



**Advocacy Centre
for the Elderly**

2 Carlton Street, Suite 701
Toronto, Ontario M5B 1J3
Tel: (416) 598-2656
Fax: (416) 598-7924
www.ancelaw.ca

Chair, Board of Directors
Lyndsay O'Callaghan

Lawyers

Judith A. Wahl, B.A., LL.B.
Rita A. Chrolavicius, LL.B.
Graham Webb, LL.B., LL.M.
Jane E. Meadus, B.A., LL.B.
Brendan Gray, B.A., LL.B.

Via Email: smason-case@lco-cdo.org

February 28, 2014

Ms. Sarah Mason-Case, Research Lawyer
Law Commission of Ontario
Capacity of Adults with Mental Disabilities and the Federal RDSP
2032 Ignat Kaneff Building,
Osgoode Hall Law School, York University
4700 Keele Street, Toronto, ON M3J 1P3

Dear Ms. Mason-Case,

Re: Comments on Discussion Paper: Capacity of Adults with Mental Disabilities and the Federal RDSP

We write to provide commentary on the Law Commission of Ontario's discussion paper entitled *Capacity of Adults with Mental Disabilities and the Federal RDSP* (October 2013) (the "Paper").

We would like to thank the Law Commission of Ontario for preparing such a detailed discussion paper outlining the difficulties and options for reform relating to capacity of adults and access to the federal RDSP. While we critique some of the potential reforms discussed in the Paper, we recognize that the Law Commission is not endorsing any particular reform recommendations at this time and is instead seeking a fulsome discussion of this complex issue.

Summary of ACE's Position

ACE agrees that reforms are needed so that adults who do not meet the capacity threshold under the *Substitute Decisions Act, 1992* (the *SDA*) to manage property or prepare a continuing power of attorney for property can more easily obtain access to the RDSP. ACE agrees with the benchmarks for reform identified at pages 6-7 of the Paper. However, ACE is concerned that many of the options for reform raised in the Paper create an increased risk of financial abuse. ACE believes that clearly defined legal roles and responsibilities are essential for preventing, investigating, and stopping financial abuse. Several of the potential options for reform set out in the Paper are overly complex, vague and are out-of-sync with Ontario's broader statutory scheme on capacity and substitute-decision making for property.

ACE believes that reforms are needed to both the personal and external appointment process for RDSP property managers.

With regard to the personal appointment process, ACE believes that revising the SDA to lower the cognitive capacity threshold for preparing a continuing power of attorney for property limited to an RDSP has merit. An attorney appointed pursuant to this lowered capacity threshold should only have authority to act as a plan holder, and should not have authority to manage funds paid out of the RDSP – as this is where the greatest potential for abuse arises. However, ACE does not recommend adopting a non-cognitive capacity threshold. ACE believes that cognitive capacity is a reasonable and legitimate basis for distinguishing between legally effective and ineffective decisions – provided that the assessment of capacity is conducted in accordance with Ontario law and with appropriate supports.

With regard to external appointments, ACE sees merit to modeling RDSP reforms on the trustee appointment process under the Canada Pension Plan and Old Age Security schemes. This approach is easy to access, cost effective, and already well understood by medical, legal and social service professionals. As the OAS/CPP trusteeship process is initiated by a capacity finding of a medical practitioner, a similar process could be integrated into the current requirement to obtain an opinion from a medical practitioner in order to access the RDSP.

ACE does not recommend the other reform proposals identified in the Paper. We believe the broader statutory schemes on guardianship, capacity to manage property, and capacity to prepare a power of attorney for property should continue to operate as is – with the assumption that “property” includes an RDSP and funds paid-out of an RDSP.

We are particularly concerned that adopting a non-cognitive capacity threshold, and implementing a corollary supported decision-making model, may conflict with Ontario’s broader statutory scheme on property decision-making. Furthermore, we are concerned that the lack of clearly defined roles in supported decision-making legislative models, and the potential for the supporter to be the lone legally recognized interpreter of the intentions of the supported adult, creates a risk that financial abuse will not be detectable. Lastly, third parties transacting with a support person and a supported adult may also have liability concerns where the supported adult remains the legal decision-maker and his/her contractual capacity remains in issue.

With regard to options for reform involving common-law trusts and fast-tracked applications to Courts or administrative tribunals (such as the Consent and Capacity Board), ACE believes these options are impractical, no less complex than presently existing processes, and/or would likely fail to succeed due to governmental resource constraints.

