



Best Practices When Working with Vulnerable Investors

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Canadian Centre for Elder Law

1. Legal research
2. Law reform
3. Legal education
4. Outreach



Disclaimer

This presentation is not legal advice



Presentation Outline

- ▶ Definition of “vulnerable investors”
- ▶ Capacity and Consent
- ▶ Legal and privacy issues
- ▶ Red Flags to consider
- ▶ CCEL’s *Inclusive Investing* Project

My Goal

You will leave this session with an:

- Understanding of basic concepts
- Enhanced ability to identify potential legal issues that require research or advice



Key sources of information

Your responsibilities may be rooted in:

- Laws
- Practice Standards / Codes of ethics
- Institutional policies



VULNERABLE INVESTORS & THE RIGHT TO MAKE ONE'S OWN DECISIONS

- ▶ Fundamental entitlement in a free and democratic society
- ▶ Some individuals are particularly vulnerable to losing this right:
 - ▶ People with intellectual disabilities
 - ▶ Survivors of traumatic brain injuries
 - ▶ People with some forms of mental illness
 - ▶ Adults with Alzheimer's disease or other forms of dementia

VULNERABLE INVESTORS & THE RIGHT TO MAKE ONE'S OWN DECISIONS

- ▶ Investment needs range from conservative to complex:
 - ▶ One or more GICs
 - ▶ Investments within an RDSP
 - ▶ Larger and more sophisticated portfolios
- ▶ “Capacity”” to manage investments can vary



VULNERABLE INVESTORS & THE RIGHT TO MAKE ONE'S OWN DECISIONS

- ▶ If incapable, dominant approach is substitute decision making
 - ▶ Example: guardianship or power of attorney
- ▶ Communicate directly with financial institution staff
- ▶ Duties and powers of the guardian or power of attorney are generally clear to financial institution staff

“VULNERABLE INVESTOR”

- ▶ “Older investors, persons with fluctuating or diminished mental capacity, and adults who are subject to undue influence or financial exploitation are collectively referred to...as vulnerable investors.”
- ▶ “vulnerable” = “social vulnerability, and does not ascribe vulnerability to older persons as an inherent personal characteristic. Rather, the term reflects an understanding that differing social conditions may make a person more or less vulnerable...”
- ▶ Factors contributing to vulnerability

Source: Canadian Foundation for the Advancement of Investor Rights (FAIR Canada) & Canadian Centre for Elder Law, *Report on Vulnerable Investors: Elder Abuse, Financial Exploitation, Undue Influence and Diminished Mental Capacity* (November 2017) at 5-6.

“VULNERABLE INVESTOR”: IIROC GUIDANCE

- ▶ *Specific to investment dealer clients, IIROC considers a client who requires more than the normal level of assistance / education / advice or relies in part on the advice of outsiders to make investment decisions to be a “vulnerable investor”*
- ▶ *Source: IIROC, 2018 Assistants Conference (Toronto, Montreal) [used with permission]*

Mental Capacity

- ▶ Decision-making ability
- ▶ Not determined by disease
- ▶ Many people with dementia have capacity



Mental Capacity

A capable adult is able to:

- Understand information
- Evaluate data
- Appreciate consequences



Capacity is decision-specific

- ▶ Always ask, capacity for what?
- ▶ What data is relevant?
- ▶ Different standards apply to different types of decisions



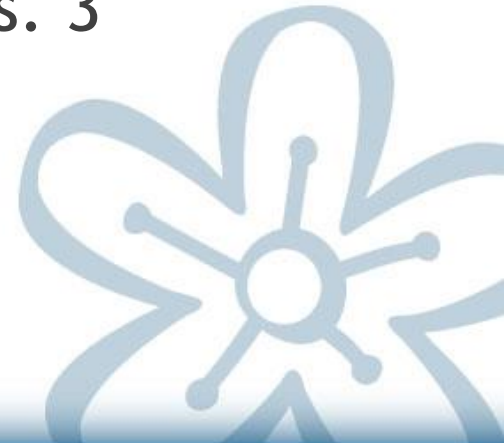
Capacity to do what?

