LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

DECISIONS, DECISIONS: PROMOTING AND PROTECTING THE RIGHTS OF PERSONS WITH DISABILITIES WHO ARE SUBJECT TO GUARDIANSHIP

Legal Capacity, Decision-Making and Guardianship

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I. INTRODUCTION

For several decades, persons with disabilities, disability organizations and other communities of advocates have criticized substitute decision-making. These communities have questioned whether substitute decision-making is the most appropriate approach to dealing with situations in which people with intellectual, cognitive, mental health, psychosocial and other disabilities appear to be 'incapable' of making their own life decisions.[1] The negotiation and passage of the *Convention on the Rights of Persons with Disabilities* ("CRPD") provided an opportunity for the global disability community to consider the issue of legal capacity and substitute decision-making. Article 12 of the CRPD recognizes the right to legal capacity on an equal basis with others without discrimination on the basis of disability, and requires states to ensure that persons with disabilities have access to the supports they need in order to enjoy and exercise their legal capacity. Since the CRPD entered into force in 2008, there have been renewed calls to critically evaluate existing substitute decision-making regimes, and to consider alternatives to substitute decision-making that would better accord with the rights and principles provided for in the Convention.

There are several types of substitute decision-making regimes that operate in Ontario, including guardians of property or personal care, substitute decision-makers who are appointed under the *Health Care Consent Act*, and personal appointments such as attorneys for property or personal care. This report focuses on Ontario guardianships. Usually guardianships are created after a person is found to lack capacity to make his/her own decisions. A guardian is the ultimate substitute decision-maker, since s/he generally has complete authority to make specific decisions on behalf of the 'incapable'

person. Due to the manner in which guardianships are created, and the broad-reaching nature of guardians' powers and obligations, guardianships have the potential to significantly impact the rights of persons with disabilities who have capacity issues. These are fundamental human rights, including the right to legal capacity, the right to self-determination, and the right to substantive equality. Consequently, it is vital that guardians carry out their roles in a manner that promotes and protects the rights of persons with disabilities.

This report delves into the issue of accountability for the actions of guardians in Ontario. We consider whether the monitoring and accountability mechanisms that currently exist are sufficient to truly promote and protect the rights of persons with disabilities who are subject to guardianship.

In chapter II we begin by developing an analytical approach, which we call a rights-based principled approach to legal capacity. This approach draws on the *Convention on the Rights of Persons with Disabilities* and the Law Commission of Ontario's *Framework for the Law As it Affects Persons with Disabilities* to describe the rights of persons with disabilities that are impacted by substitute decision-making regimes. Next, we describe and analyze the existing legal framework for monitoring and overseeing guardianships in Ontario. Many of the clients who we serve at ARCH are subject to guardianships. Chapter IV describes and analyzes a series of case examples drawn from ARCH's work with persons with disabilities, disability organizations and the broader disability community. These case examples serve to ground the report by providing real life examples that illustrate how guardianships impact the rights of persons with disabilities in practical ways. Chapter V describes selected mechanisms for monitoring and

overseeing substitute decision-makers in jurisdictions outside of Ontario. We conclude the report by considering opportunities and options for reforming Ontario guardianships in a manner that promotes and protects the rights of persons with disabilities.

A. About ARCH Disability Law Centre

ARCH Disability Law Centre ("ARCH") is a specialty community legal clinic dedicated to advancing the equality rights of people with disabilities. ARCH provides legal services to help Ontarians with disabilities live with dignity and participate fully in our communities. ARCH provides free and confidential legal advice and information to people with disabilities in Ontario. We provide legal representation to people with disabilities whose cases fall within our priority areas of work and who meet Legal Aid Ontario's financial eligibility guidelines. We work with Ontarians with disabilities and the disability community on community development, law reform and policy initiatives. We also provide public legal education to people with disabilities and continuing legal education to the legal community.

ARCH has extensive experience working on legal capacity and the rights of persons with disabilities. This experience is broad and is based upon our contacts with people with disabilities themselves, their families and support people, advocates and community organizations. Our Board of Directors has identified legal capacity as a priority area of work for ARCH. We provide legal information and advice to persons with disabilities about the law related to guardianship and substitute decision-making in Ontario. We represent persons with disabilities who have concerns or disputes with their substitute decision-makers, and we assist individuals to reassert their legal capacity.

We also have experience working in situations where others erroneously assume that a person lacks capacity because of their disability or medication. ARCH has undertaken a number of law reform projects that deal with legal capacity.[2] We have also conducted extensive public legal education to inform persons with disabilities about capacity law and how to defend their rights and protect their autonomy.

ARCH's perspective on guardianship has a different focus than much of the available literature. ARCH does not work with elderly clients, so issues of elder abuse and financial mismanagement, which are common themes in much of the literature, are not dominant concerns in our practice. Instead, many of our clients are persons who may experience temporary periods of incapacity due to disability, serious injuries, or poor health. As a result, many of our clients who are subject to guardianship may experience fluctuating capacity or periods of intermittent capacity. Other clients may require assistance with decision-making on a more permanent basis. Many of our clients seek greater freedom and independence in the management of their financial and other affairs. Often they are persons who wish to re-assert their autonomy and terminate their guardianship.

B. Terminology

In this report we use the term 'incapable' persons to refer to persons who have been found, via a legal or administrative process, to be legally incapable of making certain decisions for themselves. Throughout our report, the word 'incapable' is written in quotations. The meaning of legal capacity to make one's own decisions is a subject about which there is some debate. There are those who insist that legal capacity is a

fundamental element of his/her human dignity, which cannot be stripped away, even when a person has been found to be ‘incapable’ in law. Others point out that the legal and administrative tests for determining whether a person is capable of making his/her own decisions are arbitrary. In this paper we employ a rights-based principled approach, which accepts that an individual’s decision-making autonomy is, philosophically, a crucial aspect of human dignity and personhood. We have placed the word ‘incapable’ in quotation marks to denote this meaning and to recognize the evolving nature of our understanding of capacity.

II. ANALYTICAL FRAMEWORK: A RIGHTS-BASED PRINCIPLED APPROACH

This chapter describes the framework we use to analyze whether Ontario's existing mechanisms for monitoring and overseeing guardians effectively protect the rights and interests of persons with disabilities who are subject to guardianships. This framework will also be used to make recommendations for reforms to law and policy to ensure that those rights and interests are more effectively safeguarded.

The approach we take is a rights-based principled approach. It is important to include both rights and principles when analyzing the efficacy of Ontario's current monitoring mechanisms. Principles guide our thinking, analysis, recommendations and actions. They articulate important values and goals that we strive to achieve. Legal rights provide a vehicle by which principles become real for individuals. Rights are concrete, actionable and enforceable, making them meaningful for people who experience disadvantage and discrimination.

Our rights-based principled approach draws on the *Convention on the Rights of Persons with Disabilities* and the LCO's *Framework for the Law as It Affects Persons with Disabilities* ("Framework"). Article 12 of the CRPD provides that persons with disabilities have a right to legal capacity on an equal basis as others. Drawing on the principles articulated in other CRPD articles, we develop an analysis of the meaning of the right to legal capacity in Article 12. Many of these same principles are reflected in the LCO's Framework. We briefly describe the LCO's Framework, focusing on those similar principles. Synthesizing the analysis of the right to legal capacity and the

principles articulated in the LCO's Framework, we develop a rights-based principled approach to legal capacity.

A. Convention on the Rights of Persons with Disabilities

On May 3, 2008 the *Convention on the Rights of Persons with Disabilities* entered into force. This was a watershed moment for the international disability community. The CRPD represents global recognition that people with disabilities are citizens, capable of claiming their rights and freedoms, making decisions based on free and informed consent, and being active members of society.[3] "In 50 articles, the CRPD clearly articulates what existing human rights mean within a disability context and establishes reporting and monitoring procedures for States Parties."[4]

The CRPD has been described as a Convention of firsts: it was the first human rights treaty of the twenty-first century, the fastest negotiated human rights convention in UN history, and the first human rights convention with an explicit social development dimension.[5] Perhaps most important, it was the first time that civil society actively participated in the development and negotiation of the text of a convention. The inclusion of people with disabilities and disability organizations was particularly poignant, given that historically, people with disabilities have been disadvantaged and discriminated against by being removed or excluded from services, education, politics, employment, and social life in general. According to some, by the passage of the CRPD, "the most excluded group of people in society became the most included in the history of the United Nations."[6]

Article 12 of the CRPD deals with legal capacity, and provides that:

> States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
>
> States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
>
> States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
>
> States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.[7]

During the negotiation of the CRPD, Article 12 was one of the most controversial and contested articles.[8] States disagreed on the nature of substitute-decision-making arrangements, what due process protections should be in place, and what kinds of supports should be provided in the context of legal capacity.[9] A key dispute was whether it was necessary to distinguish between legal capacity to possess rights and legal capacity to act. The final version of Article 12 recognizes legal capacity to the fullest extent. It includes the right to recognition as a person before the law and the right to legal capacity. Capacity to be a person before the law endows individuals with the right to have their status and capacity recognized in law. Legal capacity is a broader concept; it is based upon the capacity to be a holder of legal rights and obligations, but also includes the capacity to act.[10]

The substance of Article 12 must be interpreted with reference to the CRPD as a whole, in order to understand the full extent of the rights and obligations outlined therein.[11] The foundational elements of the CRPD, specifically the Preamble and Article 3, inform a full

understanding of Article 12. Article 3 outlines general principles, which apply to all articles in the CRPD. As articulated by the Office of the High Commissioner for Human Rights, the eight general principles, "guide the interpretation and implementation of the entire Convention, cutting across all issues. They are the starting point for understanding and interpreting the rights of persons with disabilities, providing benchmarks against which each right is measured."[12]

The Preamble to the CRPD recognizes the, "importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices."[13] Similarly, Article 3 includes the principles:

- respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons; and
- full and effective participation and inclusion in society.[14]

These articles make it clear that individual autonomy and the freedom to make one's own decisions are crucial aspects of human dignity and personhood. Having the right to make one's own decisions, on an equal basis as others, is an important part of the goal of full and effective participation and inclusion in society. For the disability community, this is particularly true, given that people with disabilities have been, and still are, discriminated against and disadvantaged by excluding them from society. The right to legal capacity, is, therefore, closely tied to emancipatory goals.

This understanding of the significance of legal capacity is confirmed by considering the relationship between Article 12 and other articles that relate to decision-making. Article 25 includes the right to make health care decisions on the basis of free and informed consent. Article 19 discusses the right to live independently and be included in the

community. It provides that, "persons with disabilities have the opportunity to choose their place of residence and where and with whom they live…" Article 23 includes the right to marry and found a family on the basis of free consent of both spouses, and the right to decide on the number and spacing of children. Article 16 provides for freedom from exploitation, violence and abuse.[15] Decisions regarding one's health, residence and family are significant life choices, which are based upon the recognition that people with disabilities have the right to full legal capacity.

Article 3 also includes the principles:

- Non-discrimination;
- Equality of opportunity; and
- Accessibility.

These principles point to the importance of ensuring that people with disabilities enjoy legal capacity on an equal basis as people without disabilities. The legal capacity of people with disabilities cannot be restricted to a greater degree or on a different basis than the legal capacity of people without disabilities. People with disabilities should be provided with accommodations and supports to ensure that that they are able to exercise their legal capacity to the greatest extent possible. Under the accessibility principle, legal and bureaucratic processes and safeguards related to legal capacity must be accessible for people with disabilities.

B. LCO's Framework for the Law as It Affects Persons with Disabilities

The Law Commission of Ontario's *Framework for the Law as It Affects Persons with Disabilities* describes a set of principles that can be used to analyze and evaluate whether

laws, policies and practices advance substantive equality for persons with disabilities. Substantive equality is a central concept in Canadian equality rights and anti-discrimination law. The LCO describes substantive equality as going beyond non-discrimination. It includes values of dignity, the opportunity to participate, having one's needs met, and the opportunity to live in an inclusive society. Substantive equality may require different treatment in order to fulfill these values. The LCO's Framework underscores the importance of substantive equality, calling it the overriding value, which can be used to understand the other principles and give them greater depth.[16]

Several of the principles described in the LCO's Framework are relevant to our analysis of accountability mechanisms for guardians in Ontario, including:

- Respecting the dignity and worth of persons with disabilities: This principle recognizes the inherent, equal and inalienable worth of every person, include those with disabilities.[17]
- Responding to diversity in human abilities and other characteristics: This principle recognizes that all people have varying abilities, and that each person with a disability has unique needs, circumstances and identities.[18]
- Fostering autonomy and independence: This principle demands the creation of conditions to ensure that people with disabilities are able to make choices that affect their lives. People with disabilities should have the supports needed to do as much for themselves as possible or as they desire.[19]

- Promoting social inclusion and participation: This principle requires designing society in a way that removes physical, social, attitudinal and systemic barriers to exercising citizenship rights and responsibilities.[20]

Under the LCO's Framework, each of these principles can be applied to analyze and evaluate law, policies and practices. The principle of respecting dignity and worth means that there must be meaningful mechanisms to ensure that people with disabilities can raise concerns about mistreatment or abuse, and that there is meaningful redress when these concerns arise. Responding to diversity means that complaint and accountability mechanisms are accessible for persons with disabilities. Complaint mechanisms should be straightforward and transparent, and may require the provision of advocacy or support mechanisms. To ensure autonomy and independence, people with disabilities must have access to information needed to understand and enforce their rights. Accountability mechanisms can promote participation and inclusion by giving persons with disabilities the opportunity to provide input into the operation and reform of laws, policies and practices that affect them.[21]

C. A Rights-based Principled Approach

Drawing on the rights and principles articulated in the CRPD, as well as the principles and approach described in the LCO's Framework, we have developed the following rights-based principled approach in relation to legal capacity.

The core of this approach is the right to legal capacity, including the right to recognition as a person before the law, and the right to hold legal rights and obligations and act upon them. Underlying this right are the following principles:

- **Respect for inherent dignity and worth**: This principle is recognized in the LCO's Framework and in Article 3 of the CRPD. The right to legal capacity is fundamentally linked to human dignity and personhood. Therefore, any restrictions placed upon this right should be limited to the greatest extent possible. Under the LCO Framework, this principle requires meaningful mechanisms to ensure that people with disabilities can raise concerns about mistreatment or abuse, and that there is meaningful redress when these concerns arise.
- **Respect for and promotion of individual autonomy and independence**: The Preamble to the CRPD recognizes the importance of this principle, and makes it clear that autonomy and the freedom to make one's own decisions are crucial aspects of human dignity and personhood. Under the LCO's Framework, people with disabilities must have access to information needed to understand and enforce their rights.
- **Promotion of full and effective participation and inclusion in society**: Articulated in Article 3 of the CRPD, this principle recognizes that people with disabilities have been, and still are, disadvantaged by processes that exclude them from society. Legal and bureaucratic processes related to legal capacity should be designed so as to foster participation and engagement. Under the LCO's Framework, people with disabilities must have opportunities to provide input into the laws and policies that affect them.

- **Promotion of substantive equality**: This principle is explicitly set out in Article 12 of the CRPD and in the LCO's Framework. It recognizes that people with disabilities must enjoy legal capacity on an equal basis as others.
- **Promotion of accessibility**: Article 3 of the CRPD and the LCO's Framework both include the principle of accessibility. Legal and bureaucratic safeguards related to legal capacity must be accessible for people with disabilities.

Based upon the right to legal capacity and its underlying principles, and guided by the LCO's Framework, the following elements will be important for ensuring that guardians carry out their roles and functions in a manner that respects the rights of persons with disabilities:

- Guardianships should be permitted only on the most limited basis, taking into account the circumstances and needs of the person with a disability.
    - The need for a guardian should be subject to regular review by a competent, independent and impartial public authority or judicial body.
    - Guardians should be appointed for the shortest time possible, taking into account the circumstances of the 'incapable' individual.
- Laws, policies and practices that regulate guardians should include mechanisms through which people with disabilities who are subject to guardianship can complain or raise concerns about mistreatment or abuse. These concerns should be addressed in a meaningful way.
- Law, policies and practices that regulate guardians should include complaint mechanisms that are accessible for people with disabilities who are subject to guardianship.

    - People with disabilities must have access to information regarding these complaint mechanisms.
    - People with disabilities must have access to supports if such supports are necessary to assist and/or empower them to utilize complaint mechanisms.
    - Complaint mechanisms must be designed to be accessible and navigable for people with disabilities.
- Laws, policies or practices relating to guardianship must include mechanisms for external monitoring and/ or ensuring that guardians are accountable for the powers they exercise.
- These monitoring and/or accountability mechanisms must be accessible for people with disabilities who are subject to guardianship.
    - People with disabilities must have access to meaningful information regarding the monitoring and/or accountability mechanisms.
    - People with disabilities must have access to supports if those supports are necessary to assist and/or empower them to utilize the existing monitoring and accountability mechanisms.
    - Monitoring and accountability mechanisms must be designed to be accessible and navigable for people with disabilities.
- People with disabilities who are subject to guardianship must be able to provide feedback on the effectiveness of the laws, policies and procedures that regulate guardianship.

III. MONITORING AND ACCOUNTABILITY OF GUARDIANS IN ONTARIO

In this chapter we identify and describe the types of guardianships provided for by Ontario law, and we describe the mechanisms that are currently in place in Ontario to monitor guardians and ensure that they fulfill their responsibilities and obligations to 'incapable' persons. We also consider the mechanisms that are available to prevent guardians from misusing or abusing their powers; to ensure that guardianships are not maintained any longer than necessary; to provide processes by which people who have been declared 'incapable' can reassert their capacity; and to complain about the action or inaction of a guardian.

A. Overview of Monitoring and Accountability of Guardians under the SDA

The key legislation dealing with guardianships in Ontario is the *Substitute Decisions Act, 1992* ("SDA").[22] The SDA provides basic definitions of capacity, establishes the presumption of capacity and creates a regime to allow for substitute decision-making for those persons found to lack capacity to make specific types of decisions. The SDA outlines three basic systems for putting in place three types of substitute decision-makers: powers of attorney, statutory guardians and court-appointed guardians.

The Act also creates the Office of the Public Guardian and Trustee ("PGT"), outlines the powers of the PGT and the court in relation to substitute decision-makers and 'incapable' persons, and outlines the powers and obligations of guardians and substitute decision-makers. The regulations to the Act deal with capacity assessments,[23] the accounts and records of attorneys and guardians,[24] and applications to replace the PGT as statutory guardian [25].

The SDA accommodates issue-specific and fluctuating capacity by restricting the attribution of incapacity to particular areas of decision-making. There are no findings of global incapacity. A person is found to be capable or 'incapable' of specific types of decisions, such as decisions about property or decisions about personal care.

There are certain protections intended to ensure that guardians are appointed only where no less restrictive alternative exists. Persons are assumed to be capable unless there is good reason to believe otherwise. When questioned, a person's capacity is determined on a task-by-task basis. Under the *Health Care Consent Act* capacity is evaluated (or re-evaluated) for each health care decision. Even once declared to be 'incapable' of a particular type of decision by a doctor or capacity assessor, a person has the right to challenge that finding before the Consent and Capacity Board.