About the Advocacy Centre for the Elderly (ACE)

ACE is a specialty community legal clinic that was established to provide a range of legal services to low income seniors in Ontario. The legal services include individual and group client advice and representation, public legal education, community

development and law reform activities. ACE has been operating since 1984 and it is the first and oldest legal clinic in Canada with a specific mandate and expertise in legal issues affecting the older population.

ACE staff have had extensive experience in issues related to elder abuse and have been involved in many of the law, policy, and education initiatives related to these issues that have taken place in Ontario over the last 30 years. These have included:

- participation as a member of the Fram Committee, the work of which resulted in the passage of the *Substitute Decisions Act, 1992*;
- participation as a member of the Elder Health Coalition Elder Abuse Working Group that created a Policy lens tool to evaluate Elder abuse response programmes;
- participation as a member of the Fact Finding Working Group on Prevention and Awareness of the Abuse of Older Adults with Disabilities, , 2009-2010 and the Expert Roundtable on Elder Abuse, 2008, both initiatives organized by Human Resources and Social Development Canada;
- participation as an organizer, presenter and facilitator of the Federal-Provincial-Territorial Working Group Consultation on Financial Abuse, Ottawa, June 2008;
- participation as an organizer and presenter at training programmes on Elder Abuse Response for the Ontario Police College;
- organizing and co-chairing of the First National Conference on Elder Abuse and Crime, 1990; and,
- currently participating on the Advisory Committee for the Law Commission of Ontario's Project on Legal Capacity, Decision-making and Guardianship.

Commentary on the Paper

In order to assist the Law Commission of Ontario with organizing responses to the Paper, we have divided our comments according to the questions for discussion distributed in your email of January 28, 2014.

1. *Do the challenges with Ontario's current framework that are identified in the discussion paper accurately reflect what you've learned in your work? If they do not or you are aware of additional challenges, please explain.*

ACE agrees with many of the challenges identified in the Paper on Ontario's current legislative structure. The challenges identified in the Paper are not unique to the

RDSP context. Addressing financial decision-making can be very challenging where an adult:

- lacks capacity to manage property under the *SDA*;
- lacks capacity to prepare a continuing power of attorney for property; and,
- has not previously granted a continuing power of attorney for property.

Absent an expensive application to court to appoint a guardian for property, there are few remedies available for the adult or his/her family and friends for coordinating management of financial assets. For adults with few assets and little or no private source income, this challenge is less pronounced as trustees can be appointed under the ODSP or CPP/OAS schemes.

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.

In our practice, ACE has seen numerous cases where professionals have misunderstood Ontario law, and employed an unduly restrictive cognitive capacity threshold. ACE continues to educate members of the public and professionals to correct these misconceptions.

2. *Should Ontario’s threshold for capacity to grant a POA for property management be lowered for the specific purpose of establishing a legal representative for RDSP beneficiaries? If not, why? If so, why and to what threshold?*

ACE believes that the capacity threshold under the *SDA* should be altered only with regard to capacity to prepare a continuing power of attorney for property limited to appointing an RDSP plan holder. We would suggest that the threshold be revised to reflect a lower cognitive capacity. However, ACE does not recommend a non-cognitive test for capacity.

The *SDA* draws a distinction between capacity to give a power of attorney for personal care and capacity to give a continuing power of attorney for property. The capacity threshold to give a continuing power of attorney for property is as follows:

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.

The capacity threshold to prepare a power of attorney for personal care provides:

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.

The current threshold to prepare a continuing power of attorney for property 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. In contrast, the threshold for capacity to give a power of attorney for personal care requires only an ability to understand whether the attorney has a genuine concern for the grantor's welfare and an appreciation that the attorney may be needed to make decisions. Of course, the attorney for personal care will also have to be capable of making each particular decision (i.e. a health practitioner soliciting substitute consent must assess the attorney to determine if he/she is capable of making the particular treatment decision).

This distinction between personal care and property makes sense where the grantor is giving the attorney authority to make decisions for all of his/her property. In giving a broad continuing power of attorney for property, ACE agrees with the provisions of the *SDA* that the grantor should:

- have actual knowledge of the assets over which the attorney will exercise authority;
- know his/her rights to demand an accounting and revoke the power of attorney; and,
- appreciate the risk of abuse by the attorney for property.

The distinct capacity tests for powers of attorney for property and personal care also reflect the fact that a continuing power of attorney for property may take effect when the grantor is still capable, and the fact that there is less risk of self-interested abuse when giving a power of attorney for personal care (as the attorney will be less able to convert this authority into personal financial gain).

