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.
- (2) A person is capable of revoking a continuing power of attorney if he or she is capable of giving one.

Execution

10. (1) A continuing power of attorney shall be executed in the presence of two witnesses, each of whom shall sign the power of attorney as witness.

Persons who shall not be witnesses

- (2) The following persons shall not be witnesses:
- 1. The attorney or the attorney's spouse or partner.
 - 2. The grantor's spouse or partner.
 - 3. A child of the grantor or a person whom the grantor has demonstrated a settled intention to treat as his or her child.
 - 4. A person whose property is under guardianship or who has a guardian of the person.
 - 5. A person who is less than eighteen years old.
- (3) Repealed.

Non-compliance

- (4) A continuing power of attorney that does not comply with subsections (1) and (2) is not effective, but the court may, on any person's application, declare the continuing power of attorney to be effective if the court is satisfied that it is in the interests of the grantor or his or her dependants to do so.

Representation Agreement Act, R.S.B.C. 1996, c.405

Test of incapability for standard provisions

8. (2) In deciding whether an adult is incapable of making a representation agreement....all relevant factors must be considered, for example:
- (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.

ENDNOTES

- ¹ Government of Ontario, *A Prosperous and Fair Ontario: 2013 Ontario Budget* (Toronto: May 2013), 98-99.
- ² 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).
- ³ 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>.
- ⁴ The final report in this project is available online at: www.lco-cdo.org.
- ⁵ *Income Tax Act*, R.S.C. 1985, c.1, 5th Supp. [ITA], "disability savings plan", "holder" and "qualifying person".
- ⁶ 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>.
- ⁷ 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>; *General*, O.Reg. 222/98, ss.28, 43.
- ⁸ Canada Revenue Agency, "Tax Payable", online: <http://www.cra-arc.gc.ca/tx/ndvdl/tpcs/rdsp-reei/pybl/menu-eng.html>; ITA, note 5, ss.146.4(5), 146.4(6), 146.4(7).
- ⁹ ITA, note 5, s.146.4(1) "holder".
- ¹⁰ ITA, note 5, s.146.4(1) "disability savings plan", "qualifying person" and "holder".
- ¹¹ ITA, note 5, s.146.4(1) "qualifying person".
- ¹² *Substitute Decisions Act, 1992*, S.O. 1992, c.30 [SDA].
- ¹³ SDA, note 12, ss.7(2), 7(6).
- ¹⁴ 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>. See also: SDA, note 12, s.8(1).
- ¹⁵ Capacity Assessment Office, Ontario Ministry of the Attorney General, *Guidelines for Conducting Assessments of Capacity* (Toronto: 2005), Part II.2.
See also: SDA, note 12, s.6.
- ¹⁶ The Capacity Assessment Office explains the test for capacity to manage property in *Guidelines for Conducting Assessments of Capacity*. Capacity Assessment Office, note 15, Part II.
- ¹⁷ *Canadian Charter of Rights and Freedoms*, Part I of the *The Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982*, 1982 c.11 (U.K.); *Convention on the Rights of Persons with Disabilities*, G.A. Res. 61/106, 61st Sess., U.N. Doc. A/Res/61/106 [adopted by consensus on December 13, 2006].
- ¹⁸ *Representation Agreement Act*, R.S.B.C. 1996, c. 405.
- ¹⁹ 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>.
- ²⁰ *Representation Agreement Act*, note 18, s.8(2).
- ²¹ SDA, note 12, ss.32, 38.
- ²² SDA, note 12, ss.32, 38.
- ²³ SDA, note 12, ss.32, 38.
- ²⁴ SDA, note 12, ss.10, 27, 32. See also: SDA, note 12, ss.7, 8, 33, 39, 42, 83.
- ²⁵ For information on maximum and minimum withdrawals, see: Employment and Social Development Canada, "InfoCapsule: Maximum and Minimum Withdrawals", online: <http://www.esdc.gc.ca/eng/disability/savings/issuers/infocapsules/withdrawals.shtml>; ITA, note 5, ss.146.4(13)(c), 146.4(4)(a)(i), 146.4(11).
- ²⁶ SDA, note 12, s.12.
- ²⁷ SDA, note 12, s.8(2).
- ²⁸ SDA, note 12, ss.11, 12.
- ²⁹ SDA, note 12, s.13.
- ³⁰ SDA, note 12, s.85.