Once a guardian is appointed, however, the SDA grants that guardian substantial powers to make decisions on the adult's behalf as well as the legal authority to execute those decisions. While the SDA encourages guardians to involve 'incapable' persons in the decision-making process to the extent possible, decisions are made by the guardian and not the 'incapable' individual. Under the SDA, guardianship effectively deprives an adult of legal capacity to make decisions and transfers that capacity to another person.[26]

The SDA offers individuals subject to a guardianship little in the way of effective protection if their guardians abuse their powers or fail to carry out their statutory obligations. Under the SDA guardians are not subjected to any form of rigorous

supervision or oversight. Without proper monitoring and supervision, it is not possible to ensure that guardians actually abide by the provisions of the SDA intended to protect the rights of 'incapable' individuals. In particular, the processes related to court-appointed guardians privilege guardians, make it difficult for an 'incapable' person to defend his/her rights, and consequently leave 'incapable' persons vulnerable to abuse.

B. Legal Presumption of Capacity and Definition of Incapacity in the SDA

A key protection of a person's legal autonomy offered by the SDA is the Act's acknowledgement of the presumption of capacity. Sections 2(1), 2(2) and 2(3) outline this presumption as follows:

> 2.(1) a person who is eighteen years of age or more is presumed to be capable of entering into a contract.
>
> 2.(2), a person who is sixteen years of age or more is presumed to be capable of giving or refusing consent in connection with his or her own personal care.
>
> 2.(3) a person is entitled to rely on the presumption of capacity with respect to another person unless he or she has reasonable grounds to believe that the other person is ''incapable'' of entering into the contract or of giving or refusing consent, as the case may be.

This presumption enhances autonomy and promotes the inherent dignity, worth and equality of all persons. All persons are assumed to be capable and able to participate fully in society and all aspects of decision-making affecting their lives. No one is expected to prove their capacity. Clear evidence is required to challenge the presumption of capacity.

Additionally, the SDA allows individuals to take action to protect their rights regardless of their capacity status. Section 3 deems a person capable to instruct counsel for the purposes of defending his/her rights as listed in the SDA. Section 3 provides that:

> 3.(1) if the capacity of a person who does not have legal representation is in issue in a proceeding under this Act,
> (a) the court may direct the Public Guardian and Trustee to arrange for legal representation to be provided for the person.
> (b) the person shall be deemed to have capacity to retain and instruct counsel

This section addresses the potential vulnerability that an 'incapable' person may encounter if s/he were not able to retain a lawyer due to a finding of incapacity to make other kinds of decisions. Unfortunately, in many situations section 3 might not function as intended. For lawyers, a statement of presumed capacity to instruct may be of little practical use if they cannot actually obtain instructions from the client. Clients may be too ill to give instructions, they may not wish to participate, they may not trust a lawyer appointed for them, or they may lack capacity to give instructions. A lawyer is obliged to do all s/he can to accommodate the client and find supports that may allow the client to give instructions.[27] However, in some cases, despite the presumption of capacity to instruct, a client may not be able to provide instructions, even with support and accommodation. In such instances, a lawyer, although able to represent the person, is restricted to functioning within very limited parameters that severely compromise the lawyer's ability to advocate effectively for the client.[28] Essentially, the role of counsel in such cases is necessarily limited to ensuring that all proper processes are followed and client's rights are upheld.[29]

Section 6 of the SDA provides a definition of incapacity to manage property. A person is 'incapable' to manage 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. This section recognizes that the quality of a decision is not a basis for determining

whether a person has capacity. This promotes the principle of autonomy by offering some protection to persons who might otherwise be susceptible to findings of incapacity on the basis that their decisions were not in accord with what others would see as proper, wise or rational.[30]

Section 45 of the SDA provides a similar definition of incapacity with respect to personal care. Personal care decisions include decisions about the person's health care, nutrition, shelter, clothing, hygiene or safety. [31]

C. Guardians of Property

1. Statutory Guardians of Property: The Public Guardian and Trustee

Sections 15 to 21 of the SDA deal with the Public Guardian and Trustee as statutory guardian for property. The PGT becomes a person's guardian when a certificate of incapacity (Form 21) is issued by physician under the *Mental Health Act*,[32] or a certificate of incapacity (Form A) is issued by a capacity assessor under the SDA.[33]

Section 16(1) provides that a person may request that an assessor perform a capacity assessment of his/her own capacity or another person's capacity in order to determine whether the PGT should become the statutory guardian of property.[34] Essentially this provision allows the PGT to initiate an investigation, which could lead to a finding that the person is 'incapable', at which point the individual may be placed under the guardianship of the PGT. The SDA provides that no assessment will be performed unless certain conditions, outlined in section 16(2), are met.[35]

There are certain protections provided for individuals during the capacity assessment process. For instance, an assessor must explain the purpose of the assessment and the impact of a finding of incapacity. An assessor must also explain that a person has the right to refuse an assessment.[36]

If a person refuses to be assessed, the PGT may, pursuant to section 79(1) of the SDA, obtain a court order compelling the person to submit to a capacity assessment against his/her will. [37] The PGT may also obtain permission to enter premises and even detain a person to ensure that s/he is assessed.[38] The SDA allows for a person who is subject to an order compelling a capacity assessment to be forcibly removed by police.[39] The person can be admitted to a health facility and detained there until the assessment is complete.[40] The SDA also provides the PGT with fairly broad access to records to help it carry out its duty to investigate alleged cases of incapacity.[41]

Orders compelling a person to subject him/herself to a capacity assessment against his/her will are to be employed only where the person has refused to be assessed and it appears there is no other way to determine what the person's needs may be. Courts have ruled that a compelled assessment is a substantial intervention into the privacy and security of the individual and constitutes a demeaning and abusive process.[42] Although there is case-law that limits the use of such orders, there is still a danger that these orders will be used more widely than intended.[43]

Clearly the capacity assessment process carries with it the prospect of undermining both the inherent dignity and autonomy of individuals. Together, the PGT powers of

entry, investigation and access to records give the PGT a great deal of power to invade the privacy rights of persons alleged to be 'incapable' of property management.

If a capacity assessment is performed and the person is found to be 'incapable' with respect to property management, the PGT becomes his/her guardian of property as soon as the certificate of incapacity is received.[44] The PGT is obliged to inform the individual that s/he has been placed under the guardianship of the PGT, and that s/he has the right to apply to the Consent and Capacity Board for a review of this decision.[45]

An application to the Consent and Capacity Board must be made within six months of the finding of incapacity. The Board's decision can be appealed to the Superior Court of Justice.[46] Alternatively, a person may ask for a new capacity assessment if it has been at least six months since his/her last assessment. Pursuant to section 20(1) of the SDA, a statutory guardian is obliged to assist in arranging a new assessment.[47] If the new assessment determines that the person has capacity, the guardianship can be terminated.

The guardianship of the PGT is a 'default' position in the sense that the PGT, in some instances, becomes a guardian of property automatically following a finding of incapacity, and in the sense that the PGT will act as guardian when there is no-one else available.[48]

The PGT assigns a client representative to individuals subject to its guardianship. This client representative manages the individual's finances and becomes the primary contact between the client and the PGT. Client representatives receive on-going training and there is a process in place at the PGT to monitor their work. Client representatives

are grouped into teams with a team leader, a manager and supervisors. Clients who are unhappy with the work of their client representative can make a complaint to the client representative's supervisor.[49]

The PGT also has an obligation, pursuant to *Ontario Regulation 99/96*, to maintain a register of all persons subject to either a statutory or court-appointed guardianship.[50]

2. Terminating the Guardianship of the Public Guardian and Trustee

Pursuant to sections 16 and 17 of the SDA, the statutory guardianship of the PGT may be terminated in the following circumstances: [51]

- a person gave a continuing power of attorney before s/he was declared 'incapable';
- a guardian is appointed by the court;
- a certificate of incapacity is cancelled;
- a notice is received from an assessor stating the person has been found capable; or
- by application to court.

Pursuant to section 17(1) of the SDA, the guardianship of the PGT can also be terminated if a family member applies to assume the role of guardian in place of the PGT.[52]

The mechanisms provided to terminate the statutory guardianship of the PGT promote autonomy to some extent as there are some autonomic mechanisms that result in termination of guardianship, particularly if the individual took steps to choose a substitute decision-maker by granting a power of attorney. A person's autonomy is

further protected by the fact that an individual has the right to request re-assessment [53] and an assessment confirming capacity is sufficient to terminate the guardianship of PGT. To the extent that these processes are triggered by a finding of capacity, they promote individual autonomy by ensuring that a statutory guardianship does not remain in place once a person has been declared capable.

While there may be provisions that help a person terminate a statutory guardianship once their capacity improves, there is little formal oversight to ensure that these processes are followed. The SDA does not impose any proactive obligations on the PGT or any other statutory guardian to have an 'incapable' individual's capacity reassessed at regular intervals. It is up to the 'incapable' person to request an assessment.

There is financial assistance available from the PGT to help cover the cost of an assessment for persons whose income is too low to pay for one themselves. This is important given that capacity assessments generally cost several hundred dollars, an amount that creates a significant barrier for many low-income persons with disabilities.[54] There is no statutory requirement that the PGT provide this funding. Nor is there a requirement that persons subject to the guardianship of the PGT be informed of the existence of this financial assistance. As the PGT provides this funding on an entirely discretionary basis, access to this fund is not automatic. A manager at the PGT must approve a request to access these funds.[55] While impecunious persons can, technically, access public funds to ensure that they can have their capacity assessed every six months, there is no guaranteed right to these funds. In those cases where the PGT

does not provide funding, people may find that their ability to re-assert their capacity is compromised by their inability to pay for an assessment.

3. Statutory Guardians of Property: Private Guardians

Section 17 of the SDA outlines how certain individuals may apply to replace the PGT as statutory guardian. Through this process an 'incapable' person's spouse, partner, relative or a trust company may be appointed statutory guardian to replace the PGT. Applicants must provide a management plan to indicate how they plan to deal with the 'incapable' person's finances and the PGT has discretion to deny an application.[56]

When a family member or other private statutory guardian dies or resigns, the PGT may step in to become the person's statutory guardian until another person is appointed guardian.[57]

4. Court-Appointed Guardians of Property

Sections 22 to 24 of the SDA deal with the appointment of a guardian of property by the Superior Court of Justice. Court-appointed guardians are usually close family members to the 'incapable' person. The PGT does not generally act as a court-appointed guardian. Pursuant to section 24(2.1) of the SDA, the court shall not appoint the PGT as guardian unless there is no other suitable person who is available and willing to be appointed.[58]

Sections 72, 74 and 77 of the SDA allow for a summary process to appoint guardians of property and guardians of the person, and permit a court to make an order without anyone appearing before it and without holding a hearing.[59] Although potentially quicker

and perhaps less costly than appearing before a judge, a summary process does not allow for any discussion about how to best protect the rights of the 'incapable' person, or whether less intrusive forms of decision-making assistance would be appropriate.

Pursuant to section 22(3), a court-appointed guardian should be imposed only as a last resort where no other less restrictive option is available.[60] This provision promotes the rights of persons with capacity issues by ensuring that both formal and informal supports are considered and applied to allow persons to maintain their autonomy if they could function effectively with decision-making assistance. As stated in *Gray v. Ontario*, the autonomy and dignity of the individual and the inclusiveness of the decision-making process is best recognized by a process short of full guardianship.[61]

Section 22(3) opens the door to the SDA being interpreted in a manner that is consistent with Article 12 of the CRPD, which requires that people be given access to supports to exercise their legal capacity. Article 12 also requires that all measures related to the exercise of legal capacity are proportional and tailored to the person's circumstances.[62] If a decision-making system that protected or enhanced an individual's ability to assert his/her decision-making autonomy was or could be put in place, the court should not impose a guardian on that individual. In such circumstances the imposition of a guardian could be seen as a violation of the individual's right to legal capacity since a guardianship would restrict the person's autonomy far more than required.

Section 25(2) of the SDA allows the court to make the appointment of a guardian for as limited a period as the court considers appropriate or to impose such conditions on the

appointment as the court considers appropriate.[63] This provision is also in accord with Article 12 of the CRPD, which requires that any measures relating to a person's exercise of legal capacity apply for the shortest time possible.[64] Section 25(2) may be used to support the principle of inherent dignity by ensuring that guardians have only those powers that are absolutely required, and that guardianships exist for the most limited period of time possible.

The SDA provides the Superior Court with the authority to vary an order or replace a guardian. This offers a process to allow individuals to alert the court to problems with the guardianship or to ask that a new guardian be appointed.[65] For many 'incapable' persons, making use of this process would require legal advice and assistance.

5. Termination of Court-Appointed Guardians

Sections 69, 71, 73, and 75 of the SDA outline the process for terminating a court–appointed guardian of property. This process is far more complex than that used to terminate statutory guardianships. Whereas the production of an assessment indicating that the person is capable is usually sufficient to terminate a statutory guardianship, this is not, in itself, sufficient to terminate a court-appointed guardianship. [66]

Terminating a court-appointed guardianship requires bringing a motion before the Superior Court of Justice, Estates Court. Motion materials must be prepared presenting the capacity assessment(s) to the court and making legal arguments to convince the court that the guardianship is no longer required. The motion materials must be served on a range of family members. These family members are able to present evidence at

the hearing of the motion should they wish to challenge the termination of the guardianship.[67]

While most motions to terminate a guardianship are successful if supported by capacity assessments, even a simplified legal process can be time-consuming and expensive. It can take several months after the production of a positive capacity assessment before a court-appointed guardianship is terminated and decision-making control returned to the formerly 'incapable' individual. This means that a person capable of making decisions can remain subject to the control of a guardian long after s/he no longer requires a guardian. Additional delays, complications and costs arise if family members decide to intervene in the proceedings to challenge the termination of the guardianship. This is an unnecessary violation of the principle of autonomy and independence.

Pursuant to sections 72, 74 and 77 of the SDA, a summary process to terminate a court-appointed guardian is also available.

6. Duties and Obligations of Guardians of Property

Sections 31 to 42 of the SDA deal with the powers, duties and obligations of guardians of property and attorneys for property. Guardians are fiduciaries who are obliged to perform their duties in good faith, with honesty and integrity, for the 'incapable' person's benefit.[68] C.D. Freedman argues that the fiduciary obligations of an attorney or guardian acting on behalf of an 'incapable' person are more extensive than those of a trustee, and that persons acting on behalf of an 'incapable' person must act according to the highest standards of competency, probity and fidelity. This is in large part due to the fact that an 'incapable' person may be in no position to participate directly in enforcing the

attorney's or guardian's obligations.[69] The SDA states that a guardian's duties must be met according to the standard of care that a person of ordinary prudence would adhere to in exercising care, diligence and skill with respect to his/her own affairs, or according to the standard of a professional in cases where the guardian receives compensation.[70]

A guardian is obliged to explain to the 'incapable' person what the powers and obligations of a guardian are.[71] A guardian is supposed to manage a person's property in a manner consistent with decisions concerning personal care made by the person who has authority to make those decisions. A guardian should encourage the 'incapable' person to participate to the best of his/her abilities in decision-making about his/her property.[72] A guardian should foster regular personal contact with the 'incapable' person and his/her supportive family and friends. A guardian must act in accordance with the management plan established for the property of the 'incapable' person.[73] The SDA sets out required expenditures and guiding principles to apply to expenditures made by a guardian of property.[74]

There are certain processes available to compel guardians to demonstrate that they have carried out their obligations according to the provisions of the SDA. However, none of these processes are automatic; all require someone to initiate the process. For example, a guardian is required to keep accounts of all transactions involving the property of the 'incapable' person, but there is no provision to ensure any regular review of those accounts.[75] The SDA provides that the guardian, the 'incapable' person or other interested persons listed in section 42(4) may apply to court for an order requiring the guardian to pass his/her accounts. The PGT may also request an accounting from the guardian.[76] Under the current system a guardian's accounts may not be reviewed by

anyone for several years, if at all. It is worth noting that the original version of the SDA, prior to the amendments of 1996, required guardians to prepare annual financial statements and to give them upon request to the 'incapable' individual, the individual's guardian of the person or the PGT.[77]

Pursuant to section 20.1 of the SDA a guardian has an obligation to assist in arranging an assessment of the 'incapable' person's capacity if the assessment is requested by the 'incapable' person.[78]

The SDA offers no mechanism of formal oversight to automatically or regularly monitor guardians to ensure that they carry out their duties and obligations as required. There is no provision that mandates oversight over how faithfully a guardian follows a management plan. There is no provision to confirm that guardians respond appropriately to requests for re-assessment from 'incapable' persons.

The SDA does not require court-appointed guardians to receive any specific training on how to perform their duties.

Nor is there any obligation outlined in the SDA for anyone to provide a person subject to a guardianship with fulsome rights advice. While all guardians are required to inform 'incapable' persons about the guardian's powers, duties and obligations, this is not the same as providing 'incapable' persons with information about their rights to obtain information from the guardian, participate in decision-making, challenge the guardianship, and the processes for asserting these rights. Consequently, people subject to a guardianship may be unaware of the provisions in the SDA that may be used to protect their rights.

The current system leans toward unnecessary restrictions on autonomy rather than minimal impairment of a person's capacity.[79] Article 12 of the CRPD requires that all measures related to the exercise of legal capacity be subject to regular review by a competent, independent and impartial authority of judicial body.[80] The SDA is not consistent with the CRPD on this point. Under the SDA there are no automatic reviews or processes that monitor guardians and no mandatory periodic reporting requirements. The result is that a person can remain subject to a guardianship for far longer than is required. As noted above, under the court-appointed system, even once a person is found capable by a capacity assessor, it can take several months before the court actually terminates the guardianship.

D. Guardians of the Person

Only the Superior Court of Justice can appoint a guardian of the person. Section 57(2.2) of the SDA provides that the court shall only appoint the PGT as a guardian where there is no other suitable person available and willing to be appointed.[81] Consequently, the PGT usually acts as guardian of the person for no more than one or two dozen individuals at any given time.[82] Nevertheless, on applications for guardianship, whether for property or personal care, the PGT is an automatic party.[83] The PGT may submit a report to the court, but otherwise its involvement is often limited.

As with a court-appointment of a guardian of property, section 55(2) requires that the court not appoint a guardian of the person if there is a less restrictive alternative available.[84] Section 59 stipulates that a guardianship of the person should not be a full guardianship covering all aspects of personal care unless the individual in question is

actually 'incapable' with respect to all functions of personal care. Section 58 allows the court to make the appointment for as limited a period as the court considers appropriate and to impose such conditions on the appointment as the court considers appropriate.[85] Again, these provisions are consistent with the requirements of Article 12 of the CRPD.

Despite section 59(1), it appears that many guardianships of the person are full guardianships, granting the guardian a high level of control over crucial day-to-day concerns such as where the person lives, what s/he eats, and what social services s/he receives.[86] Given the high degree of control exercised by such guardians, it is disturbing to note that the SDA does not provide for any clear monitoring or supervision of their actions.[87]

Pursuant to section 59(2) of the SDA, under an order for full guardianship the guardian may:

- exercise full custodial power over the person under guardianship, determine his/her living arrangements and provide for his/her shelter and safety;
- be the person's litigation guardian, except in respect of litigation that relates to the person's property or to the guardian's status or powers;
- settle claims and commence and settled proceedings on the person's behalf, except for purposes of litigation that relates to the guardian's status or powers;
- have access to personal information, including health information and records to which the person would have access if capable, and consent to the release

of information to another person, except for purposes of litigation that relates to the guardian's status or powers;

- make any decision to which the *Health Care Consent Act* applies;
- make decisions about the person's health care, nutrition and hygiene;
- make decisions about the person's employment, education, training, clothing, recreation, and any social services provided to the person; and
- exercise other powers and perform other duties as specified in the court order.[88]

Pursuant to section 59(3), if the guardian has custodial power over the person, the court may in its order authorize the guardian to apprehend the person. Guardians have the power, under certain limited circumstances, to use confinement, monitoring devices or restraint, either physical or chemical.[89] The SDA restricts a guardian's ability to use confinement to control an 'incapable' individual,[90] but it is not clear how improper confinement would come to anyone's attention or that anyone has an obligation to deal with it.

