

Capacity and Legal Representation for the Federal RDSP

FINAL REPORT
June 2014



LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO



LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

CAPACITY AND LEGAL REPRESENTATION FOR THE FEDERAL RDSP

FINAL REPORT

June 2014

Disponible en français
Available online at www.lco-cdo.org
ISBN: 978-1-926661-68-1

This publication may be cited as follows:
Law Commission of Ontario, *Capacity and Legal Representation for the Federal
RDSP: Final Report* (Toronto: June 2014)

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 support to the LCO. It is located in the Ignat Kaneff School Building, home of Osgoode Hall Law School at York University.

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

LAW COMMISSION OF ONTARIO FINAL REPORTS

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

DISCLAIMER

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

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

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

FOREWORD

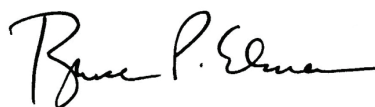
This final report in the RDSP project results from the Ontario Government's request that the LCO recommend a streamlined process for appointing a legal representative for adults with disabilities to open and manage an RDSP, when concerns exist about their capacity to enter into contracts.

The RDSP is a federal program under the *Income Tax Act* to provide support for adults with disabilities, as they grow older. Adults whose capacity is not questioned are able to open their own RDSP and manage it as a "plan holder". Where there is a question about the adult's contractual capacity, the plan holder must be appointed under the relevant provincial law. Ontario requested that the LCO recommend a process limited to appointing an RDSP plan holder that is less expensive and complex than the usual process for appointing a substitute decision-maker, but that nevertheless protects against financial abuse.

We have concluded that the most appropriate process is that an adult whose capacity to open and manage an RDSP is in question and who does not already have an attorney or guardian for property be able to personally appoint a legal representative to carry out these functions. We have provided two options for the criteria for appointment and revocation. Because we are concerned that a more flexible standard might be more open to abuse, our preference is to use the definition of legal capacity to grant (and therefore revoke) a power of attorney at common law. A more flexible standard, however, can be found under section 8(2) of the British Columbia *Representation Agreement Act*. We have also recommended that the safeguards against abuse under the *Substitute Decisions Act, 1992* apply to the legal representative, as well as that the legal representative not be given authority to manage funds once withdrawn from the RDSP.

This project is related to the LCO's larger project on capacity, decision-making and guardianship. We have made every effort to ensure that we do not foreclose options in that project by our recommendations in this project, while still developing recommendations specific to the RDSP that respect adults' autonomy, independence and security.

The Board of Governors, comprised of appointees of the founding partners, the judiciary and members at large, approved this Final Report in June 2014. The Board's approval reflects its members' collective responsibility to manage and conduct the affairs of the Law Commission of Ontario, and should not be considered an endorsement by individual members of the Board or by the organizations to which they belong.



Bruce P. Elman, Chair, Board of Governors



Patricia Hughes, Executive Director

The following individuals contributed to this project:

LCO Staff

Sarah Mason-Case (Head of Project)
Lauren Bates (Senior Lawyer)
Daniel Ambrosini (Research Lawyer to February 2014)

Student Researchers

Kai Deng Graduate Student Researcher (University of Ottawa)
Busayo Ayodele (Osgoode Hall Law School)
Megha Jandhyala Graduate Student Researcher (University of Toronto)
Cody Yorke (Queens University)
Samantha Foster (Osgoode Hall Law School)

Members of the Board of Governors during this Project

Bruce P. Elman, Member-at-large (from May 2012); Chair of the Board of Governors (from September 2012)
Mark L. Berlin, Member-at-large (from January 2012)
Gwen Boniface, Law Foundation of Ontario (from September 2011)
Christopher D. Bredt, Law Society of Upper Canada (from March 2008)
Nathalie Des Rosiers, Member-at-large (November 2009 to June 2013)
Adam Dodek, Ontario Law Schools (from July 2011)
Stephen Goudge, Judiciary (from September 2009)
Patrick Monahan, Ministry of the Attorney General (from November 2012)
Sonia Ouellet, Member-at-large (from July 2013)
María Páez Victor, Member-at-large (from January 2012)
Andrew Pinto, Member-at-large (from July 2012)
Lorne Sossin, Osgoode Hall Law School (from June 2010)
Patricia Hughes, *ex officio*, Executive Director of the LCO

Members of the Law School Research and Liaison Group

Trevor Farrow, Osgoode Hall Law School
Erik Knutsen, Queen's University Faculty of Law
Mona Paré, University of Ottawa (Civil Law)
Carol Rogerson, University of Toronto Faculty of Law
Anneke Smit, University of Windsor Faculty of Law
Melanie Randall, University of Western Ontario Faculty of Law
P.M. Vasudev, University of Ottawa (Common Law)

Members of the Community Council

Jamie Baxter, Law Clerk with Federal Court and visiting researcher at the Faculty of Law, University of Toronto (until May 2014)
Erika Gates-Gasse, Policy and Research Director, Ontario Council of Agencies Serving Immigrants
Avvy Go, Director of Metro Toronto Chinese & Southeast Asian Legal Clinic
Geoff Hall, Partner at McCarthy Tétrault in its Litigation Group
Bill Jeffery, National Coordinator of the Centre for Science in the Public Interest
Carmela Murdocca, Department of Sociology, York University
Maria Marchese, Director of Policy, Canadian Manufacturers and Exporters
Julie Mathews, Executive Director of Community Legal Education of Ontario
Nicole Pietsche, Coordinator of the Ontario Coalition of Rape Crisis Centres
Anne Marie Predko, Ministry of the Attorney General
Mehreen Raza, Research Consultant
Christiane Sadeler, Executive Director, Waterloo Region Crime Prevention Council.

The Law Commission of Ontario would also like to extend its thanks to the numerous organizations and individuals who helped shape this project through their involvement in the several stages of public consultations. A full list of contributing organizations and individuals can be found in Appendix A.

TABLE OF CONTENTS

LIST OF ACRONYMS	viii
GLOSSARY	ix
EXECUTIVE SUMMARY	x
I. INTRODUCTION	1
A. What Is the LCO’s Project about?.....	1
B. Recommendations.....	1
C. How Our Project Came to Be.....	2
1. Request from the Government of Ontario.....	2
2. The Federal Government’s 2011 Review of the RDSP and Subsequent Activities.....	2
D. The Project Scope.....	3
1. Recommending a Streamlined Process for the Jurisdiction of Ontario.....	4
2. Impediments to Accessing the RDSP Other than Legal Representation.....	4
3. Respecting the LCO’s Larger Project on Legal Capacity, Decision-Making and Guardianship.....	4
E. The LCO’s Methodology.....	5
1. Research and Consultations.....	5
2. Benchmarks for Reform.....	6
F. Structure of the Report.....	8
II. UNDERSTANDING THE FEDERAL RDSP	9
A. A Long-Term Savings Vehicle for Persons with Disabilities.....	9
B. RDSP Policy Objectives: Poverty Alleviation, Contribution and Autonomy.....	9
C. Who Are RDSP Beneficiaries and How Do They Learn about the RDSP?.....	11
D. Opening and Managing an RDSP.....	12
1. Determining the Beneficiary’s Capacity to Be the Plan Holder.....	12
2. Responsibilities of the Plan Holder.....	13
3. Receiving and Managing Funds Paid out of an RDSP.....	14
III. IMPROVING ACCESS TO THE RDSP FOR ADULTS WHO NEED LEGAL REPRESENTATION	17
A. Rationale for a Streamlined Process in Ontario.....	17
1. Beneficiaries May Be Unable to Grant a Power of Attorney to Name a Plan Holder.....	18
2. Exigencies of Applying for Guardianship Are Disproportionate to Naming a Plan Holder.....	19
B. Aspirations for a Simple Way to Designate a Trusted Person.....	22

C. Concerns of Interested Third Parties.....	23
IV. A STREAMLINED PROCESS TO APPOINT AN RDSP LEGAL REPRESENTATIVE.....	25
A. Developing the Process	25
1. Our Review of Alternative Arrangements.....	25
2. Public Consultations on the Options for Reform.....	27
B. Overview of the LCO’s Recommendations	27
C. Features of the Streamlined Process.....	29
1. Determining the Beneficiary’s Capacity to Be the Plan Holder.....	29
2. Enabling Beneficiaries to Personally Appoint a Plan Holder.....	30
3. Capacity Criteria to Grant a Personal Appointment.....	33
4. Countering the Increased Opportunities for Financial Abuse.....	39
5. The RDSP Legal Representative’s Role and Responsibilities.....	44
6. Providing Third Parties with Certainty and Finality.....	48
7. Who May Act as an RDSP Legal Representative	50
8. Terminating the Personal Appointment.....	52
D. Other Specific Issues.....	54
1. Accessible Information for Users of the Process.....	54
2. Promoting Coherence across Canada.....	55
V. LIST OF RECOMMENDATIONS.....	57
APPENDIX A: INDIVIDUALS AND ORGANIZATIONS CONTRIBUTING TO THE PROJECT.....	60
APPENDIX B: THE LCO’S FRAMEWORK PRINCIPLES.....	64
APPENDIX C: LEGISLATIVE PROVISIONS REFERRED TO IN THE REPORT.....	66
ENDNOTES.....	70

LIST OF ACRONYMS

CPP	Canada Pension Plan
CRA	Canada Revenue Agency
CRPD	<i>Convention on the Rights of Persons with Disabilities</i>
ESDC	Employment and Social Development Canada (formerly Human Resources and Skills Development Canada)
HRTO	Human Rights Tribunal of Ontario
ITA	<i>Income Tax Act</i> , R.S.C. 1985, c.1
LCO	Law Commission of Ontario
MCSS	Ministry of Community and Social Services
OAS	Old Age Security
ODSP	Ontario Disability Support Program
OPGT	Office of the Public Guardian and Trustee for Ontario
POA	Power of Attorney
RA	Representation Agreement
RDSP	Registered Disability Savings Plan
RESP	Registered Education Savings Plan
RRSP	Registered Retirement Savings Plan
SDA	<i>Substitute Decisions Act</i> , 1992, S.O. 1992, c.30

GLOSSARY

Attorney: Adults can authorize any person, called an “attorney”, to manage property on their behalf under a power of attorney.

Beneficiary or RDSP Beneficiary: Beneficiaries are the persons who benefit from payments made out of an RDSP. Under the *Income Tax Act*, adults are eligible to be RDSP beneficiaries if they qualify for the Disability Tax Credit, are age 59 or under, and are resident in Canada when the RDSP is opened. In this report, we use these terms to denote actual and potential beneficiaries, unless otherwise indicated. The legislative provisions that set out who qualifies for the Disability Tax Credit are found in Appendix C to this report.

Capacity: Capacity is a socio-legal concept that determines whether a person is entitled to make decisions for themselves and be held responsible for the consequences. In most jurisdictions, when a person is found to lack capacity to make a decision, a substitute decision-maker must do so in his or her place. Definitions of capacity vary across jurisdictions and issue areas (e.g., property management, personal care or healthcare treatment). A person’s capacity may fluctuate over time with respect to specific decisions and it may be strengthened through the provision of services and accommodations. In this report, we also use the term “legal capacity” to emphasize the socio-legal aspect of the concept.

Co-Decision Making: In certain jurisdictions, a court can name a co-decision maker for adults who need support making decisions but who do not need a guardian to make decisions on their behalf. Adults and co-decision makers have joint authority to make decisions. They must make decisions together and decisions made by either person alone might not be valid.

Common Law: The common law originates in judgments of the courts as opposed to the legislative and executive branches of government.

Financial Institution: Financial institutions issue RDSPs to eligible members of the public. A financial institution may be a bank, credit union, trust company or other business that offers financial services. Only participating financial institutions issue RDSPs.

Guardian: Guardians are authorized to make decisions on behalf of adults who have been found to be legally incapable of doing so themselves pursuant to a public appointment (e.g., a court order or statutory process).

RDSP Legal Representative: The term “RDSP legal representative” is used in this report to identify a person who is legally authorized to make decisions for a beneficiary about his or her RDSP.

Plan Holder: Plan holders are the persons who open an RDSP at a financial institution. After opening an RDSP, they make important decisions about managing funds in an RDSP, such as deciding who can make payments into the RDSP and making investment choices.

Power of Attorney: Adults can authorize an attorney to manage property on their behalf under a legal document, called a “power of attorney”. If a power of attorney is “continuing” or “enduring”, it will remain effective if the grantor is found to be incapable of property management.

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 legally incapable. One of the Public Guardian and Trustee’s roles is to act as a guardian for adults who have been found to be legally incapable of property management and for whom it has been appointed.

Substitute Decision-Maker: Substitute decision-makers are authorized to make decisions on an adult’s behalf pursuant to a legal appointment. In Ontario, substitute decision-makers can be attorneys or guardians. They must fulfill specified duties under the *Substitute Decisions Act, 1992*, which include encouraging the adult to participate in making decisions, to the best of his or her abilities.

Supported Decision-Making Authorization: Some adults need support making decisions but do not need a guardian or attorney to make decisions on their behalf. In certain jurisdictions, adults can authorize another person to help them make their own decisions under a supported decision-making authorization. Supporters can participate in activities such as receiving confidential information, giving advice and communicating decisions. However, supporters are prohibited from making decisions for an adult and a decision made or communicated with assistance is considered to be that of the adult.

EXECUTIVE SUMMARY

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

The purpose of the LCO's project is to recommend the creation of a streamlined process to appoint a legal representative for adults who are eligible for an RDSP but who are unable to establish a plan due to concerns about their legal capacity. The LCO is currently engaged in a large, multi-year project that comprehensively reviews Ontario's laws regarding legal capacity, decision-making and guardianship. It was in the context of that larger project that the Government of Ontario asked that we undertake this project on the RDSP as a separate review to be delivered on a priority timeline.

The introductory chapter to the report discusses the relationship between these two projects. It explains how we have tailored our research, analysis and recommendations where there are major areas of overlap in order to respect ongoing developments in the larger project and to achieve the most appropriate outcome for RDSP beneficiaries.

The introductory chapter also presents how our project on the RDSP came to be. The RDSP is a long-term savings vehicle created by the federal government to assist persons with disability with financial security. In 2011, the federal government undertook a review of the RDSP program. Over the course of that review, adults and their families identified issues of legal capacity and representation as a barrier to accessing the RDSP.

Under the *Income Tax Act* (ITA), adults can open an RDSP for themselves and decide the plan terms as the "plan holder". However, the ITA provides that where an adult is not "contractually competent to enter into a disability savings plan" with a financial institution, another "legally authorized" person must act as the plan holder. Therefore, a financial institution may decline to enter into an RDSP arrangement with a beneficiary who does not meet the common law test of capacity to enter into a contract. An adult or another interested person, such as a family member, may also believe that an adult lacks capacity to establish an RDSP and wish to appoint a plan holder before approaching a financial institution.

The RDSP program does not provide a means to name a plan holder. Instead, a plan holder must be appointed under separate provincial laws. The existing provincial laws that apply in these circumstances, however, tend to address areas of property management that are broader than the RDSP, such as paying bills, buying and selling real estate, and covering daily expenses. With few exceptions, they are also very much focused on protecting adults from the serious harm that can occur when they are unable to make decisions for themselves; rather than on facilitating access to a benefit program, such as the RDSP. The federal government has reported that in some provinces, opening an RDSP can involve a considerable amount of time and expense and may have a significant impact on the beneficiary.

Following our presentation of essential background to the RDSP in Chapter II, the third chapter of the report explains the rationale for a streamlined process to appoint a plan holder specifically in the province of Ontario. The LCO undertook extensive research and consultations to understand the interests of affected individuals and organizations in the Ontario context. During our consultations, we heard personal accounts that confirmed concerns regarding the necessity that a plan holder in Ontario be an attorney or guardian appointed under the *Substitute Decisions Act, 1992* (SDA) – a law that was intended for broader application to property management.

The LCO heard that adults have been unable to appoint a plan holder through a power of attorney (POA) because the threshold for capacity under the SDA that would entitle them to do so may be out of reach. Furthermore, the exigencies of applying for guardianship have been perceived as disproportionate to appointing a plan holder due to associated costs, time and possible repercussions on an adult's well-being.

The LCO's recommendations are intended to respond to stakeholders' aspirations for a streamlined process that is inexpensive, user-friendly and narrowly focused on the RDSP. Chapter IV is dedicated to our recommendations. In addition to recommending a streamlined process, we address questions about how it could be implemented. We consider measures to safeguard beneficiaries against financial abuse; whether community organizations should be

eligible to act as RDSP legal representatives; the role of RDSP legal representatives; and the provision of accessible information to members of the public, among other issues.

The Law Commission of Ontario recommends that the Government of Ontario implement a process that would enable adults to personally appoint an “RDSP legal representative” to open and manage funds in an RDSP, where there are concerns about their capacity to enter into an RDSP arrangement with a financial institution. The process would be available to adults who do not have an attorney or guardian for property who could act as their plan holder. It would enable adults to choose who they would like to assist them in gaining access to an important social benefit.

With respect to the criteria to grant the personal appointment, the LCO recommends they be based on the definition of legal capacity to grant a POA at common law. However, if the Government of Ontario believes that these criteria are not sufficiently flexible to improve access to the RDSP, we recommend that they be based on section 8(2) of the British Columbia *Representation Agreement Act*. These two thresholds for legal capacity are less stringent than the requirements to grant a POA for property under the SDA. Recognizing that Ontario’s existing threshold is unattainable for some adults with disability, we propose that this measure could improve access for adults wishing to appoint a plan holder.

As a safeguard against financial abuse, we believe that the ease with which adults would be able to personally appoint an RDSP legal representative should be offset by robust protections. Therefore, we recommend that adults be entitled to benefit from provisions under the SDA that include requiring attorneys for property to keep accounts of financial transactions and permitting members of the public to file an allegation of suspected abuse with the Office of the Public Guardian and Trustee.

In addition, we recommend that an RDSP legal representative have authority to open a plan and decide the plan terms but not to manage funds paid out of the RDSP. The ITA has embedded several protective measures for the management of funds while they are held inside the RDSP. Restricting the scope of an RDSP legal representative’s authority from extending beyond that of a plan holder would reduce the opportunities for self-dealing and mismanagement after funds have left the plan. It would also resolve unique issues that arise because of the nature of RDSP funds, which we discuss in the report.

When the time comes for beneficiaries to receive payments out of the RDSP, they would be required to manage their own funds or apply for guardianship, if they do not have legal capacity to do so themselves. In Ontario, guardians are a source of comprehensive decision-making for general property management that adults and their supporters can turn to when in need. In addition, the LCO’s larger project on *Legal Capacity, Decision-Making and Guardianship* considers less restrictive alternatives to guardianship that could, possibly, address challenges that RDSP beneficiaries may face in this respect.

Adults who appoint an RDSP legal representative using our suggested streamlined process could choose a relative, including a parent, spouse, common law partner or sibling; a close friend; or a community organization that is approved by a designated government agency.

Once an RDSP legal representative has been appointed, we recommend that he or she have the same duties of an attorney for property for an adult who has been found to be legally incapable under the SDA, as applicable, and be held to the same standard of care. This would require RDSP legal representatives to encourage an adult’s participation in decision-making, to the best of his or her abilities, and to consult with supportive family members and friends. They would also be fiduciaries under the law, whose responsibilities must be performed diligently, with honesty and integrity and in good faith, for the adult’s benefit.

Finally, the LCO recommends that measures be adopted to provide third parties with certainty and finality in transacting with an RDSP legal representative, including exemptions from liability where they reasonably rely on the RDSP legal representative’s instructions.

These and other specific recommendations from the Law Commission of Ontario are set out in Chapter V in one summary list. The list identifies the sections in the report where the recommendations are discussed in-depth, so that readers can easily locate further information.

The LCO Board of Governors approved this report in June 2014.

I. INTRODUCTION

A. What is the LCO's Project about?

Each of us receives support with decision-making as a natural part of daily life. Family members and friends often ask for advice when they are faced with a choice and come to a decision together. Service providers, such as financial advisors, also present clients with information and counsel them in their areas of expertise. In this sense, the activity that underlies every individual's decisions is inevitably dynamic, depending on his or her own choice. Nevertheless, there are circumstances where adults will be required by law to have another person make decisions on their behalf. The Law Commission of Ontario's (LCO) project on the RDSP concerns one such circumstance.

The RDSP is a long-term savings vehicle created by the federal government for persons with disability. Under the *Income Tax Act* (ITA), adults can open an RDSP for themselves and decide the plan terms as the "plan holder". However, the ITA provides that where an adult is not "contractually competent to enter into a disability savings plan" with a financial institution that issues the RDSP, another legally authorized person must act as the plan holder.¹ Therefore, a financial institution may decline to enter into an RDSP arrangement with a beneficiary who does not meet the common law test of capacity to enter into a contract. An adult or another interested person, such as a family member, may also believe that an adult lacks legal capacity to establish an RDSP and wish to appoint a plan holder before approaching a financial institution.

The RDSP is a long-term savings vehicle created by the federal government for persons with disability.

The ITA does not contain a process to appoint a plan holder for adult beneficiaries. Instead, it requires that a guardian, attorney or other legally authorized person be appointed under provincial laws. In Ontario, the *Substitute Decisions Act, 1992* (SDA) governs the appointment of guardians and attorneys for property management.² However, this framework has been a source of concern for adults and their family and friends, who have faced challenges establishing an RDSP as a result of the SDA requirements. For instance, adults have been unable to appoint a plan holder through a power of attorney (POA) because the threshold for capacity under the SDA that would entitle them to do so may be out of reach. Furthermore, the exigencies of applying for guardianship have been perceived as disproportionate to appointing a plan holder due to associated costs, time and possible repercussions on an adult's well-being.

In the course of the LCO's project, we heard from a range of individuals and organizations that an alternative process that is inexpensive, user-friendly and narrowly focused on the RDSP could alleviate the above concerns and improve participation in the program. This report responds to these aspirations in recommending the creation of a streamlined process to appoint an RDSP legal representative who can act as the plan holder for beneficiaries in Ontario.

The report was approved by the LCO Board of Governors in June 2014.

B. Recommendations

Our recommendations are intended to be pragmatic and strike an appropriate balance between the rights of adults with disabilities, the risks of financial abuse and the interests of other important actors who could be affected.

The Law Commission of Ontario recommends that the Government of Ontario implement a process that would enable adults to personally appoint an RDSP legal representative to open and manage funds in an RDSP.³ The process would be available to adults where there are concerns about their capacity to enter into an RDSP contract with a financial institution and they do not have an attorney or guardian for property.

We recommend that the criteria to grant such a personal appointment be based on the definition of legal capacity to grant a power of attorney at common law. However, if the Government of Ontario believes these criteria are not flexible enough to improve access to the RDSP, we recommend that they be based on section 8(2) of the *British Columbia Representation Agreement Act*.⁴ Once appointed, the RDSP legal representative would have the duties of an attorney for property under the *Substitute Decisions Act, 1992*, as applicable, and be held to the same standard of care.

We also make recommendations with respect to questions that flow from the process described above, such as who could be eligible to be an RDSP legal representative, how third parties can be provided with certainty and finality, and what measures could be put in place to effectively safeguard adults against the risks of financial abuse.

A full list of our recommendations is found in Chapter V at page 57.

C. How Our Project Came to Be

1. Request from the Government of Ontario

This project came to the LCO as a request from the Government of Ontario. The LCO is currently engaged in a large, multi-year project that comprehensively reviews Ontario’s laws regarding legal capacity, decision-making and guardianship. Acknowledging our work in that area, the Ontario government asked the Law Commission of Ontario

to undertake an additional review that would focus on how adults with developmental or mental disabilities might be better enabled to participate in [the RDSP].⁵

The LCO Board of Governors approved this project in April 2013. The Ontario government announced its request and the LCO’s agreement in the Ontario Budget, *A Prosperous and Fair Ontario*, in May 2013.

The genesis of this project does, however, extend further back than the LCO’s involvement and it merits the brief explanation provided below.

2. The Federal Government’s 2011 Review of the RDSP and Subsequent Activities

The RDSP is a federal benefit that has been available since December 2008. Similar to other registered savings plans, it is regulated under the ITA and offered through participating financial institutions – such as banks and credit unions – alongside mainstream investment products.

Opening an RDSP requires a plan holder to enter into a contract with a financial institution. Beneficiaries who have reached the age of majority can be the plan holder of their own RDSP. However, the ITA provides that where an adult is not “contractually competent” to open an RDSP, a guardian or another “legally authorized” person must be the plan holder.⁶ The ITA itself does not provide for a process to appoint such persons to act as a plan holder. Instead, as mentioned above, they must be appointed under separate provincial laws.

In 2011, the federal government undertook a review of the RDSP program. During that review, adults and their families voiced concerns with respect to existing processes within provincial jurisdictions to designate an RDSP plan holder. In response to those concerns, the federal government put in place a provisional remedy to permit a parent, spouse or common-law partner to become a plan holder where, in a financial institution’s opinion, the beneficiary’s capacity to open an RDSP “is in doubt”.⁷ However, the federal government’s measures will expire at the end of 2016.

In 2011, the federal government undertook a review of the RDSP program. During that review, adults and their families voiced concerns with respect to existing processes within provincial jurisdictions to designate an RDSP plan holder.

Some stakeholders have asked the federal government to amend the ITA permanently to address the subject matter of this project out of concern that, as a federal benefit, the RDSP should be treated uniformly across the country. They claim that the federal government has constitutional jurisdiction to regulate the issue of legal representation for the RDSP because it is essential to an effective, national legislative scheme. They point to examples under the Canada Pension Plan (CPP) and Old Age Security (OAS), where the federal government administers the appointment of representatives for persons who have been found to be incapable of managing their payments.⁸

During the 2011 RDSP review, the federal government held extensive consultations to consider this proposal. However, it has stated that it considers the issue to fall within provincial responsibility. In the *Economic Action Plan 2012*, the federal government suggested that the provinces and territories develop “more appropriate, long-term solutions to address RDSP legal representation issues”.⁹ It also encouraged certain provinces and territories, including Ontario, to “examine whether streamlined processes would be suitable for their jurisdiction”.¹⁰

The following year, in April 2013, the Minister of Finance asked the Standing Senate Committee on Banking, Trade and Commerce (the Senate Committee) to study the ability of individuals to establish an RDSP, with particular emphasis on legal representation and the ability of individuals to enter into a contract.¹¹ The Senate Committee heard testimony on the respective jurisdictions of the federal and provincial governments to deal with the subject matter of this project, and on other impediments to accessing to the RDSP.

...[T]he Ontario government asked the LCO to undertake this project with a view to making recommendations for reform in this province.

In its report, *The Registered Disability Savings Plan Program: Why Isn't it Helping More People?*, the Senate Committee found that it was “unable to examine fully the effectiveness of the provincial and territorial procedures...that are currently in place” based on the testimony it heard.¹² Moreover, it stated that “the Committee is not certain that a federal form of the type described by some of the witnesses would resolve the problem with legal capacity and representation in relation to the RDSP”.¹³

The Senate Committee urged provinces that have not yet examined their legislation to do so and recommended that the “federal government continue to work with the provinces to improve access to the program”.¹⁴ The Senate Committee also recommended that if the federal measures expire before the provinces have implemented changes to their frameworks, “the federal government should study two options: the feasibility of other proposals to ensure access to the RDSP program, and the possibility of extending the existing temporary measures”.¹⁵ In March 2013, the federal Minister of Finance wrote the Premier of Ontario requesting that Ontario, along with other provinces and territories, address this issue in light of their existing processes.

As indicated previously, the Ontario government asked the LCO to undertake this project with a view to making recommendations for reform in this province. In the *Economic Action Plan 2014*, the federal government noted that some provinces have instituted streamlined processes or have indicated that their system already provides sufficient flexibility to address the concerns of RDSP beneficiaries. It also stated that it appreciates the recent efforts of the Government of Ontario in tasking the LCO with this project.¹⁶

D. The Project Scope

The scope of the LCO’s project has been narrowly defined to address a specific barrier to accessing the RDSP: the appointment of an RDSP legal representative for beneficiaries who require another person to make decisions about their RDSP in Ontario.

1. *Recommending a Streamlined Process for the Jurisdiction of Ontario*

As a provincial reform agency, we consider the LCO's mandate to apply to Ontario laws, policies and practices and we do not make recommendations to the federal government or other jurisdictions in this report. The preceding section, "How this Project Came to Be", summarizes proposals as to whether the federal or provincial governments should implement a solution to address the concerns of RDSP beneficiaries. Although the LCO acknowledges stakeholders' proposals with respect to a federal solution, we consider our mandate to apply to Ontario only.

As will become clear in the remainder of this report, however, we have taken the approaches of other provinces and territories into account in coming to our recommendations. We have also suggested that Ontario enact provisions to enable adults travelling from elsewhere in the country to continue to have a plan holder who was previously appointed through a valid arrangement make decisions about their RDSP. The SDA contains a conflict of laws provision that could be used as a model.

2. *Impediments to Accessing the RDSP Other than Legal Representation*

The scope of this project is also restricted in terms of its review of the RDSP. The RDSP is a recent program, which the federal government formally reviewed shortly before the commencement of the LCO's project. Consultations and submissions to the federal government identified a number of areas for reform to increase uptake. Changes that the federal government has made since – and others that may not have been made – are still fresh in the minds of stakeholders. Furthermore, the Standing Senate Committee on Banking, Trade and Commerce recently released its report on impediments to accessing the RDSP. However, the LCO's project cannot address all barriers to accessing the RDSP that have been identified over the years, and is limited to recommending a streamlined process to appoint an RDSP legal representative for beneficiaries.

To the extent possible, we have tailored our research and analysis in this project to respond to stakeholders' aspirations for a streamlined process that is narrowly focused on the RDSP.

3. *Respecting the LCO's Larger Project on Legal Capacity, Decision-Making and Guardianship*

Another significant aspect of the project scope is how it interacts with the LCO's ongoing project on *Legal Capacity, Decision-Making and Guardianship*. It was in the context of our work on that project that we were asked to undertake this review. The former will evaluate Ontario's framework for substitute decision-making, including powers of attorney and guardianship under the SDA and other relevant legislation.¹⁷

There are many issues that overlap between the two projects and this report has certainly benefitted from insights gained in the larger project to date. For instance, we used research papers that were commissioned for that project as an important source of information in this project. While we have maintained a high level of coordination, however, our work is being conducted separately so that we can provide the Ontario government with recommendations in the RDSP project well before the federal government's measures expire in 2016.

The two-track delivery of the LCO's projects has had necessary implications. To the extent possible, we have tailored our research and analysis in this project to respond to stakeholders' aspirations for a streamlined process that is narrowly focused on the RDSP. Furthermore, we have sought to limit our recommendations in major areas of overlap in order to avoid precluding options in the larger project.

Limiting our recommendations has been particularly important for contentious questions that we have been unable to answer in the short timeline for the RDSP project but that we know could greatly impact the broader system of asset management for Ontarians under the

SDA. Throughout the report, we have noted the areas where our research is ongoing on these questions in the *Legal Capacity, Decision-Making and Guardianship* project, so that readers can follow our progress into the future. For more information, you are also invited to visit the LCO's website at <http://www.lco-cdo.org>.

