



CCEL STUDY PAPER ON INCLUSIVE INVESTING:
Respecting the Rights of
Vulnerable Investors through
Supported Decision-Making



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ABOUT THE CCEL

The CCEL conducts legal research, writing, analysis, and community engagement activities to examine the legal and policy issues that impact us as we age. As part of its work the CCEL consults with stakeholders, collaborates with community agencies, and publishes legal, policy and practice resources, including recommendations for law reform, and educational tools. The CCEL is a division of the BC Law Institute (BCLI), BC’s not-for-profit, independent law reform agency.

ABOUT THE ALZHEIMER SOCIETY OF BC

The Society’s vision is a world without dementia, and that world begins with a more dementia-friendly society, where people affected by dementia are acknowledged, supported, and included. The Society works in communities throughout BC to support, educate, and advocate for people living with dementia.

ABOUT INCLUSION BC

The vision of Inclusion BC is a world where everyone belongs. Inclusion BC is a non-profit federation that works with partners to build community and to enhance the lives of children, youth and adults with intellectual disabilities and their families by supporting abilities, promoting action and advancing rights. Inclusion BC provides support, education and advocacy where and when it is needed.



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Note from the BCLI Chair

Supported decision-making allows adults to pick who may assist them in making decisions. Supported decision-making can enable people living with disabilities to make their own decisions about financial, personal, health care, legal, or other matters. For people living with dementia, supported decision-making may open a door to maintaining a degree of autonomy in making decisions regarding their investments.

The Inclusive Investing Project was born out of a desire to enhance capacity within the investment sector to work with clients who may prefer to make decisions with the support of family and friends. We are thrilled to share with you this study paper, which is the culmination of many years of research and consultation.

The work of the Canadian Centre for Elder Law (CCEL) aims to break down silos of practice to support robust conversations about law and policy reform. The Inclusive Investing study paper reflects the perspectives of stakeholders from financial, legal, and other professional sectors, and incorporates the lived experience of older people living with dementia, people living with intellectual or developmental disabilities, and family members who provide support. Like many CCEL projects, the Inclusive Investing Project was a collaboration—this time with project partners Alzheimer Society of B.C. and Inclusion BC. The collaboration amongst the project partners was integral to ensuring this research reflected diverse experiences.

On behalf of the BCLI Board of Directors, I would like express our gratitude to the Inclusive Investing Project Advisory Committee and also to our project partners. As a member of the Committee, this project offered me the opportunity to witness firsthand the rich contributions committee members and partners bring to our understanding of law, policy, and practice. Our work is simply not possible without this critical support.

In addition to the study paper, the Inclusive Investing Project also includes a number of legal information resources. I encourage you to take a look at the booklets and slide presentations available on the project webpage.



Emily Clough
Chair
British Columbia Law Institute

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We extend our gratitude to Inclusion BC for inviting us to speak at their Annual Learning Event (May 2019) to introduce the project and engage with participants. We thank ARCH Disability Law Centre (Ontario) and Inclusion BC for hosting the focus group sessions, which facilitated an open dialogue with people from the disability communities in BC and Ontario.

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List of Acronyms

ABA	American Bar Association
AGA	<i>Adult Guardianship Act</i> (BC)
BCLI	British Columbia Law Institute
CACL	Canadian Association for Community Living
CCEL	Canadian Centre for Elder Law
CRA	Canada Revenue Agency
CRPD	United Nations Convention on the Rights of Persons with Disabilities
DTC	Disability Tax Credit
GIC	Guaranteed Income Certificate
IFIC	The Investment Funds Institute of Canada
IIROC	The Investment Industry Regulatory Organization of Canada
KYC	Know Your Client
KYP	Know Your Product
LCO	Law Commission of Ontario
LSBC	Law Society of British Columbia
LSO	Law Society of Ontario
OBSI	Ombudsman for Banking Services and Investments
ODSP	Ontario Disability Support Program
PGT BC	Public Guardian and Trustee of British Columbia
PLAN BC	Planned Lifetime Advocacy Network of British Columbia
RAA	<i>Representation Agreement Act</i> (BC)
RDSP	Registered Disability Savings Plan
RRSP	Registered Retirement Savings Plan
SDA	<i>Substitute Decisions Act, 1992</i> (ON)
TFSA	Tax-Free Savings Account
UN	United Nations

Glossary of Terms

This study paper explores several legal issues and practice areas as they relate to capacity and investing. This section describes some key terms and concepts used throughout the study paper. The terms used often hold a distinct meaning and may be context or jurisdiction specific. Jurisdiction is noted next to a definition, where appropriate.

The list of definitions in this glossary is not exhaustive, and other terms and concepts are defined as they appear throughout the study paper. This preliminary list is meant to serve as a helpful background for the reader.

Acquired Brain Injury (ABI) Any damage to the brain that occurs after birth and is not related to a congenital or a degenerative disease.² There are two types of acquired brain injury: 1) non-traumatic, and 2) traumatic.

- 1) **Non-Traumatic Brain Injury** caused by something that happens inside the body or a substance introduced into the body that damages brain tissues. Causes include stroke, brain aneurysm, seizures, tumours, poisoning, substance abuse, and infectious diseases.
- 2) **Traumatic Brain Injury** caused by something that comes from outside the body, such as a blow, bump, or jolt. It can result in temporary injury, or more serious, long-term damage to brain cells. Causes include motor vehicle accidents, falls, assault, gunshot wounds, domestic violence, shaken baby syndrome, sports injuries, explosive blasts, and combat injuries.

Adult For the purposes of this study paper, an adult is a person who has reached the age of majority in their jurisdiction. The age of majority

in BC is 19.³ The age of majority in Ontario is 18.⁴

Advance Directive (BC) A signed, written instruction to give or refuse consent to specific future health care treatment if an adult becomes incapable of making such decisions.⁵ Advance directives must meet the requirements set out in the legislation to be valid.⁶

Attorney (for financial decision-making) (BC) A person who has authority under an enduring power of attorney (defined below) to make decisions on behalf of an adult or to manage an adult’s financial affairs.⁷

Attorney (for financial decision-making) (ON) One or more persons, “whether jointly or severally or both”, who have authority to make decisions on behalf of an adult under a power of attorney.⁸

Best Practice “A Best Practice is an intervention, method or technique that has consistently been proven effective through the most rigorous scientific research (especially conducted by independent researchers) and which has been replicated across several cases or examples.”⁹ It is proven to work for the community or demographic it intends to benefit. A Best Practice can be applied successfully for most of a population group or may only be proven to benefit a specific community.

Capable (ON) Under Ontario’s *SDA* capable means “mentally capable, and ‘capacity’ has a corresponding meaning.”¹⁰

Capacity (general) In general, capacity refers to a person’s ability, or inability, to make decisions. Fundamentally, in deciding whether someone is capable or incapable of making decisions, a

person must show that they can understand information, evaluate relevant data, and appreciate the consequences of the decision.¹¹ In the context of making investment decisions, a person may not have the capacity to understand and make decisions about purchasing a complex investment, but may be able to understand less complex investment options. For this study paper, and unless otherwise stated, when we refer to capacity we mean a person's ability to make a decision.

Capacity (legal) Legal capacity is a social and legal concept used to determine if someone can make decisions for themselves, and if they can be held responsible for the consequences of those decisions.¹² Legal capacity concerns the ability to keep and exercise certain legal rights.

Continuing Power of Attorney (ON) In Ontario, one kind of power of attorney document is called a Continuing Power of Attorney (CPOA). A CPOA is a document made by a capable adult that grants authority to another capable adult to make decisions and take actions related to the **grantor's** financial affairs.¹³ The attorney can make decisions while the grantor is capable, and can continue to make decisions if the grantor becomes incapable.

Dementia Dementia is a term used to describe a set of symptoms caused by disorders affecting the brain which may include memory loss and difficulties with thinking, problem-solving, or language severe enough to reduce a person's ability to perform everyday activities. Dementia can also affect a person's mood or behaviour. Alzheimer's is a specific form of dementia.¹⁴

Disability (general) It is difficult to define disability because how we define it is informed by both a person's physical or mental abilities, and their social interactions. There is no universal definition of disability in Canada or elsewhere. However, the most widely accepted definition is provided by the World Health Organization:

"Disabilities is an umbrella term, covering impairments, activity limitations, and participation restrictions. An impairment is a problem in body function or structure; an activity limitation is a difficulty encountered by an individual in executing a task or action; while a participation restriction is a problem experienced by an individual in involvement in life situations."¹⁵ We talk more about disability in the context of the research and communities we spoke with later in this study paper.

Enduring Power of Attorney (BC) "An Enduring Power of Attorney (EPOA) is a legal document for advance planning in BC."¹⁶ With an EPOA, a capable adult can give another capable adult the authority to make decisions or take actions on the adult's behalf regarding financial and legal matters.¹⁷ An EPOA does not apply to health or personal care decisions. The adult making the EPOA can decide how broad or restricted the powers granted to the attorney can be. An EPOA can come into effect while the adult making the EPOA is still capable and continues in effect if the adult granting the authority becomes incapable. The statute governing EPOAs in BC is the *Power of Attorney Act*.

Grantor (ON) A grantor is a person who creates a power of attorney for property or personal care, putting another person in place to make decisions on their behalf.¹⁸

Guardian (ON) In Ontario, "[g]uardians may be appointed under the *Substitute Decisions Act*, through either the Superior Court of Justice or a statutory process, to make decisions on behalf of another with respect to property or personal care."¹⁹

Incapable (ON) Ontario's *SDA* defines incapable to mean "mentally incapable, and 'incapacity' has a corresponding meaning."²⁰

Intellectual Disability "An intellectual disability affects a person's intellectual development and is usually present from the time they are born or from an early age. This disability varies greatly[,] and society provides accommodations that promote the unique and diverse abilities of each person."²¹

Microboard "A Microboard™ is a small (micro) group of committed family and friends (a minimum of 5 people) who join together with the individual to create a non-profit society (board)."²²

Person-centred care "Person-centred care is a philosophy of care that recognizes that individuals have unique values, personal history and personality and that each person has an equal right to dignity, respect, and to participate fully in their environment."²³

Person-centred planning Person-centred planning is both a philosophy and process of developing and delivering services to people that focuses on the individual wants and needs of the person accessing the service. Person-centred services and programs recognize that each person is unique in their values, history, and goals and are developed with the goal of involving a person in their community and in the decisions they make.²⁴

Personal Guardian (BC) BC's *HCCA* defines a personal guardian as "a committee of a person who is declared under the *PPA* to be (a) incapable of managing [themselves], or incapable of managing [their] affairs."²⁵ A guardian under the *PPA*, also known as "committee of estate", is appointed by court order.

Promising Practice "A Promising Practice is defined as an intervention, program, service, or strategy that shows potential (or "promise") for developing into a best practice. Promising practices are often in the earlier stages of

implementation, and as such, do not show the high level of impact, adaptability, and quality of evidence as best practices. However, their potential is based on a strong theoretical underpinning to the intervention."²⁶

Regulator In this project, a regulator includes government agencies and industry organizations responsible for legislation, policy, education, and oversight of the investment sector. Regulators include provincial securities commissions, government agencies, and industry organizations like the Mutual Fund Dealers Association (MFDA) and the Investment Industry Regulators of Canada (IIROC).

Representative (BC) A person chosen by an adult to make, or help a person make, decisions. A representative is put in place by a legal document called a representation agreement. The type of decisions a representative can make will depend on the authority given to them in the representation agreement.

Representation Agreement (BC) A legal agreement made under BC's *Representation Agreement Act*²⁷ between an adult and one or more people (representatives) to make, or help an adult make, decisions about their personal care, health care, and financial matters. The agreement specifies the types of decisions the representative can make, and may include decisions about personal care, health care, or the routine management of finances, including investments.²⁸ Chapter 3 of this study paper discusses the different types of representation agreements in BC and the applicable test for capacity to make a representation agreement.

Statutory property guardian (BC) In BC, and if a certificate of incapability under Part 2.1 of the *AGA* is issued for an adult, the PGT BC will be appointed as the statutory property guardian (committee of estate) to manage the adult's financial affairs.²⁹ Note that a certificate of incapability

issued under this section “is not related to a certificate or certification under the *Mental Health Act* and the *Mental Health Act* appeal mechanisms do not apply.”³⁰

Statutory property guardian (ON) If, after completing an assessment, a health professional finds that an adult is incapable of managing their affairs, and if no power of attorney exists and the adult does not object, the Office of the Public Guardian and Trustee (OPGT) will be appointed statutory property guardian.³¹ “When the [OPGT] is acting as a guardian for an incapable person it can, in turn, appoint certain people to act in its place. A relative, spouse or partner of the incapable person may, for example, be appointed by the OPGT. This type of appointment is called “statutory guardianship” because the statute (law) allows the appointment to be made without a court order.”³²

Substitute Decision-Maker (BC) A capable adult who is authorized to make decisions for an incapable adult as an attorney (under power of attorney or enduring power of attorney), as a representative (under a representation agreement), as a court-ordered guardian (committee of estate or person), or as temporary substitute decision-maker for health care and other personal decisions.³³

Substitute Decision-Maker (ON) “a person appointed under current legislation to make decisions on behalf of another, including guardians, persons acting under a power of attorney and persons appointed to make decisions under the [Ontario] *Health Care Consent Act*.”³⁴

Supported Decision-Making Supported decision-making is generally recognized as an alternative to substitute decision-making.³⁵ Supported decision-making is a voluntary relationship where a person or network of people help another person to make, communicate, and implement their decisions. The person being

supported retains full legal capacity to make their own decisions. While many people make decisions with informal support from trusted people, supported decision-making relationships can also be formalized through legal agreements, like a representation agreement in BC.³⁶

Supportive Decision-Maker (or Supporter) There are many different ways a supportive decision-maker can support an adult to make a decision. Supportive decision-makers may support adults to:

- Understand the issues involved in a decision;
- Understand the consequences of a decision;
- Access appropriate assistance or information to make a decision;
- Express their views;
- Act as interpreter where needed;
- Help others to truly hear or understand them;
- Help people and institutions appreciate that the person living with disabilities has needs, rights, values, preferences and goals, and to appreciate the autonomy, dignity and wisdom of people living with disabilities—in other words, help prevent discrimination and bias.³⁷

Undue Influence “Undue influence consists of imposing pressure that causes a person to perform some legal act, such as making a will, that does not reflect the true wishes or intentions of that person, but rather those of the influencer.”³⁸

Executive Summary

Over the years, the Canadian Centre for Elder Law (CCEL) has led a number of projects on mental capacity, decision-making rights, and related barriers to access to justice faced by people living with dementia and other disabilities. The Inclusive Investing Project was developed to explore capacity and supported decision-making in the investment context. This study paper summarizes aspects of the law relevant to using supported decision-making for investment, shares our consultation findings, and concludes with ideas for enhanced regulation, practice guidance, professional development, and public education to promote careful and informed use of supported decision-making for investment.

PROJECT BACKGROUND

Supported decision-making is an alternative to substitute decision-making. Substitute decision-making occurs when one person is empowered by a court order or legal document to make decisions for another person. Most commonly, a substitute decision-maker is a guardian (called a committee in British Columbia) or an attorney under a power of attorney. Guardianship requires a court finding that a person lacks capacity to make their own decisions, and so results in a significant loss of decision-making autonomy.

In contrast, supported decision-making is a voluntary relationship whereby a person or network of people help another person to make, communicate, and implement their decisions. The person being supported retains full legal capacity to make their own decisions under this approach. Many of us have people with whom we confer and weigh our options when critical decisions loom; however, for some people with disabilities, supported decision-making allows them to understand enough information to make some or all of their own decisions. The supported decision-making relationship bolsters the adult’s decision-making capacity and enables accommodation of their disability in alignment with human rights law. Supported decision-making can be particularly useful for people living with dementia or other cognitive challenges, who are vulnerable to losing rights due to (sometimes discriminatory) assumptions about their capacity to make decisions.

In a small number of Canadian jurisdictions, supported decision-making relationships can be formalized through a legal document, such as a representation agreement in BC, a supported decision making agreement in the Yukon, or a supportive decision-making authorization in Alberta; in other provinces and territories, informal supported decision making occurs. However, supported decision-making remains poorly understood, and investment professionals generally prefer to take instructions from a substitute decision-maker. Against this backdrop, the Inclusive Investing Project was developed to better understand the law, policy, and practice in relation to supported decision-making and investment. We hope to help investment sector professionals, regulators, supportive decision-makers and others to better understand and make use of supported decision-making.

SCOPE OF RESEARCH AND CONSULTATION

The Inclusive Investing Project used BC and Ontario as comparator jurisdictions. They offer different perspectives because BC has supported decision-making legislation and Ontario does not.

Project work included both legal research and consultation. We examined the laws that impact investment decision-making for people living with dementia, and people who identify as living with an intellectual or developmental disability. This study paper summarizes legislation governing:

- Legal and mental capacity;
- Supported and substitute decision-making for financial and investment decisions;
- Guardianship; and
- Human rights accommodation for people living with a disability.

The paper also outlines Canada’s investment landscape, identifying the people and institutions involved in providing investment services and regulatory oversight. We review the regulation of investment industry professionals, and provide an overview of existing policies, guidelines, and training materials.

Consultation included key informant interviews, surveys, and focus groups. We interviewed 95 people, including:

- Investment advisors and regulators;
- Lawyers;
- People using supported and substitute decision-making;
- Family and friends who support people with decision-making;
- Advocates and community service providers; and
- Academics who study disability rights issues.

We surveyed lawyers and notaries in BC (through the Canadian Bar Association, BC Branch and the Notaries Society of BC), attracting over 120 responses, and held a focus group with our project partner, Inclusion BC.

This project focused on the experiences of people living with dementia and people who identify as having an intellectual or developmental disability; however, supported decision-making may be a useful approach for people living with other disabilities.

FINDINGS

Key informants identified factors that support and hinder the communication and understanding of people living with dementia or intellectual or developmental disabilities. Investment decision-making can involve complex information, particularly in relation to risk and risk tolerance. Investment advisors, and substitute and supportive decision-makers struggle with how to meaningfully engage

investors in the decision-making process. Key informants noted that while people with disabilities can experience difficulties, challenges understanding risk and imprudent decision-making are not unique to people living with disabilities. People with disabilities are often held to a higher standard, and not permitted to make mistakes.

Supported decision-making is not commonly used in an investment context. Some lawyers, notaries, and investment advisors feel very strongly that there is no safe way to use supported decision-making unless the person receiving support has capacity to make decisions independently. However, many lawyers commented that the representation agreement framework in BC is well-suited to recognizing a continuum of supported decision-making because of the flexible “help make or make” decisions language found in section 7 of the *Representation Agreement Act*. Key informants admit that this language is both a benefit and a challenge for lawyers and investment advisors who want clarity about whether a person has capacity to decide, and who is responsible for the decisions being made.

All informants agreed that, from a human rights perspective, adults receiving support should be given the opportunity to meaningfully participate in the investment decision-making process, where possible. One of the biggest barriers to more robust use of support in the investment context centres around concerns about who is responsible for the decision, and whether undue influence is at play. A power of attorney is the preferred instrument for both supported and substitute decision-making because it clearly places responsibility for the decision on the appointed attorney. Lawyers and advisors said that, if the law could clarify who has responsibility in a supported decision-making relationship, they would be open to finding more opportunities to work with this type of relationship, for as long as possible. Investment advisors are very concerned about liability in the event that an investment decision is connected to financial loss. They want investors to understand the risks associated with each investment decision.

This study paper concludes by identifying areas where regulation, practice guidance, professional development, and public education can enhance careful and informed use of supported decision-making for investment in BC and Ontario. Regulatory options include improved oversight and professional regulatory guidance regarding undue influence, record-keeping, confidentiality, and capacity to instruct counsel. Key informants from all groups expressed a desire for more reliable information. The suite of tools developed as part of this project aims to address some of these learning needs. The resources include a presentation for investment advisors, a practice checklist for investment advisors, a presentation for adults with intellectual or developmental disabilities, a booklet for people living with dementia, and a booklet for people who support others with decision-making.

Given the increasing prevalence of dementia, the need to plan for the financial future of adults with disabilities, and significant rights under international and domestic human rights law, supported decision-making is a area of growing interest. However, it is also a source of great uncertainty. We hope this study paper and the accompanying resources help to clarify how different stakeholders can incorporate supported decision-making into their professional work and their personal relationships. This work can be done in a manner that respects rights, supports autonomy, addresses both vulnerability to abuse and undue influence, and adheres to the high ethical standards that support best practice among the various professional groups involved in investment decision-making.



CHAPTER 1

Introduction

It is challenging because, on the one hand, we want to protect people's assets for all the reasons we have been discussing. But, on the other hand, we also do not want to stifle people's independence. And the fact of the matter is we all have the God-given right to make mistakes. And that is very, very difficult for people to accept.

– Investment Professional

This chapter outlines:

- Why we conducted a project to better understand how people living with dementia or an intellectual or developmental disability make investment decisions with support;
- Why we chose British Columbia and Ontario as our comparator jurisdictions for the research and consultations;
- The topics and knowledge gaps informing the research and consultation interviews;
- How we completed the project, including how we defined the project scope, how key informants with relevant expertise or experience were selected, and how we raised awareness about the project throughout its life course; and
- The values that informed the project development, scope, and findings.

1.1 RATIONALE FOR THIS PROJECT

At law, all adults are presumed capable of making decisions affecting their legal affairs, financial affairs, personal care, and health care. The right to make one's own decisions is a fundamental entitlement in a free and democratic society. However, some people may be vulnerable to losing the right to make their own decisions, due either to cognitive challenges or (sometimes discriminatory) assumptions about

capacity and disability. This is true for:

- People who identify as living with intellectual or developmental disabilities; and
- People living with dementia.

These same concerns and issues are also true for survivors of traumatic brain injuries and people living with a form of mental illness. For this project, and due to scope, time, and cost considerations, we could not include these two additional communities in our research and consultation. However, we hope that the findings from this study paper provides an opportunity to consider how these issues may impact these communities.

Generally speaking, and in deciding whether a person has the requisite capacity to make decisions for themselves, the courts and the legal profession attempt to strike a balance between two, often competing, goals:

1. to recognize and preserve a person's autonomy; and
2. to protect vulnerable people from undue influence and abuse.

Depending on the jurisdiction, if a person is deemed to lack capacity to make financial decisions, and decisions must be made, the law may require that someone be put in place to make decisions for them. This person is considered a substitute decision-maker and could be an attorney appointed by the adult in a power of attorney document, or a guardian appointed by the court or under legislation. In the investment context, taking instructions from a substitute decision-maker helps investment advisors ensure they meet professional responsibilities when giving advice. The duties and powers of the attorney or guardian (committee) are generally clear and recognized at law. In contrast, supported decision-making relationships are not as familiar to most investment advisors. If a substitute decision-making relationship is required by an investment advisor before instructions will be taken, the adult may experience an unnecessary loss of decision-making autonomy.

1.1.1 Support and Decision-Making

Many people may be able to make their own decisions, or some decisions, if they have family or friends who can support them. Making decisions this way is often called supported decision-making. Many investment advisors are either less familiar, or have less experience, with taking instructions from a client who uses supported decision-making. Advisors may worry about whether the client is being influenced by the supporter, or if the client really understands the decisions being made.

Unlike formal substitute decision-making relationships made under powers of attorney, for example, formal supported decision-making agreements are only recognized in a limited number of Canadian jurisdictions. Consequently, people from the communities noted above could lose their right to continue making investment decisions due to lack of understanding or recognition of supported decision-making arrangements. If, for instance, guardianship (or committee of estate) is required before an advisor will take instructions, the adult may experience an unnecessary loss of decision-making autonomy and may be forced to go through a public declaration of their incapacity. Many adults with cognitive disabilities function well in their community, sometimes with the assistance of supported

decision-making. These relationships can support investor activities as well. But people may use supported decision-making informally. Currently, a lack of knowledge in the financial sector, and uncertainty about the legal relationships involved, can create a roadblock to robust use of supported decision-making in this context.

A starting point for this project was to consider the factors that influence a person’s capacity to make investment decisions, and the opportunities to support their continued involvement in that process. The 2017 Report on Vulnerable Investors commented that, for older adults and their supporters, two key risks associated with investment decision-making can arise:

- 1. elder financial abuse and undue influence; and
- 2. diminished capacity.³⁹

Younger adults living with early onset dementia and people who identify as living with an intellectual or developmental disability may face similar risks.

This study paper examines how financial abuse or undue influence may apply in the context of substitute or supported decision-making for investment decisions. We are interested in how the investment advisor can recognize when a client’s diminished capacity may be affecting their ability to make investment decisions, and to consider how they can incorporate supportive practices for a client from a supported or substitute decision-maker. We are also interested to learn how instructions can be taken in this context, and in compliance with investment regulatory rules. The goal of the Inclusive Investing project is to better understand the law, policy, and practice in this area. By gathering input from people with lived experience, investment professionals and others about the use of supported and substitute decision-making in the investment context, the data can be used to identify and respond to the unique knowledge and practice gaps for the people involved.

As people age and get closer to retirement or begin to pursue other interests, their decisions change about how to manage and use money to fulfill those goals. A person’s ability to choose how to invest and spend their money later in life creates a continued sense of self-fulfillment and autonomy. Sometimes, the people who support older adults may lose sight of the older adult’s right to continue to plan, or meaningfully take part in the planning of their financial future. A person may also lose the opportunity to exercise their right to ask questions about their investment portfolio and products, to receive information about and consider options for investing money in different ways, to instruct their investment advisor on how to manage their money, and other important planning discussions.

Similar loss of decision-making opportunities, although with important distinctions, may apply to people who identify as living with an intellectual or developmental disability. As a youth moves into adulthood, and subsequently becomes eligible to take over management of their RDSP investments, they too have a right to preserve their decision-making autonomy. People aging with an intellectual or developmental disability also need opportunities and support to build their investment knowledge and decision-making skills, including understanding their options, managing risk when investing, and setting important life goals tied to the RDSP, among others.

In this project we focus on people living with dementia and people who identify as living with an intellectual or developmental disability because:

- Understanding when and how aging may impact a person’s capacity to make investment decisions continues to be a significant issue across Canada;
- People living with dementia or an intellectual or developmental disability share similar and distinct experiences with stigma and discrimination in the financial and investment services industry about their ability to make financial decisions;
- Investment advisors and supporters face practical challenges in providing support to, and receiving instructions from, people living with dementia or an intellectual or developmental disability;
- Lawyers and advocates are concerned about potential liability and risk issues that may arise when receiving instructions from clients using formal or informal supported decision-making to manage their financial affairs;
- Although the United Nations *Convention on the Rights of Persons with Disabilities*⁴⁰ provides a starting point for countries who signed the convention to support autonomy in financial decision-making, research reveals that many different interpretations and approaches to implementing the UN CRPD principles still exist. This leads to a lack of clarity and misunderstandings over what supported decision-making means, and how it can be used in the investment decision-making process as an alternative to full-scope substitute decision-making; and
- The right to be supported to continue making decisions about a person’s financial future is a shared value within the two communities we studied.

The next section summarizes the research and statistical data that confirms the need for further study on how to support people living with dementia or an intellectual or developmental disability in their investment decisions.

1.1.2 Aging, Memory, and Dementia

It is common to experience age-associated memory changes as we age. Many people, regardless of their age, experience periods of forgetfulness—misplaced keys, missing ingredients from a quick grocery run at the end of a busy day, laundry left in the washer, failure to return a phone call or text message, and so on. In a world where smartphones have all but eliminated the need for an address book, forgetting someone’s phone number is the norm. Absent any medical diagnosis for the change, these memory glitches could be an “age-associated memory impairment, which is considered a part of the normal aging process.”⁴¹ For the most part, this type of memory loss is not cause for alarm.

But there are important differences between age-associated forgetfulness and when cognitive or other physical changes are the cause. These changes can lead to challenging situations when, for example, we forget our everyday routine, names of close family and friends, whether we took our medication, whether we ate breakfast,⁴² when we forget where we live or where we are going, or when familiar places suddenly seem strange. This type of memory loss may have less to do with age, and more to do with cognitive changes caused by dementia.⁴³

Dementia Numbers in Canada

Statistics Canada census data indicates that, as at July 1, 2019, more than 6.5 million Canadians—or 17.5 per cent of Canada’s population—are aged 65 and older.⁴⁴ This number is expected to continue to grow rapidly, with an estimated one in five Canadians reaching age 65 and older by the year 2024, making up to 25 per cent of the total Canadian population by 2036.⁴⁵

Recent data from the Alzheimer Society of Canada website notes that 564,000 Canadians are currently living with dementia.⁴⁶ This number is expected to rise by 60 percent, to 937,000 Canadians by the year 2034.

Dementia Numbers in British Columbia

British Columbia, and specifically Vancouver Island, reportedly has “one of the fastest growing populations of seniors in Canada.”⁴⁷ In 2016, BC had an estimated 848,985 people aged 65 years and older.⁴⁸ As of July 1, 2019, that number grew to 948,062, or 18.7 per cent of BC’s total population (5,071,336 people).⁴⁹ It is estimated that, by the year 2038, between 24 and 27 per cent of BC’s total population will be aged 65 years and older.⁵⁰

According to the Alzheimer Society of B.C., “[a]lmost 40 per cent of people over the age of 65 experience some form of memory loss.”⁵¹ Approximately 70,000 people in BC currently live with some form of dementia.⁵² It is expected that this number will increase to 82,000 by 2024.⁵³ It is also clear that, while not necessarily an inevitable outcome of aging, dementia poses “one of the biggest health challenges for BC, elsewhere in Canada and around the world.”⁵⁴

Dementia Numbers in Ontario

Older adults are also the fastest growing age group in Ontario. In 2016, 16.4 percent of Ontario’s population was aged 65 years or older.⁵⁵ By 2018, that number grew to 16.9 per cent, or 2.4 million people. The number of older adults aged 65 and over is estimated to almost double to 4.6 million, or 23.4 per cent, by 2046.⁵⁶

In 2016, the Ontario Minister of Health and Long-Term Care reported that approximately 228,000 Ontarians were living with dementia at the time.⁵⁷ As the population continues to age, it was expected that number would rise to 255,000 people in 2020, and over 430,000 by 2038.⁵⁸

1.1.3 Stigma, Dementia, and Financial Decision-Making

Memory loss from dementia has a significant and negative impact on a person’s ability to think clearly, orientate themselves, understand, and process information.⁵⁹ People living with dementia also have difficulty with “calculating, judgment and executive function (a mental process that helps us plan, organize, remember instructions and focus our attention)”.⁶⁰ Societal and institutional responses to dementia also impacts a person’s ability, or desire, to participate in their decisions.

Research confirms that stigma and dementia go together.⁶¹ A person living with dementia may suffer in silence when they experience societal stereotypes or assumptions about their financial decision-making

capabilities. They may be hesitant to share their feelings because of negative perceptions people have about dementia. If a person living with dementia “internalizes these assumptions”, they risk losing access to necessary services and supports to continue participating in decisions that are important to them.⁶² Feelings of embarrassment can drive older adults to “underuse their social support network or [may] deny requiring assistance.”⁶³ In a way stigma, like dementia, can be its own silent disease. If a person living with dementia is increasingly ignored or dismissed, they can risk losing their decision-making autonomy.

Financial decision-making is arguably one of the most important aspects of a person’s life as they age because it can determine the quality of life they will have. Someone living with dementia may have spent most of their adult life managing their finances. The prospect of losing this right because of presumptions about a person’s ability to continue making these decisions can cause a person to feel withdrawn, pushing them further away from participating in the decisions that impact their financial well-being.⁶⁴

Recent research reveals that “arguably people living with dementia are particularly at risk of exclusion from decision-making, as compared with other older people, because myths and assumptions about dementia are linked to abilities presumed integral to decision-making, such as recall and judgment.”⁶⁵

This project explores the impact dementia can have on financial decision-making and, more specifically, investment decision-making. It discusses the conceptual and practical challenges raised by investment advisors, regulators, legal professionals, supporters, and people receiving support over how to facilitate supported decision-making while managing the risk for potential undue influence, financial abuse, or liability issues. This project also reveals the ideas and opportunities learned from the research and consultations to help the investment sector, supports, and financial service providers to support a person living with dementia to continue participating in their investment decisions.

1.1.4 The UN Convention on the Rights of People with Disabilities

On December 13, 2006, the UN adopted the *Convention on the Rights of Persons with Disabilities* and its Optional Protocol.⁶⁶ The UN CRPD is a legally binding agreement between UN Member States to uphold, promote, and protect the rights of people who identify as living with a disability. The UN CRPD calls on countries who signed the CRPD to recognize and respect the rights of people living with a disability to exercise “their individual autonomy and independence, including the freedom to make their own choices.”⁶⁷ The Optional Protocol to the UN CRPD sets out the steps for people to raise concerns about alleged violations of their rights, and an inquiry process to investigate allegations of grave or systemic violations by countries who signed the CRPD.⁶⁸

The UN CRPD is guided by eight principles:

- 1. Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons;
- 2. Non-discrimination;
- 3. Full and effective participation and inclusion in society;

- 4. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- 5. Equality of opportunity;
- 6. Accessibility;
- 7. Equality between men and women; and
- 8. Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.⁶⁹

Embedded in Article 12 of the UN CRPD is a requirement that countries who signed the CRPD “take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.”⁷⁰ Although the UN CRPD does not specifically define what support means in this context, the Office of the High Commissioner for Human Rights offered the following as a starting point:

Supported decision-making can take many forms. Those assisting a person may communicate the individual’s intentions to others or help him/her understand the choices at hand. They may help others to realize that a person with significant disabilities is also a person with a history, interests and aims in life, and is someone capable of exercising his/her legal capacity.⁷¹

On March 30, 2007, Canada signed the UN CRPD. In 2018, almost 12 years later, Canada signed the Optional Protocol, but retained the right to continue using substitute decision-making, along with its regulations and safeguards, in appropriate circumstances.⁷² As a signatory to the Convention, Canada is required to submit regular reports to the UN CRPD Committee on implementation of its terms.⁷³

For this study paper, and in the context of investment decision-making, two Articles from the UN CRPD stand out.

Article 12—Equal Recognition Before the Law

Article 12 of the UN CRPD says that people living with a disability “enjoy legal capacity on an equal basis with others in all aspects of life.”⁷⁴ Put more simply, Article 12 aims to preserve the right of all people to retain their legal capacity to make decisions, regardless of disability. A key obligation of countries who signed the CRPD is to “take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity”.⁷⁵

UN CRPD Article 12—Plain Language Meaning

- People living with a disability are to be respected by the law like everyone else;
- Everyone should have equal opportunities. People living with a disability have the same right to make their own decisions about important things as everyone else;
- People living with a disability should have the proper support they need when making decisions;

- If a person living with a disability needs someone else to speak on their behalf, there should be rules to make sure this is done properly;
- People living with a disability have equal rights to:
 - Own or receive property;
 - Control their own money;
 - Borrow money;
 - Not have their homes or money taken away from them.⁷⁶

One of the leading tensions within the legal and investment communities centres around how to balance a need to foster support for people to exercise decision-making autonomy with professional and ethical obligations to address suspected undue influence or financial abuse. The preference of both communities is to strike a suitable balance between these two, often competing, goals. The duty to apply safeguards when facilitating support for people to exercise their legal capacity derives from UN CRPD Article 12(4), as follows:

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.⁷⁷

Article 19—Living Independently and Being Included in the Community

Article 19 of the UN CRPD talks about the “equal right of all persons with disabilities to live in the community, with choices equal to others”.⁷⁸ To achieve this, people living with a disability⁷⁹ must have the freedom to access all necessary supports to meaningfully engage with their community, to support inclusion, and to secure equal access to services and facilities.⁸⁰

Article 19 of the UN CRPD aims to protect and preserve the autonomy and decision-making rights of people living with a disability through supported decision-making. To foster independence, people need access to necessary information and support mechanisms to meaningfully participate in life decisions.

Canada ratified the UN CRPD on March 11, 2010. However, Canada included a declaration and reservation that leaves the option open to continue using a substitute decision-making approach to inclusion:

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 [...].*⁸¹

1.1.5 Disability and Financial Decision-Making

According to the 2017 Canadian Disability Survey, one in five people—approximately 22 per cent (6.2 million people) of the estimated 28 million Canadians aged 15 and older—identify as living with one or more disabilities.⁸² It is estimated that, in Canada, the prevalence of people living with an intellectual or developmental disability ranges from 0.7 to 3 per cent.⁸³

According to the BC Developmental Disability Association research on older adults, roughly 50,000 people identify as living with an intellectual or a developmental disability aged 45 to 64, and approximately 11,000 aged 65 to 74.⁸⁴

People who identify as living with an intellectual or developmental disability may also face age-related physical or mental-health challenges “such as depression, cognitive decline and the effects of using multiple medications, each with its own side effects.”⁸⁵ Research reveals that “25 per cent of people with Down syndrome aged 40 and over will show signs of early-onset dementia, and by the time they reach 60, this increases to 65%. People with Rett syndrome, Fragile X syndrome, Williams syndrome and other disorders are also at high risk for early-onset dementia.”⁸⁶ A person’s ability to make complex financial or investment decisions can also be impacted by “nonprogressive origins such as psycho-social or developmental disabilities, brain injury or Post-Traumatic Stress Disorder.”⁸⁷

The UN CRPD states that everyone, regardless of disability, has the right to make decisions about all aspects of their lives. This right extends to financial and investment decisions. People living with an intellectual or developmental disability may receive federal or provincial government disability benefits in addition to employment income they may earn. They may also have a Registered Disability Savings Plan (RDSPs) for long-term savings. The importance of protecting the rights of people living with a disability to exercise choice, and to participate meaningfully in managing their RDSP investments, cannot be overstated. A person’s self-identity and independence are often defined by opportunities to be included in life decisions.

Not unlike people living with dementia “[p]eople with intellectual disabilities are particularly at risk of falling under one of the various forms of substitute decision-making because their disability is equated with limitations in mental functioning and associated adaptive behaviors and activities of daily living.”⁸⁸ People who identify as living with an intellectual or other cognitive disability also “find that third parties often have a preference to communicate with and accept decisions from people who accompany the person” due to similar presumptions about their decision-making abilities.⁸⁹

Community agencies, advocacy groups, and academics have developed many useful resources to support people living with dementia or an intellectual or developmental disability to exercise their decision-making rights and autonomy when accessing services. This project studies how people within these communities receive support to make investment decisions. The overarching project goal is to better understand how decisions are made in this context, with formal or informal supported or

substitute decision-making practices. This study paper explains what we learned from the research and consultation about what is or is not working, and what can be done to facilitate support for investment decision-making. The research and findings from this project will benefit the following groups:

- People living with dementia and their supporters;
- People who identify as living with an intellectual or developmental disability and their supporters;
- Investment sector professionals;
- Legal practitioners and academics; and
- Community agencies and advocates.

1.2 PROJECT DEVELOPMENT

This project on *Inclusive Investing* examines the law, policy, and practice of supported decision-making in the investment context. Often, service providers may assume that people living with dementia or an intellectual or developmental disability cannot be supported to continue making investment decisions. Reasons behind these assumptions vary, but include concerns about the following:

- protection of an investor’s privacy and confidentiality;
- professional responsibility to mitigate risks associated with potential undue influence and financial abuse; and
- lack of familiarity or clarity on the different approaches and legal options to incorporate support into the investment process.

Legal and investment advisors share competing goals of wanting to respect individual rights to decision-making autonomy and engagement alongside professional and ethical obligations to ensure a person is not at risk for financial abuse or undue influence. This challenge creates a difficult roadblock for legal and investment service providers to overcome. This project considers how investors from the dementia and intellectual or developmental disability communities use, or try to use, supported decision-making to make investment decisions. This project also reviews some of the challenges faced by the legal and investment community in attempting to facilitate supported decision-making in this context.

The key research question of this project is:

How can Canadian investment advisors, adults living 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?

Below is a brief outline of background research that informed the initial scope and direction of this project.

Understanding the Lived Experiences of Supported Decision-Making in Canada (2014)

In 2014, the Canadian Centre for Elder Law (CCEL) published a report examining supported decision-making in Canada from the perspective of people with lived experience.⁹⁰ The report reviewed supported decision-making law in Canada, and outlined research and consultation findings from key informant interviews from the following community and professional sectors:

- Government
- Offices of the Public Guardian and/or Trustees
- Lawyers
- Advocates
- People with lived experience (adults living with capacity challenges and their supporters or legal decision-makers)
- Members of non-profit organizations.⁹¹

Although not specifically focused on investing, the research uncovered some important factors that hinder more widespread use and acceptance of supported decision-making, including:

- **Representation agreements:** Although generally accepted in BC as the formal recognition of a person’s right to make decisions with support, service professionals suggested they were “problematic”, especially concerning the level of capacity an adult would need to sign this document;⁹²
- **Misuse of formal supported decision-making agreements:** participants also reported that “in some people’s hands they [representation agreements] are a more palatably branded version of substitute-decision-making [...] used to overprotect”;⁹³
- **Concerns over liability and decision-making responsibility:** lawyers and other professionals expressed a lack of clarity on where both liability and decision-making responsibility rests—with the adult being supported or with the supporter;⁹⁴
- **Tendency to use substitute decision-making practices for older adults:** although it was recognized that older adults could benefit from supported decision-making in their lives, research participants revealed that “there is a strong tendency to move to substitute decision-making practices for this group.”⁹⁵ Reasons include the ease and convenience of preparing and using substitute decision-making legal instruments, time pressures for decisions, or lack of people who can help someone make decisions as time goes on.
- General lack of understanding over what supported decision-making means and looks like in practice.

The report suggested that further research would help to clarify the meaning and practice of supported decision-making in Canada. It also called for consideration as to how law and policy, across several service sectors, can better respond to concerns about privacy and liability, while respecting the decision-making rights and autonomy of people living with dementia or an intellectual or developmental disability.

Almost six years after the 2014 study was published, research for the *Inclusive Investing* project confirms that legal and investment service professionals continue to struggle with the same concerns today. Chapter 7 of this study paper outlines the issues and barriers faced by members of the legal and investment communities who work with informal and supported decision-making in practice.

Report on Vulnerable Investors: Elder Abuse, Financial Exploitation, Undue Influence and Diminished Mental Capacity (2017)

The 2017 Report on Vulnerable Investors studied the vulnerable investor population with a view to the legal, policy, and regulatory options to address situations of financial abuse, undue influence, and financial exploitation. Research began with stakeholder consultation on the following issues:

- Key challenges vulnerable investors and their representatives face in the investment context;
- The existing regulatory regime and the challenges it presents to investors who want to take protective action;
- Existing or emerging best practices in leading jurisdictions; and
- Case studies illustrative of vulnerable investor scenarios; and
- consultation questions.⁹⁶

The report highlights that people living with dementia, or people who identify as living with an intellectual or developmental disability, face two important risks when investing, namely: 1) financial abuse and undue influence, and 2) issues related to diminished capacity.⁹⁷ Factors contributing to this risk include, but are not limited to:

- Low financial literacy;
- Heavy reliance on the advice and recommendations from investment advisors or financial service representatives;
- Increasing degree of product complexity and proliferation, which makes it difficult for people, regardless of their investment knowledge or experience, to obtain adequate information in order to make an informed investment decision; and
- Decline or limitations in financial reasoning skills for people living with certain forms of dementia or cognitive or developmental disabilities.⁹⁸

The results of the research revealed opportunities for the following:

- Better understanding and appreciation for the role of supported versus substitute decision-making is needed among investment professionals;
- Improved training and education for investment advisors on how Alzheimer’s, other related dementias, or cognitive disabilities can influence a person’s financial decision-making abilities;
- Research and resources that clarify how investment regulators and advisors can enhance decision-making participation of people from these communities “to be supported and empowered for their own personal and financial self-determination”;⁹⁹

- Development of education and practices that improve client understanding and awareness of both supported and substitute decision-making tools; and
- Plain language materials on elder financial literacy, and abuse response and prevention topics that contain “evidenced-based consumer-friendly information in formats which are easily accessible and usable.”¹⁰⁰

Legal Capacity, Decision-making and Guardianship: Final Report (March 2017)

From 2012 to 2016, the Law Commission of Ontario (LCO) conducted extensive research and consultation into the province’s legal capacity, decision-making and guardianship laws.¹⁰¹ The 2017 LCO Report assessed the legal capacity and guardianship regime with a focus on what was working, and opportunities for improvement.¹⁰² The report also examined the strengths and weaknesses of Ontario’s law and policy, guided by research and consultation questions that considered:

- Whether the existing legal system reflected contemporary law and values;
- Whether the existing legal system reflected contemporary needs;
- Whether the current practice was working on the ground; and
- Whether the legal protection mechanisms currently in place were adequate and accessible.¹⁰³

Currently, Ontario’s laws on capacity, decision-making and guardianship only recognize formal substitute decision-making. The report examined both the challenges and opportunities to consider how support for decision-making could be incorporated into existing substitute decision-making law and policy.¹⁰⁴ Specifically, the report identified:

- The diversity of needs and goals among persons directly affected and notes the potential benefits of supported decision-making approaches to meet the needs of some individuals and some communities;
- New processes, tools and legal instruments to meet these needs; and
- The need for ongoing pilots and evaluation of any new models or approaches.¹⁰⁵

The report includes recommendations to adopt human rights and accommodation practices, and to develop pilot projects on autonomy-enhancing decision-making practices alongside continued monitoring and study of emerging practices and laws.¹⁰⁶ Report findings also consider:

- Law reform that would enable people to make support authorizations for day-to-day decision-making needs; and
- Development of a statutory framework for network decision-making.¹⁰⁷

Under Ontario’s substitute decision-making framework, the report suggests that opportunities exist for reform and initiatives to:

- Develop and pilot new approaches to decision-making;
- Improve the quality and consistency of capacity assessments;
- Enhance the clarity and accountability of powers of attorney;

- Improve rights enforcement and dispute resolution;
- Improve external appointment processes;
- Develop new roles for professionals and community agencies;
- Improve public education and information; and
- Improve data collection, reporting, and evaluation.¹⁰⁸

1.2.1 Project Scope

Bearing in mind the various legal, policy, and practice gaps identified in the research outlined above, the goal of this project was to examine the use of supported decision-making in the investment context. The concept of supported decision-making is a difficult one to grasp, primarily because there is no single, universal definition for it. Consequently, there are different approaches and understandings of how support is used to foster decision-making autonomy. Also, the complex and multi-faceted investment landscape only adds to the lack of clarity on how to foster support for investment decision-making in a way that is legally, ethically, and practically possible.

Another complicating feature highlighted by the research is that Canada’s legal landscape on supported versus substitute decision-making is as varied and diverse as the country itself. Aside from BC, only a handful of Canadian jurisdictions formally recognize some form of supported decision-making.¹⁰⁹ A full understanding of how supported decision-making can work for investment decision-making requires review of the law and policy of jurisdictions where it is used both formally and informally. For this project, we chose BC and Ontario as comparator jurisdictions because Ontario does not currently have a statutory framework or model for formal supported decision-making. What we learned from past studies, and in speaking with key informants for this project, is that support in Ontario occurs formally through substitute decision-making arrangements, and on an informal basis.

Questions Guiding the Research and Consultation

The following key questions guided the scope of the project research and consultations:

1. What are the experiences of people living with dementia or an intellectual or developmental disability who use, or attempt to use, support to make investment decisions?
2. What safeguards exist, or are needed, to facilitate supported decisions for investing?
3. Do investment professionals have the knowledge and tools required to provide opportunities to people living with dementia or an intellectual or developmental disability to use support in the investment process?
4. What are the challenges or barriers to using support to make investment decisions for everyone involved?
5. What education, resources, or supports do supporters have to facilitate using supported decision-making in this context?
6. What are some ideas or opportunities that could enhance the use of support to make investment decisions?

This project examines the current legislative and practice landscape for supported decision-making in BC, as against the application of support and accommodation in the context of formal, substitute decision-making in Ontario. This study paper also considers, where applicable, relevant federal legislation that governs or addresses the following:

- Supported and substitute decision-making for financial and investment decisions;
- Legal and mental capacity;
- Privacy and confidentiality issues related to the advisor/client relationship;
- Regulation of investment firms and their representatives; and
- People living with dementia, or an intellectual or developmental disability.

This project considers whether the formal and informal practice of supported decision-making is, or is not, working for Canada’s vulnerable investor population. More specifically, the project considers what is being done by the investment community, the legal profession, community agencies, and supporters to encourage, or inhibit, this practice for people receiving support. The project scope includes a review of:

- The regulatory and policy regime for the investment sector (federally and provincially);
- National instruments, standards of conduct, practice guidelines, compliance rules, and training or education materials developed by national and provincial regulatory bodies on working with vulnerable investors;
- Information and resources developed to educate older adults or the disability community about investing; and
- Resources developed by people with lived experience, and their supporters, from various community organizations to educate and promote the practice of supported decision-making.

To achieve a comprehensive review of all facets of the investment relationship, project consultation (outlined below) comprised a large part of project research. CCEL staff selected key informants for this project who could share information, subject-matter expertise, and lived experiences to capture a holistic discussion of the issues involved.

It was beyond the scope of this project to make law reform recommendations to clarify or enhance legal recognition for this practice. Instead, the research and consultation findings are used to identify the following:

- The type of support that enables people living with dementia or an intellectual or developmental disability to make investment decisions;
- Barriers or roadblocks to support in the investment decision-making process;
- Challenges, concerns, or issues within the investment and legal community around the use of formal or informal support;
- Opportunities and ideas to facilitate the use of support in the investment relationship; and

- Education or training opportunities for investment advisors, people receiving support, and supporters to promote respect for the rights of people living with dementia or disability to meaningfully engage in investment decision-making.

1.2.2 British Columbia and Ontario as Comparator Jurisdictions

British Columbia is internationally recognized as one of the first jurisdictions to introduce a statute that enables adults to create formal supported decision-making relationships, namely the *RAA*.¹¹⁰ Over the past two decades, several provinces and one territory have introduced legislation that allows a person to be formally named (by a document or appointed by the court) to support or assist an adult to make decisions. In BC, we have a requirement that a guardian or committee foster the independence of the adult, and involve them in decision-making, to the greatest extent possible.

Ontario, like other common law jurisdictions, takes an approach to legal capacity and decision-making under a substitute decision-making framework. Currently, there is no formal, legal recognition for supported decision-making in Ontario. But, the 2017 LCO Report notes that the province continues to explore supported or network decision-making models. In addition, many of the regulators who need to know how to recognize supporters, and provide investment services to adults receiving support, are in Ontario.

In recent years, the social model of disability, which locates disability within society rather than the person, and focusses on social and environment[al] barriers to inclusion, is more widely accepted. As well, human rights approaches have continued to grow in influence both internationally and domestically. Thus, it is important to continue exploring the evolution of the substitute decision-making model, and the potential for alternatives. The term ‘supported decision-making’ is often used to refer to these alternatives.”¹¹¹ This study paper considers how supported decision-making is, or can be, used under Ontario’s substitute decision-making framework as a steppingstone to further research in this area.

1.2.3 Focus on Dementia and Intellectual or Developmental Disability

This project focuses primarily on investors who are living with dementia or an intellectual or developmental disability. Our research and consultation activities revealed that other disabilities, such as the impacts from mental health, can affect an adult’s ability to make investment decisions.¹¹² Limitations on project scope prevented further research or consultation with members from other disability communities. However, preliminary research suggests that the work of this project may be relevant to people from different disability communities. There may be future opportunities for focused consultation and research on how supported decision-making is used in different disability communities.

1.2.4 Investment Activities not Covered by this Project

This project, funded by a grant from the Law Foundation of Ontario Access to Justice Fund, involved extensive comparative legal research on supported decision-making in the investment context, inter-related areas of the law, and key informant consultation. The research and consultation focused 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 are not examined.

1.3 PROJECT METHODOLOGY

1.3.1 Project Leadership

The CCEL led this project with support from our project partners, the Alzheimer Society of B.C. and Inclusion BC. CCEL project staff performed all legal and social science research and project management tasks. Staff scheduled and led all key informant interviews and focus groups, wrote this study paper, and developed the suite of tools. CCEL staff also developed research content, memoranda, project timeline materials, presentations on research findings, and meeting agendas to support each of the five Project Advisory Committee meetings. CCEL staff, the Alzheimer Society of B.C., and Inclusion BC recruited supporters and adults receiving support from communities in BC, organized, and attended the group sessions facilitated by CCEL project staff. ARCH Disability Law Centre (Ontario) also helped to recruit, organize, and facilitate a consultation interview at its offices.

Throughout the project, CCEL project staff and Project Advisory Committee members worked together to raise awareness of the project. This included creating opportunities for publishing consultation posters and articles on project-related topics, and introducing project staff to interested groups and individuals.

1.3.2 Project Advisory Committee

Like many CCEL projects, an interdisciplinary Project Advisory Committee provided ongoing guidance on research and consultation methodology, connected staff to key informants and stakeholders, and raised awareness of emerging initiatives underway within the investment and legal community on the issues explored in this project. Committee members specifically supported CCEL project staff by:

- Suggesting key informants to participate in project consultation;
- Identifying topics to cover as part of project research;
- Reviewing consultation data, draft study paper, and tool development plan;
- Suggesting conferences and other avenues for sharing project findings; and
- Identifying key agencies or individuals to support knowledge mobilization of the study paper and tools.

Committee members also shared their subject-matter expertise and experience and represented a diverse range of people from various stakeholder groups and people with lived experience. All committee members were volunteers and contributed a significant amount of time to the project.

The Project Advisory Committee members were:

- **Jim Emmerton—Chair**, Senior Fellow of CCEL (British Columbia)
- **Tim Ames**, Former Executive Director, Plan Institute (September 2018 to November 2019)
- **Lauren Bates**, Lawyer (Ontario)
- **Emily Clough**, Lawyer, Clark Wilson LLP and BCLI/CCEL Board of Directors Chair (British Columbia)

- **Stephanie Debisschop**, Executive Director, Plan Institute (January 2020 to completion)
- **Kurt Goddard**, Director of Policy and Program Operations, Canadian Association for Community Living
- **Ken Gracey**, Manager, Investor Education and Engagement, British Columbia Securities Commission
- **Mario Gregorio**, Person living with dementia (British Columbia)
- **Robert Lattanzio**, Executive Director, ARCH Disability Law Centre (Ontario)
- **Alison Leaney**, Provincial Coordinator, Vulnerable Adults Community Response, Public Guardian and Trustee of British Columbia
- **Barbara Lindsay**, Interim CEO, Alzheimer Society of B.C.
- **Catherine Ludgate**, Manager, Microfinance, VanCity Credit Union (PAC member from August 2018 to June 2019)
- **Marian Passmore**, Senior Advisor, Investor Experience, Ontario Securities Commission (September 2018 to January 2020)
- **Krystal Renschler**, Community Investment Portfolio Manager, VanCity Credit Union (British Columbia)(August 2020 to completion)
- **Karla Verschoor**, Executive Director, Inclusion BC (August 2020 to completion)
- **Eleanor Wong**, Community Investment Portfolio Manager, Community Business & Investment Department, VanCity Credit Union (British Columbia) (February 2019 to July 2020)

1.3.3 Consultation Process

CCEL project staff applied a qualitative inquiry approach to the research and consultation. Qualitative research seeks to understand the ‘why’ and ‘how’ of human behaviour, and consider factors such as cultural, social, or legal practices that impact behaviour or experience. The goal in this project is to understand how people living with dementia or an intellectual or developmental disability receive support to participate in the investment process. Topics explored during our consultation process included:

- Knowledge and experience with investment decision-making;
- Experience providing or receiving support to make investment decisions;
- Observations of the legal, policy, and social dynamics among the people involved in the investment relationship;
- Perceptions, attitudes, and assumptions that inform the way people interpret, apply, and respond to the legal, policy, and practice issues; and
- The law, policy, tools, and educational resources available to people who participate in, or assist with, the investment decision-making process.

Because the goal of the research was to better understand how support is used from the perspectives of the people involved in the investment process, the project scope evolved and became more clearly defined in the early stages of the research and consultation. This approach helped to define our target

audiences for the research, while remaining open to achieve as complete an understanding of the issues as possible.

The primary qualitative research method used for this project was in-depth, one-on-one key informant interviews. We also held several group interviews with two or more people, and one focus group. This approach ran alongside staff review of legislation and legal and social science academic literature reviews. We also examined resources and tools developed by various investment and community organizations in Canada and internationally.

The consultation activities for this project included:¹¹³

- **Key informant** interviews with the following:
 - a. **People with Lived Experience**—adults receiving support (N = 11)
 - b. **People with Lived Experience**—supporters (N = 9) ¹¹⁴
 - c. **Investment advisors** who service people living with dementia and families supporting people living with intellectual or developmental disabilities (N = 8);
 - d. **Investment industry regulators** (N = 9);
 - e. **Government, public, or investment policy representatives** (N = 19);
 - f. **Academics (legal and social science)** (N = 8);
 - g. **Lawyers** (N = 17);
 - h. **Community agencies and advocates** (N = 14);
- **Focus group** with members of Inclusion BC—adults receiving support and supporters (events = 1);¹¹⁵
- **Conference presentations** where we introduced the project, discussed the legal, regulatory and social issues, and held a question-and-answer session offering practitioners (social workers, lawyers, investment advisors, financial planners, service delivery professionals, and people with lived experience) an opportunity to identify their concerns and ideas about the use of supported decision-making in the financial or investment context (events N = 3; N = 127 attendees);
- **Canadian Bar Association (CBA) BC Survey** of members across the province (N = 60);¹¹⁶ and
- **Society of Notaries Public of BC Survey** of notaries across the province (N = 68).

From the data gathered through in-depth consultation interviews, and comparative research, CCEL staff categorized the information into major themes used to organize the findings in Chapters 7 and 9 of this study paper.

Key Informants

Most consultation interviews were conducted by telephone with one interviewee. A total of 15 group interviews, comprised of two or more people, were held by phone or in-person.

The people we interviewed hold diverse positions within government and other policy offices, including the First Nations Health Authority. Interviews included people working as:

- Executive Director
- Chief Executive Officer
- Managing Director
- Information Support Officers
- Program Advisor
- Affiliate Scientist/Physician
- Deputy Public Advocate
- Vice President and Chief of Policy
- Advocate
- Assistant Public Guardian
- Manager of programs
- Policy advisor or analyst
- Director of Operations
- Provincial Coordinator
- Director, Public Affairs
- Vice-President Compliance and Chief Compliance Officer
- Vice President Strategic Initiatives

Interviews included people from the following practice sectors or organizations:

- Private practice
- Public legal advocacy, advice, education, or training
- Assisted living and long-term care
- Elder abuse and neglect education and training
- Public Guardian and Trustee
- Advocate for Service Quality
- Tax advisor
- Author and educator

A complete list of key informants interviewed for this project is included in this study paper at Appendix A.

Anonymous quotes shared by key informants and focus group participants appear throughout the study paper to help clarify the issues. Project staff have modified content only where needed to preserve anonymity. Staff also use broader sector categories than those summarized in Chapter 1 to illustrate the different communities we spoke to. Quotes do not express the views of the CCEL. People quoted are identified by sector category or role to contextualize their comments without compromising their

anonymity. People who identified as belonging to more than one category (e.g. investment professional and supporter) have been assigned a category as it relates to the context of their quote.

Focus Group

A larger focus group comprised of people receiving support, and their supporters, was held in New Westminster in March 2019 with the support of Inclusion BC. Participants were invited, along with their caregivers, to participate in an open discussion about how they use support to make financial decisions and, more specifically, investment decisions.

Community Presentations

CCEL staff participated in several presentations over the life course of the project to raise awareness of the legal issues and research topics, and to learn from larger groups of professionals and people with lived experiences. The ten presentations are listed below:

- 1. 2016 STEP Academic Community—portion of presentation and short paper
- 2. 2017 Canadian Elder Law Conference (November 2 and 3, 2017)—workshop
- 3. 2017 National Aging and Law Conference (October 2017)—presentation
- 4. Freedom55 Education Day (May 10, 2018)—presentation
- 5. 2018 STEP World Congress (September 13–14, 2018)—portion of presentation
- 6. 2018 World Congress on Adult Guardianship (October 23–25, 2018)—portion of presentation
- 7. 2018 Assistants Conference for the Wealth Management Industry (November 27, 2018)—presentation
- 8. 2019 Australian Guardianship and Administration Council Conference (March 14–15, 2019)—presentation
- 9. 2019 Inclusion BC Annual Learning Event (May 23, 2019)—presentation
- 10. 2019 Canadian Association on Gerontology Conference: Navigating the Tides of Aging Together (October 24–26, 2019)—poster presentation

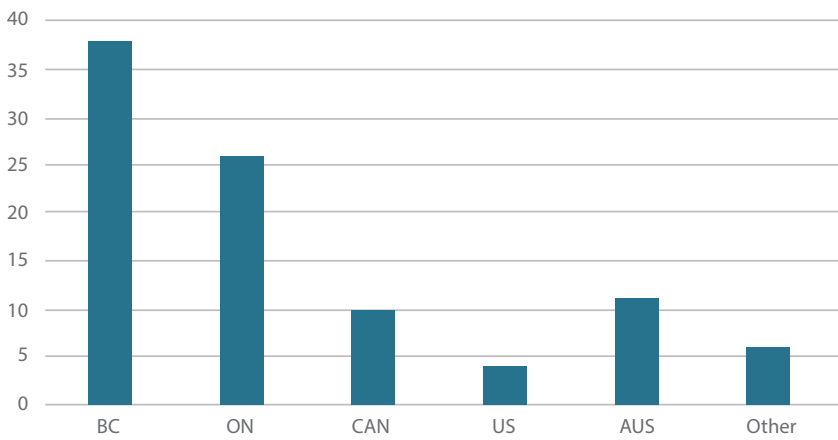
The community presentations helped CCEL staff connect with key informants and researchers from jurisdictions outside of Canada. This provided some comparative research content.

The jurisdictions captured in the consultation research include:

- Canadian federal government and provinces:
 - British Columbia
 - Manitoba
 - New Brunswick
 - Ontario, and
 - Saskatchewan

- United States;
- United Kingdom; and
- Australia.

Diagram 1: Key Informant Demographics (by Jurisdiction)



Survey of Lawyers and Notaries in British Columbia

An online survey distributed to lawyers and notaries in BC helped to gather statistics and information on the use of section 7 representation agreements in the province. The online surveys were sent to members of the Canadian Bar Association (BC Branch) and the Society of Notaries Public BC in October 2019. There were 128 survey respondents in total. Survey findings are summarized in Chapter 7 of this study paper.

1.4 VALUES INFORMING THIS PROJECT

All CCEL projects aim to apply a person-centered, human rights approach to the research, consultations, reports, and resources we develop. The work we do tries to reflect the values and principles of the communities we study. CCEL also recognizes that everyone, regardless of their needs or abilities, has the right to participate fully and meaningfully in how they want to live their lives. We understand that a person’s opportunity to exercise this right can be created or taken away by the attitudes, beliefs, or assumptions of the people or institutions that offer services to them.

Like the approach taken in our 2019 report Conversations about Care: The Law and Practice of Health Care Consent for People Living with Dementia in British Columbia [HCC Report], and guided by the values and missions of our two project collaborators, the Alzheimer Society of B.C. and Inclusion BC, this project applied the following three overarching principles to the research and tool development:

- Respect and recognition for the rights of people living with a disability to live free from discrimination;
- Respect for the rights of people living with dementia; and

- Support for inclusion in decision-making.

1.4.1 The Right to Live Free from Discrimination

Right to Equal Treatment

Section 15 of the *Canadian Charter of Rights and Freedoms*¹¹⁷ states that every person shares an equal right to live free from discrimination, regardless of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.¹¹⁸ This protection applies to government laws and programs across the country.

The *Charter* does not specifically define discrimination; but the courts describe it as:

[A] distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination [...]¹¹⁹

Andrews v Law Society of BC case created a two-part test for assessing whether a law discriminates against a person. First, the court must consider whether the law creates a distinction based on an enumerated or analogous ground, such as mental or physical disability.¹²⁰ Second, the court must be satisfied that the distinction, or differential treatment, creates a disadvantage by perpetuating prejudice or stereotyping against the person.¹²¹ The courts recognize that not all differential treatment will constitute discrimination. Equal treatment may require similar, or different, treatment in the circumstances.¹²²

To better understand how people living with a disability experience discrimination, we must consider the limitations or disadvantages that can arise in their every day lives. Social exclusion and lack of accommodation play an important role in whether a person is treated equally. For example, developing plain language or visual materials to communicate information or concepts can help to level the playing field for a person living with a disability that may impact their ability to read or process complex information.

In *Eldridge v British Columbia (Attorney General)*¹²³, the court stated that, to sufficiently preserve a person’s right to live free from discrimination, society must first recognize the true characteristics of a person’s disability that may inhibit their full participation in society. A key issue for the court to consider was whether failure by the government service provider to offer sign language interpretation services to deaf people violated their s 15(1) *Charter* rights.¹²⁴

Unlike people without hearing limitations, a person living with a hearing impairment has different communication needs when receiving and interpreting necessary information or when accessing access necessary services. Reasonable accommodation requires service providers to recognize that ensuring equal benefit and access to services for everyone requires effective communication.¹²⁵ As the court affirms, “where it is necessary for effective communication, sign language should not be viewed

as an ‘ancillary’ service. On the contrary, it is the means by which deaf persons may receive the same quality of medical care as the hearing population.”¹²⁶ Consequently, a service provider’s failure to take accommodate this requirement, in this case by way of sign language interpretation services, violates the s 15(1) rights of deaf people.¹²⁷ As La Forest J writes:

Exclusion from the mainstream of society results from the construction of a society based solely on “mainstream” attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them...It may be seen rather as a case of reverse stereotyping which, by not allowing for the condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment. It is recognition of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability.¹²⁸

Right to Life, Liberty and Security of the Person

Section 7 of the *Charter* states that “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”¹²⁹ Any interference with this right, in law or by government action, must have its basis in preserving the principles of fundamental justice.¹³⁰ For the purpose of this study paper, our analysis focuses on a person’s right to liberty under section 7.

The Supreme Court of Canada has held that a section 7 *Charter* right to liberty extends beyond a person’s right to be free from physical constraint.¹³¹ Liberty of the person includes personal autonomy to make “inherently private choices free from state interference.”¹³² Though not to be interpreted as an “unbridled freedom” over private choices, the court explains that:

the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence.¹³³

Godbout v Longueil (City) case examines whether a person’s right to choose where they want to live deserves protection under section 7. The court holds that protection of personal autonomy under section 7 ought to apply to decisions that “have a determinative effect on the very quality of one’s private life.”¹³⁴ Part of the court’s reasoning rests on the notion that decisions about where to live are often formed by “inherently personal characteristics”.¹³⁵ A person’s choice of residence is influenced by factors such as economic and social characteristics that go to “the very essence of what each individual values in ordering his or her private affairs.”¹³⁶ The court draws upon Canada’s declaration of the

*International Covenant on Civil and Political Rights*¹³⁷, and specifically Article 12(1) of the convention, to reaffirm a person’s fundamental right to choose their residence.

Arguably, we can apply a similar reasoning to other decisions that impact a person’s quality of life. For example, the HCC Report tells us that decisions about whether to refuse or accept health care treatment are closely connected to a person’s dignity and autonomy.¹³⁸ The case law tells us that, absent compelling reasons to the contrary, a person’s right to make decisions that reflect inherent “aspirations, concerns, values and priorities”, and that stand to greatly impact their quality of life, ought to be preserved.¹³⁹

Discrimination and Disability in Canadian Human Rights Law

Disability is included as a prohibited ground of discrimination under the *Canadian Human Rights Act (CHRC)*, among other human rights Acts.¹⁴⁰ Section 5 of the *CHRA* addresses discrimination in the context of how a person obtains, or is denied, access to a good, service, facility, or accommodation:

Denial of good, service, facility or accommodation
5 It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public
(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or
(b) *to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.*¹⁴¹

Missing from the *CHRA* is a definition of what disability means. If we look to the human rights codes of our comparator jurisdictions for this project, we find parallel recognition for the rights of people who identify as living with a disability.¹⁴²

British Columbia’s *Human Rights Code* includes mental and physical disability in its list of prohibited grounds; but with no corresponding definition. Instead, interpretation and application of the law is guided by the following:

Purposes
3 The purposes of this Code are as follows:
a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;
b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;
c) to prevent discrimination prohibited by this Code;
d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code;
e) to provide a means of redress for those persons who are discriminated against contrary to this Code.¹⁴³

What we glean from the stated purposes is that inclusion, free and full participation, understanding, and mutual respect for people living with a disability are fundamental to ensuring they live free from discrimination.

Ontario’s *Human Rights Code* provides a definition of disability that supports an inclusive and broad interpretation of the rights and protections:

Definitions re: Parts I and II
10 (1) In Part I and in this Part,
“disability” means,
(a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,
(b) a condition of mental impairment or a developmental disability,
(c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
(d) a mental disorder, or
(e) an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*; (“handicap”).¹⁴⁴

The Ontario *Code* definition builds on and expands BC’s outline by emphasizing that people are protected regardless of degree of disability, including people who live with a cognitive disability.

In working towards a definition of disability, the courts recognize that a person who is discriminated against because of a perceived or actual disability ought not to have to prove that they have an actual functional limitation.¹⁴⁵ Disability is not solely defined by actual physical limitations, but can manifest from “the attitudes of society and its members [...] In fact, a person may have no limitations in every-day activities other than those created by prejudice and stereotypes.”¹⁴⁶

Dementia and Disability

Before moving to the next section, it is important to note that “both professional and advocacy sectors have embraced the notion that dementia can be a disability [...]”.¹⁴⁷ We know that people living with dementia experience unfair stigma and social assumptions in ways that are similar and distinct to how people living with an intellectual or developmental disability experience them. Both groups share a common challenge—to overcome barriers that inhibit their ability to meaningfully take part in decision-making. Important lessons stem from the stories within each community over how to transform misperceptions into meaningful and collaborative conversations driven by curiosity, respect, and inclusion.

For clarity in this study paper, use of the general term disability is meant to collectively acknowledge and capture our dementia and intellectual or developmental disability community members. Where necessary, this study paper may discuss each community separately, to highlight unique attributes or challenges faced within each one.

1.4.2 Respect for the Rights of People Living with Dementia

This project recognizes that people living with dementia, and people living with an intellectual or developmental disability, share a fundamental right—to participate meaningfully in choices that affect their health, social engagement, and financial future. This approach not only supports CCEL’s commitment to inclusive research and consultation, but also Canada’s National Dementia Strategy.¹⁴⁸ The research and consultations for this project include the views and experiences of people living with dementia and were guided by the following commitments.

Canadian Charter of Rights for People with Dementia

People who live with dementia have the right, like everyone does, to make important life decisions. The laws recognize this to be true.¹⁴⁹ Unfortunately, and as symptoms take a stronger hold over their lives, people living with dementia may find it difficult to make these decisions without support. We also know that discrimination, stigma, and assumptions about a person’s ability, or inability, to meaningfully participate in life choices can make them vulnerable to losing these rights.

Adopting a human-rights approach, and with the help of an Advisory Group of people living with dementia, Alzheimer Society of Canada launched the Canadian Charter of Rights for People with Dementia.¹⁵⁰ The website states that “[t]he Charter defines seven explicit rights to empower Canadians living with dementia to self-advocate, while also ensuring that the people and organizations that support them know and protect their rights.”¹⁵¹ In the context of making investment decisions, this project recognizes that people living with dementia have the right:

- 1. To be free from discrimination of any kind.
- 2. To benefit from all of Canada’s civic and legal rights.
- 3. To participate in developing and implementing policies that affect [their] life.
- 4. To access support so that [they] can live as independently as possible and be as engaged as possible in my community. This helps [them] to:
 - a. Meet [their] physical, cognitive, social and spiritual needs,
 - b. Get involved in community and civic opportunities, and
 - c. Access opportunities for lifelong learning.

- 5. To get the information and support [they] need to participate as fully as possible in decisions that affect [them], including care decisions from the point of diagnosis to palliative and end-of-life care [...]¹⁵²

Although most people diagnosed with dementia fall within the older adult population, we know that dementia can occur earlier in life. We also know that it is not only the adult living with dementia who is affected; a diagnosis also impacts people who support a family member or friend living with dementia. For this reason, it was important that the research and consultation capture the views and insights of people living with dementia and their supporters. Collectively, these insights and experiences create a holistic image of everyday experiences and illustrate a bigger picture of opportunities for change.

1.4.3 Support for Inclusion in Decision-Making

People who identify as living with a disability are a diverse population. It is clear from the courts and the language of our federal and provincial statutes that forming a single definition of disability is no easy task. This is in part because of the unique characteristics and attributes of each person’s condition, and because disability is largely informed by how society supports or inhibits a person’s ability to participate.¹⁵³ A person’s ability to be included in important life choices depends on the opportunities created by the people who support or provide access to services.

Although there are important differences between the experiences of people in the communities studied for this project, the commitment to respect for the autonomy and agency of the people involved applies to all. Section 3 of UN CRPD Article 12 requires appropriate measures be taken to provide support so that people can exercise their legal capacity, regardless of disability.¹⁵⁴ The aim of this study paper is to identify opportunities to apply a supported decision-making approach to investment decision-making.

Our Alzheimer Society B.C. and Inclusion BC partners helped to bring an important lens to the research, consultation, and tool development for this project. CCEL staff recognize that the rights and needs of people living with a disability to meaningfully engage in the decisions that affect them is profoundly important. The goal of this project is to identify the barriers and obstacles faced by people within these communities in making investment decisions, and what practices may better support inclusion.

The guiding principle for the ideas and opportunities outlined in this study paper is inclusion. We understand inclusion to mean:

[...] an attitude and approach that embraces diversity and differences and promotes equal opportunities for all. Inclusion is not just about people with disabilities. When our communities include and embrace everyone, we are ALL better able to reach our full potential.¹⁵⁵

This project also adopts some of Inclusion BC’s values and principles as they relate to supporting people living with a disability to make investment decisions:

- that all people have the assurance of life, dignity and respect;

There is indeed life after diagnosis.

– Person living with dementia and Advocate

- that all people have the dignity of taking risks;
- that all individuals are entitled to enough money to have a reasonable quality of life;
- that all individuals are entitled to the services and supports required to ensure their full participation in our society;
- that each person can determine their own needs and make their own decisions, and when necessary, must receive the support to do so;
- that the involvement of families and support networks contributes to everyone’s safety and well-being;
- that services and supports must be delivered in a way that respects an individual’s diverse history, culture, race, religion, and sexual orientation; and
- that inclusive communities enrich the lives of all citizens¹⁵⁶

1.5 STRUCTURE OF THIS STUDY PAPER

This study paper contains eight chapters:

- **Chapter 1** introduces the project rationale, scope and methodology. It also sets out some of the guiding principles and values that informed the research.
- **Chapter 2** provides a basic introduction to dementia and intellectual or developmental disability as it relates to financial decision-making.
- **Chapter 3** sets out the law on capacity and financial decision-making in BC, including the different types of supportive and substitute decision-makers, legal documents, and the rights and responsibilities of the people involved.
- **Chapter 4** sets out the law on capacity and financial decision-making in Ontario, including the different types of substitute decision-makers, legal documents, and the rights and responsibilities of all people involved.
- **Chapter 5** explains supported decision-making in the investment context.
- **Chapter 6** outlines Canada’s investment landscape, and identifies the people and institutions involved in providing investment services and regulatory oversight for vulnerable investors and their supporters. We review the regulation of the investment industry professionals, and provide an overview of the policies, guidelines, and resources currently used to work with vulnerable clients.
- **Chapter 7** summarizes what we asked and what we heard from interviews with people living with dementia or an intellectual or developmental disability, their supporters, investment professionals (including regulators), lawyers, advocates, academics, community service providers, policy advisors, and others who engage with supported and substitute decision-making in the investment context.
- **Chapter 8** outlines the ideas and opportunities identified in the research and consultation aimed at enhancing the use of supported decision-making in the investment context.

This study paper includes five appendices:

- **Appendix A:** Table of Key Informants
- **Appendix B:** List of Key Informant Questions
- **Appendix C:** List of Investment Sector Roles and Responsibilities
- **Appendix D:** Online Survey to BC Lawyers
- **Appendix E:** Online Survey to BC Notaries

This study paper contains anonymous quotes and portraits from key informants. The quotes help readers connect to the people we spoke to about the personal and professional challenges of using supported decision-making in the investment process. Neither the quotes nor the portraits reflect the views of CCEL, the Alzheimer Society B.C., or Inclusion BC.



CHAPTER 2

Disability and Financial Decision-Making

I am 52 years old and I received a diagnosis of probable fronto-temporal dementia at the age of 45.