1. Duties and Obligations of Guardians of the Person

Sections 66 to 68 of the SDA deal with the duties and obligations of guardians of the person. As with guardians of property, there is no provision in the SDA to ensure that guardians of the person receive training on how to properly carry out their obligations.

The powers and duties of a guardian of personal care must be exercised and performed diligently and in good faith. The guardian shall explain to the 'incapable' person what the

guardian's powers and duties are.[91] Guardians are expected to make decisions to which the *Health Care Consent Act* applies.[92] Guardians are also expected to make decisions to which the *Health Care Consent Act* does not apply, in accordance with the principles set out in sections 66(3) and 66(4) of the SDA. These principles include making decisions in accordance with the person's wishes as expressed while capable, and if such a wish is not known then in accordance with the person's best interests. The SDA instructs that a person's best interests must take into consideration the values and beliefs that the person held while capable, the person's current wishes if they can be ascertained, and whether the decision is likely to improve the person's quality of life. Guardians must keep records of the decisions they make,[93] but there is no statutory requirement that these records be submitted to anyone for regular review. Guardians are to act in accordance with the guardianship plan that should be submitted to the court,[94] but again, there is no provision in the SDA to ensure that anyone monitor whether a guardian is indeed acting according to the plan.

Importantly, guardians are expected to foster the 'incapable' person's independence,[95] and encourage the person to participate to the best of his/her abilities in the decisions the guardian makes on the person's behalf.[96] When in doubt, guardians are able to seek directions from the court on any question arising in the guardianship.[97]

These provisions offer certain protections to 'incapable' persons. However, given the wide range of powers a guardian can exert over an 'incapable' person, it is not clear how effective these protections are or how readily they could be enforced in any particular circumstance. For example, it is not clear how 'incapable' persons could ensure that their guardians fostered their independence or involved them in decision-

making. Other than applying to court for directions, the SDA provides no mechanism by which 'incapable' persons could raise concerns about their guardians not abiding by these statutory requirements. Even then, unlike a guardian, an 'incapable' person requires leave of the court to use this provision.[98]

In summary, there are no provisions in the SDA that provide for any regular monitoring of guardians of the person, nor is there any requirement that guardians report on their duties and obligations. There is no requirement that the capacity of an 'incapable' person subject to a guardianship of the person be re-assessed at any point in time. The SDA requires that 'incapable' persons be told what the guardian's basic duties and obligations are, however there is no requirement that 'incapable' persons be given any fulsome rights advice.

E. Dealing with Disputes between an 'Incapable' Person and a Guardian

The SDA does not offer any complaint or dispute resolution mechanism for persons subject to a guardianship. Persons subject to the guardianship of the PGT can file a complaint with a supervisor if they feel that their client representative is not dealing properly with their finances.[99] Persons subject to the statutory guardianship of a family member have no access to a similar complaint mechanism. The SDA does not require the PGT or any other public authority to take any specific action when it comes to receiving, investigating or addressing complaints or concerns about the actions of a family member statutory guardian. If the PGT receives requests for assistance from 'incapable' persons, it may help to locate social services, may provide information to the guardian and/or third parties to help clarify the role of the guardian, or may launch an

investigation.[100] However, it is within the PGT's discretion to decide whether and how to respond to such requests.

Section 88 of the SDA provides that the PGT may mediate disputes arising between a person's attorney for property and attorney for personal care, or between joint attorneys or joint guardians.[101] There is, however, no provision in the SDA requiring or even permitting the PGT or any other public authority to mediate disputes between a guardian or attorney and the 'incapable' person.

Persons subject to a court-appointed guardianship have even less access to a complaint process. The PGT may intervene in cases where it appears that a court-appointed guardian should be removed. Anyone can make an allegation to the PGT that a person is incapable and may be subject to serious harm if no action is taken. If upon investigation the PGT determines that the incapable person or his/her property is at risk of serious harm the PGT is compelled, pursuant to sections 27(2), 27(3.1) and 62(3.1) of the SDA, to bring this to the attention of the court.[102] The PGT interprets these provisions to apply to allegations against a court-appointed guardian.[103] There is no obligation on anyone to intervene in less serious disputes between a court-appointed guardian and an 'incapable' person.

In most cases, an 'incapable' person who wishes to challenge the actions of his/her guardian must bring a motion to the court to obtain directions, pursuant to sections 39(1) and 68(1) of the SDA. The cost, legal complexity and time-consuming nature of such a process makes it inaccessible for many persons subject to guardianship. Moreover, it is clear from the language employed in these provisions that the motion is

to be brought by the guardian or the PGT. A person subject to a guardianship would have to seek leave of the court to use this process to seek directions.[104] It is worth noting that in the original version of the SDA, prior to the amendments of 1996, the 'incapable' person was able to apply to the court for directions without having to seek leave.[105]

F. Supports for 'Incapable' Persons

The *Advocacy Act* was proclaimed in 1995 and repealed in March 1996. It was created to contribute to the empowerment of vulnerable persons and to promote respect for their rights, freedoms, autonomy and dignity.[106] The Act defined 'vulnerable person' as a "…person who, because of a moderate to severe mental or physical disability, illness or infirmity, whether temporary or permanent and whether actual or perceived":

> 2(a) is unable to express or act on his or her wishes or to ascertain or exercise his or her rights; or
>
> 2(b) has difficulty in expressing or acting on his or her wishes or in ascertaining or exercising his or her rights.[107]

The Act provided advocacy services to help individual vulnerable persons who were 'incapable' of instructing an advocate; help vulnerable persons to bring about systemic changes at the governmental, legal, social economic and institutional levels; help individual vulnerable persons express and act on their wishes, ascertain and exercise their rights, speak on their own behalf, engage in mutual aid, and form organizations to advance their interests; and to acknowledge and enhance individual, family and community support for the security and well-being of vulnerable persons.[108] The Act would have created a commission of advocates to carry out its purposes.

Section 17(1) of the Act provided that advocates shall not do anything that is inconsistent with the instructions or wishes that the person being served expressed orally or in any other manner, while capable of instructing an advocate. Section 17(5) provided that:

> a vulnerable person is capable of instructing an advocate if the person is able to indicate a desire for advocacy services and the purpose for which he or she wishes to receive the services and is able to express, in some manner, his or her instructions or wishes.

This definition of capacity to instruct would have made the scheme accessible to many persons with capacity issues.

An advocate was also empowered to provide advocacy services for a vulnerable person in accordance with instructions from the person's substitute decision-maker, if the person was 'incapable' of instructing an advocate or the person agreed to allow the advocate to obtain instructions from his/her substitute decision-maker. If a person granted permission to take instructions from his/her substitute decision-maker, this permission could be revoked or revised.[109]

Given the definition of capacity required to instruct an advocate, it does not appear that a substitute decision-maker would have been able to override a vulnerable person's instructions to his/her advocate without the person's permission. In this way the ability of the advocate to take instructions from a substitute decision-maker does not seem to have placed undue restrictions on a vulnerable person's autonomy, at least vis ὰ vis his/her advocate. The fact that a vulnerable person could have revoked the permission s/he granted to his/her advocate to take instruction from a substitute decision-maker would have allowed vulnerable persons to exert some control over the extent to which

the substitute decision-maker could have been involved in their relationship with their advocate.

Advocates were given certain rights of access and entry as well as access to records for the purpose of providing advocacy services to vulnerable persons.[110]

The *Advocacy Act* was intended to be a companion act to the SDA. Some of the gaps in the SDA regarding protecting the rights of 'incapable' persons may have been dealt with by the *Advocacy Act*. In particular, before the revocation of the *Advocacy Act*, the SDA included entitlements to rights advice for individuals at crucial moments, such as during a PGT investigation, when an application for a court-appointed a guardian was filed, when a variation in a court guardianship order was sought, and when the court ordered a capacity assessment be performed against a person's wishes.[111] Prior to the 1996 amendments to the SDA, section 76(4) provided that the court could not make an order imposing a guardianship upon a person until an advocate confirmed that s/he had met with the person, explained the significance of the guardianship application and accompanying documents and informed the person of his/her right to oppose the application.[112]

The SDA was amended to deal with the revocation of the *Advocacy Act* by removing the obligation to provide fulsome rights advice to persons whenever they face the prospect of having their autonomy compromised.[113] However, despite this amendment, guardianships under the SDA still function as if the *Advocacy Act* was in place and all 'incapable' persons had access to an advocate to defend their rights. This is reflected in the assumption that 'incapable' individuals are able to take the initiative and pursue

court and other legal processes to defend their rights. Taking such action may be possible if individuals have access to an advocate to guide and support them and provide them with the information they required to defend their rights. However, without an advocate such processes are inaccessible to many individuals with capacity issues.

The *Advocacy Act* was more consistent with provisions of Article 12 of the CRPD than the current SDA; the *Advocacy Act* recognized that persons who require support to exercise their capacity are still capable of making their own decisions. It also recognized that a failure to provide supports to exercise legal capacity leaves people vulnerable and compromises their ability to defend their rights. Since the repeal of the *Advocacy Act*, the law relating to guardianships does not provide for any supports to assist 'incapable' persons to exercise their legal capacity.

G. Ombudsman Investigations

The provincial Ombudsman is empowered to investigate and respond to complaints about government offices, including the PGT.[114] The Ombudsman may investigate a claim, but can also refuse to investigate.[115] A complaint form must be completed, either on-line or by hard copy. The form is not in clear language, and there are no documents, videos or other materials that explain the complaint process in clear language. The complaints process may, therefore, be inaccessible to persons with capacity issues if no one is available to support them. Moreover, people must be aware that it is possible to file a complaint with the Ombudsman.

Despite these concerns, the Ombudsman has dealt with a variety of complaints from persons subject to the guardianship of the PGT. In one case, a person was incorrectly

found 'incapable' due to his refusal to acknowledge an $8,000 debt about which the PGT had informed his assessor. In reality, the person did not actually have any debt; he had an $8,000 unused line-of-credit. In this case the PGT paid for a second capacity assessment, which found the man capable of managing his finances.[116] In another case a man subject to the guardianship of the PGT requested a capacity assessment. The PGT refused to pay for the assessment, stating that previous assessments had found him incapable. This was incorrect, given that the man was statutorily entitled to a capacity assessment since he had not had one in the last six months. The PGT had funds to pay for the assessment if, as was the case here, the person was not able pay.[117]

While the Ombudsman may be able to resolve some individual complaints regarding the PGT, the Ombudsman has no jurisdiction over private or court-appointed guardians.[118] Furthermore, the Ombudsman may not investigate or deal with every individual complaint.[119] In these respects the Ombudsman's ability to protect the rights of persons subject to guardianships is limited. The provincial Ombudsman is not a substitute for comprehensive monitoring and oversight of guardians.

H. Criminal Proceedings

The *Criminal Code* makes financially abusive behaviour an offence.[120] These provisions apply to attorneys for property, persons holding money under direction, persons required to account, a criminal breach of trust, extortion and fraud. Technically financial abuse by a guardian could fall under these provisions. The sentence for theft or fraud

could be imprisonment for up to two years. Abuse of a position of trust or authority over a vulnerable victim is an aggravating factor for the purposes of sentencing.[121]

While these provisions address financial abuse, many writers have noted that the criminal justice system has significant limitations and does not provide a comprehensive response to monitoring and oversight of guardians.[122] Victims may be reluctant to report abuse by a family member. Persons with disabilities face numerous barriers to accessing the criminal justice system. The criminal justice system focuses on punishing the perpetrator, not ensuring the well-being of the victim. There is no obligation to ensure that the financial needs of the victim are met while the prosecution proceeds.[123]

Moreover, in many cases, blatant financial abuse is not the key issue of concern for persons subject to guardianship. In many cases disputes arise because a person's capacity has improved, but his/her guardian refuses to acknowledge this and maintains an overly controlling and paternalistic approach to the guardianship. These disputes cannot be resolved through the criminal justice system. The criminal justice system cannot protect vulnerable persons with 'capacity' issues in the same way that a comprehensive system of monitoring and supervision of guardians could.

I. Summary

Ontario's guardianship regime offers 'incapable' persons certain clear protections. However there is little oversight or monitoring to ensure that these protections are effective. Without a system to monitor and supervise the actions of guardians, there is no way to confirm that guardians are actually living up to their obligations or to ensure

that persons subject to a guardianship are actually benefiting from the protections outlined in the SDA.

The current system does not require that guardians receive any particular training to help them carry out their obligations. At the same time, while the SDA provides that persons subject to a guardianship must receive information about the role and obligations of their guardian, and their right to challenge a capacity assessment, there is no obligation to offer 'incapable' people more detailed rights advice. These gaps may contribute to some of the disputes that arise between guardians and 'incapable' persons.

The SDA does not provide for adequate supervision of guardians or monitoring of their actions. Nor does the SDA offer a clear process for persons subject to a guardianship to follow to defend themselves from an unscrupulous, negligent or simply over-protective or paternalistic guardian.

The processes that do exist to address concerns about the actions of a guardian are generally passive; all require an 'incapable' person to take action to defend his/her rights. Most processes require litigation. These are some of the barriers that 'incapable' people attempting to assert their rights encounter in the current system.

IV. CASE EXAMPLES

In this chapter we describe a number of case examples that illustrate some of the common concerns and barriers that arise for people with disabilities who are subject to guardianship in Ontario. These include situations in which:

- guardians fail to carry out their legal obligations;
- guardians assert broader powers than what is provided for under the relevant legislation;
- guardians do not consider the 'incapable' person's wishes or make decisions that are contrary to those wishes;
- guardians have insufficient contact with the 'incapable' person and share insufficient or incorrect information;
- guardians fail to assist the 'incapable' person to re-assert his/her capacity by obtaining a capacity assessment and/or terminating a guardianship;
- mechanisms available to hold the guardian accountable are inaccessible for 'incapable' persons;
- 'incapable' persons have little information about their rights and the mechanisms that exist to protect those rights;
- there are few existing mechanisms for challenging the powers that a guardian purports to hold; and
- persons who have no legal authority to act as guardians do so with impunity.

The case examples also describe how some of the existing monitoring and accountability mechanisms address these concerns. We analyze each case example by

applying the rights-based principled approach that was developed in chapter II. Using this analysis, we identify gaps and weaknesses in the current monitoring and accountability mechanisms.

The case examples we describe are drawn from ARCH's work with persons with disabilities, disability organizations and the broader disability community.[124] We also consulted with private bar lawyers who work in the area of capacity and guardianship law in order to confirm that the issues reported to ARCH are similar to those encountered in other legal practices. Some of the case examples presented are amalgams of facts from various cases where similar issues were raised. To protect confidentiality, we have use pseudonyms and changed any identifying information.

A. Ontario's Public Guardian and Trustee

1. Case Example: Adele

Adele, a woman who has intellectual and physical disabilities, was living independently in an apartment. She received services from a community agency in the form of a support worker who visited her several times a week and assisted her with budgeting, groceries, bills and various other activities. Adele's father and sister lived nearby and were involved in her life. Adele wanted to remove her sister as her guardian of property. Adele felt that she could and, in fact was, managing her finances successfully with support, and that she no longer needed a guardian. She resented her sister's on-going interference and control over her income. Adele had no understanding of how her sister had become her guardian, nor did she have any relevant documentation. She had signed a power of attorney for property, appointing her sister as her attorney. The power

of attorney document clearly stated that it was to be effective only during times when Adele lacked capacity to make her own financial decisions.

Adele was listed as a person subject to guardianship on the Register of Guardians which the PGT maintains. The PGT indicated that Adele was hospitalized as a result of her physical disability and while there, a medical doctor found her 'incapable' of managing her own property. Pursuant to the SDA, a certificate of incapacity was issued, the PGT was notified and subsequently became Adele's guardian of property.[125] When Adele was released from the hospital, a Notice of Continuance of Incapacity was issued.[126] Upon her release from hospital, Adele's sister notified the PGT of the pre-existing power of attorney for property. The PGT then terminated its guardianship in favour of the power of attorney. The sister was, therefore, not Adele's guardian, but rather her attorney.

With some assistance, Adele was able to explain this to her sister and inform her sister that her ability to control Adele's money was limited to periods when Adele lacked capacity, as provided for in the power of attorney document. Adele decided that she no longer wanted her sister to act as her attorney for property. She terminated the power of attorney and appointed a new attorney. This case had a positive outcome for Adele, since she was able to reassert her self-determination regarding decisions about her finances. However, the case highlights some of the concerns that ARCH regularly hears about from people with disabilities who are subject to guardianship by the PGT.

The PGT representative who was responsible for handling Adele's case stated that when the PGT discovered that Adele had a pre-existing power of attorney, the PGT

terminated its guardianship and appointed Adele's sister as the replacement guardian. This course of action is not provided for in the SDA. Instead, the Act requires the PGT to terminate its guardianship and allow the pre-existing power of attorney to function as it was intended to do.[127] The information given by the PGT representative was not legally accurate and ultimately, had a damaging impact on Adele. Practically, it had the effect of supporting the sister's assertion that she was a guardian and therefore had the power to control Adele's finances. Had Adele been informed and educated by the PGT that the guardianship had been terminated and her sister was functioning as an attorney for property, Adele would have been able to limit her sister's role and/or terminate the power of attorney, as she ultimately chose to do. Unfortunately, incorrect information from the PGT resulted in the sister controlling Adele's finances for more than a year longer than was necessary. Adele was, in effect, subject to a much more restrictive form of substitute decision-making than she should have been.

Troublingly, the PGT representative stated that it was standard practice for the PGT to appoint family members as guardians in this manner, since the PGT had to assume that the person with a disability would never regain his or her legal capacity. The PGT representative stated that all Adele needed to do to have the sister guardian removed was to get a capacity assessment done. This reveals a lack of appreciation of the rights and principles inherent in a rights-based principled approach to legal capacity. Under the rights-based principled approach, the right to legal capacity is fundamentally linked to human dignity and personhood. Therefore, any restrictions placed upon this right should be limited to the greatest extent possible. This is not consistent with the approach taken by the PGT in Adele's case. Assuming that a person would never

regain his or her legal capacity denies the goal of limiting restrictions placed upon the right to legal capacity. Appointing a family member as a guardian (which the PGT purported to have done) instead of allowing the power of attorney to operate effectively left Adele subject to a more restrictive form of substitute decision-making than was necessary or required by law.

Moreover, suggesting that Adele do a capacity assessment placed an unnecessary barrier in front of her ability to exercise her legal capacity. This is inconsistent with the principle of promoting accessibility of legal and bureaucratic systems related to legal capacity. It also demonstrates a lack of understanding of the significance of a capacity assessment for many people; undergoing a capacity assessment requires the 'incapable' person to locate and arrange for an appropriate assessor, pay for or apply for the PGT to pay for the assessment, and prepare for the assessment. These are significant practical barriers. For many 'incapable' people, undergoing a capacity assessment is an anxiety-ridden experience and can constitute an affront to their dignity and autonomy.

Adele's case demonstrates some additional concerns. Adele contacted ARCH for assistance after she and her support worker had already made several attempts, over a period of months, to obtain accurate information from the PGT. Many times their phone calls to the PGT representative went unanswered. Adele did, ultimately, obtain the information she needed. However it took months to receive this information and it required the assistance of a support worker and a lawyer. ARCH hears regularly from people with disabilities who have similar concerns about the inaccessibility of the PGT. Under the rights-based principled approach, the principles of promoting full and effective

participation and inclusion in society, and promoting accessibility both require that legal and bureaucratic processes related to legal capacity be designed so as to foster participation and engagement. A system in which it is not possible for an individual to obtain, in a timely fashion, legally accurate information about his/her substitute decision-maker does not respect these principles.