E. The LCO's Methodology

1. Research and Consultations

This report is the culmination of extensive research and consultations that the LCO completed in the phases described below.

Additional information, including a list of individuals and organizations consulted, Advisory Group members, and the LCO's commissioned research for the larger capacity project and the earlier Framework projects can be found at Appendix A. If you would like a copy of our publicly released documents, please visit our website at <http://www.lco-cdo.org/en/rdsp>.

Shaping the Project and Formation of the Advisory Group

We initiated our study in May 2013 through internal background research and a series of in-person and telephone interviews with individuals and organizations representing a wide range of perspectives. In June 2013, we formed an *ad hoc* project Advisory Group from among those whom we interviewed. The Advisory Group members include representatives of government from Ontario and British Columbia, the federal government, financial institutions, the private bar, legal clinics, community and advocacy organizations, and a research institute.

The purpose of the Advisory Group has been to provide the LCO with advice on public consultations and the substance of the project. The Advisory Group members gave the LCO essential input into the structure and content of our documents, beginning with the project scope released in September 2013. We are very grateful for the Advisory Group members' invaluable observations and commitment.

Release of the Discussion Paper

In December 2013, we publicly disseminated a discussion paper. Shortly after, we summarized the discussion paper in accessible language for adults with disabilities and others who might not be familiar with matters in the LCO's project.

The release of the discussion paper marked a significant step. In the discussion paper, we reviewed Ontario's existing framework under the SDA, which could be used to appoint an attorney or guardian for RDSP beneficiaries. In addition, we analyzed a range of alternative laws, policies and programs that are available in Ontario and other jurisdictions in order to develop several options for reform. The options for reform presented in the discussion paper created the foundation for the LCO's dedicated phase for public consultations.

Dedicated Phase for Public Consultations

Public input is an essential part of the LCO's methodology. With the release of the discussion paper, the LCO also launched a phase for broad-based public consultations ending in February 2014. We invited members of the public to provide written submissions, and we solicited feedback from key communities through in-person focus groups and individual interviews.

This project potentially touches the lives of a broad range of individuals and organizations. The persons most affected by the project are RDSP beneficiaries, and their family and friends, as they may be the users of a future process. Given the LCO's limited resources and timeline for the project, it was not possible for our consultations to be fully representative of their diversity of experience. Nevertheless, we heard from adults and their family and friends who have various experiences with disability, including developmental and psychosocial disabilities;

This project touches the lives of a broad range of individuals and organizations. The persons most affected by the project are RDSP beneficiaries, and their family and friends, as they may be users of a future process.

persons living in low-income households; an aboriginal self-advocate; and francophone parents and siblings of adults with developmental disabilities. Aside from self-advocates and their supporters, we also carefully selected representatives of advocacy organizations to assist us in understanding the spectrum of perspectives among their clientele.

Other parties with an interest in the outcome of this project whom we consulted in our focus groups included trusts and estates lawyers, legal clinics and financial institution employees at all levels, including legal counsel, managers and front-line staff.

In total, the LCO held eight focus groups with participants from across Ontario, including the Greater Toronto Area, London, Smith Falls, Windsor, Peterborough and Ottawa. Five of these focus groups were held uniquely for self-advocates and their supporting family and friends, who have a wealth of perspectives on the opportunities for change.

In addition to our focus groups, we conducted individual interviews with representatives from provincial governments across Canada and the federal government; group home service providers; and academics with expertise in issues of capacity, decision-making and access to social benefits from Canada and abroad. Over the course of the project, we held interviews with approximately 50 individuals and organizations.

Detailed and considered written submissions were also provided to the LCO from the Advocacy Centre for the Elderly (ACE); ARCH Disability Law Centre; Canadian Bankers Association; and the Canadian Association of Community Living (CACL), Community Living Ontario (CLO) and PooranLaw.

The LCO is very appreciative of everyone who shared their experiences with us. We would also like to express our sincere gratitude to the community partners who assisted us in organizing the focus groups, identifying participants and facilitating the discussions.

Other parties with an interest in the outcome of this project whom we consulted in our focus groups included trusts and estates lawyers, legal clinics and financial institution employees at all levels, including legal counsel, managers and front-line staff.

Research Commissioned for the LCO's Other Projects

In major projects, the LCO issues a call for the preparation of research papers on relevant subjects. We rely on these papers as another source of topical literature to inform our analysis, and make them available to the public. The papers do not necessarily reflect the LCO's views.

For this current project, we benefited from research papers that had been prepared for our past projects on *A Framework for the Law as It Affects Older Adults* and *A Framework for the Law as It Affects Persons with Disabilities*.¹⁸ After the discussion paper was released, the LCO also received commissioned research papers for our ongoing project on *Legal Capacity, Decision-Making and Guardianship*. As noted above, a list of commissioned research used in this project can be found at Appendix A.

2. Benchmarks for Reform

For the discussion paper, the LCO had formulated benchmarks or evaluative criteria that we believed our recommendations must meet to be effective. During our public consultations, we heard from many stakeholders that these benchmarks accurately capture their own goals for change.

The recommendations that the LCO has made in this report reflect what we consider to be a balanced application of the benchmarks to the subject matter of this project, also taking into account our ongoing work in the *Legal Capacity, Decision-Making and Guardianship* project. We have applied them flexibly to the many proposals for reform that we have received, recognizing that no one solution can perfectly achieve them all.

The benchmarks were originally derived from our preliminary consultations as well as various sources of law and policy that are relevant to issues of legal capacity, representation and the RDSP.

These sources include the policy objectives underlying the RDSP, Ontario's commitments to provide services and supports to persons with disabilities, the *Canadian Charter of Rights and Freedoms* and the *Convention on the Rights of Persons with Disabilities*.¹⁹

The LCO also drew on work in two prior projects in which we had released final reports, our *A Framework for the Law as It Affects Older Adults* and *A Framework for the Law as It Affects Persons with Disabilities*. Those projects define a set of principles to guide the development and evaluation of laws, policies and practices to take into account the realities and experiences of older adults and persons with disabilities, and promote positive outcomes for these members of society.²⁰ A full list of the Framework Principles is provided at Appendix B.

The benchmarks for reform propose that an effective process to establish an RDSP legal representative for beneficiaries do the following:

1. **Respond to Individual Needs for RDSP Decision-Making:** The process must be specific to the RDSP and should limit the extent to which it spills over into other areas of decision-making. The scope of an RDSP legal representative's authority should be tailored to meet a beneficiary's needs. The presumption of capacity should be retained as much as possible. Strong values of human dignity, autonomy and independence should be protected with the understanding that services and supports can improve decision-making capacity because it is social and dynamic.
2. **Promote Meaningful Inclusion in the Decision-Making Process:** Adults must be able to make choices that affect their lives and do as much for themselves as possible with appropriate supports. All people exist along a continuum of abilities. The process should encourage each adult's unique contributions and take into account how fluctuating and issue-specific capacity can be accommodated. An adult's wishes about a suitable RDSP legal representative should be respected to the greatest extent possible.
3. **Ensure that Necessary Protections for RDSP Beneficiaries Are in Place:** Legal representation in financial matters is a powerful tool that can be brandished for improper purposes. However, the absence of legal representation can also increase an adult's vulnerability, where he or she needs someone else to make financial decisions. Every person has the right to live without fear of abuse and to receive support to protect that right. The process should include measures for sustained protection from preventative "checks and balances" to intervention, where appropriate.
4. **Achieve Administrative Feasibility, Cost-Effectiveness and Ease of Use:** The process must be practical. It must be implementable on the ground in transactions between adults with disabilities and their families and friends, financial institutions, the government and community organizations. It must be easy for consumers to understand and use, cost-effective for all stakeholders, including the Government of Ontario, and take into account existing operational constraints.
5. **Provide Certainty to RDSP Legal Representatives and Third Parties:** Third parties involved in delivering the RDSP to the public should have certainty, finality and protection from liability in an arrangement for an RDSP legal representative. RDSP legal representatives should also be secured against the risk of liability when complying with an expected standard of care. Securing these parties against risks could encourage their participation.

...[Sources [for the benchmarks for reform] include the policy objectives underlying the RDSP, Ontario's commitments to provide services and supports to persons with disabilities, the Canadian Charter of Rights and Freedoms and the Convention on the Rights of Persons with Disabilities

F. Structure of the Report

The purpose of this report is to present and explain the LCO's final recommendations. The LCO has released a number of documents in this project that thoroughly review the key issues we have considered, approaches in other jurisdictions and several options for reform. This report is comparatively concise. If you would like to consult our full analysis, we encourage you to read our other documents, in particular the discussion paper.

Following this introduction, Chapter II provides essential background on the history of the RDSP, and its content and administration. It also clarifies when a beneficiary might need an RDSP legal representative to open and manage a plan on his or her behalf.

Chapter III discusses the rationale for a streamlined process in Ontario. It reviews the interests of affected individuals and organizations, including adults with disability and their family and friends, advocacy organizations, financial institutions and the Ontario government.

Chapter IV is dedicated to the LCO's recommendations. In addition to recommending a streamlined process, we address specific questions about how it could be implemented. We consider measures to safeguard beneficiaries against financial abuse; whether community organizations should be eligible to act as RDSP legal representatives; the role of RDSP legal representatives; and the provision of accessible information to members of the public; among other issues.

Finally, Chapter V sets out our recommendations in one summary list.

II. UNDERSTANDING THE FEDERAL RDSP

A. A Long-Term Savings Vehicle for Persons with Disabilities

The RDSP became available in December 2008 after several years of advocacy activities led by families of persons with disabilities and affiliated organizations.²¹ The Planned Lifetime Advocacy Network (PLAN), an organization founded by parents of children with disabilities, was instrumental in mobilizing broad-based discussions on how to secure the future well-being of children with severe disabilities, who would require funds as adults when their families would no longer be able to support them. With funding from the Law Foundation of British Columbia, PLAN commissioned two research studies to examine the viability of a savings plan for that purpose.²² Following the submission of those studies to the federal government, the Minister of Finance appointed an Expert Panel that reviewed them and made further recommendations in its report, *A New Beginning*.²³ These recommendations were largely adopted in the design of the RDSP, including that all persons entitled to the Disability Tax Credit (DTC) would be eligible to become an RDSP beneficiary, both children and adults, age 59 and under.²⁴

Figure 1: RDSP Quick Facts

- To become a beneficiary, a person must be eligible for the Disability Tax Credit, be a resident of Canada and be age 59 or under.
- The Canada Disability Savings Grant matches private contributions at rates of up to 300 per cent, depending on the amount of the contribution and family income (up to \$3,500 annually and \$70,000 over the beneficiary's lifetime).
- The Canada Disability Savings Bond provides government support to those with a low income, depending on family income, even if they make no private contributions to the plan (up to \$1,000 annually and \$20,000 over the beneficiary's lifetime).
- Funds in or withdrawn from an RDSP do not make beneficiaries ineligible for most provincial disability and income support programs, such as the ODSP, and they benefit from special treatment for tax purposes.
- When a beneficiary turns 60, mandatory periodic payments from the RDSP begin (called Lifetime Disability Assistance Payments or LDAPs).
- Beneficiaries can make one-time withdrawals, depending on rules set by the federal government (called Disability Assistance Payments or DAPs). However, withdrawals made within 10 years of receiving government contributions will reduce grants and bonds at a rate of three times (3x) the withdrawal amount.

We describe basic terms of the RDSP in the following sections. However, for more detailed information, please see the Employment and Social Development Canada (ESDC) website here: <http://www.esdc.gc.ca/eng/disability/savings/index.shtml>.

B. RDSP Policy Objectives: Poverty Alleviation, Contribution and Autonomy

The RDSP has distinctive policy objectives that are material to understanding its design and administration as well as adults' expectations when they seek to access it. Although the LCO will not evaluate the RDSP policy objectives, or their implementation, we took them into account in defining the benchmarks for reform.

The RDSP is unique to Canada. The Minister of Finance's Expert Panel surveyed a number of jurisdictions but "failed to turn up a form of tax assisted Disability Savings Plan that was in use

in other countries”.²⁵ Without the benefit of an analogous example, the RDSP was modelled on other registered savings plans offered in Canada, such as the Registered Retirement Savings Plan (RRSP) and Registered Education Savings Plan (RESP).²⁶ This approach was consistent with PLAN’s earlier proposals, which had concluded that a tax-assisted savings plan would be the appropriate mechanism to achieve several policy objectives for the RDSP.²⁷ Long-term financial security for those who bear the high costs of disability was one such policy objective.²⁸ Other policy objectives included encouraging self-sufficiency through a contributory benefit structure,²⁹ promoting active citizenship as consumers of mainstream financial services, and developing a partnership among families, the government and the private sector “to share the responsibility for securing a good life for people with disabilities”.³⁰ These are discussed briefly below.

Families and governments often share responsibility to provide assistance to persons with disabilities. Family contributions may include caregiving in the tasks of daily living as well as financial assistance. These exist as informal supports within the naturally dynamic relationships that characterize family units and they complement government benefits.³¹ Governments administer special programming for persons with disabilities, which is typically comprised of income supports and social services.³² Social services include care and other assistance delivered by government and by voluntary and professional providers in areas such as homecare, equipment, therapy and employment training.³³

The RDSP was conceived as a way to bridge the gap between the income support ceiling and the financial security required for an adult’s well-being, and it is exempted from means-testing under most provincial income support regulations, including in Ontario.

In Canada, as elsewhere, income supports and social services have changed significantly over the last fifty years alongside a shift in the way that “disability” is conceptualized.³⁴ Services provided under earlier, wholly medical models of disability frequently entailed placing persons with disabilities in institutions that were removed from society in order to treat perceived impairments or for protection.³⁵ Beginning in the 1960s, social movements to deinstitutionalize persons with disabilities have emphasized participation and inclusion in community life. “Rather than seeing disability as inherent in an individual, these new approaches see disability resulting from attitudes and conditions within society”.³⁶ Public funds have been progressively reallocated away from institutions to income supports and community-based services.³⁷

Many Canadians with disabilities now rely on income supports as their primary, if not only, source of income.³⁸ However, income support is intended only to cover the basic costs of living and supplemental benefits for disability-related services are often pre-determined.³⁹ Moreover, income supports in Canada have been found to hinder the contributions that adults can make to achieve varying levels of self-sufficiency.⁴⁰ The income support that Canada’s provinces administer to persons with disabilities is generally allocated as a monthly flat-rate and is “means-tested”: eligibility for income support requires that an adult has little independent income and, for each payment, there is a ceiling beyond which income that an adult generates, or the value of gifts, may be deducted.⁴¹ In 2012, the Commission for the Review of Social Assistance in Ontario found that persons with disabilities, especially, “get trapped in the system and face diminishing opportunities....They are not receiving the support they need to stabilize their lives and move toward greater independence and resiliency”.⁴²

The RDSP was conceived as a way to bridge the gap between the income support ceiling and the financial security required for an adult’s well-being, and it is exempted from means-testing under most provincial income support regulations, including in Ontario. An RDSP beneficiary can receive federal grants and bonds up to a maximum of \$90,000 and accumulate additional savings of up to \$200,000, before investments, without being subject to income support deductions.⁴³ As Andrew Power, Janet Lord and Allison DeFranco explain, “This is especially important because people with disabilities can now accumulate savings without jeopardising disability benefits”.⁴⁴

The RDSP was also intended to enhance adults’ autonomy and equal citizenship as consumers of private sector products.⁴⁵ Recent reforms of government supports for persons with disabilities have increasingly tended toward establishing delivery mechanisms that empower adults to

choose the assistance that they need for themselves.⁴⁶ This “personalisation of support”⁴⁷ has taken different forms across jurisdictions and may include “individual budgets, direct payments, consumer directed care, flexible funding and self-managed supports”.⁴⁸ The RDSP policy objectives are consistent with these recent reforms: “there are no restrictions on when [RDSP] funds can be used or for what purpose”.⁴⁹ RDSP funds are not limited to fulfilling basic needs, or to covering pre-determined services, which can “often take [on a] life of their own”.⁵⁰ Moreover, RDSP beneficiaries and their families are encouraged to make active contributions through the Canada Disability Savings Grant, which matches private deposits at rates of up to 300 per cent, depending on the amount of the deposit and the beneficiary’s family income (up to \$3,500 annually). For those with low incomes, the Canada Disability Savings Bond provides government supports of up to \$1,000 annually, even if no contributions are made to the plan. As with all contributions, these government supports can grow if the RDSP investments are fruitful.

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

The RDSP signals an important shift away from a welfare-based approach to helping people with disabilities and moves towards an investment-based approach. Rather than increasing the amount of short-term disability benefits, the RDSP has the overarching purpose to provide a long-term sheltered savings vehicle. People with disabilities take an active role in their own income generation and future financial stability.... Rather than imposing a limit or ceiling on what people with disabilities can own or save, the RDSP establishes a foundation or starting place for people with disabilities to save money.⁵¹

The LCO heard from one RDSP beneficiary who said that not only does the RDSP help him save for when his family is no longer present, but it is also a contingency plan in the event that his abilities, services or support networks change....

C. Who Are RDSP Beneficiaries and How Do They Learn about the RDSP?

There are over 80,000 people in Canada with an RDSP.⁵² RDSP beneficiaries must meet basic eligibility requirements set by the federal government, including that they must be a “DTC-eligible individual”.⁵³ Eligibility for the DTC is determined by the Canada Revenue Agency, based on certification by a “qualified practitioner” (such as a doctor, audiologist or occupational therapist, among others) that the individual applying for the DTC has “one or more severe and prolonged impairments in physical or mental functions” that affect his or her abilities to carry out basic activities of daily living in prescribed ways.⁵⁴ (The ITA provisions that define DTC eligibility are found in Appendix C.)

Within the bounds of these requirements, there is substantial diversity in the persons seeking to participate in the RDSP. Specific and actual beneficiaries identified in the LCO’s consultations and in submissions made to the federal government include persons with developmental, psychosocial and cognitive disabilities.⁵⁵ Some RDSP beneficiaries have lived with disability since birth, such as those persons with fetal alcohol spectrum disorder (FASD), autism or Down syndrome. For others, changes in their abilities may have occurred later in life, such as those persons with schizophrenia, HIV/AIDS, acquired brain injuries (ABI) and Alzheimer’s disease.

The onset of disability may be abrupt or may develop gradually; abilities may be stable or they may fluctuate. The LCO heard from one RDSP beneficiary who said that not only does the RDSP help him save for when his family is no longer present, but it is also a contingency plan in the event that his abilities, services or support networks change: a “safety net” for the uncertainties that could “snowball” from his current situation.⁵⁶ We also heard that beneficiaries with degenerative conditions, such as HIV/AIDS, multiple sclerosis and developmental disabilities, may age at an accelerated rate and experience conditions normally associated with older adults, including dementia.⁵⁷ These accounts point to the need to consider the lived-experience of RDSP beneficiaries, including those who use the RDSP for reasons other than for long-term savings, because they face barriers in very different ways throughout their lives.

The effect of differing abilities on relationships, the nature of stigma associated with them, and the resources that are provided to separate communities all have a profound effect on how each individual accesses the RDSP. Accordingly, this project adopted “life course” and “person-centred” approaches to reviewing options for reform.⁵⁸

In addition to disability, other common experiences and challenges are known. Both younger and older adults currently access the RDSP. RDSP funds are intended to be distributed primarily as mandatory lifetime disability assistance payments (LDAPs) that are released periodically once a beneficiary turns 60. Although there are few older adults receiving LDAPs at present, this will increasingly be the case as beneficiaries age. In Ontario, and the rest of Canada, persons over the age of 50 have withdrawn almost four times the number of payments than all other persons, totaling over \$4 million in the five years since the RDSP was established.⁵⁹ Younger people may also face their own challenges when they transition into adulthood and become entitled to make decisions independent of a parent or guardian. The transition to adulthood may be felt acutely as young people take on new responsibilities. This has raised particular difficulties for children in state care who have had an RDSP opened on their behalf and who may need a legal representative when they transition away from child protection services.⁶⁰

Adults learn about the RDSP at financial institutions and through various intermediaries. These entry points can involve the provision of information as well as advocacy assistance, such as professional financial advice or help with preparing applications for eligibility. Families and friends, including caregivers, are among the foremost entry points to the RDSP. Parents, spouses and common-law partners can temporarily qualify to open an RDSP on their loved one’s behalf through streamlined processes under the ITA, and often engage beneficiaries in informal shared decision-making on the plan terms.⁶¹ Legal clinics habitually advise clients applying for, or receiving, ODSP about the RDSP, both individually and during educational workshops.⁶² ODSP personnel have also directly informed recipients about the RDSP.⁶³ Eligibility criteria for the RDSP are not the same as for ODSP and the application processes are separate.⁶⁴ However, some adults may meet the eligibility criteria for both. Private trusts and estates lawyers also assist their clients in opening RDSPs in order to “shelter” funds, such as personal injury settlements, life insurance and inheritances, from taxation and to maintain ODSP eligibility by taking advantage of income and asset exemptions for the RDSP.⁶⁵ Community and advocacy organizations are active in raising awareness and assisting individuals seeking to access the RDSP.⁶⁶ Finally, adults have been targeted by companies whose core business is to prepare benefit applications for a fee.⁶⁷

These entry points are as spread out as the services that adults use in their daily lives and they are more or less accessible, depending on the context. To the extent that entry points facilitate access to the RDSP, they are crucial to its delivery. The LCO’s recommendations consider how entry points can be leveraged to increase the accessibility of a process to establish an RDSP legal representative. In particular, we recommend that public information on a future process be distributed in accessible languages and formats through the individuals and organizations discussed above.

D. Opening and Managing an RDSP

1. *Determining the Beneficiary’s Capacity to Be the Plan Holder*

Every RDSP needs a plan holder, whether it is the beneficiary or another person. Opening an RDSP requires the plan holder to enter into a contract with a financial institution. If a beneficiary is an adult when the RDSP is being opened for the first time, he or she must be the plan holder. However, under the ITA, where a beneficiary is not “contractually competent to enter into a disability savings plan” with a financial institution, another “qualifying person” must be the plan holder. A qualifying person can be a guardian or other person “who is legally authorized to act on behalf of the beneficiary” under provincial laws.⁶⁸

Entering into an RDSP contract with a beneficiary who is legally incapable of opening and managing a plan poses a risk both to the beneficiary and the financial institution. In Ontario, adults are presumed to be legally capable of entering into a contract and each contracting party is entitled to rely upon that presumption with respect to the other “unless he or she has reasonable grounds to believe that the other person is incapable of entering into a contract...”⁶⁹ An adult must be able to understand the nature and effect of the transaction to enter into a contract and if a party has actual or constructive knowledge that an adult is not able to meet this test, the contract could be voidable under the common law.⁷⁰ In its *Report on Common Law Tests of Capacity*, the British Columbia Law Institute explains that the law of capacity in this area attempts to strike an appropriate balance between protecting the adult’s interest and “the material interests of the other contracting party and the broader social interest in security of contracts”.⁷¹

Financial institution employees have declined to enter into contracts with beneficiaries whom they believe do not have legal capacity to open and manage an RDSP. The LCO has also learned that many beneficiaries and interested persons, such as family members, would themselves like to appoint a plan holder – before or after approaching a financial institution – because they believe that the beneficiary lacks legal capacity to be the plan holder.⁷²

The LCO has consistently heard in our project that the structure of the RDSP program is complex and that decision-making for an RDSP can be demanding.⁷³ The RDSP is a financial vehicle that calls on plan holders to make educated decisions through traditional investment instruments, such as mutual funds. Even for individuals who do not face challenges with decision-making, financial literacy with these investments may require specialized advice from professionals, like investment advisors. In addition, the timing and amount of contributions and withdrawals have repercussions on a beneficiary’s entitlements that can be difficult to understand.

The plan holder is the person who opens an RDSP by entering into a contract with a financial institution. However, the responsibilities of a plan holder do not end once an RDSP is established: a plan holder is responsible for making significant decisions about managing the plan throughout its lifecycle.

There may be individuals who disagree with a financial institution employee’s determination that they do not have legal capacity to be an RDSP plan holder and we address options for those individuals in Chapter IV.C.1, “Determining the Beneficiary’s Capacity to Be the Plan Holder”. However, we expect that the persons who have advocated for a streamlined process include adults with disability who believe they are unable to contract with a financial institution to open and manage an RDSP, and who would like someone else to do so for them.

The determination of legal capacity to be a plan holder, along with the other concerns discussed in this section, is depicted below in **Figure 2: How to Open and Manage an RDSP under the Income Tax Act**.

2. Responsibilities of the Plan Holder

The plan holder is the person who opens an RDSP by entering into a contract with a financial institution. However, the responsibilities of a plan holder do not end once an RDSP is established: a plan holder is responsible for making significant decisions about managing the plan throughout its lifecycle. Depending on the terms set out in the RDSP agreement with the financial institution, plan holders may have authority to do all of the following:

- open the RDSP;
- consent to contributions from private sources;
- decide terms for the investment of savings;
- apply for government grants and bonds; and
- decide the availability, timing and amount of withdrawals.

Plan holders have authority to decide how to invest the RDSP when it is first opened and can change investments at any time. They can also consent to private contributions being paid into the RDSP, and apply for government grants and bonds. Plan holders cannot make the initial decision to contribute funds to an RDSP on the contributor’s behalf. However, plan holders can

consent to deposits being made into the RDSP because the timing of contributions is crucial to eligibility for the Canada Disability Savings Grant that is awarded to match contributions made within a calendar year up to a maximum amount.

Depending on the plan terms, plan holders also have authority to decide whether and when a beneficiary can receive one-time payments (called disability assistance payments or DAPs) and whether to start LDAP payments prior to their mandatory commencement date. The rules regarding the timing and calculation of withdrawals are highly detailed. Like those regarding contributions, they also carry serious consequences: although the government offers grants and bonds, should withdrawals occur during certain periods of time, this government support must be paid back threefold, which can significantly diminish RDSP funds.⁷⁴

Plan holders are not authorized under the ITA to receive and manage funds paid out of an RDSP on a beneficiary's behalf. We discuss issues surrounding the receipt and management of funds paid out of the RDSP in the next section.

For more information on the basic terms of the RDSP, see **Figure 1: RDSP Quick Facts** at page 9, above. We also suggest that you consult the ESDC website at: <http://www.esdc.gc.ca/eng/disability/savings/index.shtml>.

Funds paid out of an RDSP must be received by the beneficiary him or herself, and plan holders are not authorized under the [Income Tax Act] to manage them on a beneficiary's behalf.

3. Receiving and Managing Funds Paid out of an RDSP

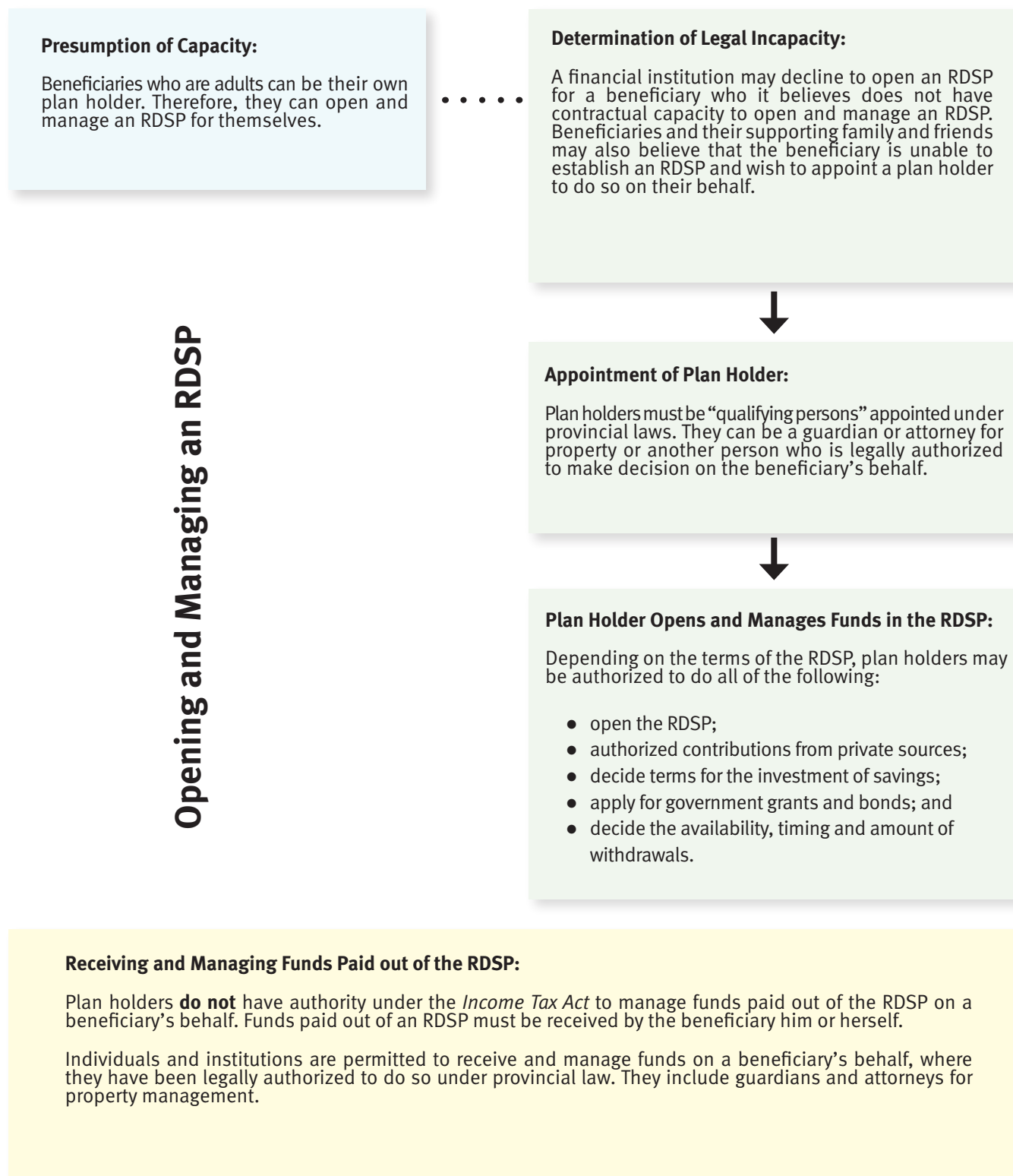
The ITA requires that an RDSP “be operated exclusively for the benefit of the beneficiary” and prohibits the surrender or assignment of payments to a person other than the beneficiary. Funds paid out of an RDSP must be received by the beneficiary him or herself, and plan holders are not authorized under the ITA to manage them on a beneficiary's behalf.⁷⁵

Funds paid out of an RDSP can be used for any purpose. A beneficiary could equally apply an RDSP payment to meet his or her basic needs, to purchase an assistive device, or to buy a movie ticket. This lack of restriction on the use of funds is consistent with the policy objectives underlying the RDSP, which include enhancing an adult's autonomy, contribution and self-determination. However, it also means that funds paid out of an RDSP are an asset, like any other asset, and the range of decisions that can be made to spend RDSP funds is wide.