Lastly, Ontario has made a legislative decision to appoint default substitute decision-makers for treatment, admission to care facilities, and receipt of personal assistance services under the *Health Care Consent Act, 1996*. There is no default statutory scheme for property decision-making where an individual becomes incapable. In the context of the broader statutory scheme for substitute decision-making under the *Health Care Consent Act, 1996*, it makes sense to lower the capacity threshold for giving powers of attorney for personal care - because all individuals have a substitute decision-maker regardless.

While we do not recommend broader changes to the regime for granting continuing powers of attorney for property, ACE does see merit to lowering the capacity threshold for giving a continuing power of attorney for property restricted to acting as an RDSP plan holder (an "RDSP Plan Holder Continuing Power of Attorney"). We would recommend that the lowered capacity threshold be similarly worded to the test for preparing a power of attorney for personal care: requiring the ability to understand that the attorney has a genuine interest in the adult's welfare and the ability to appreciate that the attorney will be needed to make financial decisions relating to the RDSP.

As summarized in the Paper, an RDSP plan holder has the authority to:

- open the RDSP at a financial institution;
- authorize contributions from private sources;
- apply for government grants and bonds;
- decide terms for the investment of savings; and,
- depending on the plan terms, decide the availability, timing, and amount of payments.ⁱⁱ

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 to grantors of 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 through an "RDSP Plan Holder Continuing Power of Attorney."

However, the same analysis does not apply to the management of funds paid out of an RDSP to a beneficiary. Payouts may be of significant value and may be put to any

use. As such, there is a real risk of financial abuse. Fortunately, we understand 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. 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).

As set out above, ACE does not recommend a non-cognitive test for capacity. The Paper references the following potential non-cognitive threshold: “the capacity to express one’s will and/or intentions and the ability of one’s life story of values, aims, needs and challenges to be understood by others, who can then give effect to one’s will and/or intentions.”ⁱⁱⁱ We see at least three difficulties with this approach:

(a) the ability to express an intention or wish does not, by itself, provide a principled basis for making that wish binding on either the expresser or third parties. 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 this approach in principle, we also believe it creates an increased risk of financial abuse;

(b) the ability for one’s life story of values, aims, needs and challenges to be understood is both so broad as to be potentially meaningless and so complex as to be impractical. Adopting this, or similar criteria, could make decisions impenetrable to outside review; and,

(c) the non-cognitive model is often associated with the ability of a close caregiver to understand the will and intentions of an adult, even if others less familiar with the adult are unable to intuit these messages. While it is certainly true that caregivers develop these interpretive abilities, ACE is concerned that this proposal will, again, create opportunities for abuse that are impenetrable to review.

While we agree that capacity assessments often unjustly correlate incapacity with disability, this does not mean that Ontario should abandon cognitive thresholds for RDSP personal appointments. Instead, we propose as RDSP Plan Holder Continuing Power of Attorney based on a lower cognitive threshold.

3. *Do you have experience with alternative decision-making arrangements (i.e., supported and co-decision making, and representation agreements)? If so, what are the lessons to be learned for the options for reform in this project?*

As ACE’s client work is almost exclusively conducted in Ontario, we do not have direct experience with supported and co-decision making legislative models. However, ACE has a great deal of experience with disputes related to decision-making for seniors,

and also participates in broader law reform discussions across Canadian and international jurisdictions.

As set out above, we have concerns about the use of supported decision-making models. Specifically, ACE believes that supported decision-making models create a greater risk of financial abuse than exists under more traditional substitute decision-making legislative models. Supported decision-making permits the adult to retain legal capacity to make decisions, while allowing the adult to receive support and assistance. The difficulty with this arrangement is that it creates a risk of undue influence by a legally designated support person. While this risk also exists in more traditional arrangements involving attorneys and guardians for property, we are concerned that actual abuse by a support person will be more difficult to detect as the true identity of the decision-maker, and the factors influencing each decision, may become opaque. While we recognize that the use of “monitors” may result in concerns being brought to the attention of investigators more readily, the vagaries inherent in the supporter’s role may make these concerns more subjective and difficult to substantiate for investigators.

We understand that the primary benefit of supported decision-making models is that adults who might be considered incapable without a support person can be found capable because of the assistance they receive. ACE believes that this same benefit already exists under Ontario law, if properly understood and applied. Fundamentally, if a person is capable through receipt of appropriate supports and interpretive services, then the person is capable under the *SDA*. There is no need to resort to a legally designated support person – the capable adult may decide whom he/she wishes to include in the decision-making process.