2. Case Example: Cora

The lack of timely response by PGT representatives can have serious practical implications for an 'incapable' person's finances. Cora, a woman who was subject to the guardianship of the PGT, had large cell phone and cable bills. While under the guardianship of the PGT, she had used different names to set up multiple cell and cable accounts, without understanding the costs and other implications of her actions. Cora received social assistance benefits, and therefore could not pay these bills. Her social worker brought this to the attention of the PGT. The PGT took no action for some time. Eventually, the bills accumulated to such an extent that it was unrealistic for Cora to ever be able to pay, given her limited income. She received harassing phone calls from the cell and cable companies and was placed under a great deal of unnecessary stress, which had a negative impact on her overall quality of life.

Cora's situation reveals an area of major concern for persons subject to a guardianship: the balance between a guardian's competing obligations. A guardian must balance the obligation to protect the 'incapable' person with the obligation to foster the 'incapable' person's independence and autonomy. If a guardian fails to intervene quickly when the 'incapable' person is threatened, there is little point to having a guardian. An inattentive

guardian simply imposes all the limitations of a guardianship without providing the 'incapable' person with any of the purported benefits or protections. In Cora's case, it is clear that the PGT failed to monitor her actions or intervene, even when notified that there was a problem. Cora clearly required the assistance of her guardian to resolve the situation with the utility company. When the PGT failed to step in and deal with the problem, Cora suffered the very consequences that a guardianship is supposed to prevent.

3. Existing Monitoring and Accountability Mechanisms That May Have Addressed Adele's and Cora's Cases

All guardians of property are fiduciaries whose powers and duties are to be exercised and performed diligently, with honesty and integrity, in good faith for the 'incapable' person's benefit.[128] Ideally, pursuant to the provisions of the SDA,[129] the PGT should interact with the 'incapable' person to discern their wishes in order to make decisions that are, to the extent possible, consistent with the wishes of the individual. Adhering to these requirements would promote the principle of full and effective participation and inclusion by fostering the participation and engagement of the 'incapable' person in the decision-making process. However, there are no specific provisions in the SDA that provide for proactive monitoring to ensure that guardians carry out these obligations.

These duties were not fulfilled in either Adele's or Cora's case. In cases where a guardian fails to meet these obligations, there is no opportunity provided for the 'incapable' person to participate and consequently, guardianship becomes a mechanism of complete control.

If a guardian feels that s/he needs guidance, section 39(3) of the SDA permits a guardian to apply to court for directions on any question arising in connection with the guardianship. However, in order to utilize this mechanism and obtain directions from the court, Adele or Cora would have had to obtain leave of the court.[130] Given the time, expense and procedural barriers, this was not an accessible process for either Adele or Cora.

In Cora's case, the ability to obtain an order requiring the PGT to pass its accounts, pursuant to section 42 of the SDA, would not likely have helped, since it was not the PGT who approved the expenditures on cell phones. Even if section 42 could have been of assistance to Cora, the time, cost and complexity involved in launching a court application would likely have posed major barriers to her ability to take advantage of this option. Effectively, Cora did not have access to any mechanism under the SDA that would have allowed her to deal with the inaction of her PGT representative.

While the PGT does have a complaint process, neither Adele nor Cora was aware that such a process existed.

The SDA does not address the concerns raised by Adele's case regarding the failure by the PGT representative to provide accurate legal information or understand the principles underlying legal capacity. Nor does the SDA address the concerns highlighted in Adele's and Cora's cases regarding the inaccessibility of the PGT system.

B. Statutory Guardians: Family Members

1. Case Example: 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.[131] 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. *Existing Monitoring and Accountability Mechanisms That May Have Addressed Michael's Case*

As noted, guardians are fiduciaries who are expected to exercise their duties diligently, with honesty, integrity and in good faith for the 'incapable' person's benefit.[132] They

must keep accounts of all transactions involving property[133] and may be asked to pass their accounts.[134] However, there are no specific provisions in the SDA requiring any form of mandatory monitoring or reporting on the activities of family member statutory guardians appointed by the PGT.

Section 42 of the SDA requires a guardian to prove they have used the 'incapable' person's funds appropriately. An application may be made to court and the court may order a passing of accounts. This may have proven useful in resolving Michael's situation, however the court order for a passing of accounts is discretionary and requires the 'incapable' person or someone on his/her behalf to initiate court proceedings to obtain the desired relief.

Pursuant to section 39, Michael may have been able to apply to a court for directions. However, this would have required him to obtain leave of the court[135] and to engage a complex legal process, which would likely have required him to obtain and pay for legal counsel. This mechanism does not promote the principle of accessibility.

An 'incapable' person may seek to terminate a statutory guardianship pursuant to section 20.3 of the SDA. However, this process involves litigation. There are clear barriers to pursuing litigation to resolve conflicts with a statutory guardian, such as the cost and complexity associated with the legal process. When the guardian is also a family member there are further concerns such as the impact litigation may have on family relationships. This is especially worrisome when the 'incapable' person may depend upon the support of the family member guardian. In cases such as Michael's, litigation or termination of the guardianship may be an extreme and inappropriate

measure to deal with problems that may be resolved through mechanisms that may allow the guardianship to remain intact.

The SDA allows the PGT to mediate disputes that arise between a person's guardian or attorney for property and their guardian or attorney for personal care, or between joint attorneys.[136] However, there is no provision that requires the PGT to mediate disputes that arise between a guardian or attorney and the 'incapable' person. The *Rules of Civil Procedure* stipulate that mandatory mediation is available for proceedings under the SDA.[137] However, a proceeding must be commenced in order to use this process, and there is a cost attached to pursuing this mediation. Mediation, therefore, was not an available option in Michael's case.

There is no requirement in the SDA that training be offered to guardians. While the PGT publishes materials regarding the SDA and the role of a guardian, guardians are under no obligation to read or use this information. In Michael's case, it is possible that his sister may have exercised her substitute decision-making powers more diligently and effectively had she been aware of her responsibilities and obligations as Michael's guardian.

C. Court-Appointed Guardians

1. Case Example: Hazel

Hazel was a young woman who had been seriously injured in a car accident. She received a large insurance settlement, and her brother was appointed her guardian of property and personal care. Several years after the accident, Hazel had recovered and

wanted to re-assert her autonomy and decision-making powers. Her guardian refused to accept that Hazel's condition had improved. Despite her young age, he wanted her to remain in a nursing home with limited ability to travel outside, since he felt that this was the only way to ensure her safety. He allowed her very limited access to money, even though Hazel had ample funds available. This curtailed her outside activities and limited her independence and ability to participate in the community. At times the guardian refused to spend money on necessary items such as personal hygiene products, new clothes, and dental care, which compromised Hazel's dignity and health.

Every step Hazel took to assert her autonomy was thwarted by her guardian. He refused to make arrangements for, or provide funds to pay for, a capacity assessment. Hazel's guardian claimed that she needed his permission to be assessed, and his agreement as to who performed the assessment. The guardian would not provide her with clear information about her finances to allow her to determine what type of alternative living arrangements she could afford.

Even after Hazel obtained assistance from counsel, and underwent capacity assessments which confirmed her capacity to manage both her property and her personal care, Hazel's guardian opposed her. He was able to use the court process to delay her re-asserting her autonomy for almost a year after she had been found capable. Eventually the guardian agreed to allow Hazel's application to terminate the guardianships to proceed unopposed.

2. *Existing Monitoring and Accountability Mechanisms That May Have Addressed Hazel's Case*

There were only limited options available to Hazel to challenge her guardian or re-assert her autonomy. Hazel could have attempted to enforce the guardian's fiduciary obligations through the criminal process, however that process is set up to deal with theft or fraud, not necessarily withholding of funds. She could have sought a court order requiring her guardian to pass his accounts; or she could have pursued litigation to seek to terminate the guardianship. The latter two options were not accessible to Hazel since both involved pursuing litigation to obtain a court order. Both involved retaining a lawyer and incurring significant costs. No process was available to resolve the conflict informally and quickly without resorting to expensive litigation.

There is no requirement in the SDA that a person subject to a court-appointed guardian be offered an opportunity to be re-assessed to establish that they have regained their capacity. Even if the 'incapable' person requests an assessment, there is no explicit obligation on a court-appointed guardian to comply with such a request. Section 20.1 of the SDA requires statutory guardians to assist in arranging an assessment of the person's capacity if requested by the 'incapable' person; there is no similar provision that applies to court-appointed guardians.

Even when Hazel attempted to pursue litigation, her guardian was able, at least initially, to thwart her. The guardian told Hazel that since the court had granted him guardianship over her, the court would always do as he requested; and that if she caused trouble he could ask the court to put her in jail. There was no obvious place for Hazel to turn to ask whether what her guardian was telling her was correct. The information published by the

PGT was not available in Hazel's first language, nor did it directly address Hazel's situation. While there is a requirement in the SDA that a guardian explain to the 'incapable' person what the guardian's powers and duties are,[138] there is no requirement that anyone inform the 'incapable' person of their rights *vis à vis* the guardian.

Provisions that require an 'incapable' person to take legal action against a guardian privilege guardians and disadvantage 'incapable' persons attempting to protect their rights. Legal processes under the SDA are complex, and usually require the 'incapable' person to find, retain and pay for legal counsel. As a result they are not accessible to many 'incapable' persons. Once an 'incapable' person is made subject to a guardianship by the court, s/he may be highly vulnerable to manipulation and intimidation by unscrupulous guardians. This vulnerability is heightened by a lack of obligation on the guardian, court, PGT, or any other public authority to provide information about the guardianship or rights advice to the 'incapable' person. There are no provisions in the SDA that require guardians to report on their activities or that require a public body to monitor the activities of guardians. In Hazel's case, reporting or monitoring requirements may have assisted to hold Hazel's guardian accountable for the unjustified control he exercised over her.

Furthermore, the SDA permits guardians to use the 'incapable' person's funds to pay for legal counsel to challenge the 'incapable' person's attempts to assert his/her autonomy.[139] This is exactly what happened in Hazel's case: her guardian used Hazel's money to pay his own legal counsel, while at the same time refusing her access to her own funds, which she needed in order to defend herself. The guardian's access to

Hazel's funds was automatic, while her ability to recoup costs if he 'overspent' would be based on her being able to convince a court to issue a costs award against the guardian. This latter process would impose further costs upon Hazel. Even if she was successful in obtaining an order from the court, there is no guarantee that her guardian would have had the resources to honour the order.

The mechanisms available to Hazel were all passive in the sense that they each require the 'incapable' person to initiate an action that may lead to monitoring or scrutiny of the guardian's actions. With limited access to rights advice and legal counsel, many 'incapable' people are prevented or limited from triggering these mechanisms. By controlling the 'incapable' person's access to his/her own funds, a guardian can further restrict the person's ability to secure legal counsel.

Rule 75.1 of the *Rules of Civil Procedure* stipulates that mandatory mediation applies to proceedings under the SDA. However, accessing this process requires that a person initiate litigation. As with most aspects of litigation, the parties must each pay an equal share of the costs related to the mediation.[140] While mediation may help to resolve some issues more quickly and shorten court proceedings, it is still, like most court-based processes, inaccessible to many 'incapable' persons due to the cost and complexity of the proceedings. The SDA makes no provision for mediation or alternative dispute resolution outside of a litigation process.

3. Case Example: 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.

4. Existing Monitoring and Accountability Mechanisms That May Have Addressed Leo's Case

There are no clear mechanisms in place to deal with court-appointed guardians who die or vanish. The SDA provides that the PGT may elect to become a person's statutory guardian if their statutory guardian dies or resigns,[141] but there is no similar provision obliging the PGT or any other person or organization to assume the role of guardian when a court-appointed guardian dies or vanishes. Even the existing provision does not explain how the PGT or the court is to be informed about the death of a guardian.

The 'incapable' person or someone on his/her behalf may pursue litigation to have the court appoint a new guardian. If no one does this, it is not clear that anyone would have any obligation to assist the 'incapable' person to sort out their financial or personal affairs in the absence of their guardian. Of course, if a guardianship has ceased to

function, an individual may be left with no way to access his/her funds to pay for counsel or necessities of life.

Leo's case highlights the potential vulnerability of persons whose court-appointed guardian dies or refuses to perform the functions of a guardian. In these situations, the 'incapable' person is left with all the limitations on his/her autonomy inherent in a guardianship, but without any of the supposed protections that a guardianship is expected to provide. If the 'incapable' person cannot initiate litigation to remove the guardian or cannot access legal supports, s/he may be left without any funds or forced to survive on far less than what his/her resources might otherwise allow.

D. Informal Substitute Decision-Makers

1. Case Example: Denise

Denise is a young woman who has an intellectual disability and a mental health disability. She has lived in the same group home since she was fifteen. When she was a minor, her mother made decisions on her behalf, such as consenting to the use of particular medications, determining which programming and activities were appropriate for her, and making decisions about financial matters. After she turned eighteen, Denise's mother continued to make these decisions for Denise and the staff at the group home continued to view the mother as a valid substitute decision-maker. This was the case despite the fact that Denise had never been found 'incapable', no guardian had been appointed, and Denise had never been given an opportunity to appoint an attorney for property or personal care.

As Denise began to assert her own autonomy, conflicts arose. For example, Denise felt that she no longer needed to take all the medications prescribed by her psychiatrist. The group home staff did not accept Denise's position. Instead, they contacted Denise's mother, who instructed them to give Denise the medication whether she wanted it or not.

This example is not uncommon.[142] Many people informally assist others to make decisions, and do so outside of the legal framework for guardianship or substitute decision-making. These informal decision-making relationships may function well in many cases. One advantage of such relationships is that they function without the person with the disability being subjected to a formal finding of incapacity. In this sense, such informal relationships promote the principle of respect for inherent dignity and worth by placing no formal restrictions on the person's right to legal capacity. Informal decision-making relationships can also be much more flexible than guardianships, since informal decision-makers may make decisions about specific issues only. In contrast, guardians are generally empowered to make all decisions in relation to a person's finances and/or personal care. Such flexibility promotes the principles of respect for inherent dignity and promotion of individual autonomy and independence.

On the other hand, informal decision-making relationships are, in many cases, problematic. Informal decision-makers who try to advocate on behalf of a person with a disability or assert that person's rights *vis à vis* a service provider may find that the service provider does not recognize the informal decision-maker's status or legitimacy. The person with the disability may then be left without any advocacy support. In many situations people with disabilities report that informal decision-makers exert too much

control and do not involve the person with the disability in the decision-making process. There are no legally-sanctioned monitoring or accountability mechanisms in place for informal decision-makers. People with disabilities who wish to remove or challenge their informal substitute decision-maker have no legal recourse. In situations where informal decision-makers act on the basis of an assumption that the person is 'incapable', that person's dignity, worth, independence and autonomy are severely curtailed.

E. Summary

In this chapter, we have described several case examples and analyzed these examples using the rights-based principled approach developed in chapter II. What emerges are significant gaps and weaknesses in the existing monitoring and accountability mechanisms for guardians in Ontario. In many cases, the SDA does technically contain mechanisms for monitoring and redress, but these mechanisms are practically ineffective because they are not accessible to many 'incapable' persons. For example, the SDA provides for several court-based processes to enable guardians to seek directions or allow 'incapable' persons to challenge the appointment or continued role of a guardian. Such processes are inaccessible due to the costs required to initiate litigation and retain counsel, the fact that they are time consuming, legally complex, and rely on the initiative of the 'incapable' person. No support is available to assist 'incapable' persons to access legal processes. Many 'incapable' people are not aware that such court-based processes exist, and the SDA does not require guardians or any public authority to ensure that 'incapable' persons have this information through the provision of rights advice or other education.

In some cases, Ontario's guardianship regime simply does not provide for any mechanism to address the concerns or issues that 'incapable' persons may face. For example, guardians may exercise control in areas where the 'incapable' person could make his/her own decisions or engage in decision-making with assistance from the guardian or another support. Outside of the litigation process, the SDA does not provide for any dispute resolution mechanisms that 'incapable' persons could access to address such concerns in a timely and accessible fashion.

People who are subject to the guardianship of the PGT may have complaints about their representative not responding or acting in a timely way, or not providing accurate legal information. The PGT has an internal complaint process, but there is no external mechanism of monitoring or oversight to ensure that people are aware of this complaint process or that such complaints are resolved.

In the next chapter we consider selected mechanisms and approaches adopted in other jurisdictions to monitor and oversee substitute decision-makers.

V. MONITORING AND ACCOUNTABILITY OF SUBSTITUTE DECISION-MAKERS IN OTHER JURISDICTIONS: Selected Mechanisms and Processes

In this chapter we identify and describe selected types of substitute decision-making in jurisdictions outside of Ontario, and the mechanisms available in those jurisdictions to monitor substitute decision-makers. The jurisdictions we selected are all common law jurisdictions, and most have either undergone or are in the process of undergoing significant reform to their substitute decision-making regimes. This chapter does not provide a complete or exhaustive review of substitute decision-making regimes in each of the jurisdictions considered. Rather, we identify and describe mechanisms that are different than those employed in Ontario, mechanisms that draw on a rights-based principled approach, or mechanisms that may provide ideas for reform in Ontario.