The LCO heard that while some beneficiaries may only need another person to manage funds in the RDSP, such as purchasing investment options, others may have a corresponding need when the time comes to spend money dispersed from the plan. The federal government permits legally authorized individuals or institutions, such as guardians and attorneys, to receive and manage funds on a beneficiary's behalf, unless this is specifically disallowed by provincial laws.⁷⁶ The guardian or attorney could be the same person as the plan holder; however, he or she would have a different status under the ITA.

In recommending a process to appoint an RDSP legal representative who can open an RDSP and decide plan terms, one key issue in the LCO's project has been to consider whether it would be appropriate to extend the scope of an RDSP legal representative's authority beyond that of a plan holder to also include managing funds paid out of the RDSP (see Chapter IV.C.5, “The RDSP Legal Representative's Role and Responsibilities”).

Figure 2: How to Open and Manage an RDSP under the *Income Tax Act*



III. IMPROVING ACCESS TO THE RDSP FOR ADULTS WHO NEED LEGAL REPRESENTATION

A. Rationale for a Streamlined Process in Ontario

The LCO's recommendations for a streamlined process to appoint an RDSP legal representative for beneficiaries primarily respond to the aspirations of adults living with disability and the family, friends and service providers who wish to establish a plan for them.

When the federal government asked the public for feedback during its review of the RDSP, it received hundreds of submissions, many expressing concerns with existing processes to appoint a plan holder. As mentioned previously, the RDSP program does not provide a means to name a plan holder for a beneficiary who has been found to be incapable of entering into a contract with a financial institution. This differs from government administered programs, where a procedure to designate a supporter or substitute decision-maker is embedded in the program.

For instance, a family member, caregiver or any other person can apply to Developmental Services on behalf of a person with a developmental disability who wishes to receive individualized funding for services and supports.⁷⁷ The CPP, OAS and ODSP also all permit recipients and interested persons to request the designation of an informal "trustee" to manage monthly payments.⁷⁸

In the case of the RDSP, a plan holder must be appointed as a guardian or other person who is "legally authorized" under separate provincial laws.⁷⁹ The existing provincial laws that apply in these circumstances, however, tend to address areas of property management that are broader than the RDSP, such as paying bills, buying and selling real estate, and covering daily expenses. With few exceptions, they are also very much focused on protecting adults from the serious harm that can occur when they are unable to make decisions for themselves, rather than on facilitating access to a benefit program, such as the RDSP. Therefore, depending on each province's framework, these appointment processes can be rigorous.

The federal government has reported that in some provinces, opening an RDSP "can involve a considerable amount of time and expense on the part of concerned family members, and...may have significant repercussions for the individual".⁸⁰ During the LCO's consultations with Ontarians, we heard personal accounts that confirmed these concerns, specifically regarding the necessity that a plan holder be an attorney or guardian appointed under the *Substitute Decisions Act, 1992* – a law that was intended for broader application to property management.

We heard that an adult with disability wanted to grant a POA for property but was informed by his lawyer that he was unable to demonstrate sufficient capacity to do so under the SDA.⁸¹ Parents and siblings have declined to apply for guardianship to become plan holders in order to avoid their loved ones being declared "incapable" of property management.⁸² Other family members have been welcomed at the bank, informally at first, but experienced difficulties later when managing the RDSP or interacting with government administrators because they did not have legal authority under the SDA.⁸³ One parent had decided to obtain a court order for guardianship in order to open an RDSP but had spent over six months without a resolution, incurring substantial legal fees along the way.⁸⁴

As these few examples show, no story that participants shared with the LCO was the same as the next. Nevertheless, common themes about the types of barriers that individuals face in Ontario did emerge as well as their aspirations for an alternative process that is specifically designed for RDSP beneficiaries. We discuss these in turn below.

During the LCO's consultations with Ontarians, we heard personal accounts that confirmed...concerns, specifically regarding the necessity that a plan holder be an attorney or guardian appointed under the Substitute Decisions Act, 1992 – a law that was intended for broader application to property management.

1. *Beneficiaries May Be Unable to Grant a Power of Attorney to Name a Plan Holder*

Powers of attorney are a private, expedient and self-determined process that would be the first avenue of recourse for adults wishing to appoint a person as their plan holder. In Ontario, an adult can execute a POA to authorize another person to “do on the grantor’s behalf anything in respect of property that the grantor could do if capable, except make a will”.⁸⁵ A POA takes effect immediately or upon the occurrence of an event that the adult can specify him or herself, and if it is a “continuing” POA, it will remain effective if an adult is found to be incapable of managing property.⁸⁶

Financial institutions told the LCO that POAs have functioned smoothly to designate RDSP plan holders. POAs do not always require a formal determination that an adult is “incapable” and staff may be willing to work collaboratively with the attorney together with the client, even after the appointment.⁸⁷ One bank employee summarized her views on POAs as follows:

...[W]e try to educate our clients who are holders about the distinction between a person granting a power of attorney and a person needing to be declared incapable....We have clients who have powers of attorney in place to deal with travelling if they’re out of the country. It’s a very common tool and it in fact allows informally supported decision-making. If you [are an attorney] and are able to involve the person who gave the power of attorney in the decision making, it becomes a very easy thing for the financial institution to...have the discussion with both people in the group.... I do find that that’s perhaps a point of education for families...to say that “this can often be very valuable. It’s a relatively inexpensive process to consult a lawyer and have this put into place”.⁸⁸

Powers of attorney are a private, expedient and self-determined process that would be the first avenue of recourse for adults wishing to appoint a person as their plan holder.

There are certainly critiques of Ontario’s framework for POAs in the banking and other contexts, some of which we address in our *Legal Capacity, Decision-Making and Guardianship* project. However, the major challenge that was expressed during the LCO’s public consultations with respect to POAs was that adults who experience significant challenges with decision-making have been unable to meet the requirements of the SDA that would entitle them to grant one.⁸⁹

The test of capacity to give a POA for property in Ontario is more stringent than in many Canadian provinces. It consists of a detailed list of requirements that “entails actual knowledge of the kind of property the grantor has and its approximate value, as well as knowledge of the specific risks and duties of an attorney for property”.⁹⁰ The SDA reads

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.⁹¹

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

- (a) has the ability to understand whether the proposed attorney has a genuine concern for the person’s welfare; and
- (b) appreciates that the person may need to have the proposed attorney make decisions for the person.⁹²

The LCO received submissions that the test to grant a POA for property under the SDA reflects the risks that an attorney might misuse his or her authority for personal financial gain, and that it is appropriate where all of an adult’s property is at stake.⁹³ Similar tests for continuing POAs for property management have been enacted in Nunavut, the Northwest Territories and British Columbia, and the Law Reform Commission of Nova Scotia recently recommended one for its jurisdiction.⁹⁴

Nevertheless, participants in our consultations acknowledged that the requirements under the SDA could be unattainable for the adults most affected by this project because of their special needs, coupled with the complexity of the RDSP as a financial investment vehicle. Consequently, beneficiaries may be unable to personally designate a plan holder, leaving an application for guardianship as their sole option to establish an RDSP.

2. Exigencies of Applying for Guardianship Are Disproportionate to Naming a Plan Holder

In Ontario, all adults are presumed to be capable of making decisions for themselves.⁹⁵ Guardianship is an avenue of last resort that is reserved for circumstances where adults’ informal supports cannot meet their needs, they do not have or are not capable of granting a POA, or they have a POA that is inadequate. Only adults who are found to be legally incapable of property management by prescribed professionals are subject to guardianship, and the Superior Court of Justice has found that “mental capacity exists if the [person] is able to carry out her decisions with the help of others”.⁹⁶ Indeed, the SDA prohibits courts from appointing a guardian where an “alternative course of action” meets an adult’s needs in a manner that does not require a finding of incapacity and “is less restrictive of the person’s decision-making rights”.⁹⁷

The target users of the streamlined process that the LCO has recommended in this project are adults who do not currently have an attorney or guardian to act as their plan holder. Many of these adults manage their finances with a degree of self-sufficiency, such as everyday banking, or benefit from supports at home and in networks of friends and service providers. For example, participants in the LCO’s focus groups included adults with disability who work with an ODSP trustee to manage their payments. Families also described private financial planning tools, such as Henson trusts. Combining such innovative mechanisms in creative ways, we were told, has meant that adults may never have encountered a situation that demanded the formal arrangement of guardianship, before attempting to access the RDSP.⁹⁸

The RDSP poses a dilemma for these persons. As the joint written submissions to the LCO from the Canadian Association for Community Living, Community Living Ontario and PooranLaw explain,

The impediment created by the contractual competence/legal authorization requirements for opening [an RDSP] has been frequently cited by parents as a barrier that prevents them from opening a plan for their family members with intellectual disabilities. These parents are caught between their desire to assure the future financial security of their son or daughter, and the stigma, and restriction of basic rights to liberty, they know comes with formally placing their son or daughter under a substitute decision-making or guardianship order.⁹⁹

Determining an Adult’s Capacity

Participants expressed different reasons for their apprehensions about guardianship. The reason cited by the CACL, CLO, PooranLaw and individuals they represent relates to how we perceive and apply the concept of “capacity” in law.

...[T]he requirements under the SDA could be unattainable for the adults most affected by this project because of their special needs, coupled with the complexity of the RDSP as a financial investment vehicle.

In Ontario, an adult may be found incapable of managing property if she or he is “not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision”.¹⁰⁰ This definition of capacity is premised on a so-called “cognitive approach” that involves assessing the process of reasoning in coming to a particular decision. The cognitive approach is widely accepted across the world as “consistent with the principle of least restriction because it involves proportionate and minimal intrusion on decision-making autonomy”.¹⁰¹

The definition of capacity under the SDA rejects the bright-line assumption that persons with disability do not have the capacity to act autonomously and are in need of protection. It allows persons to make risky decisions that some might view as imprudent based on public opinion. Moreover, it accommodates issue-specific and fluctuating abilities by restricting the attribution of incapacity to particular areas of decision-making, for instance, through the separation of property management and personal care.¹⁰²

Despite commonly perceived gains made to promote autonomy under the cognitive approach, however, there are vigorous debates about definitions of capacity and whether the designation of “incapacity” should be used as a basis for decision-making arrangements at all.

The Committee on the Rights of Persons with Disabilities (Committee), which monitors the implementation of the *Convention on the Rights of Persons with Disabilities*, has highlighted the stigma and prejudicial effect that concepts of capacity have had in denying basic rights “to many groups throughout history, including women (particularly upon marriage) and ethnic minorities”.¹⁰³ According to the Committee, “persons with disabilities remain the group whose legal capacity is most commonly denied in legal systems worldwide” and, among them, persons with cognitive and psychosocial disabilities are disproportionately affected.¹⁰⁴ The Committee has become a forum for global dialogue on the role of government in arranging services and accommodations for persons who want support to exercise their abilities independent of a substitute decision-maker, including the opportunities, constraints and risks of abuse.

In this project, the LCO heard about family members of persons with developmental disabilities who object to the “competency” requirements under the ITA. They also take issue with Ontario’s legal framework, where a declaration of incapacity is a precondition to naming a plan holder for RDSP beneficiaries who are unable to grant a POA. As a result, these family members have declined to apply for guardianship in order to establish an RDSP.¹⁰⁵

Other participants in our consultations, including family members, community organizations and legal professionals did not appear to feel strongly about or they approved of the use of capacity criteria to appoint a decision-maker.¹⁰⁶ It was acknowledged that in the community “there is a split”.¹⁰⁷ The Advocacy Centre for the Elderly expressed its endorsement of Ontario’s definition of capacity in a written submission to the LCO as follows:

ACE recognizes that cognitive capacity acts as a barrier to access to the RDSP scheme – as it does to the ability of incapable adults to access their property and finances in numerous other circumstances. However, ACE also recognizes that, in certain circumstances, this capacity barrier is “a necessary evil” to prevent abuse and financial insecurity. ACE believes that cognitive capacity is a reasonable and legitimate basis for distinguishing between the legal effect of decisions, while recognizing that the specific cognitive threshold for each decision type should be carefully [tailored] to be as minimally restrictive as possible.¹⁰⁸

Our discussion paper reviews concepts of capacity and interpretations of the CRPD more thoroughly (see Chapter II.B.3, “What is Capacity? Foundational Concepts and Tensions”, and Chapter IV.B.4, “Convention on the Rights of Persons with Disabilities” of the discussion paper for the project). These issues are also being considered in our larger project on *Legal Capacity, Decision-Making and Guardianship*.

Procedural Aspects of Applying for Guardianship

The overwhelming concern expressed in nearly all of the LCO’s focus groups and interviews was with the procedural aspects of applying for guardianship: Ontario’s application processes were described as overly cumbersome, costly and time-consuming for persons wishing only to establish an RDSP.

A family member of an adult with disability told the LCO that

...they should have introduced the RDSP by saying are you prepared to have a court appointed guardian? Are you prepared to have the legal system to look after your things? If you’re willing to jump through all of these hoops, we have an RDSP for you.... [T]he announcement’s made you are eligible for an RDSP and right away you think “this is wonderful. Finally I have something, a vehicle where I can put my monies in that I know when I reach a certain age, they will come back”.... But then you find out that all of this is necessary for anyone to continue through the system.... [I]t’s so very, very difficult.¹⁰⁹

There are two routes to apply for property guardianship in Ontario: requesting a capacity assessment for statutory guardianship or a court order. Any person can apply to the Superior Court of Justice to appoint a guardian for an adult whom a judge finds incapable of managing property. The SDA stipulates that the court can “impose such other conditions on the appointment as the court considers appropriate”.¹¹⁰ Therefore, an application could be limited to appointing a guardian to make decisions about the RDSP and not all of the adult’s property. This would be a form of “partial” guardianship – a recognized means to minimize the intrusiveness of guardianship orders in the province.¹¹¹

Court proceedings can, however, be complex for unrepresented litigants and are expensive for those with a lawyer. The LCO heard that lawyers’ fees in guardianship applications with a hearing in Toronto can range from approximately \$8,000 to \$20,000 for uncontested appointments depending on the complexities of a given case.¹¹² The father of an adult with disability in Ottawa told the LCO that he had paid approximately \$5,000 for an order that was being granted on summary disposition without a hearing before a judge. He noted that these costs were “not necessarily a problem for us...but they could be for families who have diminished resources”.¹¹³

Ontario’s statutory appointment process is a simplified route for family members to become a guardian without a court order. It was proposed to facilitate access “in situations where there is no doubt about an individual’s incapacity, and the person does not object to having a [guardian]”.¹¹⁴ It involves applying to the Office of the Public Guardian and Trustee (OPGT) following the determination that an adult is incapable by an independent, qualified professional, called a “capacity assessor”. Capacity assessments for statutory guardianship are voluntary, take place in the community and the process as a whole can cost less than \$1,000.¹¹⁵

Statutory appointments can be straightforward; however, they are not habitually used for partial guardianship. As a consequence, adults with disability who have lived independently or with adequate supports to handle their affairs in the past could find themselves after an appointment, not only with a plan holder, but also a guardian who has plenary authority over their property matters.

Perhaps because statutory appointments have a broad reach, applying to the OPGT may also be unduly onerous. An applicant must prepare a detailed management plan for the adult’s assets and complicating factors (such as difficulties preparing the application or family disputes) can result in the process becoming lengthy or finishing before a judge.¹¹⁶

It is important to remember that the procedural steps described above are designed to cover the full range of adults under guardianship who may have modest to substantial assets. They are meant to ensure that suitable applicants are approved as guardians of property with a view to safeguarding adults against those who might abuse their powers. Additionally, they protect individuals from being deprived of autonomy in situations of undue process.

The overwhelming concern expressed in nearly all of the LCO’s focus groups and interviews was with the procedural aspects of applying for guardianship: Ontario’s application processes were described as overly cumbersome, costly and time-consuming for persons wishing only to establish an RDSP.

The LCO's larger project on *Legal Capacity, Decision-Making and Guardianship* considers issues surrounding the accessibility of Ontario's appointment processes and possibilities for partial guardianship. What we have been told in our project on the RDSP is that the procedural exigencies of applying for guardianship, under the law as it now stands, are disproportionate to naming a plan holder who can facilitate access to this particular social program.

B. Aspirations for a Simple Way to Designate a Trusted Person

Your new legislation needs to be drafted keeping in mind that this silent majority can do the job of supporting their family member or friend with a disability most easily and economically, and deserves to be allowed to do so with as little government or outside interference as possible.¹¹⁷

The majority of adults with disability and their family and friends described what they would like to see come out of the LCO's project in terms of simplicity, informality and privacy. Above, we discussed just a few tools that are used in the disability community as routine methods to delegate asset management without the appointment of an attorney or guardian. In our focus groups, the LCO met several families who have "muddled through" making decisions with and on behalf of their children or siblings outside the framework of the SDA. We were often asked why a "formal" or "legal" process was necessary for the RDSP as opposed to assets, such as ODSP payments, money in a private trust and individualized funding from Developmental Services.¹¹⁸

The majority of adults with disability and their family and friends described what they would like to see come out of the LCO's project in terms of simplicity, informality and privacy.

It is true that the ITA requires a plan holder to be a legally authorized person. However, ODSP trusteeships, private trusts and other arrangements that authorize someone to manage an adult's finances are also based in law. ODSP trusteeships are made possible by the *Ontario Disability Support Program Act, 1997*, Regulations and Income Support Directives.¹¹⁹ Private trustees are regulated under the common law and legislation, such as the *Trustee Act*.¹²⁰ Additionally, the *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008* determines who can apply for, receive and administer individualized funding for a person with a developmental disability.¹²¹

What is distinctive about these examples is not that they are less legal but, perhaps, that they *feel less formal*. For instance, parents said that they had little difficulty becoming an ODSP trustee because they could meet with a caseworker and have their appointment confirmed without much procedure or delay. Private trusts were characterized as fast and easy to establish with the professional services of a lawyer, although they can be expensive.¹²²

Many families in the community of persons with developmental disabilities also said that they have formed "circles of friends" and "personal support networks" that make decisions, collaboratively, with an adult's input and interests in mind. These community networks are made up of trusted family members, friends and service providers, some of whom may have legal authority to make decisions on the adult's behalf in a given area. Community networks may incorporate to become non-profit entities – called "microboards" in British Columbia and "Arohas" in Ontario – that can enter into binding agreements with government agencies to manage individualized funding.¹²³

Participants in our consultations expressed support for a streamlined process for the RDSP that draws on these experiences, focusing on a means to designate a person who has a close, trusting relationship with the beneficiary. Keeping adults with disability at the center of the process, with the involvement of their community networks, was tendered as a means to judge the RDSP legal representative's suitability and also to guard against the potential for financial abuse.¹²⁴

C. Concerns of Interested Third Parties

The federal RDSP review consultation paper recommended that provincial and territorial proposals for an alternative process to appoint an RDSP legal representative “would require careful consideration of costs, administrative feasibility, liability issues, oversight, and accountability”.¹²⁵ The challenges that the LCO learned about in its own consultations substantiate that these are important issues in Ontario for third parties who facilitate participation in the RDSP, specifically, financial institutions and the Ontario government.

Participants in the LCO’s consultations highlighted that the subject matter of this project concerns the creation of a practical mechanism that can be used on the ground. This means that any law reform measures must be accessible, cost-effective and administratively feasible.

Financial institutions offer the RDSP voluntarily, even though it is a complex product. Financial institutions offer the RDSP because it improves their brand reputation but also because non-eligible clients as well as their own employees are the families and friends of persons with disabilities.¹²⁶ The time and efforts that financial institutions contribute to delivering the RDSP should be met with solutions to address the challenges that they face. In terms of the LCO’s project, this means that financial institutions must feel secure with an alternative process to establish an RDSP legal representative.

Feeling secure for financial institutions includes the certainty that they can rely on a new process as one that is valid under the law, that an RDSP legal representative is authorized to act with respect to the RDSP (as a specific area of financial management), and that they will not be held liable for the RDSP legal representative’s decisions in the event of loss or dispute.¹²⁷

Financial institutions also share the interest of the Ontario government in creating a process that respects operational and resource constraints. Participants in the LCO’s consultations highlighted that the subject matter of this project concerns the creation of a practical mechanism that can be used on the ground. This means that any law reform measures must be accessible, cost-effective and administratively feasible.¹²⁸

In particular, resource constraints significantly affect the implementation of Ontario’s existing legislation in this area and will continue to affect the system under any law reform. The LCO understands that it is unlikely, in the current economic climate, that the Ontario government will have significant resources available to add to the system. Our intention is that the recommendations in this project meet the expectations of individual consumers who will use a future process but that they also impose little extra cost on those who will administer it.

IV. A STREAMLINED PROCESS TO APPOINT AN RDSP LEGAL REPRESENTATIVE

A. Developing the Process

1. *Our Review of Alternative Arrangements*

There is a long history of efforts to reform decision-making laws in Canada over the years and positive changes have been implemented in nearly every province. The LCO's discussion paper for this project reviews and analyses existing laws, policies and programs in Canada and abroad as a foundation for developing creative solutions that build on past experience. We have had the benefit of commissioned reports, expert literature, policy documents and our own consultations, which provide insights into the contributions that existing frameworks can make. In this report, our recommendations integrate features of alternative arrangements in light of our research findings and the benchmarks for reform, discussed earlier.

The starting point for our review of alternative arrangements is the federal government's *Economic Action Plan*, where it recognized

Some provinces and territories have already instituted processes to allow for the appointment of a trusted person to manage resources on behalf of an adult who lacks contractual capacity, or have indicated that their system already provides sufficient flexibility to address these concerns.¹²⁹

Below, we briefly summarize the processes that are being or could be used to appoint a person who is legally authorized to make decisions for RDSP beneficiaries that the federal government has recognized.

Similar to Ontario's SDA, most of these processes were originally designed to apply to broader areas of property management than the RDSP. They permit adults to name another person to assist with or manage their finances, if they meet a stipulated threshold for capacity. Alternatively, a guardian (or substitute decision-maker by a different title) can be appointed following a capacity assessment. Nevertheless, the laws in this area vary widely across jurisdictions and governments have reported that concerns with establishing an RDSP do not arise in their jurisdictions or have not been escalated to a level that necessitates a policy response.

Newfoundland and Labrador is the exception; it passed a legislative amendment to create a new process that specifically addresses this issue, albeit it is not in force. Saskatchewan has also provided guidance to members of the public on how to draft a POA that is limited to appointing a plan holder.

Figure 3: Processes in Provinces and Territories Recognized in the *Economic Action Plan 2014*

Alberta	Alberta permits a desk application for a court appointed guardian (called a “trustee”). Applicants fill out a self-help kit and submit it to specialized review officers in the Office of the Public Guardian who ensure proper completion of the documents and fulfill other duties, including providing notice to appropriate parties and drafting a review officer’s report. Review officers typically meet with adults subject to the application to consult them about their wishes before forwarding the application and supporting documents for a judge’s approval. ¹³⁰
British Columbia	In British Columbia, adults can grant a “representation agreement” (RA) to authorize someone to help them or make decisions on their behalf. The threshold for capacity to do so is based on a set of non-cognitive factors that are less stringent and substantively different than for a POA in British Columbia and Ontario. It reflects a social policy decision to extend personal appointments to adults with significant disabilities who have unique ways of communicating that can be understood by a trusted person. RAs apply to stipulated areas of routine financial management that do not expressly include the RDSP. Some interpret the legislative language as including the RDSP and financial institutions have accepted RAs to establish plans. ¹³¹
Manitoba	As part of an overarching scheme to provide services to persons with developmental disabilities, a substitute decision-maker can be appointed for these persons through an administrative proceeding that involves an initial screening by Manitoba’s Vulnerable Persons Commissioner and an appearance before a hearing panel. ¹³²
Newfoundland and Labrador	Newfoundland and Labrador amended its POA legislation to permit adults to name two persons to be their “designates” for the RDSP. The amendments are not yet in force. The threshold for capacity to execute an agreement is less restrictive than are Newfoundland and Labrador’s and Ontario’s requirements for a POA. It is based on British Columbia’s RAs (see above). If an adult is unable to make a designation, certain family members can initiate an appointment of the Public Trustee through the Trial Division Court (equivalent to Ontario’s Superior Court of Justice). ¹³³
Northwest Territories	The Government of the Northwest Territories has indicated that it will address the issue on a case-by-case basis. Not many cases are expected given its population of fewer than 45,000 residents. ¹³⁴
Saskatchewan	<p>Saskatchewan recommends adults use a “special limited” POA to appoint a plan holder based on the province’s existing legislation, which contains a less stringent threshold for capacity than exists in Ontario. It suggests that the scope of the attorney’s powers be restricted to a plan holder who would not have authority to take funds out of the RDSP. Those extended powers would require full property guardianship or “co-decision making” due to concerns about financial abuse.¹³⁵</p> <p>In Saskatchewan, a judge may appoint a co-decision maker as a less restrictive alternative to guardianship, where an adult “requires assistance in decision-making in order to make reasonable decisions....”¹³⁶ Co-decision makers share legal authority with the adult, and where a contract requires them to co-sign, it is voidable if one person signs it alone. However, co-decision makers must acquiesce in an adult’s decision if it is reasonable. Applications for this arrangement must be brought to the Court of Queen’s Bench (equivalent to Ontario’s Superior Court of Justice).¹³⁷</p>
Yukon	<p>The Yukon permits adults to grant a “supported decision-making agreement” to give trusted friends and relatives legal authority to help them make their own decisions. Supported decision-making “arrangements are for adults who can make their own decisions with some help”.¹³⁸ Supporters can participate in activities such as receiving confidential information, giving advice and communicating decisions. However, supporters are prohibited from making decisions on an adult’s behalf and a decision made or communicated with assistance is considered to be that of the adult.¹³⁹</p> <p>The Yukon also has “representation agreements”, which authorize someone to make decisions on an adult’s behalf. Like RAs in British Columbia, they are restricted to routine financial affairs that do not expressly include the RDSP. The threshold for capacity to grant an RA is the same as for POAs in the province but is less stringent than in Ontario. RAs differ from POAs in the Yukon because they are drafted with the help of a government office rather than a lawyer. They are more accessible for that reason but also expire at the earlier of three years or when an adult’s capacity declines.¹⁴⁰</p>

In addition to decision-making laws in provinces and territories highlighted by the federal government, our discussion paper considers laws in the areas of trusts, and the income support and social benefits sectors. Certain examples have already been mentioned in this report, such as CPP, OAS and ODSP trusteeships.

2. Public Consultations on the Options for Reform

Even the brief summary of alternative arrangements in the preceding section reveals that approaches to this issue across Canada largely correspond to established legal frameworks in separate jurisdictions. The objective of our dedicated phase for public consultations was to gain feedback on the options for reform in Ontario.

Several options for reform presented in the discussion paper laid the groundwork for our consultations. Based on our review of existing arrangements, mentioned above, we proposed that a streamlined process could be administered through

- a personal appointment similar to a POA but available to adults who meet a threshold for capacity that is less stringent than that to grant a POA for property management under the SDA, alone, or in combination with
- a streamlined application to the Superior Court of Justice, an administrative tribunal or a government office.

The LCO understands that stakeholder buy-in is crucial to recommending law reform measures that are effective and we have been purposely sensitive to the feedback we received on these options. We also encouraged members of the public to comment on further options that were not identified in the discussion paper, which could reasonably achieve the benchmarks for reform.

The persons we contacted included lawyers and advocates who participated in consultations leading up to past commissioned reports that shaped the SDA (commonly called the *Fram*, *Weisstub* and *O’Sullivan* reports) and who have put the SDA in practice from the 1990s until present.¹⁴¹ Self-advocates and their family and friends shared their personal experiences with the SDA, private trusts and ODSP. Furthermore, we heard from policymakers about the opportunities and constraints for future directions in Ontario. (Detailed information on whom we consulted and how is found in Chapter I.E.1, “Research and Consultations”.)

Our recommendations in the remainder of this report are meant to balance the diverse perspectives that were expressed to us.

B. Overview of the LCO’s Recommendations

The Law Commission of Ontario recommends that the Government of Ontario implement a process that would enable adults to personally appoint an RDSP legal representative to open and manage funds in an RDSP, where there are concerns about their capacity to enter into an RDSP arrangement with a financial institution.

The process would be available to adults who do not have an attorney or guardian for property who could act as their plan holder. It would enable adults to choose whom they would like to assist them in gaining access to an important social benefit by opening the RDSP and deciding the plan terms. However, an RDSP legal representative would not have authority that extends beyond that of a plan holder to manage funds paid out of the RDSP. Therefore, when the time comes for beneficiaries to receive payments out of the RDSP, they would be required to manage their own funds or apply for guardianship, if they do not have legal capacity to do so.

The Law Commission of Ontario recommends that the Government of Ontario implement a process that would enable adults to personally appoint an RDSP legal representative to open and manage funds in an RDSP, where there are concerns about their capacity to enter into an RDSP arrangement with a financial institution.

RDSP beneficiaries, like all adults in Ontario, have legal capacity under the SDA if they are able to manage their own finances with the help of family, friends and service providers.¹⁴² However, the LCO believes that where adults are unable to manage funds paid out of the RDSP with help, they require a more comprehensive solution than an RDSP legal representative can provide. This is due, in part, to concerns about financial abuse but also the nature of RDSP funds, which we discuss later in the report.

In Ontario, guardians are a source of comprehensive decision-making for property management that adults and their supporters can turn to when in need. In addition, the LCO's ongoing project on *Legal Capacity, Decision-Making and Guardianship* considers less restrictive alternatives to guardianship that could, possibly, address challenges that adults with varying abilities face. Our discussion paper in that project was released in May 2014.

With respect to the criteria to grant the personal appointment, the LCO recommends they be based on the definition of legal capacity to grant a POA at common law. However, if the Government of Ontario believes that these criteria are not sufficiently flexible to improve access to the RDSP, we recommend that they be based on section 8(2) of the British Columbia *Representation Agreement Act*. These two thresholds for legal capacity are less stringent than the requirements to grant a POA for property under the SDA. Recognizing that Ontario's existing threshold is unattainable for some adults with disability, we propose that this measure could improve access for adults wishing to appoint a plan holder.

Adults who appoint an RDSP legal representative... could choose a relative, including a parent, spouse, common law partner or sibling; a close friend; or a community organization that is approved by a designated government agency.

As a safeguard against financial abuse, we believe that the ease with which adults would be able to personally appoint an RDSP legal representative should be offset by robust protections. Therefore, we recommend that adults be entitled to benefit from provisions under the SDA that include requiring attorneys for property to keep accounts of financial transactions and permitting members of the public to file an allegation of suspected abuse with the OPGT. In addition, we recommend that an RDSP legal representative have authority to open an RDSP and decide the plan terms but not manage funds paid out of the RDSP. The ITA has embedded several protective measures for the management of funds while they are held inside the RDSP. Restricting the scope of an RDSP legal representative's authority from extending beyond that of a plan holder would reduce the opportunities for self-dealing and mismanagement after funds have left the plan.

Adults who appoint an RDSP legal representative using our suggested streamlined process could choose a relative, including a parent, spouse, common-law partner or sibling; a close friend; or a community organization that is approved by a designated government agency.