- ▶ Make a will or Power of Attorney
- ▶ Marry or divorce
- ▶ Accept surgery or refuse treatment/medication
- ▶ Mediate or instruct a lawyer
- ▶ Enter a contract or sell real estate
- ▶ Participate in research
- ▶ Donate your money
- ▶ Appoint a supportive decision maker
- ▶ Make a decision about a care facility



Presumption of capacity: BC Legislation

- ▶ *Health Care Consent Act, s. 3*
- ▶ *Power of Attorney Act, s. 11*
- ▶ *Representation Agreement Act, s. 3*
- ▶ *Adult Guardianship Act, s. 3*



PRESUMPTION OF CAPABILITY: BC

Until the contrary is demonstrated, every adult is presumed to be capable of making decisions about the adult's personal care, health care and financial affairs.

Adult Guardianship Act, RSBC 1996, c 6, s 3(1)

Capacity is not fixed

- ▶ Can fluctuate, increase or decrease
- ▶ Can be linked to medication
- ▶ Can be affected by time of day



Who determines capacity?

- ▶ Health care professionals
- ▶ Judges
- ▶ Everyone



CAPACITY AND ACCOMMODATION

- ▶ Human rights legislation
- ▶ UN Convention on the Rights of Persons with Disabilities (UNCRPD; Article 12)
- ▶ Preserving decision-making autonomy



Maximizing capacity

1. Find out what time of day works best for your client
2. Use visual aids and memory cues
3. Plan for adequate meeting time so you don't have to rush



Maximizing Capacity

4. Orient your client at the beginning of the meeting
5. Keep food or drink in the office
6. Take breaks as needed



Risk and rights

- ▶ Any person with capacity has the right to take risks:
 - ▶ With their money
 - ▶ With their physical body



Consent

- ▶ Capable
- ▶ Informed
- ▶ Voluntary



Informed consent

- ▶ Right to sufficient information in order to make an informed decision
- ▶ Right to ask questions and receive answers



Right to revoke

- ▶ Right to change your mind
- ▶ Right to change investment objectives



Consent can be...

- ▶ Orally
- ▶ In writing
- ▶ Inferred from conduct



True choice

- ▶ Respect for authority
- ▶ Pressure and influence
- ▶ Social power



Review

- ▶ Capacity is decision-specific
- ▶ Capacity is disease-neutral
- ▶ Everyone is presumed capable at law—but you must always check for capacity

Review

Informed consent means:

- ▶ Making time for discussion
- ▶ Letting people change their mind
- ▶ Being aware of power dynamics



SUBSTITUTE DECISION-MAKING LAWS IN BC

- ▶ *Adult Guardianship Act*, RSBC 1996, c 6
- ▶ *Health Care (Consent) & Care Facility (Admission) Act*, RSBC 1996, c 181
- ▶ *Patients Property Act*, RSBC 1996, c 349
- ▶ *Power of Attorney Act*, RSBC 1996, c 370
- ▶ *Public Guardian and Trustee Act*, RSBC 1996, c 383
- ▶ *Representation Agreement Act*, RSBC 1996, c 405

Substitute decision making in BC

1. Appointed by individual (eg. power of attorney, enduring power of attorney, representative for health and personal care decisions)
2. Appointed by a court
3. Authority by statutory process



Substitute decision making authority

Can cover different types of decisions

- ▶ health care
- ▶ personal care
- ▶ financial matters
- ▶ property transfers
- ▶ facility admission



ENDURING POWER OF ATTORNEY: BC

- ▶ *Power of Attorney Act*, RSBC 1996, c 370
- ▶ Presumption of capacity and capability
- ▶ Powers of the attorney



ENDURING POWER OF ATTORNEY AND INVESTMENT DECISIONS

- ▶ Role and responsibilities
- ▶ Managing investments
- ▶ Access to information and confidentiality



Duties of substitute decision makers

- ▶ To keep records
- ▶ To act honestly
- ▶ To consult with the person
- ▶ To consider best interests



Best interests

- ▶ Are not determinative of mental capacity
- ▶ Relate to the obligations of guardians, committees, attorneys, representatives



Duty to Consult

- ▶ An attorney must...to the extent reasonable, foster the independence of the adult and encourage the adult's involvement in any decision-making that affects the adult (*Power of Attorney Act*, s. 19(3)(c))
- ▶ Same with a guardian/committee (s. 18(2))



REPRESENTATION AGREEMENTS: SECTION 7

- ▶ *Representation Agreement Act*
- ▶ Lower capacity threshold
- ▶ *Assist* adult to make decisions, **and/or make** decisions on behalf of the adult



REPRESENTATION AGREEMENTS

- ▶ Section 7: routine financial and legal affairs
- ▶ Roles and responsibilities: representative
- ▶ Roles and responsibilities: monitor



RED FLAGS: IIAC

- Signs that may indicate diminished capacity include, but are not limited to, an investor who:
 - appears unable to process simple concepts
 - appears to have memory loss
 - appears uncharacteristically unkempt or forgetful
 - appears to be disoriented with surroundings or social settings
 - appears to have difficulty speaking or communicating
 - appears unable to appreciate the consequences of decisions

Source: *Investment Industry Association of Canada, "Canada's Investment Industry: Protecting Senior Investors—Compliance, Supervisory and Other Practices When Serving Senior Investors"* (Toronto: March 2014)

PRACTICE CONSIDERATIONS

- ▶ Extra time
- ▶ Work with helpers or supporters who assist with decision making
- ▶ Be curious: ask questions to gain clarity
- ▶ Create plain language forms and use plain language when speaking with clients
- ▶ Avoid assumptions about how a person's cognitive issue or disability may impact their ability to make decisions—find what works

Most important

- ▶ Be aware of signs of abuse
- ▶ Be a good listener
- ▶ Help them access support
- ▶ Respect their rights



INCLUSIVE INVESTING: RESPECTING THE RIGHTS OF VULNERABLE INVESTORS THROUGH SUPPORTED DECISION MAKING

- ▶ Two-year project
- ▶ Investors from various disability communities
- ▶ Using supported decision making as opposed to substitute decision making
- ▶ Builds on 2014 paper “[Understanding the Lived Experiences of Supported Decision-Making in Canada](#)”
- ▶ Grant from the Law Foundation of Ontario, Access to Justice Fund

KEY RESEARCH QUESTION

How can Canadian investment and financial institutions, adults with capacity challenges, and supporters incorporate supported decision making into the investment decision making process, while guarding against undue influence and elder financial abuse?

PROJECT GOALS & OUTCOMES

- ▶ Understand the legal, regulatory and practical issues
- ▶ Identify options for legal and regulatory reform
- ▶ Develop educational resources and tools
- ▶ Evaluation
- ▶ Final Report



WHO WILL BENEFIT?

- ▶ Adults with capacity challenges
- ▶ Supporters and supporting organizations
- ▶ Investment Industry Members and Regulators



CONSULTATION: WHO WE WANT TO HEAR FROM?

- ▶ Investment advisors
- ▶ Professionals who work with investment clients who have cognitive or decision-making challenges
- ▶ Clients and their supporters

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Project Page: <https://www.bcli.org/project/inclusive-investing-respecting-the-rights-of-vulnerable-investors-through-supported-decision-making>

Some Useful Resources

www.bcli.org/ccel

- ▶ Undue Influence: Recognition/Prevention: A Reference Aid
(<https://www.bcli.org/project/project-potential-undue-influence-recommended-practices-wills-practitioners>)
- ▶ www.canlii.org
- ▶ www.cnpea.ca
- ▶ Alzheimer's Society BC: Dementia friendly practice
<http://alzheimer.ca/en/bc>
- ▶ BC: www.nidus.ca
- ▶ PQ: www.educaloi.qc.ca
- ▶ ON: www.advocacycentreelderly.org





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