



CANADIAN CENTRE FOR  
ELDER LAW

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## Inclusive Investing: Respecting the Rights of Vulnerable Investors through Supported Decision Making

### BACKGROUND

The Canadian Centre for Elder Law is conducting a two-year project that focuses on investors from various disability communities who are using supported decision making (Sup DM), as opposed to substitute decision making, in their lives. The key research question is: How can Canadian investment and financial institutions, adults with capacity challenges, and supporters incorporate Sup DM into the investment decision making process, while guarding against undue influence and elder financial abuse? The project will explore the experiences of BC and Ontario.

The CCEL wrote a first research paper on SupDM for the Law Commission of Ontario, [Understanding the Lived Experience of Supported Decision-making in Canada](#), in 2014. This second CCEL project on SupDM builds on this earlier work.

The project is made possible by a grant from the Law Foundation of Ontario, Access to Justice Fund.

### Mental capacity and vulnerable investors

The right to make one's own decisions is a fundamental entitlement in a free and democratic society. However, some individuals are particularly vulnerable to losing the right to make their own decisions, due either to genuine cognitive challenges or (sometimes discriminatory) assumptions about capacity and disability. This is particularly true of:

- People with intellectual disabilities;
- Survivors of traumatic brain injuries;
- People with some forms of mental illness; and
- Adults diagnosed with Alzheimer's disease or other forms of dementia.

If a person is not capable of making financial decisions, and decisions must be made, a substitute decision maker (SDM) may be put into place. For the investment industry member (IIM), taking instructions from a SDM helps the IIM ensure that he or she meets professional responsibilities



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when giving advice and taking instructions. The duties and powers of the attorney or guardian are generally clear to IIMs. In contrast, Sup DM relationships are not familiar to IIMs and others in the financial sector. As a result, adults with cognitive challenges risk losing capacity and decision making autonomy if they wish to engage in investment activity. Yet many of these adults can function well in community with the assistance of Sup DM. These Sup DM relationships can be adequate to support investor activities. But currently, lack of knowledge in the financial sector, and uncertainty about the legal relationships involved, pose a roadblock to robust use of Sup DM.

## **What is supported decision making?**

As an alternative to substitute decision making, Sup DM is a voluntary relationship whereby a person or network of people assist another person to make, communicate and implement his or her own decisions. The person being supported retains full legal capacity to make his or her own decisions. Although many of us make decisions with the support of people we trust, Sup DM relationships can also be formalized through legal agreements.

BC's *Representation Agreement Act* created the first legal regime for Sup DM.<sup>1</sup> Over the past two decades, a number of provinces and one territory have introduced legislation that provides for a person to be named (by a document or appointed by the court) to support or assist an adult to make decisions. Other jurisdictions are currently exploring Sup DM models, including Ontario.

The overall objective of these laws is to ensure that all adults are supported as much as possible so that they may exercise their full decision making rights. This right is now recognized in the United Nations *Convention on the Rights of Persons with Disabilities*.<sup>2</sup> Section 5 of Article 12 specifically refers to the right to control one's own financial affairs and section 3 requires appropriate measures to be taken to provide support so that one can exercise their legal capacity. Canada ratified the convention in 2010.

At law, legally appointed supporters are entitled to access the decision maker's personal information, and may be permitted to communicate directly with key people, such as IIMs.

As demand for Sup DM increases, and more jurisdictions consider implementing Sup DM legislation, there is a significant need for further research to understand the nature of the legal relationship between an adult and a supporter, and to clarify the role of the IIM vis-à-vis the adult client generally. This research project responds to this knowledge gap.

## **The CCEL project**

This project aims to:

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<sup>1</sup> *Representation Agreement Act*, RSBC 1996, c 405.

<sup>2</sup> United Nations, *Convention on the Rights of Persons with Disabilities*, in force May 2008, online: <http://www.un.org/disabilities/convention/conventionfull.shtml>.

- Enhance understanding of and access to SupDM in the investment context;
- Identify how Canadian investment and financial institutions, adults and supporters can incorporate SupDM into the investment process while guarding against undue influence and financial abuse; and
- Help investment Industry members to understand SupDM and their professional responsibilities in giving and taking instructions in a SupDM context.

The project research methodology will involve legal and social science research, comparative research to identify innovative approaches that have been explored in other jurisdictions, and comprehensive consultation with diverse stakeholders. Consultation work will include:

- Key informant interviews with experts from the financial and legal sector;
- Focus groups with stakeholders from disability sector; and
- Roundtables in Toronto and Vancouver.

Project outputs will include:

1. A report summarizing research, consultation findings and making recommendations for law and practice reform for BC and Ontario;
2. Educational and knowledge mobilization tools for adults with diminished capacity, supporters pursuant to supported decision making relationships and investment Industry members; and
3. An Evaluation report completed by an external evaluator.

This project will be supported by a volunteer inter-disciplinary advisory committee including members representing adults with diminished capacity, supporters pursuant to SupDM relationships, and investment Industry. The committee will be developed early in 2017 and the member list will be shared through the project webpage.

### **About the Canadian Centre for Elder Law**

The Canadian Centre for Elder Law (CCEL) is a national, non-profit body dedicated to exploring the legal and policy issues that impact us as we age. As part of its work the CCEL consults with stakeholders, collaborates with numerous community agencies and publishes legal, policy and practice resources including recommendations for law reform and public information materials. The CCEL is a division of the British Columbia Law Institute, BC's non-profit independent law reform agency. Established in 2003, CCEL is recognized for its expertise in elder law and policy issues both in Canada and internationally.