Once an RDSP legal representative has been appointed, we recommend that he or she have the same duties of an attorney for property for an adult who has been found to be legally incapable under the SDA, as applicable, and be held to the same standard of care. This would require RDSP legal representatives to encourage an adult's participation in decision-making, to the best of his or her abilities, and to consult with supportive family members and friends, among other duties. They would also be fiduciaries under the law, whose responsibilities must be "performed diligently, with honesty and integrity and in good faith, for the [adult's] benefit".¹⁴³

Finally, the LCO recommends that measures be adopted to provide third parties with certainty and finality in transacting with an RDSP legal representative, including exemptions from liability where they reasonably rely on the RDSP legal representative's instructions.

A full list of our recommendations is found in Chapter V at page 57. In the subsequent sections, we explain specific features of the streamlined process as follows:

Figure 4: Features of the Streamlined Process

1. Determining the Beneficiary's Capacity to be a Plan Holder
2. Enabling Beneficiaries to Personally Appoint a Plan Holder
3. Capacity Criteria to Grant a Personal Appointment
4. Countering the Increased Opportunities for Financial Abuse
5. The RDSP Legal Representative's Role and Responsibilities
6. Providing Third Parties with Certainty and Finality
7. Who May Act as an RDSP Legal Representative
8. Terminating the Personal Appointment

C. Features of the Streamlined Process**1. Determining the Beneficiary's Capacity to Be the Plan Holder****Who Determines a Beneficiary's Capacity to Establish an RDSP and How?**

The ITA sets out the terms for opening and managing an RDSP at a financial institution. As discussed above in Chapter II of this report, an adult beneficiary must be the RDSP plan holder, unless he or she is not “contractually competent to enter into a disability savings plan” with a financial institution, in which case another legally authorized person must be the plan holder.¹⁴⁴ (See **Figure 2: How to Open and Manage an RDSP under the *Income Tax Act***).

Under the common law, an adult has legal capacity to enter into a contract when he or she understands the nature and effect of the transaction.¹⁴⁵ Financial institution employees could decline to open an RDSP for a beneficiary who they have reasonable grounds to believe does not meet this threshold of capacity. However, stakeholders have informed the LCO that it is much more likely that beneficiaries and their supporters will prefer to assess whether the beneficiary has contractual capacity, privately, before appointing an RDSP legal representative and approaching a financial institution.

In practice, beneficiaries and financial institution employees may not know how to determine whether the beneficiary has capacity to open and manage an RDSP. Financial institution employees are regularly called upon to assess the legal capacity of their clients in transactions unrelated to the RDSP. Nevertheless, ARCH Disability Law Centre, community organizations and financial institutions expressed concern to the LCO about the involvement of financial institutions in determining whether an adult has contractual capacity to enter into an RDSP arrangement.¹⁴⁶ The LCO heard that not all financial institutions train their staff on the subject and some apply a “common sense” test at the stage of opening an RDSP.¹⁴⁷ Similarly, although adults with disability and their supporters may have found themselves in situations where legal capacity to make a range of decisions is at issue – such as consent to treatment or personal care – they might not distinguish between the myriad definitions of legal capacity that affect them.

As a result, in Chapter IV.D of this report, we recommend that the Government of Ontario disseminate accessible information to service providers and members of the public on any future streamlined process that includes guidance on the test for contractual capacity to open and manage an RDSP.

Refuting a Financial Institution's Opinion that a Beneficiary Is Not Contractually Capable

There may be adults who disagree with a financial institution employee's opinion regarding their capacity to enter into a contract and who would like to refute it. In Ontario, adults

Under the common law, an adult has legal capacity to enter into a contract when he or she understands the nature and effect of the transaction.

could do this by requesting a letter of opinion from a designated capacity assessor to prove that they understand the nature and consequences of opening and managing funds in an RDSP. Such a letter of opinion may not be determinative of an adult's ability to establish an RDSP because it is not a legal finding that a financial institution is required to accept. However, it would provide evidence to rebut the financial institution employee's opinion and could result in a resolution.

Capacity assessors can provide a letter of opinion on request regarding an adult's capacity to make specific decisions, such as the capacity to open and manage funds in an RDSP. The adult making the request must be careful to indicate what type of opinion is desired, however, because capacity assessments can be used for other purposes, including the appointment of a guardian for property under the SDA. The OPGT automatically becomes the statutory guardian for adults who have been determined to be legally incapable of property management under section 6 of the SDA, where the capacity assessor is asked to issue a "Certificate of Incapacity".¹⁴⁸ Nevertheless, capacity assessors can provide letters of opinion without issuing a Certificate of Incapacity, where the purpose of the request has been clearly specified. The capacity assessment process is voluntary, relatively inexpensive, takes place in the community and, for adults who believe themselves to be legally capable, it is a valid option.

The LCO is also aware that financial institutions have previously relied on doctors to conduct capacity assessments in the context of the RDSP.¹⁴⁹ In a brochure on the Capacity Assessment Office, the Ministry of the Attorney General comments,

An assessment of mental capacity for any purpose other than those specified in the *Substitute Decisions Act* need not be performed by a designated capacity assessor. In situations not covered by the *Act*, another professional may be able to provide an opinion about capacity for that particular purpose. This may be a less intrusive or less costly option.

...

Before requesting any assessment – whether from a capacity assessor or other professional – it is important to be clear about the purpose of the capacity assessment, and certain that an assessment is actually necessary in the circumstances.¹⁵⁰

Early proposals to the LCO and the federal government favoured a process that would enable adults to choose their own RDSP legal representative and enthusiasm has continued, throughout the project, for this as a preferred option.

2. Enabling Beneficiaries to Personally Appoint a Plan Holder

The Streamlined Process as a Personal Appointment

Early proposals to the LCO and the federal government favoured a process that would enable adults to choose their own RDSP legal representative and enthusiasm has continued, throughout the project, for this as a preferred option.¹⁵¹ In this report, we recommend such a process, which we believe could be readily integrated in Ontario, where POAs are already common.

POAs, representation agreements, designation agreements and supported decision-making authorizations are all types of personal appointments that are used in Canada. They can be fast and cost-effective, and the federal government has highlighted several as an adequate remedy for RDSP beneficiaries' concerns (see **Figure 3: Processes in Provinces and Territories Recognized in the Economic Action Plan 2014**).

Personal appointments are rooted in values of autonomy, human dignity and self-determination because they allow adults to proactively select whom they would like to help them and how. The procedural exigencies of personal appointments are also widely perceived as less intrusive than public appointments, which are administered with the oversight of a court, tribunal or government office.¹⁵² Unlike guardianship applications, they do not result in a formal determination of incapacity. Moreover, arrangements can be made with the assistance of a lawyer or in the comfort of one's own home.

During the LCO's consultations we asked participants whether they believe adults should be able to choose their own RDSP legal representative. Of those who responded, most affirmed that, yes, they should. The following statements are indicative of what we heard:

Legal clinic representative:

I would suggest that the threshold for capacity should be lowered and should include as many accommodations as necessary in order to enhance someone's decision-making ability so that they can appoint their own representative should they need their own representative.¹⁵³

Mother of an adult with disability:

Yes, I think that, effectively...those who are able should be entitled to choose [their RDSP legal representative].¹⁵⁴

Self-advocate:

Do you think adults themselves should be able to choose [who should] be their representative?...I think they should be able to choose and not have it decided for them.¹⁵⁵

The LCO agrees with stakeholders' assertions that this option for reform is desirable: we understand that it could be consistent with the benchmarks for reform and specific aspirations for privacy, informality and simplicity.

However, there are attributes that a personal appointment must have to improve access to the RDSP for adults in Ontario. It must be based on less stringent criteria than the threshold for capacity to grant a POA for property under the SDA because this standard has been unattainable for some adults wishing to establish an RDSP. It must also be bolstered with enhanced safeguards because the more relaxed the formalities, the greater the opportunities for financial abuse. Finally, it must satisfy third parties' concerns. We continue to discuss these and other important elements that we believe should be included in a streamlined process for RDSP beneficiaries, below.

The Law Commission of Ontario recommends that

1. The Government of Ontario implement a process that would enable adults to personally appoint an RDSP legal representative, where there are concerns about their capacity to enter into an RDSP contract with a financial institution and they do not have an attorney or guardian for property management.

What to Do When an Adult Is Unable to Choose: Applying to Be an RDSP Legal Representative

There are adults who will not be able to take advantage of a personal appointment process no matter how flexible the capacity criteria because they may not have access to a person who can understand their wishes. Personal appointments may also not be practical for all adults who are able to grant them. For instance, adults with episodic disabilities such as bipolar disorders, who experience fluctuating symptoms, might revoke the document when they are experiencing symptoms.¹⁵⁶ Therefore, the LCO's discussion paper reviewed public appointment processes that would enable a parent, sibling, friend or other candidate to apply to become an RDSP legal representative in cases where an adult cannot appoint someone him or herself.

In Ontario, a public appointment process could be administered through the Superior Court of Justice, an administrative tribunal (i.e., the Consent and Capacity Board) or a government office. Adults with disability, family members and friends whom the LCO contacted were hesitant to express a preference among these public appointment

processes and, generally, characterized them as intrusive and demoralizing. Court and administrative tribunal processes were identified as “imping[ing] too greatly on the independence, autonomy and access to justice of persons with disabilities”.¹⁵⁷ Additionally, we received feedback from numerous stakeholders to the effect that “fast-tracked court or tribunal applications are unlikely to succeed as a result of government resource constraints, inaccessible procedures, and the limited expertise of the available tribunals”.¹⁵⁸

Overall, participants familiar with ODSP trusteeships favoured a process that could be delivered by a government agency, such as the OPGT, the Ministry of Community and Social Services (MCSS) or an independent department, which they said could be established specifically to support RDSP beneficiaries.¹⁵⁹ However, experiences with government agency administered processes in Canada and abroad demonstrate that they are resource intensive and may not be feasible in these circumstances. Processes to appoint a representative for recipients of income support and social benefits payments demand that a government case worker oversee the appointment, review periodic accountings and respond to complaints.¹⁶⁰ The LCO has concerns that options for reform in this area of the law would necessarily entail the allocation of additional funding that the Province may not have at present and that without funding for adequate oversight mechanisms, financial mismanagement could go undetected.¹⁶¹

The LCO did receive a novel proposal in the final stage of our project that a comparable process could be administered in a more private and less resource-intensive manner with the oversight of a professional, such as a family doctor, lawyer or social worker. According to CACL, CLO and PooranLaw, the process would allow an individual to nominate him or herself as an RDSP legal representative, where a professional who has known the applicant and beneficiary for a designated period of time attests to their relationship as one that is characterized by trust.¹⁶²

On its face, the process could be consistent with the aspirations of adults with disability and their family and friends because it would enable them to establish a plan holder by contacting service providers who may be active in their community networks. Additionally, the Canadian Bankers Association submitted, “We are of the view that a process that engages private professionals such as doctors or lawyers to provide the requisite degree of oversight when a government approved form is completed to ‘qualify’ the holder will facilitate the opening and operating of RDSPs...”¹⁶³

However, academics specialized in legal capacity and decision-making laws, advocacy organizations, government representatives and legal professionals were unaware of analogous laws in Canada or abroad that permit a legal representative to nominate him or herself with the oversight of a non-governmental entity.¹⁶⁴ The Ontario Medical Association expressed that professionals, such as doctors, may not feel qualified to participate in such a process. Interviewees also raised questions about what assessment criteria would be used, whether the degree of oversight would be sufficient to safeguard beneficiaries against abuse and how the professionals involved in the process could be secured against liability.¹⁶⁵ Considerable research would be required to resolve these issues, beyond that which our project allows at this stage.

Adults who are unable to personally appoint a plan holder are not, however, entirely without recourse. Ontario’s existing process of applying to the Superior Court of Justice for a conditional guardianship order remains an option. It is also consistent with approaches in British Columbia, Newfoundland and Labrador, and Saskatchewan where an application can be brought to the trial level court when an adult is unable to grant a personal appointment.

3. Capacity Criteria to Grant and Revoke a Personal Appointment

As mentioned above, personal appointments do not result in a formal determination that an adult is incapable. Nevertheless, personal appointments are conditional on the grantor's ability to meet stipulated criteria that are correlated with capacity. These criteria are typically framed in positive language, which affirms that an adult has capacity to grant a POA, supported decision-making authorization or other personal appointment, at the time of its execution. The threshold for capacity to revoke a personal appointment is ordinarily the same as the threshold to grant the personal appointment.

Definitions of capacity differ from place to place and across areas of decision-making. Other jurisdictions accept less stringent criteria in relation to personal appointments for financial matters and Ontario does for personal care. Additionally, beyond the SDA, Ontario recognizes various standards, for instance, to create a trust, make a will and retain legal counsel.¹⁶⁶

The question for us in this section is what criteria would be flexible enough to improve access for RDSP beneficiaries but, at the same time, respect the fundamental characteristics of personal appointments, including safeguards against abuse and the grantor's agency.

...[P]ersonal appointments do not result in a formal determination that an adult is incapable. Nevertheless, personal appointments are conditional on the grantor's ability to meet stipulated criteria that are correlated with capacity.

In section 4, "Countering the Increased Opportunities for Financial Abuse", we also suggest a number of targeted safeguards that could be implemented to counterbalance the less stringent criteria for a personal appointment.

Agency, Flexibility and Safeguards

POAs under the common law create what is essentially an agency relationship between the principal (the grantor) and the agent (the attorney). Agents have a duty of obedience that obliges them to follow a principal's instructions. Indeed, common law POAs expire when an adult no longer has the capacity to direct the attorney because the decision of the agent is treated as though it were that of the principal.¹⁶⁷

Continuing POA legislation was enacted to allow a POA to persist into an adult's legal incapacity. Continuing POAs do not establish an agency relationship, *per se*, because although attorneys should encourage an adult's participation, among other duties, they can substitute their own decisions for those of a person who has been found to be legally incapable.¹⁶⁸

Nevertheless, there is still an element of agency in the act of granting a POA itself because it is a tool that is designed to give effect to an adult's expressed wishes, including the desire for an attorney to make decisions on his or her behalf.

Making a personal appointment conditional on the ability to demonstrate some form of agency is important to ensuring that an adult's wishes are realized.¹⁶⁹ If the criterion for a POA were that a grantor is 18 or over, alone, there would be nothing to indicate that he or she actually desires a POA.

In the course of our consultations, parents told the LCO of occasions where family members had obtained a POA or representation agreement on behalf of individuals who were unable to consent. Some expressed discomfort with having done so themselves, while others said that they had not done so because they preferred to wait for a legal process that meets their loved ones' needs. The LCO is also aware of innovative proposals that capacity criteria should not be required because an individual's capacity can be actualized through interpretive methods used by his or her informal, community network.¹⁷⁰

Our suggestions in this project are intended to be sufficiently flexible for the law to capture the diverse circumstances of adults with disability seeking to participate in the RDSP, including those who may need support making and communicating their decisions. Nevertheless, the LCO maintains that adults should be able to make choices that affect their lives and do as much for themselves as possible, and that a grantor's active contribution to making a personal appointment, such as a POA, is imperative.

Therefore, although they may be less stringent, the criteria for a personal appointment should be crafted to provide an indication that adults are executing the document willingly and free of undue influence, and that they are able to ascertain whether an RDSP legal representative is a suitable person. Otherwise, additional oversight would be required that would move the process outside the ambit of a personal appointment.

Capacity to Choose an RDSP Legal Representative: The British Columbia Approach

The most flexible test of capacity to execute a personal appointment for financial matters in Canada is found in the British Columbia *Representation Agreement Act*. Representation agreements apply to prescribed areas of routine financial management that do not explicitly include the RDSP. However, adults with disability have interpreted the legislative language as including the RDSP and representation agreements are being used to appoint plan holders in that province.¹⁷¹ Newfoundland and Labrador has also adopted a similar test for adults seeking to access the RDSP. In this report, the LCO recommends that test of capacity to appoint an RDSP legal representative in our jurisdiction be based on the *Representation Agreement Act*, only if the Government of Ontario wishes to adopt the more flexible option being used in Canada. We explain our reasons for this recommendation below and discuss several reservations that have led us to recommend that the Government of Ontario first consider a different, cognitive test that would be more in keeping with Ontario's current framework.

The most flexible test of capacity to execute a personal appointment for financial matters in Canada is found in the British Columbia Representation Agreement Act.

The *Representation Agreement Act* came into force in 2001 after years of “unprecedented community-government collaboration”.¹⁷² With substantial input from the public about their goals for a novel decision-making arrangement, it was positioned as one of several interlocking decision-making laws and was projected to supplant POAs. However, British Columbia's POA legislation remained in force and, after a review of both regimes, commissioned by the Attorney General, the two now operate in parallel.¹⁷³

Nevertheless, RAs are distinguishable from POAs. We have already noted that RAs are restricted to routine financial affairs. Additionally, whereas the threshold for capacity to grant a POA is premised on cognitive criteria that can be likened to Ontario's, adults can make an RA where they demonstrate non-cognitive factors that are both less stringent and substantively different.

The factors required to make a representation agreement reflect a social policy decision to extend personal appointments to adults with disabilities who may have “unique ways of communicating” that can be understood by a trusted person who has personal knowledge of “what he or she values and what he or she dislikes or rejects”.¹⁷⁴ Although they include an element of awareness about how a representation agreement can affect the adult, they do not require that adults have particular knowledge about their circumstances, including the types of decisions that a representative could make. The *Representation Agreement Act* reads as follows:

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.¹⁷⁵

Framing capacity in this manner has been favoured in the disability community as a means to recognize the “shades of grey with respect to capacity”.¹⁷⁶ In a research paper commissioned by the LCO, the Canadian Centre for Elder Law explains,

For supporters of the new system, moving to a functional capacity test that enumerates such subjective terms as “feelings of approval” or a relationship “characterized by trust” brings the legislative system into the circles of support and the reality of engaging with some members of the community of persons with intellectual disabilities.¹⁷⁷

Professor Robert Gordon has written that representation agreements are “of immense importance for intellectually disabled adults, and especially those who have been cared for and assisted throughout their youth by family members, and when there is a continued need for assistance during adulthood”.¹⁷⁸ He informed the LCO that the capacity criteria have opened up access to financial planning tools for adults with developmental disabilities and brain injuries. Representation agreements, he says, are also increasingly familiar to third parties, such as financial institutions, as a result of public education.¹⁷⁹

Between 2006 and 2009, approximately 1,000 RAs were filed with the voluntary registry and support service, Nidus Personal Planning Resource Centre and Registry, by adults of all ages.¹⁸⁰

Adults with disability, family members and advocacy organizations urged the LCO to adopt a process modelled on the *Representation Agreement Act*. For instance, a self-advocate told us that the British Columbia framework “makes it easier for people to do these things in a way that doesn’t create a problem as they’re trying to open [an RDSP]”.¹⁸¹ In addition, we heard from financial institutions that they would be amenable to this solution as long as the representative’s authority to make decisions concerning the RDSP was explicitly recognized.¹⁸²

Based on this information gained in our consultations, the LCO believes that the non-cognitive criteria reflected in the *Representation Agreement Act* would allow adults who otherwise might not be able to personally appoint someone as an RDSP plan holder. However, significant reservations about these criteria that were brought to our attention should be considered if this option is to be implemented in Ontario. The first relates to financial abuse and the second to uncertainties about how the criteria would be applied in practice.

With respect to financial abuse, the LCO heard from select stakeholders that the non-cognitive approach could increase the opportunities for undue influence in the drafting process and wrongdoing after an appointment because it does not require that adults have the ability to understand the nature and consequences of the appointment. ACE, for example, submitted to the LCO that

Fundamentally, we understand that the non-cognitive capacity threshold accepts that an adult decision-maker need not have the ability to understand the nature or consequences of a decision in order for binding legal effect to be given. While we disagree with approach in principle, we also believe it creates an increased risk of financial abuse.¹⁸³

The disability community acknowledges the increased risks presented by the *Representation Agreement Act* and the legislation contains enhanced protections that adults are obliged to use to offset them.¹⁸⁴ The safeguard that differs most notably from arrangements in other jurisdictions is the requirement that an adult appoint a monitor, unless the representative is a spouse, the Public Guardian and Trustee, a trust company or a credit union. A monitor is also not compulsory if the adult has at least two representatives who must act unanimously in exercising their powers.¹⁸⁵

...[C]riteria reflected in the [BC] Representation Agreement Act would allow adults who otherwise might not be able to personally appoint someone as an RDSP plan holder. However, significant reservations about these criteria that were brought to our attention should be considered if this option is to be implemented in Ontario.

According to the Public Guardian and Trustee for British Columbia, complaints regarding RAs are not prevalent and no more frequent than those concerning POAs. Nor has there been “a significant case taken to court regarding financial exploitation by a representative”.¹⁸⁶ Furthermore, in this project, we propose measures to safeguard beneficiaries against financial abuse that could be effective regardless of whether the capacity criteria are cognitive or non-cognitive. This is because each of our recommendations is premised on a process that is more approachable at the front-end.

Certain other reservations that ACE and other stakeholders have articulated are, however, unique to a process that relies on the non-cognitive approach. They relate to the practical application of the criteria, which ACE characterizes as “both so broad as to be potentially meaningless and so complex as to be impractical”.¹⁸⁷ The LCO received multiple comments that these criteria are a source of tension in British Columbia. Notably, estates and trusts lawyers who assist adults with future planning tools have been hesitant to embrace RAs because “the legal community has been concerned that the test in the representation agreements is vague”.¹⁸⁸

Determining an adult’s communication of “preferences”, the expression of “feelings of approval” and the existence of a relationship “characterized by trust” are all factors that may be difficult to gauge. In practice, a close caregiver who has intimate knowledge of the adult’s way of communicating tends to mediate the process of granting a representation agreement; however, the adult’s instructions could be ambiguous to third parties, such as lawyers and witnesses. ACE notes that “while it is certainly true that caregivers develop these interpretive abilities, [we are] concerned that this proposal will, again, create opportunities for abuse that are impenetrable to review”.¹⁸⁹

The LCO shares these apprehensions, especially as they call into question the adult’s agency in executing an authentic personal appointment that reflects his or her wishes. Stakeholders have proposed that the capacity criteria under the *Representation Agreement Act* be fine-tuned to provide clarity to third parties before they are adopted in Ontario. By way of example, a “relationship that is characterized by trust” could be qualified by its having been ongoing for a minimum number of years.¹⁹⁰ We believe that such modifications could be pursued, given the predominant view that RAs are advantageous to adults with disability seeking to establish an RDSP. However, as a first position, we recommend that the Ontario government consider an approach to deciding the capacity criteria for a streamlined process that is more consistent with cognitive standards that are already in use in our province, as discussed below.

Capacity to Choose an RDSP Legal Representative: The Common Law Test of Capacity

Although the British Columbia model is well-liked in the disability community, the LCO recommends that the Ontario government first consider a threshold for capacity that is more in keeping with existing, cognitive standards in the Province. Specifically, we suggest that a standard that is adapted from the common law threshold for a POA could be accessible to RDSP beneficiaries.

The cognitive standard that best responds to the needs of RDSP beneficiaries would be one that can reach the greatest number of individuals, who have diverse experiences with disability. The LCO’s discussion paper reviews a number of cognitive standards that are used in Canadian provinces and territories for personal appointments, such as supported decision-making authorizations, self-designated trusts and continuing POAs. For the most part, they mirror the definition of capacity at common law to make a POA, which simply demands that the grantor has the ability to understand and appreciate the nature and consequences of the appointment.

However, the threshold for capacity to enter into different types of decision-making arrangements based on the common law standard can be more or less stringent because

Although the British Columbia model is well-liked in the disability community, the LCO recommends that the Ontario government first consider a threshold for capacity that is more in keeping with existing, cognitive standards in the province.

“the requisite capacity to enter into legal transactions varies according to the type of transaction”.¹⁹¹ What an adult must be able to understand and appreciate depends on multiple considerations that include the authority awarded to the legal representative, the relative complexity of decisions and the area of decision-making (e.g., medical treatment, real estate, the RDSP).

Supported decision-making authorizations provide an example. Government representatives in the Yukon and Alberta, where supported decision-making authorizations are available, have indicated that these arrangements were created in order to respond to ideological concerns about definitions of capacity voiced in the disability community.¹⁹² Supporters can participate in activities such as receiving confidential information, giving advice and communicating decisions. They are seen as particularly beneficial in the healthcare context, where an adult may want a spouse, parent or other person to be involved in sensitive decisions.¹⁹³

However, supporters are prohibited from making decisions on an adult’s behalf and a decision made or communicated with assistance is considered to be that of the adult.¹⁹⁴ As a result, the capacity requirements for supported decision-making authorizations are elevated: they are available only to “adults who can make their own decisions with some help”.¹⁹⁵ For the RDSP, a supporter’s help would need to be sufficient to enable an adult to enter into a contract with a financial institution him or herself.

...[T]he basic common law test can be tailored to be more accessible to RDSP beneficiaries.

Family members and advocacy groups in the community of persons with psychosocial disability, such as schizophrenia, said that an adult’s capacity to make decisions about the RDSP with some help could fluctuate over time. They, along with parents of adults with developmental disability, were ambivalent as to whether their loved ones would be able to meet the threshold for capacity to grant this type of appointment.¹⁹⁶ Moreover, the LCO met with and heard about other adults with significant impairments, who would not likely be able to understand and appreciate essential terms of the RDSP, which would be required under the basic common law test.¹⁹⁷

Nevertheless, the basic common law test can be tailored to be more accessible to RDSP beneficiaries. The Law Reform Commission of Nova Scotia has observed, “For a limited [enduring POA], the test for capacity is whether the donor understands the nature and effect of the more limited powers granted”.¹⁹⁸ In the case of the RDSP, Saskatchewan has recommended that adults use a “special limited” POA to appoint an RDSP plan holder based on the province’s existing legislation, which contains a threshold for capacity that reflects the simplicity of the common law. The Ministry of Justice and Attorney General has suggested that the scope of the attorney’s powers under a special limited POA be restricted to those of a plan holder who can set up an RDSP, consent to contributions and make investments but who cannot take money out of the RDSP.¹⁹⁹

In a booklet released to the public, the Ministry explains that the test of capacity

sets a low threshold. In other words, if a person understands that he or she is signing a paper that appoints a parent as attorney to create a savings account, there would be sufficient understanding to give capacity to sign the power of attorney.²⁰⁰

The Public Guardian and Trustee for Saskatchewan informed the LCO that its guidance to the public was intended to make POAs more accessible for adults with disability. Additionally, restrictions on the attorney’s authority would serve to limit the opportunities for abuse in circumstances where the beneficiary may be unable to detect wrongdoing.²⁰¹

Ontario’s definition of capacity to give a POA for personal care provides another example of a variation on the common law test. It consists of flexible criteria, which tie the personal appointment to the existence of a trusting relationship between the grantor and the attorney. We compared the SDA provisions concerning POAs for property and personal care in this report, above at pages 18 to 19. The threshold for capacity to grant a POA for personal care reads

Capacity to give power of attorney for personal care

47. (1) A person is capable of giving a power of attorney for personal care if the person,
- (a) has the ability to understand whether the proposed attorney has a genuine concern for the person’s welfare; and
 - (b) appreciates that the person may need to have the proposed attorney make decisions for the person.²⁰²

Community Living Ontario, an organization that provides advocacy support to persons with intellectual disability, advised the LCO that it consistently encourages the use of Ontario’s criteria to give a POA for personal care among its membership, and that they would be appropriate in these circumstances.²⁰³ The CACL has stated that the same provisions have extended the right to choose a substitute decision-maker “to persons who would likely not previously have been regarded as capable of granting a power of attorney”.²⁰⁴ Furthermore, in written submissions to the LCO, ACE proposed that that a personal appointment for RDSP beneficiaries be worded similarly.²⁰⁵

The Saskatchewan approach and Ontario’s definition of capacity to give a POA for personal care offer two potential adaptations of the common law test to grant a POA that could improve access for adults wishing to personally appoint someone to establish an RDSP. Arguably, because they are based on cognitive criteria, they might be less accessible to adults with disability who have unique ways of expressing themselves than, for instance, the *Representation Agreement Act*. On the other hand, a threshold for capacity that is more compatible with existing, cognitive standards in the Province would create an option for incremental change that the LCO believes could still empower adults to participate in the RDSP to a much greater extent.

The Law Commission of Ontario recommends that

2. The criteria to grant and revoke the personal appointment identified in Recommendation 1 be based on the definition of legal capacity to grant and revoke a power of attorney at common law, which requires that the grantor have the ability to understand the nature and consequences of the appointment.
3. If the Government of Ontario believes that the criteria to grant and revoke the personal appointment proposed in Recommendation 2 are not sufficiently flexible to improve access to the RDSP, the criteria be based on the definition of legal capacity to make a representation agreement under s.8(2) of the British Columbia *Representation Agreement Act*, which consists of factors including the communication of a desire to have a representative, the expression of approval and the existence of a relationship with the representative that is characterized by trust.

4. *Countering the Increased Opportunities for Financial Abuse*

The less stringent the test is to determine whether an individual is capable to appoint a representative/decision making support person, the more protections should be in place to ensure that the representative is offering proper decision making support to the person and that the representative is not in any way abusing their authority.²⁰⁶

Authorizing a person to assist or make decisions on behalf of another creates an opportunity for mistreatment because “[t]he corollary of trust and power is that it always creates a potential for abuse”.²⁰⁷ Unfortunately, in the financial sector, many of the same tools that are introduced to promote security for persons with disability can also be exploited to their disadvantage. Financial abuse can occur through a range of activities, such as withholding funds, cashing investments without consent, pressuring an adult to make expenditures and, generally, making decisions in a manner that has detrimental consequences.²⁰⁸

The RDSP can attract significant wealth. Before investment income, private contributions to an RDSP can total \$200,000 and the federal government’s grants and bonds can total \$70,000 and \$20,000 per beneficiary, respectively, depending on factors such as income and contributions. There is a general perception among stakeholders that the amount of RDSP savings could be alluring to self-interested individuals, who might trick, threaten or persuade beneficiaries into naming them as their RDSP legal representative.

Unfortunately, in the financial sector, many of the same tools that are introduced to promote security for persons with disability can also be exploited to their disadvantage.

Consequently, although participants whom we consulted believe that adults should be able to choose their own RDSP legal representative, many were uneasy about the heightened risks that result from adopting less stringent criteria to grant a personal appointment. The mother of an adult with disability explained,

It is not that we want to deny the possibility [for adults] to choose, it is that we want, in some way, to protect them so that when the time comes for them to have a need for their money, they have access to the money.²⁰⁹

The LCO has sought to recommend criteria for a personal appointment that provide an indication that adults are executing the document willingly and that they are able to ascertain whether an RDSP legal representative is a suitable person. However, inasmuch as they are less stringent than Ontario’s existing requirements under the SDA, we agree that enhanced protections are indispensable to securing RDSP beneficiaries’ rights to live in safety.

In this section, we recommend that existing safeguards against financial abuse found in the SDA be applied to a streamlined process for RDSP beneficiaries as well as supplementary protections, which consist of restricting the scope of an RDSP legal representative’s authority.

