

Capacity and Legal Representation for the Federal RDSP Final Report: Quick Overview



The Registered Disability Savings Plan (RDSP) is a savings vehicle created by the federal government to assist persons with disabilities with long-term financial security. Adults and their family and friends can contribute up to \$200,000 to the RDSP. Adults may also qualify for government grants and bonds that can total up to \$90,000.

Background

Basic Information about the RDSP:

- Financial institutions, such as banks and credit unions, offer RDSPs to eligible persons with disability.
- *The Income Tax Act (ITA)* sets out who qualifies for the RDSP and explains how an RDSP must be opened and managed.
- Adults can open and manage funds in an RDSP themselves as the “plan holder”.
- Where there are concerns about an adult’s legal capacity to enter into a contract with a financial institution to establish an RDSP, another person must do so on his or her behalf. *In the LCO’s final report, we call this person the “RDSP legal representative”.*

Adults with disability have experienced difficulties appointing an RDSP legal representative to establish a plan on their behalf.

- The ITA does not contain a process to appoint an RDSP legal representative. It provides that provincial legislation governs the appointment of an RDSP legal representative, including a guardian, attorney or other person.
- In Ontario, the *Substitute Decisions Act, 1992* governs the appointment of guardians and attorneys.
- The SDA covers general property management, including assets other than the RDSP.

Adults with disability have reportedly faced challenges as a result of the *Substitute Decisions Act, 1992* requirements when they only wish to appoint an RDSP legal representative. For instance,

- The threshold for capacity to grant a power of attorney for property may be unattainable for some adults with disability.
- The requirements of applying for guardianship may be onerous when a person only wishes to establish an RDSP.

The Government of Ontario requested that the Law Commission of Ontario (LCO) undertake a project to recommend a simpler process to appoint a legal representative just for RDSPs for adults with disability in Ontario. The LCO’s final report makes recommendations about what measures could be put in place to create a process that is easy to use and cost-effective, and that secures adults against financial abuse.

In formulating our recommendations, we consulted with adults with disability and their family and friends, community organizations, legal clinics, the trusts and estates bar, financial institutions and provincial and federal governments. This process has helped us in making recommendations that respond to peoples’ needs for autonomy and independence and protection from abuse, and that offer security to those providing the RDSP.



Goals for Reform

The LCO formulated benchmarks for reform to reflect our consultations with stakeholders as well as various sources of law and policy, such as the *Canadian Charter of Rights and Freedoms* and the *Convention on the Rights of Persons with Disabilities*. They have guided our recommendations. The benchmarks propose a streamlined process do the following:

1. **Respond to individual needs for RDSP decision-making**
2. **Promote meaningful inclusion in the decision-making process**
3. **Ensure that necessary protections for RDSP beneficiaries are in place**
4. **Achieve administrative feasibility, cost-effectiveness and ease of use**
5. **Provide certainty to RDSP legal representatives and third parties**

The LCO's Recommendations

We recommend that a streamlined process enable adults to personally appoint a family member, friend or community organization as an RDSP legal representative, where there are concerns about their capacity to enter into an RDSP contract. The RDSP legal representative would have authority to do the following:

- **open the RDSP,**
- **consent to contributions,**
- **decide investments,**
- **apply for government grants and bonds, and**
- **request that payments be made to the beneficiary.**

OTHER RECOMMENDATIONS WE MAKE INCLUDE:

- the process be available to adults who do not have a guardian or attorney for property
- adults be required to meet a threshold for capacity to grant the personal appointment that is less stringent than that to grant a power of attorney for property in Ontario (detailed in the final report)
- adults be entitled to protections against financial abuse that are available under the *Substitute Decisions Act, 1992* and the *Income Tax Act*

What Happens to Payments Made out of the RDSP?

Adults receiving payments can manage their own funds if they are legally capable of doing so with or without the support of family and friends. Otherwise, the regular regime for managing property under the *Substitute Decisions Act, 1992* would apply.

As an added protection against financial abuse, we recommend that RDSP legal representatives be required to consider an adult's legal capacity to manage a payment prior to requesting that a payment be made directly to the adult, and to follow certain safeguards. The final report explains what these safeguards might entail.

The LCO's Final Report (English and French), and summaries in plain language English, French, Mandarin, Spanish and Tagalog, can be found at www.lco-cdo.org.

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