A. Ireland

On July 17, 2013 the Government of Ireland published the *Assisted Decision-Making (Capacity) Bill*.[143] Not yet law in Ireland, the Bill proposes comprehensive legislation on legal capacity with the aim of supporting people to exercise their decision-making autonomy to the greatest extent possible.[144] The Bill was drafted to meet Ireland's obligations under Article 12 of the CRPD.[145]

The Bill sets out a continuum of decision-making options.[146] Assisted decision-making is aimed at people who are capable of making decisions with some support and provision of relevant information. A person can appoint a decision-making assistant under a decision-making assistance agreement, and can remove the assistant at any time.[147] People who act as assistants will be under the supervision of the Office of the Public

Guardian.[148] Decision-making authority remains with the individual. The assistant must ascertain the will and preferences of the individual and endeavour to ensure that the individual's decisions are implemented. Assistants are prohibited from accessing information that is not reasonably required for the decision, without the consent of the individual.[149]

Co-decision-making applies when a court has declared that a person lacks capacity[150] to make a decision(s) alone but has capacity if assisted by a suitable person.[151] Only a family member or friend may be appointed as a co-decision-maker under a co-decision-making agreement. A co-decision-making agreement has no legal effect unless a court approves it by issuing a co-decision-making order.[152] Once a co-decision-making order has been issued, the agreement can be revoked or varied only with the consent of the court.[153] The 'incapable' person will be able to determine which decisions s/he would like the co-decision-maker to assist with, and include this in the co-decision-making agreement.[154] Co-decision-makers can assist the 'incapable' person only with decisions that are specified in the co-decision-making agreement. A co-decision-maker must explain information that is relevant to the decision, ascertain the will and preferences of the 'incapable' person, assist the person to communicate his/her will and preferences, and assist the person to make a decision.[155] Co-decision-makers are prohibited from obtaining information that is not reasonably required for the decision or using information for a purpose other than the relevant decision. Co-decision-makers are accountable to the court; the court must review a co-decision-making order three to thirty-five months after the first anniversary of the making of the order, and every three years thereafter.[156] The court may vary or rescind the co-decision-making order if the

co-decision-maker acts or proposes to act beyond the scope of the agreement, if the person regains capacity, or if the relationship between the person and the co-decision-maker has broken down.[157] Co-decision-makers must submit an annual report to the Office of the Public Guardian regarding the performance of their functions.[158]

For people who are not able to exercise their capacity with the help of an assistant or co-decision-maker, the Bill provides for a decision-making representative to be appointed by a court.[159] This is referred to as "facilitated decision-making" and is intended to be a last resort option. The representative is accountable to the court and subject to the supervision of the Public Guardian. The court may place limits on the kinds of decisions the representative can make and the role of the representative. The powers conferred on a representative must be as limited in scope and duration as possible.[160] If no family member or other person is able to perform this role, the court may nominate two or more people as representatives from a panel that will be established by the Public Guardian.[161] Representatives are prohibited from obtaining information that is not reasonably required for the decision or using information for a purpose other than the relevant decision.[162] An 'incapable' person may apply to the court to vary or rescind the powers granted to a representative, and the court may do so if the representative acts or purports to act beyond the scope of the authority conferred upon him/her.[163] Representatives must submit an annual report to the Office of the Public Guardian regarding the performance of their functions.[164]

If a court has made an order declaring a person 'incapable', the Bill requires that the court review the person's capacity at regular intervals of not more than twelve months or as specified in the order. However, the court may review the person's capacity less

frequently (up to every three years), if it is satisfied that the represented individual is unlikely to recover his/her capacity.[165] In addition, at any time an application to review a finding of incapacity can be made to the court by the 'incapable' person, the Public Guardian, the 'incapable' person's spouse or partner, the 'incapable' person's co-decision-maker or decision-making representative, the 'incapable' person's attorney, or a person specified by the court to review the person's capacity.[166] If the court determines that the represented person has capacity to make his/her own decisions, the court may revoke or amend the order declaring the person 'incapable' and may vary or discharge the order regarding the decision-making agreement.[167]

In addition to applications to court, another monitoring mechanism provided for in the Bill is the establishment of the Office of the Public Guardian. If established, the Public Guardian will be an independent agency which is part of the Courts Service. Its functions will include supervising decision-making assistants, co-decision-makers, decision-making representatives and other types of decision-makers for 'incapable' persons. It will receive reports from the various types of decision-makers, as well as from special and general visitors.[168] General and special visitors are persons appointed by the Public Guardian who will visit with the various types of decision-makers and 'incapable' persons. These visitors will submit reports to the Public Guardian regarding any matters that the Public Guardian specifies. Visitors may include medical practitioners and persons who have particular knowledge and experience regarding capacity issues.[169] The Public Guardian will establish and maintain a register of decision-making agreements and orders. It must also receive and consider complaints

in relation to the way in which a decision-maker is carrying out his/her duties, and address complaints that are substantiated. This may include making an application to court. The Public Guardian may control and manage an 'incapable' person's property, if ordered to do so by a court.[170]

Any party to proceedings under the Bill will be entitled to free legal advice provided that s/he qualifies financially, pursuant to the Civil Legal Aid regime.[171] The Public Guardian may appoint a court friend for an 'incapable' person who is a party to court proceedings regarding determination of the person's capacity, co-decision-making orders, decision-making representative orders, and other orders.[172] Court friends may, among other things, attend meetings and court with the 'incapable' person and assist him/her, or represent the interests of the 'incapable' person if s/he does not attend court.[173]

A number of civil society and disability organizations welcomed the publication of the *Assisted Decision-Making (Capacity) Bil*l, and praised the government's efforts to introduce legislation that recognizes the right to legal capacity set out in the CRPD.[174] A number of organizations put forth recommendations for reforming the Bill to ensure that it is based on best international practices and human rights standards. Included among these recommendations were the following:

- People should have a real ability to challenge decisions made under the Bill, including the appointment of substitute decision-makers and the decisions they make. This should include the right to independent advocacy.[175]
- Safeguards should be provided to address conflicts of interest between the 'incapable' individual and the substitute decision-maker, including an obligation on the state to investigate such situations.[176]

- The access to justice and legal aid provisions of the Bill should be strengthened. There should be an automatic right to legal representation, regardless of means, when an application is made to court for a declaration of an individual's capacity.[177]
- The costs of court applications and any expenses related to the duties of decision-makers should not be automatically taken from the individual's estate. This poses a significant financial barrier to people seeking to realize their rights under the Bill.[178]
- The review clause currently contained in the Bill must be strengthened to ensure that amendments to the Bill are considered in light of new international thinking on legal capacity and emerging best practices in assisted decision-making. [179]
- Court friends should be clearly instructed to act only in accordance with the will and preferences of the person and should not access the person's records without his/her consent. The use of court friends should not be viewed as an adequate substitute for effective legal representation. The role of court friends as compared with next friends or guardians ad litem must be clarified.[180]
- More guidance and clarity is needed on the role and powers of special and general visitors.[181]
- The Bill requires all types of decision-makers to respect the will and preferences of the individual, however certain discretion is retained for courts to make decisions in the "interests of relevant persons". This language is

ambiguous and could lead to courts introducing best interests tests. Greater obligations should be imposed on courts to respect the will and preferences of the individual when appointing, varying or revoking decision-making orders.[182]

- The Bill leaves the courts to deal with declarations of mental incapacity, decision-making orders, and disputes related to these issues. Instead, a Legal Capacity Tribunal should be established as an independent decision-making body, incorporating a variety of disciplines to adjudicate disputes. This offers a more flexible and accessible alternative to the court system.[183]

B. New York, United States of America

In New York, Article 81 of the *Mental Hygiene Law* and Article 17 of the *Surrogate's Court Procedure Act* govern guardianship proceedings. Article 81 establishes the more modern regime, whose purpose is to:

> …promote the public welfare by establishing a guardianship system which is appropriate to satisfy either personal or property management needs of an incapacitated person in a manner tailored to the individual needs of that person, which takes in account the personal wishes, preferences and desires of the person, and which affords the person the greatest amount of independence and self-determination and participation in all of the decisions affecting such person's life.[184]

Article 81 sets out a least restrictive approach, whereby persons under guardianship are deprived of no more of their decision-making rights than is necessary in order to protect them from harm.[185]

Article 17 establishes a regime under which courts can appoint a substitute decision-maker for an individual who has an intellectual or developmental disability. Under both

statutes, substitute decision-making is imposed upon people who do not have capacity to make their own decisions.

Several monitoring and accountability mechanisms are set out in the *Mental Hygiene Law*. A New York court can issue an injunction or restraining order before the commencement of a guardianship proceeding or at any time after the appointment of a guardian. This allows the court to stop any person who is attempting to transfer or dispose of the 'incapable' person's property or is acting in a manner that endangers the health, safety, or welfare of the person who is alleged to be incapacitated or who has been determined to be incapacitated.[186]

New York courts may also discharge a guardian or modify the powers of a guardian if the 'incapable' person has fully or partially regained his/her capacity, or if the person becomes unable to provide for personal needs or property management which the guardian is not authorized to exercise.[187]

The *Mental Hygiene Law* requires guardians to report on their activities. The guardian must file an initial report no later than ninety days after being appointed by the court.[188] In the initial report, the guardian must document a complete inventory of properties and financial resources of the 'incapable' person. For personal needs, the guardian must provide a plan of care. The guardian must also file an annual report/accounting yearly as prescribed by the court.[189] The statute includes a prescribed list of required information that the guardian must disclose, including information on the personal status of the 'incapable' person and/or the condition of the person's finances and property that fall under the guardian's authority.[190] A final report must be filed when a guardian dies,

is removed, suspended, discharged, resigns or when the 'incapable' person has died.[191] The report incorporates the same information that must be disclosed in the annual report.

Guardians must demonstrate that they have completed the guardian education required under section 81.39 of the *Mental Hygiene Law*. Every guardian is required to participate in a court approved training program which emphasizes the legal duties and responsibilities of the guardian and provides an introduction to medical terminology, particularly terminology related to diagnostic and assessment procedures.[192]

A variety of reforms have been proposed in relation to Article 81 of New York's *Mental Hygiene Law*. On November 15, 2011 Cardozo Law School hosted a conference designed to develop consensus regarding guardianship reform in New York State.[193] Several reforms were proposed in relation to enhancing monitoring and accountability of guardians, including:

- Enhancing training and supports for guardians by creating simplified, standardized forms that guardians would be required to use for initial, annual and final reports. Conference attendees recommended that these forms be available electronically. Standardizing the reporting mechanism would make it easier to train lay guardians about their reporting obligations.[194] Related to this recommendation, conference attendees suggested that guardians should receive on-going training regarding their role and obligations. Currently, guardians are required to attend training only after their appointment. It was also suggested that court clerks and/or a hotline be available to assist guardians to fulfill their reporting obligations.[195]

- Improving the training that court examiners receive. Court examiners are individuals appointed by the court to review annual reports that are submitted by guardians. Court examiners focus on the finances of the 'incapable' person and do not scrutinize the person's personal needs or general well-being to the same extent. More training for court examiners on personal needs monitoring should be provided. Annual reports filed by guardians should include more specific information on the 'incapable' person's residential status, medical treatment and social activities. This would help to ensure that persons under guardianship are living in the least restrictive setting possible.[196] It was also recommended that the "least restrictive setting" standard should be incorporated into Article 81, and that it should override the goal of conserving the 'incapable' person's funds.
- Evaluating persons under guardianship regularly to determine whether the guardianship should continue or be terminated. Conference attendees recommended that more free legal services be provided to persons who wish to terminate their guardianship.[197]
- Developing a pilot Volunteer Monitoring Program in which volunteers would make personal visits to persons under guardianship to monitor the person's living situation and the actions of the person's guardian. Under the current system in New York, guardians are supposed to visit 'incapable' persons four times per year and report on their visits to court examiners. However, the court examiner does not verify the information that the guardian reports. If the pilot Volunteer Monitoring Program succeeds, a more permanent program

would be set up as a not-for-profit organization which would train and supervise volunteer monitors from a variety of educational and professional backgrounds, including social work, law and accounting.[198]

- Creating a standardized complaint procedure by which concerned persons or persons under guardianship could complain about a guardian's conduct. The current procedure in New York requires the concerned person to complain to the judge who oversees that particular guardianship. Each judge handles complaints differently. Conference attendees recommended that a Guardianship Ombudsman's Office be created to receive and handle complaints about the actions of guardians.[199]

In addition to these reforms, conference attendees also made recommendations regarding moving towards a system of supported decision-making instead of substitute decision-making. It was noted that exploring law reform options for supported decision-making was important in order to comply with the CRPD. Conference attendees recommended exploring the availability of funding for a supported decision-making pilot program, which could explore the use of supports instead of guardianships. [200]

C. Victoria, Australia

In the Australian state of Victoria three different statutes govern the appointment of substitute decision-makers in various circumstances. A substitute decision-maker may be appointed to make personal or lifestyle decisions, financial decisions, and medical or other health care decisions. Under the *Guardianship and Administration Act* ("G&A Act"), the Victorian Civil and Administrative Tribunal ("VCAT") has the power to appoint

a guardian or administrator for a person whose disability impairs his/her judgement and who needs a substitute decision-maker.[201] The G&A Act defines a person with a disability as someone with an intellectual disability, mental disability, brain injury, physical disability or dementia.[202] VCAT can make an order for either plenary or limited guardianship. Plenary guardianship orders are rare; they convey broad powers to make decisions for the 'incapable' person.[203] More commonly, VCAT appoints a person as a guardian with a limited range of powers, or for specific decisions related to personal and lifestyle matters stipulated in the VCAT order. VCAT may also order an administrator to make decisions about all or part of an 'incapable' person's estate.[204] The duration of a VCAT appointment is specified in the order. It is usually no longer than three years, but can be renewed.[205] A VCAT appointed guardian can be an individual, family member, friend or the Public Advocate. A VCAT appointed administrator can be an individual, a professional with appropriate expertise or a trustee company.[206] It is also possible for individuals to self-appoint enduring guardians or attorneys, whose powers are on-going. Guardians and administrators appointed by VCAT are required to act in the represented person's best interests. Guardians must encourage the 'incapable' person to participate as much as possible in the community; encourage the person to be independent; protect the person from neglect, abuse or exploitation; and consult with the person and take his/her wishes into account.[207] The G&A Act requires VCAT to consider whether less restrictive options are available when deciding whether a person needs a guardian or an administrator.[208]

VCAT has primary responsibility for overseeing the activities of substitute decision-makers. In addition to making and reviewing guardianship and administration orders,

VCAT also hears applications in cases where it is alleged that guardians are acting negligently, incompetently or contrary to the best interests of the individual.[209] The Public Advocate assists VCAT by conducting investigations and providing VCAT with reports.[210] If VCAT determines that a substitute decision-maker has not fulfilled its duties or that a person has regained capacity, VCAT may remove or vary the decision-maker's authority to act.[211] Guardians and administrators are subject to regular assessments of their appointment by VCAT. For guardians this usually happens at least once a year, and for administrators once every three years[212]. After being appointed by VCAT, administrators are required to file a financial plan explaining how they will manage the 'incapable' person's estate. Administrators are also required to file annual statements of accounts, which are examined by State Trustees.[213] Breach of the G&A Act may incur a criminal penalty of up to $2443.[214]

Substitute decision-makers appointed by an enduring guardian or power of attorney are not subject to any regular external assessment. Such arrangements are generally private, unless an application is made to VCAT, in which case VCAT will review the extent to which the substitute decision-maker is fulfilling his/her obligations and responsibilities.[215]

The G&A Act establishes the Public Advocate as an independent statutory official with a broad role to promote and safeguard the rights and interests of people with disabilities.[216] The major functions of the Public Advocate include promoting the development of accessible and rights-enhancing services for people with disabilities, and supporting the establishment of advocacy programs, community education and family and community guardianship for people with disabilities.[217] The Public Advocate

is mandated to act as guardian or alternative guardian when appointed by the VCAT. [218] Staff at the Office of the Public Advocate or volunteers in a community guardianship program fulfill this function.[219] The Office is also required to make applications to VCAT for a guardian or administrator to be appointed or an existing order reassessed; seek assistance from any institution, welfare organization or service provider on behalf of a person with a disability; give advice about the G&A Act and make representations on behalf of a person with a disability; investigate complaints or allegations of abuse or exploitation of people with disabilities; and investigate any need for or inappropriate use of guardianship.[220] The Public Advocate conducts advocacy on behalf of people with disabilities, which can include making phone calls, writing letters, arranging meetings, making formal complaints, conducting mediations or legal cases. This advocacy is, however, considered a last resort service that focuses on the best interests of the person with a disability who is at risk of abuse, neglect or exploitation. The Public Advocate works with VCAT to provide optional training to newly-appointed guardians and administrators. It also publishes guides for guardians and enduring guardians, administrators and other substitute decision-makers, and conducts community education sessions. The Public Advocate operates a private guardian support program and a general telephone advice service.[221]

The G&A Act originally provided for the Public Trustee to be a preferred administrator. However, since 1999, the Public Trustee has been replaced by State Trustees, a state owned company set up to provide financial services, including acting as administrator when appointed by VCAT.[222]

In 2012 the Victorian Law Reform Commission published and tabled in Parliament a report on guardianship reform in Victoria.[223] The report was initiated at the request of the Attorney General for Victoria, and was the result of over two years of research and consultation with stakeholders. The Report makes a number of recommendations for reforming substitute decision-making legislation in Victoria, including:

- Enhanced training and education for substitute decision-makers is required. New guardianship legislation should permit VCAT to appoint a person as a guardian on condition that the person undertake a designated training program. The Public Advocate and State Trustees should be funded to provide this training and to provide information to the general community on the role and responsibilities of guardians.[224]
- New guardianship legislation should require all substitute decision-makers to undertake in writing to act in accordance with their responsibilities and duties. The Victorian Law Reform Commission did not recommend any sanction for failure to comply with an undertaking, however these documents would be available to be used in any legal or administrative proceedings regarding failure to comply with a particular duty or obligation.[225]
- Some reform of guardians' reporting requirements is necessary. VCAT should have the power to direct a more limited form of reporting when the financial administrator is responsible for managing a small estate, such as a public pension or social assistance. VCAT should have discretionary power to direct a financial administrator to file an accounting at any time. This recommendation was influenced by a concern from stakeholders that overly

onerous reporting requirements would act as a disincentive to undertaking the role of a guardian or administrator.[226]

- New guardianship legislation should provide that VCAT have jurisdiction to adjudicate any claim against a substitute decision-maker for abuse or misuse of power or failure to perform his/her duties that is presently within the jurisdiction of the courts. VCAT should have the power to order any remedy that a court could order in these proceedings, including recovery from a substitute decision-maker of funds that were misused. VCAT should be permitted to transfer any cases to the court if the court is a more appropriate venue.[227]
- New guardianship legislation should provide that it is unlawful for a person who cares for an 'incapable' person to abuse, neglect or exploit that person. Currently, a person who is found to have committed this wrong may be criminally responsible, however the Law Reform Commission found that the criminal justice system may not be the most effective way to address these wrongs. The Commission recommended that persons found to have abused, neglected or exploited an 'incapable' person should be liable to a civil penalty.[228]
- The Public Advocate should have the function of receiving and investigating complaints in relation to the abuse, neglect or exploitation of 'incapable' persons, and the misuse of powers by private substitute decision-makers. The Public Advocate should have expanded investigative powers.[229]

- New guardianship legislation should permit the Public Advocate to give the Chief Police Commissioner a report concerning any investigations that office conducts, and provide the police with access to any evidence gathered during the investigation, if the Public Advocate believes that the police should consider initiating criminal proceedings against the alleged wrongdoer.[230]
- New guardianship legislation should provide that the Public Advocate has the function and power to advocate for the rights and interests of persons with a disability, especially those who are found to be 'incapable'. The Public Advocate should engage in individual and systemic advocacy. The Public Advocate should be entitled to seek leave to participate in court or tribunal proceedings where the rights and interests of a person with a disability are in question.[231]
- The Public Guardian should have primary responsibility for educating the public about guardianship laws.[232]
- The Public Guardian should receive additional resources to carry out its functions.[233]

The Commission decided not to recommend periodic reporting by private guardians and attorneys. The Commission agreed with the Public Advocate, who argued that these reports are unlikely to promote good decision-making by guardians, and that the cost of reviewing the reports is better invested in training guardians to perform their functions well. The Commission also decided not to recommend random investigation and auditing of substitute decision-makers. It was felt that this would not be a useful or cost-effective measure, and that it was better to encourage appointments of qualified

substitute decision-makers and to provide these people with high quality training and support.[234]

D. Summary

This chapter's overview of guardianship legislation and recommendations for reform in Ireland, New York, and Australia demonstrates that a number of jurisdictions have made significant efforts to ensure that their guardianship regimes comply with the requirements of the CRPD. The general trend is to ensure that:

- guardianships are employed only when absolutely necessary;
- both the scope and duration of guardianships are limited;
- guardians receive training and support to ensure they understand their obligations;
- guardians must report on their activities;
- guardians' activities are monitored and supervised;
- 'incapable' persons' receive rights advice and advocacy supports;
- 'incapable' persons are offered the opportunity to be re-assessed on a regular basis;
- mechanisms are in place to deal with disputes between 'incapable' persons and their guardians;
- 'incapable' persons have access to free legal advice and assistance when required.

The mechanisms in place to monitor and oversee guardians in these jurisdictions may offer guidance on how Ontario's guardianship regime can be reformed to better protect and promote the rights of 'incapable' persons.