Existing Safeguards against Financial Abuse under the SDA

Ontario’s existing safeguards against financial abuse are relatively comprehensive when compared to other Canadian jurisdictions. The SDA contains measures for sustained protection from formalities in executing an appointment through to government interventions where harm is suspected.

An adult who names an RDSP legal representative should be awarded at least the same protections as a person who has an attorney acting under a POA for property. Therefore, we recommend that the Government of Ontario consider incorporating the following provisions, regarding powers of attorney, into a streamlined process for the RDSP:

1. Executing an Appointment: POAs are executed privately. Without the benefit of the OPGT or court oversight, the SDA requires that two witnesses sign the POA. The SDA prohibits certain persons from acting as witnesses, including minors, an adult’s child and a spouse or partner of the adult or the attorney.²¹⁰

An adult can appoint one or more persons as attorneys. If more than one person is appointed, the attorneys must make decisions jointly unless the POA says that they can act separately. Giving attorneys the opportunity to make decisions separately guards against interruptions in representation that can be expected from temporary absences, such as sickness or vacations, or for unexpected reasons.²¹¹ A substitute attorney can also be named to avoid an adult being “left with no one to manage [his or her] financial affairs”²¹² if the primary attorneys are unavailable. Having multiple attorneys, or a substitute, can also safeguard against the POA being automatically terminated where an attorney dies, becomes incapable of managing property or resigns.²¹³ Moreover, adults can execute multiple POAs to come into effect upon the termination of another POA.²¹⁴

2. Responsibilities Following an Appointment: Attorneys are fiduciaries “whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person’s benefit”.²¹⁵ The Office of the Public Guardian and Trustee has explained that “the most important goal in performing [the role of a substitute decision-maker] is to maximize the quality of life of the incapable person”.²¹⁶

Attorneys have a duty to take an adult’s comfort and well-being into account, and to manage his or her finances in a manner that is consistent with personal care decisions.²¹⁷ An adult’s choice of residence, desire to purchase clothing and food or even take a vacation are all personal care decisions. The attorney’s role is to realize these preferences by arranging an adult’s finances accordingly.²¹⁸

Attorneys must encourage an adult to participate in decision-making, to the best of his or her abilities, and foster regular contact between an adult and supportive family members and friends. They must also consult periodically with an adult’s family, friends and caregivers.²¹⁹

3. Accountability and Intervention: Attorneys must maintain accounts of all transactions involving the adult’s property.²²⁰ An application may be made to the courts to “pass” the accounts in order to permit those who are concerned about the administration of the adult’s property to have it reviewed by an external arbiter.²²¹ The court has broad powers during the passing of accounts, including appointing the OPGT or another person pending the determination of the application and ordering that a POA be terminated.²²²

The OPGT has an obligation to investigate all allegations that an adult is incapable of managing property and that serious adverse effects are occurring or may occur.²²³ A member of the public, a bank employee, a government agency or any other individual or organization could make such an allegation. If the results of the investigation demonstrate reasonable grounds to believe that an adult is incapable and that a temporary guardian is required to prevent serious adverse effects, the OPGT must apply to the court to be named as a temporary guardian.²²⁴

The SDA gives the OPGT significant discretion in taking steps to conduct its investigation. During the investigation, the OPGT is entitled to access records relating to the adult in the control of a range of individuals and organizations, including a bank, credit union or other financial institution.²²⁵

4. Revoking an Appointment: An adult can unilaterally revoke a POA under the SDA, where he or she is able to meet the very same threshold for legal capacity required to make the appointment.²²⁶ For a streamlined process, the LCO

suggests that this would be equivalent to the common law threshold for capacity to make a POA. Should the Government of Ontario believe section 8(2) of the *Representation Agreement Act* is the appropriate threshold for legal capacity to make a personal appointment, it would also be the threshold to revoke the personal appointment.

Supplementary Protection: Restricting the Scope of an RDSP Legal Representative's Authority

The LCO understands that there is a strong desire for safeguards that supplement Ontario's current framework. During our consultations, we received input from legal professionals, advocacy organizations and government representatives that the most effective means to achieve this goal would be to restrict the scope of an RDSP legal representative's authority.²²⁷ The LCO believes that confining an RDSP legal representative's authority to areas of minimal vulnerability would preserve an adult's autonomy to establish an RDSP, while also providing protections against financial abuse.

The greatest areas of vulnerability in RDSP transactions are the management of funds that have been paid to the RDSP beneficiary and, to a lesser degree, requests for one-time withdrawals. As mentioned previously, funds paid out of an RDSP can be used for any purpose. Should the scope of an RDSP legal representative's authority extend beyond that of a plan holder to managing these funds, the risks of financial abuse and mismanagement could be substantial. Furthermore, withdrawing funds from an RDSP before mandatory payments begin could carry penalties that reduce an adult's entitlement to government grants and bonds. Depending on the applicable rules under the ITA, one-time withdrawals could also deplete an adult's savings before his or her lifetime disability assistance payments are exhausted.²²⁸

The greatest areas of vulnerability in RDSP transactions are the management of funds that have been paid to the RDSP beneficiary and, to a lesser degree, requests for one-time withdrawals.

In our discussion paper for the project, we reviewed a range of innovative safeguards with a view to minimizing the risks of financial abuse in these major areas of vulnerability. They included measures such as the use of mandatory forms and information, limitations on withdrawals after a specified amount, and the appointment of a private monitor to advocate on an adult's behalf. There are, however, serious limitations in the available literature evaluating the alternatives that we reviewed. Moreover, our own consultations with experts in Canada and abroad were inconclusive as to whether they would have the desired effect of improving upon Ontario's existing framework. The LCO's larger project on *Legal Capacity, Decision-Making and Guardianship* will address issues relating to safeguards under the SDA, including awareness of the law, monitoring mechanisms and redress. For the purposes of the RDSP project, however, we believe that the most appropriate response is to reduce the areas of vulnerability that self-interested individuals could exploit.

Specifically, we recommend that an RDSP legal representative appointed under the streamlined process be permitted to open and manage funds in an RDSP but not to receive or manage funds paid out of an RDSP. Adults who appoint an RDSP legal representative would thus have a plan holder who could set up the plan, consent to contributions, apply for government grants and bonds, decide investments and request withdrawals on the beneficiary's behalf.

Although we do recognize that last area of decision-making (requesting withdrawals) is an area of heightened vulnerability, we question whether a plan holder's authority should be restricted in this respect. To do so would not serve adults who use the RDSP as a contingency plan throughout their lives, rather than for long-term savings. Additionally, financial institutions told the LCO that it could conflict with their operational constraints and, therefore, limit an RDSP beneficiary's choice of service provider. Most, if not all, financial institutions include one-time withdrawals as a standard term of contract. Offering two types of contracts would necessitate additional training, costs and internal monitoring of staff to confirm the proper contract is being offered. Several financial institution representatives informed the LCO that limiting a plan holder's authority to request withdrawals would be unworkable.²²⁹

Nevertheless, the LCO believes that when an RDSP legal representative wishes to request a withdrawal on a beneficiary's behalf, additional protections are required. Because the RDSP legal representative's authority is limited to that of a plan holder, he or she would not be able to act for the beneficiary if the latter lacked capacity to manage the withdrawal. Instead, the regular regime for managing property under the SDA would apply. It is important, therefore, that the beneficiary's capacity to manage the withdrawal be taken into account. Otherwise, should an RDSP legal representative request that a payment be made in these circumstances, the adult could have difficulty making prudent expenditures or be at risk of financial abuse.

As a consequence, we recommend that RDSP legal representatives have a duty to formulate an opinion with respect to the adult's capacity to manage his or her funds prior to requesting withdrawals. If the RDSP legal representative has reasonable grounds to believe that the adult is capable of managing the payment out of the RDSP, he or she should be required to provide a financial institution with a signed statement attesting to this opinion at the time of the request. On the other hand, if the RDSP legal representative has reasonable grounds to believe that the adult is not capable of managing the payment, he or she should be required to either not request the payment or consider all options available under the *Substitute Decisions Act, 1992*, as appropriate.

The options under the SDA include requesting a capacity assessment, applying for guardianship as a last resort and making an allegation to the OPGT under s.27 of the SDA. Under s.27 of the SDA, the OPGT must investigate any allegation that a person is incapable of managing property and that serious adverse effects are occurring or may occur. The OPGT must also apply for a court order to become an adult's temporary guardian of property if, as a result of the investigation, the OPGT has reasonable grounds to believe that the adult is incapable of managing property and the prompt appointment of a temporary guardian is necessary to prevent serious adverse effects.²³⁰

We propose that placing a duty on RDSP legal representatives to examine an adult's capacity to manage funds, prior to requesting a withdrawal, and to act according to options available under the SDA could achieve greater security for beneficiaries through a measure that is easy to implement.

It is also important to note that all beneficiaries have the full enjoyment of safeguards that the federal government integrated into the design of the RDSP program, which apply to the management of funds inside the RDSP. These include the following requirements under the *Income Tax Act*:

1. Mandatory Payments: Payments from the RDSP are mandatory beginning at age 60. The Minister of Finance's Expert Panel recommended that LDAPs commence at a certain point in time due to the "legitimate concern that the tax deferral benefit of [the RDSP] not be abused by permitting a multi-generational transfer of tax deferred income".²³¹ This could occur if the plan holder restricts or the beneficiary foregoes payments so that another person receives a refund of contributions after the beneficiary's death. Private contributions are also prohibited from being returned once they are deposited into an RDSP.²³²

2. Calculation of Payment Amounts: LDAPs are to be calculated on a strict formula that is intended to distribute the beneficiary's funding evenly over the course of his or her remaining lifetime.²³³ In recommending this safeguard, the Expert Panel explicitly took into account that "permitting the Beneficiary or Guardian unlimited access to the [RDSP] might result in the Plan being exhausted long before the Beneficiary's lifetime needs had been fulfilled".²³⁴ Depending on the RDSP terms, plan holders can request one-time withdrawals before or after LDAPs commence. Beneficiaries can also request one-time withdrawals from the ages of 27 to 58, inclusive, provided that the total of government contributions is greater than private contributions. The amount of these one-time withdrawals is also limited under the ITA, albeit in some circumstances there may be no maximum amount.²³⁵

3. Designation of a Beneficiary upon Death: When an RDSP beneficiary dies all remaining government grants and bonds from the preceding 10 years must be repaid and any remaining funds are to be paid out according to the beneficiary’s own instructions in a will or intestacy rules.²³⁶ Like mandatory payments, this creates a disincentive against withholding funds during the beneficiary’s lifetime because the estate does not automatically revert to the plan holder.

4. Compliance Measures: Financial institutions must notify ESDC and the Canada Revenue Agency if they are aware that the RDSP is or is likely to become non-compliant.²³⁷ An RDSP does not comply with plan conditions if it is not “operated exclusively for the benefit of the beneficiary under the plan” or if it is not operated in accordance with the plan terms.²³⁸ The CRA’s Registered Plans Directorate also has a Compliance Division that conducts random audits and follows up with financial institutions to address discrepancies that are uncovered or reported. However, it does not have the resources to monitor every RDSP financial transaction, nor is it the division’s mandate.²³⁹

Participants in the LCO’s consultations who submitted that an RDSP legal representative’s authority should be restricted to that of a plan holder under a personal appointment belong to the community of individuals and organizations that advocate on behalf of adults with disability, including ARCH Disability Law Centre, CLO, CACL, PooranLaw, ACE and the Ontario Agencies Supporting Individuals with Special Needs (OASIS). It should also be recalled that the Ministry of Justice and Attorney General for Saskatchewan endorsed a like approach (see page 36 to 38, above, “Capacity to Choose an RDSP Legal Representative: The Common Law Test of Capacity”). In written submissions to the LCO, ACE encapsulates the reasons for the LCO’s recommendations succinctly:

“Because plan holders do not have access to, or manage, funds paid out of the RDSP, there is little risk of self-dealing or financial abuse.”

- Advocacy Centre for the Elderly

Plan holders do not have authority to manage money once paid out of the RDSP to the beneficiary. Because plan holders do not have access to, or manage, funds paid out of the RDSP, there is little risk of self-dealing or financial abuse. The benefit of grantors allowing plan holders to establish an RDSP and apply for government funds is significant. In these circumstances, the balancing of autonomy and the prevention of abuse plainly favours allowing personal appointments of plan holders at a lower cognitive capacity threshold....²⁴⁰

We discuss further reasons for our recommendation that the scope of an RDSP legal representative’s authority be restricted to that of a plan holder in the following section, which is devoted to issues surrounding the RDSP legal representative’s role and responsibilities.

The Law Commission of Ontario recommends that

4. The personal appointment process identified in Recommendation 1 incorporate the following features:
 - a. The execution requirements for the personal appointment be the same as for a power of attorney for property under s.10 of the *Substitute Decisions Act, 1992*, which requires that the document be executed in the presence of two witnesses, who must sign the document. The following persons be prohibited from being witnesses: the RDSP legal representative, the grantor's spouse or common-law partner, the grantor's child, persons who have property under guardianship and minors.
 - b. The grantor have the same protections against financial abuse found in ss.7, 8, 27, 32, 33, 39, 42 and 83 of the *Substitute Decisions Act, 1992*. These protections include permitting adults to appoint more than one RDSP legal representative or a substitute, in the event the primary RDSP legal representative is unavailable; requiring RDSP legal representatives to maintain accounts of transactions; allowing an application be made to the Superior Court of Justice to pass accounts and obliging the Office of the Public Guardian and Trustee to investigate allegations that an adult is incapable of managing property and that serious adverse effects are occurring or may occur. In addition, all beneficiaries have the protection of provisions under the ITA that regulate the management of funds in an RDSP, such as mandatory lifetime payments, the calculation of payment amounts and compliance measures.
 - c. The RDSP legal representative have authority to open and manage funds in an RDSP, including consenting to contributions, deciding investments, applying for grants and bonds, and requesting that payments be made to the adult; however, he or she be prohibited from receiving and managing funds paid out of the RDSP on the adult's behalf.
 - d. The RDSP legal representative be required to formulate an opinion with respect to the adult's legal capacity to manage the payment out, prior to requesting that payments be made to the adult. If the RDSP legal representative has reasonable grounds to believe that the adult is capable of managing the payment out, he or she be required to provide the financial institution with a signed statement of that opinion at the time a payment is requested. If the RDSP legal representative has reasonable grounds to believe that the adult is not capable of managing the payment out, he or she shall either not request the payment out or shall consider all options available under the *Substitute Decisions Act, 1992*, as appropriate.

5. *The RDSP Legal Representative's Role and Responsibilities*

Opening and Managing Funds in an RDSP

Plan holders are the principal decision-makers for an RDSP. They are responsible for opening the RDSP and deciding how funds in the plan will be managed before they are received by the beneficiary. Our project seeks to improve access for adults with disability who have been unable to participate in the RDSP because there are concerns about their legal capacity to enter into a contract with a financial institution required to establish a plan. Accordingly, we recommend that an RDSP legal representative appointed under a streamlined process for beneficiaries in Ontario carry out the role and responsibilities of a plan holder, subject to stipulated terms in each plan (see **Figure 2: How to Open and Manage an RDSP under the *Income Tax Act***).

There are, however, some stakeholders who would prefer to see an RDSP legal representative's authority limited to a partial plan holder, while others would like to see it expanded to include managing funds paid out of an RDSP. In the previous section, we

briefly explained our reasons for recommending that an RDSP legal representative's authority correspond to that of a plan holder as a safeguard against financial abuse. In this section, we address further reasons for our view that this authority should not be expanded beyond that of a plan holder, which relate to the nature of RDSP funds after they are paid out of the plan.

Decision-making about funds in an RDSP is different from day-to-day financial management. Adults who are unable to select mutual funds for the RDSP may not have a parallel need in purchasing food or assistive devices or in paying rent. Throughout this report, we have related stories that adults with disability and their family and friends shared with us about how unique the RDSP is in this respect and, in particular, how they have been able to “muddle through” making decisions together without applying for guardianship before encountering the RDSP. Advocacy organizations and legal practitioners submitted to the LCO that appointing an RDSP legal representative with powers beyond those of a plan holder would unduly intrude on a beneficiary's autonomy and self-determination.²⁴¹

However, the LCO has heard that some beneficiaries may not be able to manage funds paid out of the RDSP. If an RDSP legal representative can only manage funds while they remain in the plan, beneficiaries who are unable to make their own decisions with help would be required to apply for guardianship through the very process that they have declined to follow to date. This could result in a piecemeal solution, they say, that does not respond to beneficiaries' needs and could increase vulnerability to financial abuse, should a guardian not be appointed.²⁴²

Decision-making about funds in an RDSP is different from day-to-day financial management. Adults who are unable to select mutual funds for the RDSP may not have a parallel need in purchasing food or assistive devices or in paying rent.

Because financial institutions do not have the means to trace how funds are used once they are paid out of the RDSP – and do not feel they have an obligation to do so – they would also hope to see the scope of an RDSP legal representative's authority include the ability to provide a valid receipt and discharge when funds are released. Similar to opening an RDSP and deciding plan terms, paying funds out to an RDSP beneficiary is a type of transaction that raises concerns about liability for financial institutions. In order to ensure compliance with the plan conditions, for which they are responsible under the ITA, financial institutions must direct RDSP payments to the beneficiary or a legally authorized person.²⁴³

The LCO heard from financial institutions that where they have reason to believe that adults lack sufficient legal capacity to manage their funds, they would withhold payment until a legally authorized person can receive them and give a binding discharge. Therefore, expanding the scope of an RDSP legal representative's authority beyond that of a plan holder could potentially relieve financial institutions from assessing a beneficiary's capacity at multiple junctures, when releasing one-time payments and LDAPs.²⁴⁴ In a written submission to the LCO, the Canadian Bankers Association provides a helpful explanation of its position:

The Income Tax Act provides that payments from the RDSP while the beneficiary is alive can only be made to the beneficiary. For a not contractually competent beneficiary, this means that there has to be a legal representative in existence to give a receipt and discharge for the payments. Expanding the class of persons who can be the holder of RDSPs for beneficiaries to a greater number of persons who are not the legal representative of the beneficiary only delays the problems issuers will face when it comes time to pay out from RDSPs. Any expansion of the provincial law to cover who can open an RDSP for a not contractually competent beneficiary should also make that person the legal representative for funds of the RDSP once they come out of the plan and are in use. It will be practically impossible to trace funds once they come out of an RDSP so this means the legal representative who can open and operate an RDSP should also be the legal representative of the beneficiary for all property purposes.²⁴⁵

The LCO acknowledges that there are legitimate reasons for extending the scope of an RDSP legal representative's authority beyond that of a plan holder. However, we believe

that adults who require more than informal supports to manage their payments could need a comprehensive arrangement for property management that goes beyond the scope of this project on the RDSP.

Expanding an RDSP legal representative's authority could produce a disparity among decision-making regimes in Ontario that deal with assets, which are substantially the same. Once funds leave an RDSP, they become assets like any other asset. They could be used for small expenditures, reinvested or put toward the purchase of sizeable property. Ordinarily, adults would be required to grant a POA pursuant to the SDA to authorize a person to manage these affairs and adults who are unable to do so would be required to apply for guardianship. To extend the scope of an RDSP legal representative's authority would entitle beneficiaries to personally appoint what is, in effect, an attorney for general property management through a less stringent process.²⁴⁶

Insofar as establishing an RDSP is time-sensitive, we do believe it is reasonable to make the criteria for a personal appointment less stringent to improve access at the front-end: having a plan holder would enable adults to begin saving and apply for government grants and bonds. However, as a matter of fairness, there does not appear to be a principled basis for extending a streamlined process to the back-end at the stage of general property management. Adults who are *not* RDSP beneficiaries may also experience challenges with Ontario's existing framework to grant a POA or apply for guardianship. They may be persons with disability or older adults who likewise need another person to manage their assets. Nevertheless, they would not be entitled to a streamlined process, simply because they do not have an RDSP. The LCO's larger project on *Legal Capacity, Decision-Making and Guardianship* reviews issues surrounding the accessibility of appointment processes under the SDA for all Ontarians, which could also be advantageous to beneficiaries in receipt of RDSP payments.

The LCO's larger project on Legal Capacity, Decision-Making and Guardianship reviews issues surrounding the accessibility of appointment processes under the [Substitute Decisions Act, 1992] for all Ontarians, which could also be advantageous to beneficiaries in receipt of RDSP payments.

Given the freedom to use RDSP funds for any purpose, it is also unclear to the LCO where an RDSP legal representative's role would end. Consider the example of purchasing a house. After the house has been paid for, who would have authority to administer related costs? Would the RDSP legal representative be obliged to manage the adult's taxes? Would he or she have authority to sell the house? If so, who would manage the proceeds of sale? If not the RDSP legal representative, would the adult be left to do so unaided? Uncertainties about the reach of an RDSP legal representative's authority arise with respect to countless examples (e.g., investments, motor vehicles), and the LCO believes that resolving them would have policy implications far beyond the RDSP.

More importantly, however, these questions reveal that adults who require more than informal supports to manage their payments could have a real need for a comprehensive arrangement. In contrast to government benefits, such as ODSP, funds from an RDSP likely constitute an additional source of income for adults with disability. Arguably, a legal representative could be authorized to manage funds on an adult's behalf under procedures that are fragmented across sources of income. However, this approach would leave adults with disability to navigate a multiplicity of rules that could look quite different in each case. It could also cause conflicts about tracing and the co-mingling of funds.

Consequently, the LCO believes that extending the scope of an RDSP legal representative's authority in Ontario could result in confusion and inefficiencies that can otherwise be avoided through the appointment of a guardian. Guardians are a source of comprehensive decision-making for property management that adults and their supporters can turn to when in need and they are presently the most suitable decision-makers for beneficiaries who are unable to manage their funds with help. ARCH Disability Law Centre's comments encapsulate our view:

There are two possible scenarios. In one, the individual is capable to manage their day to day expenditures, but requires help to manage their RDSP. In such cases, while a representative may be required to offer decision making supports when it comes to

the management of the RDSP, the person should be able to continue to manage their private funds unless there is clear evidence that they are unable to do so. In the second example, the individual is incapable of managing their finances. In such a situation, the person would either already have a guardian who would exercise control over the payments from the RDSP or a guardian could be appointed through the existing processes if such support was found to be necessary.²⁴⁷

The separation of a legal representative's role and responsibilities with respect to applying and deciding the terms for a social benefit, on the one hand, and receiving and managing payments, on the other, has precedents in a number of programs, including the Canada Pension Plan, Australia National Disability Insurance Scheme and Community Living British Columbia individualized funding program.²⁴⁸ As indicated above, the LCO also heard from representatives of government, legal clinics and the community of persons with disability who prefer this solution.²⁴⁹ We agree, in particular, with the remarks of stakeholders to the effect that "there will generally be an adequate time period between opening an RDSP and the first payout for other property decision-making arrangements to be made, if necessary".²⁵⁰

Finally, we would reiterate that our larger project on *Legal Capacity, Decision-Making and Guardianship* investigates a range of alternatives to guardianship for Ontarians that beneficiaries could potentially use for payments made out of an RDSP in the future, including simplified processes to apply for guardianship, supported and co-decision making models, and formalized community networks. Our research and consultations on these issues are ongoing and we anticipate our final report in the larger project will be released in 2016 before the federal government's temporary measures expire at the end of December 2016 (see Chapter I.C.2, "The Federal Government's 2011 Review of the RDSP and Subsequent Activities"). In the interim, the LCO welcomes feedback from members of the public on a discussion paper for the larger project that was disseminated in May 2014.

Including adults in decision-making activities that affect them, after an RDSP legal representative is appointed, can have a positive effect on their sense of personhood, human dignity and quality of life.

Duties and Standard of Care

The benchmarks for reform in this project accept that people exist along a continuum of abilities and that decision-making is social and dynamic. Including adults in decision-making activities that affect them, after an RDSP legal representative is appointed, can have a positive effect on their sense of personhood, human dignity and quality of life. Therefore, the LCO recommends that RDSP legal representatives be required to fulfill set duties in discharging their role and responsibilities and be held to a standard of care.

Under the ITA, an RDSP "is to be operated exclusively for the benefit of the beneficiary" and plan holders must manage funds in an RDSP according to specific rules about the amount and timing of payments to the beneficiary.²⁵¹ In Chapter IV.C.4 of this report, we reviewed these provisions alongside the duties of attorneys for property under the SDA, which include encouraging an adult to participate in decision-making, to the best of his or her abilities; taking an adult's comfort and well-being into account; keeping accounts and managing an adult's finances in a manner that is consistent with personal care decisions. Attorneys for property must "exercise the degree of care, diligence and skill that a person of ordinary prudence would exercise in the conduct of his or her own affairs".²⁵² They can be held liable for breaching a duty but can be relieved of all or part of the liability if they "acted honestly, reasonably and diligently".²⁵³

The LCO has recommended that an RDSP legal representative have the duties of an attorney for property under the SDA, as applicable, and be held to the same standard of care. Our discussion paper for the project did analyze the provisions of the SDA against laws in other jurisdictions in response to dissatisfaction expressed by advocacy organizations with existing requirements to engage adults in decision-making activities. They, as do some commentators, suggest that decision-making laws incorporate different obligations in order to make an adult's participation meaningful. Specifically, they argue for a shift in the focus of a legal representative's role from one of substitute decision-making to support and advocacy.²⁵⁴

Substitute decision-makers for adults who have been found to be incapable in the areas of personal and health care in Ontario must consider a hierarchy of factors in making decisions, beginning with the wishes or instructions that an adult expressed while capable.²⁵⁵ Other jurisdictions require legal representatives to consult with an adult and to comply with his or her instructions, if it is reasonable to do so. Where an adult's current wishes cannot be ascertained, a legal representative is obliged to take other factors into account, such as an adult's prior expressed wishes. Only as a last resort can a legal representative make decisions on a "best interests" standard, which asks what a reasonable person would do in the adult's circumstances.²⁵⁶

However, there is little empirical evidence of the impacts of these alternative ways of framing a legal representative's duties on an adult's well-being.²⁵⁷ The LCO believes that limitations in the information evaluating these regimes frustrate a thorough assessment as to whether they would improve upon existing standards in Ontario, particularly with respect to the role of an RDSP plan holder. Moreover, our research is ongoing on these questions in the *Legal Capacity, Decision-Making and Guardianship* project, where we believe they will be better addressed by the project scope and generous timeline.

With respect to RDSP beneficiaries, we view our recommendations as setting a high standard, which obliges RDSP legal representatives to realize an adult's preferences for personal care in making financial decisions. Describing the duties of substitute decision-makers for adults who have been found to be legally incapable of property management under the SDA, the OPGT explains,

The most important goal in performing your role is to maximize the quality of life of the incapable person.

You must manage the property in a way that accommodates the decisions made about the incapable person's personal care....You may make a financial decision that overrides a personal care decision **only if** to do otherwise would result in negative consequences with respect to property that **heavily outweigh** the personal care benefits of the decision.²⁵⁸

For more information, we invite you to consult the OPGT information booklet on the duties of guardians and attorneys for adults who have been found to be legally incapable, here: <http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/guardianduties.pdf>.

...[W]e view our recommendations as setting a high standard, which obliges RDSP legal representatives to realize an adult's preferences for personal care in making financial decisions.

The Law Commission of Ontario recommends that

4. The personal appointment process identified in Recommendation 1 incorporate the following features:
 - e. The RDSP legal representative have the duties of an attorney for property under s.32 of the *Substitute Decisions Act, 1992*, as applicable, and be held to the same standard of care. These duties include encouraging an adult to participate in decisions, to the best of his or her abilities; consulting from time to time with an adult's family and friends; and making decisions in a manner that is consistent with an adult's personal care decisions. The standard of care requires RDSP legal representatives to exercise the degree of care, diligence and skill that a person of ordinary prudence would exercise in the conduct of his or her own affairs.

6. Providing Third Parties with Certainty and Finality

As discussed above, the activity of decision-making after an RDSP legal representative is appointed is a social process that should foster an adult's participation, to the best of his or her abilities. Achieving meaningful participation in the activity of decision-making requires that an RDSP legal representative engage with a variety of individuals in order to identify an adult's preferences. Having multiple persons participate in decision-making activities

could, however, cause confusion for third parties who must be able to easily pinpoint those who are authorized to enter into legally binding transactions. Furthermore, third parties may desire protections from liability where they rely on a decision-making arrangement, such as a POA, in good faith but the arrangement was terminated, varied or invalid.²⁵⁹

Financial institutions that issue the RDSP have informed the LCO that they desire certainty and finality from a streamlined process. They would like to be able to reasonably rely on a personal appointment as one that is valid under the law and be able to take binding instructions from an RDSP legal representative, which would protect them in the event of subsequent loss or dispute. According to the Canadian Bankers Association,

Issuers require certainty that a person is the actual legal representative of the beneficiary under the law and that when they deal with that person, they have finality on the instructions and discharge for payments out of the plan. [Financial institutions] should be able to obtain objective proof that a person is the legal representative of the beneficiary and rely on it.²⁶⁰

The LCO heard that two measures could make financial institutions feel secure with a personal appointment.²⁶¹ The first would be the use of a standardized document that would be recognizable to staff who interact with the RDSP legal representative. One bank employee described this measure as follows: “You want to be able to say ‘if I have this piece of paper, I’m okay’”.²⁶² In section D.1, “Accessible Information for Users of the Process”, below, we suggest that the provision of a non-mandatory sample form could be helpful to consumers of a streamlined process as well as to third parties. Here, we recommend that the Government of Ontario consider the second measure proposed by financial institutions, namely, the enactment of clear exemptions from liability where third parties reasonably rely on the instructions of an RDSP legal representative appointed through a streamlined process.²⁶³

...[T]hird parties may desire protections from liability where they rely on a decision-making arrangement, such as a POA, in good faith but the arrangement was terminated, varied or invalid.

Most provinces and territories in Canada contain protections for third parties where they are unaware or could not reasonably have known that a POA is defective or has been terminated. For instance, under the SDA, when a POA is terminated or becomes invalid, any subsequent exercise of power by the attorney in entering into a transaction with a third party is binding if he or she acted in good faith and without knowledge of the termination or invalidity. This protection equally applies if a POA is ineffective because a prohibited person witnessed its execution.²⁶⁴ British Columbia, Saskatchewan and jurisdictions outside Canada also protect third parties in situations where a POA is ineffective, more generally, “for failing to meet the requirements of the legislation, including the fact that the donor did not have capacity when they first granted the EPA”.²⁶⁵

The LCO understands that comparable protections in the event of termination, variation and invalidity could be advantageous in the context of the RDSP because they could make financial institution staff feel comfortable taking instructions from an RDSP legal representative, where the document appears to be valid.²⁶⁶ Such measures would not, however, protect third parties from liability where they have acted unreasonably in relying on a personal appointment. The Supreme Court of Canada has held that banks can be liable for damages if they know or suspect that an attorney is misappropriating funds or exceeding the authority granted under a POA.²⁶⁷ Therefore, the LCO recommends that exemptions from liability under a streamlined process only go so far as to protect third parties who have reasonably relied on a personal appointment. In the language of the SDA, the person must have acted “in good faith and without knowledge of the termination or invalidity”.²⁶⁸

The Law Commission of Ontario recommends that

5. The Government of Ontario provide third parties with clear exemptions from liability should they rely on a personal appointment made pursuant to Recommendation 1 in good faith and without knowledge that it was invalid at the time it was executed or that it was subsequently terminated, varied or invalidated.