As set out in the Paper, we understand that the other main benefit of the supported decision-making model is that adults avoid the stigma of being labelled “incapable.” While ACE recognizes this as a legitimate concern, we believe it does not justify adopting a legislative model that may make it more difficult to detect financial abuse. If there were alternatives to respond to the concern of stigmatization without potentially increasing the risk of financial abuse, we would welcome these suggestions.

With regard to co-decision making, ACE understands that this legislative model is generally operationalized as a co-signing requirement – both the adult and supporter must sign contracts at the same time. While co-decision making creates clearly defined roles and responsibilities, and may not create an increased risk of abuse (provided it is implemented through a cognitive capacity threshold and with appropriate safeguards), we believe it is impractical and inefficient when compared with other available solutions to the RDSP issue.

4. *Should a trustee act as a legal representative for RDSP beneficiaries? If not, why? If so, why and what measures would be required to implement a trust mechanism as an option for reform in Ontario?*

ACE believes that the non-statutory trust option would be impractical, overly complex, and potentially more paternalistic than other legislative models. Admittedly, this is a very broad option that covers numerous types of trust instruments. As set out below, ACE is in favour of created a statutory trust mechanism similar to the OAS/CPP trustee appointment process. However, ACE is not in favour of the broader use of trust mechanisms to address RDSP concerns.

Non-statutory trusts are complex, have expansive and potentially unpredictable tax consequences, and generally require lawyers to create. ACE is concerned that this option would be inaccessible to the vast majority of the public and, if current trust models are followed, could result in beneficiaries having a smaller say in the distribution of benefits than is currently the case under continuing powers of attorney for property and/or guardianship orders. We further understand that such trusts may be difficult to establish given the mix of public and private contributions to RDSPs.

5. *Should a court or tribunal (or neither) process be used for the specific purpose of establishing a legal representative for RDSP beneficiaries? If not, why? If so, why and what measures would be required to make such a process fair, cost-effective, speedy and user-friendly?*

ACE believes that options for reform involving 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.

ACE understands that the Ontario government is unlikely to devote new funds to establish a separate application procedure for courts and tribunals. Court wait times are already excessive, and the Court process (even with simplified rules) is rarely accessible to the general public. The Consent and Capacity Board's budget is already stretched thin (as noted in the Paper). Furthermore, the Consent and Capacity Board has no institutional experience or expertise with the complex financial planning inherent in RDSPs.

While the Courts should always be available to assist with capacity and property disputes, a specialized appointment process is unlikely to solve the current inaccessibility of the RDSP.

6. *Do you have experience with processes to appoint a representative payee in the income support and social benefits sectors (e.g., ODSP trustees)? If so, which processes and what are the lessons to be learned for the options for reform in this project?*

ACE has extensive experience with the use of trustees for OAS/CPP. As set out in the Paper, the OAS/CPP trusteeship process involves the completion of a certificate of incapability by a medical practitioner. The certificate of incapability has limited effect – only applying to OAS/CPP benefits and thereby protecting the incapable adult from broader unnecessary intervention. This process is generally well understood by health practitioners (and other professionals). Most importantly, this process is accessible to adults and their friends/family. We recommend that a similar approach be adopted for the RDSP.

Because the first stage in the RDSP process is a certificate signed by a medical practitioner, we believe that an OAS/CPP statutory trusteeship approach could be easily integrated into the RDSP scheme.

We believe that a trustee appointed pursuant to a process similar to the OAS/CPP model should have both the authority of a plan holder and the authority to manage payments paid out of the RDSP. However, this trustee would not have authority to manage the other finances of the incapable beneficiary, or to manage RDSP funds once comingled with the beneficiary's other bank accounts. For this broader authority to be granted, a guardianship order or continuing power of attorney for property would be required (of course, unless the beneficiary were capable of managing this property).

This RDSP trustee process should incorporate similar abuse safeguards to those in use for OAS/CPP trustees, such as maintaining and reporting accounts, an agreement with a governmental agency stipulating the trustee's obligations, and the designation of an organization to investigate abuse and fraud. We also recognize that RDSP planning involves more complexity than managing monthly OAS/CPP payments, and would recommend that RDSP trustees be required to prepare and submit a management plan for RDSP investments and payments. We also recommend that a procedure be created for the beneficiary to challenge a finding of incapacity and/or the appointment of a trustee. However, we anticipate that trustee appointments will be generally consensual – as we do not recommend permitting an adult to be compelled to be assessed for RDSP capacity.

We recognize that this proposal would require a modest increase in government resources to implement. Specifically, it would require increased funding to process applications, review RDSP management plans, and investigate allegations of abuse. We believe that many of these new responsibilities could be integrated into currently existing Ontario governmental agency responsibilities (such as the processing of ODSP applications or the OPGT's review of guardianship management plans).

