



CANADIAN CENTRE FOR
ELDER LAW

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

PROJECT BACKGROUNDER

Introduction

The Canadian Centre for Elder Law (“CCEL”) has embarked on a project that examines how vulnerable investors¹ are using supported decision making in their lives. These investors include adults with a range of cognitive impairments arising from a variety of circumstances, including adults with intellectual disabilities and people living with dementia. The project will focus on how to facilitate supported decision making during the investment process to maximize an investor’s access to investment options while minimizing the loss of autonomy and unnecessary intervention through court ordered guardianship. The key research question is: How can Canadian investment advisors, adults with cognitive and decision-making challenges, and supporters incorporate supported decision making into the investment decision-making process, while guarding against undue influence and financial abuse?

This project will support Investment Industry Members², adults with cognitive or decision-making challenges and their supporters, to better understand the scope and potential of supported decision making in an investment context. The project will explore the experiences of BC and Ontario, and be supported by a volunteer inter-disciplinary advisory committee representing adults with diminished capacity, supporters pursuant to supported decision-making relationships, the investment industry and relevant regulators.

The project will engage and focus particularly on vulnerable investors who are living with intellectual or developmental disabilities, Alzheimer’s disease, or other forms of dementia. However, the work of the project will be relevant broadly to adults with diminished capacity who are interested in using supported decision making for investment decisions, such as survivors of traumatic brain injuries and people living with some forms of mental illness.

This project, funded by a grant from the Law Foundation of Ontario Access to Justice Fund, will involve extensive comparative legal research on supported decision making in the investment context, and interrelated areas of the law, as well as stakeholder and key informant consultation.

¹ Vulnerable/Vulnerable Investor: An investor may be vulnerable for a number of reasons. For purposes of this project, references to vulnerable/vulnerable investor refers to adults who have a supporter assisting them to make investment decisions.

² Investment Industry Member (IIM) is a general term used for the purpose of this project to refer to investment professionals in Canada who provide investment advice to Canadians who wish to participate in investment activities, ranging from the purchase of a Guaranteed Investment Certificate (GIC) to mutual funds, bonds, stocks and other securities instruments.

The research and consultation will focus only on those investors who have, or are seeking, an ongoing relationship with an investment advisor. Investors who use online or other independent investment methods will not be examined.

The project will produce:

- a report summarizing research and consultation findings for BC and Ontario; and
- a suite of tools for persons with capacity challenges, their supporters and IIMs.

Upon completion of the project, research findings, resources and tools will be shared online and through a variety of knowledge exchange channels, including conferences, community organizations, and the investment industry and regulators.

Objectives of the Project

This project aims to:

- Enhance understanding of and access to supported decision making in the investment context³;
- Identify how Canadian investment advisors, adults and their supporters can incorporate supported decision making into the investment process while guarding against undue influence and financial abuse; and
- Assist IIMs and regulators to better understand supported decision making and their professional responsibilities in giving and taking instructions in a supported decision-making context;
- Increase confidence for adults and their supporters to assert their rights and demonstrate their ability to move forward with investment choices and decisions; and
- Increase an adult supporters' ability to be a supported decision maker.

Project Methodology

The Project will involve the following activities:

- Establishing a diverse interdisciplinary project advisory committee that will meet four to five times to guide the work of the CCEL as needed on this project;
- Comprehensive consultation with diverse stakeholders. Consultation work will include:
 - a. Key informant interviews with IIMs and members of the legal profession, representatives from applicable regulators and industry organizations, as well as individuals using supported decision making and their supporters;
 - b. Key informant interviews with stakeholders from non-profit agencies representing people living with disabilities and/or dementia; and
 - c. Roundtables in Toronto and Vancouver (Fall 2018).

³ Limited to adult investors who have an established relationship with an IIM.