7. Who May Act as an RDSP Legal Representative

An RDSP legal representative must be eligible, available and willing to carry out the duties of a plan holder. During the LCO's consultations, participants identified existing restrictions on who may act as a plan holder in Ontario as a substantial barrier to accessing the RDSP. We heard that the eligibility criteria for RDSP legal representatives under a streamlined process should be as expansive as possible, while continuing to safeguard adults against the risks of financial abuse.

Nearly all of the participants with whom we spoke asserted that beneficiaries should be permitted to choose a "trusted person" as their RDSP legal representative, including a relative, such as a parent, spouse, common-law partner or sibling; a close friend; or a community organization.²⁶⁹ Our discussion in this section relates to how this might be achieved. Specifically, we recommend that eligibility criteria under the SDA, which permit family members and friends to be named in a POA, be extended to include community organizations.

Who Can Be a Plan Holder under the *Income Tax Act* and *Substitute Decisions Act, 1992*

The federal government's temporary amendments to the ITA allow a "qualifying family member" to become a plan holder where in a financial institution's opinion a beneficiary's legal capacity to enter into a contract is "in doubt". Qualifying family members are limited to a narrow class of persons consisting of parents, spouses and common-law partners. If a plan holder is appointed under the ITA's standard eligibility criteria – which will persist after the temporary measures expire – the plan holder can come from beyond this class: a plan holder can be any individual or institution that is legally authorized under provincial law.²⁷⁰

...[T]he RDSP is available to a range of persons with disability, some of whom are socially isolated and rely on a network of community service providers.

In Ontario, an adult can name any person as an attorney under the SDA. Although the SDA does not stipulate that a substitute decision-maker must be a natural person, it is generally accepted that this must be the case, except where the decision-maker is the OPGT or a trust company.²⁷¹ Therefore, a trusted family member or friend can be an attorney but an institution, such as a community organization, cannot.

However, the RDSP is available to a range of persons with disability, some of whom are socially isolated and rely on a network of community service providers. Participants in the LCO's consultations identified older adults, immigrants and persons with psychosocial disabilities as adults with disproportionately low access to close family and friends, who may be in need of a wider range of RDSP legal representatives.²⁷²

The LCO also heard that where family supports are available, they can be unsustainable. As RDSP beneficiaries age to become recipients of lifetime payments, their friends and family age along with them. Although age is not directly correlated with the difficulties that adults face with decision-making, the incidence of cognitive disability, such as Alzheimer's and dementia, increases with age.²⁷³ The parents of an RDSP beneficiary may experience challenges making financial decisions themselves or they may pass away before a beneficiary's payments are exhausted. After all, the RDSP was intended as a means to provide financial security in the *absence* of family supports.

An adult may name the Public Guardian and Trustee in a POA on consent.²⁷⁴ However, the mandate of the OPGT is strictly to make decisions on behalf of adults who have been found to be legally incapable of property management. Based on its mandate, the OPGT may turn away adults who are legally capable of granting a POA but who do not have a trusted person to act as an attorney.²⁷⁵ Moreover, adults may not wish to rely on the OPGT to manage their affairs and it is conceivable that some might simply decline to open an RDSP instead.

Permitting Beneficiaries to Name a Community Organization as an RDSP Legal Representative

The LCO believes that adults who experience social isolation should not be further marginalized by the unavailability of family and friends, and we agree with stakeholders who assert that RDSP beneficiaries should be entitled to name a community organization as their RDSP legal representative.

Organizations are commonly appointed as trustees for ODSP, CPP and OAS, including community agencies, religious organizations and long-term care homes.²⁷⁶ In Saskatchewan, *The Powers of Attorney Act* permits the appointment of corporations, other than trust corporations, as attorneys under a POA. This provision was adopted in 2002, after the Law Reform Commission of Saskatchewan recommended that the appointment of corporate attorneys be allowed, so that advocacy groups and “not-for-profit organizations dedicated to assisting vulnerable adults” would be able to act as attorneys.²⁷⁷ In addition, individualized funding programs, such as Community Living British Columbia, customarily authorize organizations to manage an adult’s direct payments.²⁷⁸

During a consultation with the Ontario Agencies Supporting Individuals with Special Needs, agencies that provide residential and day services to adults with disability across Ontario expressed to the LCO that they would be willing to become plan holders for the populations they serve. Some of these agencies already act as ODSP trustees and are paid by the government to administer a package of services to clients. They told the LCO that they view the RDSP as part of a “holistic approach” to assisting persons who “don’t have anyone else”.²⁷⁹ A staff member reported that of the 1,700 individuals they serve at one agency, “the vast majority would be individuals who have no family or long-term friends”.²⁸⁰ For these adults, “it’s really about a relationship with their agency staff members”.²⁸¹

The appointment of an organization as an RDSP legal representative is, however, more complex than that of a person. Organizations may represent more than one adult at a time, which requires them to keep separate accounts for each individual. They must develop policies to address the delegation of signing authority to staff members interacting with financial institutions, including procedures to inform them if there is a transfer in authority to another staff member.²⁸² Furthermore, conflicts of interest could arise where an organization has a right to compensation for an adult’s food, shelter or other services, while controlling his or her funds.²⁸³

To the extent that the LCO has recommended that RDSP legal representatives should not have authority to receive and manage payments on an adult’s behalf, conflicts of interest relating to expenditures will be minimized. Nevertheless, as an initial screening measure, we recommend that only community organizations that are approved by designated government agencies should qualify to act as RDSP legal representatives for beneficiaries. Government agencies approve organizations to provide services to adults with disability under certain other benefit programs. For instance, programs delivered through the MCSS, such as ODSP and Developmental Services, have detailed quality assurance policies to regulate organizations.²⁸⁴ Organizations that are approved as ODSP trustees and service agencies for Developmental Services must be familiar with these policies and accustomed to accountability requirements, such as keeping separate records.

The LCO recommends that where designated government agencies with relevant quality assurance policies approve a community organization to provide services to adults with disability, the community organization be recognized as eligible to act as an RDSP legal representative. Given that some adults may wish to appoint a community organization that has not sought out this type of qualification in the past, we also recommend that comparable procedures be developed for an entrusted government agency to determine whether the community organization is an appropriate candidate. For example, if an adult would like to appoint a religious organization that does not provide services through ODSP or Developmental Services, the government agency could undertake to assess its

credentials based on specific evaluative criteria. Moreover, the government agency could maintain a running list of approved community organizations that adults could access in order to establish whether the one they wish to appoint has been or must apply to be approved.

The LCO did receive suggestions that an additional limitation should be imposed, namely, that adults be required to appoint a community organization with which they have an established relationship. However, the LCO is of the opinion that adults should be able to select their RDSP legal representative from a broader group because there may be some who do not have an established relationship with a community organization but who still wish to appoint one. Moreover, although an adult may not have a personal connection with a community organization, we believe our proposed screening measures would ensure that community organizations will have valuable experience that can be applied in this context.

Once a community organization has been appointed as an RDSP legal representative, we believe that it should also be obliged to develop and implement an internal management policy that contains measures similar to what is required under the ODSP Directives and *Quality Assurance Regulations* for Developmental Services. Such a policy would address procedures to maintain separate records of transactions respecting a beneficiary's RDSP, to undertake periodic review of the records and to ensure that a suitable employee has clear signing authority to represent the community organization in transactions with a financial institution at all times.

The Law Commission of Ontario recommends that

6. The Government of Ontario recognize that community organizations are eligible to act as RDSP legal representatives where they are approved to provide services to adults with disability through designated Ontario ministries.
7. The Government of Ontario develop and implement a process for a designated government agency to approve the eligibility of community organizations to act as RDSP legal representatives, where they are not approved under Recommendation 6. The government agency be required to maintain a list of approved community organizations.
8. The Government of Ontario require that community organizations appointed as RDSP legal representatives under Recommendations 6 and 7 develop and implement a management policy with procedures to do the following:
 - a. maintain separate records of transactions respecting each beneficiary's RDSP;
 - b. undertake periodic review of each beneficiary's records; and
 - c. ensure that a suitable employee has clear signing authority to represent the community organization in transactions with a financial institution at all times.

8. Terminating the Personal Appointment

The LCO recommends that a personal appointment made under a streamlined process terminate in the same circumstances as a continuing POA under the SDA and also when a statutory guardian or attorney for property is appointed. The SDA provides that a continuing POA is terminated a follows:

Termination

12. (1) A continuing power of attorney is terminated,
 - (a) when the attorney dies, becomes incapable of managing property or resigns, unless,

- (i) another attorney is authorized to act under subsection 7 (5), or
 - (ii) the power of attorney provides for the substitution of another person and that person is able and willing to act;
- (b) Repealed.
 - (c) when the court appoints a guardian of property for the grantor under section 22;
 - (d) when the grantor executes a new continuing power of attorney, unless the grantor provides that there shall be multiple continuing powers of attorney;
 - (e) when the power of attorney is revoked;
 - (f) when the grantor dies.
- (2) The revocation shall be in writing and shall be executed in the same way as a continuing power of attorney.²⁸⁵

Earlier in the report, we recommended that an adult be entitled to revoke a personal appointment where he or she has the legal capacity required to grant the personal appointment. Section 12(2) of the SDA above, which concerns termination, specifies that the revocation must be in writing and executed in the same way as the originating instrument.²⁸⁶

If a guardian or attorney for property management is appointed, he or she would have authority to make decisions about the adult's assets, including the RDSP. Therefore, it would be appropriate for the personal appointment to terminate automatically.

A personal appointment will terminate automatically under the above provision if the adult grants a new one, unless he or she explicitly states that there are to be multiple appointments. Where the RDSP legal representative is no longer able or willing to act, a personal appointment could continue to be effective if another RDSP legal representative was authorized to act jointly under the document, unless it provides otherwise. It could also continue if a substitute was appointed.²⁸⁷

In the case of the RDSP legal representative's resignation, the LCO recommends that procedures under section 11 of the SDA should be required, including a delivery of a copy of the resignation to the adult, a named substitute and any attorneys, for example, acting under a POA for personal care. With certain qualifications, it would also be necessary to deliver a copy of the resignation to a spouse or partner and the adult's relatives residing in Ontario, if the RDSP legal representative believes the adult is incapable of property management and no substitute has been named who is able and willing to act. Furthermore, the RDSP legal representative would need to make reasonable efforts to notify third parties whom he or she previously dealt with on the adult's behalf, if further dealings are likely to be required.²⁸⁸

In addition to the circumstances listed in section 12 of the SDA, the LCO recommends that if a guardian for property management is appointed on an adult's behalf or an adult grants a POA after having regained the legal capacity to do so, an RDSP legal representative's authority to be a plan holder be terminated.²⁸⁹ The LCO has recommended that a streamlined process for RDSP beneficiaries be available only to adults who do not have a guardian or attorney who could be an RDSP plan holder. If a guardian or attorney for property management is appointed, he or she would have authority to make decisions about the adult's assets, including the RDSP. Therefore, it would be appropriate for the personal appointment to terminate automatically.

The Law Commission of Ontario recommends that

4. The personal appointment process identified in Recommendation 1 incorporate the following features:
 - f. The personal appointment terminate in the same circumstances as in ss.11 and 12 of the *Substitute Decisions Act, 1992*. These circumstances include where an RDSP legal representative dies, becomes incapable or resigns, unless there is another RDSP legal representative or substitute authorized to act; the adult grants a new personal appointment, unless he or she specifies that there are to be multiple appointments; the personal appointment is revoked or the adult dies. The personal appointment also terminate when a guardian for property is appointed on the adult's behalf through the court or statutory guardianship processes, or the adult executes a valid power of attorney for property.

D. Other Specific Issues

1. Accessible Information for Users of the Process

The provision of information in accessible formats, languages and locations will be crucial to the success of a streamlined process. The Senate Committee on Banking, Trade and Commerce's study on the RDSP remarked that low rates of uptake could be partly due to the issues of legal capacity and representation considered in the LCO's project. However, it concluded, "Another possible explanation for the low uptake rate is a lack of awareness and understanding of the RDSP program among disabled individuals and those who assist them in their financial decision-making".²⁹⁰ Adults with disability and their family and friends repeatedly told the LCO that there is insufficient information on the RDSP that they can readily understand.²⁹¹ Consequently, although issues of awareness and understanding do not fall squarely within the scope of our project, we do believe that the users of a streamlined process should be provided equal access to a minimum level of education on the process itself.

Adults learn about the RDSP at financial institutions and through various intermediaries. These entry points were discussed in Chapter II and include families and friends, caregivers, legal clinics, private trusts and estates lawyers, ODSP staff and community organizations. In the LCO's project on *Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity*, we focus on how entry points to the family law system "can play an important role in informing families about their options, referring them to relevant services and advising them on the best way to address legal challenges and family disputes in ways respectful of their religious, cultural, economic and other characteristics or needs".²⁹² Not unlike the family law system, adults seeking an RDSP legal representative are most likely to begin their search for information by talking to their supporters and service providers. Therefore, we suggest that information on the streamlined process be disseminated through these entry points, situated within the community networks that adults with disability commonly access.

With respect to the content of information, we mentioned previously in this report that several aspects of the streamlined process could merit attention. For instance, because beneficiaries and financial institutions may not know how to determine whether the beneficiary has capacity to open and manage an RDSP, we suggested that the Government of Ontario disseminate guidance on the test for contractual capacity (see Chapter IV.C.1, "Determining the Beneficiary's Capacity to Be the Plan Holder"). Complementary information could include how to refute a financial institution's opinion that a beneficiary is incapable of establishing an RDSP as well as the capacity criteria required to execute a personal appointment. During the LCO's consultations, participants requested that they be provided with more information on the role and responsibilities of RDSP legal representatives and on safeguards against financial abuse, and we believe that direction on these issues would also be advantageous.²⁹³

Adults learn about the RDSP at financial institutions and through various intermediaries. These entry points...include families and friends, caregivers, legal clinics, private trusts and estates lawyers, ODSP staff and community organizations.

In order to make this information as clear as possible, we suggest that the Government of Ontario consider developing a booklet targeted at beneficiaries, potential RDSP legal representatives and third parties. The Ministry of Justice and Attorney General for Saskatchewan has released a booklet to the public entitled, *RDSPs and Adults with Mental Disabilities*, which explains its recommended use of a special limited POA by RDSP beneficiaries. A sample form for a special limited POA is attached to the back of the booklet.²⁹⁴ In Ontario, the OPGT has also disseminated the *Power of Attorney* kit, which packages together basic information on POAs and a sample form that grantors can use as a template.²⁹⁵

Legal professionals and advocacy organizations submitted that a government form should be made available to RDSP beneficiaries with an explanatory introduction and notes.²⁹⁶ Financial institution employees also told the LCO that they would like to be able to objectively rely on a recognizable document, such as a government issued form (see Chapter IV.C.6, “Providing Third Parties with Certainty and Finality”).²⁹⁷ The LCO’s larger project on *Legal Capacity, Decision-Making and Guardianship* reviews the possibilities for mandatory information and forms in Ontario and we do not recommend the adoption of a compulsory kit in this project. Nevertheless, we believe that non-mandatory, standardized information that includes a sample form could be helpful to users of a streamlined process for the RDSP as well as third parties.

A conflict of laws provision would enable adults travelling from outside Ontario to continue to be represented by a plan holder who was previously appointed through a valid arrangement.

The Law Commission of Ontario recommends that

9. The Government of Ontario distribute public legal education to potential users of the streamlined process identified in Recommendation 1 in a variety of accessible languages and formats. Among other issues, the public legal information could explain how to determine whether a beneficiary has capacity to enter into an RDSP contract with a financial institution; how to refute a financial institution employee’s opinion that a beneficiary is incapable of entering into an RDSP contract; the criteria to grant the personal appointment; and the role and responsibilities of legal representatives.

2. Promoting Coherence across Canada

As a final matter in this report, we recommend that the Government of Ontario adopt a conflict of laws provision in order to promote coherence among the processes to appoint an RDSP legal representative for beneficiaries across Canada.

From the time of the federal government’s review of the RDSP in 2011, some stakeholders have advocated for a permanent amendment to the ITA to address the subject matter of this project out of concern that, as a federal benefit, the RDSP should be treated uniformly across the country. As a provincial law reform agency, the LCO’s mandate applies to Ontario laws, policies and practices and we do not make recommendations to the federal government or other jurisdictions in this report (see Chapter I.D, “The Project Scope”).

However, we have taken the approaches of other provinces and territories into account in coming to our recommendations for a streamlined process in Ontario. In particular, we have recommended that a streamlined process be constituted as a personal appointment, which is based on capacity criteria that are less stringent than the current requirements under the SDA to grant a POA. This same approach has been recognized by the federal government for the provinces of British Columbia, Newfoundland and Labrador, and Saskatchewan.

Enacting a conflict of laws provision for a streamlined process would supplement these efforts to promote coherence across the country. A conflict of laws provision would enable adults travelling from outside Ontario to continue to be represented by a plan holder who was previously appointed through a valid arrangement. It could apply throughout an adult’s lifetime, whether he or she is visiting temporarily, moving for an extended period or

settling to be close to family and friends. The SDA contains provisions for the recognition of POAs and guardianship orders made in other jurisdictions, which could be used as a model. For example, the provision respecting POAs reads,

Conflict of laws, formalities

- 85.** (1) As regards the manner and formalities of executing a continuing power of attorney or power of attorney for personal care, the power of attorney is valid if at the time of its execution it complied with the internal law of the place where,
- (a) the power of attorney was executed;
 - (b) the grantor was then domiciled; or
 - (c) the grantor then had his or her habitual residence.²⁹⁸

It is proposed that an adapted conflict of laws provision recognize approaches taken in other provinces and territories to issues of legal capacity and representation for the RDSP, including representation and designation agreements, and special limited POAs.

The Law Commission of Ontario recommends that

10. The Government of Ontario adopt a conflict of laws provisions for the streamlined process identified in Recommendation 1, modelled on ss.85 and 86 of the *Substitute Decisions Act, 1992*, in order to promote coherence in the processes to appoint RDSP legal representatives for beneficiaries across Canada. The provision would enable adults travelling from outside of Ontario to continue to be represented by a plan holder who was previously appointed through a valid arrangement.

V. LIST OF RECOMMENDATIONS

The Law Commission of Ontario recommends that

1. The Government of Ontario implement a process that would enable adults to personally appoint an RDSP legal representative, where there are concerns about their capacity to enter into an RDSP contract with a financial institution and they do not have an attorney or guardian for property management. (See pages 29 to 31 in this report.)
2. The criteria to grant and revoke the personal appointment identified in Recommendation 1 be based on the definition of legal capacity to grant and revoke a power of attorney at common law, which requires that the grantor have the ability to understand the nature and consequences of the appointment. (See pages 36 to 38 in this report.)
3. If the Government of Ontario believes that the criteria to grant and revoke the personal appointment proposed in Recommendation 2 are not sufficiently flexible to improve access to the RDSP, the criteria be based on the definition of legal capacity to make a representation agreement under s.8(2) of the British Columbia *Representation Agreement Act*, which consists of factors including the communication of a desire to have a representative, the expression of approval and the existence of a relationship with the representative that is characterized by trust. (See Appendix C and pages 34 to 36 in this report.)
4. The personal appointment process identified in Recommendation 1 incorporate the following features:
 - a. The execution requirements for the personal appointment be the same as for a power of attorney for property under s.10 of the *Substitute Decisions Act, 1992*, which requires that the document be executed in the presence of two witnesses, who must sign the document. The following persons be prohibited from being witnesses: the RDSP legal representative, the grantor's spouse or common-law partner, the grantor's child, persons who have property under guardianship and minors. (See Appendix C and page 40 in this report.)
 - b. The grantor have the same protections against financial abuse found in ss.7, 8, 27, 32, 33, 39, 42 and 83 of the *Substitute Decisions Act, 1992*. These protections include permitting adults to appoint more than one RDSP legal representative or a substitute, in the event the primary RDSP legal representative is unavailable; requiring RDSP legal representatives to maintain accounts of transactions; allowing an application be made to the Superior Court of Justice to pass accounts and obliging the Office of the Public Guardian and Trustee to investigate allegations that an adult is incapable of managing property and that serious adverse effects are occurring or may occur. In addition, all beneficiaries have the protection of provisions under the ITA that regulate the management of funds in an RDSP, such as mandatory lifetime payments, the calculation of payment amounts and compliance measures. (See pages 39 to 41 in this report.)
 - c. The RDSP legal representative have authority to open and manage funds in an RDSP, including consenting to contributions, deciding investments, applying for grants and bonds, and requesting that payments be made to the adult; however, he or she be prohibited from receiving and managing funds paid out of the RDSP on the adult's behalf. (See pages 41 to 47 in this report.)
 - d. The RDSP legal representative be required to formulate an opinion with respect to the adult's legal capacity to manage the payment out, prior to requesting that payments be made to the adult. If the RDSP legal representative has reasonable

grounds to believe that the adult is capable of managing the payment out, he or she be required to provide the financial institution with a signed statement of that opinion at the time a payment is requested. If the RDSP legal representative has reasonable grounds to believe that the adult is not capable of managing the payment out, he or she shall either not request the payment out or shall consider all options available under the *Substitute Decisions Act, 1992*, as appropriate. (See pages 41 to 42 in this report.)

- e. The RDSP legal representative have the duties of an attorney for property under s.32 of the *Substitute Decisions Act, 1992*, as applicable, and be held to the same standard of care. These duties include encouraging an adult to participate in decisions, to the best of his or her abilities; consulting from time to time with an adult's family and friends; and making decisions in a manner that is consistent with an adult's personal care decisions. The standard of care requires RDSP legal representatives to exercise the degree of care, diligence and skill that a person of ordinary prudence would exercise in the conduct of his or her own affairs. (See pages 47 to 48 in this report.)
 - f. The personal appointment terminate in the same circumstances as in ss.11 and 12 of the *Substitute Decisions Act, 1992*. These circumstances include where an RDSP legal representative dies, becomes incapable or resigns, unless there is another RDSP legal representative or substitute authorized to act; the adult grants a new personal appointment, unless he or she specifies that there are to be multiple appointments; the personal appointment is revoked or the adult dies. The personal appointment also terminate when a guardian for property is appointed on the adult's behalf through the court or statutory guardianship processes, or the adult executes a valid power of attorney for property. (See pages 52 to 54 in this report.)
5. The Government of Ontario provide third parties with clear exemptions from liability should they rely on a personal appointment made pursuant to Recommendation 1 in good faith and without knowledge that it was invalid at the time it was executed or that it was subsequently terminated, varied or invalidated. (See pages 48 to 49 in this report.)
 6. The Government of Ontario recognize that community organizations are eligible to act as RDSP legal representatives where they are approved to provide services to adults with disability through designated Ontario ministries. (See pages 50 to 52 in this report.)
 7. The Government of Ontario develop and implement a process for a designated government agency to approve the eligibility of community organizations to act as RDSP legal representatives, where they are not approved under Recommendation 6. The government agency be required to maintain a list of approved community organizations. (See pages 50 to 52 in this report.)
 8. The Government of Ontario require that community organizations appointed as RDSP legal representatives under Recommendations 6 and 7 develop and implement a management policy with procedures to do the following:
 - a. maintain separate records of transactions respecting each beneficiary's RDSP;
 - b. undertake periodic review of each beneficiary's records; and
 - c. ensure that a suitable employee has clear signing authority to represent the community organization in transactions with a financial institution at all times. (See pages 50 to 52 in this report.)

9. The Government of Ontario distribute public legal education to potential users of the streamlined process identified in Recommendation 1 in a variety of accessible languages and formats. Among other issues, the public legal information could explain how to determine whether a beneficiary has capacity to enter into an RDSP contract with a financial institution; how to refute a financial institution employee's opinion that a beneficiary is incapable of entering into an RDSP contract; the criteria to grant the personal appointment; and the role and responsibilities of legal representatives. (See pages 54 to 55 in this report.)
10. The Government of Ontario adopt a conflict of laws provisions for the streamlined process identified in Recommendation 1, modeled on ss.85 and 86 of the *Substitute Decisions Act, 1992*, in order to promote coherence in the processes to appoint RDSP legal representatives for beneficiaries across Canada. The provision would enable adults travelling from outside of Ontario to continue to be represented by a plan holder who was previously appointed through a valid arrangement. (See pages 55 to 56 in this report.)

APPENDIX A: INDIVIDUALS AND ORGANIZATIONS CONTRIBUTING TO THE PROJECT

A. In-Person Focus Groups Held

1. Focus group for members of the trusts and estates bar and staff lawyers from legal clinics hosted by the Law Commission of Ontario in partnership with ARCH Disability Law Centre, held February 6, 2014.
2. Focus group for community and advocacy organizations hosted by the Law Commission of Ontario in partnership with ARCH Disability Law Centre, held February 6, 2014.
3. Focus group for self-advocates and their family and friends hosted by the Law Commission of Ontario in partnership with Community Living Ontario and PooranLaw, held February 10, 2014.
4. Focus group for self-advocates and their family and friends hosted by the Law Commission of Ontario in partnership with the Developmental Services Partnership Table, Ministry of Community and Social Services, held February 13, 2014.
5. Focus group for self-advocates and their family and friends hosted by the Law Commission of Ontario in partnership with the Schizophrenia Society of Ontario, held February 18, 2014.
6. Focus group for financial institution employees hosted by the Law Commission of Ontario in partnership with the Bank of Montreal, held February 19, 2014.
7. Focus group for self-advocates and their family and friends hosted by the Law Commission of Ontario in partnership with l'Association pour l'intégration sociale d'Ottawa, held February 21, 2014.
8. Focus group for self-advocates and their family and friends hosted by the Law Commission of Ontario in partnership with the Peterborough Poverty Reduction Network, held February 27, 2014.

B. Individuals and Organizations Consulted

1. Al Etmanski, Co-Founder of Planned Lifetime Advocacy Network (PLAN)
2. ARCH Disability Law Centre (Executive Director Ivana Petricone)
3. Canadian Association for Community Living (Executive Vice-President Michael Bach)
4. Canada Revenue Agency (Director Registration Division Chantal Paquette, Director Policy and Communications Division Janice Laird, Manager Specialty Products Policy Section Mark Legault, Manager RDSP and RESP Products Lorraine Veilleux, Technical Policy Advisor Speciality Products Policy Section Christina O'Quinn, Technical Policy Advisor Compliance Division Registered Plans Directorate Marc Jolicoeur and Senior Program Analyst Sarah Varan)
5. Capacity Assessment Office, Ministry of the Attorney General (Ontario) (Program Coordinator Hilary Callin)
6. Terry Carney, Emeritus Professor, University of Sydney, Australia
7. Centre for Addiction and Mental Health (Senior Legal Counsel Nyranne Martin and Senior Policy Analyst Roslyn Shields)

8. Community Living British Columbia (Program Development Tamara Kulusic)
9. Consent and Capacity Board (Ontario) (Acting Counsel Isfahan Merali, Vice-Chair Lora Patton and Registrar Lorissa Sciarra)
10. Barry Corbin, Corbin Estates Law
11. Curateur public (Quebec) (Strategic Planning Officer Strategic Planning and Research Bureau André Bzedera)
12. Vincent J. De Angelis Barrister and Solicitor
13. Employment and Social Development Canada (Manager Canada Disability Savings Program Sylvie Heartfield; Senior Policy Analyst Canada Disability Savings Program Russell Deigan; Director Programs Division Etienne-Rene Massie; Senior Analyst Canada Disability Savings Program Lisa Bacon; Manager Seniors, Life Course and Disabilities John Rietschlin; Economist Andrija Popovic; Senior Legislation Officer Canada Pension Plan Policy and Legislation Natasha Rende; Manager Litigation and Legislation Old Age Security Policy Kevin Wagdin; and Legislation Officer Litigation and Legislation Old Age Security Policy Julieta Alfinger)
14. Finance Canada (Senior Chief Social Tax Policy Karen Hall, Chief Social Tax Policy Lesley Taylor, Director Tax Legislation Alexandra MacLean and Senior Tax Policy Officer Mausumi Banerjee)
15. Robert Gordon, Professor, Associate Dean of Arts and Social Sciences, and Director Applied Legal Studies Program, Simon Fraser University
16. D’Arcy J. Hiltz Barrister and Solicitor
17. HIV and AIDS Legal Clinic Ontario (Community Legal Worker and Paralegal Jill McNall)
18. Income Security Advocacy Centre (Research and Policy Analyst Jennefer Laidley)
19. Legal Aid Ontario (Jayne Mallin)
20. Lana Kerzner, Barrister and Solicitor
21. Lynn Kirshin, Senior Policy Analyst Policy Department College of Physicians and Surgeons of Ontario
22. Ministry of Health and Social Services (Yukon) (Manager Seniors’ Services and Adult Protection Unit Kelly Cooper)
23. Ministry of Community and Social Services (Ontario) (Manager Income Support Policy Unit Ontario Disability Support Program Branch Darlene MacDonald Forsyth, Manager Policy Operations and Program Design Ontario Works Branch Gurpreet Sidhu-Dhanao, Director Community and Developmental Services (former) Carol Latimer, Director Community and Developmental Services (former) Monica Neizert)
24. Mississauga Community Legal Services (Community Legal Worker and RDSP Plan Holder Daniel Amsler)
25. Newfoundland and Labrador Association for Community Living (Past President Ray McIsaac)
26. Nidus Personal Planning Resource Centre (Executive Director Joanne Taylor)
27. Office of the Public Trustee (Alberta) (Public Trustee Leslie Hills, Assistant Public Trustee Dana Kingbury and Director Legal Services C. Suzanne McAfee)

28. Office of the Public Guardian and Trustee (Saskatchewan) (Public Guardian and Trustee Ron Kruzeniski)
29. Ombudsman for Banking Services and Institutions (Ombudsman Doug Melville)
30. Ontario Agencies Supporting Individuals with Special Needs (OASIS) RDSP Group
31. Ontario Caregiver Coalition (Executive Secretariat Joanne Bertrand)
32. Ontario Medical Association (Legal Counsel Jennifer Gold)
33. Planned Lifetime Advocacy Network (PLAN) (Director of Policy and Planning Joel Crocker)
34. Public Guardian and Trustee (British Columbia) (Public Guardian and Trustee Catherine Romanko)
35. Royal Bank of Canada, RBC Law Group (Senior Advisory Counsel Suzanne Michaud and Senior Manager Registered Plans and Group Plans Don Osborne)
36. Tim Stainton, Professor and Director School of Social Work, University of British Columbia
37. Doug Surtees, Associate Dean Academic, University of Saskatchewan

C. Written Submissions Received

1. Advocacy Centre for the Elderly (ACE)
2. ARCH Disability Law Centre
3. Canadian Association of Community Living, Community Living Ontario and PooranLaw
4. Canadian Bankers Association

D. Advisory Group Members

1. Laura Addington, Bank of Montreal Financial Group
2. Ann Elise Alexander, Canadian Imperial Bank of Commerce
3. Saara Chetner and Risa Stone, Office of the Public Guardian and Trustee (Ontario)
4. Orville Endicott and Gordon Kyle, Community Living Ontario
5. Nimali Gamage, Goddard, Gamage and Stephens LLP
6. Christine Hughes, Ministry of Community and Social Services (Ontario)
7. Krista James and Laura Watts, Canadian Centre for Elder Law
8. Sean Keenan, Department of Finance Canada
9. Laura Metrick, Ministry of the Attorney General (Ontario)
10. Edgar-André Montigny, ARCH Disability Law Centre
11. Brendon Pooran, PooranLaw
12. Barbara Simmons, Developmental Services Ontario

13. Jack Styan, Community Living British Columbia
14. Irina Sytcheva, Schizophrenia Society of Ontario
15. Judith Wahl, Advocacy Centre for the Elderly

E. Relevant LCO Commissioned Research

In major projects, the LCO issues a call for the preparation of research papers in particular subjects relevant to the project. It relies on these papers in the same way as any research. The papers do not necessarily reflect the LCO's views. The following research papers were prepared for the LCO's past projects on A Framework for the Law as It Affects Older Adults and A Framework for the Law as It Affects Persons with Disabilities. After the discussion paper was released in this project, the LCO also received commissioned research papers for our ongoing project on Legal Capacity, Decision-Making and Guardianship. These are also listed below.