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

As set out above, ACE recommends that a legal representative appointed pursuant to an "RDSP Plan Holder Continuing Power of Attorney" only have authority to act as a plan holder. This legal representative would not have broader authority to manage funds once paid out of the RDSP, unless this representative was also appointed pursuant to a Continuing Power of Attorney for Property, a guardianship order, or an RDSP trusteeship (similar to OAS/ CPP trustees). Our recommendation to restrict the authority granted by an RDSP Plan Holder Continuing Power of Attorney balances the benefit of creating an RDSP and applying for government bonds with the significant risk of abuse associated with managing funds paid-out from the RDSP.

With regard to our recommendation to permit the appointment of a trustee through a process similar to the OAS/ CPP certificate of incapacity, we believe this trustee should have both the authority of a plan holder and the authority to manage funds paid out of the RDSP. Where this authority is granted, the beneficiary will have been found incapable of managing RDSP funds, thereby limiting the risk of unnecessary intervention. Furthermore, such RDSP trustees will be subject to strict safeguards.

We would recommend that guardians for property and attorney's appointed pursuant to continuing powers of attorney for property also have the authority of both an RDSP plan holder and authority to manage funds paid out of the RDSP.

8. *What specific measures should be put in place to safeguard RDSP beneficiaries against financial abuse and the misuse of a legal representative's powers? Why?*

As set out above, we have recommended that Ontario law be amended so that adults meeting a lowered capacity threshold can prepare an RDSP Plan Holder Continuing Power of Attorney. Because RDSP plan holders do not have authority to manage funds paid out of the RDSP, there is little risk of financial abuse and we do not recommend any specific new measure to safeguard RDSP beneficiaries arising from this amendment.

We have also recommended allowing RDSP trustees to be appointed through a application process similar to that existing under the OAS/ CPP scheme. We would recommend the following safeguards:

- a finding of incapacity with respect to the beneficiary by a medical practitioner;
- a trustee who maintains and reports accounts;
- a trustee who enters into an agreement with a governmental agency stipulating the trustee's obligations;

- a governmental organization tasked with investigating allegations of abuse and fraud;
- a trustee who prepares a management plan for RDSP investments and payments and submits this plan for approval to a governmental organization; and,
- a procedure for the beneficiary to challenge the finding of incapacity and/or the appointment of the particular trustee.

These safeguards are similar to those that exist under the OAS/CPP scheme, with some additions to reflect the complex management of RDSPs.

Of course, we have not commented on all possible safeguards for RDSP beneficiaries. If the Law Commission were to pursue other legislative models further, such as supported decision-making, additional safeguards would be required.

9. *Should community organizations be eligible to act as legal representatives for RDSP beneficiaries? If not, why? If so, why and what measures would be required to implement this option (for instance, what types of community organizations should and should not be eligible)?*

ACE strongly believes that community organizations should be eligible to act as legal representatives for RDSP beneficiaries. We frequently encounter older adults who do not have the benefit of robust and trustworthy social and family networks able to manage an RDSP. There is a real need for community organizations to act as both plan holders and to manage funds paid out of the RDSP, where the beneficiary is incapable. It is our understanding that community organizations are already acting as trustees in some circumstances under the OAS/CPP scheme.

To protect beneficiaries from abuse, only regulated community organizations should be authorized to act as RDSP legal representatives. These community organizations should be pre-approved by governmental agencies on the basis of their ability to manage RDSP funds. In addition to being subject to the general requirements placed on individual trustees, community organizations managing RDSP funds should be required to maintain adequate insurance for the benefit of RDSP beneficiaries.

Beyond the above requirements, ACE does not take a position on which particular types of community agencies should be entitled to fill this role.

Conclusion

Thank you for providing this opportunity to comment on the Paper. We would be pleased to expand upon, or clarify, any of the opinions expressed herein.

Yours very truly,
ADVOCACY CENTRE for the ELDERLY

Judith A. Wahl
Executive Director
Barrister and Solicitor

Brendan Gray
Staff Lawyer
Barrister and Solicitor

ⁱ Stephen V. Fram, *Final Report of the Advisory Committee on Substitute Decisions Making for Mentally Incapable Persons* (Toronto: Guardianship & Advocacy Review Committee, 1987) at 42

ⁱⁱ Law Commission of Ontario, *Capacity of Adults with Mental Disabilities and the Federal RDSP* (October 2013), at 18-19

ⁱⁱⁱ *Ibid.*, at 24