- Undertaking a comprehensive review of relevant legislation and jurisprudence in BC and Ontario;
- Completing comparative research considering key jurisdictions in Canada and abroad, such as the United States, United Kingdom and Australia;
- Completing a literature review on the subject including social science academic material from journals and reports as well as publications from the legal community;
- Producing a legal research report on the legal, policy and practice issues of supported decision making in the investment context, including education and training, outlining:
 - The experience, views and concerns of key professional and regulatory stakeholders about supported decision making in the investment industry;
 - Findings from our interviews with adults using supported decision making in their lives, and their supporters;
 - Relevant legislation and policy;
 - Legal models and legislative provisions from other jurisdictions of note; and
- Reviewing existing public legal education resources on the use of supported decision making in the investment context, and developing a suite of tools for adults with capacity challenges, their supporters, and IIMs for BC and Ontario.

Rationale for the Project

At law all adults are presumed to be capable of making decisions that affect their legal and financial affairs, as well as decisions about personal and health care matters. 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 their capacity to make investment decisions.

If a person is incapable of making investment decisions, and decisions must be made, a formal supported decision-making relationship may be put into place by written agreement (known as a representation agreement in BC), or an informal supported decision-making relationship may emerge between an adult investor and one or more of their supporters. For an IIM, taking instructions from a substitute decision maker helps an IIM ensure that he or she meets professional responsibilities when giving advice and taking instructions. The duties and powers of the attorney or guardian are generally clear to the IIM. In contrast, supported decision-making relationships are not as familiar to most IIMs. If guardianship is required by an IIM before instructions will be accepted, the adult may experience an unnecessary loss of decision making autonomy.

Many adults with cognitive challenges function well in community, sometimes with the assistance of supported decision making. These supported decision-making relationships can be adequate to support investor activities. Currently, lack of knowledge in the investment sector, and uncertainty about the legal relationships involved, poses a roadblock to enhanced use of supported decision making.

As a result of recent statutory reform in British Columbia (BC), substitute decision makers, such as attorneys appointed in an enduring (or continuing) power of attorney, and guardians (or committee) appointed by the court, have a statutory duty, to the extent reasonable, to foster the independence of the adult and encourage the adult's involvement in any decision making that affects the adult.⁴ Efforts are underway in BC to enhance understanding of what this duty means in practice. One might expect that there will be many similarities to a supported decision-making approach.

As with all Canadians, the investment needs of vulnerable investors range from the most conservative to the more complex. At one end of the continuum investors may only require one or more GICs and/or may wish to invest in a secure money market fund. Their goals are simple—maximize their return without exposing them to financial risk. Younger populations may also own a RDSP and will need to invest the funds held in the RDSP. At the other end of the continuum, investors with larger and more sophisticated investment portfolios may suffer an accident that causes a brain injury and affects the investor's decision-making capabilities, or they may begin to experience early symptoms of dementia. Victims of brain injuries may also receive large settlements. Some of these investors may be able to instruct an investment industry member with the support of a supported decision maker; some may not have adequate capacity to participate in the process, or may lack family or friends to support them with decision making. The crucial issue is to ensure that IIMs are not creating a road block to decision making autonomy due to a lack of understanding of, or comfort with, supported decision-making relationships.

Background on Supported Decision Making

BC's *Representation Agreement Act* created the first legal regime for supported decision making.⁵ 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.⁶ Other jurisdictions are currently exploring supported or network decision-making models, including Ontario.⁷

For the purposes of this project, those who are named in a legal document or by the courts to support or assist an adult are referred to as "supporters". Although there are differences between the models and legislative frameworks adopted in each jurisdiction, 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

⁴ *Patients Property Act*, RSBC 1996, c 349 s 18(2); *Power of Attorney Act*, RSBC 1996, c370 s 19(3).

⁵ *Representation Agreement Act*, RSBC 1996, c 405.

⁶ Quebec and Saskatchewan have court appointed supported decision-making roles. The Yukon has a modified version of the *Representation Agreement Act*. Alberta also provides for an adult to name someone to be a supporter or for the court to appoint a co-decision maker but both roles are limited to personal decisions. See CCEL, Understanding the Lived Experience of Supported Decision-making in Canada: A Study Paper (2014), online: CCEL <<https://www.bcli.org/project/understanding-lived-experience-supported-decision-making>>.

⁷ The Law Commission of Ontario issued its final report for its project on Legal Capacity, Decision Making and Guardianship, in March 2017 (online: <<https://www.lco-cdo.org/en/our-current-projects/legal-capacity-decision-making-and-guardianship/>>). At Section IV. Concepts of Legal Capacity and Approaches to Decision-making: Promoting Autonomy and Allocating Legal Accountability (online: <www.lco-cdo.org/en/our-current-projects/legal-capacity-decision-making-and-guardianship/final-report/>) the issues related to supported decision making are discussed and it is acknowledged that supported decision making is one of the most difficult areas for law reform today. There have also been a number of initiatives in the United States, including legislative recognition of supported decision-making relationships and development of resources and tools.

rights. This right to support is now recognized in the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). Section 5 of Article 12 specifically refers to the right to control one's own financial affairs and section 3 requires appropriate measures be taken to provide support so that one can exercise their legal capacity.⁸ Canada ratified the convention in 2010.

Although not set out in legislation, supporters appear to “support” an adult to:

- Understand the issues involved in a decision;
- Understand the consequences of a decision;
- Access the appropriate assistance or information;
- Express his or her views and act as interpreter where needed;
- Have his or her wishes be heard by an institution or individual;
- Help other individuals or institutions appreciate that the adult is a person with needs, rights, values, preferences and goals, and to appreciate the autonomy, dignity and wisdom of a person with a disability.⁹

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, landlords, physicians, social workers, bank or credit union staff, or staff administering government benefits and pensions.

As the demand for supported decision making is increasing, and more jurisdictions are considering implementing supported decision-making 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.

The nature of “supporter” appointments, and the legal relationships that they create, raise a number of legal and practical issues for the adults seeking to make investment decisions, their supporters, and the IIMs who must comply with their professional obligations.

⁸ UNAG, 61st Sess, 76th Mtg, UN Doc A/RES/61/106 (2007; entered into force 3 May 2008) (UNCRPD) at 1-2, online: <<https://undocs.org/A/RES/61/106>>. UNCRPD, Article 12 says: Article 12—Equal recognition before the law—1) States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law. 2) States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. 3) States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. 4) 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. 5) Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

⁹ Province of British Columbia, Elder Abuse Curricular Resource, *Elder Abuse Reduction: Instructor’s Guide*, (BC: July 2015) at 136, online: <solr.bccampus.ca:8001/bcc/items/8d5b3363-396e-4749-bf18-0590a75c9e6b/1/>.

Role of the Project Advisory Committee

As with many CCEL projects, an interdisciplinary project advisory committee will provide ongoing project guidance regarding research and consultation methodology, key informants and stakeholders.

Committee members support CCEL staff by:

- Identifying key stakeholders to participate in project consultation;
- Identifying key topics to cover as part of project research;
- Supporting interpretation of stakeholder input;
- Suggesting conferences and other avenues for sharing project findings; and
- Identifying key agencies or individuals who can support knowledge mobilization in relation to resources developed as part of the project.

Committee members bring their expertise and experience to bear on documents prepared by CCEL staff by participating in discussions at committee meetings.

The advisory committee brings together a diverse range of people from various stakeholder bodies as well as individuals with subject matter expertise relevant to the project.

This project includes significant stakeholder consultation. Some individuals may participate as key informants, rather than as advisory committee members.

Jim Emmerton, Senior Fellow of the CCEL, has volunteered to serve as committee chair.

CCEL staff support

CCEL staff are responsible for research, document drafting, stakeholder consultation, report writing, tool development, and meeting organization.

About the CCEL

The CCEL carries out scholarly research, writing, analysis and community engagement relating to 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 (BCLI), BC's non-profit independent law reform agency. The BCLI is organized as a society under the *BC Society Act*. As such, its governing body is its board of directors. The BCLI board's approval is the final step required before a report or study paper becomes a CCEL publication. A full list of our board members can be found on our [website](#).

Project Contact

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