1. Advocacy Centre for the Elderly and Dykeman Dewhirst O'Brien LLP (Judith Wahl, Mary Jane Dykeman and Brendan Gray), "Health Care Consent and Advance Care Planning: Standards and Supports" (Spring 2014). Available online at <http://www.lco-cdo.org>
2. ARCH Disability Law Centre (Kerri Joffe and Edgar-Andre Montigny), "Decisions, Decisions: Promoting and Protecting the Rights of Persons with Disabilities Who are Subject to Guardianship" (Spring 2014). Available online at <http://www.lco-cdo.org>
3. ARCH Disability Law Centre (Kerri Joffe), "Enforcing the Rights of Persons with Disabilities in Ontario's Developmental Services System" (Summer 2010). Available online at <http://www.lco-cdo.org>
4. ARCH Disability Law Centre (Tess Sheldon), "The Shield Becomes the Sword: The Expansion of the Ameliorative Program Defence to Programs that Support Persons with Disabilities" (Summer 2010). Available online at <http://www.lco-cdo.org>
5. Michael Bach and Lana Kerzner, "A New Paradigm for Protecting Autonomy and the Right to Legal Capacity" (Summer 2010). Available online at <http://www.lco-cdo.org>
6. Bakerlaw (Meryl Zisman Gary, Cara Wilkie and David Baker), "A Case Study Paper on the Right to Supports" (Summer 2010). Available online at <http://www.lco-cdo.org>
7. Canadian Centre for Elder Law (Krista James and Laura Tamblyn Watts), "Understanding the Lived Experience of Assisted and Supported Decision-Making in Canada" (Spring 2014). Available online at <http://www.lco-cdo.org>
8. Mona Paré, Professeure adjointe Université d'Ottawa, "La participation des personnes handicapées dans les décisions qui les concernent: L'exemple de l'éducation" (Summer 2010). Available online at <http://www.lco-cdo.org>
9. Lora Patton, Rita Sampson and Brendon Pooran, "A Principled Approach: Considering Eligibility Criteria for Disability-Related Support Programs through a Rights-Outcome Lens" (Summer 2010). Available online at <http://www.lco-cdo.org>

APPENDIX B: THE LCO'S FRAMEWORK PRINCIPLES

The following is an excerpt from the LCO's *A Framework for the Law as It Affects Persons with Disabilities*. The original can be consulted in the final report for that project, which provides greater explanation for the application of the Framework Principles. Similar principles exist for the sister project *A Framework for the Law as It Affects Older Adults*. Both reports can be accessed on the LCO's website at www.lco-cdo.org.

Excerpt from *A Framework for the Law as It Affects Persons with Disabilities*:

The LCO's *Framework* centres on a set of principles for the law as it affects persons with disabilities in order to counteract negative stereotypes and assumptions about persons with disabilities, reaffirm the status of persons with disabilities as equal members of society and bearers of both rights and responsibilities, and also encourage the government to take positive steps to secure the well-being of persons with disabilities.

Each of the principles contributes to an overarching goal of promoting substantive equality for persons with disabilities. There is no hierarchy among the principles, and the principles must be understood in relationship with each other; they may reinforce each other or may be in tension with one another as they apply to concrete situations. The *Report* explains each of the following principles in detail:

1. **Respecting the Dignity and Worth of Persons with Disabilities:** All members of the human family are full persons, with the right to be valued, respected and considered and to have both one's contributions and needs recognized.
2. **Responding to Diversity in Human Abilities and Other Characteristics:** All people exist along a continuum of abilities in many areas, abilities vary along a person's lifecycle and each person with a disability is unique in needs, circumstances and identities. Persons with disabilities also experience multiple and intersecting identities that may act to increase or diminish discrimination and disadvantage.
3. **Fostering Autonomy and Independence:** Persons with disabilities must be able to make choices about issues that affect their lives and to do as much for themselves as possible or as they desire, with appropriate and adequate supports as required.
4. **Promoting Social Inclusion and Participation:** Society should be structured to promote the ability of all persons with disabilities to be actively involved with their community by removing physical, social, attitudinal and systemic barriers to exercising the incidents of such citizenship and by facilitating their involvement.
5. **Facilitating the Right to Live in Safety:** This principle refers to the right of persons with disabilities to live without fear of abuse or exploitation and where appropriate to receive support in making decisions that could have an impact on safety.
6. **Recognizing That We All Live in Society:** This principle acknowledges that persons with disabilities are members of society, with entitlements and responsibilities, and that other members of society also have entitlements and responsibilities.

The application of the principles must be grounded in the lived experience of persons with disabilities, including attention to how the experiences of persons with disabilities are influenced by their life course, and on viewing persons with disabilities as whole persons rather than as sets of separate issues.

The circumstances of persons with disabilities will continue to change as laws, attitudes, demographics and other aspects of the broader environment change. As well, understandings of the experience of disability continue to evolve, and new perspectives emerge. What might be considered conducive to attainment of the principles at one time may appear unhelpful or inadequate at a later date.

Despite desires to implement all the principles to the fullest extent possible, there may be constraints that limit the ability of law and policy makers to do so, including policy priorities or funding limitations among others. Therefore it may be necessary to take a progressive realization approach to the full implementation of the principles. This involves concrete, deliberate and targeted steps, implemented within a relatively short period of time with a view to ultimately meeting the goal of full implementation. Such an approach mandates a continual, if gradual, movement forward towards the ultimate goal of substantive equality.

As well, attention must be paid to the relationships between principles. Frequently, the principles will support each other; for example, initiatives that increase the inclusion and participation of persons with disabilities will generally also thereby promote respect for their dignity and worth. However, sometimes two or more of the principles may be in tension with each other in a particular case. Careful thought must be given to analyzing and responding to this tension, by being sensitive to the contexts in which these tensions arise, as well as their larger social context, and the overarching value of substantive equality to which the principles were intended to respond.

APPENDIX C: LEGISLATIVE PROVISIONS REFERRED TO IN THE REPORT

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.

Capacity to give power of attorney for personal care

47. (1) A person is capable of giving a power of attorney for personal care if the person,
- (a) has the ability to understand whether the proposed attorney has a genuine concern for the person's welfare; and
 - (b) appreciates that the person may need to have the proposed attorney make decisions for the person.

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.

Income Tax Act, R.S.C. 1985, c.1 (5th Supp.)

Credit for mental or physical impairment

- 118.3 (1) Where
- (a) an individual has one or more severe and prolonged impairments in physical or mental functions,
 - (a.1) the effects of the impairment or impairments are such that the individual's ability to perform more than one basic activity of daily living is significantly restricted where the cumulative effect of those restrictions is equivalent to having a marked restriction in the ability to perform a basic activity of daily living or are such that the individual's ability to perform a basic activity of daily living is markedly restricted or would be markedly restricted but for therapy that
 - (i) is essential to sustain a vital function of the individual,
 - (ii) is required to be administered at least three times each week for a total duration averaging not less than 14 hours a week, and
 - (iii) cannot reasonably be expected to be of significant benefit to persons who are not so impaired,

- (a.2) in the case of an impairment in physical or mental functions the effects of which are such that the individual's ability to perform a single basic activity of daily living is markedly restricted or would be so restricted but for therapy referred to in paragraph (a.1), a medical practitioner has certified in prescribed form that the impairment is a severe and prolonged impairment in physical or mental functions the effects of which are such that the individual's ability to perform a basic activity of daily living is markedly restricted or would be markedly restricted, but for therapy referred to in paragraph (a.1), where the medical practitioner is a medical doctor or, in the case of
- (i) a sight impairment, an optometrist,
 - (ii) a speech impairment, a speech-language pathologist,
 - (iii) a hearing impairment, an audiologist,
 - (iv) an impairment with respect to an individual's ability in feeding or dressing themselves, an occupational therapist,
 - (v) an impairment with respect to an individual's ability in walking, an occupational therapist, or after February 22, 2005, a physiotherapist, and
 - (vi) an impairment with respect to an individual's ability in mental functions necessary for everyday life, a psychologist,
- (a.3) in the case of one or more impairments in physical or mental functions the effects of which are such that the individual's ability to perform more than one basic activity of daily living is significantly restricted, a medical practitioner has certified in prescribed form that the impairment or impairments are severe and prolonged impairments in physical or mental functions the effects of which are such that the individual's ability to perform more than one basic activity of daily living is significantly restricted and that the cumulative effect of those restrictions is equivalent to having a marked restriction in the ability to perform a single basic activity of daily living, where the medical practitioner is, in the case of
- (i) an impairment with respect to the individual's ability in feeding or dressing themselves, or in walking, a medical doctor or an occupational therapist, and
 - (ii) in the case of any other impairment, a medical doctor, has certified in prescribed form that the impairment is a severe and prolonged mental or physical impairment the effects of which are such that the individual's ability to perform a basic activity of daily living is markedly restricted or would be markedly restricted but for therapy referred to in paragraph (a.1),
- (b) the individual has filed for a taxation year with the Minister the certificate described in paragraph (a.2) or (a.3), and
- (c) no amount in respect of remuneration for an attendant or care in a nursing home, in respect of the individual, is included in calculating a deduction under section 118.2 (otherwise than because of paragraph 118.2(2)(b.1)) for the year by the individual or by any other person, there may be deducted in computing the individual's tax payable under this Part for the year the amount determined by the formula

$A \times (B + C)$

where

A

is the appropriate percentage for the year,

B

is \$6,000, and

C

is

(a) where the individual has not attained the age of 18 years before the end of the year, the amount, if any, by which

(i) \$3,500

exceeds

(ii) the amount, if any, by which

(A) the total of all amounts each of which is an amount paid in the year for the care or supervision of the individual and included in computing a deduction under section 63, 64 or 118.2 for a taxation year

exceeds

(B) \$2,050, and

(b) in any other case, zero.

ENDNOTES

1. *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp) [ITA], s.146.4(1) “disability savings plan”, “holder” and “qualifying person”.
2. *Substitute Decisions Act*, 1992, S.O. 1992, c.30 [SDA].
3. In this report, we use the terms “manage funds in an RDSP” and “decide plan terms” to denote consenting to contributions, deciding investments and requesting that withdrawals be made to the beneficiary, among other areas of decision-making that relate to funds while they are held inside the plan at a financial institution. We distinguish this terminology from “managing funds paid out of the RDSP”, which pertains to activities such as spending or reinvesting funds *after* they have been paid out of the plan to the beneficiary or another legally authorized person.
4. *Representation Agreement Act*, R.S.B.C. 1996, c. 405.
5. Government of Ontario, *A Prosperous and Fair Ontario: 2013 Ontario Budget* (Toronto: May 2013), 98-99.
6. ITA, note 1, s.146.4(1) “disability savings plan”, “holder” and “qualifying person”.
7. Government of Canada, *Jobs, Growth and Long-Term Prosperity: Economic Action Plan 2012* (Ottawa: March 29, 2012) [Government of Canada, *Economic Action Plan 2012*], 182-183, 383-384; ITA, note 1, s.146.4(1) “qualifying family member”, “disability savings plan”, “qualifying person” and “holder”.
8. Canadian Association for Community Living, PLAN, RDSP Resource Centre & PooranLaw, “Enabling Legal Capacity of Adults with Severe Disabilities to Open RDSPs: A Brief Prepared for the Honourable Jim Flaherty, Minister of Finance” (Submitted to the RDSP Review, November 2011), Appendix 2; Testimony of Brendon Pooran and Joel Crocker to the Standing Senate Committee on Banking, Trade and Commerce (December 11, 2013). See also: *Old Age Security Regulations*, C.R.C. c.1246, s.24; *Canada Pension Plan Regulations*, C.R.C. c.385, s.55.
9. Government of Canada, *Economic Action Plan 2012*, note 7, 182-183.
10. Government of Canada, *Economic Action Plan 2012*, note 7, 182-183.
11. Standing Senate Committee on Banking, Trade and Commerce, *The Registered Disability Savings Plan Program: Why Isn't It Helping More People?* (Ottawa, March 2014) [Senate Committee Report], Appendix A.
12. Senate Committee Report, note 11, 9.
13. Senate Committee Report, note 11, 9.
14. Senate Committee Report, note 11, 9.
15. Senate Committee Report, note 11, 9.
16. Government of Canada, *The Road to Balance: Creating Jobs and Opportunities: Economic Action Plan 2014* (Ottawa: February 11, 2014) [Government of Canada, *Economic Action Plan 2014*], 200-201.
17. *Health Care Consent Act*, 1996, S.O. 1996, c.2, Schedule A [HCCA].
18. Law Commission of Ontario, *A Framework for the Law as It Affects Older Adults: Advancing Substantive Equality for Older Persons through Law, Policy and Practice* (Toronto: April 2012) [LCO, *A Framework for the Law as It Affects Older Adults*]; Law Commission of Ontario, *A Framework for the Law as It Affects Persons with Disabilities: Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice* (Toronto: September 2012) [LCO, *A Framework for the Law as It Affects Persons with Disabilities*].
19. *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] [CRPD].
20. LCO, *A Framework for the Law as It Affects Older Adults*, note 18; LCO, *A Framework for the Law as It Affects Persons with Disabilities*, note 18.
21. Department of Finance Canada, *Ensuring the Effectiveness of Registered Disability Savings Plans* (Ottawa: October 2011), online: <http://www.fin.gc.ca/activty/consult/rdsp-reei-eng.asp#Ensuring> [Finance Canada, *Ensuring Effectiveness*].
22. Frances Westley & Nino Antadze, “From Total Innovation to System Change: The Case of the Registered Disability Savings Plan, Canada”, online: http://sig.uwaterloo.ca/sites/default/files/documents/Westley,%20Antadze%20-%20RDSP%20Case%20Study_VMarch15o2010.pdf. The two research studies were Richard Shillington, *The Disability Savings Plan: Policy Milieu and Model Development* (Ottawa: The Caledonian Institute of Social Policy, 2005) and Keith Horner, *The Disability Savings Plan: Contributory Estimates and Policy Issues* (Ottawa: The Caledonian Institute of Social Policy, 2005).
23. Westley & Antadze, note 22; Minister of Finance’s Expert Panel on Financial Security for Children with Severe Disabilities, *A New Beginning: The Report of the Minister of Finance’s Expert Panel on Financial Security for Children with Severe Disabilities* (Ottawa: Department of Finance Canada, December 2006) [Minister of Finance’s Expert Panel].
24. ITA, note 1, s.118.3. Minister of Finance’s Expert Panel, note 23, 29-32.
25. Minister of Finance’s Expert Panel, note 23, 14.
26. Minister of Finance’s Expert Panel, note 23.
27. Shillington, note 22; The Allen Consulting Group, *International Review of Future Planning Options: Final Report* (Final Report to the Department of Families, Housing, Community Services and Indigenous Affairs, Australia, January 2009), 37-39.
28. See: Jeanette Katrin Elise Moss, *Registered Disability Savings Plan: Making the Shift from Welfare to Wealth* (M.P.P. Thesis, Simon Fraser University, 2012); Shillington, note 22; Minister of Finance’s Expert Panel, note 23, 2-7.
29. Moss explains that “[i]n Canada, as in most of the Western world, social security systems have been deliberate in distinguishing between contributory (earnings-related) benefits, and non-contributory (means-tested, income-tested) benefits”. Moss, note 28, 9.
30. Shillington, note 22, 5; Westley & Antadze, note 22; Moss, note 28, 7-9.
31. Shillington, note 22. See also: Canadian Caregiver Coalition, online: <http://www.ccc-ccan.ca/content.php?doc=48>.
70. Law Commission of Ontario

32. See: Andrew Power, Janet E. Lord & Allison S. DeFranco, *Active Citizenship and Disability: Implementing the Personalisation of Support* (New York: Cambridge University Press, 2013), 5.
33. See, for instance, the definitions of social services in: Power *et al*, note 32; The Law Commission (United Kingdom), *Adult Social Care* (London: May 2011), 2.
34. Lora Patton, Brendon Pooran & Rita Samson, *A Principled Approach: Considering Eligibility Criteria for Disability-Related Support Programs through a Rights-Outcome Lens* (Toronto: Law Commission of Ontario, 2010); Power *et al*, note 32.
35. Colin Barnes, “Understanding the Social Model of Disability: Past, Present and Future” in Nick Watson, Alan Roulstone & Carol Thomas, eds., *Routledge Handbook of Disability Studies* (New York: Routledge, 2012); Kerri Joffe (ARCH Disability Law Centre), *Enforcing the Rights of Persons with Disabilities in Ontario’s Developmental Services System* (Toronto: Law Commission of Ontario, 2010).
36. Patton *et al* speaking of “disability activists and theorists” who in the 1960s “began to develop new conceptions of disability, noting that by focusing only on the biological and functional condition of the individual, existing models failed to recognize the role played by society in limiting and enabling people”. Patton *et al*, note 34, 9.
37. Power *et al*, note 32, “Introduction”; Barnes, note 35; Joffe, note 35.
38. Minister of Finance’s Expert Panel, note 23, 2; Moss, note 28, 10.
39. See for instance: *Ontario Disability Support Program Act, 1997*, S.O. 1997, c.25, Schedule B [ODSPA]; O. Reg. 222/98, Parts V - VI; *Ontario Works Act, 1997*, O. Reg. 134/98, Part VI.
40. Commission for the Review of Social Assistance in Ontario, *Brighter Prospects: Transforming Social Assistance in Ontario* (A Report to the Commissioner of Community and Social Services, October 2012) [Commission for the Review of Social Assistance]; Shillington, note 22.
41. The treatment of income and assets under provincial and territorial income support programs varies by jurisdiction. For more information, see: Shillington, note 22; Power *et al*, note 32, 146-149.
42. Commission for the Review of Social Assistance, note 40, 10.
43. Canada Revenue Agency, “Registered Disability Savings Plan (RDSP) Information Sheet RC4460”, online: <http://www.cra-arc.gc.ca/E/pub/tg/rc4460/rc4460-12e.pdf> [CRA, *RDSP*]; O. Reg. 222/98, s.28; O. Reg. 134/98, s.39.
44. Power *et al*, note 32, 178.
45. Power *et al*, note 32, 177-178; publicly available submissions received by the Department of Finance Canada in the context of the Three-Year Review of the RDSP.
46. Power *et al*, note 32, 11.
47. Power *et al* explain the concept of “personalisation” as follows: “[a]t its core, *personalisation* means a more individual approach to the design and delivery of supports which give people more choice over how they best meet their needs”. Power *et al*, note 32, 11.
48. Carmel Laragy & Goetz Ottmann, “Towards a Framework for Implementing Individual Funding Based on an Australian Case Study” (2011) 8:1 *Journal of Policy and Practice in Intellectual Disabilities* 18, 19, presenting a case study of an Australian program. See also: Power *et al*, note 32.
49. Power *et al*, note 32, 177; Moss, note 28.
50. Westley & Antadze, note 22, 3-4, citing Jack Styan (Vice-President Strategic Initiatives, Community Living British Columbia).
51. Moss, note 28, 8.
52. Information provided to the LCO by Finance Canada, current as of February 2014.
53. ITA, note 1, s.146.4(1) “DTC-eligible individual” and “disability savings plan”.
54. ITA, note 1, s.118.3; Canada Revenue Agency, “T201 Disability Tax Credit Certificate”, online: <http://www.cra-arc.gc.ca/E/pbg/tf/t201/README.html> [CRA, *DTC Certificate*].
55. Publicly available submissions received by the Department of Finance Canada in the context of the Three-Year Review of the RDSP.
56. Consultation with Daniel Amsler.
57. Consultation with HIV and AIDS Legal Clinic Ontario; consultation with the Canadian Centre for Elder Law.
58. For more information on these approaches, see: LCO, *A Framework for the Law as It Affects Older Adults*, note 18 and LCO, *A Framework for the Law as It Affects Persons with Disabilities*, note 18.
59. Information provided to the LCO by Employment and Social Development Canada.
60. This has been a particular challenge in British Columbia, where the Public Guardian and Trustee for British Columbia represents children in care. It may not be as relevant in Ontario, where children in care are not represented by the Public Guardian and Trustee for Ontario. PLAN & RDSP Resource Centre, *Registered Disability Savings Plan: Implications for Children-in-Care* (Vancouver: August 2011).
61. ITA, note 1, s. 146.4(1) “qualifying family member” and “qualifying person”.
62. Consultation with HIV and AIDS Legal Clinic Ontario; consultation with Legal Aid Ontario; consultation with Mississauga Community Legal Services.
63. Consultation with HIV and AIDS Legal Clinic Ontario.
64. CRA, *DTC Certificate*, note 54; ITA, note 1, s.118.3; Ontario Ministry of Community and Social Services, “Income Support: Disability/Health Eligibility”, online: http://www.mcscs.gov.on.ca/en/mcscs/programs/social/odsp/income_support/eligibility/disability_Health.aspx; ODSPA, note 39, s.4.
65. Consultation with PooranLaw; consultation with Nimali Gamage of Goddard, Gamage and Stephens LLP. A recipient may use the RDSP in conjunction with other mechanisms to maximize the amount of funds that are not considered assets or income in determining financial eligibility for income support under ODSP. In Ontario, ODSP has detailed policy rules regarding the treatment of personal injury settlements, inheritances and life insurance proceeds. For example, funds up to

- \$100,000 held in trust derived from an inheritance or the proceeds of a life insurance policy are not considered assets for the purposes of determining financial eligibility for income support. Interest earned from and re-invested in the trust is not considered income. Payments from such a trust or a life insurance policy used for approved disability related expenses are not included as income. See: Ontario Disability Support Program, Income Support Directives, online: http://www.mcscs.gov.on.ca/en/mcscs/programs/social/directives/odsp_Incomesupport.aspx [ODSP Directives], 4.6, 4.7, 4.8.
66. Consultation with PooranLaw; consultation with Community Living Ontario; consultation with the Schizophrenia Society of Ontario.
67. See for instance: The National Benefit Authority, online: <http://www.thenba.ca/about-us.html>.
68. ITA, note 1, s.146.4(1) “disability savings plan”, “holder” and “qualifying person”.
69. SDA, note 2, s.2.
70. British Columbia Law Institute, *Report on Common-Law Tests of Capacity* (Vancouver: September 2013). See also: Gerald H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011), 158-160.
71. British Columbia Law Institute, note 70, 136-137.
72. Focus group for financial institution employees hosted by the Law Commission of Ontario in partnership with the Bank of Montreal, held February 19, 2014 [LCO Focus Group 6: financial institution employees]; Focus group for self-advocates and their family and friends hosted by the Law Commission of Ontario in partnership with Community Living Ontario and PooranLaw, held February 10, 2014 [LCO Focus Group 3: self-advocates, family and friends]; Focus group for self-advocates and their family and friends hosted by the Law Commission of Ontario in partnership with l'Association pour l'intégration sociale d'Ottawa, held February 21, 2014 [LCO Focus Group 7: self-advocates, family and friends].
73. For instance: Consultation with CIBC; consultation with Community Living British Columbia; consultation with Mississauga Community Legal Services.
74. Generally, DAPs can be withdrawn at any time before LDAPs begin as long as contributions from private sources exceed government contributions. Effective January 1, 2014, a withdrawal results in all government assistance paid into the plan in the prior 10 years being returned to the government at a rate of \$3 of government assistance for \$1 of withdrawal. For more information on the RDSP plan conditions, see: Employment and Social Development Canada, Registered Disability Savings Plan, online: <http://www.esdc.gc.ca/eng/disability/savings/index.shtml>.
75. ITA, note 1, s.146.4(4)(a).
76. Consultation with Finance Canada.
77. *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008*, S.O. 2008, c.14 [SIPDDA], s.13(2).
78. *Old Age Security Regulations*, note 8, s.24; *Canada Pension Plan Regulations*, note 8, s.55; ODSPA, note 39, ss.2,12(1),(2); O. Reg. 222/98; ODSP Directives, note 65, 10.2.
79. ITA, note 1, s.146.4(1) “holder” and “qualifying person”.
80. Government of Canada, *Economic Action Plan 2012*, note 7, 182-183.
81. Focus group for self-advocates and their family and friends hosted by the Law Commission of Ontario in partnership with the Peterborough Poverty Reduction Network, held February 27, 2014 [LCO Focus Group 8: self-advocates, family and friends].
82. LCO Focus Group 3: self-advocates, family and friends, note 72.
83. LCO Focus Group 3: self-advocates, family and friends, note 72; LCO Focus Group 8: self-advocates, family and friends, note 81.
84. LCO Focus Group 7: self-advocates, family and friends, note 72.
85. SDA, note 2, s.7(2).
86. SDA, note 2, ss.7(1), 7(7), 9.
87. LCO Focus Group 6: financial institution employees, note 72.
88. LCO Focus Group 6: financial institution employees, note 72.
89. LCO Focus Group 8: self-advocates, family and friends, note 81; LCO Focus Group 7: self-advocates, family and friends, note 72; LCO Focus Group 6: financial institution employees, note 72.
90. Written submissions to the LCO from the Advocacy Centre for the Elderly (ACE), February 28, 2014 [ACE Written Submissions]; 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.
91. SDA, note 2, s.8(1).
92. SDA, note 2, s.47(1).
93. ACE Written Submissions, note 90.
94. Law Reform Commission of Nova Scotia, *Powers of Attorney Act: Discussion Paper* (March 2014), 55-57.
95. SDA, note 2, s.2.
96. *Re Koch* (1997), 33 O.R. (3d) 485, 1997 CanLII 12138 (Ont. S.C.J.), para.20. See also: *Lehtonen v Neill*, 2013 ONSC 1497; *Carano v. Manduck*, 2010 ONSC 5389; *Deschamps v. Deschamps* (1997), 52 O.T.C. 154, [1997] O.J. No. 4894 (Ont. Ct. J. (Gen. Div.)).
97. SDA, note 2, s.22.
98. LCO Focus Group 3: self-advocates, family and friends, note 72; LCO Focus Group 7: self-advocates, family and friends, note 72.
99. Written submissions to the LCO from the Canadian Association for Community Living, Community Living Ontario and PooranLaw, March 7, 2014 [CACL, CLO and PooranLaw Written Submissions].
100. SDA, note 2, s.6.
101. Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No. 67 (September 2010), Vol.1, 7.104.
102. David N. Weisstub, Chair, *Enquiry on Mental Competency: Final Report* (Toronto: Queen's Printer for Ontario, 1990)
- 72 Law Commission of Ontario

- [Weisstub Report]; Advisory Committee on Substitute Decision Making for Mentally Incapable Persons, *Final Report of the Advisory Committee on Substitute Decision Making for Mentally Incapable Persons* (Toronto: 1987) [Fram Report].
103. Committee on the Rights of Persons with Disabilities, General Comment on Article 12: Equal Recognition before the Law (adopted 11 April 2014), para. 8, online: <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx>.
104. Committee on the Rights of Persons with Disabilities, note 103, para.8-9
105. CACL, CLO and PooranLaw Written Submissions, note 99; LCO Focus Group 3: self-advocates, family and friends, note 72; LCO Focus Group 6: financial institution employees, note 72.
106. LCO Focus Group 7: self-advocates, family and friends, note 72; Focus group for members of the trusts and estates bar and staff lawyers from legal clinics hosted by the Law Commission of Ontario in partnership with ARCH Disability Law Centre, held February 6, 2014 [LCO Focus Group 1: legal practitioners]; Focus group for self-advocates and their family and friends hosted by the Law Commission of Ontario in partnership with the Schizophrenia Society of Ontario, held February 18, 2014 [LCO Focus Group 5: self-advocates, family and friends].
107. Focus group for self-advocates and their family and friends hosted by the Law Commission of Ontario in partnership with the Developmental Services Partnership Table, Ministry of Community and Social Services, held February 13, 2014 [LCO Focus Group 4: self-advocates, family and friends], speaking of a divide among families that accept guardianship and those that advocate for alternative decision-making arrangements, such as informal networks of support.
108. ACE Written Submissions, note 90.
109. LCO Focus Group 4: self-advocates, family and friends, note 107.
110. SDA, note 2, s.25(2).
111. See for instance: *Gray v Ontario* (2006), 264 D.L.R. (4th) 717, 2006 CanLII 1764 (Ont. Sup. Ct. J. (Div. Ct.)), dealing with a guardianship application for personal care.
112. Information provided to the LCO by Nimali Gamage, September 3, 2013.
113. LCO Focus Group 7: self-advocates, family and friends, note 72. Translated from “ce n’est pas forcément un problème pour nous... mais ça peut l’être pour des familles qui sont à faibles revenus”.
114. Fram Report, note 102, 104.
115. Capacity assessments generally range in cost between \$70 and \$160 per hour, and the fees paid to the OPGT are set at \$382 plus HST in the amount of \$49.66. The requesting person is responsible for paying for a capacity assessment, but where a guardian is appointed for the adult, payment can be drawn from the adult’s estate. Typically fees to the OPGT are payable by the adult; however, financial hardship may result in a waiver of these fees in individual cases.
116. LCO Focus Group 1: legal practitioners, note 106.
117. Written submission to the LCO from the Planned Lifetime Advocacy Network (PLAN), February 7, 2014.
118. LCO Focus Group 3: self-advocates, family and friends, note 72; LCO Focus Group 4: self-advocates, family and friends, note 107.
119. ODSPA, note 39, ss. 2, 12(1), 12(2); O. Reg. 222/98; ODSP Directives, note 65, 10.2.
120. *Trustee Act*, R.S.O. 1990, c.T.23. See also: *Variations of Trusts Act*, R.S.O. 1990, c.V.1.
121. SIPDDA, note 77.
122. LCO Focus Group 3: self-advocates, family and friends, note 72; LCO Focus Group 5: self-advocates, family and friends, note 106; LCO Focus Group 7: self-advocates, family and friends, note 72.
123. LCO Focus Group 3: self-advocates, family and friends, note 72; LCO Focus Group 4: self-advocates, family and friends, note 107. For more information on microboards and Aroha entities, see: Vela Microboard Association, online: <http://www.velacanada.org/>; Ontario Adult Autism Research and Support Network, online: <http://www.ont-autism.uoguelph.ca/index.shtml>.
124. LCO Focus Group 3: self-advocates, family and friends, note 72; LCO Focus Group 4: self-advocates, family and friends, note 107.
125. Finance Canada, *Ensuring Effectiveness*, note 21.
126. Consultation with BMO.
127. LCO Focus Group 6: financial institution employees, note 72; Written submissions made to the LCO by the Canadian Bankers Association, February 28, 2014 [Canadian Bankers Association Written Submissions].
128. Consultation with the Planned Lifetime Advocacy Network (PLAN); consultation with Saara Chetner and Risa Stone (Counsel for the for the) Office of the Public Guardian and Trustee (Ontario); consultation with Laura Metrick (Counsel Ministry of the Attorney General (Ontario)); consultation with BMO; consultation with Nimali Gamage of Goddard, Gamage and Stephens LLP.
129. Government of Canada, *Economic Action Plan 2014*, note 16, 201.
130. *Adult Guardianship and Trusteeship Act*, S.A. 2008, c.A-4.2; Alberta Human Services, “Trusteeship Order”, online: <http://humanservices.alberta.ca/guardianship-trusteeship/agta-trusteeship-order.html>; consultation with the Public Trustee for Alberta; consultation with Finance Canada and the Canada Revenue Agency.
131. *Representation Agreement Act*, note 4, ss.7, 8(2); *Representation Agreement Regulation*, B.C. Reg. 199/2001, s.2; Michael Bach & Lana Kerzner, *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity* (Toronto: Law Commission of Ontario, 2010), 78-79; Robert M. Gordon, *The 2008 Annotated British Columbia Representation Agreement Act, Adult Guardianship Act and Related Statutes* (Toronto: Carswell, 2008), 7; Focus group for community and advocacy organizations hosted by the Law Commission of Ontario in partnership with ARCH Disability Law Centre, held February 6, 2014 [LCO Focus Group 2: community organizations]; LCO Focus Group 6: financial institution employees, note 72; LCO Focus Group 3: self-advocates, family and friends, note 72. See also: Nidus Personal Planning Resource Centre, “Representation Agreements and RDSPs” online: <http://www.nidus.ca/?p=4691>; RDSP Resource Centre, “RDSP Improvements Announced”, *RDSP Newsblog* (1 April 2012), online: <http://rdspresource.ca/index.php/2012/04/rdsp-improvements-announced>.