VI. OPTIONS AND OPPORTUNITIES FOR REFORM

A. Opportunities for Reform in Ontario

In many jurisdictions around the world, people with disabilities, disability organizations and those who support and advocate for people with disabilities have called for reform to existing guardianship and substitute decision-making regimes that would make those regimes more consistent with the rights and principles articulated in the CRPD. Some have called for the elimination of guardianship altogether.[235] In many jurisdictions, steps have already been taken towards such reform. In Ireland, as we have seen, new proposed legislation recognizes a variety of decision-making relationships, including assisted decision-making and co-decision-making. In New York, advocates have called for the establishment of a supported decision-making pilot program to explore the use of supports instead of guardianships. And in Australia, the Victorian Law Reform Commission recommended the introduction of supporters and co-decision-makers to provide more options to people who need decision-making assistance.[236]

Similar calls for reform have been made by disability organizations and advocates in Canada. However, Canada has reserved the right of provinces, which ultimately have jurisdiction over this area of law, to maintain substitute decision-making. Canada ratified the CRPD on March 11, 2010 with the following reservation:

> Canada recognises that persons with disabilities are presumed to have legal capacity on an equal basis with others in all aspects of their lives. Canada declares its understanding that Article 12 permits supported and substitute decision-making arrangements in appropriate circumstances and in accordance with the law.
>
> To the extent Article 12 may be interpreted as requiring the elimination of all substitute decision-making arrangements, Canada reserves the right to continue their use in appropriate circumstances and subject to appropriate and effective

> safeguards. With respect to Article 12 (4), Canada reserves the right not to subject all such measures to regular review by an independent authority, where such measures are already subject to review or appeal. …[237]

It is clear from this reservation that Canada intends to maintain substitute decision-making as a valid legal framework.

Despite Canada's reservation, a number of provinces and territories have already explored alternatives to substitute decision-making, and in some cases new regimes have been introduced offering various decision-making options. In most cases these options are available in addition to, and not as complete replacements for, existing substitute decision-making regimes.[238] For instance in British Columbia, the *Representation Agreement Act*, which came into force in 2001, provides that capable adults may appoint representative(s) to help them make decisions or to make decisions on the adult's behalf. [239] Representatives may make decisions concerning the adult's personal care, financial affairs, payment of bills, purchase of food, housing, services necessary for personal care, certain health care decisions, and obtain legal services and instruct counsel.[240] Representation Agreements offer a legally sanctioned form of assistance or support to make one's own decisions. At the same time, adult guardianships continue to operate in British Columbia.[241] In Saskatchewan, the *Adult Guardianship and Co-decision-making Act* provides that a judge may appoint a co-decision-maker for adults, where the court is of the opinion that it is in the adult's best interests and the adult requires assistance in order to make reasonable decisions.[242] The inclusion in the Saskatchewan statute of a best interests test and qualification regarding "reasonable decisions" indicate some

departure from the rights and principles contained in the CRPD. Despite this concern, co-decision-making arrangements provide a less restrictive alternative to full guardianship, since the co-decision-maker's role is to advise the person or share authority to make decisions with him/her.[243] Plenary guardianship orders are still available, and, as Doug Surtees reveals, tend to dominate.[244]

Thus, tensions exist in the Canadian context. Persons with disabilities and disability organizations have advocated for reform to existing guardianship regimes. Several provinces and territories already provide for decision-making arrangements that offer less intrusive alternatives to guardianship, although in most jurisdictions guardianship continues to operate as well. By ratifying the CRPD, the federal government has indicated its agreement to progressively realize the rights and freedoms contained therein, including the right to legal capacity. However, the federal government has also reserved the right for provinces and territories to maintain substitute decision-making regimes, including guardianship. Given this context, it appears that there are opportunities to advocate for reform to Ontario's substitute decision-making regime. However, guardianship or another form of substitute decision-making may continue to operate along-side other, less intrusive decision-making relationships.

The recommendations we make below are intended to ensure that Ontario law related to legal capacity and decision-making promotes the rights of persons with capacity issues to the fullest extent possible. In this vein, the reforms we propose are based upon the rights-based principled framework outlined in chapter II.

B. A New Legal Capacity Regime

Reform to Ontario's substitute decision-making regime requires major change to the existing legislative framework related to capacity and decision-making. The goal of such reform should be to create Ontario legislation regarding legal capacity that complies completely with the rights and principles contained in the CRPD and reflected in the LCO's Framework. Such reform would likely include a variety of new decision-making relationships and supports, and few, if any, guardianship-type relationships. For example assisted decision-making, co-decision-making, supported decision-making, facilitated decision-making and other types of relationships offer ways to support people with capacity issues to exercise their legal capacity which are less restrictive than substitute decision-making. Nevertheless, despite the implementation of some or all of these new types of decision-making relationships, some people with capacity issues may still require a substitute decision-maker. Therefore, key to the reform will be determining whether substitute decision-making in the form of guardianship should be maintained, or whether alternatives exist that would provide an appropriate response to 'incapacity'. The work of the LCO's project on Legal Capacity, Guardianship and Decision-making would form an excellent basis for this legislative reform.

While the government is developing precise legislative amendments and reforms, it will be necessary to consult meaningfully with the disability community and other communities who are regularly subject to formal or informal substitute decision-making. Under the rights-based principled approach, the promotion of

full and effective participation and inclusion in society requires that people with disabilities have opportunities to provide input into the laws and policies that affect them. Private substitute decision-makers, the PGT, informal substitute decision-makers and other stakeholders such as the provincial Ombudsman must also be consulted. These consultations will assist the government to ensure that legislative reforms are workable and promote and protect the rights of persons with capacity issues.

It will be important to ensure that any changes to legislation consider the prevalence and experiences of persons who are subject to informal substitute decision-makers. Designing a new legal capacity regime is an opportunity to formalize some of these arrangements, thereby offering greater protection to 'incapable' persons. However, the advantages of flexibility and limited decision-making powers that are inherent in well-functioning informal substitute decision-making arrangements must not be lost. Moreover, informal substitute decision-making is attractive to some because it involves little in the way of costs and legal or bureaucratic processes. Great care must be taken to develop decision-making arrangements that will be appropriate for persons who are currently subject to informal substitute decision-making.

Any new legislation or programs related to legal capacity should be reviewed and evaluated after having operated for some time. This must be done by and in consultation with persons with capacity issues.

While the recommendations that follow flow from our analysis of Ontario's existing guardianship regime, they can, with appropriate modifications, be applied to any system of decision-making. The protections and supports outlined in these recommendations are necessary elements of any decision-making regime that strives to protect the rights and promote the autonomy of persons with capacity issues.

C. Supporting 'Incapable' Persons to Assert their Legal Capacity

1. Providing Rights Advice to 'Incapable' Persons

A new legal capacity regime must include the provision of rights advice to 'incapable' persons. Within Ontario's current substitute decision-making regime, there is no statutory requirement that persons subject to a guardianship, either statutory or court-appointed, will obtain rights advice. The PGT may provide basic rights advice to persons under its guardianship, but there is no guarantee that this is done in every case. It does not appear that the Superior Court provides any rights advice or information to persons subject to a court-appointed guardianship. While guardians have an obligation to inform the 'incapable' person that a guardianship has been imposed and to explain the duties and obligations of the guardian, and, in some cases, inform the person of their right to challenge a negative capacity assessment, there is no process to confirm that this has actually been done. Furthermore, this information is not the same as fulsome rights advice. Even in cases where the guardian fulfills the obligation to inform the 'incapable' person about the guardian's duties and obligations, the 'incapable' person may still be unaware of his/her rights. In addition to information about the duties and obligations of a guardian, fulsome rights advice would include information

about the 'incapable' person's right to be included in decision-making, right to receive periodic accounting, right to challenge the actions or decisions of his/her guardian, and other rights. Rights advice would also include information about how the 'incapable' person could assert his/her rights, and what supports are available to assist him/her to do so.

Providing rights advice to 'incapable' persons is one practical way in which to promote individual autonomy and independence, and full and effective participation. The first principle requires that people with disabilities have access to information needed to understand and enforce their rights. The provision of rights advice will contribute to ensuring that 'incapable' persons are aware that they can participate in decisions that affect them or challenge the actions of their decision-makers. Knowledge of their rights and mechanisms to assert those rights would provide some degree of empowerment to 'incapable' persons. The provision of rights advice to every person who is subject to some form of decision-making is a basic step towards protecting and promoting the rights of 'incapable' persons.

The principle of accessibility is important to consider. Rights advice must be provided in a manner that accommodates the individual's disability; the information must be communicated in clear language, in a manner that is accessible to the individual. If the person is not able to absorb information at the time the guardian is appointed, rights advice should be made available to the person when s/he is ready to receive it. Rights advice must also be available on an on-going basis, should new concerns arise.

A designated person or body should be obliged to facilitate the provision of rights advice to 'incapable' persons. This may be by way of written information, videos, discussion, skits or any other format that would address the communication needs of the 'incapable' person. Clear language principles and design should also be used.

Attention will need to be paid to the question of who is responsible for providing rights advice to 'incapable' persons. Some may argue that obliging decision-makers to provide rights advice is unrealistic or too onerous a burden to place on them.[245] However, the principle of accessibility requires that legal and bureaucratic safeguards related to capacity must be accessible to persons with disabilities. It is crucial that rights advice information be provided in a manner that the 'incapable' person can understand, otherwise it is not useful. If it is to be decision-makers who are obligated to facilitate the provision of rights advice to 'incapable' persons, then the additional burden placed on them may be off-set by providing them with tools, resources and supports to enable them to fulfill this obligation meaningfully.

Alternatively, a visitor system, similar to the one planned in Ireland or recommended in New York, may be considered. This may be preferable to requiring decision-makers to provide rights advice, since there may be times when advising an 'incapable' person would cause a conflict of interest for the decision-maker. The visitor may be a trained volunteer or a professional who visits the 'incapable' person to deliver the rights advice and answer any questions the person may have about the decision-making arrangement. S/he may also provide on-going rights advice, should new concerns arise. The visitor system would likely require an administrative structure to develop the rights

advice information, ensure that all 'incapable' persons receive a visit, and avoid duplication.

2. Providing Advocacy Support to 'Incapable' Persons

Article 12 of the CRPD requires states to take measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. Although persons subject to guardianship have been found to be 'incapable', they may exercise their legal capacity by deciding to challenge the finding of incapacity or the actions of their guardian, or by exercising the rights they have been advised about. Article 12 requires that supports be provided to enable persons with disabilities to exercise their legal capacity in these ways. Supports may include legal information or advice, advocacy support, legal representation, and other supports.

In particular, 'incapable' persons who wish to challenge a finding of incapacity must have access to legal advice and capacity assessments. Currently, individuals may be able to obtain legal aid funding for legal representation in guardianship or other proceedings involving substitute decision-makers. However, such funding is generally at the discretion of legal aid, extremely limited and in some parts of the province not available at all. A lack of legal advice or financial resources should not prevent a person from asserting his/her autonomy or defending his/her right to terminate a decision-making arrangement. Where a decision-maker refuses to arrange or pay for a capacity assessment, 'incapable' persons must be able to exercise their right to obtain an assessment and challenge the decision-making arrangement, regardless of their ability to pay. Persons informing 'incapable' persons of their rights should, therefore, also

include information about what services are available to arrange and pay for capacity assessments and legal advice or representation.

3. Requiring Periodic Capacity Assessments

A major weakness of the current substitute decision-making regime is that court-appointed guardians are not required to arrange for the 'incapable' person's capacity to be reassessed within any particular period of time. The only way to ensure that a person subject to a court-appointed guardianship is reassessed is for this requirement to be included in the order appointing the guardian. If no such order is made, there is little an individual can do to compel a court-appointed guardian to arrange for a capacity assessment. If a court-appointed guardian refuses to arrange or pay for an assessment, the 'incapable' person could bring a motion to court to obtain an assessment. However, where an individual subject to a court-appointed guardianship lacks sufficient resources to pay for an assessment, there is no guarantee that any other public authority would do so.

Statutory guardians are obliged to arrange a capacity assessment if the 'incapable' person requests one, as long as the person has not been assessed within the last six months. If the 'incapable' person lacks the resources to pay for an assessment, s/he may be able to access the PGT's fund. Nevertheless, the 'incapable' person must be aware of his/her right to be assessed, must make a request, and must be aware that s/he can ask the PGT to pay for the assessment.

Under the rights-based principled approach to legal capacity, the need for a substitute decision-maker should be subject to regular review by a competent, independent and

impartial public authority or statutory body. This is important in order to ensure that substitute decision-making arrangements do not last longer than necessary, and to provide 'incapable' persons with opportunities to reassert their right to legal capacity. Therefore, in Ontario's new legal capacity regime, persons subject to substitute decision-making arrangements must be notified of their right to have their capacity reassessed, and of the existence of public funds for those who are impecunious. Where a court orders a substitute decision-making arrangement, the order must require the decision-maker to offer and/or arrange for a capacity assessment at specified intervals of time.

4. Increasing the Number of Time-Limited Decision-Making Arrangements

Another way to protect the rights of persons subject to substitute decision-making arrangements and to ensure that these arrangements do not endure for any longer than absolutely necessary is to impose time limits on all such arrangements, whether statutory or court-appointed. Currently, courts are empowered to create time-limited guardianship orders, pursuant to section 25(2) of the SDA, however it is not known how often this section is invoked. In other jurisdictions all guardianships are time-limited. For example, in Australia, as we have seen, no guardian is appointed for longer than three years.

Consideration should be given to making all substitute decision-making arrangements in Ontario limited in time. Upon the expiration of the appointment, the decision-maker could seek a renewal of the arrangement. Such renewal would be subject to a review process, whereby the 'incapable' person's circumstances would be reconsidered. The

substitute decision-making arrangement could be modified to enhance or reduce the decision-maker's powers, depending on the 'incapable' person's circumstances. The review process would provide an opportunity for individuals to challenge their 'incapable' status, seek to terminate the arrangement, or raise concerns about their decision-makers. Were such reviews to be instituted, consideration would have to be given to what body would oversee and administer the process.

Ideally, legal advice and representation would be made available to 'incapable' persons in advance of the review process, in order to allow them to understand their rights, canvas their legal options and challenge the substitute decision-making arrangement if they chose to do so.

A review process for all substitute decision-making arrangements in Ontario may appear onerous. However, evidence indicates that even where alternatives to such arrangements are available, full or unrestricted substitute decision-making prevails. For example, a recent study of 446 guardianship applications in Saskatchewan revealed that despite legislative changes to allow for co-decision making and partial guardianship-type relationships, most guardianship orders remain plenary. This was the case despite legislation stating that a guardian should not be given power over all matters of property management or personal care if an order providing for more limited powers was sufficient.[246] This same trend exists in other jurisdictions, such as New York, where it is common for prospective guardians to ask for and receive a broader range of powers and control than may be required in many instances.[247] These studies demonstrate how important it is to regularly review substitute decision-making

arrangements to ensure that they are as limited, in both time and power, as possible in a given circumstance.

D. Ensuring that Decision-Makers Comply with Their Legal Obligations

1. Educating Decision-Makers

Currently, the SDA sets out a number of obligations that guardians must fulfil in respect of the 'incapable' person, however guardians receive no training on these obligations. In the new legal capacity regime, consideration should be given to developing training and/or education programs for decision-makers to ensure that they are aware of their obligations, the scope of their various roles, and the rights of 'incapable' persons. Decision-makers who have this knowledge may be less likely to infringe upon the rights of 'incapable' persons, especially when such infringement is accidental, unintentional or due to ignorance of the law.

Training programs for decision-makers exist in other jurisdictions, including New York and Victoria. Further investigation into the training programs available in these and other jurisdictions is warranted, as it may provide useful insight for considering whether to develop similar training for Ontario decision-makers, what the content of such training should be, and how to best implement the training. At minimum, the training should educate decision-makers about their legal obligations under the SDA; the scope and limits of their decision-making authority; and the rights of the 'incapable' person. The training should educate decision-makers about how to carry out their functions in a manner that respects the rights-based principled approach to legal capacity. For example, decision-makers should understand the principle of protecting and promoting

the autonomy and independence of 'incapable' persons, and should be aware of their role in implementing this principle in practice.

In New York, guardian education is mandatory; every guardian is required to participate in a court approved training program. In Victoria, guardian education is not mandatory. However in 2012 the Victorian Law Reform Commission recommended enhancing training and education for guardians, and making guardianship appointments subject to a condition that the guardian would complete training. In Ontario, consideration should be given as to whether education for decision-makers should be mandatory or left to the discretion of each decision-maker. Mandatory education would be preferable as a means to enhancing the extent to which decision-makers comply with their legal obligations. However, it has been noted that decision-makers and the broader community may view mandatory education and reporting as too onerous a burden to place upon decision-makers, many of whom are family members or friends who are not remunerated for their services.[248] From this perspective, mandatory education and reporting may act as disincentives and decrease the number of private individuals who are willing to act as decision-makers. Given the importance of education, consideration should be given to developing various methods of training, such as short webinars, seminars, written materials, and discussion groups. Offering a free, accessible method of training may help to make education for decision-makers less onerous.

Consideration should also be given to developing a system to ensure that decision-makers have completed their training before they are given authority to make decisions on behalf of the 'incapable' person. Continuing education could be offered on an on-going basis to help them refresh and update their knowledge.

2. Requiring Decision-Makers to Report

Creating reporting requirements is one way to strengthen the monitoring and oversight of decision-makers in Ontario. Article 12 of the CRPD requires states to put in place safeguards relating to the exercise of legal capacity by persons with disabilities; one such safeguard includes subjecting decision-makers to regular review by a competent, independent and impartial authority or judicial body. Periodic reporting by decision-makers would create an opportunity for them to reflect on the extent to which they are fulfilling their duties and obligations to the 'incapable' person. It would also create some mechanism for monitoring the actions of decision-makers.

Decision-makers' reports should indicate what they have done to promote the autonomy and decision-making capacity of the 'incapable' person, and how they have encouraged the person to be involved in the community. Reports should include any efforts the decision-maker has made to involve supportive family or friends of the 'incapable' person in enhancing the person's quality of life. Decision-makers should also report any concerns expressed by the 'incapable' person along with an account of what steps were taken to address those concerns.

Currently, under the SDA, 'incapable' persons may request a passing of accounts. Instead, under the new legal capacity regime, the obligation for a decision-maker to pass accounts should be made mandatory and included in all decision-making appointments or orders, regardless of whether anyone has expressed concerns about the decision-maker's actions or requested a passing of accounts. Decision-makers must be required to pass their accounts at regular intervals, such as annually or more often,

depending on the circumstances of the 'incapable' person. Accounts may be submitted with reports, in order to minimize the incidences of monitoring.

Ideally, reporting requirements would be mandatory, rather than left to the discretion of the individual decision-maker. However, as with education, other jurisdictions have noted concerns about mandatory reporting being too onerous for decision-makers. Careful consideration must be given to balancing the interests of decision-makers with the need for effective, regular monitoring of their actions.

3. Establishing a Monitoring and Advocacy Office

Consideration should be given to establishing an independent, competent, impartial body whose role would be to monitor and oversee decision-makers, address situations in which decision-makers are abusing or misusing their powers, and deal with complaints from 'incapable' persons. Establishing such an office is important in order to increase the accountability of decision-makers. Respect for the rights and interests of 'incapable' persons would be promoted and enhanced by the creation of a monitoring and advocacy office. Establishing such an office would give practical effect to the principle of respect for inherent dignity and worth, which requires mechanisms to ensure that people with disabilities can raise concerns about mistreatment or abuse, and have those concerns addressed in a meaningful way.

A monitoring and advocacy office could enhance oversight of decision-makers in several ways. The office could receive and review reports and accounts from decision-makers. If it is apparent that a decision-maker is not aware of or is not fulfilling his/her obligations and duties, the office may investigate and/or require him/her to take steps to

comply with any statutory requirements. The office could act as a resource for decision-makers, similar to the one offered in Victoria and recommended in New York. The office could design and deliver training for decision-makers, produce educational and resource materials to support them, and offer a help-line that decision-makers could access to seek information and advice.

The office could also manage the visitor system that was recommended earlier. In this respect, the office would ensure that 'incapable' persons receive independent rights advice. The office would receive reports and concerns from visitors about how a particular decision-making arrangement is functioning. If a visitor reported serious concerns about a decision-maker misusing or abusing his/her powers, the office would be empowered to investigate and address these concerns.

The office could receive and deal with complaints about decision-makers from 'incapable' persons. This is a key accountability measure that Ontario currently lacks. Upon receiving a complaint, the office would contact the decision-maker to determine whether it is possible to resolve the complaint quickly and informally. If this was not possible, the office may initiate an investigation. The office would likely require a range of investigatory powers, as well as access to private information held by the decision-maker and 'incapable' person. Once an investigation is concluded, the office would meet with or contact the 'incapable' person and the decision-maker to explain the results of the investigation and try to resolve the complaint. Mediation and other forms of dispute-resolution would be utilized.

If the office is not able to resolve the complaint, it may recommend that the 'incapable' person receive legal advice about whether it is possible and/or advisable to pursue litigation. Ideally, this legal advice would be provided on a *pro bono* basis, or without any cost to low-income 'incapable' persons.

Other jurisdictions have similar mechanisms. For example, the bill introduced in Ireland establishes the Office of the Public Guardian as an independent agency mandated to supervise the various types of decision-makers, receive reports from decision-makers, and receive and consider complaints about decision-makers. Further investigation into the monitoring and advocacy offices available in other jurisdictions is warranted, as it may provide useful insight for considering how to implement this mechanism in Ontario.

Assuming that Ontario's PGT were to remain part of a new legal capacity regime, one important consideration is the relationship between the PGT and a new monitoring and advocacy office. In some jurisdictions, such as Victoria and Ireland, the monitoring and advocacy office includes the substitute decision-maker of last resort. One concern is that such a relationship may create a conflict of interest with respect to PGT guardians. A monitoring and advocacy office that includes the PGT may not be able to investigate or resolve complaints from an 'incapable' person who is subject to the guardianship of the PGT. Even if administrative measures were taken to prevent such a conflict from arising, such as separating the functions of monitoring and advocacy from guardianship, 'incapable' persons may not trust the office to be impartial. It is vital that the office is, and is seen to be, impartial, independent and competent, as required by Article 12 of the CRPD.

The establishment of such an office would reduce some of the discretionary functions which currently fall within the purview of the PGT. For example, currently the PGT may, but is not required to, investigate or take other actions in response to complaints from individuals about their guardians. If a monitoring and advocacy officer were established, it would perform this role. Reducing some of the functions of the PGT would allow the PGT to focus solely on its role as substitute decision-maker of last resort. This may enable the PGT to devote additional resources to serving its clients, which in turn may improve the level of service and allow the PGT to be more responsive to client concerns and complaints. [249]

4. Enacting New Statutory Provisions

A new legal capacity regime should include legislative provisions that reflect the principles and safeguards set out in the CRPD, and reflected in the LCO's Framework. Currently, certain provisions of the SDA do reflect these principles, such as the presumption of capacity, the requirement for guardians to encourage 'incapable' persons to participate in decision-making, and the ability of a court to appoint a guardian for a limited period of time. However, additional provisions are needed in order to strengthen the protections that new legislation should offer to 'incapable' persons.

Consideration should be given to a new legal capacity regime including a set of guiding principles that decision-makers must utilize when making decisions with or on behalf of 'incapable' persons. These principles could draw directly from the rights-based principled approach to legal capacity, and include respect for inherent dignity and worth; respect for and promotion of individual autonomy and independence; promotion of full

and effective participation and inclusion in society; promotion of substantive equality; and promotion of accessibility.

Similar to the Victorian Law Reform Commission's recommendation, new legislative provisions should require all decision-makers to undertake in writing to act in accordance with their statutory responsibilities and duties. These documents would be available for use in any legal or administrative proceedings regarding failure to comply with a particular duty or obligation.

New legislative provisions should make it unlawful for a person who cares for an 'incapable' person to abuse, neglect or exploit that person. As recommended in Victoria, persons found to have contravened this provision should be liable to a civil penalty.

E. Strengthening Mechanisms for Resolving Disputes between 'Incapable' Persons and Decision-Makers

The case examples we presented earlier in this paper demonstrate that a significant portion of the problems that arise in the context of guardianships involve issues other than financial mismanagement or fraud by the guardian. Many issues relate to conflict over how much freedom and autonomy a guardian allows a person who is subject to his/her guardianship. These are rarely issues that require litigation. However, they are issues of key importance to the daily lives of persons subject to guardianships. If left unresolved, these disputes can create serious tension between an 'incapable' person and his/her guardian. In cases where the issue may be resolved through litigation, this process is not accessible for many 'incapable' persons. Therefore, in a new legal capacity regime, incapable' persons must have access to effective dispute resolution

mechanisms. This would reduce tensions between decision-makers and 'incapable' persons, preserve productive relations between them, and reduce the need for litigation.

Dispute resolution mechanisms may take various forms. They may include formal or informal mediation. In some cases the provision of information and rights advice to the parties may resolve the conflict by clarifying the role and powers of the decision-maker. Complaint mechanisms and investigations may be required in some cases. Whatever forms the dispute resolution mechanisms take, a key consideration will be ensuring that such mechanisms respect the principle of accessibility, which requires that safeguards related to legal capacity be accessible for persons with disabilities. Consideration should be given to providing supports to assist persons with capacity issues to access and use dispute resolution mechanisms. Such mechanisms must also be crafted to respect the principle of inherent dignity and worth, which requires meaningful mechanisms to ensure that people can raise concerns about mistreatment or abuse and receive meaningful redress. At minimum, dispute resolution mechanisms must be provided in a timely manner, must be navigable and useable by persons with capacity issues, and must be provided at no cost to low-income persons.

Consideration must be given to the management and administration of dispute resolution mechanisms. These functions should be performed by an independent, impartial body, which has knowledge of the law and the unique context of assisted and substitute decision-making relationships. The monitoring and advocacy office recommended earlier may be an appropriate body to perform these functions.

F. Summary

Many of the reforms we suggest would likely require new public expenditures. This may lead some to criticize our suggested reforms as unrealistic, given the current environment of fiscal restraint. It is important to note, however, that many of our suggested reforms, including the creation of a new monitoring and advocacy office, would allow decision-making arrangements to function much more effectively. For example, with a monitoring and advocacy office dedicated to providing both education to decision-makers and rights advice to 'incapable' persons, the instances of disputes due to decision-makers misunderstanding the scope of their obligations would be reduced. The office would assist decision-makers and 'incapable' persons to resolve disagreements using a variety of dispute resolution mechanisms. This would reduce the need to use litigation to resolve such disputes, thereby alleviating some pressure on the court system. It is likely that the mechanisms employed by the office would allow for the resolution of disputes in a more timely and cost effective manner.

A less tangible but certainly no less important result of creating a monitoring and advocacy office would be a legal capacity regime that functions more efficiently and better protects the rights and autonomy of 'incapable' persons. The more quickly disputes between decision-makers and 'incapable' persons can be resolved, the less chance there is for the relationship to break down into anger, mistrust and frustration. Importantly, the monitoring and advocacy office would offer enhanced protections for 'incapable' persons. This is particularly the case with the large number of disputes that arise due to conflict over the amount of freedom demanded by an 'incapable' person or the amount of control exerted by a decision-maker. Although these kinds of disputes

can create major problems between the decision-maker and the ‘incapable’ person, they do not fit within any of the processes currently available to deal with conflict that arises in a substitute decision-making relationship. These kinds of disputes could be dealt with by the monitoring and advocacy office in a timely and cost effective manner. The more the legal capacity regime is able to preserve relationships between decision-makers and ’incapable’ persons, the better able the system will be to defend the interests of incapable persons.

VII. CONCLUSION

This report was commissioned by the Law Commission of Ontario as part of its project on Legal Capacity, Decision-Making and Guardianship. In this report we employ a rights-based principled approach to analyze Ontario's current guardianship regime. While there are aspects of the current regime that promote autonomy and protect the rights of 'incapable' persons, much of the current system compromises the autonomy and dignity of persons with capacity issues and creates barriers for persons subject to guardianship to assert their right to legal capacity. As we saw in chapters III and IV, this is true for both the existing legislative framework and the manner in which guardianships function in practice. The case examples we analyze reveal practical barriers faced by people who attempt to protect their rights or reassert their autonomy, such as inaccessible legal and bureaucratic systems, high costs, very few supports, lack of accessible information, and lack of timely response or resolution to complaints.

Drawing on our analysis of the current legal framework and our review of initiatives relating to legal capacity in other jurisdictions, we suggest a number of recommendations for strengthening Ontario's legal capacity regime to better respect, promote and protect the rights of 'incapable' persons. We recommend reforming the existing legislative regime to ensure that legal capacity legislation complies more completely with the rights and principles contained in the CRPD and reflected in the LCO's Framework. Some of this work has already begun. A number of Canadian researchers, activists, lawyers, and people with disabilities have thought and written about what may be included in a new legal capacity regime. The LCO is presently

undertaking a large project on Legal Capacity, Decision-Making and Guardianship, which will result in recommendations for reform to this area of law. Thus, the basis for a major reform of Ontario law is being laid.

We also suggest a number of measures that should be included in a new legal capacity regime for Ontario. Such measures would promote and protect the rights of 'incapable' persons; enhance monitoring and accountability of guardians; and strengthen mechanisms for resolving disputes between guardians and 'incapable' persons.

A new legal capacity regime for Ontario will likely offer persons with capacity issues a wide range of options for obtaining assistance and support with decision-making. We hope that such a system will promote the development of strategies that respond more precisely to the particular decision-making needs of each individual person. This would promote the principles of autonomy and self-determination by enabling people with disabilities to access supports to enhance their legal capacity. Within such a system, the number of people who require a substitute decision-maker will be significantly reduced. However, those who continue to need a substitute decision-maker should have access to a framework that promotes and protects their rights to the greatest extent possible.

Earlier in this report we wrote that individual autonomy and the freedom to make one's own decisions are crucial aspects of human dignity and personhood. For the disability community, the right to legal capacity is closely tied to the emancipatory goal of full participation and inclusion in society. Given the fundamental nature of legal capacity, it is essential that work be done to promote and protect the rights of persons who are subject to substitute decision-making in Ontario. With the negotiation and passage of

the CRPD, states and the global disability community crystallized a new, modern understanding of legal capacity for persons with disabilities. Nearly four years have passed since Canada ratified the CRPD. It is now time for Ontario to reform its substitute decision-making regime to reflect our evolving understanding of legal capacity for persons with disabilities.

VIII. ENDNOTES

[1] Alan Borovoy, "Guardianship and Civil Liberties" (1982) 3 Health L. Can. 51-57.

[2] ARCH has written several law reform and policy papers on the topic of legal capacity, including: "Addressing the Capacity of Parties before Ontario's Administrative Tribunals: Promoting Autonomy and Preserving Fairness" (2009); "Addressing the Capacity of Parties before Ontario's Administrative Tribunals: A Practical Guide for Ontario Lawyers" (2009); "Embracing Supported Decision-Making: Foundations for a New Beginning" (2009). These papers can be accessed on ARCH's website: www.archdisabilitylaw.ca.

[3] UN enable, Convention on the Rights of Persons with Disabilities, online: http://www.un.org/disabilities/default.asp?navid=14&pid=150 (last accessed: 14 November 2013).

[4] CCD-CACL Working Paper, *UN Convention on the Rights of Persons with Disabilities: Making Domestic Implementation Real and Meaningful* (February 2011), online: http://www.ccdonline.ca/en/international/un/canada/making-domestic-implementation-real-and-meaningful-feb2011 (last accessed: 1 October 2013).

[5] Anna MacQuarrie, *Making the Convention Real and Meaningful for people with intellectual disabilities and their families*, online: http://www.ccdonline.ca/en/socialpolicy/poverty-citizenship/legal-protections/the-un-CRPD-making-the-convention-real (last accessed: 14 November 2013).

[6] Dulcie McCallum, "Up the Basics: the Right to Decide" in Council of Canadians with Disabilities, *Celebrating our Accomplishments: A voice of our own*, (Winnipeg, 2011) 145, 149.

[7] *Convention on the Rights of Persons with Disabilities*, 13 December 2006, 2515 UNTS 3 art 12.

[8] Amita Dhanda, "Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future" (2006-7) Syracuse Journal of International Law and Commerce 34.

[9] Robert D. Dinerstein, "Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road From Guardianship to Supported Decision-Making" (2012) Human Rights Brief 19, No. 2, 8.

[10] Office of the United Nations High Commissioner for Human Rights, *Background conference document: Legal Capacity*, 20-21, online: http://www.un.org/esa/socdev/enable/rights/ahc6documents.htm (last accessed: 14 November 2013).

[11] People with Disability Australia, *Accommodating Human Rights: A Human Perspective on Housing, and Housing and Support, For Persons with Disabilities*, (2010), 21, online: http://www.pwd.org.au/documents/pubs/AccommodatingHumanRights2003.pdf (last accessed: 18 November 2013).

[12] Office of the United Nations High Commissioner for Human Rights, *Monitoring the Convention on the Rights of Persons with Disabilities: Guidance for Human Rights Monitors*, *Professional training series No. 17*, (New York and Geneva, 2010), online: http://www.ohchr.org/Documents/Publications/Disabilities_training_17EN.pdf (last accessed: 8 November 2013).

[13] *Convention on the Rights of Persons with Disabilities*, note 7, Preamble (n).

[14] *Convention on the Rights of Persons with Disabilities*, note 7, Article 3.

[15] *Convention on the Rights of Persons with Disabilities*, note 7, Article 16.

[16] Law Commission of Ontario, A Framework for the Law as It Affects Persons with Disabilities (Toronto: September 2012) 100.

[17] Law Commission of Ontario, note 16, 101.

[18] Law Commission of Ontario, note 16, 71.

[19] Law Commission of Ontario, note 16, 77.

[20] Law Commission of Ontario, note 16, 101.

[21] Law Commission of Ontario, note 16, 119-121.

[22] *Substitute Decisions Act, 1992*, S.O. 1992, c. 30 [SDA].

[23] O. Reg. 460/05.

[24] O. Reg. 100/96.

[25] O. Reg. 26/95.

[26] Law Commission of Ontario, *Roles and Responsibilities of Adults, Legal Representatives and Third Parties* (RDSP project), 2, (unpublished paper, 2013).

[27] Law Society of Upper Canada, Rules of Professional Conduct, Rule 2.02(6); Ed Montigny, Notes on Capacity to Instruct Counsel (15 February 2011) online: http://www.archdisabilitylaw.ca/?q=notes-capacity-instruct-counsel-0 (last accessed: 20 December 2013).

[28] See *Banton* v. *Banton*, [1998] O.J. 3528 (ON Gen Div.).

[29] D'Arcy Hiltz and Anita Szigeti, *A Guide to Consent and Capacity Law in Ontario* (LexisNexis, 2012) 24-25 (Hiltz and Szigeti).

[30] Hiltz and Szigeti, note 29, 25.

[31] SDA, note 22, s. 45.

[32] SDA, note 22, s. 15.

[33] SDA, note 22, s. 16(3) to 16(5).

[34] Also see related provisions in the *Substitute Decisions Act*: SDA, note 22, ss. 81 and 81.

[35] SDA, note 22, s. 16(2).

[36] If the PGT is of the opinion that the person is truly at risk of harm it can apply to the Superior Court, pursuant to s. 79(1) of the *Substitute Decisions Act* for an order compelling the person to submit to an assessment of his/her capacity; see SDA, note 22, s. 79(1); also see Regulation 460/05,Capacity Assessment, s. 3(1).

[37] SDA, note 22, s. 79(1).

[38] See SDA, note 22, ss. 79, 80, 81 and 82, 83 to 87.

[39] SDA, note 22, s. 79(1).

[40] SDA, note 22, s. 81(3).

[41] SDA, note 22, s. 83 (1).

[42] See *Urbisci* v. *Urbisci*, [2010] O.J. No. 4740; also *Zheng* v. *Zheng*, [2012] O.J. No 2957.

[43] *Abrams* v. *Abrams*, [2008] O.J. No. 5207 (Ont. S.C.J.).

[44] SDA, note 22, s. 16(5); it is worth noting that under the original version of the SDA, s. 16(1) to (7), upon an assessment being performed and a person being found incapable, an advocate was to meet with the person and explain that the person had the right to refuse the statutory guardianship of the PGT. Only once the person agreed to accept the guardianship of the PGT did the PGT become that person's guardian of property.

[45] SDA, note 22, s. 16(6).

[46] SDA, note 22, s. 20.2(1)(a), 20.2(1)(b) and 20.2(3).

[47] SDA, note 22, s. 20.1(1).

[48] For example see SDA, note 22, ss. 24(2.1) & 57(2.2).

[49] E-mail interview (#1) of Dermot Moore (Litigation and Senior Client Counsel, Office of the Public Guardian and Trustee) (29 November 2013) (Moore Interview #1).

[50] O Reg. 99/96.

[51] SDA, note 22, s. 16.1(1).

[52] SDA, note 22, s. 17(1).

[53] SDA, note 22, s. 20.1.

[54] See Council of Canadians with Disabilities, "Federal Poverty Reduction Plan Must Address Disability Poverty", Press Release, (18 November 2010), online: http://www.ccdonline.ca/en/socialpolicy/poverty/media-release-federal-poverty-reduction-plan-18nov2010 (last accessed: 23 December 2013).

[55] Moore Interview #1, note 49.

[56] Pursuant to the SDA, note 22, s. 18, the PGT must provide written reasons for a rejection of an application. If the applicant disputes the denial, the PGT must apply to the court to decide the matter.

[57] SDA, note 22, s. 19

[58] see Dermot Moore, "Recent Decisions in Guardianship Law" presented at Grave Consequences: Traps and Pitfalls in Contemporary Estates Law, Ontario Bar Association, Institute of Continuing Education (2010) 3; also see *Farley* v. *Farley*, [2008] O.J. No. 3228 (Ont. S.C.J.).

[59] SDA, note 22, ss. 72, 74, 77.

[60] SDA, note 22, s. 22(3).

[61] *Gray* v. *Ontario* [2006] O.J. No. 266, para 47.

[62] *Convention on the Rights of Persons with Disabilities*, note 7, Article 12.

[63] SDA, note 22, s. 25(2).

[64] *Convention on the Rights of Persons with Disabilities*, note 7, Article 12.

[65] SDA, note 22, s. 26.

[66] SDA, note 22, ss. 69, 71, 73 & 75.

[67] SDA, note 22, s. 69. (2) & 73(1).

[68] SDA, note 22, s. 32(1).

[69] C.D. Freedman, "Misfeasance, Non Feasance and the Self-Interested Attorney," (2010) 48 Osgoode Hall Law Journal 457-498, 458.. (Note although the article focuses on attorneys for property, the article treats attorneys and guardians as similar – see 462).

[70] SDA, note 22, s. 32(7) and 32(8).

[71] SDA, note 22, s. 32(2).

[72] SDA, note 22, s. 32(3).

[73] SDA, note 22, s. 32(10).

[74] SDA, note 22, s. 37.

[75] SDA, note 22, s. 32(6).

[76] O. Reg. 100/96 Accounts and Records of Attorneys and Guardians, s. 5.

[77] SDA, note 22, (original version prior to amendments of 1996), s. 41(1). In 1996 there was a major legislative overhaul of the substitute decision-making regime in Ontario. This included the repeal of the Advocacy Act, note 106, and amendments to the Substitute Decisions Act to remove any references to the Advocacy Act and to make other changes. See note 113 for the amending statute.

[78] SDA, note 22, s. 20.1(1).

[79] See Luke Reid, "The CRPD and the SDA: Research Paper" (unpublished paper prepared for Ian Scott Scholarship, 2012), 84.

[80] *Convention on the Rights of Persons with Disabilities*, note 7, Article 12.

[81] SDA, note 22, S. 57(2.2).

[82] For example, the PGT reported acting as court ordered guardian of the person for 31 individuals in 2008-09 and 24 individuals in 2009-10. See Office of the Public Guardian and Trustee, Annual Report, 2008-09, "Message from the Public Guardian and Trustee" (2009) 4; online: http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/2008report/MsgFromPGT.pdf (last accessed:

3 January 2014) (PGT Annual Report, 2008-09); and Office of the Public Guardian and Trustee, Annual Report, 2009-10, "Message from the Public Guardian and Trustee," (2010) 2 , online: http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/2009report/MsgFromPGT.pdf (last accessed: 3 Jan 2014) (PGT Annual Report 2009-10).

[83] SDA, note 22, s. 69(1), 69(3).

[84] SDA, note 22, s. 55(2).

[85] SDA, note 22, ss. 58(1), 58(2), 58(3) and 59(1), 59(2).

[86] See Doug Surtees, "How Goes the Battle?: An Exploration of Guardianship Reform," (2012) 50:1 Alberta Law Review 115-27, para. 18 for a discussion of the experience in Alberta (Surtees).

[87] For an example from another jurisdiction see Surtees, note 86.

[88] SDA, note 22, s. 59(2).

[89] SDA, note 22, s. 66(11).

[90] SDA, note 22, s. 66(10)(a).

[91] SDA, note 22, s. 66(2).

[92] SDA, note 22, s. 66(2.1).

[93] SDA, note 22, s. 66(4.1).

[94] SDA, note 22, s. 66(15).

[95] SDA, note 22, s. 66(8).

[96] SDA, note 22, s. 66(5).

[97] SDA, note 22, s. 68.

[98] SDA, note 22, s. 68(3).

[99] Moore Interview #1, note 49.

[100] Moore Interview #1, note 49.

[101] SDA, note 22, s. 88.

[102] SDA, note 22, ss. 27 & 62.

[103] E-mail interview (#2) of Dermot Moore (Litigation and Senior Client Counsel, Office of the Public Guardian and Trustee) (27 December 2013).

[104] SDA, note 22, ss. 39(1) & 68(1).

[105] SDA, note 22 (original version prior to amendments of 1996), s. 39(2).

[106] *Advocacy Act, 1992*, S.O. 1992, c. 26, s. 1 (*Advocacy Act*).

[107] *Advocacy Act*, note 106, s. 2 "Definitions".

[108] *Advocacy Act*, note 106, s. 1.

[109] *Advocacy Act*, note 106, s. 19(2), 19(3).

[110] *Advocacy Act*, note 106, ss. 20(1) to 30(6).

[111] For example see SDA, note 22, (original version prior to the amendments of 1996), ss. 25(5), 62(5), 76(1).

[112] SDA, note 22 (original version prior to amendments of 1996), s. 76(4).

[113] See 36:1 *Bill 19 Advocacy, Consent and Substitute Decisions Statute Law Amendment Act*, 1995.

[114] *Ombudsman Act*, R.S.O. 1990, CO. 6 (*Ombudsman Act*).

[115] *Ombudsman Act*, note 114, ss. 14(1), 14(2), 17(1).

[116] Ontario Ombudsman, online: http://www.ombudsman.on.ca/investigations/selected-cases/2012/Unaccounted-for (last accessed: 12 December 2013).

[117] Ontario Ombudsman, online: http://www.ombudsman.on.ca/investigations/selected-cases/2013/Discreditable-conduct (last accessed: 12 December 2013).

[118] *Ombudsman Act*, note 114, s. 14(1) and definitions, "governmental organization". The Ombudsman is empowered to investigate decisions or acts of a government organization. Government organization is defined in the act as a ministry, commission, board or administrative unit of the government of Ontario.

[119] *Ombudsman Act*, note 114, s. 14(1), 14(2), 14(2,2), 17(1).

[120] See *Criminal Code*, R.S.C. 1985, c. C-46, s. 215, 330, 334, 336, 346, 366, 380, 423 (*Criminal Code*)

[121] *Criminal Code*, note 120, s. 334.

[122] Law Commission of Ontario, "Guardianship Paper" (unpublished paper, August 2013) see Chapter VI "Personal Appointments and the Problem of Abuse", 12 (LCO Guardianship Paper, Chapter VI); Selina Lai, Final Report: Community Mobilization Empowering Seniors Against Victimization to the National Crime Prevention Centre of Canada Public Safety Canada (United Seniors of Ontario: March 2008), 11.

[123] Law Commission of Ontario, "Capacity of Adults with Mental Disabilities and the Federal RDSP" (unpublished paper, 18 November 2013) 133; also see LCO Guardianship Paper, Chapter VI, note 118, 12.

[124] ARCH's experience with statutory guardianships of property is limited to those held by family members. ARCH does not have experience relating to guardianships held by a trust company.

[125] SDA, note 22, s. 16.1.

[126] *Mental Health Act*, R.S.O. 1990, c. M. 7, s. 57(2).

[127] SDA, note 22, s. 16.1(1).

[128] SDA, note 22, s. 32(1).

[129] SDA, note 22, s. 32(3).

[130] SDA, note 22, s. 39(1).

[131] Roger J. Stancliffe, et al. "Substitute Decision-making and Personal Control: Implications for Self-Determination," Mental Retardation, Vol. 38, no. 5, 407-41 (October 2000) 409.

[132] SDA, note 22, s. 32.

[133] SDA, note 22, s. 32(6).

[134] SDA, note 22, s. 42.

[135] SDA, note 22, s. 39(3).

[136] SDA, note 22, s. 88.

[137] *Rules of Civil Procedure*, O. Reg. 575/07 s. 6, Rule 75.1 (*Rules of Civil Procedure*).

[138] SDA, note 22, s. 32(2).

[139] SDA, note 22, s. 37(1), (2), there is no clear provision stating that a guardian can spend an 'incapable' persons funds on litigation that opposes the 'incapable' person, but to the extent the guardian could argue that the action was intended to protect the 'incapable' person, it could be justified.

[140] See *Rules of Civil Procedure*, note 137, Rule 75.1 O./Reg. 43/05(2).

[141] SDA, note 22, s. 19.

[142] ARCH has heard from a number of individuals, families and service providers that people with intellectual disabilities who receive developmental services and supports often have informal or purported substitute decision-makers because they are often presumed to lack capacity to make their own decisions. The Victorian Law Reform Commission heard that many carers informally assist people with disabilities, often without difficulty. A guardianship or administration order can be needed when a service is denied or a third party refuses to recognise the informal role of the carer. See: Victorian Law Reform Commission, *Guardianship: Final Report*, (18 April 2012), 27, online: http://www.lawreform.vic.gov.au/projects/guardianship-final-report (last accessed: 14 November 2013) (Guardianship: Final Report).

[143] The Department of Justice and Equality, Press Release: Minister Shatter and Minister Lynch Announce Publication of the Assisted Decision-Making (Capacity) Bill 2013, online: http://www.justice.ie/en/JELR/Pages/PR13000303.

[144] The Department of Justice and Equality, Speech by Minister for Justice, Equality & Defence at the Assisted Decision-Making (Capacity) Bill 2013: Consultation Symposium (25 September 2013), online: http://www.justice.ie/en/JELR/Pages/PR13000303; *An Billeum Chinnteoireacht Chuidithe (Cumas), 2013 Assisted Decision-Making (Capacity) Bill 2013 Explanatory Memorandum*, online: http://www.oireachtas.ie/documents/bills28/bills/2013/8313/b8313d.pdf. (Assisted Decision Making (Capacity) Bill 2013.

[145] The Department of Justice and Equality, Speech by Minister for Justice, Equality and Defence, note 144.

[146] In addition to the types of decision-making arrangements described here, the Bill includes provisions relating to Powers of Attorney and Wards of Court. We have described only those types of decision-making arrangements that may function in a similar manner to or instead of guardianship.

[147] Assisted Decision-Making (Capacity) Bill 2013, note 144, s. 10(1) and (11).

[148] Assisted Decision-Making (Capacity) Bill 2013, note 144, s. 11.

[149] Assisted Decision-Making (Capacity) Bill 2013, note 144, s.11.

[150] The Bill uses a "functional" test for capacity, which is described as follows: is the person unable to understand and retain the information relevant to the decision? Is he or she able to use that information to make the decision? Is he or she able to communicate that decision whether by talking, writing or using sign language, assistive technology or any other means of communication? Information must be communicated to the person in a way that is appropriate for his/her circumstances. See: Assisted Decision-Making (Capacity) Bill 2013, note 144, s. 3.

[151] Assisted Decision-Making (Capacity) Bill 2013, note 144, s. 17.

[152] Assisted Decision-Making (Capacity) Bill 2013, Explanatory Memorandum, 6, online: http://www.oireachtas.ie/documents/bills28/bills/2013/8313/b8313d.pdf.

[153] Assisted Decision-Making (Capacity) Bill 2013, note 144, s. 17(3).

[154] Assisted Decision-Making (Capacity) Bill 2013, note 144, s. 10.

[155] Assisted Decision-Making (Capacity) Bill 2013, note 144, s. 21(3).

[156] Assisted Decision-Making (Capacity) Bill 2013, note 144, s.17(7).

[157] Assisted Decision-Making (Capacity) Bill 2013, note 144, s. 21(9)-(12).

[158] Assisted Decision-Making (Capacity) Bill 2013, note 144, s. 21(7).

[159] Assisted Decision-Making (Capacity) Bill 2013, note 144, s. 23(1).

[160] Assisted Decision-Making (Capacity) Bill 2013, note 144, s. 23(5).

[161] Assisted Decision-Making (Capacity) Bill 2013, note 144, s. 23. At s. 24(3) the Bill provides for a list of exclusions as to who may not act as a representative.

[162] Assisted Decision-Making (Capacity) Bill 2013, note 144, s. 24.

[163] Assisted Decision-Making (Capacity) Bill 2013, note 144, s. 23(9)-(10).

[164] Assisted Decision-Making (Capacity) Bill 2013, note 144, s. 24(7).

[165] Assisted Decision-Making (Capacity) Bill 2013, note 144, s.29(2).

[166] Assisted Decision-Making (Capacity) Bill 2013, note 144, s. 29(1) and 14(3).

[167] Assisted Decision-Making (Capacity) Bill 2013, note 144, s. 29(4).

[168] Assisted Decision-Making (Capacity) Bill 2013, note 144, s. 56(2).

[169] Assisted Decision-Making (Capacity) Bill 2013, note 144, s. 59.

[170] Assisted Decision-Making (Capacity) Bill 2013, note 144, s. 56(2).

[171] Assisted Decision-Making (Capacity) Bill 2013, note 144, s. 32.

[172] Assisted Decision-Making (Capacity) Bill 2013, note 144, s. 60.

[173] Assisted Decision-Making (Capacity) Bill 2013, note 144, s. 60(3)-(8).

[174] See, for example: Centre for Disability Law and Policy at the National University of Ireland Galway, *Cautious Welcome for the Assisted Decision-Making Bill* (18 July 2013), online: http://www.nuigalway.ie/about-us/news-and-events/news-archive/2013/july2013/cautious-welcome-for-the-assisted-decision-making-bill.html (last accessed: 14 November 2013). Inclusion Ireland, *Inclusion Ireland welcomes long awaited Assisted Decision-Making (Capacity) Bill – Lunacy Act 1871 finally replaced*, (17 July 2013), online: http://www.inclusionireland.ie/content/media/1062/inclusion-ireland-welcomes-long-awaited-assisted-decision-making-capacity-bill (last accessed: 14 November 2013).

[175] Centre for Disability Law and Policy at the National University of Ireland Galway et. al., *Equality, Dignity and Human Rights: Does the Assisted Decision-Making (Capacity) Bill 2013 fulfil Ireland's human rights obligations under the Convention on the Rights of Persons with Disabilities?*, 3-4, online: http://www.nuigalway.ie/cdlp/documents/amendments_to_bill.pdf (last accessed 14 November 2013). (Equality, Dignity and Human Rights).

[176] Equality, Dignity and Human Rights, note 175, 5.

[177] Equality, Dignity and Human Rights, note 175, 5.

[178] Equality, Dignity and Human Rights, note 175, 5.

[179] Equality, Dignity and Human Rights, note 175, 7.

[180] Centre for Disability Law and Policy at the National University of Ireland Galway, *A Submission to the Department of Justice and Equality on the Assisted Decision-Making (Capacity) Bill 2013*, (4 October 2013), unpublished, 22.

[181] *A Submission to the Department of Justice and Equality on the Assisted Decision-Making (Capacity) Bill 2013*, note 180, 25.

[182] *A Submission to the Department of Justice and Equality on the Assisted Decision-Making (Capacity) Bill 2013*, note 180, 27.

[183] *A Submission to the Department of Justice and Equality on the Assisted Decision-Making (Capacity) Bill 2013*, note 180, 36.

[184] *N.Y. Mental Hyg. Law*, art 81.01, online: http://codes.lp.findlaw.com/nycode/MHY/E/81 (last accessed: 14 November 2013) (N.Y Mental Hyg Law).

[185] N.Y. Mental Hyg. Law, note 184, art. 81.02(a) (2).

[186] N.Y. Mental Hyg. Law, note 184, art. 81.23(b).

[187] N.Y. Mental Hyg. Law, note 184, art. 81.36.

[188] N.Y. Mental Hyg. Law, note 184, art. 81.30.

[189] N.Y. Mental Hyg. Law, note 184, art. 81.31.

[190] N.Y. Mental Hyg. Law, note 184, art. 81.31.

[191] N.Y. Mental Hyg. Law, note 184, art. 81.33.

[192] N.Y. Mental Hyg. Law, note 184, art. 81.39.

[193] Participants at the conference included disability organizations, lawyers, judges, mental health practitioners, social workers, psychologists and others working in the field of guardianship.

[194] The Guardianship Clinic, Cardozo School of Law, *Guardianship in New York: Developing an Agenda for Change* (2012), 6-7, online: http://www.cardozo.yu.edu/sites/default/files/GuardianshipReport.pdf (last accessed: 15 November 2013) (Guardianship in New York).

[195] Guardianship in New York, note 194, 13 .

[196] Guardianship in New York, note 194, 7-9.

[197] Guardianship in New York, note 194, 8.

[198] Guardianship in New York, note 194, 9.

[199] Guardianship in New York, note 194, 10.

[200] Guardianship in New York, note 194, 7.

[201] *Guardianship and Administration Act, 1986*, s. 22, online: http://www.austlii.edu.au/au/legis/vic/consol_act/gaaa1986304/ (last accessed: 14 November 2013) (*Guardianship and Administration Act*).

[202] *Guardianship and Administration Act*, note 201, s. 3.

[203] Plenary guardians have all the powers and duties which the plenary guardian would have if s/he were a parent and the represented person his or her child. *Guardianship and Administration Act*, note 201, s. 24.

[204] *Guardianship and Administration Act*, note 201, s. 46.

[205] *Guardianship and Administration Act*, note 201, s. 61(1).

[206] Guardianship: Final Report, note 142, 27.

[207] *Guardianship and Administration Act*, note 201, s.28.

[208] *Guardianship and Administration Act*, note 201, s.22(2)(a), 46(2)(a).

[209] *Guardianship and Administration Act,* note 201, s.35D.

[210] Office of the Public Advocate, online: http://www.publicadvocate.vic.gov.au/services/105/ (last accessed: 14 November 2013)(Office of the Public Advocate).

[211] *Guardianship and Administration Act*, note 201, see ss. 35D, 63(1).

[212] *Guardianship and Administration Act*, note 201, s. 61.

[213] *Guardianship: Final Report*, note 142, 42.

[214] *Guardianship and Administration Act*, note 201, s.80.

[215] *Guardianship: Final Report*, note 142, 408.

[216] *Guardianship and Administration Act*, note 201, s.15.

[217] *Guardianship and Administration Act*, note 201, s.15.

[218] *Guardianship and Administration Act*, note 201, s.16.

[219] *Guardianship: Final Report*, note 142, 446.

[220] *Guardianship and Administration Act*, note 201, s.16.

[221] Office of the Public Advocate, note 201.

[222] *Guardianship: Final Report*, note 142, 28.

[223] *Guardianship: Final Report*, note 142.

[224] *Guardianship: Final Report*, note 142, 413.

[225] *Guardianship: Final Report*, note 142, 413-414.

[226] *Guardianship: Final Report*, note 142, 414-415.

[227] *Guardianship: Final Report*, note 142, 416-417.

[228] *Guardianship: Final Report*, note 142, 417-423.

[229] *Guardianship: Final Report*, note 142, 455-456.

[230] *Guardianship: Final Report*, note 142, 459-460.

[231] *Guardianship: Final Report*, note 142, 460-461.

[232] *Guardianship: Final Report*, note 142, 461.

[233] *Guardianship: Final Report*, note 142, 462.

[234] *Guardianship: Final Report*, note 142, 423-24.

[235] Nina Kohn, Jeremy Blementhal, Amy Campbell, “Supported Decision-Making: A Viable Alternative to Guardianship?” (2013) Penn State Law Review 1111, 5 (Kohn, Blementhal & Campbell).

[236] *Guardianship: Final Report*, note 142, Chapter 9.

[237] Online: United Nations enable, http://www.un.org/disabilities/default.asp?id=475 (last accessed: 7 October 2010).

[238] See Surtees, note 86; Also see discussion in Law Commission of Ontario, "Capacity of Adults with Mental Disabilities and the Federal RDSP," Chapter V, "Developing an Alternative Process to Establish a Legal Representative for RDSP Beneficiaries"; Also see Michelle Browning, *Report to Winston Churchill Memorial Trust of Australia* (2010), 21, 26, 30, online: http://www.churchilltrust.com.au/media/fellows/Browning_Michelle_2010.pdf (last accessed: 2 November 2013).

[239] *Representative Agreement Act* [RSBC 1996] c. 405, ss. 4 and 7(1), (*Representative Agreement Act*).

[240] *Representative Agreement Act,* note 239, s. 7(1).

[241] *Adult Guardianship Act* [RSBC 1996] c. 6.

[242] *Adult Guardianship and Co-Decision-Making Act, Chapter A-5.3 of the Statutes of Saskatchewan, 2001,* ss.14(1) (*Adult Guardianship and Co-Decision Making Act*).

[243] *Adult Guardianship and Co-Decision-Making Act*, note 24*2,* ss. 17.

[244] Surtees, note 86, 9.

[245] *Guardianship: Final Report*, note 142.

[246] Surtees, note 86, 6-7.

[247] Kohn, Blementhal & Campbell, note 235, 5.

[248] See *Guardianship: Final Report*, note 142.

[249] In 2008-09 the Office of the Public Guardian and Trustee (PGT) reported that staff with complex case loads had 130 active files and that the workload pressures and higher risk caseload had been increasing steadily for the last several years. The PGT reported a total of 10,320 total active cases in 2008-09 and 9, 960 property guardianships alone in 2009-10; see PGT Annual Report 2008-09, note 82, 2-3 and PGT Annual Report 2009-10, note 8, 2.