– Person living with dementia

This chapter introduces the reader to the non-legal concepts that are important to understanding the research and findings in this study paper. This chapter:

- Describes Alzheimer’s and dementia;
- Discusses the impact of Alzheimer’s and dementia on financial decision-making;
- Describes intellectual and developmental disability;
- Discusses the impact of intellectual and developmental disability on financial decision-making; and
- Defines what we mean by “vulnerable investor” including factors that contribute to a person’s vulnerability in the investment context.

The content of this chapter is an introduction; it is not an exhaustive representation or discussion of the research and dialogue on the issues. Rather, this chapter raises awareness of key issues that arise for people when making investment decisions. This chapter will also help people working in legal and investment sectors to better understand how dementia and intellectual or developmental disabilities inform financial decision-making.

2.1 UNDERSTANDING DEMENTIA

At the time of writing this study paper, over half a million Canadians are living with dementia.¹⁵⁷ Of that total, 16,000 are under the age of 65. Almost 75 per cent of all Canadians diagnosed with dementia are over the age of 65.¹⁵⁸ This number is expected to almost double over the next 15 years at a rate of approximately 25,000 new diagnoses each year.¹⁵⁹ Based on the statistics referred to earlier in this study paper, at least 328,000—or 52 per cent—of the total population of people living with dementia reside in BC and Ontario.¹⁶⁰

The statistics show that the ability to offer meaningful, inclusive support and services to the dementia community is critically important. Greater knowledge and awareness of the symptoms and impact dementia can have on a person’s life is one way to achieve this goal. It is also important to understand that the symptoms of dementia manifest in different ways; they are unique to each person.¹⁶¹ There are also various forms and causes of dementia. This section provides a brief, non-medical description of Alzheimer’s and other forms of dementia, and the differences and similarities between the two conditions.

2.1.1 What is Dementia?

Dementia is not itself a specific disease but instead is a collection of symptoms caused by many different diseases that affect nerve cells in a person’s brain. As the Canadian Academy of Health Sciences notes, “[d]ementia has many faces, and affects persons of every culture, ethnicity, religion, citizenship, sexual orientation and ability.”¹⁶² Dementia can also be caused by a stroke or trauma.¹⁶³ It is a progressive and degenerative condition, meaning it tends to develop slowly and gradually, worsening over time.¹⁶⁴ Dementia is not age or gender-specific, appearing both in middle aged and older adult populations, with approximately 65 per cent of people diagnosed with dementia identifying as women.¹⁶⁵

The causes of dementia vary, but the more common ones include:

- Alzheimer’s disease;
- Vascular dementia (caused by a stroke that affects blood flow to the brain);
- Lewy Body disease;
- Fronto-temporal dementia;
- Parkinson’s disease; and
- Mixed dementia (a combination of more than one type).¹⁶⁶

There are also treatable conditions that can present dementia-like symptoms. Known as “reversible dementias”, these conditions include vitamin deficiencies, thyroid disease, sleep disorders, or some forms of mental illness.¹⁶⁷ Common causes of reversible dementias are:

- Depression;
- Medication (side effects, drug interactions, drug overdose);
- Alcohol or drug abuse;

- Dietary, vitamin and mineral deficiencies (A, C, B-12 and folate);
- Traumas (due to falls, concussions, or contusions to the head);
- Hormonal dysfunction (thyroid problems);
- Metabolic disorders (dehydration, kidney failure, COPD);
- Infections;
- Heart disease;
- Brain disease (tumours); or
- Environmental toxins¹⁶⁸

Decline in memory, judgment and reasoning skills are common symptoms of dementia. People living with dementia may experience changes in their ability to manage or perform the following:

- Complete routine daily activities;
- Absorb and process information;
- Communicate (verbally or in writing);
- Recall recent information or events;
- Problem solve;
- Focus and pay attention to conversations, tasks or activities; or
- Recognize family members or familiar places.¹⁶⁹

Other symptoms may include changes in mood, loss of control over emotional and social behaviours, and difficulty maintaining personal hygiene.¹⁷⁰

2.1.2 What is Alzheimer’s?

The Alzheimer Society of Canada (“ASC”) reports that often people confuse Alzheimer’s and dementia to be the same thing.¹⁷¹ The ASC explains that dementia on its own is not a disease, but instead can have many causes, one of which is Alzheimer’s.¹⁷² A helpful analogy to consider is to think about the difference between shortness of breath and asthma.¹⁷³ Shortness of breath is not a disease itself; it is caused by other conditions. Asthma is only one of the potential causes for shortness of breath.¹⁷⁴ The same can be said for dementia—it is “not one specific disease, it’s a combination of symptoms that has many different causes, including Alzheimer’s disease.”¹⁷⁵

Alzheimer’s is the most common form of dementia. It is “irreversible and destroys brain cells, causing thinking ability and memory to deteriorate.”¹⁷⁶ Current statistics estimate that Alzheimer’s accounts for between 60 and 80 per cent of all dementia diagnoses.¹⁷⁷ Like other forms of dementia, Alzheimer’s begins slowly, and possibly with minimal symptoms. As time goes on, symptoms worsen. Alzheimer’s progresses at different rates for everyone. Depending on what stage of the disease a person is in, people may experience early loss of ability to perform daily activities. Others may find that their symptoms remain minimal until later in life.

The most common symptom of Alzheimer’s is memory loss.¹⁷⁸ But, like dementia, symptoms of Alzheimer’s can vary, and may include:

- Difficulty making decisions;
- Confusion about time or day of the week;
- Lack of familiarity with places or people;
- Difficulty learning and remembering new information;
- Difficulty finding the right words to say what you want to say; or
- Difficulty with performing tasks like following a recipe or paying household bills.¹⁷⁹

Like other forms of dementia, Alzheimer’s can impact a person’s mood and behaviour. People may lose interest in favourite activities or hobbies, become withdrawn or disinterested in socializing, and experience changes in how they react to social situations (e.g. repeating words, hiding possessions, or feelings of restlessness).¹⁸⁰ People living with Alzheimer’s may also feel suspicious, anxious fearful, or may become easily upset when out of their comfort zone.¹⁸¹

2.1.3 Dementia versus Age-related Memory Loss

Memory loss is not in and of itself an indicator that dementia is present. As discussed in Chapter 1, age-related memory loss is common. It is not always easy to tell the difference between age-related memory loss and dementia because it depends on several variables unique to each person’s experience and symptoms. Table 1 sets out examples of Alzheimer’s or dementia-related memory loss compared to age-related memory loss.¹⁸²

Table 1: Examples of Memory Loss Due to Alzheimer’s or Dementia versus Age-related Memory Loss¹⁸³

Memory Loss Due to Alzheimer’s or Dementia	Age-related Memory Loss
Difficulty exercising judgment and decision-making; difficulty solving problems	Making a bad decision occasionally
Difficulty planning or managing a budget; difficulty working with numbers	Missing a monthly payment; making occasional errors when managing finances or household expenses
Losing track of the date or the season; forgetting important dates or events	Forgetting which day it is and remembering later
Difficulty having a conversation; frequent pauses and substitutions when finding words; using words that don’t fit the context	Sometimes forgetting which word to use
Misplacing things and being unable to retrace steps to find them	Losing things from time to time
Not recognizing or knowing the names of family members	Sometimes forgetting names or appointments, but remembering them later
Forgetting recently learned information; frequently asking the same question; increasingly relying on memory aids or family members as reminders	Sometimes forgetting the details of information learned

Memory Loss Due to Alzheimer’s or Dementia	Age-related Memory Loss
Difficulty completing familiar tasks, like organizing a grocery list, remembering rules of a favourite card game, or getting dressed	Occasionally needing help using the stove, setting the microwave, or using the recording feature to record a TV show
Avoiding social situations or abandoning work projects	Sometimes feeling weary of work or social activities

The above are only some examples of the type of memory loss a person living with dementia can experience; it is not meant to be exhaustive, nor interpreted or applied as a diagnostic tool. Everyone’s experience is different. What it does show is that people offering services or supports to someone experiencing memory loss ought to consider what may be causing it, and that it is not always a symptom of dementia. It may simply suggest that questions should be asked to explore the situation further, and to consider what accommodations or supports could be introduced to enhance a person’s participation in the process.

2.1.4 Impact of Dementia on Financial Decision-Making

Math was never a problem. But here I am now, with my very, very early stage of dementia, MCI as they call it, minor cognitive impairment, and I can no longer even make change. . . I am just trying to say that it was this mathematical or arithmetical inability that finally got [me]. Here I am, I am just really beginning the progressive down slide.

– Person living with dementia and Advocate

A diagnosis of dementia does not mean a person cannot make financial decisions. It is not a simple shift from day to night; ability fluctuates over time. Some changes are subtle while others more pronounced. The link between loss of ability and loss of capacity is not so clearly drawn. Chapters 3 and 4 of this study paper outline the law on financial decision-making in BC and Ontario, and explain how capacity is decision, situation, and time specific. But what is certain is that dementia can affect how a person receives, interprets, and uses financial information.

Adults aged 65 and older are among the fastest-growing sector of the population in the country. Of the estimated 564,000 Canadians living with dementia, 65 per cent are over age 65. This number is expected to grow at a rate of 25,000 new diagnoses each year. Thus, the older adult population is at statistically greater risk of experiencing some form of mild to severe cognitive changes from dementia in their lifetime. With that comes a compromised ability to make everyday decisions, including financial ones. Changes to financial skills may also decline in the initial stages of a diagnosis.¹⁸⁴

A person’s ability to interact with, and manage, money refers to their financial capacity.¹⁸⁵ A person’s financial capacity, and corresponding ability to make financial decisions, depends on several factors, and the type of decision being made. Whether or not a person has financial capacity is largely contextual and can often be enhanced with some level of support from one or more people in their life. Things like a person’s health, education (including financial), occupation, and socioeconomic status are also important considerations. As such, financial capacity is viewed holistically from a clinical, legal, and

ethical lens.¹⁸⁶ With the law on capacity covered in Chapters 3 and 4, this next section introduces the clinical and ethical views to consider.

A Clinical View of Financial Capacity

Research shows that “the capacity to manage financial affairs has particular significance to independent functioning of older adults.”¹⁸⁷ A clinical view of financial capacity looks at how conditions like dementia affect a person’s ability to make financial decisions. Ability, in the clinical context, is measured by the ease or difficulty a person has when making choices or performing tasks, including exercising judgment in managing their money. A clinical approach also asks if the choices a person makes with their money are consistent with their self-interest and values.¹⁸⁸

In deciding whether change in ability means a change in financial capacity, a clinical view considers that:

[F]inancial capacity comprises a broad range of conceptual, pragmatic, and judgment abilities, ranging from basic skills like counting coins and currency, to more complex skills such as paying bills, managing a checkbook, and exercising financial management. Similar to driving and mobility, it is a core aspect of individual autonomy in our society and represents a cognitively complex set of knowledge and skills vulnerable to cognitive aging and dementia.¹⁸⁹

If we apply this to investment decisions, we might consider how a person makes future planning choices with their money. Does the decision mirror what an investment advisor knows to be the person’s long-term investment goals? Does the decision factor in necessary expenses or emergency costs? Does the investment product match, exceed, or fall short of the person’s risk tolerance? These are only some of the questions to explore.

Clinically speaking, when we talk about a person’s ability to manage their financial affairs, we are not just talking about the single task of balancing a cheque book. While that may be one indicator of change, it is not a definitive sign that capacity is at issue. A clinical view of financial capacity considers the sum of a person’s performance on finance-related tasks. This is in part because we know similar changes occur in people who age without a diagnosis of dementia.¹⁹⁰

Research indicates that, historically, clinical assessments of financial capacity have been too restrictive, primarily taking an activity or skills-based approach to assessing a person’s ability to manage their finances. The focus has centred around a person’s physical interaction with money, such as counting currency, paying bills, or performing cash transactions.¹⁹¹ Activities related to more abstract financial management, like investing, have been left out.¹⁹²

Dementia presents differently depending on the type of image. We are talking about the classic kind of Alzheimer’s dementia, with this insidious onset. . . It is going to be the higher-level abstract reasoning that is going to be most impaired first. It is going to be more complicated decisions, and things that involve more juggling. . . some of the financial instruments these days are really hard to get your head around. So, I think that’s where people are particularly vulnerable. . . These are the pros and cons, and they go with that instrument [. . .] juggling all those factors is really challenging, even for the best educated, cognitively-intact person.

– Academic

[T]he notion of understanding what numbers represent is actually quite an abstract concept. I don't know about you, but for the longest time I had trouble really wrapping my head around that. I mean, we are so immersed in understanding what numbers mean from a young age. But really, to step back and recognize that numbers are an abstract concept, just like letters of the alphabet are... that ability to appreciate what numbers represent is often and sometimes a fairly early to mid-warning sign that someone is struggling with some form of cognitive impairment.

– Community Agency Representative

Another challenge with a clinical, skills-based approach to examining financial capacity is that it can be driven, at times, by the concerns of family members or friends of the person living with a disability. Research indicates that:

[F]amily members of such older adults often raise concerns about an [older adult's] new problems managing household finances, making poor financial decisions, or being financially exploited. Clinicians are increasingly being asked by families, physicians, clinicians, attorneys, and judges to evaluate and offer clinical opinions regarding the financial capacity of older adults [...] These decisions can be highly charged given the psychological importance of managing one's own funds.¹⁹³

A Person-Centred Approach to Understanding Financial Capacity

We know that other factors outside a person's diagnosis of dementia can affect their financial decision-making ability. A person's experience with investing, or lack thereof, informs how they make investment decisions. It also sheds light on whether these decisions are made independently, or with the help of others. This is true for people living with or without dementia. How a person plans their financial future is, in some ways, similar to how people make health care decisions, and so may be informed by "emotions, needs, values, preferences or habits."¹⁹⁴

A person-centred approach to financial capacity appreciates that people can still make financial decisions even with a diagnosis of dementia.¹⁹⁵ For people living with dementia, the degree and severity of the symptoms will vary.¹⁹⁶ People living with a mild form of dementia may only have limited difficulty with paying bills or reading bank statements.¹⁹⁷ But, they may still be able to make decisions about how to invest their money. Contrastingly, people living with mild to moderate Alzheimer's may struggle with both simple and complex financial tasks, potentially leading to "severe and global impairment in all financial skills [...]" or "problems of financial judgment, exploitation and elder abuse [...]."¹⁹⁸

Financial capacity extends beyond a person's skills in financial decision-making. Capacity is also determined by how a person performs financial management tasks that "identify and build on the individual's strengths, while honoring a person's values, choices, and preferences."¹⁹⁹ Further, a person-centred approach to assessing financial capacity considers that:

- a. people are more than the sum of their cognitive abilities,
- b. traditional approaches overemphasize deficits and underemphasize remaining strengths, and
- c. it is important to understand the person's subjective experience.²⁰⁰

In testing a person's ability to make financial or investment decisions, it is important to consider that "general cognition may or may not be related to a specific financial judgment."²⁰¹ There may be other factors impacting a person's ability, or inability, to perform a money-management task or to make a financial decision.

A factors-based approach to understanding financial capacity appreciates that financial decision-making "involves not only performance skills (e.g. counting coins/currency accurately, completing a check register accurately, paying bills) but also judgment skills that promote financial self-interest, and values that guide personal financial choices."²⁰² It also recognizes that education, occupation, and socioeconomic plays a role.²⁰³

Below is an explanation of key factors from the work of Gerstenecker et al.:

- **Basic Monetary Knowledge and Calculation Skills:** e.g. stating the number of quarters in a dollar, calculating a tip or change from a grocery purchase; knowledge of coin or currency value, calculating interest on savings;
- **Financial Judgment:** e.g. a person's ability to detect and avoid fraud scams;
- **Financial Conceptual Knowledge:** understanding of simple financial concepts (e.g. what is debt, what is an investment, what is a signature line on a cheque, why do we save money); and
- **Financial Procedural Knowledge:** ability to write out a cheque or record a transaction in a cheque book.²⁰⁴

The factor-based approach to financial capacity shows the changes a person living with dementia may face. Gerstenecker et al note that, as dementia progresses, a person may be at greater "risk for making poor financial decisions or committing financial errors that threaten the financial assets and well-being of themselves and their families."²⁰⁵

Despite the potential risks associated with how dementia can impact a person's ability to make financial decisions, a change in ability does not automatically mean inability. Changes in how a person connects with financial information can manifest in different ways. Symptoms may start gradually, declining over time, or may fluctuate. It may simply mean that a person needs support to decide. A person living with dementia may no longer recognize subtle fluctuations of an interest rate on their investment, but they may still understand how much money they need for their expenses. They may be clear on aspects of the decision that are most important to them, such as making sure the person they care about is cared for when they are no longer able to support them. But they may be less certain on how to accomplish the tasks needed to put this support plan into action. They may still know how much investment risk they are comfortable with but need support to continue making investment decisions.

2.2 DIFFERENT BUT EQUAL: UNDERSTANDING DISABILITY

Often what people know about disability is largely contextual. Sometimes our understanding is based on direct or indirect experience with a person living with a disability. Other times it is built by stereotypes or assumptions people develop over time. Or it may be a mix of both. The UN CRPD and the courts have helped to shift our notion of disability away from a person’s physical limitations to instead consider how disability is a by-product of how society enables, or restricts, a person’s participation. The UN CRPD highlights how a person’s abilities can be increased or decreased based on health, personal, environmental, or social factors.²⁰⁶ How people interact and receive services in their community, coupled with societal assumptions or attitudes towards disability, can broaden our understanding of how we support, or restrict, inclusion. As the 2015 IRIS Report notes:

For many disability activists there is a problem with the language of “impairment” because it implies weakness or something that is less than people without disabilities. If we are in pursuit of a human rights approach in relationship to the inclusion of people with all forms of disabilities, then it is useful to understand and include disability as another type of human diversity, i.e. different but equal.²⁰⁷

Disability Alliance BC notes that a disability may be visible or non-visible, and can be generally described as follows:

A disability is a condition or illness—visible or invisible, episodic or continuous—that affects a person’s senses or activities. Examples of disabilities include physical and sensory disabilities (quadriplegia, vision or hearing loss, etc.), mental health disabilities (including addiction), developmental disabilities, learning disabilities, brain injuries and chronic health conditions such as arthritis, hepatitis C, diabetes, morbid obesity and others.²⁰⁸

The World Health Organization provides some examples of the barriers people living with a disability may experience, including:

- **Inadequate policies and standards:** lack of consideration for the needs of people living with a disability; lack of protection or enforcement; insufficient financial or other incentives; lack of social protection;
- **Negative attitudes:** beliefs and prejudices; attitudes that prohibit inclusion; misconceptions about people living with a disability as being less productive; poor awareness of accommodations and supports that can be put in place to support inclusion.
- **Problems with service delivery:** poor coordination; insufficient staffing or resources; inadequate skills or training.
- **Lack of accessibility:** limited or no access to transportation; limited plain language resources; lack of interpretation services.
- **Lack of consultation and involvement:** people with disabilities are often excluded from making decisions that affect their lives.
- **Lack of data and evidence:** better understanding of how environment impacts a person’s disability.²⁰⁹

Greater understanding of what disability means depends on our awareness of the barriers to participation or access to services experienced by people living with a disability. In this way, disability can be understood as a combination of personal, physical, or social experiences.

2.2.1 Types of Disabilities Explored in this Project

The language we use to describe people who live with a disability is important. Research for this project tells us that people have personal preferences over how we characterize different abilities. To better understand how people with different abilities receive support to make investment decisions, we first need to consider the limitations they may face when making life choices.

Results of the 2012 Canadian Survey on Disability reports that over 3.7 million people aged 15 and over identify as living with a disability in Canada.²¹⁰ Of that total, approximately 1.6 million reside in Ontario, with over 546,000 living in BC.²¹¹

Generally speaking, “[t]here is no single definition of intellectual disability [...]”.²¹² In Canada “the terms intellectual disability and developmental disability are used synonymously”, with developmental disability used more frequently.²¹³ For instance, in BC and Ontario, the term developmental disability includes people living with Autism, Down’s Syndrome, or other verbal or non-verbal challenges. Autism is also referred to as a type of intellectual disability.²¹⁴ Consequently, there is some debate over which term should be used. This is also in part because the term “developmental” can imply “that a person is not fully developed or is ‘stuck’ at an earlier stage of development and/or that people with intellectual disabilities are ‘slow’ or delayed in development [...]”.²¹⁵

In this study paper, we use the phrase “people who identify as living with an intellectual or developmental disability” to acknowledge that how a person’s disability is characterized very much depends on how they themselves self-identify with it. People we spoke to for this study paper were invited to tell us how they describe or experience their different ability. It was important to CCEL project staff that the people who shared lived experiences exercised their choice over how they wanted us to share their story or views in the study paper.

As said earlier, this study paper uses the general term “disability” only when discussing how an experience may impact both our dementia and intellectual or developmental disability communities. We focus less on the terms used to describe a person’s disability; instead, we consider the varying degrees of support a person living with a disability may need to make investment decisions. We understand challenges can stem from actual limitations of a disability, or from barriers and social assumptions about a person’s ability to participate in the process. We adopt this social understanding of disability so we can “identify and potentially address the environmental factors that act as a barrier to the person engaging in decision-making.”²¹⁶

In the research and consultation gathered for this project, people from the intellectual or developmental disability community shared experiences related to living with or supporting people who identify as living with: Acquired Brain Injury, Autism, Cerebral Palsy, or Down Syndrome. This next section briefly describes each type of disability, including how each may impact a person’s ability to make investment decisions.

Acquired Brain Injury

Acquired Brain Injury (ABI) is any damage to the brain that occurs after birth and is not related to a congenital or a degenerative disease.²¹⁷ There are two types of ABI: 1) non-traumatic, and 2) traumatic.

- **Non-Traumatic Brain Injury:** caused by something that happens inside the body or a substance introduced into the body that damages brain tissues. Causes include stroke, brain aneurysm, seizures, tumours, poisoning, substance abuse, and infectious diseases.
- **Traumatic Brain Injury:** caused by something that comes from outside the body, such as a blow, bump, or jolt. It can result in temporary injury, or more serious, long-term damage to brain cells. Causes include motor vehicle accidents, falls, assault, gunshot wounds, domestic violence, shaken baby syndrome, sports injuries, explosive blasts, and combat injuries.

It is estimated that over 450 people every day—or one every three minutes—experience a form of serious brain injury in Canada.²¹⁸

Autism Spectrum Disorder

Autism Spectrum Disorder (ASD) is a type of developmental disability that affects brain growth. As the name states, ASD falls on a spectrum in terms of how it impacts a person’s abilities, needs, and skills.²¹⁹ A person living with ASD might show differences in how they communicate or interact with others, or in how they behave. How ASD affects a person will vary. Some examples of differences that can manifest in every day situations include:

- **Social interaction:** evading eye contact; difficulty understanding non-verbal cues, building or maintaining age-appropriate relationships.
- **Communication:** speech may be absent or delayed; poor use or understanding of gestures (e.g. pointing); difficulty with abstract concepts or confusion with pronouns (e.g. saying “you” instead of “I”); repetitive language; selective hearing; difficulty initiating or sustaining conversations.
- **Sensory responses:** certain circumstances may cause exaggerated or muted reaction; emotional response to sounds, foods or being touched; visual fascination with lights or movement.
- **Atypical behaviours:** repetition; self-stimulating behaviour (e.g. rocking); difficulty adjusting to transitions, with preference for routines and familiar surroundings; attachment to objects.²²⁰

Not everyone who lives with ASD will show the same behaviours or have the same needs or skills. In some cases, a person living with ASD may not respond to verbal instructions or may learn differently. In the context of how a person living with ASD makes investment decisions, it will depend on their individual communication, behavioural, and support needs.

Cerebral Palsy

Cerebral palsy is described as a developmental disability that affects a person’s “body movement and posture.”²²¹ It can impact reflexes or cause muscle tightness, ranging from mild to severe changes. Depending on a person’s symptoms, cerebral palsy may also lead to other disabilities, including vision or hearing problems.²²² Cerebral palsy is caused by a brain injury that occurs during pregnancy, birth, or within the first two to three years of a child’s life.²²³ It affects how a person communicates and controls their body movement and muscles.

Like many other disabilities, how cerebral palsy affects a person’s life will vary, and may impact all or only some parts of the body. Many people who live with cerebral palsy are very high functioning. Physical symptoms of cerebral palsy may include difficulty walking, loss of control over limbs or other parts of the body, or more serious changes like seizures or problems eating and speaking.²²⁴ When verbal communication is more challenging, people living with cerebral palsy, with the help of supporters, may use many different methods of relaying information and communicating choices.

Down Syndrome

Down syndrome is a type of developmental disability that occurs when a person is born with extra genetic material associated with chromosome 21.²²⁵ We understand that “[a]ll people with Down syndrome learn, develop and achieve” but they may have differences in how they receive, retain, and respond to information.²²⁶ They may need more time to process and communicate information, or may benefit from different approaches to teaching and training for skill development.

2.2.2 Impact of Disability on Financial Decision-Making

People who live with an intellectual disability may have “greater difficulty than most people with intellectual and adapting functioning due to a long-term condition that is present at birth or before the age of eighteen.”²²⁷ For example, they may face challenges with communicating, interacting with others, or money management.²²⁸ But, it is important not to over-simplify how people living with an intellectual or developmental disability may face or express challenges with daily activities. As stated in the 2015 IRIS Report, “[T]he experiences and barriers [in accessing justice] for people with intellectual disabilities differ from those for people with mental health disabilities.”²²⁹ So, it is important for service providers, in developing promising practices when working with people from this community, to ensure they address “the distinct barriers and needs of people with intellectual disabilities.”²³⁰ Everyone’s needs will be different, and will depend on what, if any, supports are available to enhance participation.

Below are some of the challenges people living with an intellectual or developmental disability have reported that relate to taking part in the investment process:

- Explaining ideas;

Someone might have said something five minutes ago, and then it is gone. The concept has to be re-explained to me. So, it is important that I do not feel rushed, for one. That I have somebody looking at their clock. Because that just agitates me.

– Person living with dementia

- Performing tasks that require multiple steps;
- Problem solving;
- Learning basic mathematics; or
- Understanding or speaking with people they just met.²³¹

For a survivor of a traumatic ABI, changes may arise suddenly, may increase or decrease over time, and may include physical and cognitive changes.

Physical Changes

- Fatigue
- Slurred speech
- Chronic pain
- Headaches
- Changes in vision
- Seizures, fluid increase in the brain, infections, damaged blood vessels in the brain, vertigo (sensation of dizziness/spinning/loss of balance)
- Sensory changes: ringing in the ears, trouble with hand-eye coordination, unpleasant tastes or smells, sensations on the skin like tingling, pain, or itching, difficulty with balance, dizziness

Cognitive Changes (different ways of thinking, learning, decision-making)

- Needing more time to understand information
- Difficulty with making plans, organizing, or beginning tasks
- Difficulty communicating: understanding conversations, finding the right word, speaking in proper sentences, understanding cues, making conversation
- Difficulty writing
- Difficulty concentrating
- Difficulty remembering things, learning, reasoning, and exercising judgment
- Difficulty making decisions
- Getting stuck on a single topic, idea, or activity either in conversation or actions (called perseveration)
- Confusion about the current date, location, or time of day
- Loss or changes to senses and perceptions: sensation, sense of smell or taste, vision, or hearing²³²

Emotional and behavioural changes may also include: “feeling irritable, having a ‘short fuse’, anxiety, anger, prone to sudden, extreme emotions for no clear reason, engaging in risky behavior, impulsive, change in role—often from being independent to relying on others for care and support.”²³³

2.2.3 Exclusion from Financial Decision-Making

People living with dementia say that making decisions is “an important means of affirming self-identity and confirmation that “I’m still here””.²³⁴ People living with an intellectual or developmental disability say being acknowledged and included in life decisions is critical to fostering independence, respecting autonomy, and building confidence in their ability to live a full life. Societal assumptions about enhanced risk for people living with dementia can create unwanted “forms of exclusion and disadvantage because of the way it is perceived and responded to in the public domain.”²³⁵

People living with a disability need opportunities to meaningfully engage in decisions that are valuable to them. That might mean relying on support from family or trusted people in their lives (e.g. friends, neighbours, community support workers) to foster participation. Research indicates that risk awareness and ability to recognize and avoid risky situations may be impacted by a person living with an intellectual disability.²³⁶ Appreciating that a person’s perception or response to risk may be different, we must weigh this against societal tendencies to take a protectionist approach to how people receive services or supports to make risk-based decisions.²³⁷

2.2.4 What we Mean by “Vulnerable Investor”?

Like the 2017 Report on Vulnerable Investors, this project refers to people living with dementia or an intellectual or developmental disability collectively as “vulnerable investors.”²³⁸ Use of the term “vulnerable” does not intend to describe or refer to an inherent characteristic of the people we spoke to. Instead, we mean the social vulnerability experienced by people with different abilities. We understand that social conditions, a person’s environment, and assumptions about their abilities (or inabilities) can make a person socially vulnerable regardless of whether they live with a disability.²³⁹ A person’s degree of social vulnerability depends on the real or perceived barriers they experience relative to their interactions with society.

Vulnerability is not singularly defined, nor informed by a person’s own attributes. Rather, it stems from how a person experiences a greater or lesser degree of vulnerability from their social relationships.²⁴⁰ Each element is described below:

- **Vulnerability is relative**—a person may be more or less vulnerable. The term does not describe an absolute state or characteristic;
- **Vulnerability is relational**—a person is always vulnerable to something;
- **Vulnerability is multi-faceted**—a person’s vulnerability is not defined by their disability. A disability or a medical condition may or may not create vulnerability. It will depend on the circumstances. Conversely, other social circumstances may render a person vulnerable whether or not they live with a disability;
- **Vulnerability is a social condition**—this social condition may arise out of diverse social factors such as isolation, a lack of education, poverty,

I think that the whole idea of stigma goes into all segments of society, including the financial society. So, if I show up and sit down in front of [a] financial advisor, they're going to take one look at me and say, 'well, you can't have dementia, you're too young.' You know, that's a typical response of someone who looks at me.

– Person living with dementia

Having a partner there who knows me is really important in any of these types of conversations. So, I would never want to be just having a one-on-one conversation.

– Person living with dementia

absence of citizenship, a language barrier, a mental health diagnosis, an illness, a developmental disability, an addiction, homelessness or housing instability, a history of abuse, gender or sex, gender identity, and/or sexual orientation. These group memberships or characteristics are indicators of vulnerability;

- **Vulnerability is acquired**—vulnerability is not an inherent quality, nor does it represent a flaw of a person. Rather, it arises out of the relationship between a person’s characteristics and/or circumstances and a potential abuser. The concept of vulnerability would be meaningless without the possibility of abuse and the presence of the individual or institution that might perpetrate the abuse. In this sense vulnerability is a social construct; and
- **Vulnerability is not a static concept** - social circumstances change and people do too.²⁴¹

2.2.5 Other Factors that Contribute to Vulnerability

Below are some other factors we uncovered in the research and interviews with key informants, discussed in Chapter 7 of this study paper.

2009 BC Adult Abuse / Neglect Prevention Collaborative Report

The 2009 Report suggests the following factors to consider when discussing vulnerability:

- Current or historical abuse or neglect
- Isolation, including both physical and social
- Lack of supportive family, friends, and other social networks
- Lack of education
- Low income / poverty
- Absence or uncertainty of citizenship
- Recent immigration
- Language or other communication barriers
- Mental health diagnosis
- Illness
- Developmental disabilities or other disability
- Physical challenges or frailty
- Addiction
- Homelessness or housing instability
- Gender / sex
- Gender identity

- Sexual orientation
- Culture of origin, including Indigenous peoples
- Transportation barriers or other access barriers.²⁴²

2017 Report on Vulnerable Investors

The 2017 Report on Vulnerable Investors tells us that “external conditions—such as ageism” can increase an older adult’s vulnerability.²⁴³ For investment decision-making, the report notes the following additional factors to consider:

Low or Diminishing Financial Literacy

The investment world is vast, diverse, and complex. As more and more people assume responsibility for managing their financial future, they simultaneously face the challenge of navigating the landscape of financial markets, investment products, regulatory requirements, and numerous service options. Financial literacy is defined as “having the knowledge, skills and confidence to make responsible financial decisions.”²⁴⁴ The complexity of the investment sector, combined with potential changes from living with a disability, may result in lower levels of financial literacy within the disability communities. Consequently, “investors, regardless of age, rely heavily on their financial services representatives who often exerts tremendous influence over the decisions that clients make.”²⁴⁵

Product Complexity and Product Proliferation

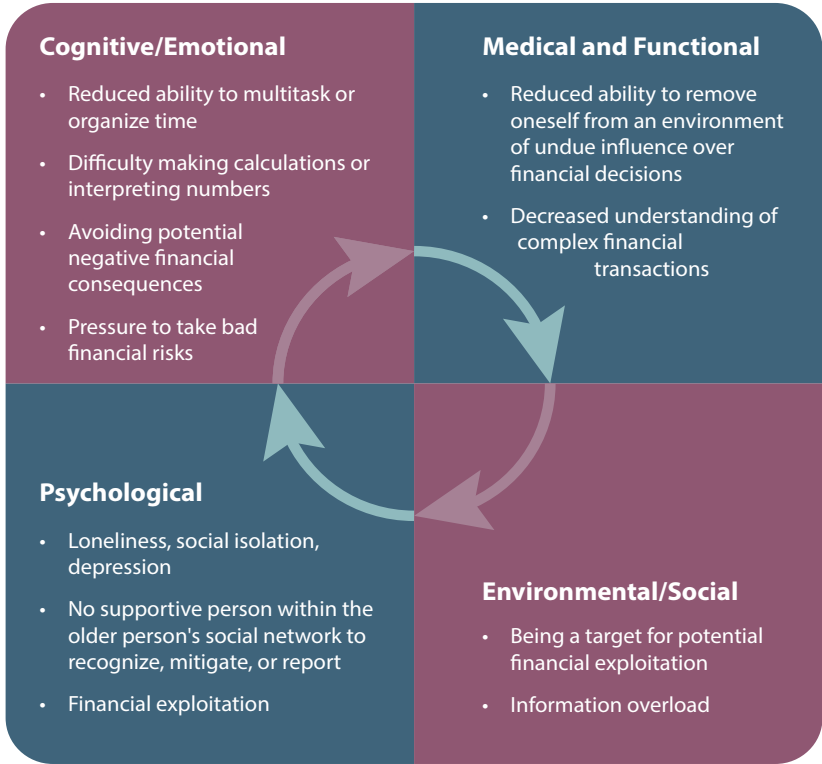
The average Canadian, regardless of whether they identify as living with dementia or an intellectual or developmental disability, faces an uphill challenge of ensuring they have complete information about their investment options.²⁴⁶ We also know that a correlation exists between aging and vulnerability in the context of financial decision-making, with a direct impact on financial literacy. Recent research also states that “individuals’ financial literacy scores decline steadily each year after age 60, and that investment performance declines significantly after age 70.”²⁴⁷

Changes in a person’s financial acuteness can occur in older adults who live with, or without, dementia.²⁴⁸ But for people who experience changes because of dementia, this may put their financial well-being in jeopardy. This is because dementia can impact a person’s ability to receive and interpret important information, problem solve, or assess the cost-benefit of an investment choice. Lachs and Hahn call functional changes in our ability to manage finances “age-associated financial vulnerability” (AAFV).²⁴⁹ These changes could put “an older adult at substantial risk for a considerable loss of resources such that dramatic changes in quality of life would result.”²⁵⁰ Diagram 2 sets out some examples of AAFV changes.

The bank has at least two, maybe three, steps; no ramps. And, as far as I know, no elevator. So, if you have a walker or wheelchair, how are you going to get in there?

– Person living with a disability

Diagram 2: Age-Associated Financial Vulnerability Risk Factors and Changes in Older Adults Living with, or without, Dementia²⁵¹



Undue Influence and Financial Exploitation

Adults living with a disability often receive some form of support from people they know and trust to help them make decisions. Support can come from many different people in their lives, including family, friends, caregivers, or support workers. For the most part, support is simply ways of helping a person decide. Unfortunately, sometimes support is used as a disguise to take advantage of a person, or to influence a decision in their favour. Otherwise known as undue influence, it has been described as:

[...] imposing pressure that causes a person to perform some legal act, such as making a will, that does not reflect the true wishes or intentions of that person, but rather those of the influencer. Undue influence goes beyond mere persuasion to make a will or other disposition of property. It is the imposition of the influencer’s wishes on another person, such that the other person is not acting freely in performing the act that the influencer desires. Direct or immediate benefit to the influencer is not essential. It is sufficient if the pressure imposed results in the act desired by the influencer being carried out.²⁵²

Undue influence “by its nature, manipulates the decision-making of the target, and thus their actions and decisions are not truly their own. Decision-making and consent are subverted.”²⁵³ How undue

influence manifests in each situation will vary. It may be obvious or may be difficult to identify. The source or motive may be unclear or multi-faceted. Not all undue influence in the investment relationship has the aim of achieving a financial “win”.²⁵⁴ There may be other emotional or relational causes at play.

The topic of undue influence is an important one for this study paper, and especially as we consider how to facilitate supported decision-making in the investment context. Our discussion in Chapter 7 of this study paper outlines the concerns raised in this area during interviews with key informants. Chapter 9 of this study paper sets out ideas and opportunities for how to manage undue influence while bolstering a supported approach to investment decision-making.

2.3 SUMMARY

There may be other factors that impact a person’s ability to make financial decisions that are not captured in the discussion above. Some arise in the consultation findings discussed later in this study paper. How vulnerability impacts a person’s ability to make investment decisions is as diverse as they are. How we support people to make investment decisions is enhanced by adopting a multi-faceted understanding of their life situation.

There’s no shortage of people who will happily separate you from your money if they see an opportunity to do that.

– Academic



CHAPTER 3

The Law on Financial Decision-Making In BC

In just about every case people have some capacity. And they should be included.
– Investment Professional

This chapter outlines the law on capacity and authority to make financial decisions in BC. It also gives a brief introduction to the concept of supported decision-making in BC law.

In this chapter we outline:

- Mental capacity in Canada;
- Capacity as decision, situation, and time specific;
- The standards for capacity to make financial decisions;
- The concept of substitute decision-making;
- Types of substitute decision-makers and instruments used to grant authority to make financial decisions; and
- An introduction to supported decision-making in BC.

3.1 MENTAL CAPACITY IN CANADA

The term capacity (or capability as it is sometimes used, depending on the jurisdiction) refers to a person’s ability to make decisions. Definitions of capacity vary across Canada,²⁵⁵ but it is generally described as a person’s ability:

[...] to understand information, evaluate data, and appreciate the consequences of decisions. In this sense capability is about a person’s decision-making process, and it is neutral as to the outcome of that process.²⁵⁶

Capacity relates to a person’s ability to make, and be responsible for, their own decisions. A person who demonstrates the requisite capacity to make a decision retains their right to make that choice, regardless of whether someone else considers it to be a bad one.²⁵⁷

3.1.1 What is Mental Capacity?

This study paper considers how people living with dementia or an intellectual or developmental disability make decisions about their investments. Currently, there is no uniform definition of (mental) capacity or capability in Canada. Each province and territory have their own statutory definitions or standards. But the law generally accepts that all adults are presumed to be capable of making decisions that affect their legal and financial affairs, and decisions about personal and health care matters.²⁵⁸

To demonstrate capacity, a person must show an ability to understand information, evaluate data, and appreciate the consequences of the decision. It is ability, rather than actual understanding or appreciation of the information and consequences, that confirms capacity.²⁵⁹ Thus, capacity is determined “not by the presence of disability or disease, but rather by their particular cognitive processes, and their experience of living with that disability or disease.”²⁶⁰

A person’s mental capacity is not constant. Rather, it can diminish or fluctuate over time, and for reasons such as health issues, disability, or other cognitive changes.²⁶¹ This means that a person may retain capacity to make some decisions, but not others. For example, a person can have full mental capacity to continue making decisions about their health and personal care but may have diminished capacity to give instructions about their investments, or vice versa. Consequently, people may face significant “risk of suffering financial losses in situations where market events make it necessary for his or her financial advisor to take immediate action to safeguard the client’s capital or income, but the client lacks the capacity to provide coherent instructions.”²⁶²

3.1.2 Decision, Situation, and Time

There is neither a single definition of, nor a uniform standard of, capacity.²⁶³ Rather, “[c]apacity is defined or determined upon factors of mixed law and fact and by applying the evidence available to the applicable test for decisional capacity.”²⁶⁴ Before exploring the different legal standards and criteria used to determine capacity, we first discuss the three key elements that inform capacity, namely decision, situation, and time.

Because people wrongly, as you know, get a doctor’s letter that says this person is incapable, and all of a sudden they are blanket incapable of everything. If mom was incapable, I wouldn’t know what she was incapable of. And, even if she was incapable of managing her own property, that does not mean that she is [in]capable of resolving a dispute that she sees as between her children or the management of her property.

– Lawyer

Decision

The law in BC reflects a functional approach to capacity.²⁶⁵ This approach acknowledges that a person’s ability to make a decision is “decision-specific.”²⁶⁶ Decisions generally relate to many facets of everyday activities, and can be grouped under one or more categories: legal, financial, health, or personal care. How a person meets the capacity threshold under each decision category is guided by the language of the statutes that govern each one.

In deciding whether a person has capacity to do something at law, we must consider—capacity to do what?

- Make a Will?
- Make a Power of Attorney?
- Marry or divorce?
- Consent to or refuse surgery, treatment, or medication?
- Instruct a lawyer?
- Donate money?
- Choose a care facility?
- Enter a contract?
- Participate in research?
- Appoint a supportive or substitute decision-maker?
- Make an investment decision or manage property?²⁶⁷

The above list shows that the decision possibilities are endless. The legal criteria for capacity to make a Will is not the same criteria to appoint a supportive decision-maker. The capacity to grant a Power of Attorney for property is different from the criteria used to assess capacity to make personal care decisions.²⁶⁸

There are also important nuances for each decision to factor in. For investment decisions, things to consider include: what investment decision is required in the circumstance? Is it to open a tax-free savings account (TFSA)? Or is it to decide what investments are purchased within the TFSA—for example, a Guaranteed Income Certificate (GIC) or complex mutual funds? A person’s capacity to decide on one option may not match their capacity to decide on another. Decisions are in and of themselves multi-faceted and informed by many different factors.²⁶⁹

Situation

We know from our discussion in Chapter 2 that a person’s ability to make an investment decision may fluctuate for reasons unrelated to whether they live with dementia or an intellectual or developmental disability. Capacity can change because of a person’s:

- Physical or mental health (e.g. medication to treat unrelated issues, diet, stress);
- Environment (e.g. location where decision is being made—home versus office);
- Social influences (e.g. family, friends); and
- Availability of requisite information to decide.²⁷⁰

One of the barriers we heard about in the consultation interviews related to gaining physical access to a bank. A person living with a physical disability may need to go through additional preparation or steps to access the meeting location. This may create additional, and unexpected, physical and emotional burdens including: frustration, anxiety, confusion, exhaustion, among others. A person living with dementia may have only a short period of time during the day when they feel most capable of making these types of complex decisions. These are only some examples of the ways in which the situation or circumstances of the decision could hinder, or support, a person’s capacity to decide.

Time

The role that time plays in a person’s ability to decide is a critical factor in assessing capacity. Imagine having an emotionally difficult day, perhaps because of receiving bad news, recovering from an illness that requires medication that causes drowsiness. In these situations, we might ask ourselves questions like:

- What are the side effects?
- How do I feel in the moment?
- Do I feel well enough to work? Drive? Study?
- Do I feel capable of engaging in a social situation?
- Is now the right time to decide on an important life choice?

All these factors, among many others, can impact a person’s ability to decide at a given point in time. If you add these considerations to a person who may live with different abilities, because of dementia or an intellectual or developmental disability, the element of time may significantly hinder their ability to make decisions.

Capacity is time-specific, meaning it can fluctuate at different points during the day, week, or month. A person’s ability to decide can be enhanced or inhibited by time-based factors. If we apply this to legal assessments of capacity, we understand this to mean that a person’s capacity must be evaluated as it relates to the point in time for when the decision or instruction is required.²⁷¹ We must also consider how the availability of time to decide can impact a person’s ability to make a choice.

When it comes to making a decision as to whether or not someone has capacity to make a financial decision, that’s a decision that’s very contextual. What is someone able to do in a certain circumstance? Someone may be able to decide if they can open a bank account, but they cannot decide if they can buy a really complex mutual fund.

– Investment Professional

I would never make a decision in one meeting either, on capacity. I will make a conscious effort to reach out a little more often and have a few more of these conversations. So that we can try and catch them on different times. Because it is not just black by any stretch. There are days where they are absolutely clear. And then you could talk to them two hours later and they are not.

– Investment Professional

3.2 CAPACITY TO MAKE FINANCIAL DECISIONS IN BC

3.2.1 Overview

In this study paper, we focus on the statutes that deal with capacity in the context of making financial decisions or managing financial property.²⁷² In BC, there are different statutory requirements used to determine capacity. As such, capacity for financial decisions tends to fall on a continuum, where the criteria to demonstrate capacity may be more or less restrictive. This chapter outlines the law in BC. It begins with the presumption of capacity in adult guardianship law, followed by discussion of the different options for formal agreements that create supported and substitute decision-making relationships. Some of these arrangements are chosen by the adult, and others are appointed by judges or the Public Guardian and Trustee of BC (PGT BC). Each section provides an outline of the type of formal arrangement, an explanation of key roles and responsibilities for people involved, and oversight.

3.2.2 Presumption of Capacity

The *Adult Guardianship Act (AGA)* is BC’s guardianship statute, put in place “to protect the interests of vulnerable adults who are incapable of making decisions on their own.”²⁷³ The *AGA* states that, unless proven otherwise, every adult is presumed capable of making their own decisions about personal care, health care, and financial affairs.²⁷⁴ An adult is anyone age 19 and older.²⁷⁵ The *AGA* also states that how a person communicates with others “is not grounds for deciding that [they are] incapable of making decisions.”²⁷⁶

Absent reasons to the contrary, a person is presumed capable of making financial decisions. This means they have a right to choose how they want to spend, save, and invest their money. They also have the right to be protected from financial hardship should they become incapable of making these decisions.

3.2.3 Options for Managing Decisions

If a person believes an adult is having difficulty managing their financial affairs, there are a range of supported or substitute decision-making measures available to consider, from least to most intrusive. There are other formal, investigative options that could be used, when and if necessary, especially in cases of suspected abuse or neglect.²⁷⁷

Below is a brief statement of the key informal and formal options for managing financial decisions, followed by a more in-depth discussion in this chapter:

- **Informal support:** An adult may receive informal support from a person in their family, or from someone they trust;
- **Representation Agreement:** An adult may formally appoint a representative (as a supported and substitute decision-maker) to help make, or to make, financial decisions on the adult’s behalf;²⁷⁸
- **Power of Attorney for Finance and Property:** An adult may appoint an attorney (a family member, friend, trust company or, in exceptional circumstances, the PGT BC) to make

decisions on their behalf. An Enduring Power of Attorney (EPOA) allows the attorney to continue to act as substitute decision-maker if the adult becomes incapable;²⁷⁹

- **Committee or Guardian:** If an adult needs help to make financial decisions, and there is no representative or attorney in place, a committee of estate (pronounced Kaw-mit-TEE) may be appointed to make decisions about an adult’s estate. A family member, close friend, trust company, or the PGT BC can act as an adult’s committee of estate. The processes for appointing committee’s, and respective duties, is discussed later in this chapter.

Diagram 3 shows the continuum of decision-making options, from least to more restrictive.

Diagram 3: Continuum of Decision-Making Options



The next several sections discuss the processes for appointing supportive or substitute decision-makers for financial decisions in BC. More discussion on the concept of supported decision-making in the context of investment decisions is set out in Chapter 5.

3.3 REPRESENTATION AGREEMENTS

In British Columbia, unless proven otherwise, an adult is presumed to have capacity to make decisions about the routine management of their financial affairs, including their investments.²⁸⁰ BC’s *RAA* allows an adult to make a formal agreement, called a representation agreement, that appoints one or more people, called representatives, to help the adult make, or to make on the adult’s behalf, decisions about personal care, health care, and routine financial and legal matters. The purpose of the *RAA* is twofold, namely:

1. To enable an adult to formally decide how, when, and who will make decisions about their health care, personal care, finances, or other matters if they become incapable of making those decisions on their own; and
2. To provide a way for the adult to avoid the need for the court to decide who will help make, or make, decisions for the adult if they become incapable of making decisions on their own.²⁸¹

Like the *AGA*, the *RAA* makes clear that the way an adult communicates with people is not grounds for deciding they are incapable of understanding the information required to make a decision.²⁸²

3.3.1 Types of Representation Agreements

There are two types of representation agreements an adult can make under the *RAA*, namely 1) section 7 standard agreement, and 2) section 9 non-standard agreement.

A section 7 representation agreement (RA7) covers decisions that relate to:

- the adult’s personal care;
- routine management of financial affairs;
- most major health care and minor health care,²⁸³ except the kinds of health care prescribed under section 34 (2) (f) of the *HCCA*; and
- obtaining legal advice or services for the adult, and instructing counsel to commence proceedings, except divorce proceedings, or to continue, compromise, defend or settle any legal proceedings on the adult’s behalf.²⁸⁴

A section 9 representation agreement (RA9) does not include financial decisions, but does covers decisions that relate to:

- Minor and major health care decisions, including end-of-life decisions;
- Personal care or health care decisions including:
 - Where and with whom an adult will live;
 - Whether an adult should work (including type or work and/or employer);
 - Educational, social, vocational, or other activities;
 - Who the adult will associate or have contact with;
 - Diet and clothing; and
 - Giving or refusing health care in the circumstances listed in the agreement (including “specified kinds of health care, even though the adult refuses to give consent at the time the health care is provided”).²⁸⁵

The above are examples of the types of decisions that a representative under an RA9 may be authorized to make. The full scope of powers of a representative under either an RA7 or RA9 will depend on how much authority the adult gives the representative under the agreement.²⁸⁶ A review of the full authority under an RA9 falls outside the scope of this study paper.²⁸⁷

For this study paper, we focus on the criteria for making and using RA7s for routine management of financial affairs, and specifically in the context of investments. Section 2 of the *Representation Agreement Regulation (RAR)* includes the following investment activities for an RA7:

- (p) establishing an RRSP for the adult;
- (q) making contributions to the adult’s RRSP and RPP;
- (r) converting the adult’s RRSP to a RRIF or annuity and creating a beneficiary designation in respect of the RRIF or annuity that is consistent with the beneficiary designation made by the adult in respect of that RRSP;

- (s) (making, in the manner provided in the Trustee Act, any investments that a trustee is authorized to make under that Act;
- (t) disposing of the adult’s investments[.]²⁸⁸

3.3.2 Capacity to Make a Section 7 Agreement

The standard for capacity to make a representation agreement is lower than the capacity threshold required to make a will²⁸⁹ or contract.²⁹⁰ There is no requirement for an adult to undergo a capability assessment from a medical practitioner, nor to consult with a lawyer, to make a RA7. The Act states that an adult may make a RA7 “even if an adult is incapable of making a contract, managing [their] health care, personal care or legal matters, or the routine management of [their] financial affairs”.²⁹¹

The representation agreement is the least restrictive, formal alternative to fully independent decision-making. The *RAA* states that a person’s ability to appoint a representative is determined by considering several factors including:

1. whether the adult communicates a desire to have a representative make, help make, or stop making decisions;
2. whether the adult demonstrates choices and preferences and can express feelings of approval or disapproval of others;
3. whether the adult is aware that making the representation agreement or changing or revoking any of the provisions means that the representative may make, or stop making, decisions or choices that affect the adult; [and]
4. whether the adult has a relationship with the representative that is characterized by trust.²⁹²

3.3.3 General Duties of the Representative

The representative under a representation agreement has legal authority to help make, or make decisions on behalf of, an adult. In helping, or making decisions for, an adult, the *RAA* requires a representative to:

- Act honestly and in good faith;
- Exercise care, diligence, and skill of a reasonably prudent person; and
- Act within their authority under the agreement.²⁹³

A representative must also, to the extent reasonable, consult with the adult to determine their wishes, and to comply with the wishes “if it is reasonable to do so.”²⁹⁴ In situations where a representative may not know the adult’s instructions or expressed wishes, the representative must instead rely on what they know to be the adult’s beliefs and values, or alternatively the adult’s best interests.²⁹⁵ The *RAR* also requires that a representative confirm they have read and understood, and agree to accept, their duties and responsibilities outlined in section 16 of the *RAA*.²⁹⁶

In fulfilling their duty to help or make decisions about an adult’s investments, the *RAA* does permit a representative to give all or part of their authority to a qualified investment specialist or mutual fund

manager.²⁹⁷ Representatives acting under an RA7 (or an alternate representative or monitor) are generally not entitled to compensation unless:

- An adult specifically authorizes compensation, and sets out the amount, in the agreement;
- The adults’ authorization for compensation is not void under Part 2 of the *HCCA*; and
- The court, on application by the representative, alternate representative, or monitor authorizes the compensation to be paid.²⁹⁸

A similar requirement to expressly authorize compensation exists for adults who appoint an attorney under a Power of Attorney.²⁹⁹

In contrast, a person acting as a trustee under a will, or a guardian appointed by the court, is entitled to receive “fair and reasonable allowance, not exceeding 5% on the gross aggregate value, including capital and income, of all the assets of the estate” as compensation for the “care, pains and trouble and [their] time spent” managing the trusteeship or guardianship.³⁰⁰ Compensation is paid over and above any lawful expenses incurred by the executor, trustee, guardian, or administrator of an estate, including for disposal and settlement of the affairs of the estate.³⁰¹

3.3.4 Duties of the Monitor

Although the *RAA* does not specifically define the monitor, section 20 of the Act states that the role of the monitor is to ensure that a representative named is complying with their duties described above.

An adult who makes a RA7 or RA9 may choose to appoint a monitor to oversee the representative that manages the personal, health care, and financial decisions of the adult. One important exception applies to this option. In the case of an RA7, where a representative is managing the routine financial affairs of the adult, an adult must appoint a monitor unless:

- a) the representative named by the adult is the adult’s spouse, the Public Guardian and Trustee, a trust company or a credit union, or
- b) the adult has assigned authority under section 7 (1) (b) to 2 or more representatives and they are required to act unanimously in exercising all authority assigned under that section.³⁰²

Under the *RAA*, a monitor has the authority to visit and speak with the adult and, if there is reason to suspect non-compliance by a representative, the monitor can require that a representative produce accounts or other records, and report to the monitor.³⁰³ Except for reasonable, out-of-pocket expenses, monitors are not entitled to be paid for their role.

3.3.5 Routine Management of Financial Affairs

In the context of managing finances and investments, whether by helping or making decisions for an adult, the *Representation Agreement Regulation* describes the full range of financial activities a representative can help with, or perform, on behalf of an adult, including:

- Bank transactions (e.g. open or close accounts, deposit, transfer, or withdraw money, or pay bills);
- Renew or make payments on existing loans;
- Obtain financial benefits or entitlements (e.g. receive pension or income);
- Receive bank account statements, passbooks, or notices from a financial institution;
- Deal with cheques, bank drafts, and other negotiable instruments;
- Make, manage and dispose of investments under the *Trustee Act*³⁰⁴;
- Establish or convert investment products (e.g. set up an RRSP, convert an RRSP to a Retirement Income Fund account);
- Make contributions to an RRSP or Registered Pension Plan;
- Take steps under the *Land Tax Deferral Act*³⁰⁵ to defer property taxes; and
- Make charitable donations, a total amount not to exceed 3 per cent of the adult’s taxable income for the year, and that are “consistent with the adults’ financial means at the time of the donation and with the adult’s past practices.”³⁰⁶

In performing the above activities, a representative has the same right to access information and records as the adult for whom the representative is acting.³⁰⁷ The requirement of a representative to act in good faith also applies to how they make use of an adult’s information and records in fulfilment of their duties.

3.3.6 Limitations on the Role of Representatives

A representative appointed under a RA7 is not permitted to:

- (a) Use or renew an adult’s credit card or line of credit, or obtain a credit card or line of credit for the adult;
- (b) Institute a new loan or mortgage on the adult’s behalf, except to renew or refinance an existing loan or mortgage where the principal does not exceed the amount owed on the loan, and no new registration is made against the mortgage;
- (c) Purchase or sell real property on the adult’s behalf;
- (d) Guarantee a loan, post security, or indemnify a third party;
- (e) Lend or give away the adult’s personal property, except as a donation to a registered charity that meets the statutory criteria;
- (f) Revoke or change a beneficiary designation;
- (g) Act as director or officer of a company on the adult’s behalf.³⁰⁸

Representatives are also required to maintain records that include:

- a current list of the adult’s assets and liabilities;
- accounts and other records; and
- invoices, bank statements, and tax returns required to create a full accounting of the receipts and disbursements.³⁰⁹

3.4 POWER OF ATTORNEY FOR FINANCE AND PROPERTY

Under BC’s *Power of Attorney Act*, a person can choose from two types of power of attorney documents:

- 1) General Power of Attorney (POA); or
- 2) Enduring Power of Attorney (EPOA).³¹⁰

Both documents must be made while an adult person is capable of making decisions. Capacity to appoint an attorney for finances requires that a person understand the nature and the consequences of the document being made. To make a valid EPOA, an adult must understand the following:

- (a) the property the adult has and its approximate value;
- (b) the obligations the adult owes to his or her dependants;
- (c) that the adult’s attorney will be able to do on the adult’s behalf anything in respect of the adult’s financial affairs that the adult could do if capable, except make a will, subject to the conditions and restrictions set out in the enduring power of attorney;
- (d) that, unless the attorney manages the adult’s business and property prudently, their value may decline;
- (e) that the attorney might misuse the attorney’s authority;
- (f) that the adult may, if capable, revoke the enduring power of attorney;
- (g) any other prescribed matter.³¹¹

3.4.1 General Power of Attorney (POA)

A general power of attorney (POA) is a legal document that allows an adult to appoint someone (called an attorney) who they trust to manage their financial affairs, either under the adult’s direction, or on the adult’s behalf, when they are unavailable.³¹² Under a POA, an adult can give general or specific powers to an attorney, depending on the situation.³¹³

The adult retains their right to make decisions about their finances, and can also receive help from their attorney to make those decisions.³¹⁴

3.4.2 Enduring Power of Attorney (EPOA)

An enduring power of attorney (EPOA) grants the same authority as a POA over an adult’s legal and financial affairs, but remains effective when an adult needs help with, or is deemed incapable of, making those decisions. The same criteria for capacity to make a POA applies to making an EPOA and is higher than that required to make a RA7. An adult who makes an EPOA must specify in the document whether the attorney has authority while the adult is capable, or only when the adult is incapable, and that the authority continues despite the adult’s incapability.³¹⁵

3.4.3 Scope of Authority

Like a POA, an adult can specify the scope of authority under an EPOA to include things like bill payments, banking transactions, tax payments, management of investments, sale of assets, and financial

responsibilities for dependents.³¹⁶ The attorney may also deal with complex financial decisions, and working with investment advisors on an investment plan. While EPOAs are generally drafted to cover all financial matters, the adult can limit the scope of authority to only certain assets.

3.4.4 When Authority under an EPOA Begins

Generally speaking, an attorney’s authority under an EPOA begins when the EPOA is signed by the adult and the attorney.³¹⁷ An adult can also specify an event or date when they wish for the EPOA to begin, such as if a family physician writes that the adult is incapable.³¹⁸ If the EPOA, or a specific provision within it, becomes effective after a specified event occurs as outlined in the document, then the adult must state in the EPOA “how and by whom the event is to be confirmed.”³¹⁹ The PGT BC resource notes that, “[w]hile this ensures the attorney cannot act unless you [the adult] are incapable, it also means they [the attorney] have no authority to speak for you or assist you while you are capable.”³²⁰ Even if an EPOA is in effect, a capable adult maintains the right to continue making decisions.³²¹ The attorney may also provide support to help the adult make decisions under the EPOA.

3.4.5 When an EPOA Terminates

An EPOA terminates if the adult revokes the document or passes away.³²² Other events that may terminate an attorney’s authority under an EPOA include:

- when a marriage or marriage-like relationship ends and the attorney is the spouse, unless the EPOA states the authority continues;
- an event or condition specified by the adult in the EPOA occurs; or
- a court order ends it under s 36(5) of the *POAA* (application by the PGT BC or a person who made a report to the PGT BC).³²³

An EPOA, and an attorney’s ability to act under it, will be suspended if the PGT BC is appointed Committee of Estate under a Certificate of Incapability.³²⁴ For more discussion on committee of estate, see next section.

3.4.6 Duties of the Attorney: EPOA

In addition to the expectation to act honestly and in good faith, and exercise the care, diligence, and skill of a reasonably prudent person, an attorney must also:

- Act in the adult’s best interests, taking into account the adult’s current wishes, known beliefs, values, and any directions to the attorney set out in the EPOA;³²⁵
- To the extent reasonable, give priority to meeting the personal care and health care needs of the adult when managing the adult’s financial affairs;³²⁶
- Unless the EPOA states otherwise, invest the adult’s property only in accordance with the *Trustee Act*;³²⁷
- To the extent reasonable, foster the independence of the adult and encourage the adult’s involvement in any decision-making that affects the adult;³²⁸

- Not dispose of property that the attorney knows is subject to a specific testamentary gift in the adult’s will, except if the disposition is necessary to comply with the attorney’s duties;³²⁹
- To the extent reasonable, keep the adult’s personal effects at the disposal of the adult.³³⁰

Of note, and unlike the requirement of an RA7 representative to confirm they understand and accept their duties, there is no requirement under a POA for the attorney to do the same.³³¹

3.5 COMMITTEES AND GUARDIANS

If an adult needs help to make financial decisions, and an RA7, POA, or EPOA is not in place, a committee of estate (pronounced *Kaw-mit-TEE*) may be appointed to make decisions about an adult’s estate. A family member, close friend, trust company, or the PGT BC can act as an adult’s committee of estate.

Appointment of a committee of estate can happen in two ways:

1. Certificate of Incapability under the *Adult Guardianship Act (AGA)*; or
2. Court appointment under *Patients Property Act (PPA)*.

3.5.1 Certificate of Incapability under Adult Guardianship Act (AGA)

As a last resort to other options for supported or substitute decision-making under RA7s, POAs, or EPOAs, and if there is reason to believe that an adult may be incapable of managing their financial affairs, the *AGA* sets out the process to appoint a statutory property guardian to make financial decisions on the adult’s behalf.³³²

Like all other provinces and territories in Canada, BC’s *AGA* relies on a presumption of capacity.³³³ The mandate of the *AGA* is to “protect individuals liable to injure themselves or undermine their assets as a result of compromised decision-making.”³³⁴ The Act also provides support, assistance, and response options for situations of abuse, neglect, and self-neglect.

In deciding whether a certificate of incapability should be issued, the *AGA* sets out the following guiding principles to ensure an adult’s wishes are respected, should they become incapable of making those wishes known:

Guiding principles

2 This Act is to be administered and interpreted in accordance with the following principles:

- (a) all adults are entitled to live in the manner they wish and to accept or refuse support, assistance or protection as long as they do not harm others and they are capable of making decisions about those matters;
- (b) all adults should receive the most effective, but the least restrictive and intrusive, form of support, assistance or protection when they are unable to care for themselves or their financial affairs;

- (c) the court should not be asked to appoint, and should not appoint, guardians unless alternatives, such as the provision of support and assistance, have been tried or carefully considered.³³⁵

The BC Supreme Court has recently summarized the purpose of the *AGA* to “prioritize self-determination and autonomy for adults with disabilities and impose involuntary measures only as a last resort and in a manner as minimally intrusive as possible.”³³⁶

Strictly speaking, these guiding principles are drafted for interpretation of the *AGA* itself. They do not extend to other guardianship statutes, like the *PPA*, which have their own statutory language and meaning. However, and from a practice standpoint, the *AGA* principles are a helpful model to emphasize respect for the autonomy of older adults and to use the least intrusive supported or substitute decision-making measures.

If an adult needs help managing their financial affairs but does not have a formal plan in place for someone to help them, then Part 2.1 of the *AGA* sets out a process for the PGT BC to be appointed as statutory property guardian. To determine whether an adult needs help with managing their financial affairs because there is a concern about mental incapacity, either the PGT BC or designated health authority staff may ask that a qualified health care provider (QHCP) assess the adult’s incapability.³³⁷ If a QHCP determines that the adult is incapable of managing their financial affairs, they may report the adult’s incapability assessment to designated health authority staff.³³⁸

Upon receiving an assessment, the designated health authority staff may issue a certificate of incapability.³³⁹ Before issuing a certificate of incapability, the health authority designate must be satisfied of the following;

- (a) the adult needs to make decisions about the adult’s financial affairs,
- (b) the adult is incapable of making those decisions,
- (c) the adult needs, and will benefit from, the assistance and protection of a statutory property guardian,
- (d) the needs of the adult would not be sufficiently met by alternative means of assistance, and
- (e) either
 - (i) the adult has not granted power over all of the adult’s financial affairs to an attorney under an enduring power of attorney, or
 - (ii) an attorney has been granted power as described in subparagraph (i) but is not complying with the attorney’s duties under the *Power of Attorney Act* or the enduring power of attorney, as applicable.³⁴⁰

If a certificate of incapability is issued, then the PGT BC is appointed as “statutory property guardian” under Part 2.1 of the *AGA*.³⁴¹ The PGT BC, as statutory property guardian, then has authority under the *PPA* to manage the adult’s financial and legal affairs. Once appointed, the PGT BC then has authority to act as committee of estate under the *PPA* to manage the adult’s financial and legal affairs. An adult named in the certificate of incapability, or a person acting on their behalf, can request a reassessment.³⁴²

3.5.2 Court Appointment under *Patients Property Act (PPA)*

Any person, including the PGT BC, may apply to the court to be appointed as committee of estate under the *PPA*.³⁴³ A capable adult can also nominate a person to be appointed as committee of their estate.³⁴⁴ The *PPA* sets out the process for court appointment of a committee of estate.³⁴⁵ If a capable adult nominates a person to be named their committee of estate, and unless there is good and sufficient reason not to, the court must follow the nomination chosen by the capable adult.³⁴⁶

On application to the court for appointment as committee of estate, and before a determination of incapacity is made, the court must consider whether the adult can manage their financial affairs.³⁴⁷ If the court finds the adult is incapable of making financial decisions, the court must then look to the suitability of the person(s) applying to be named committee.³⁴⁸ Once a committee is appointed, the court can attach conditions or restrictions that limit authority.³⁴⁹

3.5.3 Responsibilities of a Committee of Estate

If a committee of estate is put into place, either by way of statute under Part 2.1 of the *AGA*, or by court order under the *PPA*, the committee’s responsibilities include:

“[...]securing assets, confirming eligibility for benefits, receiving income, paying bills, contracting for services, maintaining, purchasing and selling real property, *managing investments*, preparing tax returns and appropriately providing for legal dependents. Legal responsibilities include acting as litigation guardian on civil law matters.”³⁵⁰

A committee must also manage a person’s financial affairs in a way that benefits the adult and the adult’s family.³⁵¹ Money that exceeds what is required to maintain routine needs is to be invested. The committee must also “to the extent reasonable, foster the independence of the [adult] and encourage the [adult’s] involvement in any decision-making that affects the [adult].”³⁵²

3.5.4 Duties of the Committee under the *Trustee Act*

Committees of estate must adhere to a standard of care for managing an adult’s financial affairs, as set out in the *Trustee Act*.³⁵³ Also known as the “prudent investor” standard “a trustee [committee, representative] must exercise the care, skill, diligence, and judgment that a prudent investor would exercise” when making investment decisions.³⁵⁴ The *Trustee Act* does not specifically define prudent investor. However, the PGT BC notes that the standards set out in other jurisdictions suggest the following interpretation:

- Make investments necessary that a prudent investor would to protect capital and provide income.
- Risk and return objectives must be reasonable and suitable.
- Provide reasonable diversification of investments.
- Act with prudence when delegating investment authority to an agent.
- Trustee should incur only costs that are reasonable and appropriate.
- Adopt a balanced approach to managing investments.³⁵⁵

A person acting as committee of estate need only show that decisions made about an adult’s investments reflect the above considerations. As long as the prudent investor rule is followed, the committee will not be liable for loss arising from those investment decisions.³⁵⁶ The committee also has authority under the Act to “delegate to an agent the degree of authority with respect to the investment of trust property that a prudent investor might delegate in accordance with ordinary business practice.”³⁵⁷ The committee must exercise prudence in choosing an agent to act on their behalf, including setting terms and limits to the authority granted.³⁵⁸

In 2003, the *Trustee Act* was amended to introduce the prudent investor criteria.³⁵⁹ Prior to the change, trustees could only invest trust money in government fixed-rate bonds and other limited securities.³⁶⁰ The changes allowed trustees to use modern, practical investment options for the estate, like mutual funds.³⁶¹ The amendments also permitted trustees to delegate their authority to a professional fund manager, using the same standard of care when choosing an appropriate agent. This includes “acquainting the agent with the investment objectives and monitoring the performance of the agent to ensure compliance with the terms of the [estate].”³⁶² These amendments were made in response to recommendations from BCLI’s 1999 Report on Trustee Investment Powers.³⁶³

3.6 THE DUTY TO ACCOMMODATE

Although the *Code* does not specifically define disability, recent decisions out of the BC Human Rights Tribunal (BCHRT) offer some guidance on how both physical and mental disabilities are interpreted.

In 2014, the BCHRT considered the definition of physical disability under the *Code*.³⁶⁴ In *Li*, the complainant, Mr. Wan Ji Li, alleged he was discriminated against in his employment, and subsequently terminated, because of a physical disability related to an injury to his right hand while working. The evidence indicated his injury would resolve with medication and a period of rest.

In considering whether Mr. Li had a physical disability, the tribunal upheld a finding from an earlier decision that interpreted physical disability as follows:

[...] the concept of disability, for human rights purposes, has generally been held to involve a physiological state that is involuntary and has a degree of severity, permanence and/or persistence. Generally, the disability impairs a person’s ability to carry out the normal functions of life to some degree and poses an impediment to a person’s participation in the economic or other areas of life which the Code seeks to protect against. It is a case-by-case analysis.³⁶⁵

We professionals are sometimes geared to get people in and out, and try to wrap things up, and get concrete answers. Does not work that way with people with a disability. Sometimes you have to explain the process numerous times. Sometimes they will forget that they have called you. Sometimes they won't get the information back to you in time, where it's really important to get it back to you in time. Sometimes they will not understand certain topics. And that is the one thing that you have got to be really cognizant about when you are dealing with a person's disability. You cannot assume anything. It would be very difficult for a professional to have the right type of relationship with a person with a disability without fully understanding their disability.

– Investment Professional

Listening, sometimes by questioning, and say, ‘is that really what you want to do? But, not saying ‘this is what you need to do.’ I just let [my family member] work it out. I still let them make choices.

– Supporter

Protection against discrimination due to a physical disability under the *Code* requires that a person’s condition is sufficiently severe, permanent, or persistent.³⁶⁶ In Mr. Li’s case, his injury was “transitory and not permanent in nature” and lacked the requisite criteria to meet the above standard.

The BC HRT website provides the following additional guidance for how to interpret whether a person’s specific circumstances will constitute a physical or mental disability under the *Code*:

Mental Disability

Mental disability includes mental conditions that affect or are seen as affecting a person’s abilities.

[...]

Mental disability includes such conditions as a learning disorder, developmental disability, or illness such as depression or bipolar disorder.

Physical Disability

Physical disability includes physical conditions that affect or are seen as affecting a person’s abilities.

[...]

Physical disability includes conditions that impair a person’s ability to carry out the normal functions of life. It includes addiction, amputation, asthma, acne, diabetes, cancer, epilepsy, high blood pressure, hypertension, obesity and impairments to mobility. It includes people who are Deaf, hard of hearing, or blind. It does not include short-lived conditions such as a cold.³⁶⁷

Many of the people we spoke to for this project shared their experiences of what it means to be meaningfully accommodated for their disability. Some people talked about having better access to financial institutions or investment firms, such as ramps or signage that provides directions on how to get to an office. Others spoke about size of entryways or lighting conditions as opportunities to improve meeting environments for investment conversations.

While the BC *Code* offers important guidelines and principles to inform practice, accommodation is often determined on a case-by-case basis. In some ways this offers more flexibility to people who have multiple disabilities, or who live with invisible disabilities. For others, a lack of a definition for disability may create a barrier to accommodation and access, especially if an application to the BCHRT is required to confirm a person’s disability under the *Code*, and their subsequent entitlement to accommodation.

3.7 SUPPORTED DECISION-MAKING IN BC—AN INTRODUCTION

The right of a person to make their own decisions is an essential aspect of social citizenship; however, a person’s disability, or misconceptions about people living with dementia, can present significant barriers to a person’s ability to make decisions that reflect their true values and wishes.

BC’s *RAA* formally recognizes the use of support from a trusted person in an adult’s life to help the adult make decisions, or to make decisions on the adult’s behalf. No specific definition is offered for how a person can provide support or assistance; but the Act allows people who may not otherwise have the legal or cognitive capacity to make decisions to formally recognize someone they trust to help them stay involved in the decision-making process.

BC’s approach is valued for significantly enhancing the self-determination and dignity of people with disabilities, as a way of promoting participation and inclusion in decisions that impact their lives. Internationally, BC’s *RAA* is recognized as pioneering legislation, being one of the first legal statutes to formally recognize supported decision-making. Over the past two decades, several provinces and one territory have introduced legislation that allows a person to be named (by a document or appointed by the court) to support or assist an adult to make decisions.³⁶⁸ Other jurisdictions have also explored supported or network decision-making models, including Ontario.³⁶⁹

3.8 PERSONAL PLANNING AND SUPPORTED DECISION-MAKING

The *Representation Agreement Act (RAA)* was designed to allow adults to decide how, when, and who would help them make decisions about the routine management of their financial affairs if they became incapable of doing so. The overall goal was to avoid the need to have the court formally appoint someone to make decisions on an adult’s behalf.³⁷⁰ The lower capacity threshold set out in the *RAA* is more flexible, to include people who may not otherwise meet the capacity test to create other planning documents.³⁷¹

3.8.1 The Purpose of the Representation Agreement Act

The purpose statement in section 2 of the *RAA* reads as follows:

Purpose of this Act

- 2 The purpose of this Act is to provide a mechanism
- (a) to allow adults to arrange in advance how, when and by whom, decisions about their health care or personal care, the routine management of their financial affairs, or other matters will be made if they become incapable of making decisions independently, and

I think [support] A) depends on the clarity of understanding on the supporter’s part about their role, and B) providing as much opportunity to build that relationship, and build the foundation for the decisions, which is knowledge of the person’s will and preference. And you are never going to get a hundred per cent. But, in simple terms, the stronger and deeper the relationship, the closer you are going to get to a true supported decision-making situation.

– Academic

- (b) to avoid the need for the court to appoint someone to help adults make decisions, or someone to make decisions for adults, when they are incapable of making decisions independently.

The court interprets the *RAA*’s purpose to mean that a representative may only act in their capacity as a substitute decision-maker for the adult “if the adult becomes ‘incapable of making decisions independently.’”³⁷²

The test for capacity required to make a RA7 is set out in section 8 of the *RAA*, as follows:

Test of incapability for standard provisions

- 8** (1)An adult may make a representation agreement consisting of one or more of the standard provisions authorized by section 7 even though the adult is incapable of
- (a) making a contract,
 - (b) managing his or her health care, personal care or legal matters, or
 - (c) the routine management of his or her financial affairs.
- (2)In deciding whether an adult is incapable of making a representation agreement consisting of one or more of the standard provisions authorized by section 7, or of changing or revoking any of those provisions, all relevant factors must be considered, for example:
- (a) whether the adult communicates a desire to have a representative make, help make, or stop making decisions;
 - (b) whether the adult demonstrates choices and preferences and can express feelings of approval or disapproval of others;
 - (c) whether the adult is aware that making the representation agreement or changing or revoking any of the provisions means that the representative may make, or stop making, decisions or choices that affect the adult;
 - (d) whether the adult has a relationship with the representative that is characterized by trust.³⁷³

In carrying out their duty to either help make, or make, decisions for the adult, a representative must:

- (a) consult, to the extent reasonable, with the adult to determine his or her current wishes, and
- (b) comply with those wishes if it is reasonable to do so.³⁷⁴

A key exception to this duty arises if the adult’s current wishes cannot be determined, or it would be unreasonable for the representative to follow them.³⁷⁵ If that is the case, then the representative must comply with instructions or wishes expressed by the adult while they were capable.³⁷⁶

3.8.2 The UN CRPD and Personal Planning

In its General Comment to the UN CRPD, the UN Committee on the Rights of Persons with Disabilities recognized that, “[f]or many persons with disabilities, the ability to plan in advance is

an important form of support, whereby they can state their will and preferences which should be followed at a time when they may not be in a position to communicate their wishes to others.”³⁷⁷ The General Comment states that the exercise of making an EPOA represents an opportunity for an adult to practice their UN CRPD Article 12 rights because the adult chooses who will make decisions for them. The General Comment acknowledges that supported decision-making includes a substitute decision-maker helping an adult in the advance planning process and providing support under their authority as attorney in an EPOA document.

3.8.3 The Representation Agreement and the EPOA

The goal of both the representation agreement and EPOA regimes is to use the least intrusive means possible to foster an adult’s decision-making autonomy and avoid a formal declaration of an adult’s incapability under the *Adult Guardianship Act* or *Patients Property Act*. The purpose and effect of the two planning documents is that, even for an adult who may be incapable of managing their financial affairs, decisions can be managed under the respective authorities within the RA7 and EPOA.

Under an enduring power of attorney (EPOA), the law permits an adult to choose who they want to formally appoint as their supported or substitute decision-maker to manage their financial affairs. An adult is presumed to be capable of creating an EPOA so long as they can understand the nature and consequences of it.³⁷⁸ Section 14 of the *Power of Attorney Act (POAA)* states that an adult must indicate in an EPOA whether the attorney can exercise authority while the adult is capable (for example, to provide support for the adult to make decisions), or if an attorney’s authority only applies if the adult is incapable of making decisions.³⁷⁹ The benefit of advance planning through an EPOA is that an adult can choose the scope of the attorney’s authority while the adult is capable of making decisions. The option for an attorney’s authority to begin only when the adult is incapable of making decisions allows an attorney to shift between the role of supporter and substitute, when and if needed.

An adult who has an EPOA “can act for themselves even if an EPOA is in effect.”³⁸⁰ An attorney’s authority as substitute decision-maker is restricted to when an adult is incapable of making decisions. If an adult has an EPOA and an RA7, then an adult can receive support, or have decisions made on their behalf, without the need for a formal declaration of incapability under the *Patients Property Act*. Like an RA7, an attorney under an EPOA can provide support to a capable adult so the adult can continue making decisions about their financial affairs. The attorney need only act as a substitute decision-maker if the adult becomes incapable of making decisions.

A representation agreement ends when an adult is declared by a judge to be a “patient” under the *Patients Property Act*.³⁸¹ But the court has discretion to permit the representation agreement “to continue to be effective, despite the onset of disability.”³⁸² The courts acknowledge that, absent specific criteria in the legislation, they can consider factors such as:

- (a) the circumstances in which the representation agreement was executed;
- (b) the scope of the representation agreement; and
- (c) the basis for the application to set it aside.

Despite the court’s jurisdiction to order an adult to undergo a physician examination for a declaration of incapability, “the requirements of the *Patients Property Act* reflect the serious restrictions of liberty that result from a finding of incapacity. It is a blunt instrument for addressing these issues” and so should only be exercised in rare circumstances.³⁸³

For more discussion on supported decision-making and how it applies to the investment context, see Chapter 5 of this study paper.



CHAPTER 4

The Law on Financial Decision-Making in Ontario

This chapter outlines the law on capacity and authority to make financial decisions in Ontario. It also describes the research conducted on support authorizations and network decision-making.

In this chapter we set out:

- Ontario’s statutory framework for legal capacity and financial decision-making;
- The elements of decision, situation, and time that inform capacity;
- The standards for capacity to make financial decisions;
- Types of substitute decision-makers and instruments used to grant authority to make financial decisions;
- Ontario *Human Rights Code* and accommodation; and
- Summary of the 2017 LCO Report review of support authorizations and network decision-making models.

4.1 CAPACITY TO MAKE FINANCIAL DECISIONS IN ONTARIO

The two overarching statutes that govern legal capacity and decision-making in Ontario are the *Substitute Decisions Act, 1992 (SDA)*, and the *Health Care Consent Act, 1996*.³⁸⁴ This study paper focuses on legal capacity to make financial decisions as set out under the *SDA*.³⁸⁵

4.1.1 Legal Capacity—General

In Ontario, the *SDA* uses the term capable to mean a person who is mentally capable, and incapable to mean a person who is mentally incapable.³⁸⁶ Throughout the *SDA*, the terms capable and incapable are used interchangeably with the terms capacity and incapacity, respectively.³⁸⁷

Like the law in BC, Ontario’s *SDA* applies a functional approach to determine whether a person is capable or incapable of managing their financial and legal affairs. Section 6 of the *SDA* outlines the functional standard for capacity to manage property, as follows:

Incapacity to manage property
6 A person is incapable of managing 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.³⁸⁸

The above standard to manage property applies a decision-specific approach that considers a person’s capacity to decide in the context of the specific decision required in the circumstances.³⁸⁹ It acknowledges that people may have capacity to make decisions about one aspect of their lives but may lack capacity to make decisions about other aspects.

4.1.2 Presumption of Capacity

Although the *SDA* does not include a specific purpose statement, a review into the history of the Act highlights some of the values it is meant to capture. Two publications, commonly known as the Fram Report³⁹⁰ and the Weissub Report,³⁹¹ played a key role in shaping the legislation. Both the Fram and the Weissub Reports called for a legislative framework of capacity that respected a person’s autonomy and right to supports, and that promoted an administratively fair and accessible capacity assessment process.³⁹² In 1992, Ontario’s *SDA* was enacted in response to these reports to “protect the rights of those vulnerable adults, the mentally or physically incapable and the elderly, who cannot make personal care and other important life decisions on their own.”³⁹³

The 2014 LCO Paper summarizes the overarching purposes of the *SDA*, as follows:

- 1. facilitating, where necessary, decision-making for persons who have been determined to lack legal capacity;
- 2. preventing undue interference in the lives and decisions of persons who have legal capacity;
- 3. recognizing and promoting the role of supportive family and friends in the lives of persons who have been determined to lack legal capacity, as well as providing last resort decision-making mechanisms for those who do not have supportive family or friends;
- 4. supporting individuals in planning for the possibility that they may be found to lack legal capacity at some point in the future;
- 5. providing safeguards against abuse of persons who have been found to lack legal capacity;

- 6. providing rules and principles for substitute decision-making that are clear and that promote both the autonomy and the basic security of persons who have been determined to lack legal capacity;
- 7. ensuring basic procedural protections for persons whose legal capacity is lacking or in question.³⁹⁴

Section 2 of the *SDA* states that every person age 18 or older is presumed to be capable of entering into a contract.³⁹⁵ This presumption of capacity stands true unless a person has “reasonable grounds to believe that the other person is incapable of entering into the contract.”³⁹⁶

4.1.3 What Constitutes “Reasonable Grounds to Believe”?

The *SDA* does not specifically define what constitutes “reasonable grounds to believe” a person is incapable of making a contract. Instead, the common law offers guidance on the relevant factors that support or refute reasonable grounds in each situation. Most cases that discuss the concept of “reasonable grounds to believe” exist in criminal law.³⁹⁷ However, a recent Ontario civil case provides some clarity in the context of contracts.³⁹⁸

In *Foisey*, the deceased died intestate, survived by two sisters. One sister acted as sole estate trustee. The other sister, Ms. Foisey, received her share of the estate, and signed a release. Soon after, Ms. Foisey was declared incapable of managing her property. The Public Guardian and Trustee (“PGT”), as guardian, determined that Ms. Foisey’s share was significantly less than 50 per cent of the estate’s estimated value. The PGT applied to the court on Ms. Foisey’s behalf and was granted an order to have the estate’s trustee pass the accounts.³⁹⁹ The trustee appealed the decision.

The question on appeal was whether the application judge applied the correct test under section 2 of the *SDA* to determine if the trustee had “reasonable grounds to believe” Ms. Foisey was incapable of signing the release. A correct application of the test requires the court to consider the facts known to the trustee when the contract (release) was signed.⁴⁰⁰ The court must also ask “whether a reasonable person with the same knowledge [...] would have had reason to believe that the other party to the contract [...] was incapable of entering into the contract.”⁴⁰¹

The *Foisey* decision supports the proposition that, to prove reasonable grounds to believe a person is incapable under the *SDA*, “there must be some direct connection between the person’s behaviour and the capacity issue [...]”.⁴⁰² Section 6 of the *SDA* states that a person’s capacity to make a contract rests on their ability to understand the information relevant to the decision being made, and appreciate the reasonably foreseeable consequences of making, or not making, that decision.⁴⁰³

In granting the appeal, the court assessed the facts actually known to the trustee when Ms. Foisey signed the release. First, Ms. Foisey had legal counsel to explain what her entitlement was, and the effect of signing the release. Evidence supported that she understood and signed the release voluntarily.⁴⁰⁴ Second, the trustee was not aware of Ms. Foisey’s long-standing mental illness. This fact on its own did not prove incapacity at the time of signing.⁴⁰⁵ Finally, Ms. Foisey’s participation in a trusteeship program to help her manage her finances did not prove incapacity to sign the release.⁴⁰⁶

4.2 DECISION, SITUATION, AND TIME

Like we discussed in the BC chapter, the Ontario court in *Foisey* considers that a person’s capacity to decide depends on the decision being made, the time the decision is required, and the circumstances surrounding the decision. Adopting this functional lens, the court in *Foisey* sets out a two-step inquiry:

- 1. At the time the person entered into the contract, were they able to understand information relevant to deciding whether to enter into the contract?
 - (a) If the answer is no, the person is not capable of entering into the contract.
 - (b) If the answer is yes, a second inquiry must be made.
- 2. At the time the person entered into the contract, was the person able to appreciate the reasonably foreseeable consequences both of entering into the contract and of not entering into the contract?⁴⁰⁷

The approach to capacity in *Foisey*, with its focus on a person’s *ability* to understand and appreciate the information required to make the decision, supports the proposition that “every decision is unique, and the presence or absence of requisite decisional capacity in one decision does not necessarily imply its presence or absence in another decision.”⁴⁰⁸ Also known as a domain or decision-specific approach, the law in Ontario recognizes “that a person can have the ability to make some decisions and not others” and that ability fluctuates over time.⁴⁰⁹

For managing financial affairs, Ontario law sets out two types of decisional capacity: 1) capacity to manage property under section 6 of the *SDA*, and 2) capacity to make a general Power of Attorney (POA) or continuing power of attorney (CPOA) for property.

4.3 POWERS OF ATTORNEY FOR PROPERTY

Assessment of a person’s legal capacity to manage property is governed by the *SDA*. As noted above, section 6 of the *SDA* states that a person is incapable of managing their property (finances) if they cannot: 1) understand relevant information, or 2) appreciate the reasonably foreseeable consequences of making, or not making, a decision.⁴¹⁰

4.3.1 Capacity to Appoint a Power of Attorney (POA)

An adult who can manage their property can choose to appoint a substitute decision-maker under the *Powers of Attorney Act*.⁴¹¹ A POA may be required for short-term or business reasons, such as vacation or illness. Otherwise known as a general POA, the person named as attorney can make decisions on the adult’s behalf (the grantor) about anything the grantor can do, subject to any restrictions listed in the POA.⁴¹² This includes decisions about finances, such as:

- Banking;
- Purchasing and selling of goods or land; and
- Entering into contracts for services, goods or land.

An attorney’s authority under a general POA ends once the reason for the POA expires, or the grantor is deemed incapable of managing their property or finances.

If a person is incapable of managing their property, there are three different ways a substitute decision-maker can be appointed under the *SDA*: 1) continuing power of attorney; 2) statutory guardian; or 3) court-appointed guardian for property.

4.3.2 Capacity to Appoint a Continuing Power of Attorney (CPOA)

In Ontario, any capable adult age 18 or over can appoint a substitute decision-maker under a continuing power of attorney (CPOA). A CPOA is a legal document that allows a person to choose a substitute decision-maker to make decisions on their behalf about their property, including financial decisions. The CPOA must state that it is continuing, such that a person’s authority to act continues if the adult is incapable of managing their property. The CPOA may take effect immediately, or only when the adult is incapable of managing their property.⁴¹³

To make a CPOA, the *SDA* requires that a person:

- a. knows what kind of property he or she has and its approximate value;
- b. is aware of obligations owed to his or her dependants;
- c. knows that the attorney will be able to do on the person’s behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;
- d. knows that the attorney must account for his or her dealings with the person’s property;
- e. knows that he or she may, if capable, revoke the continuing power of attorney;
- f. appreciates that unless the attorney manages the property prudently its value may decline; and
- g. appreciates the possibility that the attorney could misuse the authority given to him or her. 1992, c. 30, s. 8 (1).⁴¹⁴

So long as an adult meets the above standard, they can make a CPOA even if they are incapable of making decisions about their property.⁴¹⁵

Subject to any court-imposed conditions or restrictions set out by the adult, the powers granted under a CPOA are broad.⁴¹⁶ An attorney named under a CPOA has authority “to do on the grantor’s behalf anything in respect of property that the grantor could do if capable, except make a will.”⁴¹⁷ This means they can make decisions about any type of financial transaction, including savings and investments, managing debts or assets, paying bills, selling real estate, and obtaining a loan. Other activities that an attorney can perform under a CPOA include:

- open and close bank accounts;
- redirect pensions and other income;
- apply for benefits or supplementary income to which the person is entitled;

- choose pension options;
- collect debts;
- buy goods and services;
- start or defend lawsuits if there are financial implications;
- lend, sell, store, or dispose of personal belongings; and
- maintain or sell a vehicle.⁴¹⁸

While performing the above activities, the attorney is entitled to receive information about the property belonging to the adult, including documents signed by the adult.⁴¹⁹

4.3.3 Duties of an Attorney

Section 38 of the *SDA* sets out the duties, and limitations, of an attorney acting under a CPOA for property. An attorney has a fiduciary obligation to make decisions that benefit the adult. In addition to keeping accounts of all transactions made on an adult’s behalf, an attorney for property must also:

- act diligently, with honesty and integrity, and in good faith;
- explain the attorney’s powers and duties to the incapable person;
- encourage the person to participate, to the best of his or her abilities, in decisions about their property;
- seek to foster regular personal contact between the incapable person and supportive family members and friends; and
- consult from time to time with supportive family and friends of the incapable person, and with those who provide personal care to the person.⁴²⁰

When making decisions about expenditures on behalf of an adult, the *SDA* sets out a list of criteria for managing necessary expenses, in order of priority, as follows:

- for the individual’s support, education and care;
- for the support, education and care of the individual’s dependents; and
- that are necessary to satisfy the individual’s legal obligations.⁴²¹

An attorney may or may not be compensated for their role under the CPOA. The *SDA* applies a requisite standard of care for how an attorney must act when they receive, and when they do not receive, compensation. An attorney who is compensated “shall exercise the degree of care, diligence and skill that a person in the business of managing the property of others is required to exercise.”⁴²² An attorney who receives no compensation “shall exercise the degree of care, diligence and skill that a person of ordinary prudence would exercise in the conduct of [their] own affairs.”⁴²³

As noted above, the *SDA* sets out a list of duties that attorneys must perform. Although the Act says that an attorney “shall encourage the incapable person to participate” in decisions, there is no specific statutory guidance for how to meet this requirement.⁴²⁴

4.4 STATUTORY PROPERTY GUARDIANSHIP

In Ontario, there are two ways a statutory property guardian can be appointed: 1) by certificate of incapacity issued under the *Mental Health Act*⁴²⁵; or 2) by a capacity assessment conducted under the *SDA*.

4.4.1 Mental Health Act

Part III of the *Mental Health Act* sets out a process for the Ontario Public Guardian and Trustee (“OPGT”) to be appointed as a statutory property guardian of property upon admission, during their stay, or at discharge from a psychiatric facility.⁴²⁶ If, after examination by a physician, a person is assessed as incapable of managing their property, a certificate of incapacity is issued.⁴²⁷ The certificate is sent to the OPGT, which becomes the person’s statutory property guardian.⁴²⁸

Two exceptions apply to the *Mental Health Act* certificate of incapacity process, namely: 1) if a person is already under guardianship under the *SDA*⁴²⁹ (see below); or 2) there are reasonable grounds to believe that the person has a CPOA that grants authority to someone to manage their property.⁴³⁰

4.4.2 Substitute Decisions Act

Under section 16 of the *SDA*, a person can request to have a designated capacity assessor perform a capacity assessment on an adult to determine if the adult is capable of managing their property.⁴³¹ A person requesting an assessment must prove that they:

- (a) have reason to believe the adult may be incapable of managing property;
- (b) have made reasonable inquiries and have no knowledge that an attorney under a CPoA has authority over the adult’s property; and
- (c) have made reasonable inquiries and have no knowledge of any spouse, partner or relative of the adult who wishes to apply to the court to be appointed as guardian.⁴³²

If a designated capacity assessor finds that an adult is incapable of managing their property, “the assessor may issue a certificate of incapacity” to the person requesting the assessment, and to the OPGT.⁴³³ Upon receiving a copy of the certificate, and unless another person applies to be considered, the OPGT is appointed as the person’s statutory guardian of property.⁴³⁴ As the statutory property guardian, the OPGT shall inform the adult about the appointment, and that the adult can apply for a review of the assessor’s finding.⁴³⁵

If a person listed under section 17 of the *SDA* applies to be a replacement statutory guardian, then their application must also include a management plan for the property.⁴³⁶ The criteria for the management plan are set out in the general regulation under the *SDA*.⁴³⁷ The prescribed form requires an applicant to describe each item of managed property and its estimated current market value, and set out a management plan that includes the following:

- Intended use, sale, storage, gift, or other purpose for land, household items, vehicles, and valuables;

- Closure and consolidation into trust, cash deposit, maintenance, etc., for savings and savings plans (including registered retirement or other savings plans);
- Maintenance, renewal, conversion, redemption, etc., of securities and investments;
- Debt collection;
- Maintenance, dissolution, sale, etc., of business interests owned;
- Discharge of liabilities of the person under guardianship;
- Collection, deposit, and allocation of income;
- Anticipated annual expenses for the person under guardianship; and
- Commencement or defence of legal proceedings in respect of the person’s property.⁴³⁸

The form also requires an applicant to show:

- Efforts to consult with the person under guardianship;
- To the best of their knowledge, that the person under guardianship would not object to any aspect of the management plan;
- An awareness of their duty to encourage the participation of the person under guardianship in decisions made, and to consult with family, friends, and caregivers of the person;
- Agreement to make reasonable efforts to determine if the person under guardianship has a will and, if so, what the provisions of the will are and obtain the will; and
- Agreement not to dispose of property that the applicant knows is subject to a testamentary gift in the will unless the gift is money, the disposition of the property is required to comply with duties as statutory property guardian, or to make a gift of the property to a person who will be entitled to it under the will.

In deciding whether to appoint a replacement statutory property guardian, the *SDA* requires the OPGT to “consider the incapable person’s current wishes, if they can be ascertained, and the closeness of the applicant’s relationship to the person.”⁴³⁹ The OPGT must also be “satisfied that the applicant is suitable to manage the property and that the management plan is appropriate.”⁴⁴⁰ The appointee may also be required to provide security in an amount fixed by the OPGT.⁴⁴¹

4.5 COURT-APPOINTED GUARDIANS OF PROPERTY

Even if there is a statutory guardian of property in place, a person can apply to the court to be appointed as a guardian of property.⁴⁴² The court is prohibited from appointing a guardian of property if it is satisfied of two things:

- (i) that an alternative course of action can be used to avoid finding an adult incapable of managing their property; and
- (ii) that the alternative course of action is less restrictive of the person’s decision-making rights than going under guardianship.⁴⁴³

One example of an alternative is if the court is satisfied that an attorney under a CPOA can adequately manage the person’s property.⁴⁴⁴ In deciding whether to appoint a guardian for property, the court is also required to consider the following:

- (a) whether the proposed guardian is the attorney under a continuing power of attorney;
- (b) the incapable person’s current wishes, if they can be ascertained; and
- (c) the closeness of the relationship of the applicant to the incapable person and, if the applicant is not the proposed guardian, the closeness of the relationship of the proposed guardian to the incapable person. 1992, c. 30, s. 24 (5); 1996, c. 2, s. 14 (6); 2009, c. 33, Sched. 2, s. 71 (5).⁴⁴⁵

The emphasis placed on the court to consider the least restrictive alternative to guardianship deserves some discussion. In the 1997 case of *Koch (Re)*, the Ontario Superior Court of Justice, on an appeal to set aside a finding of incapacity, stressed the importance of applying an objective test.⁴⁴⁶ In allowing the appeal, the court drew a distinction between “*failing* to understand and appreciate the risks and consequences” and “being *unable* to understand and appreciate risks and consequences.”⁴⁴⁷ The court explained that a person’s failure to understand and appreciate risks and consequences does not equate to inability, which is what section 6 of the *SDA* requires.⁴⁴⁸

Whether or not an assessor agrees with an adult’s decision on a matter introduces “personal values, judgments and priorities into the process”, which the court makes clear there is no statutory basis for.⁴⁴⁹ Additionally, attempts by an assessor to rely on what they view as a best interests approach to issue a finding of incapacity, “no matter how well-intentioned, is irrelevant.”⁴⁵⁰

The court’s reasoning for moving a way from a best-interests approach supports the court’s observation that “history has shown that the road to injustice is frequently lit with the light of good intentions.”⁴⁵¹ The court summarizes the recommended approach to capacity assessments under the *SDA*, as follows:

17. It is mental capacity and not wisdom that is the subject of the SDA and the HCCA. The right knowingly to be foolish is not unimportant; the right to voluntarily assume risks is to be respected. The State has no business meddling with either. The dignity of the individual is at stake.

[...]

19. Compelling evidence is required to override the presumption of capacity found in s. 2(2) of the SDA and s. 4(1) of the HCCA. The nature and degree of the alleged incapacity must be demonstrated to be sufficient to warrant depriving the appellant of her right to live as she chooses. Notwithstanding the presence of some degree of impairment, the question to be asked is whether the appellant has retained sufficient capacity to satisfy the statutes.

20. It is to be remembered that mental capacity exists if the appellant is able to carry out her decisions with the help of others. The appellant’s apartment was located in a building that was operated under the auspices of the March Of Dimes and, as such, she had access to a number of services and social supports that allowed her to function in that environment.⁴⁵²

Arguably, the court’s summary in *Re Koch* presents an opportunity for an adult to rely on the presence of social and other supports or services as a mechanism to enhance capacity and preserve their decision-making autonomy.⁴⁵³ The wording of section 22 of the *SDA* requires that the court, in deciding whether to appoint a property guardian, to consider the least restrictive alternative to guardianship. Counsel in the 2015 *Re ED* case relied on the *Re Koch* interpretation to argue that the adult, ED, “could manage his property with assistance”.⁴⁵⁴ While the panel’s decision to reverse the finding of incapability turned on the physician’s failure to support their assessment on a balance of probabilities, the panel accepted counsel’s interpretation of the *Re Koch* principle. However, a 2016 decision of the Ontario Consent and Capacity Board rejected this interpretation, stating that “*Re Koch* makes clear that the ability to act on decisions is not a factor to be considered in assessing capacity.”⁴⁵⁵ The panel in *Re LL* held that “the decision in *Re Koch* does not stand for the proposition that a person who is incapable must be found capable if the assistance of another person would allow them to “make decisions”.⁴⁵⁶ Whether or not *Re Koch* can be used to support a least restrictive alternative to court-appointed property guardianship remains to be seen.

4.5.1 Responsibilities of a Property Guardian

When a property guardian is appointed, they have the “power to do on the incapable person’s behalf anything in respect of property that the person could do if capable, except make a will.”⁴⁵⁷ For example, section 34 of the *SDA* allows an attorney to complete a transaction that the incapable person entered before they became incapable, such as completing a purchase of an investment product.⁴⁵⁸

The responsibilities of the property guardian are set out in section 32 of the *SDA*, summarized as follows:

- A property guardian, when exercising their powers, shall act diligently and with honesty, integrity, and good faith for the benefit of the adult;⁴⁵⁹
- If the decision will affect the adult’s personal comfort or well-being, then a “guardian shall consider that effect in determining whether the decision is for the incapable person’s benefit.”;⁴⁶⁰
- A guardian’s property decisions shall be consistent with personal care decisions made by anyone with authority to make those decisions, unless the adverse consequences of the property decision significantly outweigh the benefits of the personal care decision;⁴⁶¹
- A guardian shall explain their powers and duties to the adult;⁴⁶²
- A guardian shall encourage the adult to participate, to the best of their ability, in property decisions;⁴⁶³
- A guardian shall attempt to create regular personal contact between the adult and their supportive family and friends;⁴⁶⁴
- A guardian shall consult with the adult’s supportive family and friends who are in regular contact with the adult, and with anyone that provides personal care to the adult;⁴⁶⁵
- A guardian shall keep accounts of all property transactions, per the regulations;⁴⁶⁶
- If a guardian does not receive compensation for managing the property, then they “shall exercise the degree of care, diligence and skill that a person of ordinary prudence would exercise in the conduct of his or her own affairs.”;⁴⁶⁷

- If a guardian receives compensation for managing the property, then they “shall exercise the degree of care, diligence and skill that a person in the business of managing the property of others is required to exercise.”;⁴⁶⁸
- A guardian shall act in accordance with the management plan established for the property (see above section for discussion on management plans). The management plan may be amended with approval of the PGT;⁴⁶⁹ and
- A guardian shall make reasonable efforts to determine if the incapable adult has a will, and determine what the provisions of the will are.⁴⁷⁰

4.5.2 Ontario’s Trustee Act and the Prudent Investor Rule

Like BC, Ontario’s *Trustee Act*⁴⁷¹ sets out a prudent investor rule for trustees to adhere to when making investment decisions with trust property.⁴⁷² However, and unlike BC’s *Trustee Act* which requires that committees of estate make property decisions that meet the prudent investor standard, Ontario’s *Trustee Act* “does not apply to the exercise of a guardian’s powers or the performance of a guardian’s duties” under the *SDA*.⁴⁷³

4.6 DISABILITY UNDER THE ONTARIO HUMAN RIGHTS CODE

Across Canada, everyone shares an equal right to live free from discrimination, harassment, and retaliation. This right applies to all facets of a person’s life, including their work, their education, goods and services they receive, legal relationships they have with others, and use of and access to facilities. These rights are protected by federal, provincial, and territorial human rights legislation.

4.6.1 Policy on Ableism and Discrimination based on Disability

In 2016, the Ontario Human Rights Commission issued a policy guidance on how employers, housing and service providers, and other parties under the Ontario *Code* can prevent, and effectively eliminate, discrimination against people living with a disability.⁴⁷⁴ The report examines the interplay between how people living with a disability experience social structures and attitudes that either enhance or inhibit their participation in society.⁴⁷⁵ It highlights how ableist attitudes within society can “devalue and limit the potential” of people living with a disability, and the importance of adopting an inclusive approach to accommodation that considers the needs of the people receiving accommodation.⁴⁷⁶

The 2016 OHRC Policy deserves discussion for two primary reasons. First, the policy considers how expanding our understanding of disability can bolster the duty to accommodate people living with a disability. Second, the policy and the statements contained within it are authoritative under the Ontario *Code*.⁴⁷⁷

Reasonable accommodation is not so much a support that people often described. It is the legal obligation to employ supports, to report undue hardship, respect and recognize supported decision-making or other arrangements in the decision-making process to ensure non-discrimination.

– Academic

The report refers to an earlier study of the Law Commission of Ontario for its definition on ableism, which reads as follows:

[Ableism] may be defined as a belief system, analogous to racism, sexism or ageism, that sees persons with disabilities as being less worthy of respect and consideration, less able to contribute and participate, or of less inherent value than others. Ableism may be conscious or unconscious, and may be embedded in institutions, systems or the broader culture of a society. It can limit the opportunities of persons with disabilities and reduce their inclusion in the life of their communities.⁴⁷⁸

Ableism is a view of disability that is rooted in a person’s beliefs about whether a person living with a disability can or cannot take part in society. These beliefs may develop regardless of whether a person living with a disability actually experiences personal limitations to their participation. Like other stereotypes, the 2016 OHRC Policy notes that in addition to equating disability with inability, an ableist view of disability “may also inform paternalistic and patronizing behaviour toward people with disabilities.”⁴⁷⁹ Attitudes that prompt service providers to treat a person’s disability as something to be managed or controlled can lead to indirect discrimination.⁴⁸⁰

4.6.2 Other OHRC Policies

The 2016 OHRC Policy suggests adopting a broad interpretation of the term disability.⁴⁸¹ As a starting point, it is helpful to look to Ontario’s *Code* which, unlike BC, provides a statutory definition of disability as follows:

- “disability” means,
- (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,
 - (b) a condition of mental impairment or a developmental disability,
 - (c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
 - (d) a mental disorder, or
 - (e) an injury or disability for which benefits were claimed or received under the insurance plan established under the Workplace Safety and Insurance Act, 1997; (“handicap”).⁴⁸²

Although not specifically mentioned in the list above, the 2016 OHRC Policy notes that environmental sensitivities may also be included in the definition of disability when interpreting and applying the *Code* provisions.⁴⁸³ Environmental sensitivities “can flare up from one day to the next, resulting in significant impairment to a person’s health and capacity to function, while at other times this disability may be entirely non-evident.”⁴⁸⁴

Whether or not a person is discriminated against because of a disability depends on stretching our understanding of disability beyond the *Code*. The 2016 OHRC Policy notes that a definition must include “both present and past conditions” and both perceived and anticipated disabilities.⁴⁸⁵ This broader interpretation considers how beliefs about a person’s disability can shape social understandings of someone’s current circumstances, but also create assumptions “that they will eventually develop a disability, become a burden, pose a risk, and/or require accommodation.”⁴⁸⁶

Like BC, Ontario’s *Code* protects and promotes equal rights and opportunities for people to live free from discrimination.⁴⁸⁷ The Ontario *Code* aims to foster equal treatment and respect for people without discrimination because of their race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status, or disability.⁴⁸⁸ The Ontario *Code* also clarifies that a disability does not have to be permanent to qualify for protection under the law.⁴⁸⁹ The Ontario Human Rights Tribunal has also recently explained that a definition of disability should be interpreted broadly, with a view to ensuring any new interpretation does not render the Ontario *Code* definition meaningless.⁴⁹⁰

4.7 BUILDING CAPACITY THROUGH HUMAN RIGHTS ACCOMMODATION

If a person’s capacity to decide is called into question because they live with a disability, they may be vulnerable to losing their right to participate in an activity or to receive necessary services. They may face barriers to accessing facilities or, in the case of investing, may not receive the necessary support to take part in the investment process. Reasons for failing to provide adequate accommodations vary. They may stem from societal assumptions about the relationship between a person’s disability and their capacity to decide. Or from a service provider’s inability to understand or identify suitable accommodations that could enhance participation.

As discussed earlier, how a person experiences disability is informed both by the actual limitations it may impose, and by the social and environmental assumptions or barriers they encounter.⁴⁹¹ The courts have long held that discrimination can stem from a person’s action, or inaction, in each situation. As La Forest J states, “it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination.”⁴⁹²

To avoid discrimination, service delivery models and policies must develop accommodations that reflect “how people with disabilities define their own experiences and related needs [...]”.⁴⁹³ There is a positive obligation on service providers to design accommodation policies and practices through an inclusive lens that reflects “the needs of people from diverse backgrounds, with a range of unique identities.”⁴⁹⁴ As Kerzner writes:

People plan their lives on the basis that they have a right to live as they choose. In contrast, an individual who has been found to be legally incapable does not have the freedom to make his/her personal choices; decisions are imposed by others. Reasonable accommodation is required to avoid such differential treatment. It maximizes a person’s right to prove his/her

ability to make capable decisions, demonstrate his/her capacity to others and thus exercise legal capacity on an equal basis with others.⁴⁹⁵

The Ontario *Code* also includes a duty to accommodate a person living with a disability “before finding that a person is incapable of fulfilling an essential duty or requirement due to disability. This applies in respect of services, employment, housing accommodation, contracts and vocational services.”⁴⁹⁶ The Preamble to the Ontario *Code* offers the following guidance to help inform the duty to accommodate:

- [R]ecognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations; and
- [I]t is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province.⁴⁹⁷

Three overarching principles emerge for the duty to accommodate: 1) respect for dignity; 2) individualization; and 3) integration and full participation.⁴⁹⁸ Below is a summary of the three principles, and their application in the context of enhancing a person’s capacity to participate in the investment process.

4.7.1 Respect for Dignity

People living with a disability are entitled to respect for their rights to meaningful participation in society. In the context of the duty to accommodate, the principle requires that service providers do provide accommodations that recognize a person’s “self-respect, self-worth and inherent worth as a human being.”⁴⁹⁹ This includes consideration over how physical, psychological, or other barriers can be addressed, the point of undue hardship.⁵⁰⁰

The 2014 OHRC Policy notes that respect for dignity in accommodation means providing supports and measures that minimally interfere with a person’s right to make life choices.⁵⁰¹ The goals of participation and meaningful engagement lie at the core of this principle.

4.7.2 Individualization

The principle of individualization recognizes and respects that each person living with a disability has their own set of unique challenges and opportunities to be supported to participate in society. As the 2014 OHRC Policy states, “[t]here is no set formula for accommodating people identified by *Code* grounds.”⁵⁰² Service providers need to consider an individual’s own experience with access to services and develop accommodation practices that can evolve or shift to meet changing individual needs over time.⁵⁰³

4.7.3 Integration and Full Participation

The third principle recognizes that fulfilling a duty to accommodate, up to the point of undue hardship, requires efforts to maximize “a person’s integration and full participation. Achieving integration and full participation requires barrier-free and inclusive design and removing existing barriers.”⁵⁰⁴ The principle of individuation also applies in this context, in that service providers may need to adopt different or special measures to respond to a person’s unique accommodation needs. However, the goals remain the same—foster participation, meaningful engagement, and respect for dignity.

4.8 THE 2017 LAW COMMISSION OF ONTARIO REPORT

The 2017 LCO Report recognized the importance of creating an opportunity for accommodation in the context of offering services to people who may live with different abilities.⁵⁰⁵ Appreciating that the law does not yet offer sufficient guidance on applying this duty to the use of legal capacity tests by service providers, the report suggests, at a minimum, service providers can consider modifications to “methods of communication, or the timing or environment surrounding the service” as ways to support accommodation in this context.⁵⁰⁶ The report also suggests, as a separate type of accommodation, that “where explanations and assistance from a trusted person enable an individual to meet the test for legal capacity, these may also be appropriate accommodations.”⁵⁰⁷ However, the report notes appropriate cautions must be taken to ensure others are not “speaking for” the person receiving accommodation.⁵⁰⁸

Discussion of the 2017 LCO Report’s specific recommendations related to decision-making support is set out in Chapter 5 of this study paper.

4.9 THE CONCEPT OF SUPPORT

In Ontario, there is currently no specific statutory language that speaks to how a person receives help or support to make financial decisions. If a person receives support, they do so informally or under a substitute decision-making relationship (e.g. Power of Attorney, statutory property guardianship, or court-ordered guardianship).

Despite no formal recognition for support in Ontario’s *SDA*, the purpose and language of the statute contemplates using alternatives to substitute decision-making to support inclusion in the decision-making process. In its second reading before the Ontario Legislature, the *SDA* was introduced as a statute that recognizes a person’s fundamental *Charter* rights to life, liberty, and security of the person, and the right not to be deprived of them.⁵⁰⁹ Although the Act specifically recognizes substitute decision-making relationships, this is not necessarily meant to be the default approach. Rather, Hon Hampton stated that:

[S]ubstitute decisions are a last resort. People must, if possible, make their own decisions. *There must be support for people who can, with assistance, make their own decisions. There must be advocacy to empower people to have their wishes heard.* In proceeding with legislation of this kind, it is vital that we base our decisions on the fundamental principles of our law.⁵¹⁰

Furthermore, Hon Cordiano made clear that while the *SDA* says substitute measures, like a guardian, may be necessary in cases where capacity is at issue, these options should be exercised with caution. More specifically, his position was that guardianship:

[...] should not be used unless we have exhausted all other measures, because as I said earlier, it is fundamental for a person to have the right of self-determination. We should not be quick to judge a person incompetent or incapable of making his or her own decisions until we have exhausted all other avenues.⁵¹¹

The *SDA* reflects this approach in section 22(3) which states that a guardian is only appointed once less restrictive decision-making alternatives are taken.⁵¹²

In grappling with the notion that a person could have limited capacity to decide in one aspect of their lives, but stronger capacity in others with support from family, questions arose over how to qualify or define support. How much support is too much? And is it necessary to declare a person incapable if enough support exists from family or friends of the person? These were among some of the questions posed at the time the *SDA* was introduced. It was also recognized that court-ordered guardianship “should not be ordered easily”, as it effectively removes a person’s “fundamental right to self-determination.”⁵¹³

Although the *SDA* does not yet formally recognize or define support in the context of supported or substitute decision-making, a substitute acting under their authority can advocate for and promote the decision-making autonomy and self-determination of the adult. There are also specific duties assigned to substitute decision-makers under the *SDA* that enable them to use supportive practices, such as encouraging the adult to participate in the decision-making process. Another example is explaining a person’s legal rights and options to ensure their wishes are known in each decision-making situation.⁵¹⁴



CHAPTER 5

Understanding Supported Decision-Making

This chapter outlines:

- An introduction to the concept of supported decision-making, including its origins in disability rights legislation and policy;
- The use of support in Canadian law, specifically BC and Ontario;
- A general meaning of supported decision-making and a description of the supporter’s role;
- The difference between supported and substitute decision-making; and
- Supported decision-making in the context of making investment decisions.

Many people living with different abilities function well in the community, sometimes with the support of others. This support may come from accommodations offered from service providers, other professionals, or friends, family, and other trusted people in their lives. These supported decision-making relationships can be adequate to support investor activities as well. People who want to meaningfully participate in their investment decisions may be able to instruct an investment advisor with the help of a supporter. But the concept of supported decision-making, and how to reconcile this practice with legitimate concerns about risk and liability for decisions, remains unclear for service providers.

Currently, lack of knowledge about support for decision-making in the investment sector, and uncertainty about the legal relationships involved, inhibits enhanced use of supported decision-making in this context. The purpose of this chapter is to introduce the concept of supported decision-making, and how it can apply in the investment process.

5.1 SUPPORTED DECISION-MAKING: WHAT IS IT?

To date, there is neither a single definition for, nor a universally accepted understanding of, supported decision-making. As said earlier in this study paper, and outlined in this chapter, there are many different approaches to understanding and describing what supported decision-making is. Defining what this concept means depends on several factors, including the legal language of each jurisdiction, the criteria used to describe the role of the supporter, how the person receiving support defines it for themselves, and whether a legal document is required or used in the process. Just like there is no universal definition for supported decision-making, so too is there a lack of consensus on what it means to support a person’s decision-making process.

The purpose of this study paper, and specifically this chapter, is to set out some of the overarching concepts of supported decision-making from the research, identify some of the different approaches to understanding this concept, and highlight some of the key characteristics that assist in describing it in the context of investing. The diagram below illustrates the different ways a person is supported in decision-making, based on research and consultation for this project.

Diagram 4: Types of Assistance Provided by Supportive Decision-Makers



Supported decision-making is generally described as “an alternative to substitute decision-making”.⁵¹⁵ Although not set out in legislation, research suggests that supporters support an adult by helping them to:

- Understand the issues involved in a decision;
- Understand the consequences of a decision;
- Access the appropriate assistance or information needed to make a decision;
- Express their views and act as interpreter where needed;
- Have their wishes be heard by an institution or individual;
- Help another individual or institution appreciate that the adult is a person with needs, rights, values, preferences and goals [...].⁵¹⁶

The type of supports listed above are only some examples of how a person can receive help to help make investment decisions. A supporter may also support an adult by showing that they:

- Respect and value the supported person’s autonomy and dignity.
- Know the supported person’s goals, values and preferences.
- Respect the individual decision[-]making style of the supported person and recognize when and how support may be offered.
- [Formed] a trusting relationship with the supported person.
- [Are] willing in the role of supporter, to fulfil their duty to the supported person, and not use this role as a way of advancing their own interests or any other person’s interests.
- [Can] spend as much time as is required to support a person make each decision.⁵¹⁷

To better understand what supported decision-making is, in the context of investing, it is helpful to first consider its origins, and the overall purpose it is meant to fulfill.

5.1.1 The Origin of Support for Decision-Making in Canada

There is a long-standing commitment within the Canadian disability community to recognize, promote, and protect the rights of people living with different abilities to make life decisions. Canada is often credited as being the first country to uphold the link between support and a person’s capacity to make decisions because of the historical efforts within the disability community to change perceptions about how people make decisions.

Over 20 years ago “disability organisations in Canada conceived of supported decision-making as a way to overcome the barriers that prevented people with intellectual disabilities from being self-determining citizens.”⁵¹⁸ Disability advocates across the country raised awareness about the risk people living with a disability face to losing their legal capacity based on societal barriers or assumptions related to their ability, or inability, to participate in the decision-making process.⁵¹⁹ This movement represented a call to state actors to change perceptions about disability and decision-making; to modernize law and policy to incorporate a lens of support to foster inclusion in the decision-making process.

5.1.2 Social Model of Decision-Making

In adopting a lens of supporting decision-making, it is helpful to consider that a person’s decisions, regardless of their mental, physical, or other abilities, are often not made in a vacuum. Rather, decisions are often made socially, with people seeking out and relying upon some degree of support or assistance from others to make, communicate, and implement their decisions.⁵²⁰ Whether that support comes from personal relationships with family or friends, or through learned advice from professional agencies and associations, supported decision-making “recognizes the way in which most adults function in their everyday lives”.⁵²¹ As Gordon characterized early on:

In complex, postindustrial and postmodern societies there is a high level of dependency upon the skills, acumen, ability, and knowledge of others when a variety of decisions are to be made. Many individuals use accountants and investment brokers, some purchase the

services of lawyers, others seek the counsel of members of the clergy [...] Assistance is sought because the adult faces a decision (or decisions) that require both an understanding and an appreciation of the consequences of a choice or option [...] or because he or she needs a skilled agent to carry out certain tasks [...] Most adults, when asked to reflect upon normal decision-making practices in their daily lives, usually realize the extent to which they engage in interdependent decision-making. Importantly, this interdependence is not seen as indicative of mental incapability.⁵²²

As many authors note, supported decision-making reflects the social practice of how people make life decisions.⁵²³ It recognizes that “[e]verybody needs support from others in making important as well as less important decisions concerning different areas of life.”⁵²⁴ The need for support in decision-making is not unique to people living with a disability; instead it is an inherent practice that everyone relies upon, to some degree, when facing important life choices. As the Mental Disability Advocacy Centre states:

[W]e all need the knowledge and expertise of people around us because we do not have all the talents and skills which are relevant to make every kind of decision possible in life [...]. The type and amount of assistance which we all, as individuals, need when making decisions and choices can be different, but in reality we all make choices and decisions based on the supported decision-making model.⁵²⁵

The goal of a support-based model for decision-making is to reduce the risk of people living with a disability losing their “voice in their own life.”⁵²⁶ Incorporating support, a practice considered common to everyone who makes life choices, into decision-making for people “with significant support needs or those who do not communicate or express themselves in ways that are easily understood by others” creates an equal opportunity for people to remain meaningfully engaged in the decision-making process.⁵²⁷ Developing formal recognition of this practice was seen as a critical shift in law and policy away from a paternalistic lens to disability, and towards a rights-based approach to decision-making.

5.2 SUPPORTED DECISION-MAKING IN CANADIAN LAW

Depending on the jurisdiction, supportive practices in decision-making may occur either informally, between the person receiving support and the supporters that they have a close connection with, or formally by written agreements that set out the authority and types of decisions a supporter or substitute can help with. The support provided in both types of relationships will vary.

Gordon tells us that the concept of using support in decision-making in Canada can be traced as far back as 1866 when the court could appoint a “judicial adviser” in place of a guardian for people who were considered to be of “weak intellect or inclined to prodigality [...] arousing the fear that he would dispose of his property”.⁵²⁸ Gordon notes that this option still exists in Quebec law.⁵²⁹

Kerzner tell us that “[s]upports and supported decision-making are recognized in Canadian legislation in three ways:

- 1. Supporters legislatively granted legal recognition to assist with decision-making

- a. Legislation which allows an individual to appoint support people to assist with decision-making (e.g. British Columbia, Yukon Territory and Alberta);
- b. Legislation which allows a court to appoint support people to assist an individual with decision-making (e.g. Saskatchewan, Alberta and Quebec);
- 2. Legislation which requires government to provide or arrange for the provision of supports where this would assist a person to demonstrate their capacity to make decisions (e.g. Manitoba); and
- 3. Legislative requirement not to appoint a guardian or co-decision-maker if less restrictive alternatives exist, including supports (e.g. Ontario and Saskatchewan).⁵³⁰

It falls outside the scope of this study paper to engage in a comprehensive review of the law on supported decision-making across Canada.⁵³¹ What follows in this chapter is an overview of how support is used, formally or informally, for investment decision-making in BC and Ontario.

5.2.1 British Columbia

BC’s interest in supported decision-making began with efforts by the disability community in the 1990s.⁵³² The goal was to shift law and practice away from the view of decision-making as an independent activity, to instead reflect “the interdependent nature of decision-making.”⁵³³ Much of the work in this area is summarized in a 1992 discussion paper by a provincial joint working committee.⁵³⁴ The committee suggested “a new approach to providing adults with support, assistance and protection” based on an entitlement to “receive the most effective but the least restrictive, least intrusive, and least stigmatizing form of assistance, support or protection when they are unable to act independently, or interdependently care for themselves or their property and financial affairs.”⁵³⁵ The intent was to “form the basis of new adult guardianship legislation, procedures and policies.”⁵³⁶

BC’s *RAA* is recognized as the first stand-alone regime “to provide a legal basis for supported decision-making and provided a true, legally binding alternative for guardianship or other forms of substituted decision-making.”⁵³⁷ The purpose of the *RAA* is set out in section 2 of the Act, as follows:

[T]o provide a mechanism (a) to allow adults to arrange in advance how, when and by whom, decisions about their health care or personal care, the routine management of their financial affairs, or other matters will be made if they become incapable of making decisions independently, and (b) to avoid the need for the court to appoint someone to help adults make decisions, or someone to make decisions for adults, when they are incapable of making decisions independently.⁵³⁸

As set out in Chapter 3 of this study paper, the *RAA* authorizes an adult to make an agreement with another person they trust to receive help to make decisions, or to have that person make decisions on their behalf. By virtue of a presumption of capacity inherent in the *RAA*, BC’s legislation allows the adult and their representative to work together, without the need for court approval, to decide the level and extent of support used. In all circumstances, the support provided by the representative must be done “honestly, in good faith, and with the care, skill, and diligence of a reasonably prudent person.”⁵³⁹

The Act uses the term “help” in place of support but does not define it. However, we do know from the *RAA* that, when a person helps an adult, they must:

- (a) consult, to the extent reasonable, with the adult to determine his or her current wishes, and
- (b) comply with those wishes if it is reasonable to do so.⁵⁴⁰

The *RAA* does not provide a specific model or framework for how a representative meets the threshold for reasonableness when consulting with the adult, nor how to decide whether complying with the adult’s wishes is reasonable in each instance. What is reasonable is left open for interpretation; it will depend on the context of the decision being made, and whether the adult’s instructions or expressed wishes, beliefs, or values are known to the representative at the time the decision is made. Absent any knowledge of such beliefs or values, only then may a representative act according to what is in the adult’s best interests.⁵⁴¹

The *RAA* sets a lower capacity requirement to make a representation agreement without regard to disability.⁵⁴² The 2014 Lived Experiences Report notes that this feature sets it apart from other supported decision-making laws, and is considered a strength of BC’s approach:

[...] many disability rights activists view [the Act] as “normalizing” insofar as it neither singles out nor excludes [people with disabilities] as a group. For many members of the disability rights community, part of the advantage of representation agreements is that they are not disability-specific, and they do not marginalize persons with challenges. They are broad documents that any adult can use in order to nominate a substitute [or supportive] decision-maker and to make their wishes known. An empowerment and normalization theory underlies representation agreements.⁵⁴³

When the *RAA* test for capacity was introduced, the reactions were a mix of “joy and relief to some supporters of the regime, and trepidation and rejection by others.”⁵⁴⁴ The 2014 Lived Experiences Report notes that:

For the supporters of the new system, moving to a functional capacity test that enumerates such subjective terms as “feelings of approval” or a relationship “characterized by trust” bring the legislative system into the circles of support and the reality of engaging with some members of the community of persons with intellectual disabilities. For critics, these terms are unquantifiable, easy to say but nearly impossible to interpret in reality, and represent such a “low” level of capacity that representation agreements might put people with capacity challenges at greater risk of abuse.⁵⁴⁵

The risks mentioned in the 2014 report summarize related concerns learned in the research and consultation for this project. For example, for adults who may be subject to undue influence from supported or substitute decision-makers, they may feel pressured into making, revoking, or re-making a representation agreement (RA7). With no statutory requirement to make an RA7 with a lawyer or notary, there may be no opportunity for a trained professional to evaluate an adult’s capacity to execute or amend an RA7.

5.2.2 Ontario

As stated in Chapter 4 of this study paper, Ontario’s legislation incorporates opportunities for support-ive practices in its substitute decision-making model tracing back to the 1980s. Two publications, known as the Fram Report⁵⁴⁶ and the Weissub Report,⁵⁴⁷ played an important role in shaping Ontario’s substitute decision-making laws. A key concern stemming from the Fram Report findings is that, absent suitable safeguards, more intrusive forms of substitute decision-making (like guardianship or conservatorship) could be used either inappropriately or indiscriminately.⁵⁴⁸ A third study, known as the O’Sullivan Report, went on to note that reasons for use of more restrictive guardianship measures may be the result of abuse or undue influence, or well-intentioned but overprotective supporters.⁵⁴⁹

These early efforts to consider how supportive practices could be built into the existing substitute decision-making regime resulted in the *SDA* taking a “modern and carefully thought-out” approach to substitute-decision-making.⁵⁵⁰ As outlined in Chapter 4 of this study paper, Ontario’s *SDA* and human rights code have placed a duty on substitute decision-makers and service providers to support adults living with different decision-making capacity to meaningfully participate in the decision-making process.

5.3 THE 2014 LCO REPORT: CAPACITY AND THE RDSP

In 2014, and as a follow-up to the 2011 Federal Government review of the RDSP⁵⁵¹, the Law Commission of Ontario published a report on capacity and the RDSP.⁵⁵² The focus of the report was to consider how adults living with a disability could meaningfully participate in the RDSP program. The LCO 2014 report sets out a process for an adult living with a disability, and who does not have an attorney or guardian for property, to appoint a legal representative to open and manage an RDSP on their behalf.⁵⁵³ The legal representative would have the same duties as an attorney for property, including a requirement that the adult be encouraged to participate in decision-making to the best of their ability.

Among the recommendations in the report is a suggestion to use the definition of legal capacity to grant a power of attorney at common law as a baseline for criteria to appoint a legal representative to manage the RDSP.⁵⁵⁴ Alternatively, and to support a more flexible approach to a capacity test, the LCO 2014 Report points to BC’s *RAA* section 8 criteria and the POA safeguards under the *SDA* as another possibility.⁵⁵⁵

5.4 THE 2017 LCO REPORT

The proposition that Ontario’s laws on capacity and decision-making should give formal recognition to supported decision-making was reviewed for the 2017 LCO Report, and in its earlier consultation for that project.⁵⁵⁶ Although the LCO did not make recommendations to amend Ontario legislation to formally recognize supported decision-making, it did uphold the need to use the least restrictive approach possible.⁵⁵⁷ The report also acknowledged that accountability for decision-making should reasonably apply to the person making the decision, even if they receive assistance or support from

someone to do so.⁵⁵⁸ This is distinguishable from situations where another person is the one weighing the options and consequences of a choice. When this happens, and even if the values and preferences of the person impacted by the decision are considered, the accountability rests with the person actually making the choice.⁵⁵⁹

In the context of support and decision-making, the 2017 LCO Report also proposed two changes to its legal decision-making framework to strengthen autonomy-enhancing decision-making practices, namely: 1) support authorizations, and 2) network decision-making.⁵⁶⁰

5.4.1 Support Authorizations

The 2017 LCO Report considered the use of support authorizations as one approach to formally incorporating supported decision-making into practice. The report notes that Alberta’s *Adult Guardianship and Trusteeship Act* applies a three-tiered approach to supported and substitute decision-making.⁵⁶¹ Alberta law allows a person to create a support relationship through a supported decision-making authorization. Under a support authorization, “supporters are prohibited from making decisions on behalf of an adult. Decisions made or communicated with assistance are considered a decision of the adult.”⁵⁶²

To make a supported decision-making authorization, an adult needs to show that they understand the nature and effect of it.⁵⁶³ A person granted authority under a supported decision-making authorization is called a “supporter” and may be authorized by an adult to do one or more of the following:

- a) to access, collect or obtain or assist the adult in accessing, collecting or obtaining from any person any information that is relevant to the decision and to assist the adult in understanding the information;
- b) to assist the adult in making the decision;
- c) to communicate or assist the adult in communicating the decision to other persons.⁵⁶⁴

Any decision made with the assistance of a supporter under a support authorization is a decision of the adult who receives support, unless a person has reasonable grounds to believe that a supporter has exercised undue influence, or there is fraud or misrepresentation at play.⁵⁶⁵

The 2017 LCO Report notes that “support authorizations, if properly structured, provide an accessible means of addressing the needs of some persons who currently have no alternatives to guardianship.”⁵⁶⁶ Bearing in mind the concerns about potential undue influence, fraud, or misrepresentation, the LCO proposed the following enhancements to the existing model:

- The threshold for legal capacity to create an authorization be “the ability to understand and appreciate the nature of the agreement”;
- Use of a standard form agreement to create support authorizations;
- Focus on concrete, day-to-day decision. Support authorizations are not intended for decisions that involve significant assets or complex issues because of potential

for abuse and the level of risk involved. They are meant for both personal care and property management;

- Clear duties for supporters to address concerns of misuse or abuse and harmonize duties with duties for attorneys under powers of attorney;
- Mandatory appointment of a monitor who is not a family member or a person who is in a position of a conflict of interest.
- Duties and powers of supporters would include the following:
 - maintaining the confidentiality of information received through the support authorization;
 - maintaining a personal relationship with the individual creating the authorization;
 - keeping records with regards to their role;
 - acting diligently, honestly, and in good faith;
 - engaging with trusted family and friends; and
 - acting in accordance with the aim of supporting the individual to make their own decisions;
- Supporters would also be responsible for gathering necessary information, providing information, offering explanations, and assisting with communicating and implementing the decision.⁵⁶⁷

5.4.2 Network Decision-Making

A key learning point from our research, and from the 2017 LCO Report, is that people who identify as living with a disability often rely on networks of support to foster inclusion and engagement in decision-making.⁵⁶⁸ Key informants suggested using formal Microboards™ in BC as one such model of what is otherwise known as network decision-making.

The 2017 LCO Report notes that network decision-making models have both formal and informal recognition, depending on the jurisdiction. Many of its consultation participants said that the “creation and maintenance [of networks] was extremely difficult.”⁵⁶⁹ Of interest to the LCO is that the role of the network creates two opportunities to enhance a person’s decision-making autonomy:

1. [I]t can potentially provide decision-making supports in a way that does not necessarily require an assessment of legal capacity; and
2. [I]ncorporation provides a recognized and widely understood means of sharing legal responsibility and accountability within a group, as opposed to a single individual. The decision-making entity is itself accountable, rather than any single member.⁵⁷⁰

Recognizing the potential benefit of a power-in-numbers approach to decision-making, the 2017 LCO Report suggests this model could support a broader range of perspectives when weighing decision options, and provide useful monitoring of personal biases and assumptions that may prohibit a person’s participation.⁵⁷¹ However, the LCO notes an important characteristic of the network-based model—it may not actually lead to enhanced supported decision-making practices since, arguably, a

decision reached by a network is “not necessarily that of the individual alone, whether or not there is a declaration of incapacity involved.”⁵⁷²

Of interest to the LCO, and what lies behind its recommendation for further study of network models, is that network decision-making could provide a process that is “supportive of the individual, includes the person in the decision-making process, and respects [their] life goals and values.”⁵⁷³ The LCO recommendation for further research. Piloting of a network decision-making model suggests including the following elements:

- Three or more individuals who share responsibilities, at least one of whom is not a family member;
- The person for whom the network is formed remains at the centre, protecting and promoting their participation in the decision-making process, and adopting as its core purpose the realization of the individual’s values and life goals; and
- It maintains a group process with the aim of collectively supporting a process that advances the autonomy and the achievement of life goals for the person at the centre of the network.⁵⁷⁴

As part of its recommendation, the LCO proposed that there should be formal requirements to create a network, clarity on accountability and record-keeping processes, and a registration process with annual filling criteria, among other considerations.⁵⁷⁵

The 2017 LCO Report notes:

Ontario, like other common law jurisdictions, employs an approach to legal capacity and decision-making based on substitute decision-making. Under the *Substitute Decisions Act, 1992* (SDA) and *Health Care Consent Act, 1996* (HCCA), where a person does not meet the threshold for legal capacity and a decision is required, another person—a substitute decision-maker (SDM)—will be in some way appointed to make that decision. In recent years, the social model of disability, which locates disability within society rather than the individual and focusses on social and environment[al] barriers to inclusion, has been more widely accepted. As well, human rights approaches have continued to grow in influence both internationally and domestically. In keeping with these evolutions, voices have urged a re-examination of the substitute decision-making model and the development of alternatives. The term ‘supported decision-making’ is often used to refer to these alternatives.⁵⁷⁶

In this context, the LCO has characterized supported decision-making as having two fundamental aims or goals:

1. Avoid legal structures that stigmatize or separate from the mainstream individuals who have difficulty in making decisions independently; and
2. Implement decision-making schemes that promote the abilities of individuals with impairments that affect decision-making.⁵⁷⁷

5.4.3 Putting the Goals of Supported Decision-Making into Practice

The LCO suggests one way to implement the goals of supported decision-making into practice is through support authorizations.⁵⁷⁸ These would allow one or more person, appointed by an adult receiving support, to help with decision-making. Key features of support authorizations are:

- a. **Modified test for legal capacity.** The adult decision-maker’s legal capacity is protected, provided they can understand and appreciate the nature of the support authorization;
- b. **Standardized format.** Creation of a support authorization must be done using a mandatory and standardized form;
- c. **Clear accountability.** Decisions made under a support authorization are the responsibility of the supported adult. Supporters are required to comply with the responsibilities set out in the legislation.⁵⁷⁹ Third parties can refuse to recognize a decision or decisions if there are reasonable grounds to believe that there has been fraud, misrepresentation, or undue influence by the supporter;
- d. **Requirement for a monitor.** Support authorizations must include a monitor who is not a family member and not in a position of conflict of interest.⁵⁸⁰

Drawing on examples from other supported decision-making laws across Canada, the 2017 LCO Report suggests support can come in many forms, such as:

1. accessing or obtaining information, or assisting the individual in doing so;
2. assisting with the decision-making process;
3. communicating or helping a person to communicate a decision to others;
4. helping to implement a decision;
5. advising the individual by providing relevant information and explanations; and
6. ascertaining the wishes of the individual.⁵⁸¹

The recommendations contained in the 2017 LCO Report encourage governments to consider how to enhance decision-making autonomy in everyday practices. The report also suggests building in accommodation approaches, like the ones discussed in Chapter 4 of this study paper, into how we understand and assess legal capacity more generally.

5.5 KEY PRINCIPLES

Even though there is no single model or definition of supported decision-making, there are some key principles of this practice that set it apart from traditional substitute decision-making approaches. We can begin to understand the differences by first exploring the literal meaning of the terms used in each instance.

The term support, and in the context of helping someone make financial decisions, is generally defined by a combination of the following:

- Spiritual help; an instance of this. Also more generally: encouragement, emotional help, mental comfort.
- A person or thing that provides assistance, backing, encouragement, or comfort; a strengthener of a person’s spirits or resolution.
- The action of contributing to the success of something.⁵⁸²

If we look to the term substitute we understand it involves a person being given authority by another person to act on their behalf in their absence or when they lack decision-making capacity.⁵⁸³

Support generally has to do with responding to the emotional, physical, mental, or practical needs of another person to help them to successfully complete a task. A substitute takes on responsibility for deciding on behalf of another person when that person is unable to do so. A shared goal emerges from both roles—to successfully achieve an outcome or decision that is required in the circumstances. However, the approach used in achieving that end is what sets both practices apart in important ways.

Moving from words into practice, Kohn, Blumenthal and Campbell summarize the practice of supported decision-making as follows:

[...] supported decision-making occurs when an individual with cognitive challenges is the ultimate decision-maker but is provided support from one or more persons who explain issues to the individual and, where necessary, interpret the individual’s words and behaviour to determine his or her preferences.⁵⁸⁴

Support in decision-making is meant to help a person make decisions by clarifying information, asking questions, communicating ideas or decisions, and sometimes implementing a person’s decision. As Browning notes, the following five principles are inherent in the practice of supported decision-making in Canada:

1. All people have a right to autonomy and determination;
2. All people are entitled to the presumption that they are capable of making decision and, where necessary, to support and assistance in order to understand and make informed decision on their own behalf;
3. The person [being supported] is at the centre of the decision-making process and their will and preferences direct the process;
4. Support should be entered into freely, and must be free from abuse and undue influence; and
5. Supported decision-making is about the process not outcomes.⁵⁸⁵

5.5.1 Building Support into Investment Decision-Making

Decisions made under a substitute model, even when done with involvement by the person who appointed the substitute, are often driven by the outcome of the decision. The focus is to reach a solution that reflects, as much as is reasonable in the circumstances, the best possible outcome that supports the will and preferences of the person for whom the decision is made. As Browning notes,

the challenge then becomes how to shift the focus of support to put the process of making the decision at the forefront.

A challenge faced by investment advisors, and which the study paper and tools for this project discuss, is to consider what supports may be required to facilitate decision-making for a person who has diminished capacity for investment decisions. What we heard from key informants for this project is that everyone, regardless of whether they receive support to make decisions or not, has the freedom to make decisions that may have negative outcomes. If we think about this in the context of investing, it means that everyone, regardless of disability, has the right to make bad investment decisions. The challenge then becomes how to ensure that even a bad investment choice does not cause harm such that a person can no longer manage their everyday and future expenses.

While support is used to help a person continue to make their own decisions, with this comes a certain degree of increased risk, depending on the decision being made. The consequences of a risky or poor decision, under a supported decision-making framework, generally rest with the supported person. Comparatively, and under a substitute decision-making model, the legal accountability is clearly that of the substitute decision-maker.

Ahead of its 2017 Report, the LCO identified four common elements of supported decision-making models.⁵⁸⁶ While not universally agreed-upon, the elements are generally stated as follows:

1. **Supported decision-making does not require a finding of incapacity.** In contrast to substitute decision-making, the focus of supported decision-making “is not on the presence or lack of particular mental attributes, but on the supports and accommodations that can be provided to assist individuals in exercising control over decisions that affect them.”⁵⁸⁷
2. **In supported decision-making arrangements, legal responsibility for the decision remains with the supported individual.** “The supported individuals retain control over their decisions, and those are decisions are theirs, and not their supporters’.”⁵⁸⁸
3. **Supported decision-making arrangements are based on consent by the individual who may require assistance when making decisions and choosing who will assist him or her.** Thus, they are voluntary relationships, and “must be entered into freely in order to function.”⁵⁸⁹
4. **Supported decision-making is based on relationships of trust and intimacy.** “For supported decision-making to function as envisioned, any supporter must have significant personal knowledge of the individual, and must have the trust of the individual, to assist her or him in understanding and putting into effect her or his values and preferences.”⁵⁹⁰

5.5.2 Models Across Canada

Three key differences exist among the statutory supported decision-making models in Canada:

1. **Terminology.** Different terminology is used to refer to the supportive decision-maker, such as representative (British Columbia), associate decision-maker (Yukon), supporter

(Alberta), and co-decision-maker (Alberta and Saskatchewan). Sometimes the same term is used in different jurisdictions to denote a very different kind of relationship;

2. **How arrangements are put in place**, particularly how often court processes are required. In BC and Yukon, supported decision-making relationships are exclusively created by agreement between the adult and supportive decision-maker, without court intervention. In Alberta, a kind of supported decision-making relationship is possible through either agreement or court order. In Saskatchewan, formal supported decision-making is only possible by court order; and
3. **Scope of powers**, particularly as to whether personal, health care or financial decisions may be included in the arrangement.⁵⁹¹ In BC, the representative may be granted the power to help the adult make decisions about personal care, routine management of financial affairs, instructing counsel, and some health care matters. In Yukon, the legislation is silent about the types of decisions that may be included in a supported decision-making agreement. In Alberta, the authority of a supporter (by agreement) and co-decision-maker (by court order) is limited to personal matters, which, under the statute, appears to capture health care decisions but not financial decisions. In Saskatchewan, the powers of a co-decision-maker are extremely broad.

5.5.3 The UN CRPD

When Article 12 of the UN CRPD was passed, it called for the recognition by countries who signed the CRPD that “persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.”⁵⁹²

A key obligation set out in Article 12 is for Member States to “take appropriate measures *to provide access by persons with disabilities to the support they may require in exercising their legal capacity*”.⁵⁹³ The UN CRPD does not specifically define the term support. However, and after ratification of the CRPD, the Office of the High Commissioner for Human Rights issued the following as a starting point:

Supported decision-making can take many forms. Those assisting a person may communicate the individual’s intentions to others or help him/her understand the choices at hand. They may help others to realize that a person with significant disabilities is also a person with a history, interests and aims in life, and is someone capable of exercising his/her legal capacity.⁵⁹⁴

A 2014 General Comment to Article 12 of the UN CRPD provided some direction to countries who signed the CRPD for how support should be provided.⁵⁹⁵ While the goal of Article 12 was to see countries replace existing substitute decision-making regimes with supported decision-making models, no framework or prescribed form was offered.

Countries who signed on to Article 12 have taken different approaches to incorporate the principles, goals, and above-stated elements into either supported or substitute decision-making regimes. For this reason, the above guidance does not on its own help to define support. Much of that depends on whether the term has been adopted into legislation, and whether any provisions defer to least

restrictive options for decision-making. But the 2014 General Comment does encourage “an open-ended conceptualisation of support” that moves from definition to guiding principles⁵⁹⁶

5.5.4 Adapting Practice to Match Needs and Abilities

As stated earlier, the notion of support in decision-making is not a new concept. People make decisions with support every day. The picture of support is different for everyone, coloured by the wishes, goals, values, and people that help us make life choices. Let us consider a decision about whether to rent an apartment or to purchase a house. Many factors influence the choice that makes the most sense for us. Things like cost, location, size, community, or proximity to services and supports are only a small sampling of the numerous factors to consider. The input and ideas of those we trust or care about may, in varying degrees, help us choose one option over another.⁵⁹⁷

Often, whether we need or want support to decide is a matter of personal preference. Support may simply be one of many tools to lead us closer to a decision, to shorten the distance between option and choice. But people who live with different abilities, or who face changes in their decision-making ability over time, may depend on a degree of support from others to make life choices.⁵⁹⁸ In this case, support is necessary to participate in the decision-making process. Without support, a person’s ability to choose may be hindered or, in some cases, replaced by the decision of someone acting on their behalf.

A principle-based approach to interpreting the UN CRPD suggests that support in the context of how a person participates in the decision-making process is not meant to be singularly defined. Rather, as de Bhailís and Flynn explain, support is contextual, and depends largely on a person’s unique needs and decision-making attributes.⁵⁹⁹ Support, in this sense, is best understood as a practice or set of activities that enhance a person’s right to exercise their self-determination and decision-making autonomy. How a person receives support, or how a country facilitates providing support to people living with a disability, is guided by principles of what it means to foster inclusion and reduce discrimination for people when exercising their legal capacity in decision-making.

The Mental Disability Advocacy Centre tells us that anyone offering support to a person so they can meaningfully participate in making life decisions should act with an understanding and acceptance of the following principles:

- The person receiving support retains their full legal capacity;
- The person receiving support makes the decision. The role of supporter[s] is to assist the person to reach their own decisions;
- There is a relationship of trust between the person making the decision and the supporter[s];

Do you like when people read the things for you to give you advice? Yeah, cause then I understand what it is all about. I read it myself, but I could not understand what they want. Some of the letters are very confusing.

– **Person living with a disability**

- Support must occur with the free agreement of the adult and the supporter(s);
- There is usually a supporting group or network around the person making the decision;
- The role of supporter[s] is to assist the person making the decision to communicate their intentions to others and help them understand the choices at hand; and
- Supporters are usually unpaid and could include friends, family, and/or members of the community.⁶⁰⁰

Often the people receiving support are adults who may have different decision-making abilities because of circumstances related to intellectual disability (either from birth or as survivors of traumatic brain injuries), the effects of dementia, or a combination of circumstances that impact their ability to make life choices. Generally, supporters are often people “who respect and are committed to that individual’s well-being.”⁶⁰¹

Supported decision-making is seen as a less intrusive legal alternative to guardianship by maintaining “some protection for the vulnerable adult while honouring an individual’s right to choose who participates in making decisions about issues that impact them, and reinforces the right to be part of that decision-making process as well.”⁶⁰² Research tells us that the absence of a prescribed definition for support or supported decision-making allows for this practice to occur either informally or formally.⁶⁰³

5.6 SUPPORTED DECISION-MAKING FOR INVESTING

Past research on the subject tells us that, across Canada, there is limited research on the experience of using supported decision-making for investment decisions. CCEL’s 2014 Lived Experiences Report notes that a fundamental stumbling block to effective use of supported decision-making in the financial sector stems from concerns about the role of the supporter, the respective duties of care or fiduciary responsibilities, undue influence, and the perceived lack of accountability on the part of the supporter in the legal life of a potentially vulnerable adult. Below is a summary of the legal and practical challenges raised in the research that led to this project.

5.6.1 Investment Sector Concerns

Investment industry members and other financial professionals report a general lack of awareness of, and discomfort with, supported decision-making. This section summarizes investment sector concerns that arose from earlier research related to working with supported decision-makers. They are grouped under two broad categories: legal concerns and practical challenges.

5.6.2 Legal Issues

Taking Instructions

Financial institutions and other third parties struggle with what supported decision-making agreements mean in terms who is responsible for the decision.⁶⁰⁴ The system has been criticized for being awkward and too imprecise in terms of who to take instructions from.⁶⁰⁵ Supportive decision-makers

may be permitted to communicate directly with key people, such as investment advisors. Third parties are much more familiar with substitute decision-making (e.g. powers of attorney or guardianship), and these systems seem to be more “clear.”

Liability

Financial institutions and other third parties struggle with what supported decision-making agreements mean in terms of their potential liability when relying on a supported decision.⁶⁰⁶ There are some protections in the legislation. In Alberta, for example, a person may refuse to recognize a decision made, communicated by, or with the assistance of a supporter as a supported decision if the person has reasonable grounds to believe that the supporter exercised undue influence, or if there may be fraud or misrepresentation on the part of the supporter.⁶⁰⁷ Further, in Alberta, no action can be taken against a person who does anything in good faith and in reliance on a supported decision-making agreement.⁶⁰⁸

Scope of Supported Decision-Maker’s Powers

The scope of a supporter’s powers varies across jurisdictions, particularly as to whether personal, health care, or financial decisions may be included in the arrangement.⁶⁰⁹ This can create uncertainty and a lack of clarity. In BC, a representative may be granted the power to help the adult make decisions about personal care, routine management of financial affairs, instructing counsel, and some health care matters. In Yukon, the legislation is silent about the types of decisions that may be included in a supported decision-making agreement. In Alberta, the authority of a supporter (by agreement) and co-decision-maker (by court order) is limited to personal matters, which, under the statute, appears to capture health care decisions but not financial decisions. In Saskatchewan, the powers of a co-decision-maker are extremely broad.⁶¹⁰

Role of the Supported Decision-Maker

The role, or extent of involvement, of the supporter also varies across jurisdictions, again creating uncertainty and a lack of clarity. Legislation uses vague language, enabling the supporter to do general tasks such as “assist” and “advise.” This can make it difficult for financial institutions to determine the appropriate level of involvement allowed, or needed, of a supporter.

Privacy and Access to Information

At law, legally appointed supported decision-makers may be entitled to access the adult’s personal information, but access to information rights vary by jurisdiction. In Alberta, for example, supported decision-makers can access the adult’s personal information, except financial information, that is relevant to the decision.⁶¹¹ Given the lack of familiarity with formal supported decision-making documents, and the importance of upholding privacy protections, financial institutions may feel uncomfortable or resist providing a supporter with the adult’s personal financial information.

Determining Capacity

Supported decision-making involves a concept of capacity that is novel in law, shifting away from the traditional threshold of capacity needed to grant a power of attorney. In BC, for example, an adult may make a standard representation agreement even if they are incapable of making a contract or managing their health care, personal care, legal matters, or routine financial affairs.

While this statutory language “caused joy and relief to some,” it was initially met with “trepidation and rejection” by others.⁶¹² For critics, the language “is unquantifiable, easy to say but nearly impossible to interpret in reality and represent[s] such a ‘low’ level of capacity that representation agreements might put people with capacity challenges at greater risk of abuse.”⁶¹³

Risk of Financial Abuse

Supported decision-making arrangements may expose the supported adult to financial abuse. This risk is present across the life course, and may increase in the later stages of life, especially if the adult has a degenerative disease like dementia.

Generally speaking, different types of decisions are made at different stages of a person’s life.⁶¹⁴ For instance, younger adults living with intellectual disabilities may be looking for positive ways to increase their “ability to manage money, engage with employment opportunities and consider future options for marriage or children.”⁶¹⁵ In contrast, older people living with dementia “may be most concerned about health and personal care planning, financial arrangements such as wills or use of life-long saved assets.”⁶¹⁶ Supported decision-making may have initial value in the early months or years for people living with dementia, but that value may deteriorate with their condition, and the formal support arrangement “can become a tool of abuse.”⁶¹⁷

There are some safeguards in the legislation. In BC, for example, representatives must act honestly, in good faith, and with the care diligence and skill of a reasonably prudent person.⁶¹⁸ Oversight may be provided by a monitor, who is an individual named in the representation agreement who must make reasonable efforts to determine whether the representative is complying with their duties.⁶¹⁹ But, there remains some degree of uncertainty around the specific role and day-to-day functions of monitors.⁶²⁰

In Yukon, the supporter must not exert undue influence upon the adult.⁶²¹ But it may be difficult to obtain evidence of undue influence, as “decision-making practices are for the most part essentially private and informal, and not the subject of documentation.”⁶²²

5.6.3 Practical Challenges

Lack of Strong and Trusting Relationship

Financial institutions often feel uncomfortable dealing with formal supported decision-making documents, unless there is a strong relationship between the family and financial institution.⁶²³ Currently, informal and formal support arrangements may work best when the family and third-party institution know and trust each other.⁶²⁴ We know from the 2017 Report on Vulnerable Investors that the

relationship of trust between the advisor and adult investor is integral to how decisions are made. The report notes various studies reveal:

The relationship between representatives and investors, regardless of age, is a spectrum ranging from unconditional confidence and trust, to dealing with the registrant as a mere order taker. Having said that, typically, advice is a recommendation upon which investors place a great deal of reliance. [...] Overwhelmingly, participants put unconditional confidence and trust in their advisor. Advisors are the main source of investment information and most blindingly trust the advice they are given.⁶²⁵

If the financial institution is unfamiliar with the adult investor and their supporter(s), the perceived risk to the institution may be too high or uncomfortable, and the institution may be hesitant or unwilling to rely on decisions made through this type of arrangement. This may pressure the family to resort to substitute decision-making, such as guardianship. This outcome is often the very one the adult and their supporters are trying to avoid.

Some groups may be more likely to lack a strong relationship with a financial institution. Recent immigrants, refugees, and other newcomers might not have been in the community long enough to have developed a strong relationship with an institution. One may develop over time, but in the early stages, the family and institution may lack comfort and familiarity with each other.

Institutions may also feel uncomfortable if supporters are from out of town, or not actively and consistently engaged in a circle or network of support. This may be the case, for example, when an adult child occasionally visits their aging parent living with dementia to help with financial affairs and other routine matters, or who provides decision-making support from a distance. Some may have no family or friends who could be their supportive decision-maker. Others may initially have social networks but, as they age, those relationships disappear.⁶²⁶

Preference for Institution’s Own Forms

Financial institutions may prefer if clients use the institution’s own forms. In BC, for example, since the process of creating a formal support arrangement can be difficult, expensive, and confusing,⁶²⁷ especially if a lawyer is involved, families may feel pressure to sign the financial institution’s forms. This may provide greater comfort for the institution, but it may have unintended consequences for the adult investor and their supporters, such as invalidating an existing supported decision-making agreement.

In BC and Yukon, supported decision-making relationships are exclusively created by agreement between the adult and supporter, without court intervention. Financial institutions may prefer clients to sign specific forms, or if the person living with a disability is capable, to complete power of attorney forms prepared by the institution.

Multiple Supporters

Supported decision-making is generally not a two-person relationship. Rather, it often involves a group or network of three or more people.⁶²⁸ Even more, there may be other supporters within the

adult’s network who are not formally named in the legal agreement. These scenarios can add complexity and uncertainty for financial institutions and other third parties who are being asked to rely on the supported decision.

Since supported and substitute decision-making systems currently co-exist in jurisdictions with formal supported decision-making arrangements (like BC), a person may be acting as both a supporter (e.g., through a representation agreement) and a substitute decision-maker for property or finance (e.g., through a power of attorney). This can make it difficult for third parties to identify which capacity the person is acting in, and the scope of their authorized powers.

Terminology Used to Denote Supporters

A further complicating factor is that the same terminology may be used to denote a very different kind of relationship. In BC, for example, the *RAA* allows an adult to appoint supported and substitute decision-makers. Both decision-makers are called representatives. So, a representative may be a supported or substitute decision-maker, depending on the terms of the agreement. Across jurisdictions, different terminology is used to refer to the supported decision-maker, such as representative (BC), associate decision-maker (Yukon), supporter (Alberta), and co-decision-maker (Alberta and Saskatchewan).

Lack of Education and Training

Supported decision-making is more likely to be used when there is a great deal of education about the system.⁶²⁹ Specifically, individuals and third parties, such as financial institutions, need practical training to help them understand how to develop and encourage supportive practices that consider some of the concerns outlined above.

If supported decision-making remains misunderstood, or the perceived risk to the financial institution is too high or uncomfortable, supporters may be required to choose between not accessing the third-party services or seek partial or full-scope substitute decision-making alternatives.

Canadian investment firms and their financial services representatives provide information and advice to millions of investors across Canada. Many of these investors may be people who live with dementia or an intellectual or developmental disability. Despite their unique needs and abilities, they share the right to have full and meaningful participation in their investment decisions. And they all share an interest in preserving their entitlement to have a role in how their finances are managed.

The ability to make meaningful life choices is a fundamental tenet of what it means to be a participating individual in society. Similarly, decisions about how our money is managed as we age is of equal significance.⁶³⁰ In looking back at Article 12 of the UN CRPD, the goal is to ensure a person in need of support receives the assistance required to retain their capacity to participate in the decision-making process. It attempts to do away with the long-standing presumptions that people with disabilities cannot participate fully and effectively in the decision-making process.

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 investment advisors, landlords,

physicians, social workers, bank or credit union staff, or staff administering government benefits and pensions. Consultations for this study paper revealed that how support is defined and the role of the supporter largely depend on what support means to the person receiving it.

In the context of who provides support in the investment relationship, it is important to note that, under BC’s *RAA*, a representative “may delegate to a qualified investment specialist, including a mutual fund manager, all or part of the representative’s authority with respect to investment matters.”⁶³¹ This enables a person to hire an advisor to manage their investments. The role of the adult in this situation would be to answer questions so that the investment advisor knows what the needs, preferences, financial circumstances, and risk tolerances are. A qualified investment specialist is specifically defined under section 4 of the *RAA*.⁶³²

With this in mind, and in working with clients who have different abilities, the investment advisor may need to help a client in the decision-making process, including ascertaining what their beliefs and wishes are as they relate to the required investment decision. This can be done in situations where the adult does not necessarily have an in-depth understanding of the details of the underlying investments. Rather, the understanding surrounds making sure that the management of the funds reflect the adult’s beliefs and wishes.

Also important to note is that supported decision-making is not just an alternative to guardianship for people living with a disability. Rather, the HCC Report highlights that “supported decision-making may be a good option for some people living with dementia who have diminished capacity for independent decision-making.”⁶³³ As the demand for supported decision-making increases, and more jurisdictions consider implementing supported decision-making legislation, there is a significant need to better understand the nature of the legal relationship between an adult and a supporter, and to clarify the role of the investment advisor vis-à-vis the adult client generally.

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



CHAPTER 6

Canada’s Investment Landscape

My experience is most people do not understand investing at all.
– Investment Professional

This chapter outlines:

- An introduction to investing, including common investment terms and general and specific products, including those available to people living with a disability;
- The element of risk in the investment process;
- An overview of the Canadian investment regulatory structure and key regulatory obligations and standards of practice that relate to investment services, including suitability obligations, policies, guidance, and professional codes;
- Reporting obligations of investment industry professionals; and
- Current initiatives within the investment sector on working with vulnerable investors.

6.1 INTRODUCTION TO INVESTING

Canada’s investment landscape is as complex and diverse as the community of people it serves. People’s investment knowledge and experience varies, in large part because people interpret the meaning of “investment” in different ways. Some understand investments to include everything from tax-free savings accounts (TFSA) to mutual funds, stocks, and bonds. Others see it as a high-stakes activity restricted only to people of high-net worth, involving complex market trades and

portfolio management. The truth is the practice of investing incorporates all the above. Depending on the amount of funds available, the purpose of an investment, and our preferences over the type of product we feel most comfortable with, we may participate in the investment process to varying degrees.

6.1.1 The Difference Between Savings and Investing

Consultation findings suggest that unless someone has participated in the investment process throughout their life, often people do not understand what it means to invest, or sometimes they do not realize they have investments. Even if they appreciate the concept of setting aside an amount of money for future use, they may not consider this to be investing, nor appreciate the associated risks and benefits of this activity. Sometimes savings is confused with investing because the practices seem similar, albeit with some important differences.

The BC Securities Commission tells us that, simply put, “saving means putting money aside gradually for purchases and emergencies.”⁶³⁴ Money put into a savings account will gradually grow over time through accumulation of interest. Saving money in a typical bank account will allow you to earn interest and make small gains on your deposit later. This activity involves little to no risk.

Although the practice of saving and investing seem intuitively similar, there are important characteristics that set them apart. With a savings account, there is relatively little to no risk that the amount saved will decrease in value. A person who puts \$500 into a savings account today can generally expect that the same \$500 will be available on a future date, as and when they need it. Savings products are often tailored to individual spending habits, and with little to no cost to set up or maintain.

On the other hand, the term invest means putting money into an asset (something that holds the money) so that the money can grow over time.⁶³⁵ The term investment is generally understood to mean “[t]he use of money or capital to purchase an asset or assets (such as property, stocks, bonds, etc.), in the expectation of earning income or profit over time.”⁶³⁶ Investing money involves choosing a product or investment option that a person thinks will help to generate income or growth in the future.

Investments can be used for short-term goals, such as to pay for a vacation or special purchase, or for a long-term commitment to purchase a house, purchase a car, pay for education, or use for retirement. Decisions made about how and where to invest is a critical component of achieving these goals.

Savings

An amount of money set aside, usually into a savings account, for purchases or emergencies. Involves little to no risk and can earn some interest over time.

Investing

An amount of money used to purchase one or more investment products to earn higher interest over a longer period. More risk involved, with a goal of increasing a person’s future wealth.

Difference Between Savings and Investing—A Primer

Savings	Investing
<ul style="list-style-type: none">• Savings account or guaranteed income certificate (GIC)• Little to no risk of loss of funds• Minimal gain (low to moderate interest)• Money is available when you need it• Little to no cost to maintain savings account• Goal = keep money safe	<ul style="list-style-type: none">• Bonds, stocks, mutual funds, etc.• Low to high risk of loss of funds, depending on investment product purchased• Potential for high gain (higher interest)• Complex product options• Managed by professionals or self-directed• Goal = make money over time

To some extent, savings is an introductory form of investing. Although the practice of investing uses the same concept of putting money away for future use, the key distinction between the two is risk. Money put into a savings account remains in place for when a person needs it. In this sense, savings helps people to keep their money safe, with some potential for small growth. Funds are easily accessible for when people need it. Investing, on the other hand, is money put into an investment product, like a mutual fund or stock, for higher, long-term growth, with a risk that money could be lost.

Sometimes people may not realize they are participating in the investment process. Take a TFSA for example, which has both a cash savings and investment option. A TFSA allows people to save money using either the cash account or investments (stocks, bonds, mutual funds, etc.). Money earned on the original invested amount is tax-free. Money can be taken out of a TFSA at any time, with all withdrawals done tax-free as well. Although the account is called a “tax-free savings account” it has the added benefit of potential for higher growth over time because people can use investment products to grow their savings.

People also do not necessarily associate the idea of putting money away for a long period of time as investing. This is partly because investment products are sometimes used for shorter-term savings, but with the added benefit of greater growth than a traditional savings account. Accounts like TFSAs, which allow people to take money out at any time, can often be disassociated with investment products that are traditionally more restrictive in terms of access to funds.

The next section discusses some common investment terms, and the different investment products available in Canada.

6.1.2 Common Investment Terms

Everyone’s experience with investing is different. Some people invest money all their lives, starting from holding investments like mutual funds and TFSAs, through to managing their own portfolios and making high-risk trades. Others may have limited experience, with only a few investments that are fairly low risk and are meant for long-term goals. Some people are just starting out, with little to no knowledge beyond a savings account.

Many of the people with lived experience that we spoke to were forthcoming and honest about their level of experience with investing. Even people who have participated in the investment process for many years described their investment knowledge or experience as basic or elementary. Before taking

a closer look at different investment options, this section describes some key investment terms used throughout this study paper. The terms reflect a distinct meaning or concept in the context of the investment relationship or process. The list of definitions in this section is not exhaustive; but it serves as a useful background for the reader. Anyone already familiar with these terms can move on to the next section of this chapter.

- **Capital Gains:** A profit from sale of an investment (or property).
- **Capital Loss:** Negative return when an investment loses its original value.
- **Diversification:** A mix of investments in different asset classes to reduce risk of loss. There are two ways to diversify investments: portfolio diversification and asset allocation.
 - **Portfolio diversification** means having a mix of investments to reduce risk. For example, having investments in many companies instead of just one.
 - **Asset allocation** means having different types of asset classes in an investment portfolio, for example: stocks, bonds, and cash. This can reduce the risk that all assets will lose value at the same time.
- **Dividends:** A portion of a company’s profit that is paid to its shareholders.
- **Risk:** The potential of losing money in an investment, or the level of uncertainty over how much will be earned or lost on an investment. Most investment products come with some degree of risk, usually associated with the rate of potential return. Higher return means higher risk; lower return means lower risk. We discuss risk and investing later in this chapter.
- **Return:** The profit or growth a person makes on an investment. Return can vary, and is usually unpredictable. There are two forms of return on an investment:
 - **Income**, including interest or dividends; and
 - **Capital Gains** (or increased value).
- **Risk tolerance:** A person’s comfort level with risk as it relates to whether a person will earn or lose money on an investment. Financial institutions will ask investors a series of questions to assess their level of risk tolerance before purchasing an investment product.
 - **Risk averse:** A person who prefers little or no risk of losing some or all an original investment.
 - **High risk tolerance:** A person who is willing to risk losing some or all an original investment in exchange for the potential to earn more money.⁶³⁷

6.2 INVESTMENT PRODUCTS AND OPTIONS: GENERAL

Most Canadian financial institutions and investment firms offer a variety of investment products to their clients, tailored to their needs, goals, and risk tolerance. Often people choose more than one product to reach different investment goals, and sometimes those products will have varying degrees of risk tied to them. In this study paper, and specifically in the consultation interviews, we review and discuss different investment options as they relate to people’s preferences and choices over how to invest their money.

The Financial Consumer Agency of Canada (FCAC) is a regulatory agency that monitors federally regulated financial institutions (e.g. banks) to ensure compliance with consumer protection measures like codes of conduct and public commitments. The FCAC provides a list of the most common types of investments, summarized as follows:

- **Annuity**—an investment contract that pays a person income at regular intervals, usually after retirement;
- **Bond**—A loan of money to a company or government (an issuer). In return, the issuer of the bond promises to pay interest at a set rate, and to repay the loan by a set date;
- **Exchange traded fund (ETF)**—An investment fund that holds assets such as stocks, commodities or bonds. ETFs trade on stock exchanges and have a value that is like the total value of the assets they contain. This means that the value of an exchange traded fund can change throughout the day. The risk level of an ETF depends on the assets it contains. If it contains high-risk assets, then the risk level will be high.
- **Guaranteed investment certificate (GIC)**—An investment that protects the money paid into it. The amount will not fall below the original investment. Growth depends on fixed or variable interest rates.
- **Mutual fund**—A type of investment where the money of many investors is pooled together to buy a portfolio of different securities. A professional portfolio manager manages the fund. Money is invested in stocks, bonds, or other mutual funds, and may be invested in an industry, sector, or country.
- **Security**—A transferable certificate of ownership of an investment product such as a note, bond, stock, futures contract or option.
- **Segregated fund**—A pooled investment fund, much like a mutual fund, is set up by an insurance company and segregated from the general capital of the company. The main difference between a segregated fund and a mutual fund is the guarantee that, regardless of fund performance, at least a minimum percentage of the investor’s payments into the fund will be returned when the fund matures.
- **Stock**—A stock is a unit of ownership in a company which is bought and sold on a stock exchange. Stocks are also called “shares” or “equities”.
- **Treasury bill (T-bill)**—A short-term, low-risk investment issued by a federal or provincial government. A T-bill is sold in amounts ranging from \$1,000 to \$1 million and held for a fixed term ranging from one month to a year.⁶³⁸

6.2.1 Registered Plans

For people who wish to put away money for longer-term savings goals, they may use a registered savings plan. Registered plans offer several different benefits, including the ability to avoid or defer some of the taxes people pay each year. In addition to TFSA, below are four other types of popular registered savings plans:

- **Registered education savings plan (RESP)**—A registered contract between an individual (the subscriber) and a person or organization (the promoter). The subscriber generally

makes contributions to the RESP, which earns income, paid in the form of educational assistance payments to one or more identified beneficiaries.⁶³⁹

- **Registered pension plan (RPP)**—A RPP consists of funds contributed by an employer, or by an employer and employees, to provide a pension to employees when they retire.
- **Registered retirement income fund (RRIF)**—A registered fund created with a carrier. Money is transferred from a registered fund, and the carrier makes payments to the person from the RRIF.
- **Registered retirement savings plan (RRSP)**—A retirement savings plan that you establish, and to which you or your spouse or common-law partner contribute. Any income earned in the RRSP is usually exempt from tax if the funds remain in the plan. Generally speaking, tax is paid when payments are received from the plan.⁶⁴⁰

6.2.2 Financial Planning versus Financial Advice

Financial planning is sometimes confused with financial advice. Financial planning involves review of the following:

- current financial and personal circumstances
- present and future financial needs
- priorities and objectives
- risks associated with a client’s current circumstances
- future needs
- objectives; and
- priorities which can but need not include the establishment of strategies to address and mitigate these matters whether or not a formal financial plan is prepared.⁶⁴¹

Financial advice is the practice of an investment advisor or financial planner providing guidance and suggested strategies to a person based upon review of their background, financial circumstances, and investment goals. Taking the above factors into consideration, among others, helps an advisor to recommend investment products and options that suit a client’s present and future financial needs.

Financial product includes a security as defined in provincial securities legislation; a contract of insurance, as defined in provincial insurance legislation; and any investment in a mortgage or any mortgage type product, including syndicated mortgages.⁶⁴²

Financial product sales are an interaction or process involving a consumer and an individual or firm wherein the individual or firm provides an opinion, suggestion, or recommendation to the consumer to buy or sell or hold a financial product including any associated investment advice, opinion, suggestion, or recommendation relating to the financial product or the consumers’ financial affairs.⁶⁴³

6.3 THE REGISTERED DISABILITY SAVINGS PLAN

First introduced in Canada in December 2008, the Registered Disability Savings Plan (RDSP) is a federal tax-deferred, long-term savings plan for people who identify as living with a disability and their families. The purpose of the RDSP is to help with planning for future financial security. With an RDSP, people can access up to \$90,000 in federal grants and bonds. People who have an RDSP can generally also still receive provincial disability benefits. RDSPs are registered by the Government of Canada, and savings in an RDSP grows tax-free until the beneficiary makes withdrawals. Access to, and support in managing the RDSP, is significant because often this may be the primary investment savings vehicle used by people who identify as living with a disability.

Contributions can be made to an RDSP up until the beneficiary turns 59 years of age. Although contributions are not tax deductible, they do not count as income to the beneficiary when paid out. Any grants, bonds, investment income, or proceeds earned in the plan are included in the beneficiary's income for tax purposes when paid out to them.⁶⁴⁴

6.3.1 RDSP and Provincial Disability Benefits

Money paid out of an RDSP does not impact eligibility for federal benefits (e.g. Canada Child Tax Benefit, Old Age Security, etc.), and most provinces offer full exemption for money paid out of an RDSP on eligibility requirements for provincial benefits. In BC and Ontario, money held in an RDSP, and money taken out of an RDSP, does not affect a person's eligibility to apply for provincial disability benefits.⁶⁴⁵ This exemption allows people living with a disability, or their families, to invest the funds held in their RDSP.

6.3.2 The RDSP and the Disability Tax Credit (DTC)

To open an RDSP, a person must first qualify for the Canada DTC. The DTC is a federal income tax credit for people living with a disability and their supporters. A person can claim the DTC when they file their income taxes. The DTC helps to lower the amount of income tax a person must pay. Once a person qualifies for the DTC, they can become eligible to open an RDSP.

In Spring 2019, the federal government proposed two important changes to the RDSP.⁶⁴⁶ The first proposed change is to eliminate the requirement to close an RDSP when a beneficiary no longer qualifies for the DTC. This would allow grants and bonds otherwise required to be repaid to the Government to remain in the RDSP. The second proposal is to exempt RDSPs from seizure in bankruptcy, except for contributions made in the 12 months before the filing.

6.3.3 The RDSP and Government Grants and Bonds

When a person opens an RDSP, they may be eligible to receive federal government contributions through two programs:

- The Canada Disability Savings Grant; and
- The Canada Disability Savings Bond.

The Canada Disability Savings Grant:

1. The federal government provides matching contributions of 100%, 200% or 300%—up to \$3,500 every year—on contributions made to an RDSP;
2. The grant is paid until the end of the year the beneficiary turns 49;
3. The grant amount depends on the yearly contribution amount and the family income of the beneficiary;
4. Family income is based on the income of the parents until the year the beneficiary reaches age 18, and on the income of the beneficiary (and their spouse) beginning the year the beneficiary reaches age 19; and
5. There is a \$70,000 lifetime grant limit for a beneficiary.⁶⁴⁷

The Canada Disability Savings Bond (CDSB):

1. A person can be eligible for the CDSB even if they do not make contributions to an RDSP;
2. To qualify in 2019, a person needs to calculate the family income of the beneficiary;
3. The amount of the bond depends on net family income. The maximum bond per year is \$1,000, until the end of the year the beneficiary turns 49; and
4. There is a \$20,000 lifetime limit for a beneficiary.⁶⁴⁸

6.4 HENSEN TRUSTS

Eligibility for provincial disability benefits can sometimes be impacted by assets owned by the recipient of those benefits. Generally, to qualify for benefits payments, a person with a disability must show that they do not have significant financial assets.

In 1989, the Ontario Court of Appeal confirmed that a properly formed trust could be established for a beneficiary with a disability without reducing the beneficiary's entitlement to receive provincial disability benefits.⁶⁴⁹ Ms. Henson was a person living with a disability. Her father created a discretionary trust⁶⁵⁰ in her name. The trust was governed by three trustees, who had discretion over whether Ms. Henson received payments from the trust. The trust also created a "gift over" to a charity if the trust was collapsed, so Ms. Henson could never be the recipient of the residue in it. With these conditions, the court held that the assets in the fund were not assets of Ms. Henson, and therefore did not prevent her from receiving provincial disability benefits.

After the success of the *Henson* case, disability trusts came to be known as "Henson Trusts". Essential elements of a Henson Trust are listed here:

- The trustee must have absolute discretion;
- The assets of the trust do not vest in the beneficiary; and
- There is a gift-over following the death of the beneficiary.⁶⁵¹

What does it mean by risk tolerance? It is a little bit more of an explanation about understanding your client's ability to withstand risk, and willingness to withstand risk. So, it is more than just about, are they a low, medium, high risk investor.

– Investment Professional

That whole notion of risk and autonomy is where I think the tire tread hits the road. Because some people, their personality is such that they want to take a risk.

– Community Agency Representative

In January 2019, the Supreme Court of Canada considered a Henson Trust for the first time in the context of determining eligibility for a Metro Vancouver rental assistance program benefit.⁶⁵² The appellant, SA, lived in a public housing complex in Vancouver, BC. The housing authority learned of SA's status as a trust beneficiary and argued that SA was ineligible for a rental subsidy based on this fact. SA argued that her trust was a Henson Trust, and therefore is not an asset for the purposes of determining her eligibility for the rental assistance subsidy. SA relied on the characteristics of the Trust in *Henson* to support her position, namely that she had no vested entitlement to the assets of the Trust, the trustees had absolute discretion, and the Trust could not be collapsed to her benefit. Both the BC Supreme Court and Court of Appeal said the Trust was an asset that disqualified SA from the rental assistance program.⁶⁵³

Côté J held that since “the Trust only provides her with what is essentially akin to a mere hope of receiving some or all of the property at some point in the future”, it does not fall within the meaning of the word “assets” for the purpose of assessing eligibility for the rental subsidy.⁶⁵⁴ Also, the facts supported a finding in favour of SA on the grounds that she could not unilaterally terminate the Trust to her benefit, and “that the discretion over distributions lies exclusively in the Trustees’ hands [...]”.⁶⁵⁵

While the Henson Trust model generally remains excluded from eligibility assessments for provincial or other benefits, the court cautioned that the terms of the particular benefit must be assessed when determining if the assets or income of a Henson Trust will be included when deciding a person's eligibility for the benefit.⁶⁵⁶

6.5 RISK AND INVESTING

Investing involves varying degrees of risk. Plan Institute offers a helpful starting point to understanding the concept of risk as it applies to the investment process. In its RDSP guide, the notion of risk and investing is described as “the chance you take that your investments will not meet your expectations and may even lose money”.⁶⁵⁷ The BC Securities Commission expands on this definition by explaining that:

Risk involves the possibility of an investment's actual return differing from its expected return and the potential to lose some or all of the money you have invested. You invest to earn a return on your money, but returns are not the only consideration. Generally, the higher the risk of an investment, the higher the potential return. If you have a low risk tolerance, you will likely choose a portfolio with lower risk investments and therefore a lower potential return. If you have a higher risk tolerance, you will likely choose a portfolio with higher risk investment and therefore a higher potential return.⁶⁵⁸

Both definitions highlight that risk is a person-centered exercise that people use to decide where and how to invest their money. It is about taking chances, trusting (and hoping) that one choice over another will generate the growth a person needs over time to achieve a financial goal. Risk can be both a positive and negative experience. A positive experience may mean a large sum of money invested ends up generating a high return. A negative experience can mean a shift in interest rates or a correction in the market that results in a substantial loss. Depending on a person's experience, knowledge, and comfort level with investing, a single negative experience could mean an end to future investment activity. Simultaneously, a single positive experience could spark interest in engaging in this practice long term.

A person's ability and willingness to accept risk in investing, and how they perceive and manage the risk taken with their money, is a personal choice. It depends on several factors, including investment objectives, how much time a person has between buying an investment product and when they need access to the money, and their ability to tolerate unexpected changes in the investment market.

The BCSC suggests that a person's risk tolerance is measured by asking two important questions, namely:

- 1. How much risk are you able to take?
- 2. How much risk are you willing to take?⁶⁵⁹

Diagram 5: Ability and Willingness to Tolerate Risk in Investing⁶⁶⁰

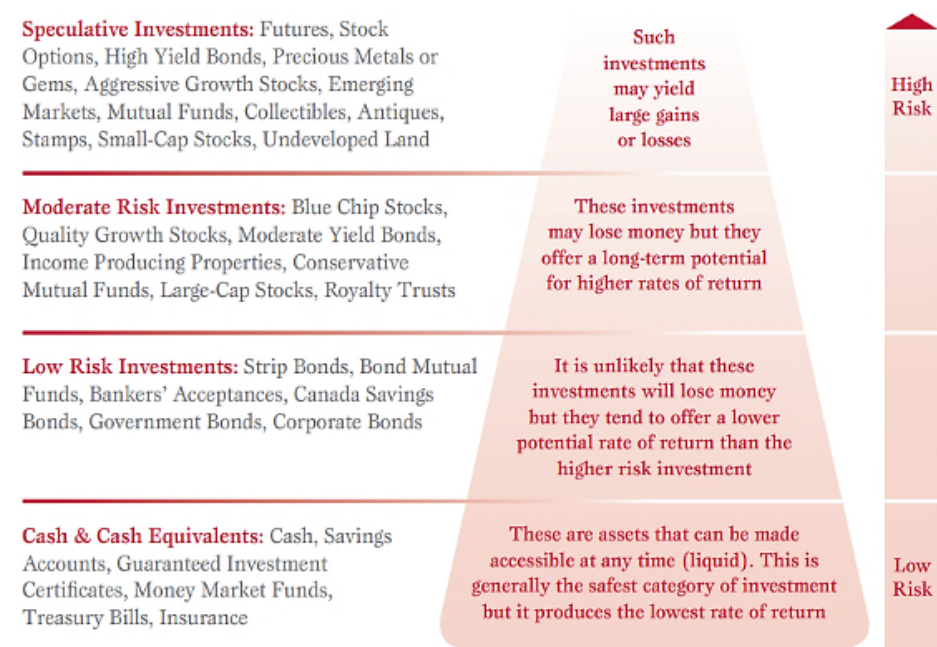
Ability to Tolerate Risk	Willingness to Tolerate Risk
<ul style="list-style-type: none">• Depends on wealth (financial and ability to generate income from work)• Influenced by how much money is needed to support standard of living	<ul style="list-style-type: none">• How we emotionally react to financial loss• Influenced by past investment experience and beliefs about the future



In the investment context, risk tolerance is measured on a scale, from little to no risk through to high risk. The Canadian Securities Administrators (CSA) has a helpful guide that explains different types of investments and corresponding risk categories from low to high.⁶⁶¹ Lower risk investments usually fall under the cash or cash equivalent categories, with fixed or short-term investment periods and guaranteed interest rates. Higher-risk investments vary between bonds, shares, and investment funds with longer-term time horizons.⁶⁶²

Plan Institute provides a helpful diagram to illustrate the progression of risk as it applies to each investment option:

Diagram 6: Type of Investments and Risk Allocation (Plan Institute BC)⁶⁶³



6.6 THE INSTITUTIONS INVOLVED IN THE INVESTMENT PROCESS

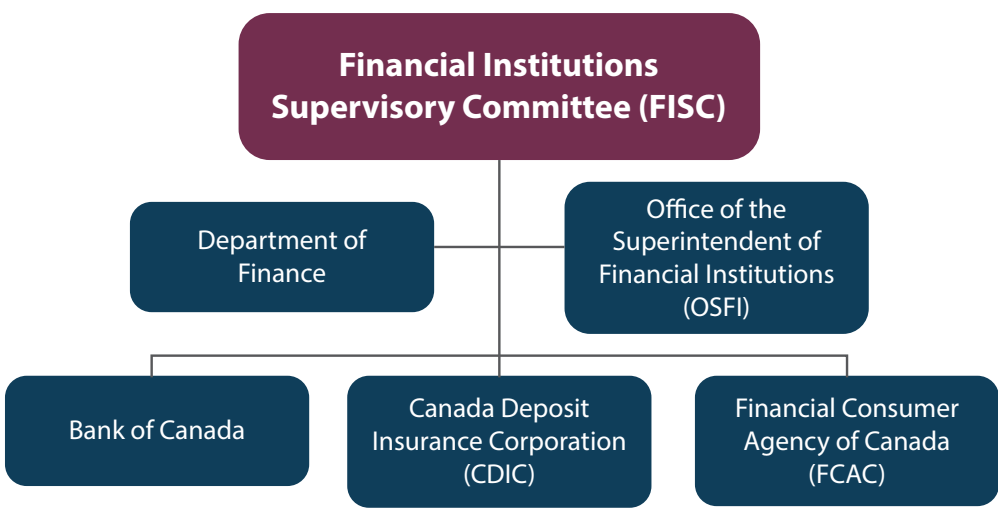
6.6.1 Investment Agencies and Regulatory Bodies

Regulation of Canada’s investment sector is divided among federal and provincial government agencies, and national self-regulatory organizations (SROs). Activities like routine banking, taking of deposits, credit, and lending fall under federal jurisdiction. Investment services such as advice, sale of investment products, mutual fund firms, and other investment service agencies are regulated by provincial and territorial securities commissions. This section describes the role of federal and provincial or territorial oversight bodies, and their related functions.

6.6.2 Federal Government Agencies

The Government of Canada oversees banks, federally incorporated insurance companies, trust and loan companies, cooperative credit associations and federal pension plans. Diagram 7 shows the federal government oversight hierarchy for financial services, followed by a brief description of what each agency does:

Diagram 7: Federal Government Agencies—Financial Services (General)



- **Financial Institutions Supervisory Committee (FISC):** FISC facilitates consultation and the exchange of information on the supervision of federal financial institutions. FISC is chaired by the Superintendent of Financial Institutions;⁶⁶⁴
- **Department of Finance:** The Department of Finance develops and implements financial sector policy and legislation on fiscal, tax, social, security, international and financial issues. Department responsibilities include preparing the federal budget and annual financial report, and managing federal borrowing on financial markets;⁶⁶⁵
- **Office of the Superintendent of Financial Institutions (OSFI):** As an independent agency of the Government of Canada “OSFI supervises and regulates federally registered banks and insurers, trust and loan companies, as well as private pension plans subject to federal oversight;”⁶⁶⁶
- **Bank of Canada:** The Bank of Canada is responsible for monetary policy, monitoring of financial systems, designing, issuing, and distributing Canada’s bank notes, and managing the Government of Canada’s public debt programs and foreign exchange reserves;⁶⁶⁷
- **Canada Deposit Insurance Corporation (CDIC):** Provides deposit insurance against the loss of eligible deposits (coverage up to \$100,000 per insured category) at banks, federally regulated credit unions, loan and trust companies, and associations under the *Cooperative Credit Associations Act*;⁶⁶⁸ and
- **Financial Consumer Agency of Canada (FCAC):** The FCAC “ensures federally regulated financial entities comply with consumer protection measures, promotes financial education and raises consumers’ awareness of their rights and responsibilities.”⁶⁶⁹

6.6.3 National Self-Regulatory Organizations

A self-regulatory organization (SRO) “is a non-governmental organization that regulates the operations, standards of practice, and business conduct of its members with a view to promoting the public interest.”⁶⁷⁰ Provinces and territories have statutory authority under their corresponding securities

legislation to recognize SROs, effectively extending the regulation and oversight of investment actors within each jurisdiction. In Canada, national SROs provide additional policies, guidance, standards of practice, and conduct directives to their members to promote investor protection.

Investment Industry Regulatory Organization of Canada

The Investment Industry Regulatory Organization of Canada (IIROC) is a national SRO that oversees investment dealer firms and advisors, and trading activities on Canadian debt and equity marketplaces. IIROC regulates activities like the buying and selling of securities and other investments, among others. All Canadian provinces and territories recognize IIROC as an SRO within their respective securities legislation.⁶⁷¹ IIROC sets practice standards for the investment industry to protect investors, including requirements for Dealer Members to fulfill suitability obligations to clients when providing investment advice and recommendations. These are discussed in more detail later in this chapter.

Mutual Fund Dealers Association of Canada

The Mutual Fund Dealers Association of Canada (MFDA) is the SRO for regulating the distribution side of the Canadian mutual fund industry. The MFDA oversees mutual fund dealer operations, practice standards, and business conduct. MFDA members are licensed mutual fund dealers.⁶⁷² Currently, eight provinces formally recognize MFDA as an SRO.⁶⁷³

6.6.4 Other Federal Oversight Agencies

Advocis, The Financial Advisors Association of Canada

The Financial Advisors Association of Canada, also known as Advocis “is the largest voluntary professional membership association of financial advisors in Canada.”⁶⁷⁴ Membership provides designation, continuing education, resources, and practice development opportunities to financial advisors.

Investment Funds Institute of Canada

The Investment Funds Institute of Canada (IFIC) membership consists of fund manufacturers, dealers, and dealing representatives that serve investors who purchase or invest in investment funds. IFIC is comprised of 150 organizations, including fund managers, distributors, and industry service organizations, and is divided between managed mutual fund assets and managed ETFs.

According to its website, IFIC’s mandate focuses on four key areas, namely: 1) public policy advocacy; 2) research; 3) sales and asset data collection and reporting; and 4) tools and training.⁶⁷⁵ IFIC’s vulnerable investor education and training initiatives are discussed later in this chapter.

Investment Industry Association of Canada

The Investment Industry Association of Canada (IIAC) is a not-for-profit organization that engages in committee work, develops government submissions and relations, and participates in industry

meetings to discuss issues affecting member firms and investors.⁶⁷⁶ The IIAC is the trade association for the investment dealer community in Canada; it advocates on behalf of investment dealer firms on initiatives that impact their business and clients. The IIAC also creates financial literacy resources and works with IIROC “to regulate and promote credible financial advisors and institutions”.⁶⁷⁷

Financial Planning Standards Council

The Financial Planning Standards Council (FP Canada) provides leadership and certification to professional financial planners across Canada.⁶⁷⁸ FP Canada is made up of two divisions: 1) standards and enforcement,⁶⁷⁹ and 2) education, tools, and resource development.⁶⁸⁰ FP Canada operates in all provinces except Québec.⁶⁸¹ A key effort of FP Canada is to create a mandatory requirement for all financial planners to obtain certification across Canada, and adhere to corresponding standards of practice and ethics requirements.⁶⁸²

FP Canada provides a robust definition of “financial planning” that adds to our earlier summary:

Financial planning is a disciplined, multi-step process of assessing an individual’s current financial and personal circumstances against their future desired state and developing strategies that help meet their personal goals, needs and priorities in a way that aims to optimize the allocation of their resources. Financial planning takes into account the interrelationships among relevant financial planning areas in formulating appropriate strategies.⁶⁸³

Of note is that FP Canada Standards of Professional Responsibility requires all certified planners to make recommendations that are “both prudent and appropriate for the client.”⁶⁸⁴ In assessing whether a recommendation meets this standard, planners are guided by the following criteria:

Prudent strategies and recommendations will take into consideration, among other factors, the client’s current situation, goals, needs, priorities, risk tolerances and time horizons. *Certificants should also take into consideration the client’s values, attitudes and beliefs when determining whether a strategy is prudent and appropriate.*⁶⁸⁵

The addition of a client’s “values, attitudes and beliefs” enables planners to capture aspects of a client’s financial plan that may not otherwise be revealed. FP Canada standards also point to the role that interdependencies and interrelationships play in a person’s financial plan.

Canadian Securities Administrators

The Canadian Securities Administrators (CSA) is a national body organized by the provincial and territorial securities regulators to develop policies and regulations that apply consistently across the country.⁶⁸⁶ The objectives of the CSA are to:

- **Protect Investors** by requiring full disclosure of information to make investment decisions, educating investors about investment risk and responsibility, member authorization, and supervising market intermediaries;

- **Promote fair, efficient, and transparent markets** through fair access to market facilities, price information, and trading practices; and
- **Reduce systemic risk** of failure of market intermediaries, and reduce the impact on investors and other participants.⁶⁸⁷

The CSA distributes national instruments and notices that set out the policies, rules, regulations, and responses to securities activities as adopted by the member provinces and territories. Further discussion of CSA initiatives is provided later in this chapter.

Canadian Securities Institute

The Canadian Securities Institute (CSI) provides credentials training and compliance programs to the financial services industry.⁶⁸⁸ CSI offers more than 170 education and training courses for financial service professionals in retail banking, financial planning and insurance, investment management and training, wealth management and private banking, and business banking. The CSI also offers licensing support to IIROC.

Ombudsman for Banking Services and Investments

The Ombudsman for Banking Services and Investments (OBSI) is a national, not-for-profit organization that investigates and helps to resolve disputes between financial consumers and banking or investment firms.⁶⁸⁹ If a consumer and financial service provider cannot resolve an issue at the firm level, OBSI will aim to resolve complaints through fair and impartial investigations at no cost to the consumer. Investment regulatory oversight of OBSI is mandated by a Memorandum of Understanding signed between OBSI and the CSA.⁶⁹⁰

Depending on the outcome of an investigation, OBSI has authority to make financial and non-financial recommendations. Financial recommendations are limited up to \$350,000. Any claims above this amount can be voluntarily reduced by the complainant. Unlike other federal regulatory bodies discussed above, OBSI is not a regulator, so does not have authority to order compliance with its recommendations, nor advocate for consumers or investment industry firms. OBSI is an alternative dispute resolution option.

In May 2014, the CSA issued a notice requiring registered firms to make OBSI services available to consumers for disputes that fall within OBSI's mandate.⁶⁹¹ In providing impartial and objective dispute resolution services, OBSI “should take into account general principles of good financial services and business practices, and any relevant laws, regulatory policies, guidance, professional standards and codes of practice or conduct.”⁶⁹²

6.7 PROVINCIAL AND TERRITORIAL SECURITIES COMMISSIONS

Provincial governments are responsible for supervising securities dealers, mutual fund and investment advisors, credit unions, and provincially incorporated trust, loan, and insurance companies. All Canadian provinces and territories have their own securities commission that administers the jurisdiction's securities legislation, rules, and regulations.⁶⁹³ Commissions also adhere to any adopted

National Instruments (NIs), policies, and standards as set out by federal agencies or SROs. The CSA coordinates efforts by provincial and territorial securities commissions to harmonize laws and practices across the country.

Most provincial securities commissions operate under a national policy that apply a passport system such that registration in one commission allows for registration in another jurisdiction.⁶⁹⁴ In BC, the provincial securities agencies are the BC Securities Commission and the crown regulatory agency BC Financial Services Authority. In Ontario, the two provincial oversight bodies are the Ontario Securities Commission (OSC) and the Financial Services Regulatory Authority of Ontario.

6.7.1 BC Securities Commission

The BC Securities Commission is an independent provincial government agency that oversees implementation and enforcement of BC's *Securities Act*. The mission of the BC Securities Commission is to foster “a securities market that is fair and warrants public confidence.”⁶⁹⁵ As a provincial securities regulator, the Commission oversees securities trading, and dealer registrations provides investor education resources, and enforces provincial securities legislation and regulation. The Commission can also investigate complaints and take action against misconduct like fraud, misrepresentation, and the illegal sale of securities.⁶⁹⁶

6.7.2 Ontario Securities Commission

The Ontario Securities Commission (OSC) administers, monitors compliance with, and enforces Ontario's *Securities Act*. The OSC develops policies and rules to prevent investment dealer misconduct through consultation with investors, industry representatives and other groups.⁶⁹⁷ The OSC conducts investigations into alleged breaches of securities legislation and regulation, and can initiate enforcement proceedings against an individual or company.

6.8 THE PEOPLE INVOLVED IN THE INVESTMENT PROCESS

According to a 2015 national study, approximately 30 per cent of Canadians age 35 and over invest with an investment advisor.⁶⁹⁸ Of that number, 25 per cent fail to conduct background checks on their advisor, discuss how the advisor is paid, or read their investment statements.⁶⁹⁹ Over a third of all Canadian investors surveyed also report a lack of clarity on what products their advisor is authorized to sell.⁷⁰⁰ In speaking with investors for this project, we learned that many have a mixed understanding of the following:

- The difference between investment service and investment advice;
- Who is authorized to provide investment services or advice;
- What an investment advisor does;
- The official designation or certification investment professionals must maintain;
- The investment products retail investment service providers and advisors are authorized to sell; and
- How people within this sector are regulated.

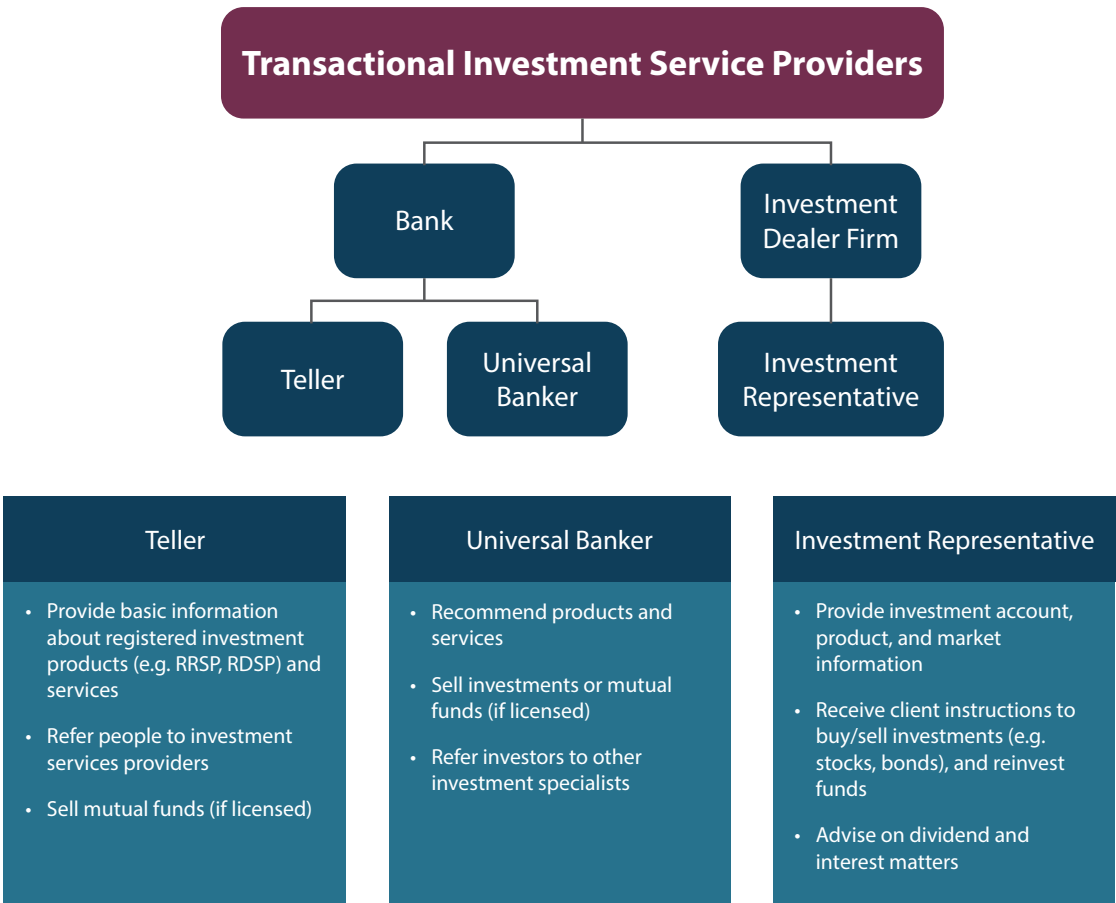
According to the CSI, there are four overarching sectors within the financial services industry: 1) Institutional/Corporate; 2) Middle Office; 3) Back Office; and 4) Retail.⁷⁰¹ The investment service providers we spoke to for this study paper primarily work in the retail investment sector. People in this sector provide retail banking and investment services to individual investors and small business owners. Services range from purely transactional (e.g. purchase of investment products) to advisory (recommendations).

The type of services offered depend on several factors, including whether a person obtains services from an investment firm or a bank, a service provider's title or designation and accreditation or certification, and regulatory oversight. The next section describes two categories of retail investment services, namely: 1) Investment Transactions; and 2) Investment Advice.

6.8.1 Retail Investment Services: Investment Transactions

People who offer transactional investment services generally do not provide investment advice⁷⁰²; instead, they process investment transactions and refer people to investment advisors for specific investment advice. Diagram 8 identifies the key people who perform transactional investment services, and a brief outline of their role as it relates to the purchase of investment products.

Diagram 8: Investment Transaction Service Providers and Key Responsibilities⁷⁰³



6.8.2 Retail Investment Services: Investment Advice

People who provide investment advice are required to hold special licenses to sell a variety of investment products. They have an elevated level of responsibility, are heavily regulated by national SROs, provincial securities commissions, or other oversight bodies, must adhere to standards of conduct and service delivery, and fulfill reporting requirements.

People authorized to advise on, sell, and manage investment products fall under four primary investment service providers:

1. **Insurance Agencies**—licensed to sell insurance (health, life, property, and casualty) and mutual funds, variable annuities, or other securities;
2. **Mutual Fund Dealer Firms**—regulated by the MFDA to provide services, advice, and sale of mutual funds;
3. **Investment Dealer Firms**—licensed by IIROC to deal in a wide range of investment products (stocks, mutual funds, fixed-income or money market securities, etc.). On the retail side, this includes both full service and discount brokerages; and
4. **Banks**—in-house specialists who manage investment portfolios, real estate investments, or trusts, and provide advice or referral.⁷⁰⁴

At Appendix C to this study paper, we outline the different roles and responsibilities of people who work within the above four investment service groups. For each role, we provide examples of title(s) used and summarize roles and responsibility. The information is adapted from the CSI Financial Services Career Map and corresponding links to detailed descriptions for each role within the Financial Services Sector.

Another person involved in the investment advisory process is called a portfolio manager. Portfolio managers work in banks, investment dealer firms or fund companies, investment management firms, or insurance companies. They are responsible for managing investment portfolios for individuals or large institutions, such as mutual funds or pension funds.⁷⁰⁵

According to the CSI, a portfolio manager is responsible for using securities investments to maximize investor return as against their risk tolerance. Other stated roles include:

- Identify a client's investment objectives and constraints.
- Develop investment policies and strategies, taking into consideration market and economic conditions.
- Implement policies and strategies including security research, selection and portfolio construction.
- Measure and evaluate portfolio performance.
- Rebalance the portfolio as it changes, to reflect the original plan.
- Make presentations to current and prospective clients on behalf of the organization.⁷⁰⁶

6.9 REGULATORY COMPLIANCE AND REPORTING OBLIGATIONS

As discussed earlier in this chapter, the investment industry is subject to significant regulation, and is governed by a mix of federal and provincial laws and regulatory bodies. The role of supporters, and the legal relationships that they create, raise several legal and practical issues for the investment advisors who must comply with their professional obligations to the investor.

Research confirms that there remains a fundamental stumbling block to effective use of supported decision-making in the investment context.⁷⁰⁷ This block relates to concerns within the investment sector about the role of the supporter, the respective duties of care or fiduciary responsibilities, undue influence, and the perceived lack of accountability on the part of the supporter in the legal life of a potentially vulnerable investor. Questions for advisors include: who is the client, and who has liability for the investment decision. In practice, this translates into investment advisors either avoiding or outright refusing to work with investors who receive support to make their investment decisions.

Investment dealers and advisors must also grapple with regulatory compliance and federal or provincial privacy laws. Working within reasonable and legislated parameters for collection and use of client information requires a delicate balance between what constitutes a legitimate purpose in the circumstances and extending beyond what is necessary to keep up-to-date client information. Investment dealers and representatives are bound by regulatory and legislative requirements even in situations where they do not provide investment advice. Managing these obligations requires careful consideration of what is required in each circumstance.

Another challenge for dealers and advisors is that collection and use of client information often is required to assess whether instructions received match a client’s investment or risk profile. Such information could also be used to determine whether people within the client’s family may be influencing a client to make investment decisions that do not align with their “Know Your Client” (KYC) information (discussed below). Material change information may also be critical to determining whether a client’s capacity is changing, such that reaching out to a trusted contact person may be necessary. Determining what information is needed, and how it can be used, depends on several considerations.

In Canada, regulatory compliance and reporting obligations are set by both the provinces and federal oversight bodies. Some requirements are mandatory while others are voluntary. What is required will vary across the country, with exception to adopted National Instruments, or IIROC or MFDA Rules.

6.9.1 IIROC

All IIROC registered members must adhere to the IIROC Dealer Member Rules (DMR) that cover, among other issues, applicable standards of conduct, suitability, privacy and confidentiality, and reporting obligations.

Suitability Obligations

Investment advisors owe a duty of care to investors to provide investment advice and recommendations that suit an investor’s needs. This obligation helps to ensure that investors are not advised to

purchase investment products that fall outside their investment goals.

Investment advisors use different tools to determine what investment option(s) will suit each investor. Below are two key components of the IIROC DMR suitability obligation:

- **Know Your Client (“KYC”):** IIROC-registered investment advisors must gather the following details from an investor when opening an initial account:
 - Name, address, citizenship, occupation, and employer of each beneficial owner of the investment;
 - Financial situation;
 - Investment knowledge and objectives;
 - Risk tolerance; and
 - Investment timeline before offering services or making recommendations.⁷⁰⁸

The purpose of KYC information is to ensure investor instructions support their KYC profile, and to avoid improper activities. If instructions do not match the KYC profile, an advisor must caution against proceeding with the instructions.⁷⁰⁹ An investor may still choose to proceed regardless of this recommendation.

The 2017 Vulnerable Investors Report tells us that advisors may need to take protective steps to ensure a warning is sufficiently executed, including:

- Providing a full, clear, written risk assessment to the client;
- Referring the client’s situation to the firm’s compliance unit;
- Obtaining clear, written instructions from the client on how to proceed; and
- In extreme situations, withdrawing the investment representative’s services where the client’s instructions are destructive to their own self-interest.
 - **Disclosure:** The [investment] representative must disclose all material negative factors about an investment product and ensure the client comprehends the information. When a[n investment] representative receives an unsuitable order from a client (a client-directed trade), the [investment] representative must warn the client that the investment is unsuitable and discuss whether there have been any changes to the client’s KYC profile. The [investment] representative must document all disclosures.⁷¹⁰

Other KYC details include information about an investor’s age, occupation, marital status, and number of dependents.⁷¹¹ An investor’s KYC profile must be updated upon any material change in their circumstances.⁷¹² Although the term material change is not defined in the IIROC DMR, the language suggests that material changes may include things like “change of address, financial situation, investment objectives or risk tolerance.”⁷¹³ Material changes may also include changes in job, marital status, or parental status.⁷¹⁴

- **Know Your Product (KYP):** All registered IIROC members must “understand the structure, features and risks of each investment product” they recommend.⁷¹⁵ They must

assess all investment products as against an investor’s KYC profile to ensure it is an appropriate recommendation.⁷¹⁶ For each product, an advisor should be able to explain the investment risk, key features, initial and ongoing costs or fees, and whether it is suitable or unsuitable for the investor.⁷¹⁷

As a supplement to the IIROC DMR, a 2012 guidance notice states that fulfilling these suitability obligations for each file ensures that dealer members and advisors “deal fairly, honestly, and in good faith with clients.”⁷¹⁸ Dealer members are advised that some KYC information will take one meeting to assess; other details, such as risk tolerance or investment objectives, may take more than one meeting to gain clarity on. The guidance notice also provides some direction on best practices for gathering material change information from an investor, as follows:

- Periodically inquire about whether there are any material changes in the investor’s circumstances. These inquiries can take place when meeting to review the portfolio, correspondence to discuss other account related matters, or annual verification of account information;
- Upon opening the account, informing an investor of their obligation to notify their respective advisors any time there is a material change in their circumstances; and
- During periodic suitability reviews, the review discussion can be used to ask whether any material changes have taken place.⁷¹⁹

Standards of Conduct and Conflicts of Interest

IIROC members must adhere to high standards of conduct when providing investment advice and services. This includes acting “openly and fairly” and not engaging in conduct that would be unbecoming or detrimental to the public interest.⁷²⁰ The standards require that all registered dealers act diligently, and comply with securities laws, regulatory, contractual and other obligations, including the IIROC Rules and IIROC policies.

IIROC members are also required to take reasonable steps to identify existing and potential material conflicts of interest between themselves and an investor. In addressing a conflict of interest issue, IIROC members must act fairly, and in an “equitable and transparent manner, and consistent with the best interests of the client[s].”⁷²¹

Best Execution

Investment dealers and advisors “must make reasonable efforts to achieve best execution when acting for a client.”⁷²² Best execution is defined in the NI 23-101 as “the most advantageous execution terms reasonably available under the circumstances[.]”⁷²³ The companion policy document explains that what will constitute reasonable efforts in each circumstance varies, and does not necessarily apply to every action taken on an investor’s behalf.

In deciding what is reasonable, a dealer or adviser should be able to demonstrate the following:

- Adherence to applicable policies and procedures that:
 - i. Require [them] to follow the client’s instructions and objectives;
 - ii. Outline the process designed towards the objective of achieving best execution; and

- Describe how they evaluated whether best execution was obtained, with regular and rigorous review.⁷²⁴

To achieve best execution, dealers should consider investor instructions, factors that include investment objectives, and dealer knowledge of markets and trading patterns.⁷²⁵ Advisors should consider “particular client’s requirements or portfolio objectives”, in addition to other factors.⁷²⁶ The IIROC Rules offer more clarity on the factors to be considered, as follows:

3121. Best execution factors

- (1) The policies and procedures for achieving best execution must address the following broad factors when executing all client orders:
 - i. the price of the security,
 - ii. the speed of execution of the client order,
 - iii. the certainty of execution of the client order, and
 - iv. the overall cost of the transaction, when costs are passed on to clients.⁷²⁷

As noted in the 2017 Report on Vulnerable Investors, limitations of the best execution standard include a failure to consider other factors that may require a trade not to be executed, such as when concerns arise about an investor’s capacity or suspected financial abuse.⁷²⁸

6.9.2 MFDA

Like IIROC, the MFDA sets out suitability obligations that mutual fund dealers must follow for KYC and KYP information gathering.⁷²⁹ However, and unlike IIROC, the MFDA Rule does not specify the type of information that should be gathered to fulfill the KYC, only that a member “learn the essential facts relative to each client”.⁷³⁰ Further guidance on what may be considered essential facts is outlined in a 2017 MFDA Bulletin, illustrated in the next diagram:

Diagram 9: Some Essential Facts Mutual Fund Dealers Must Know about a Client



Other essential facts include:

- A client’s knowledge and understanding of borrowing to invest;
- Whether the client has sufficient income or unencumbered liquid assets to be able to:
 - withstand a market downturn without jeopardizing their financial security (including their ability to maintain their home);
 - meet a margin call⁷³¹ (if applicable);
 - satisfy all loan obligations (both principal and interest) associated with the strategy without relying on anticipated income from the investments; and
- Whether there is any reason to expect the client’s current sources of income to be reduced in the short term bearing in mind the client’s stage of life (age, anticipated retirement date, etc.), employment status and personal circumstances (e.g. disability, pregnancy, any known risk of imminent anticipated job loss, etc.).⁷³²

The MFDA Rules also define material change in client information to mean “any information that results in changes to the stated risk tolerance, time horizon or investment objectives of the client or would have a significant impact on the net worth or income of the client.”⁷³³ Mutual funds are regulated by national instruments (NIs) issued by securities regulators and adopted by provinces and territories across Canada.⁷³⁴

6.9.3 Use and Disclosure of Client Information—Federal Privacy Legislation

As discussed above, investment dealers and advisors are required to obtain detailed information from investors to fulfill suitability reporting obligations. In some situations, a dealer or investment advisor may be required to use investor information, or disclose this information, to comply with a regulatory obligation on opening an investment account.

Collection and use of personal information must be done in accordance with federal privacy laws set out in Canada’s *Personal Information Protection and Electronic Documents Act (PIPEDA)*.⁷³⁵ *PIPEDA* is a federal statute that protects information gathered by federally-regulated businesses, such as banks, airlines, and telephone companies, and for personal information gathered in provinces or territories that do not have private-sector privacy laws. The relevant sections of *PIPEDA* related to investment dealer and advisor use and disclosure of investor information are set out as follows:

Purpose of Collecting Investor Information

Division 1—Protection of Personal Information

Appropriate purposes

5(3) An organization may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate under the circumstances.⁷³⁶

Schedule 1 (Section 5) Principles Set Out in the National Standards of Canada Entitled Model Code for the Protection of Personal Information, CAN/CSA-Q830-96

4.2 Principle 1—Identifying Purposes

The purposes for which the personal information is collected shall be identified by the organization at or before the time the information is collected.⁷³⁷

4.4 Principle 4—Limiting Collection

Personal information shall not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or as required by law. Personal information shall be retained only as long as necessary for the fulfilment of those purposes.⁷³⁸

In assessing whether an investment dealer or advisor has complied with *PIPEDA* requirements, the question to ask is whether the information requested goes beyond what is needed to fulfill the intended purpose. For investment dealers or advisors, suitability obligations require specific KYC information to be gathered to better understand and assess an investor’s financial situation and risk tolerance. Dealers must comply with this obligation in order to provide appropriate advice and services. The same applies to mutual fund dealers under MFDA criteria. So long as a dealer or advisor has told an investor the reasons for gathering the information before or when it is gathered, no contravention of *PIPEDA* will be found.

The Act provides that organizations can use or disclose information to fulfill a specified and legitimate purpose.⁷³⁹ In considering whether the information is being used for a legitimate purpose, NI 31-103 requires IIROC registered dealers to conduct reasonable due diligence and collect enough information to satisfy IIROC’s KYC requirements. The MFDA also has specific criteria related to essential facts about an investor’s circumstances, and updates on any material changes. Applicable securities legislation will also set parameters on what can be used.

Client Consent

Client knowledge and consent is required to gather, use, or disclose personal information, unless it would be inappropriate to do so. For consent to be valid, the person obtaining consent must have the reasonable expectation that the person consenting “would understand the nature, purpose and consequences of the collection, use or disclosure of the personal information to which they are consenting.”⁷⁴⁰ In assessing whether a person knows the purpose of the disclosure, *PIPEDA* requires organizations to “make a reasonable effort to ensure that the individual is advised of the purpose.”⁷⁴¹ This includes stating the purpose in a way that the person “can reasonably understand how the information will be used or disclosed.”⁷⁴²

Only certain circumstances, such as legal, medical, or security reasons, will permit an organization to lawfully disclose personal information without consent. We know from the 2017 Vulnerable Investors Report that the *PIPEDA* provisions relating to disclosure of client information without consent are overly broad, and do not provide enough clarity over who has access to the information:

PIPEDA authorizes organizations that collect, use or disclose personal information in the course of their commercial activities to disclose an individual’s personal information to a “government institution,” or the individual’s “next of kin” or “authorized representative,” without the affected individual’s consent, provided that: the disclosing organization has reasonable grounds to believe the individual has been, is, or may be the victim of financial

abuse; the disclosure is made solely for purposes of preventing or investigating the abuse; and it is reasonable to expect disclosure to the individual would compromise the prevention or investigation of the abuse.

Unfortunately, these amendments are not particularly helpful, as PIPEDA does not define the terms “governmental organization,” “next-of-kin,” “authorized representative,” or “financial abuse”. Hansard and the federal Interpretation Act⁷⁴ are also silent, providing no guidance in terms of definitions.⁷⁴³

The report also notes that, unless “the organization has reasonable grounds to believe that the individual has been, is or may be the victim of financial abuse,” any disclosure of information without a client’s consent would constitute a breach of the Act.⁷⁴⁴

PIPEDA sets out national standards for private-sector organizations to collect, use, and disclose personal information for commercial, for-profit activities in Canada. The Office of the Privacy Commissioner of Canada website notes that, “[u]nless the personal information crosses provincial or national borders, *PIPEDA* does not apply to organizations that operate entirely within Alberta, British Columbia, or Quebec. These three provinces have general private-sector laws that have been deemed substantially similar to *PIPEDA*.”⁷⁴⁵

6.9.4 Reporting Requirements—Other

Although the Canadian *Criminal Code*⁷⁴⁶ does not have a stated offence of elder abuse or financial exploitation “a representative who believes that a client is being abused or financially exploited can notify the police.”⁷⁴⁷ Some Canadian provinces and territories permit or require individuals to report concerns of suspected abuse, neglect, or self-neglect to the provincial or territorial Public Guardian and Trustee.

There is no mandatory requirement to report abuse or neglect in BC. The *AGA* permits a person who has information that an adult is being abused or neglected, and the adult cannot seek support and assistance, to report this concern to a designated agency.⁷⁴⁸ As discussed in Chapter 3 of this study paper, if a person’s finances or assets are at risk, and they cannot manage their financial affairs, the *Public Guardian and Trustee Act* provides the PGT BC with the power to investigate concerns. If financial decisions must be made, this may include the PGT BC becoming committee of estate. If the adult is in immediate danger of physical harm, then the police should be contacted.⁷⁴⁹

Like BC, Ontario has no mandatory reporting requirement for suspected financial abuse or neglect generally, except for misuse or misappropriation of a person’s money when the person resides in a retirement home or long-term care home.⁷⁵⁰ People can contact the Ontario Public Guardian and Trustee if they have concerns that a person may be at risk of financial abuse.

6.10 INDUSTRY INITIATIVE

6.10.1 2017 Vulnerable Investors Report

The 2017 Vulnerable Investors Report made the following six recommendations for Canadian securities regulators to develop and implement, summarized as follows:

1. **Trusted Contact Person (“TCP”):** Securities regulators should implement a rule that requires firms to make reasonable efforts to obtain the name and contact information of a trusted contact person for all non-institutional clients, regardless of the client’s age, at the time of opening a new account, or, in the case of existing accounts, the next earliest occasion that the firm updates a client’s “Know Your Client” profile.
2. **Temporary Hold on Trades and Disbursements:** Securities regulators should implement a rule that authorizes qualified individuals within a firm to place a temporary hold on trades and disbursements of funds or securities from the account of a vulnerable client, where the qualified individual reasonably believes that financial exploitation or undue influence of the vulnerable client has occurred, is occurring, or will be attempted, or where the qualified individual reasonably believes that the vulnerable client has lost the capacity to provide instructions.
3. **Legal Safe Harbour:** Regulators should implement a legal safe harbour that shields firms and their representatives from regulatory liability if they act in good faith and exercise reasonable care in making a disclosure about a client to his or her designated TCP, specified government agency, securities commission or other designated reporting body. In addition, a regulatory legal safe harbor should be extended to the firm and their representatives for placing a temporary hold on disbursements or trades from the account of a vulnerable client, provided the firm and its representatives act in accordance with the regulatory requirements (which are discussed in this study paper) including the applicable provisions of a regulator-approved conduct protocol.
4. **Conduct Protocol:** Canadian securities regulators should publish a ‘Conduct Protocol’ that defines key terms and sets out the steps firms and representatives should take to identify and protect vulnerable clients.
5. **Education and Training:** Firms should be required to ensure that their representatives and staff have competency-based training in the areas of elder abuse, undue influence, mental capacity issues, enduring powers of attorney and ageism and have the required proficiencies. Topic areas include elder abuse, financial exploitation, undue influence, mental capacity issues, and ageism and also have education on enduring powers of attorney, and substituted and supported decision-making.
6. **Firms Become Familiar with Outside Resources and Responders:** Firms need to learn how and when to appropriately refer a case of suspected elder financial abuse, undue influence or diminished mental capacity to local responders.⁷⁵¹

6.10.2 IIROC

Following a 2014 IIAC report⁷⁵² on best practices for working with senior investors, IIROC introduced a guidance on senior investor issues.⁷⁵³ The guidance provides greater clarity and direction to representatives on how to best deal with the following issues:

- **Power of Attorney:** policies directing dealer members to ask senior clients about the existence and validity of POAs at the time an account is opened, and with periodic updates; obtain copies; refer to applicable KYC information for changes to existing POAs; and remain attentive to red flags during the creation or modification of POAs;
- **Effective communication:** increase frequency of contact; maintain accurate and complete KYC information; document all material conversations with senior clients; educate clients about benefits of POA; discuss the use of a trusted contact person; use plain language and larger font size; and comply with statutory obligations for appropriate accommodations for people living with a disability;
- **Policies and Procedures:** train and educate Dealer Members on how to identify diminished capacity and financial exploitation; discuss escalation and reporting processes; encourage future planning for all clients; appropriate advertising and marketing; obtain KYC information about important life changes; fulfill suitability obligations; and conduct senior-focused supervision and compliance reviews; and
- **Investment Objectives:** recognition that investment objectives may change with older adult clients. The role of the dealer member is to identify the inconsistencies, help the client determine which objectives are more important to them, and advise of any risks associated with choosing one or more options.⁷⁵⁴

Other proposed best practices from the IIROC guidance include use of temporary holds and managing risk of potential financial exploitation.⁷⁵⁵

In April 2019, IIROC published a policy update report outlining key policy priorities for implementation, including:

- Plain Language Dealer Member Rules Rewrite Project (“Plain Language Project”) to rewrite current Dealer Member Rules into plain language; and
- A Regulatory Framework for Addressing Financial Exploitation and Cognitive Impairment among Older and Vulnerable Investors. This initiative consists of amendments to the Dealer Member Regulatory Resources and has been introduced to prevent the financial exploitation of vulnerable investors through obtaining trusted contact person information, placing temporary holds on trades and disbursements, and operating under a legal safe harbour. IIROC is working with the Canadian Securities Administrators and the Mutual Fund Dealers Association to develop a regulatory framework to address these areas where a Dealer can accommodate and protect vulnerable investors. Proposed amendments to this Framework are currently under consideration.⁷⁵⁶

The 2019 policy updates respond to IIROC’s May 2016 guidance to address issues, including technological change, a changing regulatory and legislative landscape, evolution in investor demographics,

and a decline in retail investor ownership of individual securities.

In June 2019, IIROC published the results of a national survey canvassing input on provisions to protect vulnerable investors.⁷⁵⁷ Survey data gathered from 1,000 Canadian investors covered a range of topics including awareness of regulatory tools and resources on available protection measures, uptake on the use of a trusted contact person, and the correlation between tools for protection and investor confidence.

The purpose of the survey was twofold—1) to gauge investor awareness and familiarity with available protection measures; and 2) to “explore overall understanding of, support for, and concerns with, the concepts of a ‘trusted contact’ person, ‘safe harbour’ and ‘temporary hold’ policies and specific elements within.”

Key findings from the survey are:

- **Awareness of tools to protect vulnerable investors is low.** Only 18 percent of respondents reported an unaided awareness of regulatory rules to help investment firms and advisors protect vulnerable investors. Only 22 percent report having aided awareness of tools and resources on the use of a trusted contact person (TCP);
- **Uptake of the TCP is low.** Only 22% of investors confirm having named a TCP for their file. This is despite 71 per cent saying they would provide the name of a TCP if their advisor requested it. (NOTE: The 22 per cent may be underreported because 39 per cent of survey respondents say they have a Power of Attorney who is also named as their TCP);
- **More than 8 in 10 investors agree that they would benefit from more information about specific aspects of the TCP role.** An overwhelming 93 percent of survey respondents support the use of a TCP on their account. However, more information is needed on the circumstances under which an advisor can contact a TCP, how to update TCP information, and how an investor can choose someone to act as a TCP;
- **Support for tools that protect vulnerable investors is high.** 92 percent of survey respondents support investment firms and advisors having regulatory tools in place, such as a TCP and temporary hold measures to enable them to protect investors they know, or suspect, are vulnerable;
- **Investor confidence is directly correlated to awareness of the regulatory tools that support protection of vulnerable investors.** Awareness regulatory tools and measures has a significant impact on investor confidence that they are effectively protected, their assets are safe, investment firms and advisors are acting in their best interest, and Canadian markets are effectively regulated;
- **Investors support tools that empower firms and advisors to protect vulnerable investors.** Most survey respondents agree that “investment firms and advisors should have the ability to speak with a ‘trusted contact’ person if they suspect their client is vulnerable or being exploited, [they] should be able to temporarily pause activity in a client’s account if they suspect the client is vulnerable or being exploited” and a safe harbour regime should be in place to protect them if action is needed to be taken on a client’s file;

- **The majority believe that investment advisors would use these tools in the investor’s best interest.** 72 per cent agree (and 32 per cent strongly agree) that their advisor is looking out for their interests by recommending that they designate a TCP and are confident that they would implement them appropriately based on sound judgement;
- **Values of investor privacy and control over financial affairs must guide the development, execution, and communication of these tools.**
 - Investment firms’ and investment advisors’ primary concern should be to protect their client’s privacy, even if they believe the client may be vulnerable;
 - Advisor should not be able to discuss their financial affairs with anyone but them regardless of their perceived physical/mental health and capacity; and
 - The physical and mental health status of clients is private and should not be shared with investment dealers or investment advisors.

According to IIROC’s President and CEO Andrew J. Kriegler, “[t]his input from investors complements the comments we have heard from the investment industry on the need for tools like a regulatory safe-harbour to address the issues associated with Canada’s aging population and vulnerable investors.”⁷⁵⁸

IIROC has developed an Investor Resource Centre on their website, with various brochures, online tools, videos, and bulletins dedicated to educating people about investing.⁷⁵⁹ IIROC also has an additional resource specifically designed to educate senior investors, and direct people to provincial investment education and resources.⁷⁶⁰

In June 2020, a year after it published the survey results on issues impacting vulnerable investors, IIROC released a proposal to merge IIROC and the MFDA to develop a single, consolidated self-regulatory organization.⁷⁶¹ The proposal was developed “in consultation with investors, investment and mutual fund dealers and advisors, professional bodies and industry associations.”⁷⁶²

The purpose of the proposed merger is to respond to the barriers created by the existing “fragmented and duplicative account and product-based self-regulatory framework” to enhance investor protection and access to advice services.⁷⁶³ The report notes that the 2020 global pandemic only exacerbated the impact of these barriers. In the research to prepare the proposal, Canadians called for “more goals-based financial advice that speaks to their entire family situation, advice that is more flexible, transparent and which gives them more control over their investment experience.”⁷⁶⁴ A consolidated regulatory organization could also support increased investor education and awareness of the applicable regulations, information sources on advisors and firms, and how to file complaints.⁷⁶⁵

To illustrate the complexity of the current regulatory landscape in Canada, the IIROC 2020 Proposal provides a table outlining the direct oversight, by activity⁷⁶⁶, for each type of regulatory body in Canada.

The Proposal suggests that the benefits to investors flowing from a new, consolidated self-regulatory model include:

- Reduc[ing] unnecessary duplication and process.

- Increas[ing] Canadians’ understanding of regulation and their ability to navigate through the system.
- A seamless graduation as their investment needs change over time, from fairly simple products and advice to more complex advisory channels and solutions.
- More products at lower cost, e.g. a full suite of ETFs, would be available to many more Canadians
- Clients would not have to re-open accounts and/or change firms/advisors as their investing needs change, resulting in:
 - Less “paperwork burden”
 - Improved consolidated reporting to investors
- Elimination of regulatory duplication would offer cost savings that could be reinvested in innovation and client service.⁷⁶⁷

6.10.3 MFDA

The MFDA has hosted three Seniors Summits in 2013⁷⁶⁸, 2015 and 2019, respectively. Topics addressed at the summits include:

MFDA 2015 Seniors Summit

- Legal issues in servicing senior clients;
- Facing elder financial abuse; and
- Compliance reviews.⁷⁶⁹

MFDA 2019 Seniors Summit

- Advising seniors;
- International initiatives on senior investor issues;
- Member best practices; and
- MFDA regulatory approach.⁷⁷⁰

In September 2019, MFDA released its Member Outreach Initiative detailing feedback on various issues.⁷⁷¹ Consultation participants called for better guidance and education on working with aging investors and vulnerable clients. Recommendations include clarity on MFDA’s approach to assessing suitability for senior investors, and guidance and education on dealing with issues of potential financial abuse and safe harbour provisions.

In response to the Outreach Initiative, the MFDA released a policy on seniors and vulnerable clients.⁷⁷² On the issue of a trusted contact person (TCP), the policy notes that members may take “reasonable steps to obtain the name and contact information of a TCP from their clients.”⁷⁷³ The policy cautions that a TCP is not a substitute for obtaining confirmation of a Power of Attorney, nor does a TCP have decision-making authority on a file. The role of the TCP is to provide information about a client related to issues like potential financial exploitation or a client’s mental capacity.

In obtaining a TCP, members are advised to apply the following practices:

- Provide the client with written notice of the circumstances in which a TCP may be contacted and obtain the client’s written consent to disclose any personal information that may be shared with the TCP in those situations, as required by MFDA Rule 2.1.3 (Confidential Information) and privacy legislation;
- The TCP should be an individual over the age of majority. As a matter of good practice, the TCP should generally not be an individual who has an interest in the client’s account [...] Members and Approved Persons should encourage their clients to name different individuals as their TCP and POA, however, it is recognized that this may not be possible for all clients; and
- When a decision is made to contact a TCP, Members should consider whether other relevant parties such as the MFDA, the police or an office of a public guardian or trustee in the relevant jurisdiction should be contacted.⁷⁷⁴

The policy also provides guidance on placing temporary holds on transactions where concerns about financial exploitation or an investor’s mental capacity are at issue. Members are advised to have clear policies and procedures to 1) identify supervisory and compliance staff to manage placement of a temporary hold; 2) review, monitor, or address the issues; and 3) decide to complete or disallow the transaction.⁷⁷⁵

The 2019 Seniors Summit touched on issues related to best practices and MFDA regulatory approaches in response to the outreach consultation. Future initiatives include working with other securities regulators to develop safe harbour and trusted contact policies.⁷⁷⁶ The MFDA has also dedicated a section of its website to providing education, tools, and resources for senior investors.⁷⁷⁷ Topics covered include working with an advisor, and education on frauds and scams.

6.10.4 Canadian Securities Administrators (CSA)

In June 2019, the CSA released a Staff Notice on suggested practices for working with older or vulnerable clients, including guidance on how to respond to issues of suspected financial exploitation or diminished mental capacity.⁷⁷⁸ Some key features of the practice guidance include:

Red Flags for Diminished Capacity and Potential Financial Exploitation⁷⁷⁹

Signs of Diminished Capacity	Signs of Financial Exploitation
<ul style="list-style-type: none">• memory loss (e.g. forgetting previously given instructions or repeating questions)• increased difficulty completing forms or reviewing disclosure documents• increased difficulty understanding important aspects of investment accounts• confusion or unfamiliarity with basic financial terms and concepts	<ul style="list-style-type: none">• sudden change of risk profile from low risk/capital preservation to high risk• sudden reluctance to discuss financial matters• unexplained or sudden withdrawals from accounts or account closures• being accompanied to meetings by new or unknown caregivers, friends, or family members or having difficulty communicating directly with the client without the interaction of others

Signs of Diminished Capacity	Signs of Financial Exploitation
<ul style="list-style-type: none">• reduced ability to solve everyday math problems• exhibiting unfamiliarity with surroundings or social settings• missing appointments• problems with language• changes in personality• increased passivity, anxiety, aggression or other changes in mood• an uncharacteristically unkempt appearance	<ul style="list-style-type: none">• sudden or unusual requests to change ownership of assets (for example, requesting that investments be transferred to a joint account held by family members, friends, or caregivers)• sudden or unexplained changes to legal or financial documents, such as POAs and wills, or account beneficiaries• unusual anxiety when meeting with or speaking to a firm employee (in-person or over the phone)• unusual difficulty with, or lack of response, to communications or meeting requests• limited knowledge about their financial status• increasing isolation from family or friends• signs of physical neglect or abuse.

- KYC and suitability obligations, with additional information gathered on client employment status and intended retirement date, potential retirement expenses, and TCP information;
- registrants should meet more frequently with vulnerable clients to keep apprised of changes like: health status, death or incapacity of a spouse, and decision-making patterns; and
- Communicating with older or vulnerable clients.⁷⁸⁰

For communicating with vulnerable investors, registered firms and representatives are encouraged “to give deference to the client to select their preferred method of communication (for example, in-person meetings or discussions via telephone) to facilitate their ability to participate in a meeting comfortably.”⁷⁸¹ Registrants are also to receive education and training on how to have difficult conversations with clients around issues like income, health care needs, and physical and cognitive changes. The CSA Notice works alongside IIROC’s 2016 guidance and MFDA’s seniors’ initiatives.

Of note in its 2019 Notice, the CSA explains that older clients “are not a homogenous group” nor should all older adult clients be considered “vulnerable or unable to protect their own interests.”⁷⁸² The CSA notice raises awareness among registered firms and representatives that vulnerability is not age-specific; it can impact anyone, and at any age. The notice also highlights that “vulnerability can take many forms, and can be temporary, sporadic or permanent in nature [...] caused by a number of factors, including a physical, cognitive or psychological limitation, or an illness or injury.”The notice goes further to outline suggested practices for investment professionals to use when working with vulnerable investors. We discuss these suggested practices in our ideas and opportunities section in Chapter 9 of this study paper.

In October 2019, the CSA issued a set of client-focused reforms to improve the client-registrant relationship.⁷⁸³ Key amendments include:

- **Expand KYC Criteria to include:**
 - Information about a person’s circumstances (not limited to financial), investment knowledge, risk profile (tolerance and capacity) and investment time horizon;
 - Reasonable steps to confirm accuracy of KYC information;
 - Requirement to update KYC information and maintain currency of information when significant change occurs;
 - Minimum intervals for updating KYC: 12-36 months, depending on type of account;
- **Enhanced KYP criteria;**
- **New suitability criteria, set out as follows:**
 - the registrant must determine, on a reasonable basis, that
 - the action is suitable for the client, based on the following factors:
 - KYC information;
 - the registrant’s assessment or understanding of the security;
 - the impact of the action on the account, including its concentration and liquidity;
 - the actual and potential impact of costs on the client’s returns;
 - a reasonable range of alternatives available through the firm at the time the determination is made; and
 - the action puts the client’s interest first.
 - Advisors must also review a client’s account in certain situations, including a change in KYC information.⁷⁸⁴

As recent as March 2020, the CSA announced proposed changes to assist firms to protect seniors and vulnerable investors from financial exploitation and fraud.⁷⁸⁵ Proposed amendments open for comment include obtaining the name and contact for a trusted contact person (TCP) “to be a resource for registrants to assist in protecting their clients against possible financial exploitation or if there are concerns about a client’s mental capacity”, but without preventing a client from opening an account if they do not consent to provide a TCP.⁷⁸⁶ It is unclear in the proposed amendments whether or not “assist” may include a TCP providing support to a vulnerable investor to enhance their capacity to make a financial decision.

The amendments, if adopted, would also allow registered firms and advisors to place a temporary hold on the purchase, sale, withdrawal, or transfer of cash or securities if the firm reasonably believes a client is being financial exploited, or does not have the mental capacity to make the financial decision.⁷⁸⁷ Other important changes include the addition of definitions for financial exploitation, mental capacity, temporary hold, and vulnerable client.⁷⁸⁸

The CSA website also has a dedicated page for investor education and resources, with several brochures and items on topics including financial concerns checklist, questions to ask when working with an advisor, investment fraud and scams, and information for young investors.⁷⁸⁹

6.10.5 IFIC

IFIC has an Investor Centre resource page that provides a variety of tools and links to information for investors, including information targeted at young adult investors and students.⁷⁹⁰ It also has a “Vulnerable Investors” page with resources, including best practice checklists on working with older adult investors.

6.10.6 FPSC

During its 2017 Financial Planning Week, FPSC provided educational resources on topics related to client capacity and financial vulnerability, red flags for financial planners to consider when working with vulnerable clients, standards of conduct, and practice guidance.⁷⁹¹

The FPSC website has a section called “Financial Planning Body of Knowledge” outlining the different knowledge categories financial planners must maintain.⁷⁹² A review of its topic “Values, Attitudes, Emotions and Disorders Related to Money” notes that FPSC professionals must consider how personal feelings, needs, beliefs, and experiences with money shape how people make financial decisions. For example, financial planners are expected to identify when issues like physical or mental fatigue may lead to what is called mental depletion. Risk factors that could contribute to mental depletion include:

- Diminished learning capacity;
- Flawed decision-making;
- Vulnerability to temptation; or
- Non-adherence to change or recommendations.⁷⁹³

Planners must also familiarize themselves with strategies to reduce mental depletion, such as how sleep, nutrition, and exercise may enhance or inhibit a person’s capacity to make financial decisions. Practice considerations to support a person who is experiencing mental depletion include:

- Postpone decision-making;
- Postpone providing information to client;
- Postpone educating client; or
- Reschedule meeting.⁷⁹⁴

Other materials in the knowledge section include recognition of how environment, time of meeting, information overload, and other factors can impact capacity to make sound financial decisions.⁷⁹⁵

One highlight of the FPSC Standards of Professional Responsibility is that a “certificant”⁷⁹⁶ owes a duty of confidentiality to a client that requires express, written consent from the client to disclose or use any personal or confidential client information.⁷⁹⁷ The guidance note indicates that certificants cannot presume to have implied consent from the client to share or disclose information “including where a client may bring a family member, spouse or third party to a meeting. Consent to disclose confidential client information must be expressly and explicitly provided by the client [...]”.⁷⁹⁸

6.10.7 BC Securities Commission (BCSC)

In October 2019, the provincial government announced proposed changes to BC securities legislation to modernize securities regulation and equip the BCSC with “the strongest enforcement and collection tools in the country”.⁷⁹⁹ Amendments to the legislation include bolstering “BCSC’s current ability to freeze property and other new measures, such as seizing registered retirement savings plans.”⁸⁰⁰ The Ministry of Finance News Release also notes that the amendments would help to harmonize BC’s statutory protection measures with provinces like Alberta and Ontario.

The BCSC has developed an InvestRight website dedicated to investor education about the practice of investing, fraud awareness, investor protection, and working with an investment advisor.⁸⁰¹

6.10.8 Ontario Securities Commission

In March 2018, the Ontario Securities Commission (OSC) published OSC Staff Notice 11-779—Seniors Strategy, which included an action plan to respond to the needs and priorities of Ontario seniors.⁸⁰² Led by a Seniors Expert Advisory Committee, the purpose of the strategy is to provide registered firms and representatives with “a flexible and responsive framework to address issues of financial exploitation and cognitive impairment among older investors [.]”⁸⁰³

Key elements of the OSC Seniors Strategy include:

- Requirements that registered firms and representatives make reasonable efforts to obtain the name and contact of a TCP to discuss concerns about a client’s behaviour or transactions;
- Temporary holds on account withdrawals if there is a reasonable belief financial exploitation or fraud has, is, or will take place, and there are concerns about a client’s judgment;
- Guidance for obtaining information from older clients, including “supporting their decision-making as they age”⁸⁰⁴;
- Clarity on firm and representative use of official titles; and
- Enhanced research, education, and training to bolster firm and representative knowledge and capacity work with older investors, their families, and caregivers who support them.⁸⁰⁵

When describing “the way forward”, the strategy sets out a series of principles aimed at making the investment process “inclusive, social, and responsive.”⁸⁰⁶ Excerpts from the three principles are set out below:

Inclusive: Being inclusive means taking into account, among other things, differences in mobility, vision, hearing, and literacy, including financial literacy [...] An inclusive approach means combating ageism and making clear that the contributions of older Ontarians are important to our economy and society, and that seniors’ goals and priorities are important to our financial services sector. An inclusive approach helps Ontarians maintain an independent lifestyle that allows them to make choices and engage with others on their own terms.

Social: Financial and other important decisions are rarely made in isolation. People are social: they consider the effects of their actions on others and seek others’ advice before making a decision. For example, a parent may delay retirement to help adult children buy a home or pay off student debt. Investors of all ages rely on registered firms and their representatives, as well as trusted friends and family members, as sources of information and advice before making financial decisions. Family and friends can play important roles as caregivers later in life, and a representative’s relationship with a client may evolve as the client ages [...]

Responsive: Being responsive means delivering timely and relevant support and resources to investors, as well as the people they work with when making financial decisions, in a way that reflects and responds to changes in investors’ personal circumstances [...].”⁸⁰⁷

Key informants for this project told us that they receive informal support to make investment decisions. This is the case in both BC and Ontario. Appreciating that most decisions are made with some form of support, investment professionals we spoke to commented that it was not uncommon for an investor to rely on the support of someone they trust to help them make an investment decision. As we discuss in more detail in the next chapter, there is unanimous agreement among investment industry professionals to find ways to encourage the use of some form of supported decision-making in the investment process.

We discussed in Chapter 4 that Ontario does not formally recognize supported decision-making, where a person is assisted to make financial decisions, in its legislation. As it stands, anyone receiving support to make investment decisions does so informally, or under a formal power of attorney relationship where the attorney retains decision-making authority. Whether or not Ontario will move towards amending its laws to recognize formal support in decision-making remains to be seen. The strategy is a helpful resource for firms and representatives to consider how support can enhance a person’s ability to meaningfully participate in the investment process.

6.11 SUMMARY

As discussed earlier in this chapter, the investment industry is subject to significant regulation, and is governed with a mix of federal and provincial laws and regulatory bodies. If supported decision-making remains misunderstood, or the perceived risk to the financial institution is too high or creates discomfort, family members or supporters may find themselves in a situation where they must choose between not accessing third-party services or products, or obtaining more restrictive substitute decision-making alternatives. This could result in the adult losing their decision-making autonomy, which is often the outcome adults and supporters are trying to avoid.

The importance of the issue is highlighted in a related Law Commission of Ontario Report on the RDSP, which noted that:

Under the *Income Tax Act* (ITA), adults can open an RDSP for themselves and decide the plan terms as the “plan holder”. However, the ITA provides that where an adult is not

“contractually competent to enter into a disability savings plan” with a financial institution, another “legally authorized” person must act as the plan holder. Therefore, a financial institution may decline to enter into an RDSP arrangement with a beneficiary who does not meet the common law test of capacity to enter into a contract. An adult or another interested person, such as a family member, may also believe that an adult lacks capacity to establish an RDSP and wish to appoint a plan holder before approaching a financial institution. The RDSP program does not provide a means to name a plan holder. Instead, a plan holder must be appointed under separate provincial laws.... The federal government has reported that in some provinces, opening an RDSP can involve a considerable amount of time and expense and may have a significant impact on the beneficiary.... (indeed) adults have been unable to appoint a plan holder through a power of attorney (POA) because the threshold for capacity under the [*Substitute Decisions Act*] that would entitle them to do so may be out of reach. Furthermore, the exigencies of applying for guardianship have been perceived as disproportionate to appointing a plan holder due to associated costs, time and possible repercussions on an adult’s well-being.⁸⁰⁸

The next chapter of this study paper sets out what we learned from speaking with everyone involved in the investment process. The questions we asked were based upon an understanding of the following issues, specifically:

- There is increased understanding and attention to abuse and neglect of vulnerable adults within the public, among professionals, and in the investment community.
- There is increased awareness and law reform interest in supported decision-making.
- There is increased clarity about the use of enduring powers of attorney and the duties of an attorney.
- The investment industry in Canada has been in a debate about the investment advisor’s duty of care to investors generally. To date there appears to have been little to no consideration of the implications of supported decision-making arrangements.
- There is increased awareness and diligence with respect to protecting privacy and what an investment advisor can share with others.
- There are concerns about liability of investment advisors generally when dealing with investors, and particularly when working with vulnerable community members.
- There are concerns about the balancing the right to autonomy and the right to protection, which continue to be a challenge.⁸⁰⁹



CHAPTER 7

Consultation Findings

This chapter summarizes what we learned from key informants about the use of supported decision-making in the investment process. This chapter is the largest in the study paper. Our two primary comparator jurisdictions were BC and Ontario, but we also spoke to people from Manitoba, Saskatchewan, United States, Australia, New Zealand, and the United Kingdom.

As stated earlier, we interviewed 95 people from the following sectors of the investment community:⁸¹⁰

- **Key informant** interviews:
 - a. **People with Lived Experience**—adults receiving support (N = 11)
 - b. **People with Lived Experience**—supporters (N = 9)
 - c. **Investment advisors** who service people living with Alzheimer’s or dementia and families supporting people living with intellectual or developmental disabilities (N = 8);
 - d. **Investment industry regulators** (N = 9);
 - e. **Government, or other public policy representatives** (N = 19);
 - f. **Academics (legal and social science)** (N = 8);
 - g. **Lawyers** (N = 17);
 - h. **Community agencies and advocates** (N = 14);
- **Focus group** with members of Inclusion BC—adults receiving support and supporters (events = 1);⁸¹¹

- **Conference presentations** where we introduced the project, discussed the legal, regulatory, and social issues, and held a question and answer session to gather input. We presented to social workers, lawyers, investment advisors, financial planners, service delivery professionals, supporters, and people receiving support about their experience with supported decision-making in the investment context (events N = 3; N = 127 attendees);
- **Canadian Bar Association (CBA) BC Online Survey** to members across the province (N = 60);⁸¹² and
- **Society of Notaries Public of BC Survey** to notaries across the province (N = 68).

This chapter is divided into four parts:

1. **Note on Methodology** for the consultation interviews, interviewee selection, online survey respondents, and structure;
2. **Observations** we made about limitations or challenges faced during recruitment and participation of key informants for the consultation interviews; and
3. **What we heard** from people who use, or attempt to use, supported decision-making in the investment process, namely:
 - i. People living with dementia, or who identify as living with an intellectual or developmental disability;
 - ii. Supporters;
 - iii. Investment advisors;
 - iv. Investment regulators;
 - v. Lawyers;
 - vi. Government or other public policy offices;
 - vii. Community agencies and advocates; and
 - viii. Academics.
4. **Summary** of consultation findings, including survey results and conference participant input.

Key informants shared knowledge, observations, concerns, and ideas about many aspects of the investment process. The degree of investment knowledge and experience among adults receiving support, and their supporters, varied. Many participants shared personal and professional stories about their challenges and successes in using support to make, or help a person make, investment decisions.

Except for people who asked to remain anonymous, a complete list of key informants is included in Appendix A. Consultation planning and observations of note are discussed below. From the consultation findings, we identified several ideas or opportunities to enhance the use of supported decision-making for investing. These are discussed in Chapter 9 of this study paper.

7.1 METHODOLOGY

7.1.1 Semi-structured Interviews

Like the CCEL’s approach for the 2014 Understanding the Lived Experience report, staff for this project used semi-structured interviews to gather input from key informants.⁸¹³ A semi-structured interview uses key themes to guide interview questions “but also allows the interviewer or interviewee to diverge in order to pursue an idea or response in more detail.”⁸¹⁴

Except for some larger group interviews, most key informant interviews were conducted by phone, primarily for the following reasons:

- **Comparator Jurisdictions:** With BC and Ontario serving as the primary comparator jurisdictions, the option for in-person interviews was limited. Staff conducted some in-person interviews with Ontario participants during pre-planned staff travel for conferences. Staff held larger in-person group interviews in BC, where possible.
- **Federal and International Initiatives:** Project staff identified several initiatives across Canada and internationally on working with vulnerable investors, different models for supported decision-making, and efforts to foster greater inclusion and decision-making autonomy for the disability community. Academics and community experts participated in consultation interviews from a wide variety of geographical locations. With exception to pre-planned staff attendance at Canadian or international conferences, most were phone interviews.
- **Accommodation Needs:** Some people with lived experience stated that in-person interviews posed mobility or other challenges. Some of the factors include meeting environment, access to transportation, supporter availability, and time of day. Consequently, staff offered phone interviews as a primary meeting method, followed by video or other remote interview options.

Many of our key informants shared information about their primary role as a person receiving support, an investment professional, lawyer, supporter, community representative, or academic. People would often start out by saying “I’m not sure how helpful I will be”, especially if the link between their title and the topic of our research was unclear. Staff gave interviewees a list of key themes ahead of each interview to guide the discussion. Rather than assigning specific questions, staff leveraged the early part of each interview to unpack each person’s reaction to the topic as a window into how they might bolster their contribution.

Several interviewees would casually say things like “I know this because I support my [family member or friend]” or “my [family member or friend] had a different experience when receiving support.” Staff used those moments to expand the conversation to include related personal lived experience. People were often surprised to uncover how involved they are in other facets of the investment decision-making process. Some supporters shared that, although they did not consider how to use support for investing, they saw an opportunity to build this into their support toolkit in the future.

Another benefit of the semi-structured interview approach was staff ability to adapt to, and accommodate, the different communication needs of people receiving support. How people interpret the meaning of investment terms or concepts varied. Leading with themes like “what does good support look like to you”, instead of using structured questions, opened the dialogue about personal preferences, values, beliefs, and needs. Staff asked people to share experiences receiving, or seeking, support to make investment decisions. Discovering new ways of extracting the information helped to create a more fulsome conversation.

As discussed in the 2014 Understanding the Lived Experience report, a significant challenge to the semi-structured interview method is that analysis of findings can only be done by the interviewer.⁸¹⁵ For this project, that meant one staff member reviewed all interviews, with exception of interviews where two staff members attended. This lengthened the analysis and organization of consultation findings considerably. Staff were able to mitigate this to some degree by using an automated transcription service to transfer audio data into Word text. Support from CCEL administrative staff and contractors facilitated completion of the transcripts within a more manageable timeframe.

7.1.2 Focus Groups

Project partners Alzheimer Society B.C. and Inclusion BC, Public Guardian and Trustee of BC, ARCH Disability Law Centre (Toronto), and Alzheimer’s Society Ontario worked with project staff to plan, recruit, and coordinate focus group interviews with people from the dementia and intellectual or developmental disability communities in each jurisdiction. Project staff worked with project partners and supporting organizations to develop community-friendly consultation posters to distribute to members. The focus group recruitment and registration period ran from February 2019 to April 2019. Despite strong efforts from everyone involved, registration uptake for focus group events was low.

Due to low registration numbers, staff conducted one-on-one interviews for Ontario registrants. Project staff held one focus group session with Inclusion BC in Vancouver. Nine people with lived experience attended the session. The topic of money and investing caused some participants to initially feel hesitant to share personal experiences. Project staff spent time at the beginning of the session clarifying the purpose of our research—to better understand how people receive support to make investment decisions—and to reassure people that information shared would remain anonymous. Most members felt more comfortable once staff clarified that no details on amount of money, or type of investments, needed to be shared. Project staff also asked people to share insights and opinions on the type of support they appreciate, and the kind of support that makes it harder for them to participate in the decision-making process.

7.1.3 Inclusion BC Annual Learning Event (May 2019)

In May 2019, CCEL project staff attended Inclusion BC’s Annual Learning Event in Victoria, BC to present on the project, and to gather input from attendees on their experience receiving or providing support to make investment decisions. With over 45 participants in attendance at the session, project staff asked the following questions:

- What does support mean to you?

- What does supported decision-making mean to you?
- Who supports you to make decisions?
- For people who receive support from a group of people in their lives, how do you work together with your supporters? What are some of the things you do as a team to ensure you get the support you need?
- What are examples of how people provide support to make financial decisions. What kind of help is appreciated?
- What are some of the obstacles or roadblocks in using support to make financial/ investment decisions?
- What tools or resources are, or would be, helpful to you to learn about how to save your money for the future?

7.1.4 Online Surveys to BC Lawyers and Notaries

Our research and interviews revealed that while lawyers and the public are familiar with enduring powers of attorney, and section 9 representation agreements for health care made under the *RAA*, section 7 representation agreements for routine finances are not widely understood and are underutilized.

To gather more input from lawyers and notaries in BC, project staff developed two online surveys. Specifically, staff wanted to learn more about how often people use section 7 representation agreements in the investment process. Each survey asked specific questions about a lawyer or notary’s:

- Years of practice;
- Experience preparing section 7 representation agreements:
 - Standard Provisions;
 - Authority of the Representative;
 - Use of the Monitor; and
 - Number and frequency of agreements prepared; and
- Process for informing clients or representatives about representation agreement purposes, roles, responsibilities, etc.

Each survey took an average of five minutes to complete. Staff ran the surveys for three weeks in October 2019. A total of 60 lawyers and 68 Notaries responded to the survey. Questions asked in each survey are listed in Appendices D and E of this study paper. Survey results are discussed throughout the next section.

7.1.5 Roundtable Stakeholder Events

The original project plan contemplated holding two roundtable stakeholder events, one each in Toronto and Vancouver. The purpose of the events was to gather members from all the communities we interviewed to discuss their collective ideas for how to enhance the use of supported decision-making in the investment context.

To me, to do it properly, to know your client, you need to understand not only their existing knowledge level, but their propensity to gain more knowledge. The vast majority of individuals, when they first open an account, are pretty much all unsophisticated. It is not just measuring their sophistication level at a point in time; but their capacity to become sophisticated. Their desire to want to learn [...] What are their vulnerabilities? What are their disabilities? What are their constraints? Because clients will go down different paths, either because they have certain challenges, or because they just do not want to be bothered, or whatever.

– Investment Professional

Every person we interviewed for this project was keen to participate in the events. Invitations ran for a period of three to four weeks, approximately two and half months ahead of the selected event date. Unfortunately, and when it came time to register participants, scheduling conflicts, travel limitations, and low registration numbers necessitated cancellation of the events.

7.1.6 Key Informant and Focus Group Interview Questions

Questions asked of key informants and focus group participants are listed in Appendix B of this study paper.

7.2 WHAT WE HEARD

Applying the semi-structured approach to our interviews allowed for more fulsome discussion about the issues. It also revealed that it is easier to organize findings by themes, as opposed to interviewee categories, because many people commented on multiple issues that extended beyond their primary role or experience. Use of anonymous quotes in this study paper highlight distinct views from each sector. Otherwise, we summarize the comments, criticisms, and ideas shared to reflect consensus or disagreement with a topic.

A Note about Titles Used in this Chapter

In this section, and for ease of review, we use the following terms to refer to the key informants we spoke to:

- **Investor** means a person living with dementia or an intellectual or developmental disability who receive support to make investment decisions;
- **Supporter** means a person who provide support to an investor, either as a representative, attorney under a POA, or informally as a family member, friend, or trusted person;
- **Advisor** collectively means any investment or other professional who offers direct investment services and advice to investors and their supporters, or advises on investment-related matters;

It is fundamental [to] remember who your client is. It is fundamental not to alienate the client because someone else is coming in the door with them. Because your obligation is to your client, and your client is the person who owns the assets, not the person who is sitting next to them.

– Investment Professional

- **Regulator** means an investment regulatory professional who develops policy or who works on enforcement and compliance issues; and
- **Investment or Legal Professional** is used in place of the more specific categories of advisor, lawyer, or regulator, and to preserve a key informant’s anonymity.

7.2.1 Regulatory and Practice Issues⁸¹⁶

KYC Policy and Process

- 1

Every investment regulator and advisor we spoke to agrees that developing a client’s Know-Your-Client (KYC) profile should start prior to opening the account, with continuous updates throughout the investment relationship. As one investment professional notes, “[t] he Know Your Client is one of the most fundamental obligations; everything stems from that. And it is not just about knowing your client when you are completing forms. It is about knowing your client throughout their investing life cycle. And checking in with them with regularity.”
- 2

Some investment professionals believe current KYC factors are too “black and white.”The focus is primarily on financial situation and risk tolerance, which are relatively easy to measure. Also, existing KYC rules do not specifically mention changes in physical, emotional, or mental health of an investor as a material change. For example, if an investor acquires frontal temporal dementia, which may impact their numeracy skills or risk tolerance, some lawyers and investment professionals believe this should prompt a redo of the KYC interview. But unless the change is a material change, the onus rests with the investor, or their supporter, to tell the advisor, instead of acting as a prompt for advisors to ask about.
- 3

Advisors agree that investors and supporters should clearly understand the purpose of KYC information, and what it means to an advisor’s assessment of a client’s risk tolerance and preferences.

Receiving and Refusing Instructions

- 4

Advisors are concerned about how to receive instructions from an investor, or update KYC information, when a supporter is with them. Often, investors want their supporter to attend all meetings; this may be necessary to ensure they have equal opportunity to participate in the process. One lawyer said that, arguably, a section 7 representation agreement essentially creates two clients: 1) the person receiving support; and 2) their representative due, in part, to the sliding scale of the representative’s role to help make or to make decisions. Advisors are also

If you are feeling, as an advisor, that you are not confident your client is understanding the information, and the decisions that they are making, you have to take steps to be able to make sure that they can understand [...] and are making decisions that are the right decisions for them.

– Investment Professional

concerned about how to make sure the instructions are those of the investor, and not the result of undue influence from a supporter. Preserving the relationship and trust with the investor, and their supporter(s), is of utmost importance to advisors in these circumstances.

- 5
- When receiving instructions, advisors prefer in-person meetings over telephone. If in-person is not available, most advisors will go to an investor’s home to meet them. If a supporter is involved, advisors prefer in-person meetings or video conferencing so they can observe the people in the room.
- 6
- Advisors would like more training and education about how to navigate the option of a trusted contact person without breaching either securities law (if they allow a transaction to proceed) or investor privacy. Regulators note that standards of professional responsibility require detailed, written consent from an investor for an advisor to speak with a trusted person. Ensuring an investor understands why a person is contacted and that consent can be withdrawn, are a top priority when using this option.
- 7
- If an investor’s instructions go against an advisor’s suitability assessment, advisors sometimes struggle with how to confirm an investor’s understanding, especially if they have fluctuating capacity. We heard similar concerns from lawyers who receive instructions from people with different abilities (discussed in next section).
- 8
- Academics stressed that advisors must test an investor’s understanding of the decision being made. The goal is not to protect the investor from making a bad decision. All the advisors and regulators we spoke to recognize that investors make bad investment decisions all the time. The goal should be to ensure that, with the help of a supporter, an investor has the required information they need to make the decision that anybody with that information would make, bad or good.
- 9
- Advisors commented that, when they work with supporters at a meeting, it is important to be clear about who has authority to make the decision. With a power of attorney, most advisors said they clearly understand where the responsibility lies. But it is less clear in supported decision-making relationships, either formally or informally. Even if a supporter is simply helping an investor interpret information, the line between supporter and decision-maker is a blur for most of the advisors we spoke to.

It is much easier to hold the Power of Attorney accountable for decisions that are taken that are not in the client’s interests. The challenge here is when the individual is involved in decisions, but not exclusively making decisions.

– Investment Professional

- 10
- If an investor and supporter disagree, all advisors said they defer to the person with authority to make the decision. The challenge is that advisors do not always keep a copy of authorization documents, like representation agreements or powers of attorney, on the investor’s file. Lack of documentation confirming decision-making authority can cause delay, confusion, frustration, and potentially result in loss of a financial opportunity if instructions cannot be taken.
- 11
- One person said that there are only two occasions when instructions will be refused: 1) if they suspect an investor does not have capacity to give the instructions; or 2) if they believe the investor is the victim of financial abuse, undue influence, or exploitation.
- 12
- If an advisor refuses an instruction, or questions how an investor is spending their money, there is a risk that investors and their supporters could move to another firm or turn to self-directed investing. This does not mitigate potential for undue influence, nor does it help to protect a potential vulnerable investor from being financially exploited. It also creates a related challenge of investors having to rebuild a relationship with a new firm, where the advisor may have less experience working with investors who live with a disability.

Tools and Resources on Working with Vulnerable Investors

- 13
- The regulators and advisors we spoke to agree that the investment sector is committed to improving education and training on how to work with vulnerable investors. Recent CSA amendments have expanded the meaning of vulnerable investor to include people who may have diminishing capacity due to disability, illness, or injury. Investment professionals we spoke to agree that most distribution firms have a spectrum of basic tools to educate clients about investment decision-making.
- 14
- Advisors admit that while they are gaining confidence on how to work with powers of attorney and trusted contact people, they feel less equipped to handle supporter-type situations, especially if they are informal. Lawyers also commented that much of the training and awareness does not go deep enough to teach advisors how to manage issues related to diminishing capacity.
- 15
- Advisors said that a lot of investors with signs of diminishing capacity do not have powers of attorney in place. This puts the advisor in a position where there is no documented decision-making authority on file, nor a trusted contact person to call. Advisors commented that existing tools do not respond to the challenge of when an investor who has no power of attorney, no trusted contact person, and fluctuating capacity. There is no sense of what steps to take to deal with this situation.

When you can see that the client is starting to struggle, maybe that is the point to ask them if it is okay to start bringing their family members in with them to start making decisions together. If the family member has not been appointed as attorney, obviously, you can only take instructions from the client. We cannot call up a family member and invite them without the client doing that. We have to wait for the client to bring in their next of kin, or their friend, or whoever it may be who is acting as their attorney.

– Investment Professional

- 16
- Investment professionals we spoke to said they are unsure how to assess if an investor is incapable of making an investment decision. Most advisors commented that, if they are unclear about a person’s capacity to make the decision, they will ask that person to bring in a power of attorney.
- 17
- One advisor we spoke to said that, when working with long-term clients, they often look for triggers or flags that indicate there may be either capacity issues or undue influence at play. Examples include, but are not limited to:
- a change in spending patterns;
 - a change in demeanor of the client when it comes to dealing with, or talking about, the money;
 - a change in companions; or
 - a new family member who was previously uninvolved.
- 18
- Advisors and supporters want to learn more about how they can incorporate supported decision-making into the investment process.

Safeguards—Existing or Needed

- 19
- One lawyer said that investors could incorporate supported decision-making into the investment process through a Microboard™. Vela Canada is one example of this within BC.⁸¹⁷ A Microboard™ is a group of people who have a relationship of trust with the person receiving support. The people in the group work together with the person receiving support to secure services and supports to “create the life the person wants.”⁸¹⁸ The benefit of this model is that the group is registered as a non-profit society, and the person being supported is on the Board and at the center of decision-making. The Board must adhere to bylaws, and everyone works together to foster a person’s decision-making autonomy. One key informant commented that conflicts of interest would have to be carefully managed if this model is used for investing.
- 20
- Advisors and lawyers suggested expanding the trusted contact person (TCP) role so that copies of statements, with the investor’s consent, could be shared with a TCP to support the advisor and the investor, when needed.

I think there should be some sort of [safeguards] or limitations, but I am not sure that I know what they are. If it is clear that the supporter only has a certain kind of role or authority, that in itself could be a [safe]guard [...] It would be important for all three people to be clear on the roles and responsibilities. [...] It could be a monetary limitation. There is always a trade-off because you do not want to make things so cumbersome that it becomes impractical.

– Investment Professional

- 21
- Lawyers also said that an attorney under a power of attorney could act as a supporter, so long as their authority is not springing. Under BC’s *POAA*, an attorney’s authority can “spring” into effect “after a specified event occurs”.⁸¹⁹ For example, an investor who makes an enduring power of attorney can specify in the document that authority is only triggered when “two doctors have provided letters stating that” they are physically or mentally incapable of managing their financial affairs.⁸²⁰ Lawyers and advisors in Ontario contemplated expanding the power of attorney legislation to include acting as a supporter to help the adult make decisions. Lawyers acknowledge that Ontario substitute decision-making and human rights laws already require that substitute decision-makers encourage an adult’s participation in decision-making. But specific language around support to participate might help create more practical opportunities for attorneys to engage the adult in the decision-making process.
- 22
- Advisors said they need more training to know how to properly manage situations where a supporter might cross the line into acting as a substitute decision-maker unnecessarily, and especially if the supporter disagrees with an adult investor’s decision.
- 23
- One investment professional noted that while safe harbor provisions could help bolster protections for advisors who disclose client information in good faith, advisors “should already have protections, and be taking steps to protect and report” suspected abuse or exploitation.
- 24
- Regulators and advisors asked about how to perform proper checks and balances if a supporter participates in the meeting. Some of the questions included ‘What does support look like? How much can a supporter do?’ Unless an advisor is clear on who has authority to decide, they may feel they need to manage two competing investment interests—the investor’s and the supporter’s. How can advisors ensure the portfolio remains stable if a supporter can make suggestions or recommendations that may be less suitable?
- 25
- One investment professional suggested that a possible safeguard is to require that supported decision-makers be bonded to help with investment decisions. Another lawyer suggested a monetary limit on investment transactions made with the help of a supporter. Other key informants cautioned against imposing monetary limits for risk of infringing on a person’s right to equal opportunity.
- 26
- If an investor has diminishing capacity that compromises access to and liquidity of enough funds to support their care, advisors may prefer a supporter to have shifting authority to move

In the investment sector, unlike the banking space, the chances of getting sued are profound, much more than in the banking world. And the threshold is a fiduciary threshold, which the banking sector is not. So, the risk of doing it wrong is real. And then what almost nobody knows in the public is that the investment advisor is usually personally financially liable to the person.

– Lawyer

into a substitute role, if needed. Lawyers commented that BC’s legislation permits this shift from helper to decision-maker with the representative role.⁸²¹

27 One regulator commented that existing safeguards operate inconsistently across the country. For example, bank-owned dealers have different requirements in different provinces which “is very challenging because then, you know, different standards and different provinces make it very hard to execute their business effectively.” A standardized approach may help to create consistency and predictability for advisors and investors. Also, informal, on-the-job training contributes to the potential for inconsistent approaches, especially for advisors who may have limited access to in-house training.

28 A lawyer commented that, if an advisor’s insurance covered off liability, they may feel more comfortable using supported decision-making in the investment process. Even if complaints are issued “the investment sector typically subrogates against the advisor individually. It is a hidden issue. So, an advisor can lose their house. So, it’s going to make them much more risk adverse.” If advisors feel there is insufficient protection in place to manage the risk of an investor filing a complaint against them, then they may be unwilling to use supported decision-making unless it is clear who is responsible for the decision.

Concerns about a Change in a Supporter

29 Every investment professional we spoke to said that a change in supporter is treated as a red flag or material change. But a change in supporter does not automatically mean undue influence or financial abuse is taking place. There may be several reasons why a supporter changes—maybe a supporter moved away, or became ill, or could no longer fulfill their role, or there was a relationship breakdown. Advisors we spoke to acknowledged that, when these types of changes occur, it is better to be curious than judgmental. These same advisors cautioned that acting too quickly on an assumption that abuse or undue influence is behind the change could cause an investor, and their supporter, to fire the advisor or leave a firm entirely.

30 Speaking directly with investors about a change in any major relationship with their family or friend supporter may be difficult for many advisors. Many investors feel that talking about their money, or who supports them to manage their money, are very personal and private issues. Regulators say advisors should be asking tough questions, and having difficult conversations with investors, to make sure they fully understand the circumstances behind the change. One advisor stressed the importance of asking questions about a change in supporter

A change of agent, or a power of attorney, or adding the name of a bank or brokerage account should always be a red flag. Why has this change taken place?” [...] If you do not have a reasonable explanation, then the concern becomes why is this new person in their life? Are they trying to take advantage and exploit the person? [...] Stealing the person’s money? [...] How long have you known this person? How well do you know them?

– Lawyer

to confirm that the change was made “at the behest of the [investor]—not because another family member doesn’t like the way the current supporter is operating.” Advisors also must be cautious that a new supporter is not deviating from a path that the advisor and investor have been working towards prior to the change.

Capacity and Financial Decision-Making

31 People disagree about whether advisors should be responsible for assessing an investor’s capacity to make investment decisions. Some investment professionals believe advisors should only assess for red flags, leaving capacity assessments for legal or medical professionals. Others believe that advisors have a legal responsibility to assess an investor’s capacity. Some lawyers we spoke to acknowledge the challenge faced by advisors who are not trained to make capacity assessments but feel pressured to do so to appease family demands to protect the adult investor’s assets.

32 Regulators mention that in-house counsel for investment dealer firms is one option to turn to for guidance on how to manage the capacity question. One advisor told us that assessing an investor’s capacity to make an investment decision should never be made in one meeting. Most advisors say they do not have clear or consistent training on how to manage an investor who shows signs of diminishing or fluctuating capacity. Efforts are underway in the mental health community to better equip advisors with tools on the type of questions to ask when mental health issues impact capacity.

Risk

33 The challenge for advisors is how to balance risk tolerance and risk expectations. Investors’ (and supporters’) expectations do not always align with the level of risk tolerance they can take on. Advisors must ensure an investor has enough financial resources to cover their actual and unexpected costs. Regulators suggest using a trusted contact person (TCP) as one way to mitigate risk but note that this role needs to expand to include support or, even further, decision-making authority. Right now, and with the CSA’s recent proposed amendments to national dealer member and representative obligations, the TCP acts as “a resource for registrants to assist in protecting their clients against possible financial exploitation or if there are concerns about a client’s mental capacity.”⁸²²

Far too often investment advisors or broker-dealer reps will get overwhelmed with the idea that, somehow, they need to be able to assess cognitive status. And that is not the case. What they need to be able to do is to identify whether or not there are red flags.

– Investment Professional

- 34 One lawyer asked whether risk assessment tests should adjust for investor capacity changes. The challenge with this approach is that if an investor has fluctuating capacity because of a temporary illness or injury, an advisor may have to conduct multiple risk assessments to confirm where an investor’s tolerance level is on a given day. Depending on how frequently risk tolerance changes, and as it relates to recovery from illness or injury, it may be impractical for an advisor to confirm an investor’s tolerance level. On the other hand, investors and their supporters agree that risk should be measured relative to how well a person functions on a given day.
- 35 Another problem can arise if a supporter’s risk tolerance is either higher or lower than the investor. One supporter told us they avoid risk when managing their family member’s RDSP. Despite acknowledging the loss of opportunity for growth with higher-risk products, the reason behind this approach is to better predict how much money will be available when their family needs it. This is in part because an underlying worry for all the supporters we spoke to, and especially supporters of people who live with an intellectual or developmental disability, is that the beneficiary will likely outlive their supporter. Worries over who will help invest the money when they are gone, or whether they can supplement potential loss from higher-risk investments, keep most supporters in the low-risk category. Regulators struggle with how advisors can manage risk tolerance of the investor when, ultimately, the beneficiary is the one who will benefit from the investment. A community advocacy representative suggests that advisors should limit (by percentage) how much of an investment can be changed or purchased when investors have supporters helping them make decisions.
- 36 More education and tools are needed for vulnerable investors to better understand what risk means, how it impacts investments, how it can be managed over time and through different life stages, and how to build risk into a supported decision-making relationship for investment decisions. One investment professional commented that education and resources must reflect the different meanings risk will have for different investors, based on capacity, life stage, and experience with investing. For example, learning should include how to explain to investors that “financial risk can also substantially mean outliving your money where a guaranteed rate of return won’t provide you with an outcome that is going to meet your needs.”
- 37 Some supporters told us that the person they support either does not understand, or is not comfortable with, the concept of risk. For people receiving support, risk is often understood in the context of safety or danger as it relates to the potential loss of money. Supporters said that they have tried to introduce risk and financial decision-making to the person they support, but that they struggle with how to best present the concept in a way that is

My [other] approach is to have the safest investment possible. That way there is not any volatility. And do I know what I am doing? Not really a hundred per cent. And there are times where I wonder ‘am I doing the right thing?’ Other people would look at me and go, ‘why are you doing this? This is so safe; the interest is so low. Why would you do that?’ My goal is not to lose the money.

– Supporter

easily understood, and that does not cause undue stress. Regulators, supporters, community agencies, and academics agree there is a need for plain language educational materials, tools that use visual diagrams, or role play scenarios to convey risk concepts to people receiving support. Some examples of basic investment tools were discussed in Chapter 6, such as the BC Securities Commission *InvestRight* resources. Disability community agencies also told us that how people receiving support interpret risk can depend on their individual learning and educational needs, which may not fit within the parameters of short, online videos or fact sheets that are generally used today.

Trusted Contact Person (TCP)

- 38 A key concern for advisors is how to guard privacy interests of investors while at the same time utilize the Trusted Contact Person (TCP) safeguard for suspected financial abuse or undue influence. Some advisors agree having a TCP helps as “a touch point—someone to contact when you haven’t been able to reach the client.”
- 39 Finding a TCP for an investor who may have no power of attorney or representative is a challenge for advisors. If there is no other person in place, no family, who can they contact to check-in on the investor? Some advisors also suggested that the TCP should be someone that does not live with the investor, to mitigate potential for undue influence.
- 40 One advisor told us that sometimes investors are not the ones who take issue with an advisor reaching out to a TCP; it is often the person who is exploiting the investor that becomes upset “because now they know they’re being watched a little bit.” As said earlier, one risk for an advisor that uses the TCP as a safeguard is that an investor may threaten to move to another firm, perhaps under the influence of the person exploiting them.

Other Comments

- 41 One lawyer said that family firms, or advisors with long-standing investment relationships, may be more comfortable introducing supported decision-making into the investment process. This is because advisors who work with families tend to have more insight into the whole family; they know who the members are, and have probably observed them in meetings or have seen them provide some level of support to the investor. One limitation with this model is that it may not be available to first-time investors, such as adults taking over their RDSP, or investors with lower net worth. Most of the time, long-standing advisor-investor relationships

I think there is more comfort [with supported decision-making] because [the family firm has] more insight into the whole family. And, so, it does not tend to be that it is so much supported decision-making as it is already informal conversations that are happening, combined with expert experience in that family anyway.

– Lawyer

are more prevalent in firms with high-net-worth investors. This can create a “two-tiered investment service sector.” But these are often the type of investment environments where investors bring supporters with them, on an informal basis. The advisor’s comfort level is directly related to their long-standing relationship with the investor and their family.

42 Some key informants said that it can be difficult to know when to introduce supported decision-making into the investment process. If you introduce the practice at the start of the relationship, then “[e]veryone’s starting from the same level of knowledge, understanding... and that’s potentially optimal, because you have everyone in the room involved in the planning.” The key is to strike a balance between not overwhelming an investor, but also not wanting to miss the time when support may help to preserve an investor’s decision-making autonomy. One advisor commented that “[i]nvesting is like life decisions; it is goal driven. [You] need to start with goals and work backwards.”

43 Adults aging with a disability say that advisors should be more proactive and plan to have more frequent meetings with an older adult investor, to make sure their financial plan continues to meet their needs, values, and goals as they age. One supporter commented that “in the beginning [of the investment relationship] we had yearly meetings but then, after a while, they didn’t happen.”

44 BC’s representation agreements are something only a handful of investment professionals are either familiar or comfortable with. Most advisors that work for national firms are either completely unfamiliar with representation agreements or have seen them only a handful of times.

7.2.2 Legislation, Policy, and Practice

Supported and Substitute Decision-Making

1 The law does not specifically define supported decision-making; nor is it clear what it means when the law allows someone to help a person make decisions. Lawyers and advisors wonder whether help means just getting information from a supporter to help inform an investor of their options, or if it means using supporter input and approval to verify an investor’s choice. Every lawyer we spoke to say the law should be clarified to explain what help means in practice. One lawyer commented that “we’re using the same language to do different things” because supported decision-making means different things to different people. Without a

I would argue, in BC, that representation agreement[s] [are] a bit problematic. Because it is unclear to me what the extent of their decision-making is. Other than if you just want me to phone [the supporter], and bounce the idea off him, that is fine. But if you are expecting me to phone John, and bounce the idea off him, get him to say yes, and then call the client back, and say, ‘hey, John says yes. Do you want to go forward?’ That is a different relationship.

– Investment Professional

formal, legal definition of support, people receiving support apply their own meanings to the term. And we learned that it means something different for everyone.

2 There are many different opinions on what supported decision-making means. Some would say that support cannot be truly done under a substitute decision-making document because substitute decision-making contravenes UNCRPD Article 12 and decision-making rights. Defining supported decision-making largely depends on the jurisdiction, and how far the law extends to recognize it, if at all. Some people believe that true supported decision-making aligns closely with the UN CRPD rights for people to “have the proper support they need” to exercise their decision-making autonomy. But there is no definition of what proper support means. Some informants agree that support should extend as far as possible, along a continuum of support, to ensure people can continue making decisions. Some question how far this right can extend in cases where a person’s ability to make decisions, even with robust support, is limited.

3 People receiving support shared the following views on what the law of supported decision-making should recognize:

- The value of the legal right to be supported to make decisions;
- A desire to be given equal opportunities to exercise their decision-making rights, with or without support;
- Shared and unique experiences of discrimination by front-line bank employees and investment advisors who assume they are unable to communicate about or make investment decisions;
- Lack of awareness by investment firms or banks to identify and implement suitable accommodations to facilitate participation by people in the disability community, including access barriers;
- “Good” support depends on how well their supporter(s) understand their role, and the limitations of that role;
- Support can take many forms; and
- Supported decision-making means letting them ask for, or receive, the help they need and want from someone they trust, and a corresponding respect for situations when they wish to decline unwanted support.

Supportive decision-making has always been taking place. We just have not recognized it as that, or labeled it, or paid attention to it.

– Community Agency Representative

- 4
- Lawyers sometimes expressed their own understanding of what supported decision-making means. Both lawyers and advisors often confused substitute decision-making with supported decision-making and admitted that sometimes the concepts are “murky”.
- 5
- Despite the option to create a formal supported decision-making relationship in BC, uptake of section 7 agreements remains low according to the lawyers and notaries we surveyed (see discussion of survey results later in this chapter).
- 6
- Several lawyers and community agencies commented that supported decision-making usually begins informally. Lawyers said this happens frequently when people come in for a real estate transaction, or to draft wills, and they have their family member attend with them. The role of the supporter varies between helping the person understand the information and process to asking key questions and helping the person work towards a decision.
- 7
- For some, there is a dichotomy that exists between substitute and supported decision-making. Some lawyers feel very strongly that there is no safe way to use supported decision-making unless the person receiving support has capacity to make the decision. One informant told us that, when in doubt, only substitute decision-making should be used. All the lawyers we spoke to have some form of checklist or set of questions they use to assess a person’s capacity to instruct them, but also admit that they rely heavily on their intuition and experience during these assessments.
- 8
- When asked to define supported decision-making, one lawyer told us that it “essentially involves helping, guiding, reminding (e.g. situations where person suffers short-term memory loss). It is about providing accommodation to people who need support from A to B.” Another lawyer said that supported decision-making is about “talking with the individual, keeping them informed about what’s happening, letting them know what the options are, making a recommendation, but asking for their input or choice.” It involves taking the time, communicating, maximizing a person’s ability to make a choice, or getting their input and the “direction they are leaning” towards so the decision made reflects their values. Lawyers and advisors who see support in practice agree that it tends to operate on a continuum, moving from support to substitute, especially in jurisdictions without formal recognition.

Duties of the Power of Attorney

- 9
- With some exceptions, most advisors and lawyers admit that when they see substitute decision-making in practice, usually under a power of attorney, the attorney does not always understand their role. There also seems to be mixed messages coming from advisors when speaking to substitute decision-makers about their role in the investment process. One supporter told us

People that agree to take on a Power of Attorney for someone else often do not realize what they are committing to.

– Community Agency Representative

-
- that, in setting up an RDSP for their family member, the advisor said “it’s [theirs], but you’re going to manage it. It’s in your name, but it’s theirs.”
- 10
- Regulators spoke about cases where things went wrong; when attorneys overstepped their role or, worse yet, influenced an investor to make decisions that went against the person’s values and preferences. We heard earlier that, in making decisions about risk for an RDSP investment, supporters will sometimes choose the products that fit their own risk tolerance, without considering, or based on, assumptions about the risk tolerance of the beneficiary (adult being supported). Advisors seemed more attuned to ensuring the decisions reflect the wishes of the investor, but also admit to deferring to what they perceive to be in the investor’s best interests when necessary.
- 11
- One regulator commented that the power of attorney role is easier to understand when addressing situations where decisions are made against an investor’s best interests. The roles and responsibilities are clear. Representative roles under a section 7 agreement are less clear because of the help provision.
- 12
- A few key informants said that attorneys under a POA should be required to meet certain qualification criteria to provide support for, or to make, investment decisions. One community agency representative suggested a short course on what it means to act as a power of attorney, including education about their rights and obligations. There is a sense that the attorney role needs more oversight, beyond the standard obligations we discussed earlier in this study paper. The same key informant appreciated that the criteria or process should not be so onerous such that the investor cannot put someone in place. Consideration was given to whether this should also apply to representatives under a representation agreement. Some advisors and lawyers asked if attorneys or representatives who help with managing investments should be required to obtain basic investment training to ensure they understand the process and risks involved.
- 13
- One person living with dementia highlighted that an important task they faced early in their diagnosis is to develop a financial plan, not only for themselves, but also for their caregiver. This person felt strongly that developing the financial plan must be built into the role of the power of attorney “because it’s absolutely necessary. The person living with dementia has to rely—their increasing need is, as your own capabilities decrease, you need to go up for assistance to substitute decision-maker.”

Law Reform

- 14
- Many lawyers and supporters commented that BC’s representation agreements are well structured to support a continuum of supported decision-making because of the “help make

When you look at how [supported decision-making has] been formalized, it is almost entirely about empowering the supporter. The point of supported decision-making should be to empower the person being supported. So, if you really wanted a great supported decision-making law, it would say something like, 'doctors, investment advisors, anyone cannot prevent an individual from bringing someone in to help them make decisions.' We could create a law that says somebody has to share their financial records.

– Lawyer

or make” decisions provision. But key informants admit that this language creates both a benefit and a challenge for lawyers and investment advisors who need clarity about whether a person has capacity to decide, and who is responsible for the decision being made.

- 15
- Lawyers agree that BC’s *Representation Agreement Act (RAA)* fails to both provide a definition of what support means, and sufficiently explain how a representative should fulfill their duty to “consult, to the extent reasonable, with the adult to determine his or her current wishes.”⁸²³ The statute provides no guidance for what will constitute “to the extent reasonable” in the circumstances. This is in part because, as said earlier, capacity to decide is decision, situation, and time specific. But, absent a framework or model that explains how to do it, lawyers said this is where it becomes problematic. On the other hand, supporters and people receiving support appreciate the flexibility the *RAA* provides so they can structure supported or substitute decision-making to fit the situation.
- 16
- Supporters say there is inconsistent recognition of representation agreements at some Canadian financial institutions. This results in representatives being refused access to necessary information to fulfill their role. BC’s legislation gives representatives a right of access “to the same information and records...as does the adult”.⁸²⁴ But presently, there is no legislation that requires a federally regulated financial institution to recognize a representation agreement. Some key informants suggest amending the federal statutes (e.g. *Income Tax Act*, *Bank Act*, etc.) to formally recognize supported decision-making for investing.
- 17
- For federally regulated financial institutions, the power of attorney tends to be the most widely recognized and accepted document for substitute decision-making. But, the capacity threshold to create a power of attorney is much higher than the capacity test to make a representation agreement. This creates a roadblock for people who want to appoint a supporter or substitute decision-maker for their investments but are unable to because they may not meet the higher capacity threshold test under power of attorney legislation. Advisors agree that the complexity of different pieces of legislation make it difficult for people receiving support to participate in the investment process.
- 18
- One key informant said that, even though the representation agreement gives people the option to appoint a supporter and substitute, questions arise over whether this arrangement does a disservice to the person receiving support. Supporters of people living with an

When individuals are making investment choices, they are vulnerable, and particularly in the disability sector. There are so many intersections of different legislation at play here. And, unfortunately, there does not seem to be any congruency amongst these Acts. You are always planning to make sure that you are on side of one piece of legislation versus another. To make sure a person does not, for example, get a benefit clawed back because they have taken advantage of some other kind of benefit. It has been really made complex for individuals with a disability to navigate through all this.

– Investment Professional

intellectual disability worry that advisors may insist that representatives act in their substitute decision-making role under an RA7 without taking time to consider if the option to “help make” would support the adult to make the decision. The RA7 could effectively silence the person receiving support if an advisor does not take steps to create opportunities for the investor to receive support to make the decision. The default can easily be that if you have a representation agreement, your representative can make the decision for you. There is concern that this may be the preferred option for advisors for liability reasons.

- 19
- Key informants note that, given the lack of clarity on what it means to help an adult make decisions under an RA7, a substitute decision-making option creates “much brighter lines about the duties of the [substitute decision-maker]”. Lawyers and advisors commented that the challenge with a combined supported and substitute decision-making relationship is that you could face situations where “it seems as though the older adult has taken legal responsibility for financial transactions in respect of which the older adult really did not understand information or appreciate the consequences of decisions, with catastrophic results.” Lawyers and investment sector professionals agree that support in the form of education and interpretation go a long way to enhance a person’s capacity. There is also unanimous agreement that people living with a disability should have the opportunity and support to make investment decisions.
- 20
- One community agency representative commented that the investment sector “can only go so far within, you know, the reading of the law as it exists.” Many of the lawyers we spoke to agree that the law needs to both clearly recognize supported decision-making as a tool to help people exercise their decision-making autonomy, and “provide some parameters around that with respect to appointment of representatives and to the obligations of those supporters who are representatives.” A robust legal framework for support may help the investment sector gain more confidence with supported decision-making and alleviate some concerns around privacy and liability.
- 21
- Some key informants suggest that the law in Ontario requires a shift away from more restrictive cognitive assessments of capacity, to instead focus more on support and accommodation needs. One academic said the legislation and policy should reconsider the “understand and

Why wouldn't you want the client, in whatever limited capacity they have, to have some involvement in the decision-making to turn it around. I think it gets really messy very quickly when it is not clear that the client is actually really involved at all in decision-making and does not necessarily understand what they are agreeing to.

– Investment Professional

appreciate” test to instead focus on the supports and accommodations that could be used to enhance decision-making capacity.

Role of the Representative—BC

- 22 Many key informants are troubled by the lack of criteria for a person to act as a representative to manage investments. One key informant said “[t]hey definitely have to be more sophisticated than the individual they’re assisting. Otherwise, what’s the point?” A person living with dementia told us that the supporter needs to clearly understand the investor’s risk tolerance. Investment advisors agree that, to properly support an investor to make decisions, the supporter should have some experience or knowledge with investing, and that this should at least be equal to, or in some cases greater than, the investment knowledge and experience of the person being supported.
- 23 For complex portfolios, or higher-net worth investors, advisors believe representatives should either receive additional training, or have extensive investment experience, to ensure they have a clear and sophisticated understanding of the process and risks associated with different options.
- 24 Many of the supporters we spoke to admit to having either no experience with investing, or limited knowledge that is largely based on their own investment habits. A challenge for them is knowing where to go for the information, finding materials that are relevant to the type of investment options available, and building in the time to educate themselves in an already overwhelmed support schedule.
- 25 Every supporter, person receiving support, and lawyer agreed that supported decision-making can only work in a relationship of trust between the person being supported and the supporter. Advisors believe this trust relationship must also include the advisor and any other people in the investor’s life who may provide them with advice, opinions, or information on their investments. Advisors recognize that supporters may not be the people who provide advice, perhaps due to lack of experience. Instead, they may only help interpret information or provide other support.
- 26 One academic suggested the supporter should be the person “that is most intimately connected to them and best able to form which is essentially an interpretive role.” Several key informants believe the representative should be someone a person has a close relationship with, and preferably in their immediate family. Academics and lawyers commented that, practically

I am always dealing with [things] when it comes to [my family member]. Something is taking up my time. It is good to have easy access to the [online] information. But the problem is for family members. I think the key problem is you do not know what information you need. You do not know what information you have to ask; you have no idea. So, it is kind of like you are entering in something because you are told ‘this is a good idea for the future.’ But you really do not know what you are doing, how to access the [RDSP] plan [or] information.

– Supporter

speaking, one of the greatest challenges for people in the disability community is that they may not have trusted relationships with people outside their immediate family. While family members may be best positioned to provide necessary communication, interpretation, and other support needs, they may not necessarily be equipped to provide support to make investment decisions.

- 27 One supporter of a person living with a disability told us that their role is to maximize RDSP benefits by investing conservatively, while also recognizing there is a long window of investing time to take some degree of risk in those decisions. This approach is based on knowing that their family member prefers having “the maximum amount of resources to do the things [they] want to do when [they] get older.” Supporters of people living with an intellectual or developmental disability are generally focused on preservation of assets and financial security. The tendency is to manage investments conservatively, taking limited and calculated risks to avoid loss of assets.
- 28 Some informants told us that the role of the representative is partly guided by the *RAA*, and partly by what they know is or will be important to the person they support. One key informant commented that the *RAA* makes it clear that the representative’s role is to consult with the person receiving support to confirm wishes and preferences, and “to stay on the support side as much as possible. Stay away from substitute [decision-making].” The role includes listening to the advisor and the investor, asking clarifying questions, and confirming with the investor that the choice they are making is the one they truly want to make by rephrasing it or providing visual or other interpretation.
- 29 One lawyer commented that sometimes service providers pressure representatives to step into their substitute role. This may be, in part, because front-line bank staff or investment advisors do not understand supported decision-making, or they want to be able to rely on the representation agreement to say the decision was made by the representative. So, the role of the representative is sometimes to act as an advocate or first line of defence against service providers who may refuse to offer services under a support-type relationship.
- Role of the Monitor—BC
- 30 Key informants asked whether a monitor under the *RAA* should be mandatory for all people who use a section 7 representation agreement to make investment decisions. Right now, the

The more sets of eyes, the harder it is for me to do something wrong. And the last thing I want to do, in the position I am in, is be accused of doing something wrong in the care of [the person]. You only want one agent, but you need somebody else to watch over.

– Lawyer

monitor is only required if the representative is someone other than the person’s spouse, Public Guardian, a trust company, a credit union, or if two or more representatives are appointed. In all other cases, appointing a monitor is optional.

- 31
- One policy representative we spoke to commented that sometimes a monitor is a close friend of the representative, and not the adult receiving support. This may occur in situations where the adult is limited in who they can choose within their social circle. This arrangement could compromise the monitor’s ability to remain impartial in their oversight of a representative’s actions. Key informants suggest that adults carefully choose monitors and, to prevent bias, a monitor should be someone with no beneficiary status tied to the adult’s estate.
- 32
- Lawyers we spoke to and surveyed commented that the monitor role is seldom used, despite the requirements set out in the *RAA*. Reasons provided include a lack of understanding of the monitor role or responsibility, or not enough trusted people in an adult’s life to appoint both a representative and a monitor. Most lawyers described different methods they use to explain the role to people who appoint one, but the infrequency of use of this provision makes it impossible to confirm whether people are exercising this role properly.
- 33
- One policy representative told us that “I have never heard [service providers] mention that we should check with the monitor when they have concerns about the rep’s decision. So even the agencies who would use that are not engaging with the monitoring.”

Formal versus Informal Supported Decision-Making

- 34
- Several key informants took the position that whether a person receives support informally or formally should depend on the degree of their capacity to make the decision required in each situation. One advisor pointed to the heightened risk if an advisor takes instructions from an investor who has diminishing capacity, and no formal supported or substitute decision-maker is in place.
- 35
- Supporters and academics report that one of the early challenges with formal supported decision-making was convincing the banks that people receiving support had a legal right to be the signatories on their own RDSPs. There is little confidence among supporters that investment firms would be more lenient to permit informal support to take place for investment decisions. The experience tends to be, if an investor shows signs of fluctuating capacity, advisors prefer a formal power of attorney document so they can defer to the attorney for confirmation of instructions. Advisors admitted during our interviews that there would

I have yet to be convinced that supported decision-making should ever be formal. I think there are a lot of things that happen in reality that do not necessarily fit exactly what our legal constructs are.

– Lawyer

be more openness to incorporating support into the investment process if it were always done formally.

- 36
- One advisor acknowledged that a formal supported decision-making process may be problematic because it is financially and administratively prohibitive to people with limited financial means, or for people who struggle with administratively dense processes. On the flip side, financial institutions feel more comfortable if a formal supported decision-making relationship is in place.
- 37
- There is a sense among the investment community that a formal supported decision-making framework would help guide practice. But lawyers and advisors note that this requires that the law clearly define what support means, and how formal supporters are to fulfill their roles. As stated earlier, many of the people we interviewed feel there is room for more clarity and direction from the law on these points.
- 38
- Advisors and lawyers have competing views on whether informal supported decision-making takes place in Ontario. One person commented “We see it all the time. Otherwise, if it did not happen, then you would have a lot more people under guardianship here in Ontario.”
- 39
- Concerns with informal supported decision-making largely centred around change in supporters. An advisor must be able to 1) confirm that the investor wants the change, and 2) that the change is valid and not being made because another person has stepped in and taken over. There is uncertainty among the investment community about how to effectively do this due diligence check, without requiring a formal capacity assessment to satisfy an advisor that the investor willingly made the change, and with capacity to do so. Key informants note that this approach could potentially prohibit people from exercising their right to change a supporter and provide investment instructions.
- 40
- One lawyer commented that having a formal supported decision-making agreement and appointment process adds value because it prompts people to clarify roles at the outset. But a government representative pointed out that the validity and success of a representation agreement depends entirely on the trust relationships between the people involved. There also needs to be a collective understanding of each person’s responsibility to fulfill their roles and obligations in accordance with the Act and the wishes and preferences of the person being supported.

Often people have all the goodwill in the world, and they want to help someone who they feel needs their support. But they may not have the money to get this documentation. Conversely, I think what financial institutions want is something formalized. That this has actually been vetted by someone with expertise. Because, a lot of bankers, they have not received any kind of formal training in that area at all. Their expertise is largely in customer service first, and financial services second. I think you would need a huge shift in the way banks and other financial institutions operate.

– Investment Professional

- 41
- Some key informants spoke passionately about the formal representation agreement doing a disservice to people receiving support because it forces people to sign a formal document to obtain a service or benefit. Even though the intent of the *RAA* was to create more opportunities for people to exercise their decision-making rights, some see it as a “systems-focused tool” that places an undue burden in the name of equality. “There are the banks who say we need someone with legal authority to be able to sign to create this account to make decisions. So, it’s not really person-centered.” The representation agreement structure is also highly community and family-driven, meaning it is difficult to regulate how well it is being implemented even with the basic formal outline we have in BC.
- 42
- One academic told us that it is critical to give supporters legal recognition to participate in the investment decision-making process. But it is equally important to ensure supporters are properly educated on their role and responsibilities under the Act, and that they work cooperatively with the advisors to ensure the investor’s wishes and preferences are implemented accordingly.
- 43
- Advisors are sensitive to the time and money aspect of obtaining either a capacity assessment or formal supported or substitute agreement. They acknowledge physicians often charge for assessments. Even though people are not required to have a lawyer draft their documents, the validity and reliability from an advisor’s standpoint is critical because “you don’t necessarily want people relying on power of attorney kits because they’re not necessarily getting good advice from a kit that they picked up at Shoppers Drug Mart, for example.” Also, people receiving support, or their supporters, may prefer or feel pressured to have it vetted by a lawyer for personal reasons, or to fulfill a request from a financial institution to obtain advice or services.
- 44
- A few key informants talked about the benefits of Microboards™ as one way to support people living with an intellectual or developmental disability to manage their investments. Microboards are “a small group of committed family and friends who join together with the individual to create a non-profit society (board).”⁸²⁵ People told us that these groups often help adults to manage their RDSP investments. We learned that supported decision-making takes place in these groups using various types of communication strategies including, vocal, symbolic, pictorial, or computer-assisted language, photos or images to describe investing

The bottom line is that there are probably thousands of [people] who are not benefiting from an RDSP because there is nobody. They are not legally authorized to open it, and they do not want to be subjected to guardianship. And there is a cohort of people every year who are turning 49 who are losing out on \$20,000 that they could be benefiting from through the RDSP. It is a significant issue, and I am in awe that it still has not been addressed.

– Lawyer

- and options, and goal-based conversations to help people decide how they want to save their money.
- 45
- One self-advocate told us that they receive support to make decisions about the RDSP by having conversations with their supporters about their goals. Sometimes more than one conversation takes place that focuses on the steps to take to use the investments to achieve those goals. This self-advocate described doing their own research about investment options, reviewing statements and letters, and then meeting with their supporters to help them choose the best option. And if anyone disagrees with the self-advocate’s choice, they work together as a support team to better understand what they want, “to make sure everyone is on the same page.”
- RDSP and Other Provincial Benefit Criteria
- 46
- One key informant commented that, depending on the test for capacity in the jurisdiction, the way the legislation and policy is drafted may require that a person living with a disability be “contractually competent” to be an RDSP plan holder.⁸²⁶ If a financial institution does not believe a person has contractual capacity, a substitute decision-maker may be required to open the account. In Ontario and other provinces that operate exclusively under a substitute decision-making framework, people seeking the RDSP benefit must either appoint an attorney (assuming they meet the capacity standard to do so) or be placed under guardianship. In BC, a person who does not meet the capacity standard for a POA may still meet the criteria to appoint a representative under the *RAA*, effectively preserving a formal right to receive support to open and manage their RDSP plan under that agreement.
- 47
- Several key informants agree that there is low uptake of the RDSP due to legal and other access issues. People living with an intellectual or developmental disability express having low financial literacy, or insufficient access to plain language resources to help them navigate the RDSP investment process. Other issues include lack of awareness over DTC eligibility, and fear of a negative impact on provincial benefit entitlements if they hold investments. Some say there is a need for RDSP navigators or advocacy services to support people to access this financial resource. Key informants also pointed out that lack of required government-issued identification and homelessness are other barriers that may prohibit eligible people from opening an RDSP account.

The bank did not give me a lot of information about [the RDSP]. I had to do a lot of research on my own [...]mostly online. It's kind of confusing [...] that is kind of problematic now in terms of me finding out the information and accessing, so I did read up a lot. I've read several brochures. I did most of the research on my own. I've gone to seminars over the years that were offered in my neighborhood [...] and I also called the government line directly. That was probably the most helpful.

– Supporter

- 48
- One key informant challenged whether the RDSP encourages supported decision-making because usually RDSPs are opened without consultation or consent with the beneficiary. Despite good intentions on the part of family to financially plan for the future, the beneficiary is usually not involved in the decision over whether to open the RDSP or not. Often, it is a parental choice, which one key informant noted could make transfer of power when the beneficiary reaches the age of majority more challenging. The question becomes how parents of an RDSP beneficiary transition away from a long-held substitute decision-making role so that the young adult beneficiary can take part in the investment choices for the plan.
- 49
- One key informant talked about the practical and emotional burdens applicants and their families experience during the DTC application process. The amount of paperwork required, combined with “the reality of families and individuals having to relive worst-case scenarios [...] to say how horrible a day could be for your loved one, or for yourself; that’s not easy.” There is also the possibility that, depending on the Canada Revenue Agent reviewing the application, a decision could be made that assesses a person’s disability as episodic, and thereby disqualifying them for the credit. Other barriers include the time and expense required to have the paperwork completed by a qualified professional.
- 50
- We heard from supporters that information about the RDSP and DTC is not easy to find, and that financial institutions have inconsistent practices and resources on the RDSP. Supporters commented that the banks do not know a lot about the DTC and RDSP, despite acknowledging that a large part of their customer base is people living with a disability and their families. One key informant commented that a key component to successfully opening and managing an RDSP depends on having a pre-existing relationship with a bank.

Receiving Instructions—General

- 51
- The lawyers we spoke to acknowledge that there is a difference between a person lacking capacity to give instructions, and a person who simply has difficulty responding to traditional decision-making questions. A person’s inability to communicate a clear response could simply reflect their limited or basic investment knowledge. Lawyers we spoke to in BC and Ontario commented that if they have concerns about a person’s ability to instruct them on a representation agreement or power of attorney, their approach is to ask questions like, ‘Why are you doing this?’ Lawyers stress the importance of meeting with a client alone to avoid “having other people in the room answering the questions for them”. In cases where clients

come into a meeting with a spouse or significant other, lawyers say they will deliberately direct questions to the client and take instructions only from that client.

- 52
- All the lawyers we spoke to agree that capacity and a person’s ability to understand information and to communicate that understanding, manifests in different ways, and with different people. A few lawyers talked about situations where they struggled to make a connection with a client, and so brought in a colleague to help during the meeting.
- 53
- Lawyers said it is important for advisors, when building a trusting relationship with a client, to remember that the client often is the expert on their own life. Sometimes clients want lawyers or advisors to tell them what to decide. Sometimes lawyers and advisors might assume the client cannot make decisions. Lawyers say it is important for service providers to find ways to build a client’s confidence to make the decision.
- 54
- Lawyers and community agency representatives commented that often people living with a disability may be socialized or accustomed to having people who support them “impose things on them.” This may cause an adult to become agreeable to a course of action, or decision, based on what they are used to doing. Participants agreed that service providers should tell clients early, and often, in the relationship that their voice matters, that their life matters, that finding ways to communicate their wishes and preferences matters, and demonstrating their decision-making matters.
- 55
- One lawyer we spoke to commented that, if a financial advisor has been meeting with a couple for many years, it is good practice for the advisor to regularly meet alone with each person to determine their individual KYC information.

Test for Capacity to Instruct Counsel and Section 7 Representation Agreements

- 56
- Members from the BC legal community said that the lower capacity test for people to make a RA7, combined with the fact that there is no requirement to have a lawyer prepare the agreement, may explain why most people who have a RA7 do not work with a lawyer to draft it. This is in part because people living with diminished capacity must meet a higher capacity threshold to instruct counsel.
- 57
- The Law Society of BC states that a person’s capacity to instruct a lawyer rests on whether they have “the ability to understand the information relative to the decision that has to be made and [are] able to appreciate the reasonably foreseeable consequences of the decision or lack of decision.”⁸²⁷ The language in the LSBC Code mirrors the test for capacity to make a power of attorney, which is a much higher standard. BCLI’s *Report on Common Law Tests of Capacity* recommended amending the *RAA* to allow a person with the capacity to make a section 7 representation agreement to also meet the test for capacity to retain and instruct legal counsel to prepare the agreement.⁸²⁸
- 58
- Lawyers and community agency representatives agree that the challenge with the current language for section 7 agreements is that “there is nothing that says what level [of capacity]

do they have to have.” In practice, and for the limited number of section 7 representation agreements a lawyer might prepare over a given year, most lawyers will “take it as meaning they have to be able to make choices, express a preference for one person or another, and so they have to have a sufficient level of functioning to at least know the people they might consider.”

59 Members of the legal profession say that, to this day, many lawyers are still uncomfortable with section 7 representation agreements, mainly because lawyers struggle with taking instructions from a client for a representation agreement (lower capacity threshold test) when the client may not meet the higher capacity test to instruct counsel under the Law Society rules. People said that this may be less of a concern for notaries, who are not bound by the same practice rules and insurance requirements as lawyers.

Conflicts of Interest

60 One academic said that if a supporter is also a beneficiary, either on a registered investment plan, a will, or as joint account holder, they are in a conflict of interest and therefore should not be a supporter, full stop. But an adult may have no one else in their life that can step in as supporter. Absent a legal prohibition preventing a beneficiary from acting as a supporter⁸²⁹, the risk is that the supporter, and consequently the adult investor, may decide to move the account. The other complicating factor to this is that the *RAA* does not require an adult to appoint a monitor if the representative is the adult’s spouse. In many cases, a spouse is also the beneficiary to many of the adult’s investments and other assets. There is a real challenge for advisors and lawyers to ensure an adult has someone they trust and are familiar with to support them with their investment choices, while also managing the potential risks associated with a conflict of interest in the supporter-beneficiary role.

Other Comments

61 One legal professional told us that sometimes people do not understand the difference between lawyers and notaries. Some people will complain about the cost of services, but often it is in the context of lawyers’ fees.

7.2.3 Factors Contributing to Investor Vulnerability

Relationship of Trust Between Adult Investor and Supporter

We said earlier in this study paper that challenges arise because the concept of supported decision-making is neither universally defined nor understood. There is also no universal understanding of what the relationship of trust means for the person being supported and their supporter. The different legal opportunities, or lack thereof, to formally use it for investment decision-making create both legal and practical challenges about the risks associated with more robust application of supported decision-making as an investment decision-making tool. And there is also a need to guard against potential undue influence and financial abuse in this process. Below are the comments from key informants about the various vulnerability factors to consider.

I think the biggest thing is trust. That the senior, the mother, or father trusts the child that they are working with. Because without that, I think that would be a lot harder.

– Community Agency Representative and Supporter

1 Lawyers, investment advisors, and regulators share common concerns about risk for potential financial abuse or undue influence in the investment process when working with people who live with a cognitive disability. They all agree that the risk exists in both supported or substitute decision-making relationships. But, and as one key informant notes, people living with a disability that affects their capacity to make investment decisions, and who have “enough money to invest, simply can be targets.”The vulnerability lies not in the disability itself, but in the potential that supporters who stand to profit from the investment may influence how they support an adult to make investment decisions.

2 Investment advisors, lawyers, and supporters agree that, for true supported decision-making to work for investing, or in any context for that matter, there must be a relationship of trust between the adult and the supporter. This trust relationship is the backbone to true support. But lawyers and advisors note that they too often see supported and substitute decision-makers use this relationship of trust to manipulate, threaten, deceive and, in worst cases, act aggressively towards an adult being supported—to effectively shift an adult’s wills and preferences to align with the supporter or substitute’s goals. The practical challenge is in managing the fine line between support to help an adult make decisions that reflect the adult’s wants and needs versus the use of support, or coaching, as a guise for undue influence and financial abuse.

3 Another lawyer commented that sometimes supporters worry about spending estate money. Whether or not this concern is fueled by a legitimate concern for the adult’s ability to financially manage their needs and wants, or is guided by ulterior motives, it often influences how supporters provide support to the adult to make decisions. Advisors struggle with knowing what to do in these circumstances because, ultimately, their goal is “to protect the client assets from being depleted [...] you want to make sure that the money is being used for the benefit of the client”.

4 Lawyers, advisors, and family members note that an adult living with a cognitive disability could face heightened vulnerability if they are in a romantic relationship with a supporter who is looking out for their own self-interest. Sometimes the adult experiencing the financial abuse or undue influence would rather keep things status quo than to have finances subjected to more attack. Sometimes being connected to the supporter, or a desire to please others, overtakes an adult’s ability to take measures to avoid the abuse, fraud, or undue influence.

Potential for Undue Influence or Financial Abuse

5 Lawyers and advisors shared stories of situations where a supporter attends a meeting with an adult client, and the supporter or client begins talking about an “evil sister” or other family

The ethical challenge is when a client states they trust the person (e.g. son, daughter, spouse). And then I can see from notes or records or letters written by professionals in that individual's life that it is their judgment that that individual is taking advantage of the client. Because on the one hand people can be mistaken, and assumptions about taking advantage of someone or abusing someone or exploiting someone are very loaded with sex bias and cultural bias. I have absolutely seen professionals be wrong in their assessments that someone is taking advantage of someone else.

– Lawyer and Supporter

member. Practitioners note that an adult could face greater vulnerability based on how a supporter perceives, or attempts to influence an adult’s perception of, other members in the family. This too can have an impact on how an adult receives support, and the investment decisions made as a result.

- 6
- Lawyers who practice in wills, estate planning, and guardianship comment that undue influence is prevalent with older adult investors who work with supported or substitute decision-makers. Informants spoke about situations where attorneys, guardians, and supporters “have a tendency to disregard that there’s a human being, and a human being that still has—may have a lot of ability to understand or express preferences.”This behaviour is more concerning for lawyers and advisors if the person making the recommendation, coaching, or encouraging the adult to make a specific decision will in some way benefit or profit from the outcome of it.
- 7
- Dementia, and even age-related changes, impact decision-making capacity over time. For some, capacity may decline gradually. Others may face rapid decline. People living with dementia said that, for supported decision-making to work, the supporter must be a person “who truly understands my values.” Support must happen “as early as possible, with as much capacity as possible” to ensure supporters know the purpose of their role is to act with a view to the wishes and preferences of the adult they support. Many informants shared concerns about both supported and substitute decision-makers acting in their own best interests, either because they genuinely did not understand their role, or because they wanted to take advantage of their position. Advisors attribute a supporter or substitute decisions-maker’s lack of understanding to a gap in training or education about their role, or misinformation about what representatives or powers of attorney can and cannot do.
- 8
- Advisors note that older adults living with a disability may have limited ability to access available funds, or to take advantage of investment savings plans, “because of paperwork, or because of [a lack of personal] identification, or because there was nobody who could walk them through” their investment options.

Limited Access to an Available Supporter

- 9
- Lack of access to someone who can help is one of the most common themes emerging from the consultation data. Several key informants note that people living with or without a

Not everyone has someone that they can designate as a power of attorney. Not everyone has someone that they would want to act as a supportive decision-maker. They do not have these people. What do you do in those cases? Is someone appointed for them? The complexity of these issues is kind of baffling.

– Investment Professional

disability often face a common challenge as they age—their adult children may move away, or a partner or trusted person may die. The adult may be left without anyone to support them. Lawyers and investment advisors comment that this situation opens the door to vulnerability for any investor, but especially people living with a disability and who need support to continue making investment decisions. They may not have anyone they trust to appoint as a representative under a representation agreement, or as an attorney under a power of attorney. Another issue we heard about is the isolation adults may face if they live in rural or remote communities that limit their access to necessary supports.

- 10
- Advisors also note that even if older adults experience a gradual decline in their capacity to make investment decisions, by the time they next meet with their advisor, the “jump in decline” may appear more drastic. Advisors could easily misinterpret this shift to mean that capacity will continue to drastically decline and may require the use of a substitute decision-maker sooner than needed.

Technology Limitations and Client Verification

- 11
- People aging with a disability may face new challenges with technology. With the upward trend in online investing and considering recent access limitations to in-person investment advisor services because of the COVID-19 pandemic⁸³⁰, older adult investors may struggle to continue participating in the investment process due to lack of familiarity, trust, or comfort with online or remote communication. People living with dementia commented that reading text on a computer screen can be challenging. Older adults living with a combination of disabilities that may impact their hearing, speech, or sight could face significant barriers to meaningfully participate in their investment decisions remotely.
- 12
- One lawyer noted that advisors who meet with clients in-person often verify client information by asking the client to enter usernames, passwords, and respond to personal verification questions. However, and if an investor attends a meeting remotely, and requires a supporter to help them participate, the same lawyer asked whether taking this information from the supporter is a form of supported decision-making, and whether it crosses over into potential undue influence or fraud. In situations where an advisor requires express written consent from a client to share personal information, and if the older adult investor is limited in their ability to provide this remotely, then an advisor may be unable to facilitate supported decision-making for practical reasons.

Even if their capacity is diminishing, we will still explain all of that to them. Even if it has to happen multiple times.

– Investment Professional

Meeting Environment

- 13
- Several key informants said that the investment meeting environment can either enhance capacity to participate or act as a barrier. For a person living with a cognitive disability, getting to and from the meeting successfully may depend on several factors, including:
- The location or absence of proper signage in the bank lobby;
 - Whether the meeting room is soundproof;
 - The intensity of the lighting;
 - The desk shape and distance of the desk from the door;
 - The position of the computer screen; and
 - The colour or font size used when reviewing documents or account information.

Distractions from sound or other external environmental factors can cause significant frustration and discomfort for a person living with a disability. One person living with dementia told us that they often feel frustrated when they get overwhelmed by the information being shared in the meeting, such that they will leave altogether.

Communication Needs

- 14
- People living with an intellectual or developmental disability, and people living with dementia, may also face different communication challenges. Investment and related account information are inherently complex and rely on several technical terms and acronyms. People living with a cognitive disability may have difficulty retaining or recalling complex information or may need information to be presented in plain language or through other visual formats.⁸³¹
- 15
- Lawyers and advisors are keenly aware that silence does not equal agreement, and agreement does not equal understanding. When clients avoid asking questions, or may otherwise be non-verbal, key informants say supported decision-making practices are essential help service providers communicate with the client. One advisor commented that “I don’t think [the client] would have gotten access to legal services without a supporter there to assist with our communication.” But one lawyer pointed out that, in these situations, it is always important to “ensure that the person understands the implications” of the decision being made.
- 16
- A common theme shared among our dementia and intellectual or developmental disability members is that they often feel they are not given enough time to process the information necessary to make a decision. Getting enough time and focus to make an investment choice is a challenge, as advisors often schedule meetings according to what may be enough time for someone not living with a disability. One lawyer pointed out that, for people living with

a disability that is compounded by trauma, it can be a struggle to manage the emotional challenges of making a decision.

Varying Degrees of Familiarity or Understanding with RDSPs

- 17
- Another element contributing to investor vulnerability is that, generally speaking, there is a lack of awareness, or confusion and misinformation about the Registered Disability Savings Plan (RDSP).⁸³² Supporters and service providers commented that lack of awareness of the RDSP program “results in people finding out about it later in life, and perhaps close to when they can no longer contribute.”
- 18
- Supporters said they sometimes struggle to develop a trusted relationship with an RDSP investment advisor because “I know there is pressure—I know they have to sell things.” Supporters express feeling vulnerable to being pressured into an investment path that may not benefit the adult being supported can lead to supporters choosing lower-risk investments. Key informants stress that a solid relationship of trust, and preferably a long-standing advisor-client relationship, be put in place early on, to ensure the advisor understands the adult’s long-term needs and the supporter’s relationship and role in this context.
- 19
- Sometimes the client has no interest in making the investment decision. They may lack experience or confidence with investing or may prefer to have someone else make the decision for them. The challenge for advisors is that it can be hard to know whether the client would change their mind if given an opportunity to participate. In this case, both supporters and advisors may be “[t]rying to facilitate something that [the client doesn’t] care about.”

Changes in a Supporter

- 20
- When a supporter changes, whether for reasons of marriage, death, or geographical change, service providers note significant challenges and potential vulnerabilities arise. But providers acknowledge that a change in supporter does not automatically mean undue influence or financial exploitation. One lawyer commented that a client’s spouse “is also aging, and might be dealing with their own medical problems, and feeling overwhelmed. And then an adult child will become more and more involved [over time]. And there’s nothing inherently suspicious about that.” Regulators note that there is no specific guidance for how to manage a change in supporter, except that rules around protection and privacy of client information would still apply. Lawyers and advisors said they would make efforts to verify the reasons for the change to verify that the new supporter is there to support the interests of the adult client.

Structure of the Investment Relationship

- 21
- One person with lived experience talked about the structural challenges with the practice of supported decision-making for investing, because it often highlights the inequalities faced by “the haves and the have nots” of our society. A person who lacks sufficient financial means to participate in the investment process faces both additional vulnerabilities and an access-to-justice issue to exercising their legal rights to support for decision-making. One lawyer commented that often people who need or want supported decision-making may also struggle

If a person has investments, then there is a level of privilege associated with that. The culture of investing often means some degree of stability, people in your life who care, that the adult client has sufficient capacity to navigate needs (or has someone there to support that), and good relationships with financial advisors to work in their best interest.

– Lawyer

to make ends meet, to secure food or housing, or to develop short or long-term savings. Some key informants felt that the practice of supported decision-making also has an element of privilege “because the frameworks that have to scaffold [it] needs to be individually purchased by people who have the time, energy, and financial autonomy to do it.”

22 One person commented that sometimes advisors are unwilling to take on low-fund investment clients. Many people may have small amounts of assets combined with fewer social supports or less stability, so may be equally susceptible to financial abuse or undue influence as those with larger asset pockets. This could lead to more assumptions about when, how, and to whom financial abuse or undue influence occurs. This notion of supported decision-making as a privileged practice also highlights the vulnerabilities faced by people of different socio-economic, geographical, or cultural backgrounds.

Impact of Culture on the Investor-Supporter Relationship

23 In thinking about the influence culture has on decision-making, key informants note that a person’s cultural background or traditions could lead advisors to misinterpret behaviours as a red flag for undue influence or financial abuse. For example, training on undue influence and financial abuse for advisors often highlights that lack of eye contact, or silence, on the part of the adult client could indicate undue influence or financial abuse. However, and for example when working with older adult clients, key informants note it is important to consider whether a lack of eye contact, or long pauses between question and decision, may be a sign of respect. Other cultural influences to consider are the relationship dynamics between adult children and their parents, gender biases, and specific behaviours or practices used to enhance decision-making capacity for older adults.

Other Factors

24 One advisor said that clients who live with drug or alcohol addiction, but who are otherwise still capable of making investment decisions, can face added barriers to support or safeguards to protect their interests. In the absence of evidence to confirm the client lacks capacity to decide, advisors report feeling compelled to continue taking instructions.

25 People living with a disability may rely heavily on the income from provincial disability benefits. But lawyers and community advocates note that this can create a false expectation that provincial disability benefits mean future financial security. Government benefits may

Caregivers go through so much in a day. They are not only working at their employment jobs but have to take care of either their adult or minor child with a disability. And then they have to worry about what happens when they are not around, or [when] they are too old help take care of that person. And then they have to navigate all these pieces of legislation to get the right benefits and structure for their son or daughter.

– Investment Professional

mean a person will live in poverty for the rest of their life “with some really onerous rules that say you can only work so much before your income starts to get clawed back.”

26 Service providers and supporters note the lack of a single, unified process to qualify for the federal DTC, provincial disability benefits, or the RDSP program can leave adults and supporters either applying for only one benefit or avoiding the application process completely. Even if an adult qualifies for the DTC, supporters said it is hard to find advisors who are comfortable accessing the RDSP, often being put through to “a 1-800 number or middleman” for piecemeal information and advice. There is also the issue of supporter burnout.

27 Some key informants felt that adults living with intellectual or developmental disabilities often miss opportunities to participate in the investment process because supporters continue managing an adult’s RDSP beyond the point when the adult could perhaps be supported to take over. Supporters believe the reasons for maintaining status quo may relate to one or more of the following:

- the adult has never shown an interest in their savings or investments, or their interest may be fleeting or only focused on short-term purchases or goals;
- the supporter would like to involve the adult, but is genuinely unsure about how to help the adult understand concepts of investing and risk, given the complexity of these topics;
- supporters feel overwhelmed or short on time to go through the details of the investment; and
- supporters face situations where they try to involve the adult but, for reasons related to the adult’s capacity challenges, the adult cannot demonstrate that they can understand and appreciate the information.

One of the challenges supporters and service providers acknowledge with an adult’s lack of opportunity is that, because decisions have been made for the adult for most of their life, they may have no baseline for risk tolerance that an advisor can work from. And the advisor may not know how to convey investment information in a way that supports the adult. One informant commented that this inexperience on both the adult and advisor’s part could lead supporters and advisors to assume “that [the adult’s] risk exposure is as low as possible. So, they put them into investment vehicles, like GICs, that offer barely any return at all. So, they

are missing opportunities, even once they get the RDSP, to make that kind of return that can deliver for them 20, 30 years down the road.”

28 Advisors and supporters share a common challenge with finding enough time to convey complex investment and risk concepts to support an adult to participate in the investment process. Although everyone we spoke to agrees that it is important to make efforts to involve an adult in their investment decisions, many informants note that more time is needed to make sure an adult understands the information and appreciates the consequences, or that the adult has the time needed to process the information and express their choice and preferences about the investment option.

29 Supporters worry about who will help to manage the investments when the supporter is no longer able to. Parents of people living with intellectual or developmental disabilities expressed real concern over how to create a succession plan for support. For adults who have no interest in savings or investing or, for reasons related to their disability, “cannot manage the ins and outs of how to manage a fund, or when to withdraw funds”, supporters felt uncertain about who they can trust to help when they are gone. One supporter said that because the person they support does not understand savings, and is unable to follow or track their investment statements, they are concerned that their family member could be taken advantage of because “[they] certainly would never know if someone was dipping into [their] savings.”

30 One supporter said that gender-bias can also be a barrier to an investor’s meaningful participation in the investment process. The supporter said that, in his experience, there is a natural tendency for advisors to talk numbers with him because “the male is perceived as being the one that’s in charge”.

31 A few supporters we spoke to said that another vulnerability factor to consider is the frequent change-of-hands, from one advisor to another, throughout the life course of a file. One supporter we spoke to said that their family experienced “maybe 17 managers now, in 14 years, taking care of [the] account. They’ve had to get to know us each time.” We know establishing trust in the advisor-client-supporter dynamic is critical to facilitating support in the investment process. And we also know that people living with a disability may experience greater capacity with familiar people, places, practices, and approaches to how they are included in the process. Frequent changes of an advisor on a file could rewind months and possibly years of hard work to establish a working, trusted investment relationship with everyone involved.

32 One supporter talked about the lack of knowledge and information related to investment fees associated with certain types of investment options. Sometimes the cost of fees was surprising, which can cause adult investors and their supporters to worry that the investments may not “surpass these fees.”

This is the hard part with people with developmental disabilities. They have not really been able to demonstrate their tolerance of risk because, for their whole life, someone has likely been making decisions on their behalf. So, it is really hard to get a baseline of change.

– Policy Representative

7.2.4 Disability, Capacity, and Financial Decision-Making

1 All the supporters we spoke to said that involving the person they support in the decision-making process, to the extent possible, is a priority. They recognize and value the need to preserve the adult’s decision-making autonomy and spoke about creative approaches to understanding and communicating about the adult’s wishes, preferences, values, and goals.

Impact of Aging and Dementia on Decision-Making

2 Community advocates and academics note that adults living with dementia may approach supported decision-making differently than adults living with an intellectual or developmental disability. An older adult living with dementia may move into supported decision-making from an “earlier life over power of decision-making.” This past decision-making experience may make it easier for both the older adult and their supporter to transition into a more supportive practice. Comparatively, people living with an intellectual or developmental disability, who may not have past decision-making experience to draw from, could face more barriers to participation in the investment decision-making process.

3 One community advocate commented that the impact of aging on our ability to make financial decisions is significant, and certainly compounded if someone ages with dementia. A key change to note in this process is a person’s willingness to assume risk when emotionally charged or triggered by the decision at hand. Combine that with someone living with dementia, who may also lose their ability to read social cues, and the risk for undue influence or exploitation increases.

4 Advisors with long-standing investment relationships with older adults living with dementia said it is easier to determine if the adult’s capacity is impacted, and perhaps to make suggestions earlier in the process for the adult to seek support for decision-making. It is much harder for an advisor at the start of an investment relationship with the adult and their family because they do not yet know the investor’s situation and past investment behaviour. Similar challenges can arise in a new relationship with an adult living with an intellectual or developmental disability, and who may not have experience with the investment decision-making process. This is especially true for young adults who become legally entitled to take over their RDSPs.

5 An adult living with dementia told us that one of the biggest challenges faced by adults who experience changes in their decision-making capacity is “accept[ing] the fact that they have a problem.” Accepting help is a challenge we all face. But for an adult investor who is living with dementia, and who may be used to a life of power over decision-making, the thought of

In dealing with the problem of dementia, you have to have this representative or substitute decision-maker. I am not worried about the legal definition here so much as I am talking about the role. This is the person that works directly, hand-in-hand, with the person with the problem to make the decisions that are becoming increasingly complicated as life proceeds.

– Person with lived experience

losing that power can cause fear, uncertainty, and worry, among other things. And this may create barriers to using supported decision-making in the investment process if the advisor does not know how to help the adult to accept support from their supported or substitute decision-maker.

- 6
- Dementia often impacts an adult’s executive functioning and their ability to interpret and work with numbers. Dementia can also affect a person’s ability to understand or manage risk in a way that supports their previously stated values or goals. An adult living with dementia may lose their inhibition around risk, which could make it difficult for an advisor to satisfactorily assess the adult’s risk tolerance.

Support Needs to Build Capacity

- 7
- Service providers agree that knowing how to support a person living with dementia in the investment process and knowing how to support a person living with an intellectual or developmental disability in that same process, is a challenge. Some advisors may have more, or less, experience working with members from these communities. One informant stressed that “one of the challenges is to figure out how one size fits all” because the experiences and needs are different for each community member.
- 8
- A few key informants said that, in some ways, the capacity needs of people living with a developmental disability are more predictable and, in some ways, more stable than a person living with a progressive cognitive disability. Supporters and service providers also note that members of the developmental disability community often have a circle of supporters in place to help with life choices.
- 9
- Service providers and supporters commented that people living with an intellectual disability may have difficulty staying focused on a task or learning a concept. They may be able to focus for a few minutes, but then may become distracted or curious about something else. Supporting a person living with an intellectual disability may require revisiting conversations about investing and savings over more than one meeting, or it may mean scheduling a longer meeting to work towards a decision.
- 10
- Advisors and community advocates agree that a primary concern for adults living with an intellectual or developmental disability is to keep money safe and secure for their future. This is especially true for people who rely on provincial disability benefits as their primary income

Advisors are set up to take a decision from the rational man—autonomous individual, which is sort of a legalistic construct. The idea of taking it from somebody who has diminished capacity, to begin with, is already uncomfortable. Less uncomfortable if it comes with a person with a [developmental disability], where they have this group of trusted supporters around them. So, that’s kind of a stable idea of developmental disability. This person has a certain level of capacity, and that level of capacity is not going to decline. It may grow.

– Lawyer

source. One of the challenges for investors from these communities is that they may feel less comfortable with risk and money management for these reasons.

- 11
- A few advisors talked about adjusting their practice approach to allow for clients living with dementia to have more frequent meetings to confirm information and instructions.
- 12
- Adults living with Autism may have “peaks and valleys” when it comes to their awareness, understanding, and appreciation for money management. Activities like planning, time management, financial management, and understanding how money works can be difficult. One supporter described the challenge with understanding money and the passage of time; the grey areas of investing, risk, and future planning are too complicated, which sometimes leads to an adult’s lack of interest or an unwillingness to participate in the process.
- 13
- Academics, community advocates, and supporters agree that people living with an intellectual disability are treated unfairly when it comes to making “bad decisions” about money. Informants suggested that investment professionals seem to forget that “people who don’t have intellectual disabilities make stupid decisions all the time, and we just say, ‘no, they just made a stupid decision.’ Whereas we don’t want to let people with intellectual disabilities make those decisions.” Advocates say that service providers and supporters need to strike a balance so that the adult making the decision is making it “in a fully informed way.” One informant suggested this could be done safely with discretionary money—that is, money set aside for an adult to use or invest at their discretion, and without threat of losing necessary funds to sustain their needs, services, and long-term supports. In this case, “if they made some bad choices, as we knew people would, hopefully they would learn from that and, with support, be able to make better choices next time.”
- 14
- Lawyers expressed concern that, for survivors of a traumatic brain injury, and unless “the brain injury was not so severe that they could participate in selecting [a supported decision-maker]”, they may face unnecessary loss of decision-making autonomy. The connection between trauma and injury is significant. One person with lived experience described that their speech, hearing, and ability to handle decisions was drastically diminished after their injury. They also shared concerns about not having enough time to read through complex investment documents and feeling that there should be more frequent check-ins to make sure necessary steps are taken to manage and protect their investments. This protection is especially important for people who receive large settlements.

How do you tell your supporter you do not like the support they are giving you?
I tell them the truth.

– Self-Advocate and person with lived experience

- 15
- Although research and consultation into the role of mental illness and supported decision-making fell outside the scope of this project, we heard from some people that mental illnesses (e.g. bipolar, schizophrenia, attention-deficit hyperactivity disorder, post-traumatic stress, clinical depression, or anxiety) may have compounding effects on an adult’s capacity to make investment decisions. These may include, but not be limited to, symptoms of mania, reckless decision-making, suicidal thoughts, or feeling low.
- 16
- One advisor commented that often clients living with mental illness may change a power of attorney at will or behave in ways that call their capacity into question. The compounding challenge for advisors is that people may behave inconsistently from one meeting to another. A lawyer also questioned whether supported decision-making can work for people living with combined capacity challenges from mental illness “because supported decision-making, by its nature, requires some degree of insight. Some degree of predictable insight.” People feel that, when someone experiences a manic state or behaves erratically, it may be more appropriate to use substitute decision-making “which you can turn on and off.”
- 17
- Hearing about the impact of mental illness on people living with dementia or an intellectual or developmental disability helped to shed light on a greater challenge facing supporters and service providers—namely when the person they support or work with lives with multi-capacity challenges. For example, someone living with diabetes and dementia may forget to take medication, or that they have already taken the medication, resulting in a missed or duplicate dose. Both instances can seriously impact their health, and their ability to make decisions. Similarly, a person living with an intellectual disability may also age with dementia, resulting in added challenges working with numbers, performing tasks that may require multiple steps, or understanding complex investment ideas and options.

7.2.5 Education and Training

- 1
- Advisors describe seeing positive support scenarios, both formally and informally, where the client, supporter, and the advisor discuss everyone’s role at the start of the investment relationship. Advisors, regulators, and supporters stress the importance of engaging in conversations about support as early as possible in the investment process, so that everyone understands each person’s role. People living with dementia said that they often bring their supporter with them to appointments, both for transportation reasons and because they appreciate having someone in the room to take notes and ask questions to help them understand and clarify the information.

It is critical that people engaged in supported decision-making understand that it is about self-determination. That it is about enabling someone to exercise their legal decision-making rights and legal capacity. People should be encouraged to become more aware of what they are coming to that role of the supporter with. They might have certain expectations [or] beliefs around the person’s abilities that limits the options that they would explore for a person. The ability to reflect on what they bring, the process that they are going through, and reflect on the outcome of the process itself, is incredibly important.

– Community Agency Representative and Academic

Supported and Substitute Decision-Makers

- 2
- Lawyers, academics, and service providers feel that supporters and substitute decision-makers need more education and training on their role and responsibilities, but also the limitations of their authority under formal support and substitute decision-making agreements. Supporters often take on an advocacy role, to make sure the person they support receives the services and supports they need. This is sometimes developed over time, and especially for younger adults living with an intellectual or developmental disability who will transition into a legal age to take over their investments. But sometimes supporters are reluctant to adjust their role once the adult comes of age, and instead take an “all or nothing” approach. Several key informants talked about the impact of a supporter’s intentions as shaping an adult’s agency to make decisions in the investment process. And it could also impose the supporter’s version of the choices they think the adult should make, as opposed to providing support that enhances the adult’s ability to make a choice that suits their personal preferences.
- 3
- People receiving support are also self-advocates. They actively engage service providers in conversations about how best to offer services, they communicate their needs, and they work collaboratively with their supporters (or network of support) to preserve their independence. Self-advocates said that sometimes it is hard to tell their supporter what kind of support they need, for fear of seeming critical or unappreciative of the help they receive. But they also agree that it is important for supporters and the adult’s they support to talk openly, and frequently, about what kind of support is useful to foster the adult’s meaningful participation in the investment decision-making process. Self-advocates agree that supporters need more education on how to have ongoing support conversations, to better understand how support evolves over time.
- 4
- One lawyer and academic said that education about investing for adult’s receiving support needs to involve asking the adult what their goals, values, likes, and dislikes are. For example, and for an adult investor who cares about the environment, or is “very anti-tobacco”, they may want to invest in ethical things. Similarly, investing in Canadian companies may be important to an adult investor. If advisors or supporters do not understand what is uniquely important to the adult, then their role is really limited to helping the adult pick a stock, which the adult might be able to do without support. There is a sense that support for investment

[Investment professionals] have no idea what supported decision-making is. Supported decision-making just does not even register. If you ask the average person who is working in the investment sector about supported decision-making, you would be hard-pressed, with respect, to find anyone who knows really what it is.

– Lawyer

decision-making is about weighing important factors related to an investment as against the goals, values, and needs of the adult investor.

- 5
- Lawyers, community agency representatives, and academics agree that families who understand that supported decision-making is about promoting self-determination for adults to meaningfully participate in the investment process are the ones that could help to educate and train other families. People feel there is an opportunity for families to support one another and better understand when and how to engage their role of supporter or substitute decision-maker. Community agency representatives agree that to provide support in the investment context, supporters may need to take more time to explain and describe complex investment concepts and options in ways that could foster more participation and decision-making by the adult investor.

Investment Professionals

- 6
- Investment advisors and regulators want more education and training on supported and substitute decision-making. They also want to better understand the support and investment needs of people from different disability communities, and for people living with multiple capacity challenges. Most advisors we spoke to said their reluctance to use supported decision-making in the investment context has more to do with lack of understanding, guidance, and clarity as to who is responsible for the decision at the end of the day.
- 7
- Lawyers and investment professionals agree that more training on how supported decision-making (formally and informally) intersects with regulatory authority, oversight, and risk management is critical to facilitating the use of support in the investment context.
- 8
- Regulators comment that a lot of responsibility is placed on the investment advisor or financial planner to self-educate about powers of attorney and other supported or substitute decision-making roles and agreements. There is a lack of clarity on how advisors and planners go about securing this education and training, since much of it is self-directed. People feel that current training programs do not offer enough guidance on the fiduciary obligation advisors have towards their clients. The constant “pressure to sell” is said to pose a risk to clients, and especially clients who live with a disability that impacts their decision-making.
- 9
- One advisor stressed the importance of making efforts to understand what contributes to a client’s lack of participation in a meeting. Asking questions about what helps to foster participation may reveal personal, emotional, environmental, or other practical changes

A lot of people are doing supported decision-making without calling it that.

– Lawyer

occurring in that client’s life. For example, a client may be going through a divorce, may be living with mental health challenges, or may be a person living with early-stage dementia to live with hearing loss, which may be unchecked. A client’s lack of participation, or vacant demeanour, may be entirely unrelated to their dementia, and instead may be attributed to other factors. People feel that advisors should ask about any recent changes in health, personal relationships, or medications that may be impacting their decision-making ability. Having regular conversations with the adult investor and their supporters could help to reveal practical solutions to enhance and extend the adult’s meaningful participation in the decision-making process.

- 10
- Service providers commented that sometimes parents of people living with an intellectual or developmental disability “often feel they have to protect [their children] from bad people in the world.” This protective approach can help to provide a safe and secure upbringing while their child is young. But it may also mean that, when it comes time for the adult to participate in making decisions about investments, they may be uncomfortable with risk because they never had the opportunity to make, or learn from, mistakes with their money. People generally felt that supporters would benefit from education and training on how to support someone to experience risk with their money.
- 11
- Advisors would like more training and guidance on how to manage situations when an adult investor and their supported or substitute decision-maker disagree on an investment option.
- 12
- Lawyers and advisors are keenly aware that people living with a disability may experience changes in their capacity on a given day, at a point in time, or in a specific situation. They understand that illness and medication can have a significant impact on a person’s ability to meaningfully participate in the decision-making process. Both groups would like more training and education on how to work with clients that have fluctuating capacity so that the client can be supported to continue making decisions, where possible.
- 13
- Community agency representatives, supporters, and adults receiving support would like advisors to better understand how different cognitive disabilities impact financial and investment decision-making.
- 14
- Some people we spoke to expressed concerns about lawyers and accountants giving advice to substitute decision-makers that runs contrary to the power of attorney laws in their province. One person we spoke to described situations where lawyers and accountants have told attorneys to change beneficiary designations, or to add themselves as joint owners of their parents’ accounts. Some key informants stated that they have worked hard to enhance proper training about powers of attorney, but that more could be done by professional

Professionals focus on client management, or how to make our clients fit in around what works for us. And that just absolutely does not work when you are trying to provide legal services to folks with mental disabilities. We have to work very hard to accommodate disability, and it is my obligation to try lots of different things. And if it is not working, I see that as my fault. It is time-consuming, but the benefits are huge. There is a lot of creativity, and a lot of variety, because the same thing often does not work across different people.

– Lawyer

regulatory bodies to ensure clients and their supported or substitute decision-makers receive the right advice.

15 All the supporters we spoke to share a common goal—to create financial security for the person they support. Lawyers we spoke to say that supporters work hard to make sure professionals speak to the adult they support, and that they often take pauses throughout the meeting to make sure the adult understands the information presented to them. One supporter we spoke to said that they help service providers to interpret non-verbal communication cues from the adult to facilitate decision-making. Service providers feel supporters could use some help identifying opportunities where the adult they support could participate in the investment decision-making process.

16 Several lawyers, service providers, and people receiving support agreed that supporters need training and guidance on how to be a supporter for investment decisions. The kind of support that works for everyday life decisions may need to adjust to facilitate decision-making for investing. People receiving support would like supporters to spend more time thinking about how the support they provide enhances, or inhibits, an adult’s agency in the decision-making process. People would like plain language guides on how to explain investing to people living with a disability.

Supporters and People Receiving Support

17 Several of the supporters we spoke to said that advisors often assume the supported or substitute decision-maker has more sophisticated knowledge about investing than they do. Service providers note that some supporters may assume that a formal supported or substitute decision-making agreement is only needed to open bank accounts, do basic savings, or open an RDSP. But they may not go further to think about appropriate investment options. Supporters need a clear roadmap of the investment options available to the person they support, information on how to do investing, and more education around risk and investing so that they can support the adult investor to participate in the process.

18 People living with an intellectual or developmental disability said that much of their investment knowledge comes from asking people they know and trust about the process and options. They said they would like to be able to get more information from advisors in formats and language that supports their learning and accessibility needs. Lawyers agree that

I think that the basic tools that would help assist the supporter are to understand the investment management or investment advice relationship, in the same way that the individual client investor would have to understand it. But then you have to layer on top of that what the role of the supporter is. This is the role you play, and the parameters of that role. So, to the extent that capacity is not an issue, you have to be able to support the decision of the client, even if you don’t agree with them, provided the consequences of the decision are fully understood by the client. People are allowed to make mistakes.

– Lawyer

more could be done to educate service providers about how to develop client practices that accommodate the needs of a person living with a disability.

19 Lawyers felt that advisors should be trained to see the supporter as a person who is there to support the client to make decisions, to facilitate the relationship between the client and the advisor.

20 Lawyers also commented that advisors need to better understand the complex and multi-dimensional lives of the supported or substitute decision-maker. Often supporters are “going online, or they are calling numbers, and they are being redirected to someone somewhere else. And it is so time consuming.” Supporters describe their attempts to navigate the complex investment landscape as “overwhelming, time-consuming, and exhausting”. Lawyers agree that investment advisors could work to develop materials and services that target supporters.

21 One key informant spoke about the different roles supporters play depending on the capacity needs of the adult they support. When you support someone with an intellectual or developmental disability, you are working to build their capacity so they can take over managing their life decisions, with support. In contrast, when supporting an adult living with dementia, whose capacity is diminishing over time, supporters often look for ways to keep an adult involved in the decision-making process. The former is often seen as an adult growing towards greater capacity; and the latter involves an adult being supported to preserve capacity as it diminishes.

22 In thinking about the different roles supporters play for each community, people said that the investment sector should work more closely with the dementia and intellectual or developmental disability communities to develop education and training materials that explain investing, risk, and long-term money management for members from each community.

23 Lawyers and service providers agree that supported and substitute decision-makers need to learn how to make space for an adult to accept some level of risk in the investment process. There needs to be space for an adult receiving support to make a poor investment choice, to the degree that it does not jeopardize life savings or their ability to pay for their needs and expenses over time. Many people we spoke to agree that people make risky investment

It is the lazy advisors who send out a 16-page report that nobody knows what they mean, and nobody knows where their investments are at. And then just picks up the phone and says, 'we're doing this and this.' That puts a bad rap on an investor community, I find. But there are a lot of thoughtful advisors out there who intuitively know that it is important to manage this as people become more frail, and not just drive the decision.

– Lawyer

decisions all the time. Sometimes the decision is a good one; sometimes it is a bad one. But a choice to make a bad or risky investment decision “doesn’t mean [the adult] can’t make it.” People we spoke to feel that supporters need to be trained on how to safely manage risk and investing, while preserving funds needed for the long-term, and that not all risk is bad or needs to be avoided. There is a tendency to think that only someone with full mental capacity can make foolish or risky decisions.

Building the Investment Relationship and Fostering Support

24 Adults receiving support, and their supporters, feel that advisors sometimes focus too heavily on the decision to be made, and less on building the investment relationship. Supporters and community agency representatives agree that “financial service professionals are in a very unique position to facilitate and advocate on behalf of their clients, to prolong their decision-making abilities as long as possible, without ever putting them in undue financial risk.” But people agree that advisors need more training and guidance on how to drive the relationship versus driving the decision when working with investors living with a disability. One theme people said needs to be emphasized when building relationships with investors is that “investment decisions are like life decisions—they are goal setting in nature. [Advisors] need to work from goals and [move] backwards.”

25 Lawyers and community agency representatives agree that advisors and supporters need practice guidance on how to foster support in the investment decision-making process. People said there needs to be a shift away from assuming the person living with a disability is unable to make the decision, to someone that may reach a level of capacity to make the decision, with support. Informants suggest looking to the language of the UN CRPD, the language of the supported or substitute decision-making laws of the province they live in, and to the person being supported to identify practical ways to build support into the investment decision-making process.

Representation Agreements and the RDSP

26 Lawyers, supporters, and people receiving support feel that front-line banking staff need more education and training on what constitutes a valid supported or substitute decision-making document. More specifically, and in BC, front-line banking staff need to understand that the law does not require a person living with a disability to have a representation agreement as a condition to receive services.⁸³³ One of the major challenges we heard from several people

I think bankers in general are taught, 'you better err on the side of being cautious with people's money, and risk displeasing them from a customer service standpoint in the interest of protecting them.' You need to make sure that the people who are controlling the gateways to the funds can have comfort that they are doing the right thing. Because generally people who work in banks want to do right by their customers, but they do not necessarily have the training.

– Investment Professional

is the lack of consistent supported or substitute decision-making documents in Canada. Banks are a federal institution. Representation agreements are a provincial decision-making instrument. So, trying to achieve consistent service delivery across provinces and territories that have different legal frameworks and documents for supported or substitute decision-making is problematic. Similarly, supporters said often what is acceptable documentation for one bank branch may not be accepted at another branch of the same financial institution.

27 People living with a disability in BC, and their supporters, would like more education and training for advisors on the criteria to create a representation agreement. Currently, the law does not require people to use a specific format or form of representation agreement. Nor are people required to work with a lawyer to create one. Informants told us that often bank tellers will refuse to accept a representation agreement unless they can confirm the adult worked with a lawyer to develop it. One policy representative acknowledged that, in some ways, “the banking community is behind the investment side on some of these issues. And it may be in part because of the relationships between customers and banks—it is different. There’s not as much of a relationship in a lot of cases as there is with an investment advisor.” People agree that the investment advisor, and the investment relationship, is uniquely structured to facilitate supported decision-making, more so than for everyday banking activities.

28 People we spoke to said they would like to see advisors spend more time learning about, and raising awareness of, the RDSP program for people living with a disability. There is sense that investment advisors, and perhaps front-line bank staff, need to take a more proactive role to educate and encourage eligible clients to open an RDSP to promote inclusive investing. People wondered what happens when large sums of money come into account, outside of a typical provincial disability benefit payment. Is the advisor taking the initiative to introduce investment options to the adult and their supporters? What conversations is the advisor having with the client to introduce the RDSP or other investment options so that the adult investor can grow their money? One informant said they “get a little bit tired of always being the expert on disability in the room.” While people do not expect advisors to become disability experts, several people we spoke to said that more education and practice guidance on how to support investing for people living with a disability is needed.

29 Some key informants felt that the banks, and advisors, show little interest in the RDSP because they are not necessarily going to make a lot of money on the product. Often people opening an RDSP may only have this one investment vehicle, with comparatively smaller bank accounts. Their income may also be limited. Although community agencies are working towards building awareness around the RDSP⁸³⁴, people we spoke to say the financial institutions should do more to promote and facilitate access to this product. We also talked earlier about the administrative challenges supporters face when attempting to enroll people in the DTC and RDSP programs. Many advisors said that supporters also need help accessing these benefits.

30 Lawyers and supporters agree that advisors need to learn how to have conversations about support, and who can provide support, early in the investment relationship, and preferably before serious concerns related to capacity arise. Often people do not think about support or substitute decision-making options until they face a crisis. Everyone we spoke to agrees that education and guidance on how to have support conversations sooner could facilitate the use of supported decision-making in the investment context.

7.3 SURVEY OF BC LAWYERS AND NOTARIES

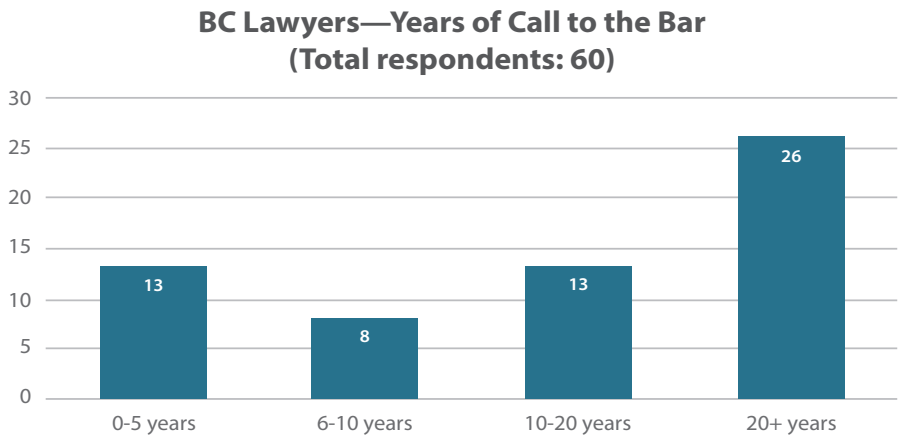
7.3.1 Purpose

The goal of the Inclusive Investing project is to better understand how people living with dementia, or people living with an intellectual or developmental disability, use support to continue making investment decisions. We know that one way this practice happens in BC is if an adult investor has a section 7 representation agreement (RA7). Our research and interviews suggest that while lawyers and the public are familiar with enduring powers of attorney, and many are familiar with representation agreements for health care (under section 9 of the *RAA*), RA7s are neither widely used nor understood, and so may be underutilized.

Members of the legal profession expressed concern about the test of capacity for making a representation agreement. In 2013, the BC Law Institute’s *Report on Common Law Tests of Capacity* recommended that the *RAA* be amended to allow people with the capacity to make an RA7 to also meet the capacity threshold to retain and instruct legal counsel to advise on and draft the representation agreement.⁸³⁵ For the Inclusive Investing project, we wanted to learn more about when representation agreements are being prepared for clients and for what kinds of decisions.

Project staff developed two surveys to gather more data and information on the use of RA7s in BC. A list of the survey questions is included at Appendices D and E to this study paper. Staff worked with representatives from the Canadian Bar Association—BC and The Society of Notaries Public of BC to launch the surveys to practitioners. These surveys ran for three weeks in October 2019 and were distributed to sections of the Canadian Bar Association—BC Branches and members of The Society of Notaries Public of BC. The CCEL project staff received a total of 128 responses to the surveys (60 lawyers; 68 notaries). Below is a breakdown of the demographics from each respondent category.

7.3.2 Findings from BC Lawyers



Of the 60 BC lawyers who responded to the survey, over 85 per cent practiced in the Lower Mainland/ Fraser Valley, or on Vancouver Island.⁸³⁶ The majority (85 per cent) said they prepared enduring powers of attorney documents, followed by 81 per cent preparing section 9 representation agreements for health care decision-making. Several lawyers practised in multiple practice areas (reflected in the bar graphs above).

Only 29 lawyers (48 per cent of the respondents) said they prepared RA7s. When asked why they do not prepare RA7s, 54 per cent said it is because clients do not request them. When asked how many

RA7s they prepared in a 12-month period, 80 per cent said they make up to five agreements in that timeframe.⁸³⁷ Lawyers also listed the following reasons for not preparing RA7s:

- Lack of familiarity with how to prepare them;
- Clients lack capacity to retain counsel to instruct a lawyer to prepare a section 7 representation agreement;
- Clients prefer the more robust section 9 representation agreement;
- A belief that legal and financial authority should be under a power of attorney document; and
- Concerns that a section 7 representation agreement is too narrow in scope, may conflict with the terms of a power of attorney, or may not be widely recognized by the financial or investment community.

Of the lawyers who said they do prepare RA7s, 96 per cent of them said they include terms for personal care, followed by major and minor health care (92 per cent), and routine management of financial affairs (88 per cent). That same number include authority for the representative to both help make, and to make, decisions for the adult. They also reported providing clients information on the following:

- how to use the agreement (88 per cent);
- the role of the representative (100 per cent);
- the rights of the adult client (92 per cent);
- the option to appoint a monitor (80 per cent); and
- the role of the monitor (84 per cent).

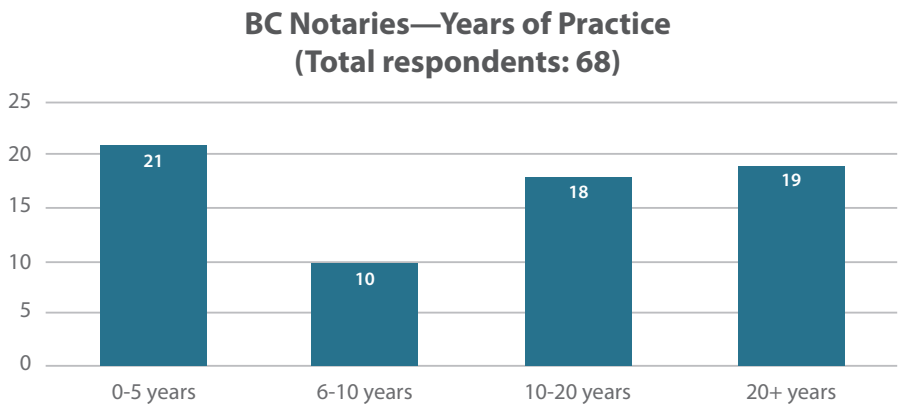
When advising representatives appointed under a section 7 representation agreement, lawyers said they provide information on the following points:

- duties of the representative, including the scope and limitations of authority (91 per cent);
- rights of the adult client (75 per cent);
- role of the monitor and access to information rights (70 per cent); and
- duration of authority and resignation (79 per cent).

Most clients (76 per cent) appoint an alternate representative, but 40 per cent of those clients do not appoint a monitor. When a monitor is appointed (87 per cent of the time), it is usually a trusted friend or adult child of the client.

Despite the low uptake of RA7s, respondents reported that they consider the RA7 to be a valuable tool in granting planning autonomy to people living with diminished capacity.

7.3.3 Findings from BC Notaries



Of the 68 BC notaries who responded to the survey, over 52 per cent practiced in the Lower Mainland/ Fraser Valley, with 23.5 per cent on Vancouver Island. The remaining respondents were in the Southern Interior and Northern BC.⁸³⁸ All notaries reported that they prepare enduring powers of attorney documents, followed by section 9 representation agreements (94 per cent) and RA7s (66 per cent).

Of the 68 respondents, 45 notaries (66 per cent) said they prepared section 7 representation agreements (RA7). When asked the reasons why they do not prepare RA7s, 47 per cent said it is because clients do not request them. When asked how many RA7s they prepared in a 12-month period, 82 per cent said up to five agreements were made in that timeframe.⁸³⁹

Of the notaries who prepare RA7s, 97 per cent of them said they include terms for routine management of financial affairs and personal care, followed by major and minor health care (74 per cent) and obtaining legal services/instructing counsel (40 per cent). Just over 77 per cent of the notaries said they include authority for the representative to both help make, and to make, decisions for the adult client. They also reported providing clients information on the following:

- how to use the agreement (82 per cent);
- the role of the representative (97 per cent);
- the rights of the adult client (91 per cent);
- the option to appoint a monitor (82 per cent); and
- the role of the monitor (94 per cent).

When advising representatives appointed under a section 7 representation agreement, notaries said they provide information on the following points:

- duties of the representative (97 per cent), including the scope and limitations of authority (88 per cent);
- rights of the adult client (80 per cent);
- role of the monitor (82 per cent);

- access to information rights (40 per cent); and
- duration of authority and resignation (71 per cent).

Over half of their clients (57 per cent) appoint an alternate representative, with 48 per cent of clients occasionally appointing a monitor. Most of the time—64 per cent—the monitor is an adult child of the client, followed by a trusted friend or sibling.

7.4 INCLUSION BC ANNUAL LEARNING EVENT

CCEL project staff participated in Inclusion BC’s Annual Learning Event in May 2019, in Victoria, BC. Over 45 people attended the in-person dialogue session, to learn about the Inclusive Investing project research, and to comment on their professional and personal experiences related to supported decision-making.

CCEL staff led event attendees through a series of questions that asked participants to comment on the following:

- What does support look like to you?
- What are some of the roadblocks to using supported decision-making for investing?
- What ideas or opportunities do you have for how to facilitate the use of supported decision-making in the investment process?

Below is a summary of the feedback we received to each question category:

7.4.1 Support

Participants commented that support occurs both formally and informally, depending on the relationship between the people involved, and the support needs of the adult receiving support. Most people described the supporter-supported adult relationship as “interdependent” with each person relying on the other for support in some capacity. Some supporters and people receiving support said that often support involves the supporter interpreting information for the adult or helping the adult to simplify the questions or information presented to them by a service provider, so that the adult can make a decision.

7.4.2 Roadblocks

Participants commented that often the barriers to using support for decision-making relate to practical issues in how services or information is provided to the adult client. Things like font size can have a significant impact on an adult client’s ability to read or understand and interpret the information presented to them. One participant who lives with a visual disability said that there are not enough investment resources offered in braille. Also, if the information, service, or product seems too general, or does not have an obvious connection to the needs and experiences of the adult, it can be hard for them to connect with the reason behind the decision. Participants said advisors should shift the focus

away from “selling investments” to “educating about investment choices”. Also, better access to different communication styles and plain language materials would bolster participation in the investment process. Another participant said that too much information is provided online, which assumes people have equal access to technology, or can easily read and review online materials.

When presented with information to assist in planning, adults would like to better understand the pros and cons to choosing one option over another, so they can work with their supporter to evaluate their choices. Adults receiving support say that assumptions made by service providers about their ability (or inability) to participate in the process often lead to service providers refusing to interact with them, or fully excluding the adult from the conversation. Adults receiving support, and some supporters, said that the reluctance of service providers to include the adult client in the conversation may also be influenced by paternalistic behaviours of the supporters involved.

7.4.3 Opportunities

Many participants called for more innovative approaches to working with adults living with a disability for their investment needs. People said that the law should work towards a consistent understanding of what supported and substitute decision-making means, to help minimize the impact of personal interpretations or assumptions about what each role means. Several members said that advisors should develop a more holistic understanding of financial security to include consideration for more than just monetary security.

In working towards a definition of support, participants said that the adult’s quality of life should be of paramount consideration, followed by conversations relating to the adult’s preferred level of safety (risk) to reach future goals. Frequent and open communication was raised, to make sure the adult understands the information, and is supported to make decisions that meet their individual needs and wants.

7.5 SUMMARY

The consultation interviews and events for this project generated a total of 184 issues related to the law, policy, and practice of supported decision-making for investing. An overarching theme from the research and consultation for this project is that everyone we spoke to would like to learn more about how to facilitate the use of support, formally and informally, in the investment decision-making process. All informants agreed that, from a human rights perspective, adults receiving support should be given the opportunity to meaningfully participate in the investment decision-making process, where possible. The main question is how to incorporate support while making sure the adult receiving support understands and appreciates the consequences of the decision being made.

Supporters acknowledged that investment decision-making is not always something the person they support wants to be involved in. So, it is sometimes easier not to make efforts to involve the adult in the process. However, supporters agree that more guidance and training on how to educate adults about investing, risk, and goal-based planning would better-equip them to provide support in this context.

Several informants said that the biggest barriers to more robust use of support in the investment context centres around concerns about who is responsible for the decision, and whether undue influence is at play. Even in BC, where we have legislation that formally recognizes support, practitioners say the term “help” to make decisions is unclear, and that they want more guidance on how to confirm who is making the decision in a supported decision-making arrangement. Practitioners from both jurisdictions admit that the power of attorney document is the preferred instrument for both supported and substitute decision-making in this context. Because it clearly places responsibility for the decision on the appointed attorney. Lawyers and advisors said that, if the law could clarify who has responsibility in a supported decision-making relationship, they would be open to finding more opportunities to work with this type of relationship, for as long as possible. There was some concern among lawyers and advisors that, without a clear and robust legal framework for supported decision-making, the potential for undue influence or financial exploitation could rise.

When it comes to regulatory guidance and protection, advisors acknowledge that the investment industry is working to improve the investment process for vulnerable investors. Most recently, we know that the Investment Industry Regulatory Organization of Canada (IIROC) and the Mutual Fund Dealers Association of Canada (MFDA) have proposed to create a consolidated self-regulatory organization to enhance investor protection and access to advice. Advisors would like more education and training on how to work with people living with a disability, including people who live with more than one disability. Advisors and supporters agree that the term vulnerable investor tends to focus more on older adult investors and does not necessarily capture adult investors who live with multiple disabilities. Lawyers and supporters would like to see changes in the investment approach.

Supporters would like a clear roadmap for both the DTC and Registered Disability Savings Plan (RDSP) application process. People often said that accessing these benefits is administratively challenging, that information is scattered and must be accessed through multiple channels, and that some advisors are not even aware of the eligibility criteria for clients living with a disability.

All informants would like more tools, educational resources, and promising practices for how to support people living with dementia, or people living with an intellectual or developmental disability, to meaningfully participate in the investment process.



CHAPTER 8

Ideas and Opportunities

8.1 OVERVIEW

As stated in the introductory chapter to this study paper, it was beyond the scope of this project to make law reform recommendations to clarify or enhance legal recognition for supported decision-making. Instead, the research and consultation findings revealed the following:

- Types of support that are helpful to people living with dementia or an intellectual or developmental disability;
- Barriers to working with supporters;
- Issues within the investment and legal community around the use of supported decision-making;
- Strategies to facilitate the use of support in the investment relationship; and
- Ideas for education, training, and professional development.

In this section we summarize the ideas and opportunities raised from the 184 issues set out in the consultation interviews, focus groups, surveys, and events. Ideas are grouped into three overarching categories that relate to:

1. **Opportunities for enhanced regulation;**
2. **Practice guidance and education for investment professionals; and**
3. **Education and resources for adult investors and supporters.**

For the purposes of this study paper, and except where otherwise indicated, the ideas outlined in the next sections relate specifically to Canada. It fell outside the scope of this project to do a fulsome review of the United States and other foreign jurisdictions that have legislative frameworks or models for supported decision-making. Project staff note that there may be opportunities for further research on legislative, regulatory, education, and practice guidance developed elsewhere to manage similar concerns related to supported decision-making relationships for investing.

8.2 ENHANCED REGULATION

Below is a list of the suggested enhancements discussed in this section:

- Create standards for consent to share investment information and client instructions;
- Expand the Know-Your-Client Practice Tool;
- Expand the Role of the Trusted Contact Person;
- Enhance Record-Keeping Standards;
- Provide Legislative Guidance on the Meaning of Help in BC’s *Representation Agreement Act*;
- Bolster the Requirements to Act as a Monitor in all Supported or Substitute Decision-Making Relationships;
- Incorporate formal Recognition for Support in Ontario Substitute Decision-Making Legislation;
- Amend Federal Legislation to Formally Recognize Representation Agreements;
- Develop Law Society Guidance for Client Instructions for Representation Agreements;
- Establish Qualification Criteria for Supporters, Monitors, and Trusted Contact Persons;
- Develop a Formal Regulatory Body for Supported and Substitute Decision-Makers;
- Develop a standardized process for accessing federal and provincial disability benefits and plans; and
- Expand the RDSP Withdrawal Limits to Enhance Investment Opportunities.

Create Standards for Consent to Share Investment Information and Client Instructions

Lawyers and advisors agreed that the legal and practice guidance on taking instructions from people living with capacity challenges varies. Lawyers struggle with how to take instructions from a client that meets the capacity threshold to make a representation agreement but simultaneously does not meet the capacity test to instruct the lawyer to prepare the agreement.

Advisors said that an industry standard for taking instructions and obtaining consent to share investment information with supporters would encourage advisors to adopt more supported decision-making practices in the investment relationship. For example, we mentioned in Chapter 6 that Certified Financial Planners are not permitted to rely on a client’s implied consent to share confidential information when family members, spouses, or third parties attend the meeting with the client.⁸⁴⁰ Consent

must be expressed clearly in writing. Similarly, financial service representatives at banks follow different standards around privacy and sharing of confidential information than advisors.

Advisors acknowledge that efforts are underway to bolster the use of the trusted contact person (TCP), but wonder if that role should be expanded to include support from the TCP to help an adult with their investment decisions. Advisors would like more training on how to ask tough questions to obtain requisite consent, like the threshold questions used by lawyers. For example, does consent only apply to a single meeting of the client and their supporter? Or does it extend to all subsequent meetings where client instructions may be taken? There may an opportunity to develop a standard practice guidance on how to obtain and clarify the scope of client consent that incorporates suggested practices from different regulatory bodies.⁸⁴¹

Expand the Know-Your-Client Practice Tool

Some investment professionals believe current KYC factors are too “black and white.” The focus is primarily on financial situation and risk tolerance, which are relatively easy to measure. Advisors said that KYC rules and, more specifically, the definition of material change should be expanded to include changes in physical, emotional, or mental health of an investor. KYC rules should also take into consideration whether the change(s) relate to one or more of an adult’s disabilities, and specifically capacity changes, so that the adult’s investment options, and risk tolerance, are assessed with these factors in mind. Other considerations include, but are not limited to, environmental factors that may be impacting the client, communication, and meeting preferences. Advisors also suggested that a modified risk tolerance test, that adjusts to a client’s changing capacity needs, may also help to bolster the client’s investment profile.

Advisors also agree that more education and explanation should be given to adult investor’s and supporters about the purpose of KYC information, and how it relates to the investor’s risk assessment. KYC information should also be updated more frequently throughout the investment relationship to better reflect the evolving needs of the adult investor.

Expand the Role of the Trusted Contact Person

The 2017 Report on Vulnerable Investors recommended that Canadian securities regulators introduce the trusted contact person (TCP) as a practice tool for advisors “to obtain essential information about the client, or to alert the TCP about concerning conduct by the client or persons close to the client.”⁸⁴² In describing when and how to use this tool, the report also suggested that advisors “should be accorded broad discretion to use the TCP as a resource to help them act in the client’s supported or protective interests”.⁸⁴³

Informants for the Inclusive Investing project queried whether the TCP role could be expanded to permit a TCP to provide support to the adult to make investment decisions, especially around how to confirm an investor’s understanding and appreciation of the consequences of the decision. Support may include the TCP verifying important environmental information as context for how the adult client can be supported to make investment decisions. The TCP could also “provide insight on recent surgery, medication impacts, travel (reasons for no contact) without compromising the capacity rights

of adult client.” Lawyers we spoke to said they encourage their clients to reach out to peers in their life, who have no vested or beneficiary status or interest in their estate, as sources of support.

Concerns related to client confidentiality and potential undue influence may be mitigated by imposing similar training and qualification criteria as outlined in the 2017 Report on Vulnerable Investors.⁸⁴⁴ For guidance on how to bolster the TCP role, Canada has looked to the United States. In 2018, the Financial Industry Regulatory Authority (FINRA) enacted a rule that bolstered customer account information records to include obtaining the details of a trusted contact person.⁸⁴⁵ Rule 4512 of the FINRA manual states that, for each account, members shall take reasonable steps maintain the name and contact information for a trusted contact person age 18 or older who may be contacted about the customer’s account.⁸⁴⁶ FINRA expanded the TCP role to permit advisors to “reach out to a trusted contact person if it suspects that a client may be suffering from Alzheimer’s disease, dementia, or other forms of diminished capacity”.⁸⁴⁷ The notice states that, although the amendments do not stipulate the kind of contact information to obtain, “FINRA believes that a mailing address, phone number and email address for the trusted contact person may be the most useful to members.”⁸⁴⁸

We stated earlier that, in March 2020, the Canadian Securities Administrators (CSA) issued proposed amendments to support introducing the TCP requirement for each client when “there is reasonable belief that a vulnerable client is being financially exploited or that a client lacks mental capacity.”⁸⁴⁹ The CSA notice reflects the steps taken by both FINRA and the NASAA.⁸⁵⁰ The proposed amendments, if implemented, will apply to all registered firms, and member firms of both IIROC and the MFDA.⁸⁵¹

Enhance Record Keeping Standards

Many of the advisors we spoke to said they do not always have a copy of a representation agreement or power of attorney document on their client’s file. All advisors acknowledge that, if a client brings a person with them to the meeting, they will confirm the relationship and the role of that person. But they will not necessarily ask a client to provide them with a copy of the authorization document that confirms this relationship. Advisors acknowledge that, absent a requirement to maintain robust documentation on a file, unnecessary delays, confusion, frustration, or loss of financial opportunity for the adult investor may arise. A checklist or formal requirement that includes requesting copies of authorization documents could help to mitigate these barriers.

Provide Legislative Guidance on the Meaning of “Help” in BC’s Representation Agreement Act

While the focus of our project was not to develop law reform recommendations, many of the lawyers, service providers, community agency representatives, and supporters we spoke to in BC suggested that the law could be amended to clarify what it means for a representative to help an adult to make decisions.⁸⁵² How people receive help to make decisions varies across communities and is often shaped by the specific needs of the person being supported. Legal and investment professionals would like some guidance to better recognize and understand how to incorporate support into their practice.

Participants agreed that some legislative guidance, followed by a set of promising practices, may encourage more lawyers and advisors to feel more comfortable working with clients who use section 7

representation agreements.⁸⁵³ One suggestion was to bolster the purpose and presumption of capability sections of the *Representation Agreement Act*. Currently, these sections read as follows:

Purpose of this Act

- 2 The purpose of this Act is to provide a mechanism
- (a) to allow adults to arrange in advance how, when and by whom, decisions about their health care or personal care, the routine management of their financial affairs, or other matters will be made if they become incapable of making decisions independently, and
 - (b) to avoid the need for the court to appoint someone to help adults make decisions, or someone to make decisions for adults, when they are incapable of making decisions independently.

Presumption of capability

- 3 (1)Until the contrary is demonstrated, every adult is presumed to be capable of
- (a) making, changing or revoking a representation agreement, and
 - (b) making decisions about personal care, health care and legal matters and about the routine management of the adult’s financial affairs.
- (2)An adult’s way of communicating with others is not grounds for deciding that he or she is incapable of understanding anything referred to in subsection (1).⁸⁵⁴

Participants suggested that legislative drafters could look to the language from other provinces, such as Alberta and Ontario, for guidance. For instance, Alberta’s *Adult Guardianship and Trusteeship Act*, section 2, sets out the following guiding principles:

Principles

- 2 This Act is to be interpreted and administered in accordance with the following principles:
- (a) an adult is presumed to have the capacity to make decisions until the contrary is determined;
 - (b) an adult is entitled to communicate by any means that enables the adult to be understood, and the means by which an adult communicates is not relevant to a determination of whether the adult has the capacity to make a decision;
 - (c) where an adult requires assistance to make a decision or does not have the capacity to make a decision, the adult’s autonomy must be preserved by ensuring that the least restrictive and least intrusive form of assisted or substitute decision-making that is likely to be effective is provided;
 - (d) in determining whether a decision is in an adult’s best interests, consideration must be given to
 - (i) any wishes known to have been expressed by the adult while the adult had capacity, and
 - (ii) any values and beliefs known to have been held by the adult while the adult had capacity.⁸⁵⁵

Of note is that the Alberta supported decision-making framework is “appropriate for any personal, non-financial decisions” and is best suited “for capable individuals who face complex decisions, people whose first language is not English and people with mild disabilities.”⁸⁵⁶

In Ontario, the *Substitute Decisions Act*, section 1(3) states that an attorney, guardian, or assessor acting under the Act must explain matters “to the best of his or her ability and in a manner that addresses the special needs of the person receiving the explanation, whether that person understands it or not.”⁸⁵⁷ People we spoke to agreed that similar language could be developed for substitute decision-making laws to bolster use of supported decision-making practices, where possible.

Guidance on How to Build Support into the Decision-Making Process

Although it fell beyond the scope of this project to do a comprehensive review of international jurisdictions that have supported decision-making legislation or models, one project of note is the Essex Autonomy Project.⁸⁵⁸ This project looks specifically at issues related to decision-making capacity, implementation of the UN CRPD Article 12 principles, and promoting self-determination and autonomy for people living with a disability. In its Three Jurisdictions Project, the Essex Autonomy Project staff conducted a comparative review of UK legislative models for supported decision-making, namely: 1) Scotland; 2) England and Wales; and 3) Northern Ireland.

Research summarized in the Three Jurisdictions Project notes that “current experiments with supported decision-making in jurisdictions around the world typically seek to develop frameworks of support within an overall legal framework that permits substitute decision-making, even if only as a last resort.”⁸⁵⁹ The TJP Briefing Paper notes that most jurisdictions take one of two approaches to incorporating principles from the UN CRPD Article 12 into their respective supported or substitute decision-making regimes.

The first approach “treats supported decision-making as the master-principle for all decisions pertaining to persons with disabilities” that effectively replaces “paternalistic protective measures, substitute decision-making and the best-interests principle”.⁸⁶⁰ The second approach, used by many jurisdictions including Canada, “embed[s] support” into the various supported and substitute decision-making statutes and related practices.⁸⁶¹ The goal with this approach is to help people living with a disability to exercise their decision-making rights, either through support that enables a person to continue making decisions, or using support to ensure that a person’s “will and preferences are identified and articulated in the process of making decisions” that the adult is unable to make.⁸⁶²

The TJP Briefing Paper notes that both Scotland and England and Wales legislation discuss support, and in some cases offer guidance on how to ascertain an adult’s wishes and preferences. But absent from the language in the respective statutes is specific guidance on steps, falling short of providing specific guidance on the “practicable steps to help” a person make a decision.⁸⁶³ Northern Ireland’s *Mental Capacity Act*⁸⁶⁴ provides some guidance on the type of practical steps that build support into the decision-making process, as follows:

Supporting person to make decision

5.—(1) A person is not to be regarded for the purposes of section 1(4) as having been given all practicable help and support to enable him or her to make a decision unless, in particular, the steps required by this section have been taken so far as practicable.

(2) Those steps are—

- (a) the provision to the person, in a way appropriate to his or her circumstances, of all the information relevant to the decision (or, where it is more likely to help the person to make a decision, of an explanation of that information);
 - (b) ensuring that the matter in question is raised with the person—
 - (i) at a time or times likely to help the person to make a decision; and
 - (ii) in an environment likely to help the person to make a decision;
 - (c) ensuring that persons whose involvement is likely to help the person to make a decision are involved in helping and supporting the person.
- (3) The information referred to in subsection (2)(a) includes information about the reasonably foreseeable consequences of—
- (a) deciding one way or another; or
 - (b) failing to make the decision.
- (4) For the purposes of providing the information or explanation mentioned in subsection (2)(a) in a way appropriate to the person’s circumstances it may, in particular, be appropriate—
- (a) to use simple language or visual aids; or
 - (b) to provide support for the purposes of communicating the information or explanation.
- (5) The reference in subsection (2)(c) to persons whose involvement is likely to help the person to make a decision may, in particular, include a person who provides support to help the person communicate his or her decision.⁸⁶⁵

Also, Ireland’s *Assisted Decision-Making (Capacity) Act 2015*⁸⁶⁶ sets out a “modern statutory framework to support decision-making by adults who have difficulty in making decisions without help.”⁸⁶⁷ The Ireland statute outlines three decision-making support options to reflect “the range of support needs that people may have”⁸⁶⁸, briefly summarized below:

Assisted decision-making: a person may appoint a decision-making assistant – typically a family member or carer – through a formal decision-making assistance agreement to support him or her to access information or to understand, make and express decisions. Decision-making responsibility remains with the person. The decision-making assistant will be supervised by the Director of the Decision Support Service.

Co-decision-making: a person can appoint a trusted family member or friend as a co-decision-maker to make decisions jointly with him or her under a co-decision-making agreement. Decision-making responsibility is shared jointly between the person and the co-decision-maker. The co-decision-maker will be supervised by the Director of the Decision Support Service.

Decision-making representative: for the small minority of people who are not able to make decisions even with help, the Act provides for the Circuit Court to appoint a decision-making representative. A decision-making representative will make decisions on behalf of the person but must abide by the guiding principles and must reflect the person's will and preferences where possible. The functions of decision-making representatives will be as limited in scope and duration as is reasonably practicable. The decision-making representative will be supervised by the Director of the Decision Support Service.⁸⁶⁹

Although it fell outside the scope of this project to do comprehensive research and review on supported decision-making frameworks internationally, there is opportunity for future research on how other models build support into the statutory language, and how these supports are used in the investment decision-making context.⁸⁷⁰

Bolster the Requirements to Act as a Monitor in all Supported or Substitute Decision-Making Relationships

Right now, in BC, an adult must only appoint a monitor if the representative is someone other than the person's spouse, Public Guardian, a trust company or credit union, or if two or more representatives are appointed. In all other cases, a monitor is optional. People we spoke to within and outside Canada agreed that having a monitor in place could enhance the use of supported decision-making for investing. Some participants went further to suggest that, to prevent potential bias or undue influence, the monitor role should only be held by someone who has no beneficiary status tied to the investor's estate.

One informant suggested that there may be opportunity to amend legislation to require that more than one representative be appointed when helping an adult make investment decisions, alongside a mandatory monitor appointment. Having more than one representative would provide more checks and balances on the support provided. However, a key challenge with this approach is that this may unduly restrict people who only have one person they trust in their life to assist them.

Incorporating Formal Recognition for Support in Ontario Substitute Decision-Making Legislation

Ontario lawyers and advisors said that incorporating language around support into existing substitute decision-making legislation would create more practical opportunities for adults to receive formal support to participate in the investment decision-making process. The more we integrate the values and preferences of the adult we support into our role as substitute decision-makers, the more supported and substitute decision-making can take place along a continuum. But advisors and lawyers would like more clarity on where liability for the decision rests in each instance.

Some key informants suggest that the law in Ontario requires a shift away from more restrictive cognitive assessments of capacity, to instead focus more on support and accommodation needs. One academic said the legislation and policy should reconsider the "understand and appreciate" test to include the supports and accommodations that could be used to enhance decision-making capacity. One idea raised is that if laws are amended to recognize supported decision-making as a form of

human rights disability accommodation, then a new set of rules related to privacy, confidentiality, regulatory standards, and ethics guidance will apply.

Many people acknowledge that legal capacity can be thought of as all-or-nothing, universal, or on a continuum. The way people think about legal capacity affects the way supported decision-making is implemented.⁸⁷¹ Supported decision-making is both a process and an end goal. It can also be seen as the way that substitute decision-making can be grounded in the will and preferences of the person subject to it.⁸⁷² A focus on a universal understanding of supported decision-making, as opposed to a continuum-based analysis, may ignore the fact that substitute decision-making is sometimes necessary.⁸⁷³ There may be opportunity for capacity laws to focus more on a person's ability, supports, and accommodations and whether all of that together is enough for the person to be able to make the decision. People agree that, the more that statutory language can incorporate opportunities for support, where possible, the more supporters and service providers will gain clarity on when and how to use it.

Amend Federal Legislation to Formally Recognize Representation Agreements

One of the biggest challenges supporters talked about is the lack of awareness within the financial services sector over the representation agreement as a valid supported and substitute decision-making instrument. Adults and their supporters face losing access to necessary financial services, including representatives being denied access to necessary information to perform their duties.

The federal *Bank Act* formally recognizes personal representatives as someone who can stand in the place of or represent a client.⁸⁷⁴ The definition of personal representative includes "a trustee, an executor, an administrator, a committee, a guardian, a tutor, a curator, an assignee, a receiver, an agent or an attorney of any person, but does not include a delegate."⁸⁷⁵ There is no mention of a representative as defined under a representation agreement. While the term agent may leave it open for interpretation to include representatives, the lack of specific mention in the section results in most supporters reporting inconsistent reactions among financial service representatives across Canada. Supporters say their experience is that federal financial institutions will often refuse to accept a representation agreement.

Develop Law Society Guidance for Client Instructions for Representation Agreements—BC

Several members from the BC legal community expressed concerns about how to take instructions from clients who meet the lower capacity threshold to make a representation agreement, but who simultaneously do not meet the higher capacity test to instruct counsel. One practitioner commented that neither the legislation nor the reported decisions set out specific criteria to meet the capacity test to make a section 7 representation agreement.

The Law Society of BC's Code of Professional Conduct states the following about working with clients who live with diminished capacity:

Clients with diminished capacity

3.2-9 When a client's ability to make decisions is impaired because of minority or mental disability, or for some other reason, the lawyer must, as far as reasonably possible, maintain a normal lawyer and client relationship.⁸⁷⁶

Although the LSBC Code encourages lawyers to maintain a normal lawyer–client relationship when working with clients in this circumstance, the commentary to the Code states that “[a] lawyer who believes a person to be incapable of giving instructions should decline to act” unless the lawyer “reasonably believes that the person has no other agent or representative and a failure to act could result in imminent and irreparable harm.”⁸⁷⁷ In this case, the lawyer is permitted to act in this capacity until a legal representative can be appointed.⁸⁷⁸ A similar opportunity for the lawyer to act applies to disclosure of confidential client information.⁸⁷⁹

The language under the LSBC Code mirrors the test for capacity to make a power of attorney, which is a much higher standard. As stated earlier in this study paper, BCLI’s *Report on Common Law Tests of Capacity* recommended amending the *RAA* to allow a person with the capacity to make a section 7 representation agreement to also meet the test for capacity to retain and instruct legal counsel to prepare the agreement. Participants said that a practice guidance document may help to bolster practitioner confidence in taking instructions from clients for representation agreements. One option to consider may also be specific rules or guidance on developing limited scope retainers strictly for this purpose. This may serve to enhance access to, and uptake of, section 7 representation agreements.

Establish Qualification Criteria for Supporters, Monitors, and Trusted Contact Persons

Although attorneys and representatives must fulfill specific duties when acting in their capacity as supported or substitute decision-makers, there is no specific eligibility or qualification criteria to be appointed to these roles for managing investments. Lawyers and advisors say that, given the risk of financial exploitation and undue influence when managing an adult’s life assets, the legislation should set out specific criteria for an attorney or representative to support these types of decisions. One suggestion was to require that supported and substitute decision-makers be bonded to help with investment decisions.

Community agency representatives and people receiving support felt strongly that supported and substitute decision-makers should receive training on their respective roles, and perhaps specialized training on how to support investment decisions. One idea raised was to develop a province-wide online certification course that accompanies registration of a section 7 representation agreement.

People also spoke candidly about the vast array of investment knowledge and experience among clients and supporters alike. Professionals may assume that supporters or substitute decision-makers have investment decision-making experience they can draw from. However, we learned from many people with lived experience that this is not necessarily the case. That much of what they know about investing happens through piecemeal research and information received in investment meetings with the advisor. Advisors agree that, to properly support an investor to make decisions, the supporter should have some experience or knowledge with investing, and that this should at least be equal to, or in some cases greater than, the investment knowledge and experience of the person being supported.

Develop a Formal Regulatory Body for Supported and Substitute Decision-Makers

Lawyers and advisors commented that what is missing from the existing supported and substitute decision-making frameworks is a formal oversight body for people who act as supported or substitute

decision-makers. While the legislation covers duties and responsibilities, informants said the law does not go far enough to regulate who can act as a supported or substitute decision-maker.

One example raised in consultation for this project is the use of a personal ombudsman for people living with a disability. In 2000, Sweden established a nationwide Personal Ombudsman (or ‘personal agent’) service to provide formal decision-making support to people living with “severe mental or psychosocial disabilities.”⁸⁸⁰ The Personal Ombudsman (PO) is a highly trained individual who provides support for decision-making to the person living with a disability. Governed by Sweden’s National Board of Health and Welfare (Socialstyrelsen), the PO helps the person receiving support to:

[t]ake control of their own situation, identify care needs, and ensure that [they] receive the necessary help. POs have no medical responsibility, nor do they make any decisions in the capacity of an authority; they work only to represent the individuals they assist.⁸⁸¹

The PO works for municipalities, foundations, care associations, or businesses to support up to 15 clients per year. One option to consider is developing an Investment Ombudsperson, someone who is formally trained to help people living with a disability to navigate the investment process and make investment decisions.

Develop a Standardized Process for Accessing DTC, RDSP, and Provincial Benefits

Service providers and supporters note the lack of a single, unified process to qualify for the federal DTC, provincial disability benefits, and the RDSP program can leave adults and supporters either applying for only one benefit or avoiding the application process completely. Several supporters said that the administrative burdens associated with applying for one benefit, let alone all three, left them exhausted, frustrated and, at times, abandoning the process completely.

Recall from our discussion earlier in this study paper that the Law Commission of Ontario’s project on *Capacity and Legal Representation of the Federal RDSP* “recommended that the Government of Ontario implement a process that would enable adults to personally appoint an ‘RDSP Legal Representative’ to open or manage funds in an RDSP”.⁸⁸² The LCO 2017 report goes on to note that Alberta’s supported decision-making authorization regime is a promising model to draw from, with appropriate safeguards in place, to develop an RDSP representative mechanism.⁸⁸³

The DTC has previously been described as “the front gate for eligibility for RDSPs.”⁸⁸⁴ Supporters said that advisors sometimes are either unfamiliar with the RDSP option or have only had a limited number of clients that request it. A centralized system would help to alleviate some of the administrative barriers to accessing these benefits.

In 2013, the Federal government advised RDSP issuers and agents that a person who lacks the capacity to enter a contract can have their parent, spouse or common-law partner to become the holder of the person’s RDSP without becoming their legal representative.⁸⁸⁵ The purpose of this measure was to provide an interim support mechanism for people while provinces and territories “develop long-term solutions to address legal representation issues.”⁸⁸⁶ This temporary measure “applies as of June 29, 2012 and ends on December 31, 2023.”⁸⁸⁷

Another option participants suggested is to develop specialized education and support, through partnerships between investment firms and community organizations, for people who need assistance qualifying and applying for provincial and federal disability benefits. One example where community organizations have worked to enhance education and support in this area is Disability Alliance BC, through their Tax AID DABC program.⁸⁸⁸ Also, the Bank of Montreal, “as the first Canadian bank to offer [the RDSP] product in 2008”, has extended its partnership with PLAN Institute to raise RDSP education and awareness.⁸⁸⁹

Expand the RDSP Withdrawal Limits to Enhance Investment Opportunities

In 2014, the BC RDSP Action Group issued its Disability Consultation Report calling for, among other things, expansion of the RDSP program so that people receiving provincial disability benefits could build wealth through home ownership or other tax credits.⁸⁹⁰ One option put forward, and raised during consultation for this project, was to increase the RDSP withdrawal limits so that plan holders could use the funds to create more investment opportunities, like home ownership.⁸⁹¹

8.3 PRACTICE GUIDANCE AND EDUCATION FOR INVESTMENT PROFESSIONALS

Almost every single key informant said that more education and training is needed on the following:

- Capacity and its impact on financial decision-making;
- The impact of dementia on financial management and decision-making;
- The impact of intellectual or developmental disabilities on financial management and decision-making;
- How to communicate and engage with people who identify as living with intellectual or developmental disabilities;
- How to educate clients and their supporters about risk and investing;
- Supported and substitute decision-making; and
- The role of supported and substitute decision-makers.

Below is a list of areas for enhanced practice guidance and education for investment professionals:

- Education on How to Work with Clients Living with a Disability;
- Practice Guidance from Adults Receiving Support and Supporters; and
- Other Practice Guidance and Ideas.

Expand Education on How to Work with Clients Living with a Disability

Key informants commented that most investment industry training is targeted to working with senior or older adult investors (collectively referred to as vulnerable investors). Education and training are often focused on specific issues like elder financial abuse, undue influence, and financial exploitation as it applies to older adult clients. People who identify as living with intellectual or developmental

disabilities are generally not included in the category of vulnerable investors. Interviewees commented that more education and guidance is needed on how to work with people who identify as living with intellectual or developmental disabilities.

One informant said that “now...resources are targeting the person themselves and encouraging them to take control of their own lives, their own futures, to plan ahead to advocate for themselves, to speak up.” While training materials sometimes refer to factors that contribute to client capacity, interviewees for this project want more guidance and education on how to support and continue working with clients who may be experiencing dementia, or adults living with an intellectual or developmental disability.⁸⁹² Advisors would like a discussion guide that sets out the type of questions, and provides a plan, for how to integrate support and accommodation into the investment relationship.

Some examples of how to build supportive practices into the investment services environment may include one or more of the following:

Services

- providing multiple ways of contacting a service including by phone, in person and by regular and electronic mail;
- providing extra time to a service user; and
- providing more breaks to a service user, where appropriate.⁸⁹³

Investment professionals we spoke to said they want more training on:

- How to manage situations where an attorney may act as a substitute decision-maker unnecessarily, especially when they disagree with an investor’s decision.
- How to confirm who has authority to make the investment decision when supporters are present.
- How to obtain client consent in supported decision-making relationships.
- What support looks like, and how to foster meaningful engagement with a person living with a disability.
- How to manage situations when a change in supporter occurs, or when advisors suspect undue influence or financial exploitation may be taking place.
- How to recognize support versus undue influence, considering individual client circumstances, relationship to the supporter, and support preferences.
- Questions to ask of in-house counsel when facing issues working with people who use supported or substitute decision-making for investment decisions.
- How to modify their response to red flags to consider whether cultural, environmental, or other factors may be impacting a client’s capacity.
- Steps to take when a client shows signs of diminishing capacity, but has no power of attorney, representative, or trusted contact person to provide support.
- Checklists or questions about capacity (e.g. factors that enhance capacity—environmental, cultural, ethnic, religious, and family considerations).

- The purpose of RA7s, and clarity on the duties, role, and responsibilities of monitors and representatives.
- How to manage conflicts of interest when a supporter is also a beneficiary on an investment or other asset.
- How to apply a trauma-informed lens to practice, including how to develop and ask questions about changes in a client’s personal life (relationships, health, etc.).
- How culture influences decision-making behaviour for adults receiving support and their supporters.⁸⁹⁴
- How to work with people living with multiple disabilities, including mental illness and its impact on decision-making.⁸⁹⁵
- Steps to take when a client wants to shift away from a full-service relationship.
- How to request formal documentation to verify the right of a supporter to attend meetings and provide support.
- How supported decision-making (formally and informally) intersects with securities legislation and privacy laws, regulatory authority, oversight, and risk management.
- Fiduciary obligations to clients living with different abilities.
- Checklists or guidance on how to work with a Trusted Contact Person (TCP), including opportunities to enhance the TCP role.⁸⁹⁶
- Education on the rights of adult clients to be signatories on the RDSP.
- Since the BC *RAA* does not require people to use a standard form for RA7s, advisors would like a checklist of criteria to assess whether a RA7 is completed properly.⁸⁹⁷, especially if a client did not consult a lawyer in the drafting process.

Practice Guidance from Adults Receiving Support and Supporters

Below is a list of the ideas and opportunities self-advocates and supporters shared about what would support them to participate in the investment decision-making process.

- Advisors should be more proactive with their relationship-building practices, including planning more frequent meetings.
- Provide letters or meeting agendas in advance, to give adults receiving support some lead time on what to expect during the conversation. Agenda items should:
 - Be numbered to help both the client and the supporter to follow along and recognize or recall talking points.
 - Include a list of documents or information the client needs to bring to the meeting. This would help supporters to go over necessary background information, and develop questions or topics to discuss.
- Ask questions about the adult’s communication needs and preferences related to money and investing, environmental concerns, and the use of decision aids or modules, which may include one or more of the following:⁸⁹⁸
 - Font size and type;
 - Document layout;

- Delivery of information (e.g. online or in print, black and white or colour);
- Use or avoidance of acronyms;
- Use or avoidance of graphics or other visual tools (scenarios, gaming strategies, etc.). This may require a whiteboard, or having a note-taker attend the meeting;
- Quantity of information an adult receiving support can manage in each meeting, and a plan for the delivery and timing of information;
- Use of information videos or other media to convey concepts related to money, savings, risk, and investing;⁸⁹⁹
- Use of a glossary of terms;
- Changes to office environment for meetings, including one or more of the following:
 - Use, or omission, of music;
 - Quieter office locations to avoid chatter and office noise;
 - Special lighting;
 - Access doors;
 - Table and chair set-up;⁹⁰⁰
 - Computers facing clients so they feel connected to the discussion;
 - Turn off cellular and desk phone ringers to minimize distractions;
 - Silence email notifications;
 - If an advisor knows about a client’s hearing limitations, ask if they have their hearing aid device or need volume adjusted;
 - Offer to meet clients in the lobby to accompany them to the meeting room location; or
 - Have reading glasses or magnifiers on-hand for clients with visual support needs;
- Provide plain language summaries of information as often as possible;
- Make direct eye contact with the adult client when asking questions about goals, values, wishes, and preferences;
- Use the client’s name and speak clearly;
- Allow for pauses and silence to facilitate listening, understanding, interpretation, or processing of information;⁹⁰¹
- Watch for non-verbal cues to indicate comprehension, fatigue, confusion, or frustration—offer breaks or alternative methods of delivering information;
- Consider time of day and travel requirements;
- For advisors who take specific training to work with adults living different abilities, consider displaying a certificate, or telling the client and supporters.

Other Ideas

Advisors should develop personalized decision-making portfolios for each client, at file opening, that illustrates how the client makes investment decisions. Advisors can then refer to this throughout the investment relationship as a checkpoint for possible changes in client behaviour or approaches to decision-making.

Advisors should also consider obtaining a list of trigger words or expressions from family members to avoid when working with a client who may have experienced trauma, or who may have negative associations with them. This would help advisors avoid inadvertently retraumatizing the adult receiving support or saying a word or expression that may offend them. Another suggestion put forward was that advisors could meet alone with the client to create a safe word that could be used by the client to let the advisor know they have concerns about their supporter.

Another option an advisor can consider is to encourage their clients and supporters to maintain an investment journal.⁹⁰² This practice is commonly used in the online investment arena, for people who are self-monitoring their investment needs and decisions. There may be opportunity for advisors to consider how the clients they work with, and their supporters, can create an investment decision-making history log that may help advisors to work more closely with the client and family. One resource that could be modified for investment planning is the “MyBookletBC”, a free “online tool that families and people with disabilities can use to create a beautiful and personalized information booklet for a loved one or for themselves.”⁹⁰³

Other ideas include:

- Create formal training requirements for advisors on the DTC, RDSP, and related provincial disability benefits, including how to support access to these benefits.⁹⁰⁴
- Investment firms and financial institutions could consider providing opportunities for in-house advisors to receive PATH Facilitator training.⁹⁰⁵
- Advisors should regularly remind clients that their voice matters, their life matters, and that working together to foster decision-making also matters.
- Create advisor training on how to dispel bias and discrimination when working with people living with a disability, including how to make investment services community and person-centred.

Supporters say that advisors should ask questions about an adult’s comfort and familiarity working with technology, and whether they would like the option to meet remotely. This is especially important in the current COVID-19 environment, where in-person advisory services may be more difficult to access. Advisors should pay particular attention to things like time of day, remote meeting software, font size, document sharing modifications, and audio support options, to support the remote meeting experience. Supporters and lawyers note that advisors should receive guidance on how to properly assess for potential undue influence or financial exploitation in the remote meeting landscape. One option is to look to legal and investment regulatory bodies for practice guidance.

In thinking about the different roles supporters play for each community, people said that the investment sector should consult, where possible, financial planning resources developed by community agencies that work closely with the dementia and intellectual or developmental disability communities. Advisors and firms could work with agencies to develop customized education and training materials that explain investing, risk, and long-term money management for community members.⁹⁰⁶

Survivors of traumatic brain injuries say that the connection between trauma and injury is significant. One person with lived experience described that their speech, hearing, and ability to handle decisions was drastically diminished after their injury. Advisors should consider simplifying complex financial and investment information for brain injury survivors and provide more frequent check-ins and lengthier meetings times to support meaningful participation in the investment process.

Other Practice Guidance

Advisors should spend time at the start of an investment relationship getting to know the adult’s level of banking and investment knowledge and experience, using plain language and scenarios or practical examples to illustrate concepts. Examples of questions may include things like: Do you handle your own banking? Do you use bank machines? Do you prefer cash or credit cards? These are only some of the suggestions we heard, and which may help advisors to assess how much support the client needs.⁹⁰⁷ There may be opportunity to develop specific discussion or question guides for advisors when working with people living with a disability.

Lawyers commented that often having a note-taker in the room can help the lawyer to concentrate on building connection with the client and their supporters, and to ensure that important information, comments, and questions asked by clients or supporters are captured. Having the note-taker present also creates an opportunity for the advisor to meet with their colleague afterwards, to confirm information received and perhaps discuss any potential concerns or areas for follow-up.

Advisors could consider sending out letters of engagement, after the first meeting, that sets out the investment meeting process and plan, communication needs and agreements, meeting schedule, expectations, roles, etc. Like how lawyers use retainer letters to set out the agreed-upon terms for the client-lawyer relationship, there is an opportunity for advisors to adopt a similar practice.

Advisors should ask questions about who the adult would like to have present at meetings, who can provide them with support for investment decisions, and things that are important to them in working with an advisor. Advisors should also obtain written consent to contact a Trusted Contact Person (TCP) upon opening a file, and routinely confirm that the client wishes to use the same TCP throughout the relationship. Since long-standing clients may have opened a file before the TCP was introduced, advisors should verify a TCP for all existing and new client files.

Practitioners commented that often the front desk reception, or assistant to the practitioner, may notice smaller changes in client behaviour while in the waiting room, or when booking appointments. There may be opportunity to develop guidance or a resource to support administrative staff to record their observations of changing client behaviour.

Advisors should consider holding more frequent meetings with older adults, or adults with specific communication or support needs, to confirm understanding of information and instructions, and to avoid potential overwhelm from too much complex information. Plain language should also be the norm, not the exception, when conveying investment information and options.

Advisors may need to consider different communication strategies to confirm a client understands the information and appreciates the consequences of the decision. One idea brought forward is to develop experiential learning tools and resources that illustrate the investment decision-making process in a relatable way. This may involve connecting investment decision scenarios to values or goals expressed by the adult investor (e.g. travel/vacation, house or condo purchase). Using mock investment decision scenarios with clients may help to bridge the learning gap and enhance support for decision-making.

Advisors and lawyers that have seen supported and substitute decision-making used successfully in practice credit good listening skills as a key reason. Participants agreed that practice guidance and training could be bolstered to teach and test advisor listening skills and techniques to work with different disability communities. Participants also said they will often check their understanding of a client’s response, at different points throughout the meeting, to make sure they understand the instructions received.

Advisors should have separate conversations with clients who attend with a supporter to confirm the client’s wishes and preferences. Advisors can ask questions about the supporter’s role in the client’s life, and the parameters the client is comfortable with. Regulators acknowledge that it is easier for advisors to work with supporters when they have had a long-standing relationship with a client. Advisors should also spend time getting to know the supporter or substitute decision-maker, especially about their investment experience and knowledge.

Lawyers, community agency representatives, and supporters said that advisors should work with adults receiving support and their supporters to develop a values-based investment portfolio or options that match things the adult cares about (e.g. environment and climate change, anti-smoking, technology). Different communities approach investment decisions differently and will draw upon different educational materials and approaches to supported and substitute decision-making for investing activities. Also, advisors can think about how to use visual representations for different investment options for people who rely on visual supports to interpret and understand their decision options. Many participants we spoke to said there is an opportunity to transform investment decision-making into a values-based activity.

Some lawyers talked about developing family trees for investment clients. Lawyers who work in family, wills, and estates law commented that they will draw out family tree diagrams to outline the different relationships that the client is connected to. They said this same activity could be used in the investment sector to help advisors visualize the different roles and connections available to their adult investor client. These family maps can help advisors to also understand who offers support to the client, and when and how such support is offered. There may be people who are immediately involved, and those that are less accessible. Advisors who work with adult investors over longer-term relationships could use these diagrams to help create conversations about who could come in as supporter, when and if needed.

Advisors should consider asking clients early in the investment relationship, and at the first sign of potential changes in capacity, whether they would like to start bringing in a supporter. If the client has not formally appointed a supported or substitute decision-maker, then advisors acknowledge they can only take instructions from the client. But, the sooner a supporter is introduced into the investment process, the sooner advisors and clients can work together to avoid potential setbacks on managing the investment portfolio.

Lawyers stressed the importance of advisors not doing any kind of capacity assessment or query with supporters in the room, and that advisors should have suitable guidance on how to ask questions about capacity at various stages of the investment relationship.

Lawyers and advisors recommend that advisors ask clients who the supporter or substitute decision-maker is, and why the client trusts that person to help them with investment decisions. This should be done without the supporter or substitute decision-maker present.

Investment regulators suggest one practical tip for advisors to use when a client brings a supporter or substitute person with them to a meeting is ask for identification from the supporter or substitute. This process is like client verification practices used by lawyers when opening client files.

Although research and consultation for this project did not include online investment activities, legal and investment professionals wondered if industry standards should require voice or facial recognition software for clients who want to do direct, online investing.

8.4 EDUCATION AND RESOURCES

Below is a list of topics for education and resource development for adult investors and supporters:

Adults Receiving Support

- Risk and investing;
- Goal-based conversations about investing;
- Financial literacy for adults living with a disability; and
- How to work with an investment advisor.

Supporters

- How to balance legal rights of supported and substitute decision-makers with the rights of adults to participate;
- Future planning;
- The cost of investing;
- Risk and investing for adults living with a disability;
- Supporter-to-supporter education forums or discussion groups for investing;

- How to find and work with an advisor;
- Guidance on the DTC and provincial benefits;
- How to educate advisors on the communication and support needs of the adult; and
- Self-Assessment tools on how to be a substitute or supported decision-maker for investing.

Adults Receiving Support

More education and tools are needed for vulnerable investors to better understand what risk means, how it impacts investments, how it can be managed over time and through different life stages, and how to build risk into a supported decision-making relationship for investment decisions. Investment professionals commented that education and resources should reflect the different meanings risk will have for different investors, based on capacity, life stage, knowledge, and experience with investing.

Risk and Investing

Supporters commented that the person they support often does not understand, or is not comfortable with, the concept of risk. Risk is often associated with concepts of safety or danger as it relates to the potential loss of financial security. An advisor may consider asking questions like:

- What does safety mean to you when you think about your money?
- What makes you feel safe when you think about what you want to do with your money?
- When you think about being financially safe in the future, what does that look like?
- What activities make you feel safe?

Information obtained from asking questions like the ones above could then be used to develop an investment strategy that informs how much risk the adult is willing to take on.

Supporters also said that adults receiving support would benefit from training and resources on the concept of risk that is easily understood, and that connects to their understanding of using money to plan for their future. Information should be developed in plain language and should incorporate visual diagrams or role play scenarios to convey risk and opportunities to make risky decisions with money. Some examples of basic investment tools were discussed in Chapter 6, such as the BC Securities Commission *InvestRight* resources. Disability community agencies told us that a person’s interpretation of risk may depend on their individual learning needs, which may not fit within the parameters of short, online videos or fact sheets that are generally used today. This is perhaps another opportunity where investment firms can work closely with community agencies to develop content and materials.

Goal-based Conversations about Investing

Self-advocates said they appreciate having goal-based conversations with their supporters. These conversations are helpful when talking about how to manage their RDSP investments. For adults who can do their own independent research, they said that supporters and advisors can help by providing them with lists or other plain language materials to guide their search.

Financial Literacy for Adults Living with a Disability

Adults who are just starting to take over their RDSP, so may be at the beginning of an investment relationship, may have little to no prior experience with saving and managing their money. Self-advocates said that they would like more support to learn about investing, and to boost their overall financial literacy. Plain language resources, and different visual delivery modes, are thought to be the most effective way of educating people receiving support about investing, risk, and long-term financial planning. Some resources include gaming opportunities, which can work well to boost literacy and interest in investing for adults who are new to this activity.

Financial literacy should cover many different aspects of investing and long-term financial planning including:

- The difference between saving and investing;
- The DTC;
- The RDSP;
- Provincial disability benefits;
- How to map out a financial plan for their future using goals and values to drive investment decisions;
- Easy-to-read charts or visual diagrams that show growth of savings and investments over time; and
- Investment options that will not impact benefit entitlements.

For example, most RDSP companion booklets that are handed out upon opening the account are lengthy and in smaller print. Self-advocates and supporters said that investment firms and financial institutions need to develop more plain language, easy-to-read (and shorter) materials.

How to Work with an Investment Advisor

People living with an intellectual or developmental disability said that much of their investment knowledge comes from asking people they know and trust. They said they would like more information about how to work with an advisor, and about their rights to participate in the investment decision-making process in formats and language that supports their learning and accessibility needs.

Supporters

How to Balance Legal Rights of Supported and Substitute Decision-Makers with the Rights of Adults to Participate

Several participants agreed that it is important to give supporters legal recognition to participate in the investment decision-making process. But key informants also said it is equally important to ensure supporters are properly educated on their role and responsibilities under the relevant statutes, and to work cooperatively with advisors to help implement the adult’s wishes and preferences. Lawyers who work with people receiving support said they would like to see more education and training for

supporters on how to step back, where possible, and allow the adult receiving support more opportunity to participate in the decision-making process.

Supporters told us that there is good information about representation agreements and powers of attorney available, through agencies and organizations like NIDUS, Inclusion BC, Community Living offices, Public Guardian and Trustee offices, and advocacy organizations, but that there is no specific training on how to provide support so that the adult can continue making decisions. People said that supporters would benefit from specific training on the legal role of a supporter and a substitute decision-maker.

Advisors, lawyers, and community agency representatives said that supporters of an RDSP beneficiary may need some training and guidance on how to transition away from a long-held substitute decision-making role, so that the young adult beneficiary can take part in the investment choices. Supporters we spoke to admitted that often the person they support is disinterested in investing and financial planning, which can make it harder to step back from their substitute role. They would like guidance and support from community and advisors on how to encourage participation for the adult they support. Self-advocates agree that supporters need more education on how to have ongoing support conversations, to better understand how support evolves over time.

Help with Future Planning

Many supporters said that they worry about who will help to manage the investments when the supporter is no longer able to. Parents of people living with intellectual or developmental disabilities are often the ones setting up the RDSP and, at some point, may no longer be able to provide support to continue managing the funds. Supporters expressed real concern over how to create a succession plan for support. There is an opportunity for advisors and supporters to work together with community agency representatives to develop education, training, and practice guidance on how to build a succession plan for support that will respond to the evolving needs of the adult investor. One informant suggested this may require government oversight program to help manage the funds.

The Cost of Investing

Supporters who have limited investment knowledge or experience commented that they are often unaware or unclear about the costs associated with investing. Supporters would like advisors to spend more time educating them, and the adult they support, on the fees that apply to their investment products.

Risk and investing for adults living with a disability

Lawyers and service providers agree that supported and substitute decision-makers need to learn how to make space for an adult to accept some level of risk in the investment process. Supporters and advisors alike need more education and training on how to make space for an adult receiving support to make a poor investment choice, to the degree that it does not jeopardize life savings or their ability to pay for their needs and expenses over time. Some of the supporters we spoke to said they will default to lower-risk investment options because they lack awareness, comfort, or familiarity with higher-risk investment options for the adult they support. Often supporters assume RDSP investments must be

low risk because of the lifetime contribution limit (\$200,000) and the shorter lifespan of the product (grants and bonds run until the year the beneficiary turns 49).

Several of the supporters we spoke to said that advisors often assume the supported or substitute decision-maker has more sophisticated knowledge about investing than they do. Supporters would like a clear roadmap of the investment options available to the person they support, how to do investing, and more education around risk and investing so that they can support the adult investor to participate in the process. Supporters said that advisors should also work with them to help determine how the supporter’s approach to investment decision-making may be influencing the adult’s decision-making, and opportunities to make sure the adult’s wishes and preferences remain the focus.

Supporter-to-Supporter Education Forums or Discussion Groups for Investing

Lawyers, community agency representatives, and academics agree that families who understand that supported decision-making is about promoting self-determination for adults to meaningfully participate in the investment process are the ones that could help to educate and train other supporters on how to create more decision-making opportunities for the adult they support.

Supporters told us that there is a wealth of experience and knowledge to be shared among the community of supporters for people living with dementia, and those living with an intellectual or developmental disability. Community organizations often work with adults receiving support, and their families, to develop training. Supporters and legal professionals agree there is an opportunity to expand this training to include collective knowledge about investing and financial planning.

One informant told us that volunteers in the Autism community offer parent-to-parent support opportunities, and that perhaps a similar model could be developed in different community groups, for sharing investment experience, knowledge, and support. Group discussion forums could be held online, on evenings and weekends, or at other times that respond to the busy schedules of supporters. There may be further opportunity for different disability community supporters, for example from dementia, intellectual or developmental disability, or mental health community groups, to work collaboratively to develop and share support strategies. This may involve leveraging existing partnerships or finding ways to build relationships in this regard. A collaborative approach may be particularly useful for supporters of adults living with multiple disabilities.

How to Find and Work with an Investment Advisor

Supporters said they would like to find out how to locate advisors that have experience working with both older and younger adults with different abilities. Supporters and advisors acknowledged that existing advisor training and certification content does not specifically teach advisors how to work with people living with a disability, or multiple disabilities.⁹⁰⁸ Supporters would like guidance on the type of questions to ask advisors when setting up a new investment relationship for the person they support.

We said earlier that advisors commented that most of the training on working with vulnerable investors relates to older adults, and not necessarily people who live with disabilities. There is an opportunity

for training that will equip advisors to work with adults living with different abilities including dementia and intellectual or developmental disabilities.

Information and Guidance on the DTC and Provincial Benefits

Supporters commented that it often takes hours and hours of research, looking at several different online and print resources, to gather and distill information about eligibility and criteria for the DTC and related provincial disability benefits programs. While supporters acknowledge that community agencies have worked to develop educational and reference materials on these programs, supporters with limited resources and time do not have the same access to this information as others. This is where a provincial or national discussion forum for supporters may serve to bridge the access-to-information gap for supporters who find themselves lost amid the myriad of information sources related to these programs. Another idea may be to develop a central provincial or national repository of information strictly related to accessing these benefits.

How to Educate Advisors on the Communication and Support Needs of the Adult

Supporters said that teaching people within the disability community, and service providers who frequently work with people living with a disability, about how to work with the adult they support requires less time than it does to teach advisors. Supporters commented that they often face challenges with financial professionals who have little to no experience working with people from the disability community. Supporters said that, in their experience, advisors do not know how to communicate with and acknowledge the adult in the meeting, or the importance of allowing for more time to process information and making eye contact with the adult, among other issues. Supporters would like advisors to understand that it’s okay to say “I’m sorry, I don’t understand. Can we work together so I can better understand your needs? Can we work with you and your supporter so I can be clear on what your goals and values are?” Advisors who work with families of people living with a disability acknowledge that more training and guidance is needed, especially for new advisors. All the advisors we spoke to expressed interest in learning about promising practices to work with and support families with adults living with a disability.

Self-Assessment Tools on How to be a Substitute or Supported Decision-Maker for Investing

Many supporters told us that they step into a role as supporter or substitute decision-maker in an “all or nothing” capacity. They told us that, as a supporter or substitute, they may be tasked with participating in a vast array of decision-making activities, some of which they have little to no experience with. When it comes to investing, and unless a supporter has past or current investment experience, they may feel overwhelmed, uncertain, or have heightened concerns about taking over support or substitute decision-making for investments. Supporters asked whether the investment sector could develop a self-assessment tool to help supporters assess whether they are the best person to help with investment decisions, or if the adult and their family should consider a different person for this role (where possible).

8.5 CONCLUSION

The research and consultation for this project builds upon earlier research conducted on the way people living with a disability engage with their decision-making rights for finances. The focus of our research was to develop a better understanding of how the concept of support is built into existing supported and substitute decision-making laws in BC and Ontario to foster meaningful participation for people living with a disability in the investment context. The purpose and scope of this project is not to develop specific recommendations. Rather, the goal is to identify ideas and opportunities from the research and consultation to enhance the use of support in the investment process.

Based on the research and consultation findings set out in this study paper, the CCEL notes the following key opportunities:

Enhance Legislative Guidance on How to Support People to Make Investment Decisions

Many of the people we spoke to for this project agree that the language of the respective supported and substitute decision-making statutes could be expanded to include detailed guidance, or specific examples, on how representatives, attorneys, or other supported or substitute decision-makers should provide support to the adult. Participants felt that both BC and Ontario laws recognize the importance of making sure an adult’s wishes and preferences are known when helping or making decisions for an adult. But, more guidance or clarification on what it means to help, consult or ascertain would provide a more robust and collaborative approach to decision-making overall. Further comparative research on current supported and substitute decision-making laws, both within and outside Canada, that looks specifically at the language of support (including terms used to outline specific duties of a substitute decision-maker) may help to respond to this need.

Develop More Robust Practice Guidance for Lawyers and Investment Advisors

Lawyers and investment professionals (advisors and regulators) we spoke to acknowledge both the benefits and challenges with using supported decision-making for investing. Participants felt that most of the existing regulatory and practice guidance language for working with clients who live with capacity challenges may unduly restrict the participation of people living with a disability to instruct legal counsel or work more closely with their investment advisor. For example, lawyers in BC and Ontario said more guidance on how to receive instructions from someone living with capacity issues would help to determine what, if any, limited scope services could be offered (for example, to execute a representation agreement in BC). Investment advisors pointed out that better practice points on how to secure a trusted contact person, and how to maintain more robust records of decision-making supports used throughout the investment relationship, would enhance the confidence and willingness of advisors to incorporate supported decision-making opportunities in practice.

Develop Education and Resources for Investment Advisors

Investment advisors said they would like to learn more from fellow practitioners, clients, and supporters about how to incorporate support practices into the investment decision-making process. All the advisors we spoke to are keen to better understand how to support adult investors to continue

participating in the investment process, while balancing their regulatory and practice obligations. Supporters would like advisors to receive mandatory training on how to work with people living with an intellectual or developmental disability. Investment sector professionals we spoke to agree that most of the training and resources currently available to them are focused on how to work with people living with dementia or mental health issues. Community agencies in both BC and Ontario continue to develop resources for different service sectors, but agree that mandatory training in the early stages of advisor certification courses would help to build awareness earlier on. Although this project was not able to conduct roundtable stakeholder consultation events that would bring members from all consultation sectors together, there may be future opportunities to hold these types of events, and especially in the online meeting space.

Respond to Education Needs of Adults Receiving Support and their Supporters

Every supported and substitute decision-maker we spoke to says that their goal in providing support is to make sure the person they support is and feels heard, can meaningfully participate in the decisions that matter to them, and is financially secure. Many supporters talked about the challenges in providing support opportunities when their family or friend shows little to no interest in investing. Supporters often use different tools and techniques to convey complex information for the adult they support. But every supporter we spoke to said they often rely on their own research and creativity to translate investment terms and concepts. This is true even for supporters who admit to having only a very basic or limited knowledge or experience with investing. Supporters of people living with an intellectual or developmental disability said that more resources could be developed within the investment sector that target how to educate members within this community about savings, investing, and risk in formats that are easy to understand and go beyond print or video content. One example is to build in role play games or scenarios at the investment meeting that clearly sets out the steps of making investment decisions for life goals.

People receiving support told us that it can sometimes be hard to tell their supporter about the kind of support they need. For young adults living with an intellectual or developmental disability, who may just be entering into the investment relationship to manage their RDSP, they may not yet know what kind of support will be useful to them to participate in the investment decision-making process. This lack of awareness over the kind of support they need has less to do with their ability to make decisions than it does with the practical gap in actual experience making investment decisions. People living with dementia and an intellectual or developmental disability acknowledge that good support depends on time and trial and error with their supporter.

One way to bridge the experience gap for people who are new to the investment decision-making process, or who are learning new ways to participate, could be to develop a shared discussion forum for adults receiving support and their supporters to hear about strategies used by others. Supporters from both community groups we spoke to said a lot of their experience supporting someone came from a combination of working one-on-one with the adult they support and hearing from other supporters in the community. Future opportunities to gather lived experience knowledge among supporter and adults receiving support could help to identify new and emerging ways of fostering support in the investment context.

Research on Shared Knowledge and Experience

While the research and consultation for this project focused specifically on supported decision-making for adults living with dementia or an intellectual or developmental disability, CCEL staff acknowledge that some of the ideas and opportunities discussed in this study paper may be useful to other community members who live with different decision-making abilities. It may be beneficial to conduct future research on how other community members receiving support apply similar or different practices to bolster participation in the investment decision-making process. For example, there may be opportunity to consider how people living with mental health challenges, or survivors of brain injuries, and their supporters use supported decision-making for investing. This data may help to develop more holistic training and practice guidance for advisors who work with clients living with multiple ability challenges.

The concept of supported decision-making is complex and depends largely on how people living with a disability define, receive, and experience support for themselves. As such, this study paper neither advocates for, nor attempts to reach, a universal understanding of supported decision-making. Rather, it acknowledges that how support is interpreted and used for investment decision-making largely depends on how it functions within law and practice. This study paper offers insight into the challenges and opportunities for using supported decision-making in the investment context from the perspective of each of the people involved in the process. What is clear from the research and consultation findings is that everyone who participates in this activity respects the rights of the adult receiving support to meaningfully engage in their investment decisions. It also recognizes that not all support is created equal, and that different support practices should be considered for each adult investor, and within the decision, situation, and time of each circumstance. Finally, this study paper identifies creative and useful opportunities for future study in this area.

Table of Key Informants

No.	Name	Role and Affiliation	Jurisdiction
1	Laura Addington	Manager, Regulatory and Compliance & Issues Management, American Express	ON/USA
2	Michelle Alexander	Vice President and Corporate Secretary, Investment Industry Association of Canada	Canada
3	DA	Person with lived experience	ON
4	WA	Person with lived experience	BC
5	Guy Amighetti	Portfolio Manager, Verity Investment Counsel, and person with lived experience	BC
6	Kimberly Azyan	Executive Director, Services to Adults, Public Guardian and Trustee BC	BC
7	Michael Bach	Managing Director, Institute for Research and Development on Inclusion and Society, Ryerson University	ON
8	Joanne Bertrand	Executive Secretary, Ontario Caregiver Coalition	ON
9	Jessica Boots	Information Support Team, NSW Public Guardian Department of Justice	AUS
10	Michelle Browning	Academic, Decision Agency	AUS
11	Clare Burns	Partner, WeirFoulds LLP	ON
12	CB	Person with lived experienced	BC
13	KB	Person with lived experience	BC
14	Marta Carlucci	Program Advisor, Office of the Advocate for Service Quality	BC
15	PC	Person with lived experience	BC
16	LC	Person with lived experience	BC
17	John Chesterman	Deputy Public Advocate, Office of the Public Advocate	AUS
18	Dr. Carole Cohen	Affiliate Scientist/Physician, Department of Psychiatry, Sunnybrook Health Services Centre	ON
19	Richard Corner	Vice President and Chief Policy Advisor, Investment Industry Regulatory Organization of Canada	Canada
20	MD	Person with lived experience	BC

No.	Name	Role and Affiliation	Jurisdiction
21	Leanne Dospital	Advocate for Service Quality, Office of the Advocate for Service Quality	BC
22	Maureen Etkin	Executive Director (former), Elder Abuse Ontario	ON
23	Al Etmanski	Author; social entrepreneur	BC
24	Brian Evans	Litigation Analyst, Ministry for Children and Family Development, Legislation and Litigation Branch, Province of British Columbia	BC
25	RE	Person with lived experience	BC
26	Norah Flaherty	Person with lived experience	BC
27	Tyler Fleming	Director—Investor Office, Ontario Securities Commission	ON
28	Lynne Gaucher	Manager—Disability Programs Section, Canada Revenue Agency	Canada
29	David Godfrey	Senior Attorney, American Bar Association Commission on Law and Aging, and person with lived experience	USA
30	Leona Gonczy	Gift Planner, Alzheimer Society of B.C., and person with lived experience	BC
31	BG	Person with lived experience	BC
32	Anna Grouchy	Assistant Public Guardian—Advocacy and Policy, NSW Public Guardian	AUS
33	Marta Hajek	Director of Operations, Elder Abuse Ontario	ON
34	Margaret Hall	Professor and Society of Notaries Public of BC Chair in Applied Legal Studies, Simon Fraser University, School of Criminology	BC
35	CH	Person with lived experience	ON
36	Ian Hull	Co-founding partner, Hull & Hull LLP	ON
37	LJ	Person with lived experience	BC
38	Laura Johnston	Lawyer, Community Legal Assistance Society	BC
39	Naomi Karp	Senior Policy Analyst, Consumer Financial Protection Bureau	USA
40	Anna Arstein-Kerstlake	Associate Professor, The University of Melbourne, Melbourne Law School	AUS
41	Lana Kerzner	Barrister & Solicitor	ON
42	Nina Kohn	David M. Levy Professor of Law and Associate Dean for Online Education, Syracuse University College of Law	USA
43	Mike Krabbendam	Manager, Manoh Manor, and person with lived experience	BC
44	Ken Kramer	Founder and principal, KMK Law and person with lived experience	BC

No.	Name	Role and Affiliation	Jurisdiction
45	Alison Leaney	Provincial Coordinator, Vulnerable Adults and Community Response, Services to Adults, Public Guardian and Trustee BC	BC
46	Damienne Lebrun-Reid	Executive Director, Financial Planning Standards Council	Canada
47	Berta Lopera	Executive Director (former), Seniors First BC	BC
48	Tracy Lundell	Investment Advisor, Sea Glass Wealth Advisory Group	BC
49	Carol Lynde	President and CEO, Bridgehouse Asset Managers	Canada
50	Amy Maas	Regional Manager, Services to Adults, Public Guardian and Trustee BC	BC
51	Susan Mader	Accessibility Secretariat, Province of British Columbia	BC
52	MM	Person with lived experience	BC
53	Gemma McNabb	Diversity Services, NSW Public Guardian Department of Justice	AUS
54	Karin Melberg-Schwier	Freelance writer, editor, illustrator, Saskatoon HOME Magazine (editor)	SK
55	Suzanne Michaud	Legal Counsel, RBC Wealth Management Division (retired)	ON
56	Jennifer Moir	Owner, Age Well Solutions	ON
57	Denise Morris	Senior Manager—Regulatory Change Management, Ontario Securities Commission (former)	ON
58	Dr. Roxanne Mykitiuk	Professor, Osgoode Hall Law School	ON
59	JN	Person with lived experience	BC
60	Andrea Natoli	Manager, Partnerships and Development, Participate Australia (former)	AUS
61	Tom O’Dwyer	Lead Tax Advisor, Ability Tax & Trusts	BC
62	Roy O’Leary	Financial Planner, IG Wealth Management, and person with lived experience	ON
63	Justine O’Neill	Chief Executive Officer, Council for Intellectual Disability	AUS
64	Marian Passmore	Legal, Regulatory, and Policy Advisor	ON
65	Linda Perry	Executive Director, VELA Microboard Association	Canada
66	Derina Peters	Policy Analyst, First Nations Health Authority	BC
67	Fancy Poitras	Senior Policy Analyst, Program Strategy, First Nations Health Authority (former)	BC
68	Brendan Pooran	Founder, Pooran Law	ON
69	RP	Person with lived experience	ON
70	AR	Person with lived experience	BC
71	Mike Reynolds	President, Absolute Engagement (former TD Wealth Management)	ON/BC
72	Stan Rule	Partner, Sabey Rule LLP	BC

No.	Name	Role and Affiliation	Jurisdiction
73	Peter Schneider	Executive Manager, Strategy and Communication, Participate Australia (former)	AUS
74	Kate Schroeder	Manager, Corporate Tier 1 Supervision, IG Wealth Management	MB
75	Rosemarie Schoutsen	Person with lived experience	ON
76	Mary Schulz	Director (Education), Alzheimer Society of Canada	Canada
77	Richard Schwier	Interim Associate Dean, University of Saskatchewan, Research and the Scholarship of Teaching and Learning	SK
78	Malcolm Schyvens	Deputy President (Head of Guardianship Division), NSW Civil and Administrative Tribunal	AUS
79	Judith Shaw	Securities Administrator, Office of Securities, State of Maine	USA
80	Carolyn Smith	Supported Decision-Making Training Team, NSW Public Guardian Department of Justice	AUS
81	Dr. Tim Stainton	UBC Professor (School of Social Work) and Director of Centre for Inclusion and Citizenship, and person with lived experience	BC
82	Ian Strulovitch	Senior Legal Counsel, Director Communications and Public Affairs, Mutual Fund Dealers Association	Canada
83	Jack Styan	Vice President Strategic Initiatives, Community Living BC	BC
84	Doug Surtees	Associate Dean (Academic), University of Saskatchewan, College of Law	SK
85	Laura Tamblyn-Watts	President and CEO, CanAge	Canada
86	Danielle Tétrault	Vice-President Compliance and Chief Compliance Officer, IG Wealth Management	MB
87	Goran Todorovic	Manager, Assessment and Investigations, Public Guardian and Trustee BC	BC
88	Diane Tom	Senior Counsel, RBC Law Group	ON
89	Minal Upadhyaya	Vice President, Policy & General Counsel, The Investment Funds Institute of Canada	Canada
90	Ron Usher	Regulation—General Counsel, The Society of Notaries Public of BC	BC
91	Christine Van Cauwenberghe	IG Wealth Management	MB
92	Judith Wahl	Barrister and Solicitor, Wahl Elder Law	ON
93	Graham Webb	Executive Director/Lawyer, Advocacy Centre for the Elderly	ON
94	Kim Whaley	Lawyer and founding partner, WEL Partners	ON
95	Mary-Beth Wighton	Ontario Dementia Advisory Group, and person with lived experience	ON

List of Key Informant Questions

Below is a list of key informant questions used throughout the consultation interviews, focus groups, and events. As mentioned earlier in this study paper, several key informants revealed that they held more than one role, either as a person who provides services to people receiving support, as a personal supporter, as someone receiving support, or a combination of these experiences. Consequently, staff used a combination of questions from the list below, depending on the person we spoke to, their respective role and/or relationship to adults receiving support, and related personal or professional experience with supported and substitute decision-making.

1. Please describe your title and/or role in relation to working with, advising, or supporting people (in the investment context, where applicable).
2. What does your organization do?
3. Have you seen supported decision-making used, formally or informally? If yes, in what context?
4. Describe your background, experience, and/or knowledge with investing.
5. Do you receive support from someone you trust? If yes, is it one person? Or a group of supporters?
6. If you receive support from a group of people, how do you work together?
7. What type of support do you appreciate when you are making decisions about how to invest or save your money?
8. What type of help do you not appreciate when you are making decisions about how to invest or save your money? How do you handle those situations?
9. Do your supporters ever disagree with one another? How do you handle those disagreements?
10. What does supported decision-making mean to you?
11. Have you met with an investment advisor or other professional to talk about your investment options? What did you like about that experience? What did you dislike about it?
12. What do you look for in an investment advisor?
13. How are you treated by an investment advisor when you have brought someone to help you?
14. When you attend meetings with your investment advisor, who do they speak to? You or your supporter?
15. What does your supporter do during investment meetings to support you to make decisions about your money?

16. What does your investment advisor do to involve you in the decision-making process? What, if anything, could they do better?
17. What, if any, environmental factors about the meeting could be changed to enhance your ability to participate in the decision-making process?
18. If you could choose one thing investment advisors, banks or credit unions could do better in terms of providing service to you as a person who gets help with financial decisions, what would that be?
19. What information do you think is important for your supporter to know if they want to help you with your investment decision-making?
20. What does good support look like to you?
21. What type of support do you not appreciate?
22. What helps you participate in making decisions about your money?
23. What is your experience working with people who have limited capacity, or where capacity is in question, and they need assistance to make investment decisions?
24. What are some of the capacity issues you have seen, personally or professionally?
25. How, if at all, do you assess a client's capacity to participate in the (investment) decision-making process?
26. How do you handle situations where decision-making capacity may be in question?
27. What are your instructions (e.g. regulatory, practice, other, etc.) for handling these types of situations?
28. In situations where there was a support person present (e.g. family, friend, trusted person, etc.), what was the supporter's role?
29. Did the supporter help the adult to make the investment decision? If so, describe the kind of help provided.
30. In your opinion, what do you believe the legal relationship between supporter and the adult is or should be?
31. In your experience, how are decisions made in situations where a client has a supporter?
32. How, if at all, do you involve the client in the decision-making process?
33. Do you talk directly with the client? Or only the supporter? Describe.
34. When conducting meetings where a client and a supporter are present, what aspects of these types of meetings are you:
 - a. Comfortable with? Why?
 - b. Uncomfortable with? Why?
35. How does the current legal or regulatory framework guide you in working with clients with capacity challenges and their supporters?
36. What is your experience with clients who have a change in supporter? How do you manage those changes?
37. What education, practice resources, or training are you aware of that relates to supporting people with their investment decisions?

- 38. What would help you or others to be more comfortable using supported decision-making practices in the investment context?
 - a. Training?
 - b. Policy?
 - c. Other?
- 39. What risks or safeguards exist, or that you think should be in place, for:
 - a. The client?
 - b. The advisor?
 - c. The supporter?
- 40. When have you seen supported decision-making used successfully? What made it successful?
- 41. What are some of the challenges you, or people you know, have experienced when attempting to use supported decision-making for investing?
- 42. What do you think is needed to enhance use of supported decision-making in this context?
 - a. Enhanced legislation or regulation
 - b. Practice Guidance or Training
 - c. Resources
- 43. This project intends to produce a suite of tools as part of its output. What kind of tool(s) do you think could be developed for:
 - a. Investment professionals;
 - b. Supporters; and
 - c. Adults receiving support.
- 44. What, if any, limitations do you think should apply when using supported decision-making for investment decisions?
- 45. Who do you provide support to?
- 46. How did you step into this role?
- 47. If by legal document, which one?
- 48. Who, if at all, helped you and/or the adult prepare the preparation of the legal document?
- 49. Do you act with another family member, friend, or trusted person to assist the adult to make decisions?
- 50. What, if anything, was explained to you about your responsibilities as a supporter?
- 51. What is your understanding of supported decision-making generally?
- 52. What do you understand to be your role in the investment decision-making process?
- 53. Who decided that the adult needed assistance with investment decisions?
- 54. What supports or resources do you rely on to help you fulfill this role? If none, what would help you to fulfill your role?
- 55. What do you look for in seeking an investment advisor to work with you and the adult you support?

- 56. When you attend meetings with the adult, who does the investment advisor speak to?
- 57. How do you assist the adult to make or participate in the decision-making process?
- 58. What happens when you and the adult you support disagree with a suggestion made during the meeting?
- 59. What do you find easy about fulfilling your role? What do you find difficult?
- 60. Does the investment advisor understand your role as supporter in the meetings?
- 61. How can adults living with cognitive disabilities enhance their capacity to make investment decisions?
- 62. What are the challenges, issues or barriers to consider when people use, either formally or informally, supported decision-making for investment decisions?
- 63. Other issues, ideas, or opportunities raised by the key informant.

List of Investment Sector Roles and Responsibilities

(Source: Canadian Securities Institute)⁹⁰⁹

Insurance Agencies	Role and Responsibility
Insurance Agent Alternate name(s): Life Insurance Sales Agent, Life Insurance Broker	Analyze clients’ financial needs If the Insurance Agent is licensed, they can sell mutual funds, annuities that provide retirement income, or other investments
Mutual Fund Dealer Firms	Role and Responsibility
Mutual Fund Representative Alternate name: Mutual Fund Sales Representative	Provide services to investors for investment, retirement and estate planning needs. Employed by mutual fund dealers and independent financial planning firms. Only licensed to advise on and sell mutual fund investment products.
Personal Banker Alternate name(s): Financial Advisor, Account Manager	Administer investment accounts, both registered and non-registered. Comprehensive personal service and financial advice. Build long-term client relationships; develop financial strategies for evolving client banking and investment needs.
Financial Planner Alternative name: Financial Advisor	Financial planning advice. Some are licensed to sell insurance, mutual funds, and other securities. Consulting on financial planning strategies including securities, insurance, pension plans, and real estate and the development of financial plans for individuals and businesses Establishing individual financial plans and helps customers build investment portfolios, including stocks, bonds, mutual funds, etc. based on their financial needs and objectives Good knowledge of estate planning, tax, and family law.
Investment Dealer Firms	Role and Responsibility
Investment Advisor Alternate name(s): Registered Representative, Financial Advisor, Wealth Advisor, Investment Executive	Gather information about an investor’s personal, financial, and risk tolerance profiles to identify suitable investments and strategies. Customize investment policy statements. Monitoring stock market and industry trends likely to affect clients’ investments. Arrange purchase or sale of stocks, bonds, and other investment products.

Investment Dealer Firms	Role and Responsibility
Wealth Manager Alternate name(s): Wealth Advisor, Wealth Professional	Gather information about investor’s personal life-style choices, financial needs and risk management profile. Develop and implement a customized wealth plan and wealth transfer plan that reflects wishes of the client and needs of the family. Collaborate with clients to preserve wealth and optimize the conversion of assets into income to meet life long, life-style expectations.
Bank/Credit Union/Trust Company	Role and Responsibility
Estate & Trust Officer Alternate name(s): Assistant Trust Officer, Trust Officer, Senior Trust Officer, Executive Trust Officer	Identification and collection of assets. Manage portfolio of estates and trusts, guardianships and powers of attorney. Officers deal with specialized personal assets, real estate and manage relationships with estate, trust and POA clients, beneficiaries and co-trustees/POA.
Financial Services Representative Alternate name(s): Personal Banking Officer, Financial Advisor (Banking), Personal Account Manager, Lending Officer, Greeter	Conduct needs assessments of customers resulting in either product sales or referrals to specialized sales personnel. Familiar with all retail banking products, include personal credit and mortgage lending, small business products and lending, personal and business bank accounts, and registered products. They must also be familiar with in-house systems, transaction processing, teller functions, and mutual fund investments and transactions.
Financial Advisor Alternate Name(s): Personal Banking Officer, Senior Personal Banking Officer, Financial Advisor (Banking), Personal Account Manager	Conduct needs assessments of customers resulting in either product sales or referrals to more specialized sales personnel. Recommend appropriate mutual fund investments in compliance with securities regulations and branch policies and procedures
Private Banker Alternate name: Wealth Manager	Complete financial strategy for ultra high net worth individuals, their families, and their businesses. Knowledge of investing, business banking, and trust and estate planning.

Online Survey to BC Lawyers

(via Canadian Bar Association BC)

1. How many years of call do you have in BC?
- A. 0-5 years

B. 6-10 years

C. 10-20 years

D. 20+ years
2. What are your practice areas? (select all that apply)
- A. Aboriginal Law

B. Charities and Not-for-Profit Law

C. Civil Litigation

D. Elder Law

E. Estate Planning

F. Family Law

G. Health Law

H. Immigration Law

I. Insurance Law

J. Labour & Employment

K. Pensions and Benefits Law

L. Real Property

M. Taxation Law

N. Wills, Estates and Trusts

O. Other:
3. What region of the province do you practice in?
- A. Vancouver Island

B. Lower Mainland/Fraser Valley

C. Southern Interior BC

D. Northern BC
4. In your practice, do you prepare any of the following documents? (select all that apply):
- A. Enduring Power of Attorney

- B. Representation Agreement—s. 7

C. Representation Agreement—s. 9 (health and personal)

D. None of the above
- [If A, C or D is selected, respondent is sent to question 5].
- [If B is selected, respondent is sent to question 6].
5. You indicate that you DO NOT prepare section 7 representation agreements. Please indicate the reason(s) below? (select all that apply):
- A. Does not fall within current practice area(s)

B. Clients do not request/want it

C. Lack of familiarity with how to prepare

D. Clients lack capacity to retain me to prepare a section 7 representation agreement

E. Other (please specify):
6. You indicated that you prepare section 7 representation agreements. The remainder of the survey is about section 7 representation agreements. What standard provisions do you include in the section 7 representation agreements you prepare? (select all that apply):
- A. Personal care

B. Routine management of financial affairs

C. Major and minor health care

D. Obtaining legal services and instructing counsel
7. What authority of the representative do you include in the section 7 representation agreements you prepare?
- A. Make decisions for the client

B. Assist the client to make decisions

C. Both

D. It depends (please explain):
8. What information, if any, do you provide to clients about the representation agreement? (select all that apply):
- A. How to use the agreement

B. Role of the representative

C. Rights of the adult

D. Option to appoint a monitor

E. Role of the monitor

F. Other (please explain):
9. What information, if any, do you provide to the representative about the representation agreement? (select all that apply):
- A. Duties of the representative

B. Rights of the adult

- C. Role of the monitor
 - D. Access to information
 - E. Scope and limitations of authority
 - F. Duration of authority and resignation
 - G. Other (please explain):
10. How often do clients appoint a monitor?
- A. Never
 - B. Occasionally
 - C. Most of the time
 - D. Always
11. Who do clients appoint as a monitor? (select all that apply):
- A. Adult child
 - B. Sibling
 - C. Trusted friend
 - D. Other (please specify):
12. Approximately how many section 7 representation agreements have you prepared in the last 12 months?
- A. 0-5
 - B. 6-10
 - C. 11-25
 - D. 26-40
 - E. 40 or more
13. Based on your response to question 12, would you say you are preparing more or fewer section 7 representation agreements in the last five years?
- A. More
 - B. Fewer
 - C. Same
- Please explain why:

APPENDIX E

Online Survey to BC Notaries

(via The Society of Notaries Public of BC)

1. How long have you practiced as a notary public in BC?
- A. 0-5 years
 - B. 6-10 years
 - C. 10-20 years
 - D. 20+ years
2. What are your practice areas? (select all that apply)
- A. Contracts
 - B. Personal Planning
 - C. Real Property
 - D. Wills, Estates and Trusts
 - E. Other: (please list other areas of practice)
3. What region of the province do you practice in?
- A. Vancouver Island
 - B. Lower Mainland/Fraser Valley
 - C. Southern Interior BC
 - D. Northern BC
4. In your practice, do you prepare any of the following documents? (select all that apply):
- A. Enduring Power of Attorney
 - B. Representation Agreement—s. 7
 - C. Representation Agreement—s. 9 (health and personal)
 - D. None of the above
- [If A, C or D is selected, respondent is sent to question 5].
- [If B is selected, respondent is sent to question 6].
5. You indicate that you DO NOT prepare section 7 representation agreements. Please indicate the reason(s) below? (select all that apply):
- A. Does not fall within current practice area(s)
 - B. Clients do not request/want it
 - C. Lack of familiarity with how to prepare

- D. Clients lack capacity to retain me to prepare a section 7 representation agreement
 - E. Other (please specify)
6. You indicated that you prepare section 7 representation agreements. The remainder of the survey is about section 7 representation agreements. What standard provisions do you include in the section 7 representation agreements you prepare? (select all that apply):
- A. Personal care
 - B. Routine management of financial affairs
 - C. Major and minor health care
 - D. Obtaining legal services and instructing counsel
7. What authority of the representative do you include in the section 7 representation agreements you prepare?
- A. Make decisions for the client
 - B. Assist the client to make decisions
 - C. Both
8. What information, if any, do you provide to clients about the representation agreement? (select all that apply):
- A. How to use the agreement
 - B. Role of the representative
 - C. Rights of the adult
 - D. Option to appoint a monitor
 - E. Role of the monitor
 - F. Other (please explain)
9. What information, if any, do you provide to the representative about the representation agreement? (select all that apply):
- A. Duties of the representative
 - B. Rights of the adult
 - C. Role of the monitor
 - D. Access to information
 - E. Scope and limitations of authority
 - F. Duration of authority and resignation
 - G. Other (please explain)
10. How often do clients appoint a monitor?
- A. Never
 - B. Occasionally
 - C. Most of the time
 - D. Always

11. Who do clients appoint as a monitor? (select all that apply):
- A. Adult child
 - B. Sibling
 - C. Trusted friend
 - D. Other (please specify)
12. Approximately how many section 7 representation agreements have you prepared in the last 12 months?
- A. 0-5
 - B. 6-10
 - C. 11-25
 - D. 26-40
 - E. 40 or more
13. Based on your response to question 12, would you say you are preparing more or fewer section 7 representation agreements in the last five years?
- A. More
 - B. Fewer
 - C. Same

Please explain why:

Endnotes

1 We use the term “cognitive disability” when speaking about community members who identify as living with a minor or major intellectual or other cognitive change that impacts their ability to independently make financial planning and investment decisions. Different forms of cognitive disabilities include, but are not limited to, autism, Down Syndrome, traumatic brain injury and, more broadly, dementia. When referring to both our dementia and intellectual or developmental disability members in their shared experiences and challenges, we use the general term “living with a disability”.

2 Canada, Brain Injury Canada (adapted from), “Acquired Brain Injury (ABI)—The Basics”, online: <www.braininjurycanada.ca/acquired-brain-injury/> [Brain Injury Canada].

3 *Age of Majority Act*, RSBC 1996, c 7, s 1(1)(a).

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93 *Ibid* at 50.

94 *Ibid* at 51.

95 *Ibid* at 52.

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97 *Ibid* at 10.

98 *Ibid* at 20–22.

99 *Ibid* at 81.

100 *Ibid* at 82.

101 2017 LCO Report, *supra* note 12.

102 *Ibid* at i.

103 *Ibid* at ii–iii.

104 *Ibid* at vi.

105 *Ibid.*

106 *Ibid.*

107 *Ibid.*

108 *Ibid* at v–x.

109 At the time of publication, only Alberta, Manitoba, Saskatchewan and the Yukon legally recognize a form of supported decision-making.

110 2014 Lived Experience Report, *supra* note 90 at 3.

111 2017 LCO Report, *supra* note 12 at 63.

112 See e.g. “Mental Health & The Financial Advice Relationship” online: *Bridgehouse Asset Managers* <bridgehousecanada.com/mental-health/>. See also Joel Schlesinger, “Mental health can influence investment decisions: Wealth planning beneficial when everything is on the table”, *Winnipeg Free Press* (last modified: 02 June 2018), online: <www.winnipegfreepress.com/business/finance/mental-health-can-influence-investment-decisions-484374423.html>.

113 N denotes the number of people who were interviewed in each category.

114 This number reflects interviewees who identified their primary role as a supporter of an adult from one of our communities. However, and among those interviewees categorized as lawyers, academics, community agency/advocacy, policy, investment advisors, or investment regulators, approximately 25% said they act as a supporter for a family member or friend.

115 The number of attendees is included in the key informant statistics for Adults Receiving Support and Supporters listed above.

116 Survey was distributed to CBA BC section members from these practice areas: Banking, Charities and Not-for-Profit, Commercial and Real Estate, Elder Law, Family Law, General Practice, Health Law, Tax, Wills and Trusts.

117 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

118 *Ibid*, s 15(1).

119 *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at para 37, 56 DLR (4th) 1.

120 *Ibid* at para 46.

121 *Ibid.*

122 See *R v Big M Drug Mart Ltd*, [1985] SCJ No 17, [1985] 1 SCR 295 at 347.

123 *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, 151 DLR (4th) 577 [*Eldridge* cited to SCR].

124 *Ibid* at para 18.

125 *Ibid* at para 69.

126 *Ibid* at para 71.

127 *Ibid* at para 80.

128 *Ibid* at para 65, citing Sopinka J in *Eaton v Brant County Board of Education*, [1997] 1 SCR 241 at para 67. See also *Eldridge* at para 56 which states: “It is an unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization. Persons with disabilities have too often been excluded from the labour force, denied access to opportunities for social interaction and advancement, subjected to invidious stereotyping and relegated to institutions [...] This historical disadvantage has to a great extent been shaped and perpetuated by the notion that disability is an abnormality or flaw. As a result, disabled persons have not generally been afforded the “equal concern, respect and consideration” that s. 15(1) of the Charter demands. Instead, they have been subjected to paternalistic attitudes of pity and charity, and their entrance into the social mainstream has been conditional upon their emulation of able-bodied norms [...].”

129 *Charter*, *supra* note 117, s 7.

130 See *Charkaoui v Canada (Citizenship and Immigration)*, [2007] 1 SCR 350 at para 19, 276 DLR (4th) 594.

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134 *Ibid* at para 68.

135 *Ibid* at para 67: “Some people choose to establish their home in a particular area because of its nearness to their place of work, while others might prefer a different neighbourhood because it is closer to the countryside, to the commercial district, to a particular religious institution with which they are affiliated, or to a medical centre whose services they require. Similarly, some people may, for reasons dearly important to them, value the historical significance or cultural make-up of a given locale, others again may want to ensure that they are physically proximate to family or to close friends, while others still might decide to reside in a particular place in order to minimize their cost of living, to care for an ailing relative or, as in the case at bar, to maintain a personal relationship.”

136 *Ibid.*

137 *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 art 12(1) (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*], cited in *Godbout*, *supra* note 131 at 69.

138 *Fleming v Reid*, [1991] OJ No 1083, 4 OR (3d) 74, 1991 CanLII 2728 (ON CA) at 18 [*Fleming* cited to CanLII], cited in HCC Report, *supra* note 11 at 46. See also *Ciarlariello v Schacter*, [1993] 2 SCR 119 at 135; *AC v Manitoba (Director of Child and*

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139 *Godbout*, *supra* note 131 at 68.

140 *Canadian Human Rights Act*, RSC 1985, c H-6, s 3(1) [*CHRA*].

141 *Ibid*, s 5 [emphasis added].

142 *Human Rights Code*, RSBC 1996, c 210, s 8 [BC *Code*]; *Human Rights Code*, RSO 1990, c H 19, “Preamble” [Ontario *Code*].

143 BC *Code*, *ibid*, s 3.

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151 Alzheimer Society of Canada, *The Charter*, (Toronto: 01 July 2019), online: <alzheimer.ca/en/Home/Get-involved/The-Charter>.

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154 UN CRPD, *supra* note 40.

155 “About Inclusion BC” (Vancouver: 2020), online: *Inclusion BC* <inclusionbc.org/about/>.

156 *Ibid*.

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158 “Dementia” (Ottawa: 09 December 2019), online: *Canada* <www.canada.ca/en/public-health/services/diseases/dementia.html>.

159 Alzheimer Society of B.C., *supra* note 157.

160 Rising Tide, *supra* note 57. The total number of 328,000 is the combined number of people estimated to be living with dementia in BC. It is expected that the actual total number of BC and Ontario residents at the time this report is published will be higher than this estimate.

161 HCC Report, *supra* note 11 at 52.

162 Canadian Academy of Health Sciences, “Improving the Quality of Life and Care of Persons Living with Dementia and Their Caregivers: Canadian Academy of Health Sciences’ Assessment of Dementia Care in Canada” (Ottawa: January 2019) at 2.

163 Canada, Senate Standing Committee on Social Affairs, Science and Technology, *Dementia in Canada: A National Strategy for Dementia-friendly Communities* (November 2016) (Chair: Honourable Kelvin Kenneth Ogilvie) at 3.

164 HCC Report, *supra* note 11.

165 ASC, *supra* note 41.

166 *Ibid*. See also Canada, *supra* note 163. For more discussion on the different forms of dementia, see HCC Report, *supra* note 11 at 53-55.

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170 HCC Report, *supra* note 11 at 52.

171 ASC, *supra* note 41 at “What’s the difference between Alzheimer’s Disease and dementia?”.

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186 Daniel C Marson, “Clinical and Ethical Aspects of Financial Capacity in Dementia: A Commentary” (2013) 21:4 The American Journal of Geriatric Psychiatry 382 at 382.

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190 Daniel C Marson & Charles P Sabatino, “Financial capacity in an aging society” (Summer 2012) 36:2 Generations: Journal of the American Society on Aging 6 at 6.

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201 *Ibid* at 15.

202 Adam Gerstenecker et al, “Exploring the Factor Structure of Financial Capacity in Cognitively Normal and Impaired Older Adults” (2018) 41:1 Clinical Gerontologist 33 at 33 [doi.org/10.1080/07317115.2017.1387211].

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205 *Ibid* at 39.

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216 Browning, *supra* note 213 at 21.

217 Brain Injury Canada, *supra* note 2.

218 “Brain Injury Statistics” online: *Northern Brain Injury Association* <www.nbia.ca/brain-injury-statistics/>.

219 “About ASD” online: *Pacific Autism Family Network* <pacificautismfamily.com/about-asd/>.

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223 *Ibid.*

224 *Ibid.*

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226 *Ibid.*

227 Bach & Kerzner, *supra* note 88 at 14.

228 *Ibid.*

229 2015 IRIS Report, *supra* note 153 at 16–17.

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231 2011 IRIS Report, *supra* note 212 at 6.

232 Brain Injury Canada, *supra* note 2.

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236 Browning, *supra* note 213 at 20.

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243 2017 Report on Vulnerable Investors, *supra* note 39 at 19.

244 Canada, Task Force on Financial Literacy, “Canadians and Their Money: Building a brighter financial future—Report of Recommendations on Financial Literacy” (Ottawa: December 2010) at 10, online (pdf): <www.canada.ca/content/dam/fcac-acfc/documents/programs/financial-literacy/canadians-and-their-money.pdf>.

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247 *Ibid* at 20.

248 Mark S Lachs & S Duke Han, “Age-Associated Financial Vulnerability: An Emerging Public Health Issue” (01 December 2015) 163:11 Ann Intern Med 877 at 877, online (pdf): <www.ncbi.nlm.nih.gov/pubmed/26458261>.

249 *Ibid.*

250 *Ibid.*

251 Adapted from Table in Lachs & Han, *supra* note 248 at 5.

252 Undue Influence Guide, *supra* note 38 at 5, cited in 2017 Report on Vulnerable Investors, *supra* note 39 at 23.

253 2017 Report on Vulnerable Investors, *supra* note 39 at 22–23.

254 *Ibid.*

255 See e.g. *Decision Making Support and Protection to Adults Act*, SY 2003, c 21 (Yukon); *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2 (Alberta); *The Adult Guardianship and Co-decision-making Act*, SS 2000, c A-5.3 (Saskatchewan); *The Vulnerable Persons Living with a Mental Disability Act*, CCSM c V90 (Manitoba).

256 BC Adult Abuse and Neglect Prevention Collaborative, *supra* note 240 at 17, cited in 2014 Lived Experiences Report, *supra* note 90 at 21. See also Bach & Kerzner, *supra* note 88 at 16–17.

257 BC Adult Abuse and Neglect Prevention Collaborative, *supra* note 240 at 17.

258 See, for example, *HCCA*, *supra* note 6 at s 3 and *POAA*, *supra* note 7 at 11.

259 See e.g. *Starson v Swayze*, 2003 SCC 32 at para 80, [2003] 1 SCR 722. The Supreme Court of Canada in *Starson* considered the legal requirements to determine if a person has capacity to make decisions about their medical treatment.

260 HCC Report, *supra* note 11 at 82.

261 2017 Report on Vulnerable Investors, *supra* note 39 at 5. See also *Starson*, *supra* note 259 at para 118.

262 Canadian Centre for Elder Law & Canadian Foundation for the Advancement of Investor Rights (FAIR Canada), “Consultation Paper on Vulnerable Investor Protective Action”, (April 2017) at 6, online: *British Columbia Law Institute* <www.bcli.org/wordpress/wp-content/uploads/2017/04/170510-CONSULTATION-PAPER_withLFOLogo.pdf>.

263 Kimberly A Whaley & Ameena Sultan, “Capacity and the Estate Lawyer: Comparing the Various Standards of Decisional Capacity” (May 2013) 32:3 ETPJ 215 at 217.

264 *Ibid.*

265 See e.g. Law Commission for England and Wales, *Consultation Paper on Mentally Incapacitated Adults and Decision-Making: An Overview*, CP 119 (London: HMSO 1991) at 50–53; Law Reform Commission of Ireland, *Consultation Paper on Vulnerable Adults and the Law: Capacity*, LRC CP 37–2005 (Dublin: The Commission, 2005) at 41–50, cited in British Columbia Law Institute, *Report on Common-Law Tests of Capacity*, Report 73 (September 2013) at 17–18, online (pdf): <www.bcli.org/wordpress/wp-content/uploads/2013/09/2013-09-24_BCLI_Report_on_Common-Law_Tests_of_Capacity_FINAL.pdf>. The two other approaches to mental capacity are 1) status, and 2) outcome. The BCLI Report on Common-Law Tests of Capacity discusses each approach. See also HCC Report, *supra* note 11 at 82.

266 Law Reform Commission of Ireland, *supra* note 271 at 52.

267 See e.g. Krista James, “Consent & Capacity Part 1: Introduction to Mental Capacity & Informed Consent” (Webinar hosted by AGEWELL, online, 15 May 2018) at 10, online (pdf): *Canadian Centre for Elder Law* <www.bcli.org/wordpress/wp-content/uploads/2018/06/Mental-capacity-2018-agewell.pdf>; Valerie Le Blanc, “Best Practices When Working with Vulnerable Investors” (Presentation delivered at the 2018 Assistants Conference: For the Wealth Management Industry, Vancouver, 27 November 2018) [unpublished].

268 Whaley & Sultan, *supra* note 263 at 218.

269 *Ibid.*

270 Whaley & Sultan, *supra* note 263 at 219.

271 Whaley & Sultan, *supra* note 263 at 218.

272 For a discussion about the law on health and personal care decisions in BC, see HCC Report, *supra* note 11, ch 3.

273 “An Introduction to Adult Guardianship in British Columbia” (Vancouver: August 2016) at 1, online (pdf): *Public Guardian and Trustee of British Columbia* <www.trustee.bc.ca/Documents/adult-guardianship/Introduction_to_Adult_Guardianship.pdf>.

274 *AGA*, *supra* note 29, s 3(1).

275 *Ibid*, s 1.

276 *Ibid*, s 3(2).

277 “A Guide to the Certificate of Incapability Process under the *Adult Guardianship Act*” (Vancouver: last updated 01 May 2016) online (pdf): *Public Guardian and Trustee of British Columbia* <www.trustee.bc.ca/reports-and-publications/Pages/certificate-of-incapability-guidelines.aspx>. Discussion of the investigative powers and processes of the PGT BC, as they relate to suspected abuse or neglect of an adult, falls outside the scope of this report.

278 *RAA*, *supra* note 27. There are two types of representation agreements which are discussed in the next section of this chapter.

279 *POAA*, *supra* note 7, s 12.

280 *RAA*, *supra* note 27, s 3.

281 *Ibid*, s 2.

282 *Ibid.*

283 See *HCCA*, *supra* note 6, s 1. “**Major health care**” means major surgery, any treatment involving general anesthetic, major diagnostic or investigative procedures, or any health care designated by regulation as major health care. “**Minor health care**” means any health care that is not major health care and includes routine tests to determine if health care is necessary, and routine dental treatment that prevents or treats a condition or injury caused by disease or trauma, for example, cavity fillings and extractions done with or without a local anesthetic, and oral hygiene inspections. See also *HCCA*, s 34(2)(f).

284 *RAA*, *supra* note 27, s 7.

285 For a complete list of the decisions covered under a section 9 representation agreement, see *RAA*, *supra* note 27 s 9.

286 See HCC Report, *supra* note 11 at 89.

287 The powers, duties, and obligations for representatives acting under an RA9 falls out of scope of this study paper. For discussion on the use of section 9 non-standard representation agreements for health care consent and decision-making, see HCC Report, *supra* note 11.

288 BC Reg 199/2001 [*RAR*].

289 Capacity to make a will is a legal concept known as “testamentary capacity”. The court first set out the legal test for testamentary capacity in *Banks v Goodfellow* (1870), LR 5 QB 549 (Eng QB). The Supreme Court of Canada restated the test in *Re Schwartz* (1970) 10 DLR (3d) 15, [1970] 2 OR 61, aff’d *Laszlo v Lawton*, 2013 BCSC 305 [*Laszlo*] at para 188: “The testator must be sufficiently clear in his understanding and memory to know, on his own, and in a general way (1) the nature and extent of his property, (2) the persons who are the natural objects of his bounty and (3) the testamentary provisions he is making; and he must, moreover, be capable of (4) appreciating these factors in relation to each other, and (5) forming an orderly desire as to the disposition of his property...”. For capacity to contract, see the section on making powers of attorney later in this chapter.

290 At common law, the test for capacity to contract is set out in the 1973 Prince Edward Island Supreme Court case of *Bank of Nova Scotia v Kelly* (1973), 41 DLR (3d) 273, 5 Nfld & PEIR [*Kelly* cited to 1973 CanLII 1289 (PE SCTD)], which states at 277 that, to prove capacity to enter into a contract, a person must show that they: 1) are mentally competent at the time the contract is made and signed; 2) are “capable of understanding the terms” of the contract “and of forming rational judgment of” the effect of the contract terms on their interests; and 3) the other party has “knowledge, actual or constructive” of the person’s “mental incompetence” cited in BCLI, *Report on Common Law Tests of Capacity*, Report 73 (September 2013) at 133 & 97, n 400.

291 *RAA*, *supra* note 27, s 8(1).

292 *Ibid*, s 8(2).

293 *Ibid*, s 16(1).

294 *Ibid*, s 16(2).

295 *Ibid*, s 16(4).

296 *RAR*, *supra* note 288, Form 1, Part 2—Certifications made by representative or alternate representative, 1(e).

297 *Ibid*, s 16(6.1).

298 *RAA*, *supra* note 27, s 26(1). Note that the requirement for the court to authorize compensation under s 26(1)(c) does not apply if the representative (or alternate representative) is the Public Guardian and Trustee, and the compensation is in accordance with a regulation made under the *Public Guardian and Trustee Act*, RSBC 1996, c 383, s 23(1).

299 *POAA*, *supra* note 7, s 25(1).

300 *Trustee Act*, RSBC 1996, c 464, s 88(1).

301 *Ibid*, s 88(2). Section 88(3) of the *Trustee Act* also permits a trustee or executor to apply to the court, on an annual basis, for a care and management fee of up to 0.4 per cent of the average market value of the estate’s assets.

302 *RAA*, *supra* note 27, s 12(1).

303 *Ibid*, s 20(2), (4).

304 The *Trustee Act* provides a list of investment activities that a trustee can perform. It also sets out a standard of care that trustees must adhere to when making investment decisions.

305 *Land Tax Deferralment Act*, RSBC 1996, c 249.

306 *RAR*, *supra* note 288, s 2(1).

307 *RAA*, *supra* note 27, s 25(1).

308 *RAR*, *supra* note 288, s 2(2).

309 PGT BC, *supra* note 5 at 15.

310 *POAA*, *supra* note 7.

311 *Ibid*, s 12(2).

312 PGT BC, *supra* note 29 at 5.

313 *POAA*, *supra* note 7, s 13(2).

314 This study paper focuses on the use of EPoAs for the purposes of supported and substitute decision-making for finances. Generally speaking, PoAs are used for specific or time-limited purposes. For more information on PoAs, see PGT BC, *supra* note 29 at 5.

315 *POAA*, *supra* note 7, s 14.

316 PGT BC, *supra* note 29 at 4.

317 *POAA*, *supra* note 7, s 26(1).

318 *Ibid*.

319 *Ibid*, s 26(2).

320 PGT BC, *supra* note 29 at 4.

321 *POAA*, *supra* note 7, s 27(1).

322 *Ibid*.

323 *Ibid*.

324 *Ibid*.

325 *POAA*, *supra* note 7, s 19(2).

326 *Ibid*, s 3(a).

327 *Ibid*, s 3(b).

328 *Ibid*, s 3(c).

329 *Ibid*, s 3(d).

330 *Ibid*, s 3(e).

331 *RAR*, *supra* note 288, Form 1, Part 2—Certifications made by representative or alternate representative, 1(e) requires representatives to confirm they “have read and understand, and agree to accept, the duties and responsibilities of a representative as set out in section 16 of the *Representation Agreement Act* [...]”.

332 *AGA*, *supra* note 29, s 32.

333 *Ibid*, s 3(1).

334 2014 Lived Experience Report, *supra* note 90 at 18.

335 *AGA*, *supra* note 29, s 2.

336 *AH v Fraser Health Authority*, 2019 BCSC 227 at para 101.

337 *AGA*, *supra* note 29, s 32(1), (2). See also s 1 that defines “qualified health care provider” as “a medical practitioner or a member of a prescribed class of health care providers”. *AGA* s 1 defines “health authority designate” as any person designated by a prescribed body as having authority to issue a certificate of incapability under section 32.

338 *Ibid*, s 32(2).

339 *Ibid*, s 32(3). See also Public Guardian and Trustee of BC, “When the PGT is Committee” (Vancouver: February 2020) at 3.

340 *Ibid*, *AGA*, s 32(3).

341 *Ibid*, ss 32(4), (5). Note that *AGA* section 32 does not apply if the adult has a committee of estate under the *PPA*, per *AGA* s 32(7).

342 *AGA*, *supra* note 29, s 33(3).

343 *Patients Property Act*, RSBC 1996, c 349, s 6(1).

344 PGT BC, *supra* note 29.

345 Adapted from “An Introduction to Adult Guardianship in British Columbia” (Vancouver: August 2016) at 2, online (pdf): *Public Guardian and Trustee of British Columbia* <www.trustee.bc.ca/Documents/adult-guardianship/Introduction_to_Adult_Guardianship.pdf>. The *PPA* “would be repealed if the court ordered guardianship provisions of the *Adult Guardianship Act* are brought into force.”

346 *PPA*, *supra* note 343, s 9.

347 “Adult Guardianship in BC; Private Committeeship and Statutory (Public) Guardianship”, (Vancouver: May 2016) at 2, online (pdf): *NIDUS* <www.nidus.ca/PDFs/Nidus_Info_AdultGuardianship.pdf>.

348 *Ibid*.

349 *PPA*, *supra* note 343, s 16.

350 “When the Public Guardian and Trustee is Committee: Client Information when the PGT is acting as Committee of Estate” (Vancouver: March 2015) at 3, online (pdf): *Public Guardian and Trustee of British Columbia* <www.trustee.bc.ca/Documents/STA/When_the_PGT_is_Committee.pdf> [emphasis added].

351 *PPA*, *supra* note 343, s 18(1).

352 *Ibid*, s 18(2).

353 *Trustee Act*, *supra* note 300, s 15.2.

354 *Ibid*. See also “Fact Sheet for Private Committees: Your Investment Decisions” (Vancouver: last visited 09 February 2020) at 1, online (pdf): *Public Guardian and Trustee of British Columbia* <www.trustee.bc.ca/documents/PCS/Fact%20Sheet-Your%20Investment%20Decisions.pdf>.

355 *Ibid*.

356 *Trustee Act*, *supra* note 300, s 15.3.

357 *Ibid*, s 15.5(2).

358 *Ibid*, s 15.5(3).

359 Bill 30, *Trustee Investment Statutes Amendment Act*, 3rd Sess, 37th Leg, British Columbia, 2002 (assented to 09 May 2002), SBC 2002, c 33.

360 *Trustee Act*, RSBC 1996, c 464, s 15, as amended by *Trustee Investment Statutes Amendment Act*, SBC 2002, c 33, s 23.

361 British Columbia, *Debates of the Legislative Assembly (Hansard)*, 37–1, vol 7, No 1 (01 May 2002) at 3098 (Hon G Plant).

362 *Ibid*.

363 British Columbia Law Institute, *Report on Trustee Investment Powers*, (1999), online (pdf): <www.bcli.org/sites/default/files/TrusteeInvest.pdf>.

364 *Li v Aluma Systems Inc et al*, 2014 BCHRT 270 (CanLii) [*Li*].

365 *Ibid* at para 38, citing *Ma v Dr Iain GM Cleator and another*, 2014 BCHRT 180.

366 *Li*, *supra* note 364 at para 41.

367 “Human Rights Duties: Personal Characteristics Protected in the BC Human Rights Code” (Vancouver: last visited 20 March 2020) online: *BC Human Rights Tribunal* <www.bchrt.bc.ca/human-rights-duties/characteristics.htm>.

368 For example, Quebec and Saskatchewan have court-appointed supported decision-making roles. The Yukon has a modified version of BC’s *RAA*. Alberta allows a person to name someone to be a supporter, or the court can appoint a co-decision-maker, but both roles are limited to personal decisions. See Lived Experience report, *supra* note 96 for further discussion on supported decision-making in other Canadian jurisdictions.

369 2017 LCO report, *supra* note 12 at Section IV. Concepts of Legal Capacity and Approaches to Decision-making: Promoting Autonomy and Allocating Legal Accountability. The 2017 LCO Report acknowledges that supported decision-making is currently one of the most difficult areas for law reform.

370 *RAA*, *supra* note 27, s 2.

371 2014 Lived Experience Report, *supra* note 90 at 14.

372 See e.g. *Begg (Guardian ad litem of) v Begg*, 2013 BCSC 84 at para 37.

373 *RAA*, *supra* note 27, s 8.

374 *Ibid*, s 16(2).

375 *Ibid*, s 16(3).

376 *Ibid*.

377 Committee on the Rights of Persons with Disabilities, *General Comment No. 1 (2014) Article 12: Equal recognition before the law*, CRPD/C/GC/1, 11th Sess, UN Doc GE.14-03120 (2014) at 5.

378 *POAA*, *supra* note 7, s 12(1).

379 *Ibid*, s 14(a).

380 Andrea E Frisby, Legacy Tax + Trust Lawyers, “Powers of Attorney and Representation Agreements: (Remote) Planning for the “New Normal” (Presentation delivered at the Pacific Business Law Institute Elder Law Conference: 03 November 2020) at 31 (conference materials available to registered conference participants only).

381 *RAA*, *supra* note 27, s 29(1)(h); *PPA*, *supra* note 40, ss 1, 18, 19(b).

382 See e.g. *Darwes v Darwes*, 2012 BCSC 1323 at para 58.

383 *Témoin v Martin*, 2011 BCSC 1727 at para 55, aff’d 2012 BCCA 250 [*Témoin*], cited in Frisby, *supra* note 386 at 35.

384 SO 1996, c 2, Sched A.

385 For further reading of Ontario’s statutory framework for legal capacity in the context of health care decision-making, see 2017 LCO Report, *supra* note 12 at ch 2.

386 *SDA*, *supra* note 10, s 1(1).

387 This is not the first time a jurisdiction has adopted this approach. See HCC Report, *supra* note 11 at 82.

388 *SDA*, *supra* note 10, s 6.

389 This approach is discussed in the context of health care decision-making in HCC Report, *supra* note 11, starting at 82. For capacity to make health care decisions under the *SDA*, see s 45.

390 Ontario, Advisory Committee on Substitute Decision Making for Mentally Incapable Persons, *Final Report of the Advisory Committee on Substitute Decision Making for Mentally Incapable Persons* (Toronto: Queen’s Printer, 1987) (Stephen V Fram, Chairman).

391 Ontario, Enquiry on Mental Competency, *Enquiry on Mental Competency: Final Report* (Toronto: Queen’s Printer, 1990) (David N Weisstub, Chairman).

392 Law Commission of Ontario, *Legal Capacity, Decision-Making and Guardianship: Discussion Paper*, (Toronto: March 2014) at 33–34, online (pdf): <www.lco-cdo.org/wp-content/uploads/2014/06/capacity-guardianship-discussion-paper.pdf> [2014 LCO Paper].

393 “Bill 108, An Act to provide for the making of Decisions on behalf of Adults concerning the Management of their Property and concerning their Personal Care”, 1st reading, Ontario, Debates of the Legislative Assembly (Hansard), 35–1 (27 May 1991) at 1440 (Hon Hampton).

394 2014 LCO Paper, *supra* note 392 at 32.

395 *SDA*, *supra* note 10, s 2(1).

396 *Ibid*, s 2(3).

397 See e.g. *R v Debot*, [1989] SCR 1140 at para 54, 73 CR (3d) 129; *Hunter v Southam*, [1984] 2 SCR 145 at 167, 11 DLR (4th) 641.

398 *Foisey v Green*, 2019 ONSC 4989 (Ont Div Ct), rev’g 2017 ONSC 7140, WD Newton J [*Foisey*].

399 “There is a general legal obligation for an estate trustee (like any trustee) to keep a complete and accurate set of accounts of the assets under the estate trustee’s administration. Passing of accounts refers to the process of obtaining the court’s approval of the accounts.” Law Society of Ontario, “Passing of Accounts” (Toronto: November 2013), online: <lso.ca/lawyers/practice-supports-and-resources/practice-area/estates-and-trusts/passing-of-accounts>.

400 *Foisey*, *supra* note 398 at para 34.

401 *Ibid*.

402 *Flynn v Flynn*, 2007 CarswellOnt 10220 (Ont SCJ), cited in *Foisey*, *supra* note 398 at para 37.

403 *SDA*, *supra* note 10, s 6, cited in *Foisey*, *supra* note 398 at para 43.

404 *Foisey*, *supra* note 398 at para 64.

405 “A person who suffers from a cognitive impairment is competent with respect to a specific act as long as the act in question takes place during a lucid interval. (Ontario Guardianship Law, (Carswell: Toronto, 2014) at 23, citing *Banks v Goodfellow* (1870), LR 5 QB 549 (Eng QB)” cited in *Foisey*, *supra* note 398 at para 63.

406 *Foisey*, *supra* note 398.

407 *Foisey*, *supra* note 398 at para 46.

408 Kimberly A Whaley et al, “Standardizing the Assessment of Testamentary Capacity” (March 2017) 46:4 Adv Q 441 at 443.

409 2017 LCO Report, *supra* note 12 at 15.

410 *SDA*, *supra* note 10, s 6.

411 RSO 1990, c P 20.

412 *Ibid*, s 2.

413 *SDA*, *supra* note 10, s 7(7).

414 *Ibid*, s 8(1).

415 *Ibid*, s 9(1).

416 *Ibid*, s 31(3).

417 *Ibid*, s 8(2).

418 Ontario, Ministry of the Attorney General, The Office of the Public Guardian and Trustee, “Duties and Powers of a Guardian of Property”, (Toronto: Queen’s Printer for Ontario, 2007) (last visited 20 February 2020) online: *Ministry of the Attorney General* <www.attorneygeneral.jus.gov.on.ca/english/family/pgt/guardduties.php>.

419 *SDA*, *supra* note 10, s 31.1.

420 *Ibid*, s 32(2)–(5).

421 2017 LCO Report, *supra* note 12 at 17.

422 *SDA*, *supra* note 10, ss 32(8), (9), 38(1).

423 *Ibid*, ss 32(7), 38(1).

424 *Ibid*, s 32(3).

425 RSO 1990, c M.7.

426 *Ibid*, Part III, ss 54(1), (2), 57. See also *SDA*, *supra* note 10, s 15.

427 *Ibid*, s 54.

428 *Ibid*, s 54(4), (5).

429 *Ibid*, s 54(6)(a).

430 *Ibid*, s 54(6)(b).

431 *SDA*, *supra* note 10, s 16. For a list of people qualified to be a designated capacity assessor, see *Capacity Assessment*, O Reg 460/05, s 2(2).

432 *Ibid*, s 16(2).

433 *Ibid*, s 16(3), (4).

434 *Ibid*, s 16(5). Under section 17(1) of the *SDA*, an incapable person’s spouse or partner, relative, attorney under a CPoA, or a trust corporation can apply to the OPGT to take over guardianship of the person’s property.

435 *Ibid*, s 16(6).

436 *Ibid*, s 17(3).

437 *General*, O Reg 26/95, s 3(2) “A management plan required by subsection 17 (3) or clause 70 (1) (b) of the Act shall be in Form 2. O. Reg. 101/96, s. 1; O. Reg. 272/15, s. 1.”

438 Government of Ontario, Ministry of the Attorney General, Office of the Public Guardian and Trustee, “Form 2—Management Plan” (Toronto, Queen’s Printer for Ontario: November 2014), online (pdf): <www.attorneygeneral.jus.gov.on.ca/english/family/pgt/brochures_and_forms.php>.

439 *SDA*, *supra* note 10, s 17(5).

440 *Ibid*, s 17(4).

441 *Ibid*, s 17(6).

442 *Ibid*, s 22(1), (2).

443 *Ibid*, s 22(3).

444 *McGoey v Wedd*, 45 OR (3d) 300, 1999 CanLII 15073 (ON SC).

445 *SDA*, *supra* note 10, s 24(5).

446 *Koch (Re)*, [1997] OJ No 1487, 1997 CanLII 12138 (ON SC) [*Koch* cited to CanLII].

447 *Koch*, *ibid* at Part VIII—Summary of Findings, para 13.

448 *Ibid* at para 11.

449 *Ibid* at para 14.

450 *Ibid* at para 15.

451 *Ibid*.

452 *Ibid* at paras 17, 19, 20.

453 This principle was raised in a 2015 decision of the Ontario Consent and Capacity Board, *ED (Re)*, 2015 CanLII 28960 (ON CCB). The *ED (Re)* case involved a 70-year-old man, ED, who attended at the emergency department of a hospital complaining of chest pains. ED was involuntarily detained because the attending physician argued “that ED suffered from mental disorder of a nature or quality that would likely result in serious physical impairment of himself unless he remained in the custody of a psychiatric facility, and that he was unsuitable for voluntary status.” The physician also assessed ED as being incapable of managing his property, but “acknowledged that if ED had assistance he would be able to manage his property.” Counsel for ED argued that the ruling in *Koch* suggested that a finding of incapability can be overturned on the basis that ED could manage his property with assistance. Although, “the panel unanimously found that ED was capable of managing his own property”, the ruling was based solely on the physician’s failure to provide sufficient evidence to prove ED’s incapability on a balance of probabilities.

454 *Ibid*.

455 *LL (Re)*, 2016 CanLII 31950 (ON CCB).

456 *Ibid*.

457 *SDA*, *supra* note 10, s 31(1).

458 *Ibid*, s 34.

459 *Ibid*, s 32(1).

460 *Ibid*, s 32(1.1.).

461 *Ibid*, ss 32(1.2), (1.3).

462 *Ibid*, s 32(2).

463 *Ibid*, s 32(3).

464 *Ibid*, s 32(4).

465 *Ibid*, s 32(5)(a), (b).

466 *Ibid*, s 32(6). See also *Accounts and Records of Attorneys and Guardians*, O Reg 100/96.

467 *Ibid*, s 32(7).

468 *Ibid*, s 32(8). This section applies to the PGT, per *SDA*, s 32(9).

469 *Ibid*, ss 32(10), (11).

470 *Ibid*, s 33.1.

471 RSO 1990, c T 23.

472 *Ibid*, s 27(1) and (2).

473 *SDA*, *supra* note 10, s 32(12).

474 Ontario Human Rights Commission, *Policy on ableism and discrimination based on disability*, (Policy Guidance), (Toronto: 27 June 2016) online (pdf): <www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability> [2016 OHRC Policy]. The report is an update to the Ontario Human Rights Commission, *Policy and Guidelines on Disability and the Duty to Accommodate* (Toronto: 23 November 2000, last revised December 2009), online (pdf): <www3.ohrc.on.ca/sites/default/files/policy%20and%20guidelines%20on%20disability%20and%20the%20duty%20to%20accommodate.pdf>.

475 2016 OHRC Policy, *supra* note 474 at 3.

476 *Ibid*.

477 Ontario *Code*, *supra* note 142, ss 45.5, 45.6.

478 Law Commission of Ontario, *A Framework for the Law as it Affects Persons with Disabilities: Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice*, (Report) (Toronto: September 2012) at 2 [LCO Framework], cited in 2016 OHRC Policy, *supra* note 474 at 10.

479 2016 OHRC Policy, *supra* note 480 at 11.

480 *Ibid*.

481 *Ibid* at 8.

482 Ontario *Code*, *supra* note 142, s 10.

483 2016 OHRC Policy, *supra* note 474 at 14.

484 *Ibid* at 12.

485 *Ibid* at 8.

486 *Ibid*.

487 Ontario *Code*, *supra* note 142, s 10.

488 *Ibid*, s 1.

489 *Ibid*, s 10(3).

490 *Mou v MHPM Project Leaders*, 2016 HRTO 327 at para 16 (CanLII) [*Mou*].

491 See e.g. 2016 OHRC Policy, *supra* note 474 at 9.

492 *Eaton*, *supra* note 128 at para 67.

493 2016 OHRC Policy, *supra* note 474 at 10.

494 *Ibid* at 20.

495 Lana Kerzner, “Paving the way to Full Realization of the CRPD’s Rights to Legal Capacity and Supported Decision-Making: A Canadian Perspective” (Paper delivered at the Peter Wall Institute Exploratory Workshop, University of British Columbia, Vancouver, April 2011) at 63.

496 Ontario *Code*, *supra* note 142, s 17(2).

497 *Ibid*, Preamble.

498 2016 OHRC Policy, *supra* note 474 at 29–31.

499 Ontario Human Rights Commission, *Policy on preventing discrimination based on Mental health disabilities and addictions*, (Toronto: 18 June 2014) at 39, online (pdf): <www.ohrc.on.ca/en/policy-preventing-discrimination-based-mental-health-disabilities-and-addictions> [2014 OHRC Policy].

500 *Ibid*.

501 *Ibid* at 40.

502 *Ibid*.

503 *Ibid*.

504 *Ibid*.

505 2017 LCO Report, *supra* note 12 at 89.

506 *Ibid* at 90.

507 *Ibid*.

508 *Ibid.*

509 “Bill 108, An Act to provide for the making of Decisions on behalf of Adults concerning the Management of their Property and concerning their Personal Care”, 2nd reading, Ontario, Debates of the Legislative Assembly (Hansard), 35–1 (20 June 1991) at 1650 (Hon Hampton) [Bill 108].

510 *Ibid* [emphasis added].

511 *Ibid.*

512 See Robert M Gordon, “The Emergency of Assisted (Supported) Decision-Making in the Canadian Law of Adult Guardianship and Substitute Decision-Making” (2000) 23:1 Intl J L & Psychiatry 61 at 70 (Elsevier) [Gordon].

513 Bill 108, *supra* note 509.

514 *Ibid.*

515 HCC Report, *supra* note 11 at 27.

516 British Columbia, Elder Abuse Curricular Resource, “Elder Abuse Reduction: Instructor’s Guide”, (Vancouver: July 2015) at 136, online: <solr.bccampus.ca:8001/bcc/items/8d5b3363-396e-4749-bf18-0590a75c9e6b/1/> [Elder Abuse Resource]. See also HCC Report, *ibid*.

517 South Australian Public Advocate, “What is Supported Decision Making” (Adelaide: 10 April 2013) online: *Office of the Public Advocate* <www.opa.sa.gov.au/resources/supported_decision_making/what_is_supported_decision_making> cited in Elder Abuse Resource, *ibid*.

518 Michell Browning, Christine Bigby & Jacinta Douglas, “Supported Decision Making: Understanding How its Conceptual Link to Legal Capacity is Influencing the Development of Practice” (2014) 1:1 Research and Practice in Intellectual and Developmental Disabilities 34 at 35, online (pdf): <www.tandfonline.com/doi/pdf/10.1080/23297018.2014.902726?needAccess=true>.

519 See e.g. M Bach, “Securing self-determination: building the agenda in Canada”, (Toronto: 1998), cited in Browning, Bigby & Douglas, *ibid*. See also “Position on Legal Capacity” (Toronto: June 2010) at 1, online (pdf): *Canadian Association for Community Living* <cacl.ca/wp-content/uploads/2018/01/CACL-Position-legal-capacity_0.pdf> [CACL].

520 See e.g. Gordon, *supra* note 512 at 65. See also at A-3; David Godfrey & Morgan K Whitlatch, “Defining Supported Decision-Making—SDM in Advance Care Planning” (Paper delivered at the American Bar Association 2017 National Aging and Law Conference, Maryland, 25 October 2017); HCC Report, *supra* note 11 at 85.

521 Gordon, *supra* note 512. See also “Capacity and Legal Representation for the Federal RDSP: Final Report” (Toronto: June 2014 at 1, online (pdf): *Law Commission of Ontario* <www.lco-cdo.org/wp-content/uploads/2014/11/rdsp-final-report.pdf> [LCO 2014 Report].

522 Gordon, *supra* note 512 at 65.

523 *Ibid*; See also 2014 Lived Experiences REport, *supra* note 90 at 20; Godfrey & Whitlatch, *supra* note 520 at A-3: “We all practice [supported decision-making] in our daily lives. When we are sick, we ask medical professionals for a diagnosis and advice and make a choice on the treatment we want or do not want based on that information. When we take our cars in for service, the “service advisor” makes recommendations on work to be done, and we make choices based on that advice. We select advisors -- be they doctors, mechanics, bankers or plumbers [--] based on how they treat us and how we feel about their advice. As adults we engage in supported decision-making all of the time.”

524 “Supported decision-making: An alternative to guardianship” (Budapest: 2006) at 3, online (pdf): *Mental Disability Advocacy Center* <www.mdac.org/sites/mdac.info/files/English_Supported_Decision-making_An_Alternative_to_Guardianship.pdf> [MDAC], cited in HCC Report, *supra* note 11 at 85; see also 2014 Lived Experiences Report, *supra* note 90 at 19–20.

525 MDAC, *ibid*.

526 CACL, *supra* note 519 at 1.

527 *Ibid*.

528 Gordon, *supra* note 512 at 63.

529 *Ibid*. See *Civil Code of Quebec*, SQ 1991, c 64, s 258 which states that “A tutor or curator is appointed to represent, or an adviser to assist, a person of full age who is incapable of caring for himself or herself or of administering property by reason, in particular, of illness, deficiency or debility due to age which impairs the person’s mental faculties or physical ability to express his or her will. A tutor or an adviser may also be appointed to a prodigal who endangers the well-being of his or her married or civil union spouse or minor children.”

530 Lana Kerzner, “Paving the way to Full Realization of the CRPD’s Rights to Legal Capacity and Supported Decision-Making: A Canadian Perspective” (Paper delivered at the Peter Wall Institute Exploratory Workshop, University of British Columbia, Vancouver, April 2011) at 31, online (pdf): <citizenship.sites.olt.ubc.ca/files/2014/07/In_From_The_Margins_Paper-Lana_Kerzner-FINAL-April_22_2011__2_.pdf>. Canadian statutes outside BC and Ontario that currently recognize support in decision-making are: *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2 (Alberta); *Adult Guardianship and Co-decision Making Act*, SS 2000 c A-5.3 (Saskatchewan); *The Vulnerable Persons Living with a Mental Disability Act*, CCSM 1993 c V90 (Manitoba); *Adult Protection and Decision Making Act*, SY 2003, c 21, Sch A (Yukon).

531 For detailed discussion on how supported decision-making has been adopted in the laws of other Canadian provinces, see 2014 Lived Experiences Report, *supra* note 90.

532 See e.g. Gordon, *supra* note 512; see also Justice Marion Allan & Laura Watts, Canadian Centre for Elder Law, *A Comparative Analysis of Adult Guardianship Laws in BC, New Zealand and Ontario*, CCEL Report No 4, BCLI Report No 46 (Vancouver: October 2006) at 7, online: *British Columbia Law Institute* <www.bcli.org/elder-law-resources/ccel-publications/reports>, cited in 2014 Lived Experiences Report, *supra* note 90 at 15–16.

533 Browning, Bigby & Douglas, *supra* note 518 at 35.

534 British Columbia, Joint Working Committee, Interministry Committee on Issues Affecting Dependent Adults & Project to Review Adult Guardianship, *How can we help? A new look at self-determination, interdependence, substitute decision making and guardianship in B.C.: a paper inviting public and government discussion and comment* (Victoria: Interministry Committee on Issues Affecting Dependent Adults; Project to Review Adult Guardianship, 1992) at 2 [BC Discussion Paper]. See also British Columbia, Joint Working Committee on Dependent Adults, *How can we help?: a new look at self-determination, interdependence, substitute decision making and guardianship in B.C.: a report providing recommendations for legislation and policy* (Victoria, The Committee, 1992).

535 BC Discussion Paper, *supra* note 534 at 3. This statement formed part of principle 2 of “five fundamental principles” set out in the BC Discussion Paper. The other principles were the right to autonomy and self-determination (principle 1), entitlement to a legal presumption of capacity to make decisions (principle 3), use of court procedures and orders only as a last resort (principle 4), and accessibility of support (principle 5).

536 *Ibid* at 1.

537 Gordon, *supra* note 512.

538 *RAA*, *supra* note 27, s 2.

539 *Ibid*, s 16(1).

540 *Ibid*, s 16(2).

541 *Ibid*. s 16(4).

542 2014 Lived Experiences Report, *supra* note 90 at 14.

543 Justice Allan & Watts, *supra* note 532, cited in 2014 Lived Experiences Report, *supra* note 90 at 15–16.

544 2014 Lived Experiences Report, *ibid* at 17.

545 *Ibid*.

546 Ontario, Stephen V Fram, Chairman, Advisory Committee on Substitute Decision Making for Mentally Incapable Persons, *Final Report of the Advisory Committee on Substitute Decision Making for Mentally Incapable Persons*, (Toronto: Queen’s Printer, 1987).

547 Ontario, David N Weisstub, Chairman, Enquiry on Mental Competency, *Enquiry on Mental Competency: Final Report*, (Toronto: Queen’s Printer, 1990). See also “Review of Advocacy for Vulnerable Adults, Terms of Reference, January 1987” in

Ontario, Sean O’Sullivan, Ministry of the Attorney General, *You’ve Got a Friend: A Review of Advocacy in Ontario* (Toronto: August 1987) [O’Sullivan Report].

548 O’Sullivan Report, *supra* note 553 at 80.

549 *Ibid.*

550 2017 LCO Report, *supra* note 12 at 63.

551 See Canada, “Archived—Budget Plan 2011 Chapter 4.2: Supporting Families and Communities” (Ottawa: 22 March 2011) online: <www.budget.gc.ca/march-mars-2011/plan/chap4b-eng.html>. Launched in October 2011, the three-year review of the federal RDSP program sought input from people living with a disability and financial institutions on RDSP program eligibility and operational requirements, the impact of the Disability Tax Credit eligibility criteria on people living with periodic disabilities, and challenges faced in accessing and setting up an RDSP. See also Canada, “Jobs, Growth and Long-Term Prosperity: Economic Action Plan 2012” (Ottawa: 29 March 2012) online: <www.budget.gc.ca/2012/plan/pdf/Plan2012-eng.pdf>.

552 LCO 2014 Report, *supra* note 521.

553 *Ibid* at (iii).

554 *Ibid* at 36–7.

555 *Ibid* at 38.

556 LCO 2017 Report, *supra* note 12 at 68. See also Law Commission of Ontario, “Legal Capacity, Decision-Making and Guardianship: Discussion Paper” (Toronto: May 2014) at 134–135.

557 *Ibid* at 85.

558 *Ibid.*

559 *Ibid.*

560 *Ibid* at 96.

561 *Adult Guardianship and Trusteeship Act*, SA 2008, c A–4.2 [*AB AGTA*]

562 2017 LCO Report, *supra* note 12 at 99.

563 *AB AGTA*, *supra* note 561, s 4(1).

564 *Ibid*, s 4(2).

565 *Ibid* s 6.

566 2017 LCO Report, *supra* note 12 at 100.

567 *Ibid* at 100–105.

568 *Ibid* at 106.

569 *Ibid.*

570 *Ibid* at 107.

571 *Ibid* at 106.

572 *Ibid.*

573 *Ibid.*

574 *Ibid* at 107.

575 *Ibid* at 108.

576 *Ibid* at 58.

577 *Ibid* at 69.

578 *Ibid* at 105.

579 *Ibid* at 102.

580 For a full and complete list of the key features, see *ibid* at 105.

581 2017 LCO Report, *supra* note 12 at 102.

582 J A Simpson & E S C Weiner, eds, *The Oxford English Dictionary*, (2d) (Oxford: Clarendon Press, 1989) sub verbo “support” [OED].

583 *Ibid*, sub verbo “substitute”.

584 Nina A Kohn, Jeremy A Blumenthal & Amy T Campbell, “Supported Decision-Making: A Viable Alternative to Guardianship” (Spring 2013) 117:4 Penn St L Rev 1111 at 1120.

585 Browning, *supra* note 213 at 184.

586 Law Commission of Ontario, *Legal Capacity, Decision-making and Guardianship: Interim Report* (Toronto: October 2015) at 131–32, online: <www.lco-cdo.org/capacity-guardianship-interim-report.pdf> [LCO *Interim Report*].

587 *Ibid* at 132.

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591 2014 Lived Experiences Report, *supra* note 90 at 5.

592 UN CRPD, *supra* note 40 at 9, art 12 (2).

593 *Ibid* at art 12 (3), (4), (5) [emphasis added].

594 United Nations Office of the High Commissioner for Human Rights, *From Exclusion to Equality: Realizing the rights of persons with disabilities (Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol)*, No 14, UNOHCHR (Geneva: United Nations, 2007) at 90–91, online: <www.ohchr.org/_layouts/15/WopiFrame.aspx?sourcedoc=/Documents/Publications/training14en.pdf&action=default&DefaultItemOpen=1>.

595 Committee on the Rights of Persons with Disabilities, *General Comment No. 1—Article 12: Equal Recognition Before the Law*, UN Doc CRPD/C/GC/1 at 1 (adopted at the 11th Session, 31 March to 11 April 2014), online (pdf): <documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement> [2014 General Comment].

596 Cliona de Bhailís & Eilionóir Flynn, “Recognising legal capacity: commentary and analysis of Article 12 CRPD” (2017) 13:1 International Journal of Law in Context 6 at 12 (Cambridge University Press).

597 Gordon, *supra* note 512 at 65.

598 *Ibid.*

599 de Bhailis & Flynn, *supra* note 596.

600 “Supported decision-making: An alternative to guardianship” (Budapest: 2006) at 3, online (pdf): *Mental Disability Advocacy Centre* <www.mdac.org/sites/mdac.info/files/English_Supported_Decision-making_An_Alternative_to_Guardianship.pdf>, cited in HCC Report, *supra* note 11 at 85; see also 2014 Lived Experiences Report, *supra* note 90 at 19–20.

601 Lana Kerzner, “Paving the way to Full Realization of the CRPD’s Rights to Legal Capacity and Supported Decision-Making: A Canadian Perspective” (Paper prepared for In from the Margins: New Foundations for Personhood and Legal Capacity in the 21st Century, 22 April 2011) at 15, online: *Centre for Inclusion and Citizenship, University of British Columbia* <citizenship.sites.olt.ubc.ca/files/2014/07/In_From_The_Margins_Paper-Lana_Kertzner-FINAL-April_22_2011__2_.pdf>.

602 2014 Lived Experiences Report, *supra* note 90 at 18–19.

603 Eilionóir Flynn & Anna Arstein-Kerslake “Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity” (2014) 10:1 International Journal of Law in Context 81, cited in *ibid*. See also Kohn, Blumenthal & Campbell, *supra* note 584 at 1121.

604 2014 Understanding the Lived Experiences Report, *supra* note 90 at 51.

605 *Ibid* at 53.

606 *Ibid* at 51.

607 *Adult Guardianship and Trusteeship Act*, SA 2008, c A–4.2, s 6(1).

608 *Ibid*, s 10(2).

609 2014 Lived Experiences Report, *supra* note 90 at 5.

610 *Ibid.*

611 *Adult Guardianship and Trusteeship Act*, *supra* note 607.

612 2014 Lived Experiences Report, *supra* note 90 at 17.

613 *Ibid.*

614 *Ibid* at 52.

615 *Ibid*.

616 *Ibid*.

617 *Ibid*.

618 *RAA*, *supra* note 27, s 16(1).

619 *Ibid*, s 20.

620 2014 Lived Experiences Report, *supra* note 90 at 78–79.

621 *Decision-Making Support and Protection to Adults Act*, SY 2003, c 21, s 5(2).

622 LCO Interim Report, *supra* note 586 at 131–32.

623 2014 Lived Experiences Report, *supra* note 90 at 8.

624 *Ibid*.

625 2017 Report on Vulnerable Investors, *supra* note 39 at 20.

626 LCO Interim Report, *supra* note 586 at 138.

627 2014 Lived Experiences Report, *supra* note 90 at 9.

628 *Ibid*.

629 *Ibid* at 8.

630 Gavin Davidson et al, “Supported decision making: A review of the international literature” (2015) 38 Intl J L & Psychiatry 61 at 61 [Davidson et al].

631 *RAA*, *supra* note 27, s 16(6.1).

632 *RAR*, *supra* note 288 says ““mutual fund manager”has the same meaning as in the Securities Act; “qualified investment specialist”means an individual who (a) is registered under the Securities Act to trade in or advise on securities or exchange contracts, and (b) is acting within the scope of the discretionary authority provided by his or her registration.”

633 HCC Report, *supra* note 11 at 87.

634 “InvestRight: Savings vs Investing” (last visited 28 February 2020), online: *BC Securities Commission* <www.investright.org/get-started-with-investing/saving-vs-investing/>.

635 OED, *supra* note 582, sub verbo “invest”.

636 *Ibid*, sub verbo “investment”.

637 Adapted from “The basics of investing” (last modified 29 April 2019) online: *Canada, Financial Consumer Agency of Canada* <canada.ca/en/financial-consumer-agency/services/savings-investments/investing-basics.html>.

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639 *Ibid*. See also Revenu Quebec, “Quebec Education Savings Incentive” (Quebec: last visited 02 November 2020) online: <www.revenuquebec.ca/en/citizens/tax-credits/quebec-education-savings-incentive/>.

640 *Ibid*.

641 Ontario, Ministry of Finance, “Financial Advisory and Financial Planning Regulatory Policy Alternatives: Advisory and Financial Planning Policy Alternatives” (Toronto: 01 November 2016), online: <fin.gov.on.ca/en/consultations/fpfa/fpfa-final-report.html#ch6>.

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643 *Ibid*.

644 “Savings and Pension Plans: Registered Disability Savings Plan (RDSP)” (last modified 01 April 2019), online: *Canada* <www.canada.ca/en/revenue-agency/services/tax/individuals/topics/registered-disability-savings-plan-rdsp.html>.

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646 Canada, Employment and Social Development Canada, *Notice #347—Changes Proposed in Budget 2019 to the Registered Disability Savings Plan*, (Information Bulletin No CDSP/PCEI-2019/20-001-347) (Ottaway: 30 May 2019), online: <www.canada.ca/en/employment-social-development/programs/disability/savings/issuers/bulletins/notice-2019-347.html>.

647 “Canada disability savings grant and Canada disability savings bond” (Ottawa: last modified 06 February 2019), online: *Canada* <canada.ca/en/revenue-agency/services/tax/individuals/topics/registered-disability-savings-plan-rdsp/canada-disability-savings-grant-canada-disability-savings-bond.html>.

648 *Ibid*.

649 *Ontario (Director of Income Maintenance Branch of the Ministry of Community and Social Services) v. Henson*, [1987] OJ No 1121, aff’d [1989] OJ No 2093 (Ont CA) [*Henson*].

650 OED, *supra* note 582, sub verbo “discretionary trust” means “a trust under the terms of which the trustees are allowed to make payments of capital and income to any class of beneficiary that they think appropriate, possibly guided by non-binding letters expressing the settlor’s wishes.”

651 Ian M Hull, Hull & Hull LLP, “Henson Trust—Advantages and Disadvantages” (21 December 2015), online: <hullandhull.com/2015/12/henson-trust-advantages-and-disadvantages/>.

652 *SA v Metro Vancouver Housing Corp*, 2019 SCC 4.

653 *SA v Metro Vancouver Housing Corporation*, 2017 BCCA 2, aff’g *SA v Metro Vancouver Housing Corporation*, 2015 BCSC 2260.

654 *SA v Metro Vancouver Housing Corp* 2019, *supra* note 658 at para 54.

655 *Ibid* at para 56.

656 *Ibid* at para 55.

657 “Step-by-Step Guide to Becoming Eligible, Opening and Managing Your RDSP” (Vancouver: October 2016) at 18, online (pdf): *Plan Institute* <rdsp.com/wp-content/uploads/2016/10/PI_SBS_Guide_160211_HR-2.pdf>.

658 BC Securities Commission, *supra* note 634 at “Understanding risk and return”.

659 *Ibid*.

660 Adapted from BC Securities Commission, *supra* note 634 at “Risk Tolerance”.

661 Canadian Securities Administrators, “Investments at a glance” (Montreal: last modified 28 October 2013), online (pdf): <securities-administrators.ca/uploadedFiles/General/pdfs/Investments_at_a_glance_E.pdf>.

662 *Ibid*.

663 Reproduced with permission, courtesy of Plan Institute BC, *supra* note 657 at 19.

664 “Financial System Committees” (Ottawa: undated), online: *Bank of Canada* <bankofcanada.ca/core-functions/financial-system/financial-system-committees/>.

665 Canada, Department of Finance, “Mandate” (last modified 10 October 2018), online: <canada.ca/en/departement-finance/corporate/mandate.html>.

666 Canada, Office of the Superintendent of Financial Institutions, “About OSFI” (last modified 03 March 2020), online: <osfi-bsif.gc.ca/Eng/Pages/default.aspx>. OSFI’s oversight is guided by the following federal statutes: *Bank Act*, SC 1991, c 46; *Cooperative Credit Associations Act*, SC 1991, c 48; *Insurance Companies Act*, SC 1991, c 47; *Trust and Loan Companies Act*, SC 1991, c 45.

667 Bank of Canada, “About the Bank, online: <www.bankofcanada.ca/about/>.

668 “About CDIC” (Ottawa: undated) online: *Canadian Deposit Insurance Corporation* <cdic.ca/about-us/>.

669 Financial Consumer Agency of Canada, “Home” (Ottawa: last modified 19 February 2020), online: <canada.ca/en/financial-consumer-agency.html>.

670 “Self Regulatory Organizations (SROs)” (Vancouver: undated) online: *BC Securities Commission* <bsc.bc.ca/Marketplaces/SRO/>.

671 See e.g. *Securities Act*, RSBC 1996, c 418, s 24; *Securities Act*, RSO 1990, c S.5, s 21.1(1).

672 “About”, online: *Mutual Fund Dealers Association of Canada* <mfd.ca/about/>. According to its website, the MFDA has an agreement with the Quebec Autorité des marchés financiers to participate in the regulation of mutual fund dealers in the province. As at 31 December 2019, the MFDA has 91 members. For a list of all MFDA members, see the Directory of Members <mfd.ca/members/directory-of-members/>.

673 “SRO Recognition and Oversight” online: *Mutual Find Dealers Association* <mfd.ca/about/sro-recognition/>. “The MFDA is formally recognized as a self-regulatory organization (SRO) by the provincial securities regulatory authorities in Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, Prince Edward Island and Saskatchewan (Recognizing Regulators).”

674 The Financial Advisors Association of Canada (Advocis), “About Us” (Toronto) online: <myadvocis.ca/contact-advocis/>. The website indicates there are currently over 13,000 Advocis members across Canada.

675 “About IFIC”, online: *Investment Funds Institute of Canada* <ific.ca/en/pg/about-ific/>.

676 “Who we are”, online: *Investment Industry Association of Canada* <iiac.ca/who-we-are/>.

677 *Ibid*.

678 “About FP Canada”, online: *FP Canada* <fpcanada.ca/about-fp-canada>.

679 *Ibid*. FP Canada Standards Council™ “establishes and enforces financial planning standards, sets the certification requirements for professional financial planners and develops and delivers certification examinations.”

680 *Ibid*. FP Canada Institute™ “provides professional education, practice support tools and other resources to financial planners and financial planning students to help them meet the needs and expectations of all Canadians seeking financial planning advice from a certified professional.”

681 *Ibid*. The website notes that “through a strategic partnership with Institut québécois de planification financière (IQPF), the only body in Québec authorized to confer financial planning diplomas, FP Canada’s standards are adopted nationally.”

682 In most Canadian provinces there is no legislated standard in place for the estimated 100,000 people who claim to offer financial advice. With the exception of Québec, people who call themselves financial planners are not required to obtain any credentials whatsoever.

683 “Standards of Professional Responsibility” (01 January 2020) at 23, online (pdf): *FP Canada* <fpcanada.ca/docs/default-source/standards/standards-of-professional-responsibility.pdf>.

684 *Ibid* at 15, s 22.

685 *Ibid* [emphasis added].

686 “Who We Are”, online: *Canadian Securities Administrators* <securities-administrators.ca/aboutcsa.aspx?id=77>.

687 *Ibid* at “Our Mission”.

688 “About CSI”, online: *Canadian Securities Institute* <csi.ca/student/en_ca/about/index.xhtml>.

689 “About OBSI”, online: *Ombudsman for Banking Services and Investments (OBSI)* <obsi.ca/en/about-us/about-us.aspx>.

690 Ombudsman for Banking Service and Investments & Canadian Securities Administrators, “Amended and Restated Memorandum of Understanding concerning oversight of the Ombudsman for Banking Services and Investments” (01 December 2015) online (pdf): *OBSI* <obsi.ca/en/about-us/resources/Documents/mou_20151202.pdf>.

691 *Ibid* at 1. See e.g. *National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations*, BC Reg 226A/2009 (British Columbia Securities Commission), s 13.16(2)(c) [NI 31-103]. For commentary on the memorandum and NI 31-103, see CSA, News Release, “Canadian Securities Regulators Mandate OBSI’s Dispute Resolution Service for Registered Dealers and Advisers” (19 December 2013), online: <securities-administrators.ca/aboutcsa.aspx?id=1205>.

692 OBSI, *supra* note 689; CSA, *supra* note 686 at 3.

693 For a list of provincial and territorial securities commissions, see “Federal oversight bodies and other regulators” (Ottawa: last modified 26 November 2019) online: *Canada* <canada.ca/en/financial-consumer-agency/corporate/federal-oversight-bodies-regulators.html>.

694 See e.g. Ontario Securities Commission (OSC) “Schedule D: NP 11-204 Process for Registration in Multiple Jurisdictions” (2009) 32 OSCB (Supp-2) (Toronto: 17 July 2009) online (pdf): <osc.gov.on.ca/documents/en/Securities-Category1/pol_20090717_11-204_schedule-d.pdf>.

695 “Who We Are: Mission, Values & Overall Benefits” (Vancouver) online: *BC Securities Commission* <besc.bc.ca/About_Us/Who_We_Are/Mission/>.

696 *Ibid* at “Enforcement”.

697 “About our role”, online: *Ontario Securities Commission* <osc.gov.on.ca/en/About_our-role_index.htm>.

698 BC Securities Commission, “National Smarter Investor Study: Public Opinion Research” (Vancouver: November 2015) at 16, online (pdf): <besc.bc.ca/uploadedFiles/About_Us/Publications/Smarter%20Investor%20Study%20FULL%20REPORT.pdf?t=1579995189208>.

699 *Ibid* at 39.

700 *Ibid* at 53.

701 The CSI has a detailed schematic diagram of the financial services roles within other investment sectors, like management/supervisory, transactional, or institutional/corporate: “Financial Services Career Map” (last visited 09 March 2020) online: *Canadian Securities Institute* <csi.ca/student/en_ca/careermap/index.xhtml>.

702 *Ibid*. Of note is that the CSI description states investment representatives can advise clients “on matters relating to dividends and interest: “Investment Representative”, online: *Canadian Securities Institute* <csi.ca/student/en_ca/careermap/careers/retail/transactional/investment-dealer/investment-representative.xhtml>.

703 Information used to develop this diagram was gathered from the CSI Financial Services Career Map.

704 *Ibid*.

705 “Portfolio Manager” online: *Canadian Securities Institute* <csi.ca/student/en_ca/career/portfolio/pm.xhtml>.

706 *Ibid*. Portfolio Managers have CSI training, and may also be certified as a Chartered Financial Analyst (CFA).

707 See e.g. 2014 Lived Experiences Report, *supra* note 90.

708 Investment Industry Regulatory Organization of Canada, “IIROC Dealer Member Rules” (Toronto: 14 November 2019), ss 1300.1, 2500, online (pdf): <iiroc.ca/RuleBook/MemberRules/RulesCollated_en.pdf> [IIROC DMR]; see also IIROC, “How IIROC protects investors” (Toronto: last modified 29 March 2018) at 4, online (pdf): IIROC <iiroc.ca/industry/member-resources/Documents/How-IIROC-protects-investors.pdf>.

709 *Ibid*, s 1300.1(p).

710 2017 Report on Vulnerable Investors, *supra* note 39 at 25.

711 *Ibid* at 24.

712 IIROC DMR, *supra* note 708, Rules 1300.1(r)(iii), 2500(II): Opening New Accounts, A--Documentation.

713 *Ibid*.

714 2017 Report on Vulnerable Investors, *supra* note 39 at 24. See also IIROC DMR, *supra* note 708, R 1300.1.

715 *Ibid*.

716 Investment Industry Regulatory Organization of Canada, “Notice 09-0086—Rules Notice—Response to Comments received on draft guidance notice: “Best practices for product due diligence” (Toronto: 23 March 2009) at 3, online (pdf): <iiroc.ca/Documents/2009/555D780F-9EEA-4D13-BBBD-4F6516A44D8F_en.pdf>.

717 Investment Industry Regulatory Organization of Canada, “Rules Notice Guidance Note—Dealer Member Rules” No 12-0109 (Toronto: 26 March 2012) at 5, online (pdf): <iiroc.ca/Documents/2012/d21b2822-bcc3-4b2f-8c7f-422c3b3c1de1_en.pdf>. See also Investment Industry Regulatory Organization of Canada, “Best Practices for product due diligence” Guidance Note 09-0087 (Toronto: 25 March 2009).

718 *Ibid* at 2.

719 *Ibid* at 4.

720 Investment Industry Regulatory Organization of Canada, “Rules” (Toronto: effective 01 June 2020) at 20, online (pdf): <iiroc.ca/Rulebook/PPLRuleBook/IIROC_Rule_Book_clean_en.pdf> [IIROC Rules].

721 IIROC Rules, *ibid* at 123, Part B—Conflicts of Interest, Rule 3111.

722 BC Securities Commission, “NI 23-101—*Trading Rules*” (Toronto: effective 10 April 2017) Rule 4.2, online (pdf): <besc.bc.ca/Securities_Law/Policies/Policy2/PDF/23-101__NI__April_12__2017/>.

723 *Ibid* at Part 1—Definition and Interpretation, Rule 1.1 “best execution”.

724 BC Securities Commission, “Companion Policy 23-101 CP—*Trading Rules*” (Toronto: effective 10 April 2017) at 10-11, Part 4—Best Execution, Rule 4.1(3) online (pdf): <bcsc.bc.ca/Securities_Law/Policies/Policy2/PDF/23-101CP__CP__April_12__2017/> [BCSC Companion Policy]. See also Investmnet Industry Regulatory Organization of Canada, “IIROC Notice 17-0138—Rules Notice—Guidance on Best Execution” (Toronto: 06 July 2017) at 4, online (pdf): <iiroc.ca/Documents/2017/1b8dfd31-462d-4a5d-8bdb-3cc2605b9d2c_en.pdf>.

725 BCSC, Companion Policy, *ibid*, cited in 2017 Vulnerable Investors Report, *supra* note 39 at 27.

726 BCSC, Companion Policy, *ibid*.

727 IIROC Rules, *supra* note 720 at 127, Rule 3121. Best execution factors.

728 2017 Report on Vulnerable Investors, *supra* note 29 at 27.

729 Mutual Fund Dealers Association of Canada, *Rules* (Toronto: 12 April 2018) at Rule 2.2.1, “Know-Your-Client”, online (pdf): <mfdca.ca/wp-content/uploads/Rules-Apr18.pdf> [MFDA Rules].

730 *Ibid* at Rule 2.2.1(a).

731 A margin call usually means that one or more of the securities held in the margin account has decreased in value below a certain point. The investor must either deposit more money in the account or sell some of the assets held in the account.

732 Mutual Fund Dealers Association of Canada, “Suitability—Research Paper on Canadian Securities Regulatory Authority Decisions” Bulletin No 0713-P (Toronto: 24 January 2017), online: <mfdca.ca/bulletin/0713-p/>. See also Mutual Fund Dealers Association of Canada, “MSN-0069—Suitability” (Toronto: 14 April 2008), online: <mfdca.ca/notice/msn-0069/>.

733 MFDA Rules, *supra* note 729 at Rule 2.2.4(a) “Updating Client Information”.

734 Examples of key National Instruments applicable to investment funds include: NI 31-103—Registration and Exemptions; NI 81-101 Mutual Fund Prospectus Disclosure; NI 81-102 Mutual Funds; and NI 81-106 Investment Fund Continuous Disclosure. Some NIs are discussed throughout this report, as they relate to specific investor-investment advisor issues raised in the research and consultations.

735 SC 2000, c 5 [*PIPEDA*].

736 *Ibid*, s 5(3).

737 *Ibid*, Schedule 1.

738 *Ibid*.

739 *Ibid*, Schedule 1, 4.3 Principle 3—Consent, s 4.3.3.

740 *Ibid*, s 6.1.

741 *Ibid*, Schedule 1, s 4.3.2.

742 *Ibid*.

743 2017 Vulnerable Investors Report, *supra* note 29 at 31.

744 *Ibid* at 32.

745 Office of the Information and Privacy Commissioner of Canada, “Summary of privacy laws in Canada” (revised January 2018) online: <www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/02_05_d_15/#heading-0-0-2-2>. See e.g. BC’s *Personal Information Protection Act*, SBC 2003, c 63. The 2017 Vulnerable Investors Report discusses some limitations of BC’s Act as compared to *PIPEDA*’s provisions relating to when information can be disclosed without consent, see *supra* note 39 at 31-32.

746 RSC 1985, c C-46.

747 2017 Vulnerable Investors Report, *supra* note 39 at 30.

748 *AGA*, *supra* note 29, s 46(1). “The designated Agencies in BC are: the five regional health authorities; Providence Health Care Society (some hospital settings in Vancouver), and Community Living BC (for adults who are eligible for these services.”: Source: Public Guardian and Trustee of British Columbia, “BC’s Adult Guardianship Laws: Supporting Self Determination for Adults in British Columbia” (Vancouver: December 2014) at 1.

749 Public Guardian and Trustee of British Columbia, RCMP BC “E” Division, Crime Prevention Services, and Fraser Health Authority, “How to Assist an Adult Who is Abused, Neglected or Self Neglecting: A Decision Tree for Effective Referrals for

Adults in BC Who may be Vulnerable and/or Incapable” (last visited 04 November 2020) online (pdf): *Public Guardian and Trustee of British Columbia* <www.trustee.bc.ca/Documents/adult-guardianship/Decision%20Tree.pdf>.

750 See *Retirement Homes Act, 2010*, SO 2010, c 11, s 75(1); *Long Term Care Homes Act, 2007*, SO 2007, c 8, s 24(1).

751 2017 Vulnerable Investors Report, *supra* note 39 at 7-8.

752 “Canada’s Investment Industry: Protecting Senior Investors—Compliance, Supervisory and other Practices When Serving Seniors” (18 March 2014), online (pdf): *Investment Industry Association of Canada* <iiac.ca/wp-content/uploads/Canadas-Investment-Industry-Protecting-Senior-Investors_March-18-2014.pdf>.

753 IIROC, *Rules Notice—Guidance Note—Dealer Member Rules—Guidance on compliance and supervisory issues when dealing with senior clients*, IIROC Notice 16-0114 (31 May 2016), online (pdf): <docs.iiroc.ca/DisplayDocument.aspx?DocumentID=87C0E6D580544E889B569A079B8C35AA&Language=en>

754 *Ibid* at 3-6.

755 *Ibid* at 7-8.

756 Investment Industry Regulatory Organization of Canada “Policy Priorities—Update Report” (Toronto: 09 April 2019) online (pdf): <iiroc.ca/Documents/2019/c4ee1ab3-c9d2-454e-b49d-dcf627985b17_en.pdf>.

757 Investment Industry Regulatory Organization of Canada, News Release, “Majority of Canadian investors support measures to protect vulnerable investors, IIROC survey reveals” (21 June 2019). Link to IIROC survey, *Awareness and Attitudes Related to Provisions to Protect Vulnerable Investors and Investment Firms/Advisors: Presentation of Key Findings*, is no longer available on the IIROC website.

758 *Ibid* at 1.

759 “Investor Resource Centre”, online: *Investment Industry Regulatory Organization of Canada* <iiroc.ca/investors/Pages/default.aspx>. See also “Investor Education Fact Sheet” (December 2019) online (pdf): *Investment Industry Regulatory Organization of Canada* <iiroc.ca/investors/Documents/InvestorEducationFactSheet_en.pdf> for a complete list.

760 “External Investment Resources for Seniors”, online: *Investment Industry Regulatory Organization of Canada* <iiroc.ca/investors/Pages/seniors.aspx>.

761 *Investment Industry Regulatory Organization of Canada*, “Improving Self-Regulating for Canadians: Consolidating the Investment Industry Regulatory Organization of Canada (IIROC) and the Mutual Fund Dealers Association of Canada (MFDA)” (Toronto: June 2020) online (pdf): <www.iiroc.ca/Documents/2020/IIROC_consolidation_FNL.pdf> [IIROC 2020 Proposal]. See also Investment Industry Regulatory Organization of Canada, News Release, “IIROC calls for consolidation of self-regulators to better serve and protect Canadians” (09 June 2020) online (pdf): <www.iiroc.ca/Documents/2020/28f2d73a-76ab-4513-8db0-fa1856c2c0b2_en.pdf>.

762 IIROC 2020 Proposal, *ibid* at 4.

763 *Ibid* at 6.

764 *Ibid* at 7.

765 *Ibid* at 19.

766 *Ibid* at 36.

767 *Ibid* at 20.

768 A search of the MFDA website rendered no results for publicly available content on the 2013 Seniors Summit (Mutual Fund Dealers Association of Canada, last visited 04 November 2020, online: <mfdca.ca/>).

769 “2015 Seniors Summit” (29 October 2015) online: *Mutual Fund Dealers Association of Canada* <mfdca.ca/members/member-webcasts/mfdca-2015-seniors-summit/>.

770 “2019 Seniors Summit” (30 October 2019) online: *Mutual Fund Dealers Association of Canada* <mfdca.ca/bulletin/bulletin0797-p/>.

771 MFDA, *MFDA Member Outreach Initiative*, MFDA Bulletin 0792-M (25 September 2019) online: <mfdca.ca/bulletin/0792-m/> [MFDA Bulletin 0792-M].

772 MFDA, *Policy: Seniors and Vulnerable Clients*, MFDA Bulletin 0797-P (25 October 2019) online: <mfd.ca/bulletin/bulletin0797-p/>.

773 *Ibid.*

774 *Ibid.*

775 *Ibid.*

776 MFDA Bulletin 0792-M, *supra* note 771.

777 “For Seniors”, online: *Mutual Fund Dealers Association of Canada* <mfd.ca/investors/for-seniors/>.

778 Canadian Securities Administrators, *Suggested Practices for Engaging with Older or Vulnerable Clients*, CSA Staff Notice 31-354 (Toronto: 21 June 2019), online: *BC Securities Commission* <bcs.bc.ca/Securities_Law/Policies/Policy3/PDF/31-354__CSA_Staff_Notice__June_21__2019/> [CSA]. This guidance was released alongside CSA’s amendments to NI 31-103 on Registration Requirements, Exemptions and Ongoing Registrant Obligations.

779 *Ibid* at 3-4.

780 *Ibid* at 1-2.

781 *Ibid* at 9.

782 CSA, *supra* note 778 at 1.

783 Canadian Securities Administrators, *CSA Notice of Publication: Amendments to Policy Statement to Regulation 31-103 respecting Registration Requirements, Exemptions and Ongoing Registrant Obligations*, (Toronto: 03 October 2019) online: *BC Securities Commission* <bcs.bc.ca/Securities_Law/Policies/Policy3/PDF/31-103__CSA_Notice__October_3__2019/> [2019 Client-focused Reforms].

784 Canadian Securities Administrators, *Annex A—Summary of Changes to the Instrument* (Toronto: 03 October 2019) at 2-4, online (pdf): *BC Securities Commission* <bcs.bc.ca/Securities_Law/Policies/Policy3/PDF/31-103_Summary_of_changes_to_the_Instrument__October_3__2019/>.

785 Canadian Securities Administrators, *CSA Notice and Request for Comment – Proposed Amendments to National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations and Changes to Companion Policy 31-103CP Registration Requirements, Exemptions and Ongoing Registrant Obligations to Enhance Protection of Older and Vulnerable Clients* (Toronto: 05 March 2020), online (pdf): Ontario Securities Commission <osc.gov.on.ca/documents/en/Securities-Category3/csa_20200305_31-103_protection-older-vulnerable-clients.pdf> [CSA].

786 *Ibid* at 2.

787 *Ibid* at 4.

788 *Ibid.*

789 Canadian Securities Administrators, “Equipping Yourself: making informed investments—Brochures” (Toronto) online: <securities-administrators.ca/investortools.aspx?id=1005>.

790 “Investor Centre” online: *The Investment Funds Institute of Canada* <investorcentre.ific.ca/>.

791 Materials shared for research purposes only. Not available for reproduction.

792 “Financial Planning Body of Knowledge” online: *FP Canada* <fpcanada.ca/en/bok/bok-statement?topicUrl=human-behaviour&articleUrl=values-attitudes-emotions-and-disorders-related-to-money#0>.

793 *Ibid.* See also “Case Study: Mental Depletion” (last modified 07 September 2017), online (pdf): *FP Canada* <fpcanada.ca/docs/default-source/default-document-library/cfp_10_mental-depletion---version-1-0-0-updated-20170907.pdf?sfvrsn=a6f8dfb2_0>.

794 FP Canada, *ibid.*

795 *Ibid.*

796 A “certificant” is a Certified Financial Planner (CFP) Professional who holds the FPSC Level 1 Certification.

797 FP Canada Standards Council, “Standards of Professional Responsibility” (Toronto: effective 01 January 2020) at 17, online (pdf): <www.fpcanada.ca/docs/default-source/standards/standards-of-professional-responsibility.pdf>.

798 *Ibid.*

799 British Columbia, Ministry of Finance, News Release, “New powers protect people from fraud” (Victoria: 21 October 2019) online: <news.gov.bc.ca/releases/2019FIN0112-002020> [BC Ministry of Finance]. See also BC Securities Commission, News Release, 2019/64, “BCSC to get strongest collection and enforcement powers in Canada” (Vancouver: 21 October 2019) online: <bcs.bc.ca/News/News_Releases/2019/64_BCSC_to_get_strongest_collection_and_enforcement_powers_in_Canada/>.

800 BC Ministry of Finance, *supra* note 799.

801 BC Securities Commission, “InvestRight” online: <investright.org/about-us/>.

802 Ontario Securities Commission, *OSC Staff Notice 11-779 Seniors Strategy*, (Toronto: Ontario Securities Commission, 20 March 2018), online (pdf): OSC Seniors Strategy <www.osc.gov.on.ca/documents/en/Securities-Category1/sn_20180320_11-779_seniors-strategy.pdf>.

803 *Ibid* at 2.

804 *Ibid.*

805 *Ibid.*

806 *Ibid* at 38.

807 *Ibid* at 38-9.

808 Law Commission of Ontario, “Capacity and Legal Representation for the Federal RDSP: Final Report” (Toronto: June 2014) at 1, online (pdf): <lco-cdo.org/wp-content/uploads/2014/11/rdsp-final-report.pdf>.

809 For a complete list of the questions asked during the consultation interviews, see Appendix B.

810 As mentioned in Chapter 1, the numbers listed are based on primary role assignments chosen by our interviewees; however, approximately 25% of the people we spoke to said they also support a family member or friend.

811 Nine people with lived experience attended the Inclusion BC Focus Group session. The number of attendees is included in the key informant statistics for Adults Receiving Support and Supporters listed above.

812 The survey was distributed to CBA BC section members in these practice areas: Banking, Charities and Not-for-Profit, Commercial and Real Estate, Elder Law, Family Law, General Practice, Health Law, Tax, and Wills and Trusts.

813 2014 Lived Experience report, *supra* note 90 at 38-40.

814 P Gill et al, “Methods of data collection in qualitative research: interviews and focus groups” (2008) 204:6 Br Dent J 291 [Gill et al], cited in 2014 Lived Experience report, *supra* note 90 at 39.

815 2014 Lived Experience Report, *supra* note 90 at 39.

816 Key informant interviews ran from October 2018 to October 2019. Several changes occurred within the investment regulatory sector policies, rules, and guidance for dealer firms and advisors since the interviews were held. In some cases, and depending on when an interview took place, comments may reflect the investment landscape at the time of the interview, and possibly before the landscape changed.

817 “About Microboards” online: *VELA Canada* <velacanada.org/vela-microboards>. “A Microboard™ is a small (micro) group of committed family and friends (a minimum of 5 people) who join together with the individual to create a non-profit society (board).”

818 *Ibid*; VELA Canada, “The Role of Microboards” (28 October 2015) at 00h:00m:38s, online (video): *You Tube* <youtube.com/watch?v=i3rougAnKiE&feature=emb_title>.

819 *POAA, supra* note 7, s 26.

820 “Enduring Power of Attorney: Example of Clauses—Springing Power of Attorney” (Vancouver: last visited 17 March 2020) online: *Seniors First BC* <seniorsfirstbc.ca/for-professionals/enduring-power-attorney/>.

821 *RAA, supra* note 27, s 7(1).

822 CSA, *supra* note 785 at 2.

823 *RAA, supra* note 27, s 16(2)(a).

824 *Ibid*, s 18(2).

825 See e.g. VELA Canada, “About Microboards”, *supra* note 22.

826 “Registered Disability Savings Plan” (last modified 20 March 2020) online (pdf): *Canada* <canada.ca/en/employment-social-development/programs/disability/savings/issuers/user-guide/section2.html#h2.1-h3.4>.

827 The Law Society of British Columbia, Codes of Professional Conduct for British Columbia, Vancouver: The Law Society of British Columbia, 2013 (updated December 2019) at s 3.2-9 and Commentary [1], online: <www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/code-of-professional-conduct-for-british-columbia/chapter-3-%E2%80%93-relationship-to-clients/> [LSBC Code].

828 BCLI, *Report on Common Law Tests of Capacity*, *supra* note 290 at 172, Recommendation 26.

829 *RAA*, *supra* note 27, s 16(12) states “A person who, on the death of an adult, will be or might be a beneficiary of the adult’s estate does not, for that reason, have a conflict of interest with the adult.”

830 In March 2020, the World Health Organization declared COVID-19 a global pandemic: see e.g. World Health Organization, “WHO Director-General’s statement on IHR Emergency Committee on Novel Coronavirus (2019-nCoV)” (Geneva: 30 January 2020); WHO, “WHO Director-General’s opening remarks at the media briefing on COVID-19” (Geneva: 11 March 2020).

831 CCEL’s Health Care Consent project notes that “[o]lder people will sometimes say ‘yes’ even though they don’t understand what the health care professional or staff is saying.” See HCC Report, *supra* note 11 at 163.

832 See e.g. British Columbia, Ministry of Social Development and Social Innovation, *Disability Consultation Report: Moving Together Toward an Accessible B.C. A REFLECTION OF THE VOICES OF BRITISH COLUMBIANS HEARD DURING THE DISABILITY WHITE PAPER CONSULTATION* (Victoria: May 2014) at 22, online (pdf): <www2.gov.bc.ca/assets/gov/government/about-the-bc-government/accessible-bc/disability-consultation/disability-consultation-report/disability-consultation-report_standard-type_web.pdf> [2014 Disability Consultation Report].

833 See *RAA*, *supra* note 27, s 3.1 “An adult must not be required to have a representation agreement as a condition of receiving any good or service.”

834 Our project partner, Inclusion BC, and ARCH Disability Law Centre (Ontario) do a lot of promotion and education for their members on the RDSP program. Similarly, other community organizations that work to promote the RDSP to their members include, but are not limited to: PLAN Institute, Disability Alliance BC, and British Columbia Aboriginal Network on Disability Society (BCANDS).

835 BCLI *Report on Common Law Tests of Capacity*, *supra* note 290 at 172, Recommendation 26.

836 Note that no lawyers from Northern BC responded to the survey (the remaining 13.56 per cent of respondents came from the Southern Interior of the province).

837 Note that only 25 of the 29 lawyers who prepare RA7s responded to this question.

838 Note that 7 per cent of respondents came from Northern BC, followed by 16 per cent from the Southern Interior.

839 Note that only 34 of the 45 notaries who prepare RA7s responded to this question.

840 See “Standards of Professional Responsibility: Duty of Confidentiality” (1 April 2019) at 17, s 28, online (pdf): *FP Canada Standards Council* <www.fpcanada.ca/docs/default-source/standards/standards-of-professional-responsibility.pdf>.

841 See e.g. Canadian Securities Administrators, “CSA Staff Notice 31-354: Suggested Practices for Engaging with Older or Vulnerable Clients” (21 June 2019) at 8, online (pdf): <www.osc.gov.on.ca/documents/en/Securities-Category3/csa_20190621_31-354_suggested-practices-for-engaging-with-older-or-vulnerable-clients.pdf>; M Alexander, IIAC “Canada’s Investment Industry: Protecting Senior Investors - Compliance, Supervisory and Other Practices When Serving Senior Investors” (18 March 2014) at s 2E, online (pdf): *Investment Industry Association of Canada* <iiac.ca/wp-content/uploads/Canadas-Investment-Industry-Protecting-Senior-Investors_March-18-2014.pdf>; Mutual Fund Dealers Association of Canada, “MFDA Rules” (4 January 2018) at s 2.1.3(a), online (pdf): <mfga.ca/policy-and-regulation/rules/mfga-rules/>.

842 2017 Report on Vulnerable Investors, *supra* note 39 at 58.

843 *Ibid* at 60. Supportive interests include identifying a client’s whereabouts, health status, the name of a power of attorney or guardian, or to alert the TCP about concerns related to a client’s capacity, potential undue influence, or financial exploitation. See also Ontario, Ombudsman for Banking Services and Investments, *2019 Seniors Report*, (Toronto: 18 July 2019) at 36, online

(pdf): <www.obsi.ca/en/news-and-publications/resources/PresentationsandSubmissions/seniors-report_FINAL_EN.pdf> which recommended that “[f]irms should develop protocols for asking senior consumers, especially older seniors, to identify a ‘trusted person’ for their accounts”.

844 *Ibid* at 58-60.

845 FINRA is a government-authorized, not-for-profit organization that oversees US broker-dealers who buy or sell securities on behalf of clients. For more information, visit: FINRA, online: <finra.org>. The FINRA Rule was issued in response to the 2016 review of registered US firms about practices related to older adult investors. See North American Securities Administrators Association, *NASAA Broker-dealer section study of senior practices and procedures* (Washington: 2017) online (pdf): <nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2017/06/BD-Study-of-Senior-Practices-and-Procedures_06152017.pdf>.

846 FINRA Rules, *ibid* at Rule 4512(a)(1)(F). Guidance on the rule also requires members to ensure the name and contact of the trusted contact person remains up to date throughout the account relationship.

847 FINRA, *Regulatory Notice 17-11: Financial Exploitation of Seniors*, (Washington: 2017) online: <www.finra.org/rules-guidance/notices/17-11>.

848 *Ibid* at n 4.

849 CSA, *supra* note 791.

850 Canadian Securities Administration, *ibid* at 5.

851 The proposed amendments are expected to come into force on 31 December 2021: see Canadian Securities Administration, News Release, “Canadian Securities Administrators Adjust Implementation Date for Client Focused Reforms” (16 April 2020), online: <www.securities-administrators.ca/aboutcsa.aspx?id=1890>.

852 This finding aligns with what we learned in the 2014 Understanding the Lived Experiences Report, *supra* note 90 at 76, which notes “Overall, supported decision-making was found to be a welcome option in the five jurisdictions. However, in each of these jurisdictions, the same types of comments emerged: ‘we like having it but we do not really know how to use it well’. All informants referenced a lack of available information on supported decision-making. Even individuals engaged in supported decision-making relationships shared some confusion about what it was and how it was different from substitute decision-making.”

853 This finding was also shared in 2014 Lived Experiences Report, *ibid* at 77.

854 *RAA*, *supra* note 27.

855 SA, 2008, c A-4.2, s 2.

856 See Alberta, Office of the Public Guardian, “Supported Decision-making: *Adult Guardianship and Trustee Act*” (brochure) (last accessed 06 December 2020) online (pdf): <open.alberta.ca/dataset/b3ffdeec-d659-4bef-ace3-79dca5384df5/resource/7d8ce508-7e51-448e-9cfe-b0bd3bdba0ad/download/opg-guardianship-brochure-opg5609.pdf>.

857 *SDA*, *supra* note 10, s 1(3) “explain”.

858 See Essex Autonomy Project, School of Philosophy and Art History, University of Essex, “About Us” (last visited 10 January 2021) online: <autonomy.essex.ac.uk/contact/>. The Essex Autonomy Project “is a collaborative, interdisciplinary research initiative based in the School of Philosophy and Art History. We were founded in 2010 with the initial aim of clarifying the ideal of self-determination history, theory and practice, but have developed our work to include research on topics such as decision-making capacity after brain injury, the application of the UN Convention on the Rights of Persons with Disabilities in care practice and objective risk assessments. We work with academic researchers, practitioners and policy-makers across the UK.”

859 Wayne Martin et al, Essex Autonomy Project, “Support for the Exercise of Legal Capacity: EAP Three Jurisdictions Project—Briefing Document” (09 November 2016), online: <autonomy.essex.ac.uk/wp-content/uploads/2016/11/ThreeJurisdictionsProject_briefingpaper4_supportforexerciseoflegalcapacity.pdf> [TJP Briefing Paper].

860 *Ibid* at 11.

861 *Ibid*.

862 *Ibid* at 11-12.

863 *Ibid* at 13-14.

864 *Mental Capacity Act (Northern Ireland) 2016* (NI), 2016, c 18. An important distinction between Northern Ireland’s standard for capacity and BC’s *RAA* is that Ireland’s statute uses an adult’s ability to communicate their decision (whether by talking, using sign language or any other means) in its meaning of “unable to make a decision” (s 4(1)(d). Contrarily, BC’s *RAA* presumption of capacity clearly states that “an adult’s way of communicating with others is not grounds for deciding that he or she is incapable of understanding” information required to make decisions about the routine management of their financial affairs.

865 *Ibid*, s 5.

866 *Assisted Decision-Making (Capacity) Act*, No 64 of 2015 (IR).

867 Ireland, Department of Justice, “*Assisted Decision-Making (Capacity) Act 2015*” (last visited 10 January 2021), online: <justice.ie/en/JELR/Pages/Assisted_Decision-Making_(Capacity)_Act_2015#>.

868 *Ibid*.

869 *Ibid*.

870 See e.g. Uniform Law Commission, *Uniform Guardianship, Conservatorship and Other Protective Arrangements Act and Protective Proceedings Act (UGCOPAA)*, (ULC: July 2017) online: <www.uniformlaws.org/committees/community-home?communitykey=2eba8654-8871-4905-ad38-aabbd573911c&tab=groupdetails>; Australian Law Reform Commission, Australian Government, “Equality, Capacity and Disability in Commonwealth Laws—Chapter 4: Supported Decision-Making in Commonwealth Laws” (Queensland: 18 September 2014) online (pdf): < www.alrc.gov.au/wp-content/uploads/2019/08/fr124._chapter_4_supported_decision-making_in_commonwealth_laws.pdf>.

871 See *supra* note 518.

872 *Ibid* at 37.

873 *Ibid*.

874 *Bank Act*, *supra* note 672, s 2.

875 *Ibid*. The Act defines “delegate” as “a natural person appointed or elected to represent a member of a federal credit union at a meeting of members”. See also *Income Tax Act*, RSC 1985, c 1 (5th Supp), s 270(1)(a), which defines “account holder” to mean “the person listed or identified as the holder of a financial account by the financial institution that maintains the account, other than a person (other than a financial institution) holding a financial account for the benefit of, or on behalf of, another person as agent, custodian, nominee, signatory, investment advisor or intermediary”. There is no formal recognition for a representative for the purpose of account holders under this Act.

876 LSBC Code of Professional Conduct, *supra* note 827.

877 *Ibid* at Commentary [2].

878 *Ibid*.

879 *Ibid* at 3.3 Confidentiality, 3.3.1 Confidential Information, and Commentary [10]. For an example of a resource used in the United States, see National Resource Centre for Supported Decision-Making and the Administration of Community Living of the United States Department of Health and Human Services, “Supported Decision-Making as an Alternative to Guardianship: A Nevada Conversation” (Las Vegas: 28 November 2017) online (pdf): <www.washoecourts.com/OtherDocs/AdultGuardianship/SDMASurveys/November28SDMAPresentationMaterials.pdf>; American Bar Association, Commission on Law and Aging, Commission on Disability Rights, Section on Civil Rights and Social Justice and Section on Real Property, Trust and Estate Law, “PRACTICAL TOOL for Lawyers: Steps in Supported Decision-Making” (Washington: 08 May 2016) online (pdf): <www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/practical_tool/>; National Centre on Law and Elder Rights, online: <ncler.acl.gov/>.

880 In 1995, the Swedish Parliament enacted the *Fundamental Act* No 387 to create a legal entitlement for people living with severe intellectual or physical disabilities to receive 10 measures of support. This expanded on the support provisions set out in the *Act concerning Support and Service for Persons with Certain Functional Impairments*, Swedish Code of Statutes SFS 1993:387. See also Maths Jespersen, “Supported decision-making in theory and practice: Ireland’s Capacity Bill” (Amnesty International Ireland conference on supported decision-making, May 2013) online (video): *You Tube* <youtu.be/t6scSjDq21I>; Maths Jespersen, Zero

Project, “Personal Ombudsmen in Sweden” (January 2015) at 1, online (pdf): <zeroproject.org/wp-content/uploads/2015/01/ZPR2015-INNOVATIVE-POLICY-SWEDEN-Personal-Ombudsmen_barrierfree.pdf> [Jespersion, Zero Project].

881 Jespersen, Zero Project, *ibid* at 1.

882 LCO 2014 Report, *supra* note 521, cited in LCO 2017 Report, *supra* note 12 at 99.

883 LCO 2017 Report, *ibid* at 99-100.

884 2014 Disability Consultation Report, *supra* note 832.

885 Canada, Information Bulletin PCEI /CDSP-2012/13-005B-117, “Qualifying Family Member” (Ottawa: 07 February 2013).

886 *Ibid*.

887 Canada Revenue Agency, “Registered Disability Savings Plan” (Ottawa: last modified 09 January 2020) online: <www.canada.ca/en/revenue-agency/services/forms-publications/publications/rc4460/registered-disability-savings-plan.html>.

888 See “Tax AID DABC: Tax Assistance and Information for People with Disabilities Receiving PWD and PPMB benefits” (last updated January 2017) online (pdf): *Disability Alliance BC* <taxaidabc.files.wordpress.com/2015/05/taxaidbrochure-february2017.pdf>.

889 See e.g. Bank of Montreal, News Release, “BMO Surpasses \$1 Billion in RDSP Assets Under Management” (20 December 2016), online: *BMO* <newsroom.bmo.com/2016-12-20-BMO-Surpasses-1-Billion-in-RDSP-Assets-Under-Management>.

890 *Ibid*.

891 *Ibid*.

892 Advisors note that while investment regulators and firms have developed resources on working with vulnerable clients, most of the information is about protecting from undue influence and financial exploitation. Advisors would like more guidance on how to draw on supported decision-making, and how to incorporate this into investment relationships with different communities. Some examples of existing checklists and resources include: e.g. *New Checklists from IFIC Help Advisors Protect Vulnerable Clients*, (June 2018), online (pdf): *The Investment Funds Institute of Canada* <www.ific.ca/wp-content/uploads/2018/06/Advisor-Insights-Meeting-the-Needs-of-Investors-with-Cognitive-Decline.pdf/19868/%20https://www.ific.ca/wp-content/uploads/2018/06/Advisor-Insights-Protecting-Investors-from-Financial-Exploitation.pdf/19872/>; *A Toolkit for Dealers and Advisors* (November 2017), online (pdf): *The Investment Funds Institute of Canada* <www.ific.ca/wp-content/uploads/2017/11/2017-Its-your-money-Find-out-more-A-Toolkit-for-Dealers-and-Advisors.pdf/18564/>; “Fact Sheet—Tips for Lawyers and Paralegals in Ontario: Accommodating clients requiring a support person” (last modified 01 October 2019) online: *ARCH Disability Law Centre* <archdisabilitylaw.ca/resource/fact-sheet-tips-for-lawyers-and-paralegals-in-ontario-accommodating-clients-requiring-a-support-person/>.

893 2016 OHRC Policy, *supra* note 474 at 40.

894 See e.g. Rianka Dorsainvil “How Culture Impacts Investing Habits”, *Forbes* (03 October 2019), online: < www.forbes.com/sites/riankadorsainvil/2019/10/03/how-culture-impacts-investing-habits/?sh=533ff64b6572>.

895 As mentioned earlier in this study paper, efforts are underway in the investment community to better understand how mental health impacts the financial advice relationship. See e.g. Bridgehouse Asset Managers and Canadian Mental Health Association, “Mental Health & The Financial Advice Relationship” (2018) online (pdf): *Bridgehouse Asset Managers* <bridgehousecanada.com/wp-content/uploads/infographics/Infographic-Mental-Health-and-Financial-Advice-Relationship-EN.pdf>. For more information and resources, see “Mental Health & The Financial Advice Relationship” website: *Bridgehouse Asset Managers* <bridgehousecanada.com/mental-health/?utm_source=cnw&utm_medium=release&utm_campaign=mhfar&utm_content=18-04-top-eng>.

896 See e.g. “TCP and POA: Complementary Client Tools” (December 2018) online (pdf): *Bridgehouse Asset Managers* <bridgehousecanada.com/mental-health/wp-content/uploads/mental-health/Bridgehouse-TCP%20and%20POA-Guide-EN.pdf>. See also Quebec, Autorité des Marchés Financiers, “Protecting Vulnerable Clients: A practical guide for the financial services industry” (Quebec: 2019) at 10-11, online (pdf): <lautorite.qc.ca/fileadmin/lautorite/grand_public/publications/professionnels/tous-les-pros/guide-bonnes-pratiques-personnes-vulnerables_an.pdf>.

897 Many informants also suggested that advisors should make sure to keep a copy of all supported or substitute decision-making documents on the client file, and regularly verify that they are up to date.

898 See e.g. The Canadian Foundation for Economic Education and Investors Group Wealth Management, “Money and Youth Program” online: <moneyandyouth.com/>. The program “develop[s] and provide[s] free, non-commercial programs and resources for teachers and students” about money, savings, and investing. See also Alzheimer Society of Canada, *Help and Support: I’m a financial professional*, (Toronto: Alzheimer Society of Canada, 2015) online: <alzheimer.ca/en/help-support/im-financial-professional>. See also Alzheimer Society B.C., *Making your workplace dementia friendly: Information for financial professionals*, (Vancouver: 18 August 2015) online (pdf): <archive.alzheimer.ca/sites/default/files/files/bc/advocacy-and-education/dfc/2015%2008%2018%20finance%20web%20final.pdf>. See also Autism Canada, “Words Matter—A collaborative language and communication guide in the autism field” (Toronto: September 2016) online (pdf): <secureservercdn.net/45.40.155.175/506.fdc.myftpupload.com/wp-content/uploads/2015/04/AC_LanguageDocument-2016-1.pdf>.

899 See e.g. “Autism Information Database” (last visited 06 December 2020) online: *Autism Community Training* <www.actcommunity.ca/aid-search/info?keywords=&csch=y&submit=Search&subject=12&language=English>.

900 One supporter talked about going into investment meetings with the person they support, and there only being two chairs. So, they often have to track down a third chair. Placing this third chair front and centre with the advisor sitting across, and the supporter(s) beside the adult, goes a long way to empower and communicate respect to the adult being supported at the meeting.

901 Supporters notes that sometimes people receiving support do not want to feel “put on the spot” or pressured to provide an answer right away.

902 See e.g. United States Securities and Exchange Commission, Office of Investor Education and Advocacy, “Saving and Investing: A Roadmap to Your Financial Security Through Saving and Investing” SEC Pub 009 (Washington: June 2011) online (pdf): <www.sec.gov/investor/pubs/sec-guide-to-savings-and-investing.pdf>; Commonwealth Securities Limited, Commonwealth Bank of Australia, “Investing basics: Why should I keep an investment journal?” (last visited 07 December 2020) online: <www.commsec.com.au/education/learn/investing-basics/why-should-i-keep-an-investment-journal.html#>.

903 Family Support Institute, “MyBooklet BC” (last visited 07 December 2020) online: <www.mybookletbc.com/>.

904 One suggestion was to develop a specific role within financial institutions and investment firms for a DTC/RDSP/ Benefits Specialist.

905 See e.g. “Programs: PATH” (last accessed 07 December 2020) online: *Inclusion NS* <www.inclusionns.ca/programs>: “PATH (Planning Alternate Tomorrows with Hope) is a person-centered planning tool that helps individuals plan for their future. Used widely with persons who have a disability, though not limited to this use, the process involves a carefully ordered structure that uses graphics to focus energy and support memory. PATH also identifies supports and people that will help to accomplish the goals identified, guiding the individuals toward the future they desire. PATH outcomes are achieved through a collaborative process by first planning backwards, from the vision of a desirable future to a detailed action plan. Participating in PATH helps individuals navigate a successful future, but it also involves the participants support network and helps them invest in the same vision for what a bright and inclusive future will look like.” See also “On My Way: Transition Planning Workshop Guide for Students and Families” (October 2018) online (pdf): *Inclusion BC* <inclusionbc.org/wp-content/uploads/2018/10/TransitionPlanningBooklet.pdf>.

906 See e.g. “Future Planning Tool” (last accessed 06 December 2020) online: *Plan Institute* <futureplanningtool.ca/home>; “2017 Inspiring Possibilities: Estate Planning Guide: A Tax, Benefits, Trusts, and Wills Toolkit for Ontarians with Disabilities” (2017) online: *Community Living Ontario* <www.communitylivingontario.ca>; “Planning for your future” (last accessed 07 December 2020) online: *Alzheimer Society of Canada* <alzheimer.ca/en/help-support/im-living-dementia/planning-your-future>; ARCH Disability Law Centre, “Respecting Rights Video Project”, online (videos): *You Tube* <www.youtube.com/channel/UC4hVo6RyLu_oW8t7owTiaUg/featured>; Community Living Toronto, ConnectABILITY, “Financial and Legal Issues” (last accessed 07 December 2020) online: *ConnectABILITY* <connectability.ca/2014/12/09/financial-and-legal-issues-2/>; Community Living Toronto, ConnectABILITY, “Money Matters” (last accessed 07 December 2020) online: *ConnectABILITY* <connectability.ca/2011/11/08/budgeting/>; ABC Life Literacy Canada, “Money Matters” (last visited 07 December 2020) online:

<abcmoneymatters.ca/about/>. ABC Money Matters is a Government of Canada and TD Bank Group sponsored program that provides “free introductory financial literacy” to adult learners.

907 See e.g. “WEL Partners on Powers of Attorney: Checklist # 5—Considerations for Financial Advisors” (Fall 2016) at 232–38, online (pdf): *WEL Partners* <welpartners.com/resources/WEL-on-powers-of-attorney.pdf>. The same resource includes checklists for capacity criteria and undue influence (at 248–72).

908 While the Canadian Securities Institute does offer a course called “Safeguard Elderly Clients from Financial Fraud”, the content appears to focus specifically on working with older adult clients. See “Safeguard Elderly Clients from Financial Fraud” (last visited 07 December 2020) online: *Canadian Securities Institute* <www.csi.ca/student/en_ca/courses/continuing/secf.html>. The website notes that the course “is designed for students at securities firms, banks, insurance companies and trust firms. This includes bank sales associates, CSRs, mortgage specialists, financial advisors, and branch managers.”

909 NOTE: The titles listed in the tables are taken from the Canadian Securities Institute Financial Services Career Map content. They are not meant to be interpreted as applying uniformly across all financial institutions. Some financial institutions may use different titles and/or different role and responsibility descriptions.

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