132. Under *The Vulnerable Persons Living with a Mental Disability Act*, the appointment process includes an initial screening by the Vulnerable Persons Commissioner prior to a hearing. The hearing panel is constituted of members of the public, including family members and lawyers. The decision to appoint a substitute decision-maker is based on an assessment of capacity and need. However, it can only be made where a person is “incapable of managing his or her property by himself or herself or with the involvement of a support network”. Where it appears that reasonable efforts have not been made to involve a support network prior to the application, the Commissioner must dismiss the application and request that the Executive Director facilitate a support network or individual plan. Otherwise, the application is referred to the hearing panel, which makes a recommendation to the Commissioner, who ultimately determines the appointment of a substitute decision-maker. *The Vulnerable Persons Living with a Mental Disability Act*, C.C.S.M. c.V90, ss.84, 85, 88; Zana Marie Lutfiyya, Mary-Ann Updike, Karen Schwartz & Jennifer Mactavish, *Report on the Examination of the Implementation and Impact of The Vulnerable Persons Living with a Mental Disability Act (VPA)* (September, 2007).
133. *Enduring Powers of Attorney Act*, R.S.N.L. 1990, c.E-11; *An Act to Amend the Enduring Powers of Attorney Act*, S.N.L. 2012, c.4 (assented to June 27, 2012); *An Act to Amend an Act to Amend the Enduring Powers of Attorney Act*, S.N.L. 2012, c.45 (assented to December 22, 2012).
134. Government of Canada, *Economic Action Plan 2014*, note 16, 201; consultation with Finance Canada and the Canada Revenue Agency.
135. 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> [Saskatchewan Ministry of Justice and Attorney General].
136. *The Adult Guardianship and Co-decision-making Act*, S.S. 2000, c. A-5.3, s.40.
137. *The Adult Guardianship and Co-decision-making Act*, note 136.
138. Yukon Health and Social Services, “Adult Protection and Decision-Making Act – Supported Decision-Making Agreements”, online: http://www.hss.gov.yk.ca/supported_agreements.php.
139. *Decision-Making, Support and Protection to Adults Act*, S.Y. 2003, c.21, Schedule A.
140. *Decision-Making, Support and Protection to Adults Act*, note 139; consultation with Seniors’ Services and Adult Protection Unit, Yukon Health and Social Services.
141. Fram Report, note 102; Weisstub Report, note 102; Sean O’Sullivan, *You’ve Got a Friend: Review of Advocacy for Vulnerable Adults* (Ontario Ministry of the Attorney General: August 1, 1987).
142. See: *Re Koch*, note 96, para.20.
143. SDA, note 2, s.32.
144. ITA, note 1, s.146.4(1) “disability savings plan”, “holder” and “qualifying person”.
145. Fridman, note 70, 158.
146. LCO Focus Group 6: financial institution employees, note 72; LCO Focus Group 2: community organizations, note 131; Written submissions to the LCO from the ARCH Disability Law Centre, March 7, 2014 [ARCH Disability Law Centre Written Submissions].
147. LCO Focus Group 6: financial institution employees, note 72; consultation with BMO.
148. SDA, note 2, s.16.
149. Canadian Bankers Association Written Submissions, note 127.
150. Ontario Ministry of the Attorney General, *The Capacity Assessment Office: Questions and Answers* (Queen’s Printer for Ontario: 2007), 4-5.
151. Publicly available submissions received by the Department of Finance Canada in the context of the Three-Year Review of the RDSP; LCO Focus Group 2: community organizations, note 131; LCO Focus Group 3: self-advocates, family and friends, note 72; LCO Focus Group 4: self-advocates, family and friends, note 107; LCO Focus Group 5: self-advocates, family and friends, note 106; LCO Focus Group 6: financial institutions, note 72; LCO Focus Group 7: self-advocates, family and friends, note 72; ARCH Disability Law Centre Written Submissions, note 146; ACE Written Submissions, note 90; CACL, CLO and PooranLaw Written Submissions, note 99.
152. See for instance: Western Canada Law Reform Agencies, *Enduring Powers of Attorney: Areas for Reform*, Final Report (2008), 2.
153. LCO Focus Group 2: community organizations, note 131.
154. LCO Focus Group 7: self-advocates, family and friends, note 72. Translated from « Oui, moi je pense qu’effectivement... ceux qui ont la capacité devraient pouvoir choisir... »
155. LCO Focus Group 4: self-advocates, family and friends, note 107.
156. LCO Focus Group 3: self-advocates, family and friends, note 72; LCO Focus Group 1: legal practitioners, note 106.
157. ARCH Disability Law Centre Written Submissions, note 146; LCO Focus Group 4: self-advocates, family and friends, note 107; LCO Focus Group 5: self-advocates, family and friends, note 106.
158. ACE Written Submissions, note 90; LCO Focus Group 1: legal practitioners, note 106; consultation with PooranLaw.
159. ARCH Disability Law Centre Written Submissions, note 146; ACE Written Submissions, note 90; LCO Focus Group 6: financial institution employees, note 72; LCO Focus Group 1: legal practitioners, note 106.
160. For more information, see the LCO’s discussion paper for the project at pages 77 to 82. See also: Parliament of Australia, *National Disability Insurance Scheme (Nominee) Rules, 2013*, F2013L01062 [NDIS Nominee Rules]; Information provided by Employment and Social Development Canada (OAS/CPP); Service Canada, “Agreement to Administer Benefits under the Old Age Security Act and/or the Canada Pension Plan by a Private Trustee”, Form No. ISP3506OAS, online: <http://www.servicecanada.gc.ca/cgi-bin/search/eforms/index.cgi?app=prfl&frm=isp3506oas&ln=eng>; ODSP Directives, note 65, 10.2.
161. See for instance: Australian Law Reform Commission, *Family Violence and Commonwealth Laws: Improving Legal Frameworks* (ALRC Report 117, November 2011), Ch.9; United States Government Accountability Office, Report to Congressional Requesters, *SSA Representative Payee Program: Addressing the Long-Term Challenges Requires a More Strategic Approach* (Washington: GAO, 2013) [GAO]; Committee on Social Security Representative Payees, National Research Council, *Improving the Social Security Representative Payee Program: Serving Beneficiaries and Minimizing Misuse* (Washington:

- The National Academies Press, 2007); Reid K. Weisbord, "Social Security Representative Payee Misuse" (2013) 117:4 Penn State Law Review 1257.
162. CACL, CLO and PooranLaw Written Submissions, note 99.
163. Canadian Bankers Association Written Submissions, note 127.
164. Consultation with Emeritus Professor Terry Carney; consultation with CLO and PooranLaw; Advisory Group Meeting, held February 25, 2014.
165. Consultation with Emeritus Professor Terry Carney; consultation with the Ontario Medical Association. For a practitioner's perspective on the involvement of doctors in assessing the capacity of a grantor of a POA, see also: Jan Goddard, "Powers of Attorney: Safekeeping and Other Practical Considerations" in *The Six-Minute Estate Lawyer* 2013, written for the Law Society of Upper Canada, Continuing Professional Development.
166. Donovan W.M. Waters, Mark Gillen & Lionel Smith, *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012), 119, citing *Royal Trust Co. v. Diamant*, [1953] 3 D.L.R. 102, B.C.J. No. 126 (B.C.S.C.). For a review of common law tests of capacity to make a will and retain legal counsel, see: British Columbia Law Institute, note 70.
167. Law Reform Commission of Nova Scotia, note 94, 33; Gerald H.L. Fridman, *The Law of Agency* 5th ed. (London: Butterworths, 1983), 138-139; William Bowstead, Francis M.B. Reynolds, Peter Watts & Michelle Graziadei, *Bowstead and Reynolds on Agency*, 18th ed. (London: Sweet & Maxwell, 2006), 10-15; A.J. McClean, *Review of Representation Agreements and Enduring Powers of Attorney* (Undertaken for the Attorney General of the Province of British Columbia, February 2002) [McClean Report], 2; New Zealand Law Commission, *Misuse of Enduring Powers of Attorney*, Report No. 71 (Wellington, New Zealand: April 2001), 2.
168. The Law Reform Commission of Nova Scotia explains "Beginning in the 1970s, law reform agencies in England, Australia and Canada began to consider whether or not to alter the common law to allow powers of attorney, as a distinct form of agency, to endure despite the mental incapacity of the donor (i.e., enduring powers of attorney)". Law Reform Commission of Nova Scotia, note 94, 33-34. For a general discussion of how an attorney's duties can change once the donor has been found to be incapable (in the United States) see: Nina A. Kohn, "Elder Empowerment as a Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney" (2006) 59:1 Rutgers Law Review 1.
169. McClean Report, note 167, 12, referring to the need for some degree of formality to ensure that the intent of the grantor is carried out.
170. LCO Focus Group 3: self-advocates, family and friends, note 72; LCO Focus Group 7: self-advocates, family and friends, note 72. See also: Canadian Centre for Elder Law, *Understanding the Lived Experiences of Supported Decision-Making in Canada* (Toronto: Law Commission of Ontario, March 2014) [CCEL, *Supported Decision-Making*], 50.
171. *Representation Agreement Act*, note 4, s.7(1)(b); *Representation Agreement Regulation*, note 131, s.2; LCO Focus Group 2: community organizations, note 131; LCO Focus Group 6: financial institution employees, note 72; LCO Focus Group 3: self-advocates, family and friends, note 72. See also: Nidus Personal Planning Resource Centre, note 131.
172. McClean Report, note 167, 4.
173. British Columbia, Office of the Ombudsperson, *No Longer Your Decision: British Columbia's Process for Appointing the Public Guardian and Trustee to Manage the Financial Affairs of Incapable Adults* (Public Report No. 49 to the Legislative Assembly of British Columbia, February 2013); Gordon, note 131, Ch.1.
174. Bach & Kerzner, note 131, 78-79; Lana Kerzner, *Paving the Way to Full Realization of the CRPD's Rights to Legal Capacity and Supported Decision-Making: A Canadian Perspective* (paper delivered at "In From the Margins: New Foundations for Personhood and Legal Capacity in the 21st Century", University of British Columbia, April 2011), 38-40; M. Melinda Munro, "Guardianship of Adults: Good Faith and the Philosophy of Mental Disability in British Columbia" (1997) 14:2 Canadian Journal of Family Law 217, 228-230; Gordon, note 131, 24.
175. *Representation Agreement Act*, note 4, s.8(2).
176. Kerzner, note 174, 39; Power *et al*, note 32, 174-175.
177. CCEL, *Supported Decision-Making*, note 170, 17.
178. Gordon, note 131, 24. For more information on the use of representation agreements, see: CCEL, *Supported Decision-Making*, note 170; Wendy Harrison, *Representation Agreements in British Columbia: Who Is Using Them and Why?* (M.A. Thesis, Simon Fraser University, 2008).
179. Consultation with Professor Robert Gordon.
180. Nidus Personal Planning Resource Centre, *A Study of Personal Planning in British Columbia: Representation Agreements with Standard Powers* (Nidus Personal Planning Resource Centre, 2010).
181. LCO Focus Group 4: self-advocates, family and friends, note 107.
182. LCO Focus Group 6: financial institution employees, note 72.
183. ACE Written Submissions, note 90.
184. Gordon, note 131, 23-24; consultation with Professor Robert Gordon.
185. *Representation Agreement Act*, note 4, s.12.
186. Consultation with the Public Guardian and Trustee for British Columbia; Michelle Browning, *Report to Investigate New Models of Guardianship and the Emerging Practice of Supported Decision-Making* (Winston Churchill Memorial Trust of Australia, 2010), 32; CCEL, *Supported Decision-Making*, note 170, 51.
187. ACE Written Submissions, note 90.
188. LCO Focus Group 2: community organizations, note 131; consultation with Professor Robert Gordon; CCEL, *Supported Decision-Making*, note 170, 15-17.
189. ACE Written Submissions, note 90.
190. LCO Focus Group 2: community organizations, note 131.
191. Law Reform Commission of Nova Scotia, note 94, 51, writing on the presumption of capacity.
192. Browning, note 186, 23, 27-28; consultation with Seniors' Services and Adult Protection Unit, Yukon Health and Social Services.

193. *Decision-Making, Support and Protection to Adults Act*, note 139, Schedule A, ss.4, 5; *Adult Guardianship and Trusteeship Act*, note 130, s.4; Browning, note 186, 23.
194. *Decision-Making, Support and Protection to Adults Act*, note 139, Schedule A, s.11; *Adult Guardianship and Trusteeship Act*, note 130, s.6; Victorian Law Reform Commission, *Guardianship: Final Report* (April 2012) [VLRC], 8.97-8.107.
195. Yukon Health and Social Services, note 138.
196. LCO Focus Group 5: self-advocates, family and friends, note 106; LCO Focus Group 7: self-advocates, family and friends, note 72; LCO Focus Group 3: self-advocates, family and friends, note 72.
197. LCO Focus Group 3: self-advocates, family and friends, note 72; LCO Focus Group 1: legal practitioners, note 106.
198. Law Reform Commission of Nova Scotia, note 94, 55.
199. Saskatchewan Ministry of Justice and Attorney General, note 135.
200. Saskatchewan Ministry of Justice and Attorney General, note 135, 4, 5.
201. Consultation with the Public Guardian and Trustee for Saskatchewan.
202. SDA, note 2, s.47(1).
203. Consultation with CLO and PooranLaw.
204. Canadian Association of Community Living, *Understanding Legal Representation and Supported Decision Making for Persons with Disabilities in Canada* (March 2011), 25.
205. ACE Written Submissions, note 90.
206. ARCH Disability Law Centre Written Submissions, note 146.
207. Vanguard Project Collaborative, *Vulnerable Adults and Capability Issues in BC: Provincial Strategy Document* (Vanguard Project Collaborative, January 2009), 23.
208. Canadian Centre for Elder Law, “Financial Abuse of Seniors: An Overview of Key Legal Issues and Concepts”, (Background paper prepared for the International Federation on Ageing, March 2013), 4, writing on the financial abuse of older adults; Vanguard Project Collaborative, note 207, 22.
209. LCO Focus Group 7: self-advocates, family and friends, note 72. Translated from the French: “Et ce n’est pas qu’on veut leur enlever la possibilité de choisir, c’est qu’on veut, dans une certaine mesure, les protéger pour que, quand ça va être le temps qu’ils vont avoir besoin de cet argent-là, qu’ils aient accès à cet argent”.
210. SDA, note 2, ss.10(1), 10(2).
211. SDA, note 2, s.7(4); Ontario Ministry of the Attorney General, *Powers of Attorney* (Queen’s Printer for Ontario, 2012) [Ministry of the Attorney General, *Powers of Attorney*], Part 2.
212. Ministry of the Attorney General, *Powers of Attorney*, note 211, Part 3; SDA, note 2, ss. 11, 12.
213. SDA, note 2, ss. 7(4), 7(5), 12.
214. SDA, note 2, s.12; D’Arcy Hiltz & Anita Szigeti, *A Guide to Consent & Capacity Law in Ontario* (Markham, Ontario: LexisNexis Canada Inc., 2012), 29.
215. SDA, note 2, ss.32, 38.
216. The Office of the Public Guardian and Trustee, *Duties and Powers of a Guardian of Property* (Queen’s Printer for Ontario, 2013) [OPGT, *Duties and Powers*], 4.
217. SDA, note 2, s.32.
218. OPGT, *Duties and Powers*, note 216, 4.
219. SDA, note 2, s.32.
220. SDA, note 2, s.32(6); *Accounts and Records of Attorneys and Guardians*, O. Reg. 100/96.
221. Fram Report, note 102, 235; SDA, note 2, s.42.
222. SDA, note 2, s.42.
223. SDA, note 2, s.27(2).
224. SDA, note 2, ss.27(3.1).
225. SDA, note 2, s.83.
226. SDA, note 2, s.8(2).
227. For example: consultation with PooranLaw; ACE Written Submissions, note 90 (concerning personal appointments); Saskatchewan Ministry of Justice and Attorney General, note 135.
228. For information on maximum and minimum withdrawals, including DAPs and LDAPs, see: Employment and Social Development Canada, “InfoCapsule: Maximum and Minimum Withdrawals” [ESDC, “InfoCapsule”], online: <http://www.esdc.gc.ca/eng/disability/savings/issuers/infocapsules/withdrawals.shtml>.
229. LCO Focus Group 6: financial institution employees, note 72
230. SDA, note 2, s.27.
231. Minister of Finance’s Expert Panel, note 23, 39.
232. Minister of Finance’s Expert Panel, note 23, 44-46; ITA, note 1, s.146.4(4)(i).
233. Jamie Golombek, “Planning with Registered Disability Savings Plans” (2009) 57:2 Canadian Tax Journal 338, 350.
234. Minister of Finance’s Expert Panel, note 23, 40.
235. ITA, note 1, 146.1(4)(n)(ii). For information on maximum and minimum withdrawals, including DAPs and LDAPs, see: ESDC, “InfoCapsule”, note 228.
236. CRA, *RDSP*, note 43, 8; Ann Elise Alexander, “Estate Planning Tips for Tax-Free Savings Accounts (TFSA) and Registered Disability Savings Plans (RDSP)” (Paper prepared for the Ontario Bar Association Institute of Continuing Legal Education, Trusts and Estates Section, “Grave Consequences: Traps and Pitfalls in Contemporary Estates Law”, February 2010).
237. ITA, note 1, s. 146.4(13)(c).
238. ITA, note 1, ss.146.4(4)(a)(i), 146.4(11).
239. Consultation with the Canada Revenue Agency.
240. ACE Written Submissions, note 90.

241. Consultation with CLO and PooranLaw.
242. For instance, Joanne Taylor, Executive Director of Nidus Personal Planning Resource Centre, commented to the LCO, “I do not think it would be ‘safe’ to only provide a mechanism for authority to act as a plan holder of an RDSP. Building up funds in an RDSP could in fact increase an adult’s vulnerability unless there is a mechanism to ensure support for all life areas (health care, personal care, financial, legal) as these areas overlap and intertwine in real life. Compartmentalizing one aspect of financial benefit doesn’t address the needs of a whole person”.
243. ITA, note 1, ss.146.4(1) “disability assistance payment”, 146.4(4)(a)(iii), 146.4(13)(C).
244. LCO Focus Group 6: financial institution employees, note 72.
245. Canadian Bankers Association Written Submissions, note 127.
246. For instance, ACE states “By not granting authority to manage funds paid out of an RDSP, we would also avoid having significantly different capacity regimes for dealing with substantially similar assets (depending on whether funds are paid out of an RDSP or are paid from some other source)”. ACE Written Submissions, note 90.
247. ARCH Disability Law Centre Written Submissions, note 146.
248. For more information, see the LCO’s discussion paper for the project at pages 78 to 80. Each of these examples integrates a staged approach to legal representation. For example, CPP distinguishes representation to apply for a benefit, a division of pensionable earnings or an assignment of a portion of a retirement pension from the payment of benefits to a CPP “trustee”. The Australia National Disability Insurance Scheme, which provides individualized funding to persons with disability, separates the role of legal representatives (called “plan nominees”) between a planning function and the management of direct payments. An adult could have a plan nominee who serves one or both of these functions as well as more than one plan nominee with separate or joint decision-making authority. Furthermore, Community Living British Columbia permits family members, support networks, friends and trusted advisors to assist an individual with a developmental disability to submit a plan for individualized funding, while the individual or a CLBC-approved agent can receive direct payments. If the beneficiary’s funding amounts to more than \$6,000 annually, only a legally authorized person or organization can receive and manage payments on his or her behalf, such as a representative under the *Representation Agreement Act* or the equivalent of a guardian (called a “committee”). *Canada Pension Plan Regulations*, note 8, ss.44, 55; NDIS Nominee Rules, note 160, 3.6-3.10; Community Living British Columbia, “Individualized Funding”, online: <http://www.communitylivingbc.ca/individuals-families/support-for-adults/individualized-funding>, 7.
249. ARCH Disability Law Centre Written Submissions, note 146; consultation with CLO and PooranLaw; ACE Written Submissions, note 90 (regarding a personal appointment); Saskatchewan Ministry of Justice and Attorney General, note 135.
250. ACE Written Submissions, note 90 (regarding a personal appointment); consultation with CLO and PooranLaw.
251. ITA, note 1, s.146.4(4)(a)(i).
252. SDA, note 2, s.32.
253. SDA, note 2, s.33.
254. ACL, CLO and PooranLaw Written Submissions, note 99; Bach & Kerzner, note 131, 87-90; Ann Soden, “Beyond Incapacity” (2011) 5:2 McGill Journal of Law and Health 295.
255. HCCA, note 17, s.21; SDA, note 2, s.66.
256. Bach & Kerzner, note 131, 87-90; *Representation Agreement Act*, note 4, s. 16(2); *Decision-Making Support and Protection to Adults Act*, note 139, Schedule A, s.23. See also: The Law Commission (United Kingdom), note 33, 4.26; NDIS Nominee Rules, note 160, Part 5, “How nominees are expected to act”. For a discussion of the best interests standard, see: Linda S. Whitton & Lawrence A. Frolik, “Surrogate Decision-Making Standards for Guardians: Theory and Reality” (2012) 3 Utah Law Review 1491.
257. A number of studies have been undertaken to evaluate different types of decision-making arrangements. However, they use inconsistent analytical criteria, making it a challenge to draw conclusions about comparative advantage. See for instance: Nina A. Kohn, Jeremy A. Blumenthal & Amy T. Campbell, “Supported Decision-Making: A Viable Alternative to Guardianship?” (2013) 117:4 Penn State Law Review 1111; CCEL, *Supported Decision-Making*, note 170; Whitton & Frolik, note 256; Lutfiyya *et al*, note 132; Margaret Wallace, *Evaluation of the Supported Decision Making Project* (Office of the Public Advocate for South Australia, November 2012); Wendy Harrison, note 178.
258. OPGT, *Duties and Powers*, note 216, 4.
259. The Law Reform Commission of Nova Scotia, note 94, 181-183.
260. Canadian Bankers Association Written Submissions, note 127.
261. The LCO also heard that having a lawyer, doctor or government employee certify the appointment would provide a degree of certainty to third parties. However, we do not consider these options here for the reasons expressed in Chapter IV.C.2 of this report.
262. LCO Focus Group 6: financial institution employees, note 72.
263. LCO Focus Group 6: financial institution employees, note 72.
264. SDA, note 2, s.13.
265. The Law Reform Commission of Nova Scotia, note 94, 182; *Power of Attorney Act*, R.S.B.C. 1996, c.370, s.31(1); *The Powers of Attorney Act, 2002*, S.S. 2002, c.P-20.3, s.21; VLRC, note 194, 10.33. The Saskatchewan legislation also stipulates that third parties are not required to inquire or ascertain the existence of defects or the termination of a POA, if they do not know of their existence.
266. The Law Reform Commission of Nova Scotia has remarked, “The benefit of the British Columbia model is that third parties do not have to worry whether or not the donor was legally capable, for example, or whether or not the [enduring POA] was otherwise validly executed. Third parties may therefore be more willing to deal with the attorney without confirming for themselves the validity of the [enduring POA], including the capacity of the donor”. The Law Reform Commission of Nova Scotia, note 94, 182.
267. *Begley v. Imperial Bank of Canada*, [1935] S.C.R. 89, 1934 CanLII 31; The Law Reform Commission of Nova Scotia, note 94, 183.
268. SDA, note 2, s.13.
269. For example: LCO Focus Group 3: self-advocates, family and friends, note 72; LCO Focus Group 7: self-advocates, family

- and friends, note 72; LCO Focus Group 5: self-advocates, family and friends, note 106; consultation with the OASIS.
270. ITA, note 1, s.146.4(1) “qualifying family member”, “qualifying person”, “disability savings plan” and “holder”; consultation with Finance Canada.
271. A trust corporation can replace the OPGT following a statutory guardianship appointment, if the person who has been found to be incapable has a spouse or partner who consents in writing. SDA, note 2, ss.7, 17(1).
272. Consultation with Nimali Gamage of Goddard, Gamage and Stephens LLP; consultation with the Schizophrenia Society of Ontario; ACE Written Submissions, note 90.
273. GAO, note 161, 13, citing Liesi E. Hebert, Paul A. Scherr, Julia L. Bienias, David A. Bennett & Denis A. Evans, “Alzheimer Disease in the US Population: Prevalence Estimates Using the 2000 Census”, (2003) 60:8 Archives of Neurology 1119; Sumit Agarawal, John C. Driscoll, Xavier Gabaix & David Laibson, “The Age of Reason: Financial Decisions over the Life Cycle and Implications for Regulation”, Brookings Papers on Economic Activity (Washington: 2009).
274. SDA, note 2, s.7(3).
275. Information provided by Saara Chetner and Risa Stone (Counsel for the Office of the Public Guardian and Trustee (Ontario)).
276. Consultation with the Ontario Disability Support Program; ODSP Directives, note 65, 10.2; Information provided by Employment and Social Development Canada (CPP/OAS).
277. *The Powers of Attorney Act*, note 265, s.8; Law Reform Commission of Saskatchewan, *Consultation Paper on Enduring Powers of Attorney* (Saskatoon: January 2001), 28, online: <http://www.lawreformcommission.sk.ca/Papers.htm>. *The Adult Guardianship and Co-Decision-Making Act* also provides that corporations or agencies or categories of the same can be designated by the Minister as eligible applicants to be appointed as a co-decision maker or guardian. Community organizations, such as the Saskatchewan Association for Community Living, have also been appointed through the courts as substitute or co-decision makers. Consultation with Professor Doug Surtees; Doug Surtees, “The Evolution of Co-Decision-Making in Saskatchewan” (2010) 73:1 Saskatchewan Law Review 75, 87; *The Adult Guardianship and Co-Decision-Making Act*, note 136, s.30.
278. Community Living British Columbia, *Host Agency Funding Policy* (effective June 1, 2009), online: <http://www.communitylivingbc.ca/wp-content/uploads/Host-Agency-Funding-Policy.pdf>; consultation with Professor Tim Stainton.
279. Consultation with OASIS.
280. Consultation with OASIS.
281. Consultation with OASIS.
282. See for instance: Community Living British Columbia, *Standards for Unaccredited Service Providers: A Resource Guide* (April 2012), 30; Focus Group 6: financial institution employees, note 72; Focus Group 1: legal practitioners, note 106.
283. Consultation with OASIS; LCO Focus Group 7: self-advocates, family and friends, note 72; LCO Focus Group 4: self-advocates, family and friends, note 107; LCO Focus Group 5: self-advocates, family and friends, note 106; Social Security Advisory Board
- “Disability Programs in the 21st Century: The Representative Payee Program” (2010) 2:1 Social Security Advisory Board Issue Brief Series, 5; Weisbord, note 161.
284. ODSP Directives, note 65, 10.2; *Quality Assurance Measures*, O.Reg. 299/10; Ministry of Community and Social Services, *A Guide to the Regulation on Quality Assurance Measures* (Queen’s Printer for Ontario, 2011).
285. SDA, note 2, s.12.
286. SDA, note 2, ss.10, 12.
287. SDA, note 2, s.12.
288. SDA, note 2, s.11.
289. The rules for termination under the SDA currently provide that a POA ends if a court appoints a guardian for property on an adult’s behalf. In contrast, a POA that gives an attorney authority over all of the adult’s property takes precedence over a statutory guardianship appointment. Should an adult have a guardian appointed as a result of a statutory capacity assessment, the guardianship is terminated if such a POA is authenticated by the OPGT and the attorney agrees to act. SDA, note 2, s.16.1.
290. Senate Committee Report, note 11, 13.
291. LCO Focus Group 7: self-advocates, family and friends, note 72; LCO Focus Group 2: community organizations, note 131; Focus Group 8: self-advocates, family and friends, note 81.
292. Law Commission of Ontario, *Increasing Access to Family Justice through Comprehensive Entry Points and Inclusivity* (Toronto: February 2013), 9.
293. LCO Focus Group 7: self-advocates, family and friends, note 72.
294. Saskatchewan Ministry of Justice and Attorney General, note 135.
295. Ministry of the Attorney General, *Powers of Attorney*, note 211.
296. CACL, CLO and PooranLaw Written Submissions, note 99.
297. LCO Focus Group 6: financial institution employees, note 72; Canadian Bankers Association Written Submissions, note 127
298. SDA, note 2, s.85.

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

Tel: (416) 650-8406

Toll Free: 1 (866) 950-8406

TTY: 1 (877) 650-8082

Fax: (416) 650-8418

E-mail: LawCommission@lco-cdo.org

<http://www.lco-cdo.org>



LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO