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## Supported Decision Making and the RDSP Executive Summary 2022

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## **Legal Representation and the Registered Disability Savings Plan**

### **Introduction**

The Registered Disability Savings Plan (RDSP) is an innovative and forward-thinking program that assists people who qualify for the Disability Tax Credit to save for their future. With up to \$90,000 in federal grants and bonds available to beneficiaries, people can accumulate hundreds of thousands of dollars, greatly improving their quality of life and reducing long-term health and social costs for governments.

The RDSP has shortcomings that can be improved in ways that will increase the ability of hundreds of thousands of people who have an intellectual disability to participate and benefit from the program. We are proposing legislative measures that would address these shortcomings, reform burdensome laws that govern an important aspect of the RDSP, allow people who have an intellectual disability to access the program, and reduce administrative burden on the Office of the Public Guardian and Trustee.

### **The Issue**

The RDSP is a tax-deferred registered savings plan for persons who qualify for the Disability Tax Credit, which was created by Parliament in 2008 under the *Income Tax Act*, R.S.C., 1985 c. 1 (the “ITA”).

As the RDSP is a creation of statute, the ITA sets out who qualifies to become a plan holder (essentially, a trustee). Only a “qualifying person”, as defined in the Act, can become a plan holder. Until 2012, qualifying persons were limited to:

1. the beneficiary (if they attained the age of majority and are contractually competent);
2. a parent (if the beneficiary has not yet attained the age of majority); or
3. a guardian or some other legally authorized individual or entity.

The ITA further provided that if an adult beneficiary was not contractually competent, only a legally authorized person under option #3 above (a “substitute decision maker”) could become a plan holder. These provisions are still in the Act. However, in 2011, after an extensive review of the RDSP, the federal government, mainly enlightened by the experiences of stakeholders, recognized that limiting qualifying persons to substitute decision makers where the beneficiary was unlikely to be considered

contractually competent was obstructive to families and unnecessarily limiting of the rights and freedoms of people with disabilities.

In 2012, the federal government therefore amended the ITA by adding temporary provisions which permit qualifying family members (QFM) (i.e., a parent, spouse or common-law spouse) of a beneficiary who is not considered to be contractually competent, to become plan holders. While this alleviated immediate concerns regarding access to RDSPs for some people, the federal government has made it clear that this measure is temporary as the issue falls within provincial/territorial jurisdiction.

In 2013, on the urging of the Standing Senate Committee on Banking, Trade and Commerce, and on the written request of the federal Minister of Finance, the province asked the Law Commission of Ontario (“LCO”) to review how adults with developmental and intellectual disabilities might be better enabled to participate in the RDSP. The LCO approved the project in April 2013 and delivered its final report in June 2014 (the “LCO Report”).

The LCO made comprehensive recommendations in relation to addressing the issue of legal representation for beneficiaries of RDSPs. Now nearly eight years later, it is our understanding that the report is yet to be considered by the provincial government.

### **Impact on People with Intellectual Disabilities**

When people with intellectual disabilities or other cognitive impairments apply to open an RDSP, they may be subjected to a capacity test, and to a finding of incapacity. When a person is deemed to be “contractually incompetent”, the impact of the resulting loss of rights and freedom can be profound (see Appendix A for examples of this).

Because of the risks related to a finding of incapacity, there is a long history of opposition to capacity tests and guardianship among people who have an intellectual disability and their families. Many families refuse to put their loved ones at risk of guardianship, and therefore are losing out on federal government RDSP contributions of up to \$90,000.

For people who have taken advantage of the temporary QFM measure, RDSPs will be jeopardized as parents, spouses and common-law partners become incapable of managing the plan or pass away. In many cases people will be subjected to the procedural requirements of a guardianship application – often against their wishes – and the stigma and risk associated with being placed under guardianship (this will also have a negative impact on OPGT administrative burden). In the absence of an application for guardianship, there will be no clear process for managing funds for a person considered incapable.

More generally, there is no clear process for the tracking and reporting of deceased QFMs, or QFMs who may have become contractually incompetent, among RDSP issuers. It is likely that decisions are being made and funds are being disbursed in a manner that is not in the best interests of beneficiaries.

The Ontario *Substitute Decisions Act 1992* (the “SDA”) directs decision makers to not resort to guardianship if it can be “satisfied that the need for decisions to be made will be met by an alternative course of action that does not require the court to find the person to be incapable of managing property; and is less restrictive of the person’s decision-making rights than the appointment of a guardian.”

The Province of British Columbia passed the *Representation Agreement Act* in 1993. This Act provides an alternative to guardianship and allows for broad access to the RDSP while safeguarding people’s rights. This longstanding solution demonstrates that there are viable alternatives to guardianship in the case of the RDSP, and that RDSP-related applications for guardianship in Ontario contravene the spirit and guidance of the Substitute Decisions Act.

Other provinces and territories including Yukon, Saskatchewan, and Newfoundland & Labrador have passed legislation to provide their residents with greater accessibility to RDSPs.

The unique features of the RDSP (e.g., tax deferral options, federal government contributions of up to \$90,000, and a \$200,000 personal contribution limit) make it a lucrative investment for anyone looking to achieve long-term financial security for their loved one with a disability. People and families in Ontario should never have to disregard their desire to open RDSPs because the process is unnecessarily onerous.

### **The Legislative Barrier**

For people who are deemed to be “contractually incompetent” under the ITA, there are limited options under prevailing interpretations of the SDA to address the gap in legislation that we have highlighted. A person could execute a Continuing Power of Attorney for Property (“CPOAP”), however, most people found to be incapable of being their own plan holder will not be able to meet the legislative threshold to execute a CPOAP. Therefore, the only option remaining would be for the that person to be subjected to guardianship appointment.

Guardianship appointments confer substantial decision-making power on guardians, well in excess of what is necessary to manage an RDSP. There are considerable human rights implications with respect to such appointments, the process can take many months, and applications may be opposed by other interested parties. Moreover, guardianship applications are generally costly and can run into the thousands of dollars – money which could instead be contributed to an RDSP. As noted above, a significant influx of applications will also add to the already overburdened workload of the Office of the Public Guardian and Trustee (the “PGT”).

In instances where a sibling or anyone other than a parent, spouse, or common-law spouse (i.e., the Government’s temporarily eligible persons) wish to apply to become a plan holder, they would be required to apply for guardianship of the beneficiary in order to do so.

Obtaining guardianship under the SDA is too intrusive, costly, time-consuming and represents an overly complex method of obtaining legal authorization just to manage an RDSP. Moreover, it is inconsistent with Article 12 of the Convention on the Rights of Persons with Disabilities (of which Canada is a signatory) and the movement towards supported decision-making legal frameworks.

### **The Coalition's Recommendations**

Given that people with disabilities continue to be impacted by this legislative gap and that the temporary provisions in the ITA will expire in 2023, we respectfully request that the province of Ontario review and act on the following recommendations contained in the LCO Report:

1. Implement a process so that adults can 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.
2. The criteria used to grant or revoke the personal appointment of an RDSP legal representative should be based on section 8(2) of the British Columbia *Representation Agreement Act* (which consists of several 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).
3. The relationship between the grantor and the legal representative would benefit from existing protections offered through the *SDA* (e.g., the ability to appoint more than one legal representative, and requiring RDSP legal representatives to maintain accounts of transactions).
4. The RDSP legal representative would 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, they would be prohibited from receiving and managing funds paid out of the RDSP on the grantor's behalf.
5. The RDSP legal representative would have the duties of an attorney for property under s.32 of the *SDA* 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 their 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. This standard of care would require RDSP legal representatives to exercise the degree of care, diligence and skill that a person of ordinary prudence would exercise in the conduct of their own affairs.
6. The Government of Ontario would 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.

## Appendix A: Guardianship Gone Wrong

In a [2014 report](#) commissioned and published by the Law Commission of Ontario, the ARCH Disability Law Centre provides several examples of the negative outcomes experienced by people under guardianship. We are reproducing two of these examples here to highlight the risks of guardianship in Ontario.

### 1. Michael

Michael, a man in his early forties, was deaf and had an acquired brain injury. Michael's sister became a family member statutory guardian for property using the application process through the PGT. There were no conflicts between Michael and his sister as long as Michael's injuries restricted his ability to socialize or remain active in the community. However, when Michael became better able to assert his independence, and wanted to socialize and travel within the community, tensions rose. His sister was very uneasy about Michael travelling without an escort and she did not trust the friends with whom Michael wanted to socialize. Michael's sister assumed that he was being taken advantage of and she felt that the only way to protect him was to restrict his ability to leave the facility she had placed him in for his own protection. To this end Michael's sister asked staff at the facility to 'watch' Michael, report his activities to her and make efforts to keep him away from the friends she did not approve of.

Michael wanted to leave the facility and rent an apartment with a friend. His sister refused to release funds to allow Michael to pay rent. Michael felt that his sister was thwarting his attempts to become more independent, and that she was exercising an unreasonable amount of control over his daily life.

Michael's sister did not understand the limits of her powers as guardian or the scope of her obligations. She felt that a guardianship of property gave her the power to control any and all aspects of Michael's life. Michael sought the assistance of a lawyer. His sister refused to speak to Michael's lawyer. She did not accept that Michael had any ability to retain a lawyer to assist him. Michael's sister effectively acted as a barrier to communication or resolution of the situation. To the extent that facility staff co-operated with her and refused to pass messages to Michael, she was able to use them to interfere with Michael's access to his own legal counsel.

Michael's sister threatened to not repair his computer or TTY equipment, which would have greatly limited Michael's ability to communicate with his other family and friends. He felt he had to co-operate with his sister since it did not appear that anyone could intervene effectively to change or challenge his sister's behaviour.

Michael's case illustrates the practical implications that can result when a guardian exerts control over an 'incapable' person. In Michael's case, as long as his sister controlled his money, she also effectively controlled many other aspects of his life, including where he lived, what assistive devices and equipment he could access and what funds he had available for social activities. A danger of guardianships is that they can become oppressive if the guardian exercises control in areas where the

person could make their own decisions or engage in collaborative decision-making with support. Michael's ability to assert his autonomy and independence was compromised. His ability to participate fully and effectively in his community was unduly restricted.

## 2. Leo

Leo, a person with an intellectual disability, was involved in litigation which resulted in a financial settlement being awarded to him. A court appointed Leo's mother as his guardian for property and personal care, largely for the purposes of dealing with the financial settlement. Leo's mother administered and made decisions about the financial settlement funds. She spent the settlement improperly and failed to file reports as required by the guardianship order. No court or other public body pursued or monitored Leo's mother. Once the settlement funds were exhausted, Leo's mother vanished. No one was carrying out any guardianship obligations and responsibilities towards Leo. The mother refused to take any action to remove herself as Leo's guardian. The PGT was notified but did not take any action. Fortunately, Leo received services from a community organization, and this organization ultimately assisted Leo to locate free legal counsel to assist him to have the guardianship terminated.