Representing the Incapable Client in Capacity Proceedings[*]

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Where court proceedings are brought affecting the property of a person under disability, the Rules of Civil Procedure provide for the appointment of a litigation guardian.[2] When the very issue in the proceeding is the capacity of the individual or the appointment of a substitute decision-maker, however, litigation guardians are not required. The client is deemed capable of instructing counsel and those instructions are deliberately unmediated.

The approach taken by counsel for the person alleged to be incapable can have a profound impact on the client and the litigation process[3] yet the available literature and instances of judicial guidance respecting the nature of the role are limited.[4] This paper addresses the role of counsel acting for an alleged incapable person in capacity-related proceedings. It considers the applicable legislation, the *Rules of Professional Conduct* and cases where courts and the Consent and Capacity Board (Board) have considered the subject. The resulting principles are then applied to some of the more difficult situations that counsel may encounter.

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[2] Rules of Civil Procedure, Rule 7, Ontario Regulation 194

[3] See, for example, the active role taken by counsel appointed under section 3 of the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30 (*SDA*) in *Teffer v. Shaefers* (2008), 93 O.R. (3d) 447 (S.C.J.).

[4] Procedural guidance is provided by the Office of the Public Guardian and Trustee on its website: http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/legalrepduty.asp (last accessed: 11 Nov 2009). PGT Louise Stratford's article, *Protecting Vulnerable Adults – A Community Responsibility* presented at the Eleventh Colloquium on the Legal Profession is most helpful and can be found at http://www.lsuc.on.ca/media/eleventh_colloquium_stratford.pdf (last accessed: 11 Nov 2009).

Legislation

Section 3 of the *Substitute Decisions Act, 1992*

Section 3 of the *SDA* provides as follows:

> **Counsel for person whose capacity is in issue**
>
> 3. (1) If the capacity of a person who does not have legal representation is in issue in a proceeding under this Act,
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> (a) the court may direct that the Public Guardian and Trustee arrange for legal representation to be provided for the person; and
>
> (b) the person shall be deemed to have capacity to retain and instruct counsel.
>
> **Responsibility for legal fees**
>
> (2) If legal representation is provided for a person in accordance with clause (1) (a) and no certificate is issued under the *Legal Aid Services Act, 1998* in connection with the proceeding, the person is responsible for the legal fees.

Nature of proceedings under the SDA

Proceedings under the *SDA* include applications for the appointment of guardians of property[5] and personal care, [6] temporary guardianship applications,[7] applications to terminate guardianship orders[8] and applications for directions respecting decisions by a guardian or attorney.[9] Capacity is potentially in issue in each type of proceeding under the *SDA.* Whether it is actually in issue in a proceeding must be determined on a case by case basis. An important distinction to be drawn in this regard is between findings of incapacity by a psychiatrist or a capacity assessor and findings of incapacity by a court, which do not

[5] *SDA*, section 22

[6] *SDA*, section 55

[7] *SDA*, sections 27 and 62

[8] *SDA*, sections 28 and 63

[9] *SDA*, sections 39 and 68

necessarily follow. In most cases the alleged incapable person will at least have a position in respect of the relief sought.

Choice of counsel

Subsection 3(1) of the *SDA* provides that the court's authority to direct the Public Guardian and Trustee (PGT) to appoint counsel arises only where the person whose capacity is at issue does not have legal representation. A person whose capacity is in issue in a proceeding may secure legal representation independently. This is consistent with the expectation that a choice of lawyer made by a person whose capacity is in issue should be respected.

The role of the PGT

Upon receipt of direction from the court, the PGT is responsible for arranging for legal representation. In practice, appointments are also made directly by the court. In some cases, counsel may have previously been retained by the person whose capacity is in issue and they may nonetheless seek an appointment under section 3. This can occur where a guardian or attorney for property refuses to pay counsel or where counsel is having difficulty obtaining access to the client (i.e. where the client is in the custody of a party who does not recognize counsel's role). The PGT may be asked prospectively to agree to a lawyer continuing to act should the court direct that a lawyer be appointed.

Arranging representation does not extend to the payment of counsel. In cases where counsel has accepted an appointment under section 3 of the *SDA* or section 81 of the *Health Care*

Consent Act, 1996 (*HCCA*),[10] the incapable person is responsible for the legal fees if he or she does not otherwise qualify for legal aid.[11] The PGT is not itself responsible for payment of counsel's legal fees unless it also acts as a guardian of property or interim guardian of property for the incapable person. Under either statute, the lawyer is responsible for assisting his or her client to complete an application for a legal aid certificate.[12]

Deemed capacity to retain and instruct counsel

By deeming the client capable of retaining counsel, the statute contemplates that the client may otherwise be incapable of doing so. This removes the requirement that the lawyer establish that the client has capacity to enter into the financial aspects of the retainer.

Capacity to retain implies the capacity to discharge counsel or decline representation. Counsel cannot be forced upon a person who does not wish to be represented. Reasons for refusing the appointment may range from not wanting to have someone speak for them to not wanting to pay for a lawyer.

Deemed capacity to instruct removes the requirement that the lawyer be satisfied that the instructions provided by a client are capable.[13] Where capacity is the issue in the proceeding, a client who wishes to dispute the allegation of incapacity is entitled to do so. For the lawyer

[10] S.O. 1996, c. 2, Sch. A. Please see the discussion of the *HCCA* below at page 5.

[11] Subsection 3(2) *SDA* and subsection 81(2) *HCCA*

[12] If legal aid is required, information provided by the PGT to lawyers accepting an appointment indicates that "Regarding payment of legal fees in the absence of a private retainer, the lawyer must assist his or her client to complete an application for a legal aid certificate and submit it to the Area Director of the Legal Aid Office indicated on the materials from the PGT in advance of the return date of the Court or Board proceeding wherever possible."

to impose a threshold of capacity upon a client in such cases would deprive the client of representation. Moreover, the client may be incapable in some aspects of their decision-making but capable in others. An incapable client may also have prior capable wishes and in most cases will express wishes and preferences, even if incapable, that are applicable to matters in issue in the proceeding. The role of counsel for the incapable person includes advancing these wishes and preferences.

Health Care Consent Act, 1996

The *SDA* does not contain a purposes section. The *HCCA*, however, which is the counterpart of the *SDA* in the sphere of health care, does.[14] The same hierarchy, which recognizes the autonomy of capable persons, respects their prior capable wishes and allows for the appointment of a representative for the purpose of making decisions in the event of incapacity arguably applies to both statutes.

Subsections 81(1) and (2) of the *HCCA* presently[15] provides as follows:

> **Counsel for incapable person**
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> 81. (1) If a person who is or may be incapable with respect to a treatment, admission to a care facility or a personal assistance service is a party to a proceeding before the Board and does not have legal representation,
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> (a) the Board may direct the Public Guardian and Trustee or the Children's Lawyer to arrange for legal representation to be provided for the person; and
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> (b) the person shall be deemed to have capacity to retain and instruct counsel.

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[13] This however, does not relieve the requirement that the lawyer be satisfied that the instructions are indeed those of the client, as discussed below in the context of the *Banton* case.

[14] *HCCA*, section 1

[15] This section of the *HCCA* is proposed to be amended by Schedule 18 Ministry of Health and Long-Term Care, section 10 of Bill 212, *The Good Government Act, 2009*.

Responsibility for legal fees

(2) If legal representation is provided for a person in accordance with clause (1) (a) and no certificate is issued under the *Legal Aid Services Act, 1998* in connection with the proceeding, the person is responsible for the legal fees.

Proposed Amendments

Section 81 of the *HCCA* is proposed to be amended by Schedule 18 of Bill 212, *The Good Government Act, 2009*, which received first reading on October 27, 2009, and provides, in part, as follows:

> 10. (3) Subsection 81 (1) of the Act is amended by striking out "a treatment, admission to a care facility or a personal assistance service" in the portion before clause (a) and substituting "a treatment, managing property, admission to a care facility or a personal assistance service".
>
> (4) Clause 81 (1) (a) of the Act is amended by striking out "the Public Guardian and Trustee or the Children's Lawyer" and substituting "Legal Aid Ontario".
>
> (5) Section 81 of the Act is amended by adding the following subsection:
>
> Same
>
> (2.1) Nothing in subsection (2) affects any right of the person to an assessment of a solicitor's bill under the Solicitors Act or other review of the legal fees and, if it is determined that the person is incapable of managing property, the assessment or other review may be sought on behalf of the person by,
>
> (a) the person's guardian of property appointed under the Substitute Decisions Act, 1992; or
>
> (b) the person's attorney under a continuing power of attorney for property given under the *Substitute Decisions Act, 1992*.

The impact of the amendments would be to expand the circumstances in which counsel can be appointed to cases where the ability to manage property is at issue before the Board. They also make explicit the right of a person (directly or through a guardian or attorney for property) to assess the account of counsel who is appointed under this section. The proposed amendments further shift responsibility for arranging legal representation from the PGT Trustee or the Office of the Children's Lawyer (OCL) to Legal Aid Ontario.

Nature of proceedings under the HCCA

Proceedings before the Board under the *HCCA* include applications to appoint a representative for the purpose of making decisions respecting treatment,[16] admission to a care facility,[17] personal assistance services[18] and applications questioning the propriety of decisions made by substitute decision-makers.[19] In each such application, there is a deemed Form A application to the Board to determine whether the person for whom decisions are to be made is indeed incapable.[20] Direct challenges of findings of incapacity in these three areas are also considered by the Board.[21]

The Board's ability to direct the PGT to appoint counsel under section 81 of the *HCCA* is not available in proceedings before the Board under the *Mental Health Act* (*MHA*),[22] which include reviews of involuntary admission to hospital, community treatment orders and financial capacity. This omission is curious and is often overlooked by the Board in practice

[16] Subsections 33(1) to 33(3), *HCCA*. The incapable person may apply to the Consent and Capacity Board for appointment of a representative. Further, a person over the age of 16 may apply to the Board to have himself or herself appointed. These two sections do not apply if the incapable person has a guardian of the person or an attorney for personal care empowered with authority to make treatment decisions.

[17] Subsections 51(1) to 51(3), *HCCA*. The incapable person may apply to the Consent and Capacity Board to seek appointment of a specified representative. Any person over the age of 16 may apply to the Board to be appointed representative. As with treatment, these sections do not apply where a guardian of the person or an attorney for personal care is in place.

[18] Subsections 66(1) to 66(3), *HCCA*. The person found incapable of making decisions respecting personal assistance services may apply to the Consent and Capacity Board for the appointment of a representative. Any person over the age of 16 may apply to the Board to be appointment representatives. Again, these sections do not apply where a guardian of the person or an attorney for personal care is in place.

[19]Section 37, *HCCA*. If a physician believes that a substitute decision-maker has not complied with the principles for giving or refusing consent to treatment set out in section 21 of the *HCCA*, the physician may apply to the Board for a determination as to whether the substitute decision-maker has complied with section 21 of the *HCCA*. Sections 54 and 69 of the *HCCA* allow similar applications in respect of admission to care and personal assistance services.

[20] *HCCA*, sections 37.1, 54.1 and 69.1

[21] *HCCA*, sections 32, 50 and 65

[22] *Mental Health Act*, R.S.O. 1990, c. M.7

as the *MHA* otherwise provides that sections 73 to 80 of the *HCCA* apply to proceedings under the *MHA*.[23] The proposed amendments to section 81 of the *HCCA* in Bill 212 make the omission more obvious by including "managing property" as one of the areas of incapacity for which counsel may be appointed.

Choice of counsel

As in the case of subsection 3(1) of the *SDA*, the Board's authority under the *HCCA* to direct the PGT to appoint counsel arises only where the person whose capacity is at issue does not have legal representation. The Board, however, has taken a pro-active approach and issued a policy guideline[24] that provides for the PGT to be directed to arrange counsel in any case where it appears that an applicant is without legal representation. This can result in the appointment of counsel for someone who does not want representation or to two lawyers being engaged, one by the client directly and one appointed by the PGT.

The role of the Public Guardian and Trustee and the Office of the Children's Lawyer

The role of the PGT and the OCL in appointing counsel under the *HCCA* is similar to that of the PGT in cases under the *SDA*. The distinction between the two offices is likely based on the age of the person requiring representation although the statute does not state this. It should be noted that the same material is distributed by the PGT to counsel appointed under section 81 of the *HCCA* as under section 3 of the *SDA*.

[23] Involuntary admission to hospital, community treatment orders and capacity to manage property are all determined by the Board under the *MHA*, not the *HCCA*. The sections of the *MHA* that import the *HCCA* provisions in respect of such hearings are 13(7), 39(7) and 60(2).

[24] Consent and Capacity Board Policy Guideline 2, published September 1, 2007: http://www.ccboard.on.ca/english/legal/documents/policy_guideline2.pdf (last accessed: 11 Nov 2009).

Deemed capacity to retain and instruct

In most proceedings before the Board, the party initiating the application is the person whose capacity is at issue. The application to the Board generally follows a finding by a physician or an evaluator that the person is incapable of making a certain type of decision. It stands to reason, therefore, that the person would be deemed capable of retaining and instructing counsel in the resulting proceeding before the Board. In the case of deemed Form A applications to the Board,[25] which are generally triggered by persons other than the person whose capacity is at issue, the person whose capacity is in issue may or may not provide instructions. If the person does give instructions, those instructions are deemed to be capable and the appointed lawyer is obliged to follow them.

Professional Responsibility

A common misconception is that the role of counsel appointed under section 3 of the *SDA* or section 81 of the *HCCA* is to act in the best interests of the person alleged to be incapable.[26] It has been asserted by at least one lawyer experienced in the area of capacity law that in the absence of any instructions from the client for whom the lawyer is appointed, it is the lawyer's role to pursue what the lawyer considers to be in the client's best interests.[27] There is no statutory support for this position. Moreover, the legitimacy of the adjudicative process

[25] Deemed applications to determine whether a person is capable of making decisions respecting treatment, admission to care or personal assistance services. See above at note 20.

[26] This is based on the author's experience and some general articles respecting power of attorney challenges.

[27] In *Re L.*, 2009 CanLII 47225 (ON C.C.B.), objection was taken to submissions being made by counsel appointed under section 81 of the *HCCA* who was unable to obtain instructions but who supported one of two competing substitute decision-makers based on his view of the client's best interests. An appeal to the Superior Court of Justice is pending. The author wishes to disclose that he is counsel for the appellant in this case.

depends on lawyers refraining from imposing their personal views respecting their clients' best interests upon their clients.

In examining the role of counsel for a person whose capacity is in issue in a proceeding, the first principle is found in the *Rules of Professional Conduct*. Subrule 2.02(6) provides that "the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship."[28] Representing a client who is alleged to be incapable should, accordingly, be no different from representing a client whose capacity is not in issue.

In a normal solicitor-client relationship, a client is free to give instructions that may be considered contrary to the client's best interests. While the lawyer may advise the client of the potential adverse consequences of pursuing such a course of action, it would be inappropriate for the lawyer to disregard the client's instructions on the basis that they are contrary to what the lawyer believes to be in the client's best interests. The same applies where a client is under disability. Once instructions are obtained, the lawyer must "represent the client resolutely and honourably within the limits of the law."[29] For the lawyer to abandon this principle in favour of the lawyer's notion of the client's best interests will effectively silence the client.

What constitutes instructions from a client deemed capable to instruct?

The provisions in section 3 of the *SDA* and section 81 of the *HCCA* that deem the client capable of instructing counsel lower the threshold for what a lawyer may accept as

[28] *Rules of Professional Conduct,* Law Society of Upper Canada, Subrule 2.02(6)

[29] *Rules of Professional Conduct,* Rule 4.01

instructions. In a guardianship application, these instructions may be as minimal as not wanting to undergo a capacity assessment or to be found incapable.[30] In an application before the Board under the *HCCA*, a client may wish to avoid a particular treatment or admission to a care facility or object to a particular person being appointed as a decision-maker. In each of these situations, a lawyer is able to act on the instructions and seek to achieve the outcome sought by the client. In cases involving a risk of undue influence or where there are communication difficulties, a lawyer must ensure that the instructions received are both independent and reliable. There is further discussion of this issue below in the context of the potential problems faced by counsel.

What if there are no instructions?

Where a client is unable to provide instructions, there may be scope for a lawyer appointed to act on the basis of an unambiguous prior capable wish. Such a role would necessarily require that there be strong (and ideally corroborated) evidence of the prior capable wish. Sources may include a continuing power of attorney for property, a power of attorney for personal care, a will or a previously granted consent to treatment or admission to a care facility.

If a client, after being given a full opportunity to do so, provides no instructions to the lawyer or terminates the relationship, the lawyer cannot act. Indeed, in a normal lawyer-client relationship, termination by the client or a failure to give instructions are the primary grounds

[30] Capacity assessments can have significant implications in the context of guardianship proceedings, particularly where the evidence of incapacity is poor or a finding of incapacity may open the door to a guardianship order that displaces a valid continuing power of attorney for property. A lawyer for a person alleged to be incapable should not routinely consent to orders for assessment. It is of no benefit to the lawyer, whose client is deemed capable of providing instructions, to have the opinion of a capacity assessor on the issue.

(together with non-payment) for a lawyer to withdraw from the record.[31] There is simply no authority, in the absence of instructions from a client, for a lawyer to continue to act for that client. There is good reason for this as well. An uninstructed lawyer is the legal equivalent of a loose cannon on the deck of a ship.

Despite any temptation to act in the absence of instructions, the dangers outweigh any benefit. Neither of section 3 of the *SDA* nor section 81 of the *HCCA* permits a lawyer to act in such circumstances. The concept of best interests can be used to justify a range of responses in any given situation. The lawyer's view of the client's best interests, if not informed by the instructions of a client, is nothing more than the lawyer's personal opinion, which has no place in the adjudicative process.

There is also the risk that the role of counsel for the alleged incapable person will conflict with the role of the judge or tribunal. Each of the *SDA* and the *HCCA* contain provisions which define the best interests of the individual for the purpose of specific decisions to be made under those Acts.[32] In a contested guardianship application or a dispute between two potential substitute decision-makers, uninstructed counsel could tilt the balance amongst the parties. Counsel who is uninstructed and acting in accordance with the lawyer's opinion of the client's best interests could even have the effect of silencing or contradicting a client who seeks to assert a different position or who wishes to make no submissions.

As discussed below, there may be scope for a lawyer who is unable to obtain instructions to nonetheless assist in the administration of justice. There are cases where there is a risk that

[31] *Rules of Professional Conduct*, Rule 2.09(7)

the adversarial process will fail to disclose evidence and arguments relevant to the matters in issue, such as the existence of a prior capable wish or a conflict of interest on the part of one or more parties to an application. If such circumstances are present, the lawyer can seek an appointment as *amicus curiae* or friend of the Board. Other parties, including the person whose capacity is in issue, would be free to object. If appointed, it would then be clear that the lawyer's role is not as counsel for the person whose capacity is at issue but to address specific matters that might otherwise not be raised in the adversarial context.

Guidance from Judicial and Board Decisions

While appointments under section 3 of the *SDA* and section 81 of the *HCCA* are made with some regularity, few court or Board decisions discuss the role of counsel so appointed. One case that discusses the role of section 3 counsel is *Banton v. Banton*.[33]

The Banton case

Consider the following passage respecting the role of appointed counsel written by Mr. Justice Cullity in the *Banton* case:[34]

> The position of lawyers retained to represent a client whose capacity is in issue in proceedings under the *Substitute Decisions Act, 1992* is potentially one of considerable difficulty. Even in cases where the client is deemed to have capacity to retain and instruct counsel pursuant to section 3(1) of the Act, I do not believe that counsel is in the position of a litigation guardian with authority to make decisions in the client's interests. Counsel must take instructions from the client and must not, in my view, act if satisfied that capacity to give instructions is lacking. A very high degree of professionalism may be required in borderline cases where it is possible

[32] See, for example, subsection 21(2) of the *HCCA* and subsection 66(4) of the *SDA*.

[33] *Banton v. Banton* (1998), 164 D.L.R. (4th) 176 (Ont. Ct. Gen. Div.)

[34] *Ibid.*, at page 218

> that the client's wishes may be in conflict with his or her best interests and counsel's duty to the Court.

The first part of this quote manages to do in three sentences what has taken the writer the above 13 pages to explain. The last sentence, however, seems almost enigmatic. If a client is deemed capable of instructing counsel and capable clients are permitted to provide instructions that are in conflict with their best interests, why, in borderline cases, might the actions of the then lawyer in accepting those instructions conflict with the lawyer's duty to the court? To appreciate this statement, an understanding of the case is required.

The *Banton* case involved an archetypal legal conflict between George Banton's adult children and his new wife, Muna Banton, whom he met at a time that his capacity to manage his property was disputed. Mr. Justice Cullity's comments above are part of his description of the role played by the recently-called lawyer who had represented Mr. Banton in the resulting guardianship proceeding.

Mr. Banton's lawyer acknowledged that on most occasions he took his instructions over the telephone and that they were conveyed by Mrs. Banton and not Mr. Banton. There were many such telephone conversations and very few meetings or telephone conversations with Mr. Banton. Mrs. Banton attended all meetings between the lawyer and Mr. Banton. Mr. Banton's affidavit in the guardianship application seemed to have been vetted by Mrs. Banton but not by Mr. Banton.

At a time that the lawyer knew that Mr. Banton was comatose in hospital, he made no effort to effort to correct Mrs. Banton's evidence in cross-examination that Mr. Banton was able to take care of his own needs without difficulty. Mr. Banton's children were otherwise kept

incommunicado on the basis of Mrs. Banton's advice to the lawyer that these were Mr. Banton's instructions. The lawyer's actions were considered by the Court to demonstrate excessive zeal as well as partisanship toward Mrs. Banton whose influence was such that the Court described Mr. Banton as a "mere puppet."[35]

In light of the above, the enigmatic final sentence from Mr. Justice Cullity's quotation can be parsed as follows: A *very high degree of professionalism* relates to the need, in all cases but especially where there is a risk of undue influence, to ensure that instructions come directly and independently from the client. *[B]orderline cases* refers to cases where the client's ability to provide instructions independently, which is essential for the lawyer to act, is at issue. Circumstances *where it is possible that the client's wishes may be in conflict with his or her best interests* are those where a client's wishes may benefit another party to the client's detriment. *[C]ounsel's duty to the Court* recognizes the reliance of the court and the parties upon the lawyer appointed under section 3 to faithfully advance the client's instructions alone and no other position.

Consent and Capacity Board Decisions

There is no appellate jurisprudence on the role of counsel appointed under section 81 of the *HCCA* to represent persons whose capacity is at issue. There are, however, appellate decisions that recognize the importance of counsel generally for persons facing treatment based on substitute consent.[36] The Board has commented on the implications of deemed

[35] *Ibid.*, at page 219

[36] See, for example, *Paluska v. Cava* (2001), 55 O.R. (3d) 681 (S.C.J.), reversed on the ground of failure to deliver a notice of constitutional question at (2002), 59 O.R. (3d) 469 (C.A.), in which Madam Justice Molloy wrote, "The consequences for Mr. Paluska of the matters raised in this appeal are as serious as the consequences

capacity under section 81 of the *HCCA*. In *Re M.B.*,[37] the Board wrote that there was no need for the Board to inquire beyond the objection of an incapable person to the appointment of a representative to make decisions respecting admission to a care facility under the *HCCA*. Nor was there any basis not to accept the communication of this position through counsel who was appointed on the incapable person's behalf.

The Board's record where counsel has been unable to obtain instructions is less consistent. In the case of *Re L*, noted above,[38] the Board agreed to receive and ultimately accepted, over the objection of one of the parties, the submissions of counsel appointed under section 81 that were based on counsel's position respecting his client's best interests. The Board noted that counsel was "a most experienced lawyer in this field… well aware of his difficult role as counsel for someone he did not know before the hearing and a client who was unable to communicate her instructions to him."

In *Re F*,[39] where counsel advised that she could not obtain instructions from her incapable client, the Board refused to permit counsel to participate in the hearing in any capacity (other than informing her client of the outcome). In *Re A.F.*,[40] the Board disregarded the submission of counsel appointed under section 81 of the *HCCA* that was based on her opinion rather than instructions from her client.

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of the kind of criminal charges that have been found to warrant a Rowbotham type order. He faces a loss of liberty as well as forcible treatment with anti-psychotic and other drugs."

[37] *Re M.B.*, [2004] O.C.C.B.D. No. 91 (QL)

[38] Please see note 27, above.

[39] *Re F* [2006] O.C.C.B.D. No. 69 (QL)

[40] *Re A.F.* [2005] O.C.C.B.D. No. 338 (QL)

There are also cases where counsel who were appointed under section 81 of the *HCCA* but were unable to obtain instructions have been appointed *amicus* or friend of the Board. In *Re I.Q.*[41] counsel appointed for the incapable person advised the Board that she was unable to obtain instructions from her client and asked to be appointed *amicus*. The Board agreed, citing the *Paluska* case[42] and writing that "[t]he appointment of… amicus will allow [counsel] to act without specific instructions to bring out all information that may be necessary for the Board to determine the issues in this case." The Board has also appointed counsel to act as *amicus* where patients have wished to represent themselves at hearings.[43]

Viewing these cases together, it is fair to state that the Board has not developed a coherent position respecting the role of counsel appointed under section 81 of the *HCCA* where counsel's ability to obtain instructions is at issue. Given the similarity of the wording of section 3 of the *SDA* and section 81 of the *HCCA*, however, the principles applicable to practice before the Superior Court under the *SDA* and Mr. Justice Cullity's pronouncement in *Banton* should apply with equal force before the Board.

[41] *Re I.Q.* [2005] O.C.C.B.D. No. 267 (QL)

[42] Please see note 36, above.

[43] See *Re B*, 2009 CanLII 54132 (ON C.C.B.); *Re A.M.*, 2004 CanLII 6726 (ON C.C.B.); and *Re L.N.D.*, 2006 CanLII 51693.

Application to Practice

The following are some of the more difficult situations that are encountered by counsel appointed under section 3 of the *SDA* and section 81 of the *HCCA* and a discussion of how they might be resolved based on the above principles

The non-communicative client

As noted above, counsel cannot act in the absence of instructions. The client, however, is entitled to every opportunity to provide instructions, including, where appropriate, more than one visit and possibly several approaches to the issue. As capacity can fluctuate, inquiries should be made respecting the best time of day to meet with a client and whether the client is functioning below their usual base-line on the day of a visit. If there is a reasonable prospect of improvement, such as in the period of time following a stroke, counsel may ask caregivers to let the lawyer know if the client's condition improves so as to warrant a further attempt to obtain instructions.

In the absence of the ability to obtain instructions, a lawyer can consider accepting an appointment as *amicus curiae* or friend of the Board. Perhaps the best example of a situation where this would be appropriate is an application for directions under the *SDA*[44] seeking to depart from a prior capable wish or a similar application to the Board under the *HCCA*.[45] If no other party to the proceeding is inclined to assume this role, the incomplete adversarial

[44] *SDA*, sections 39 and 68

[45] *HCCA*, sections 36, 53 and 68

context may fail to uncover evidence and arguments that support the existence of a prior capable wish and/or ensure that the proper test is applied.

Inability to access client

A lawyer's professional obligations require that the lawyer have unmediated, direct access to a client for the purpose of obtaining instructions. When a lawyer is appointed to represent vulnerable clients who are detained who or lack control of their living circumstances, ensuring client access can be a challenge. In treatment capacity cases the client may be in locked seclusion or may not have access to a private telephone. In guardianship proceedings, feuding relatives may go to great lengths to keep the subject of the application incommunicado. A lawyer cannot accept such limitations upon access, nor can the lawyer accept a purported termination of the lawyer's retainer that may have been obtained by improper means. The lawyer should in such circumstances move for directions before the court to seek an order for unimpeded access to the client or similar direction from the Board.

Client subject to the influence of others

A lawyer must ensure that the instructions received from a client are the instructions of the client alone and not the product of undue influence. The simplest measure that can be taken in this regard is to ensure that no other person is present at the lawyer's meetings with the client. If the lawyer cannot be assured that the client is alone during telephone conversations, the lawyer should avoid taking instructions in this manner. Finally, written instructions should be taken in person rather than by mail. It also follows that a lawyer should not use

family members as interpreters but instead, where one is required, the lawyer should engage an independent interpreter.

Concerns of undue influence sometimes result in variations of the problem of client access. A client may insist or "instruct" the lawyer that the client will meet with the lawyer only in the presence of a party to the proceeding whose interest is potentially in conflict. Effort should be made in such cases to explain to the client that such an insistence could interfere with the lawyer's duty to the court or the Board to ensure that the client's instructions are independent. The lawyer seeking exclusive access to a client can also enlist the assistance of counsel for the other party seeking to be present, assuming the party is represented, to facilitate such access. If the issue cannot otherwise be resolved, direction from the court or Board can be sought.

Once reasonable precautions are taken to ensure that the client's instructions are free from undue influence, the lawyer appointed for an alleged incapable person should document instructions, in writing where possible, and then seek to carry them out. It is wrong to assume that all instructions that are not in the client's best interests or which tend to favour one party in a proceeding over another are the product of undue influence.[46]

Conflict with professional obligations

A lawyer's duty is to "represent the client resolutely and honourably within the limits of the law."[47] Effective advocacy is not accomplished by half measures. Some instructions may conflict with one's professional obligations, however. For example, a client before the Board

[46] This comment may at times seem reminiscent of Captain John Yossarian's line in Joseph Heller's *Catch 22*, "Just because you're paranoid doesn't mean they aren't after you."

may insist that a witness who has no relevant information be summoned to give evidence. The insistence may originate from a delusional belief or a client's desire to use the Board hearing for an ulterior purpose. Before resisting such instructions, counsel must be satisfied that the proposed line of inquiry is of no relevance to the application. This will involve at least preliminary investigation of the client's contentions and, if indicated, efforts to dissuade the client from pursing an inappropriate course. Withdrawal from representation other than where one's services are terminated is an option of last resort and is also governed by the Law Society's *Rules of Professional Conduct*.[48]

Mediation and Settlement

Lawyers have a professional obligation to encourage mediation and settlement.[49] Settlement and processes directed toward achieving it should not be impeded by concerns respecting the capacity of one of the parties to a proceeding. All parties, including those alleged to be incapable, should be encouraged to participate in the mediation process to the full extent that they are able. The role of counsel appointed under section 3 of the *SDA* is not to ensure that a potential settlement is consistent with the client's best interests but with the client's instructions. There is certainly scope, however, consistent with the client's instructions, for counsel for the alleged incapable person to facilitate settlement amongst the parties.

Whether a person alleged to be incapable signs minutes of settlement reached amongst the parties will sometimes depend on the length of the document or even the size of the print. A

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[47] Please see note 29, above.

[48] *Rules of Professional Conduct*, subrule 2.09(7)

[49] *Rules of Professional Conduct*, subrules 2.02(2) and (3)

matter can nonetheless be settled based on instructions received by counsel for the alleged incapable person. Depending on the circumstances of the case (and more often in respect of property issues rather than personal care), judicial approval of a settlement may be required. Where there is a concern respecting the consequences of a settlement upon a person alleged to be incapable, it is the PGT[50] that examines whether a settlement is in the person's best interest, either of its own initiative or at the direction of the court.

A client's instructions respecting settlement in the context of matters before the Board should be documented. There is no requirement that the Board approve a settlement although it is open to the parties to seek an order from the Board documenting or operationalizing a settlement (such as a consent order for the appointment of a representative for the purpose of making treatment decisions).

Fees and Payment

A lawyer acting for a client whose capacity is at issue should take the same prudent measures as would be taken in any case to secure the payment of fees. This will include preparing written retainer agreements establishing the scope of the retainer and the manner in which fees are to be determined and obtaining a retainer deposit. The *Rules of Professional Conduct* require that fees be fair and reasonable and disclosed in a timely fashion.[51] Where a third party refuses to make the client's funds available to the client for the purpose of paying the lawyer, this can be addressed by motion for directions in the same manner as would a denial of access to the client.

[50] The PGT is served with all types of guardianship applications under section 69 of the *SDA*.

Where it is determined in the course of the proceeding that the client is not capable of managing property or where capacity is not yet determined in the proceeding but the client's funds are managed by an attorney for property, interim or statutory guardian, it is prudent to ask that the court fix the fees of the lawyer representing the incapable client in connection with any interim or final disposition of the proceeding or confirmation of any settlement. The amount of the lawyer's fees may also be addressed by a guardian of property or statutory guardian or referred for assessment by an assessment officer under the *Solicitors Act*[52] (which was the case regardless of the pending amendments to section 81 of the *HCCA* which make this right explicit).[53]

Legal Aid

Both of section 3 of the *SDA* and section 81 of the *HCCA* indicate that the client is responsible for the legal fees where no certificate is issued under the *Legal Aid Services Act, 1998*.[54] Where a client has access to sufficient funds to retain counsel on a private-retaining basis, the client will unlikely be eligible for legal aid. The availability of legal aid can be particularly beneficial, however, to a client whose major asset is real property (i.e. a home), the value of which will be realized only upon its sale. Legal Aid will secure itself by a lien against the real property and the client will receive the benefit of the dramatically reduced rates paid to lawyers by Legal Aid Ontario.

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[51] *Rules of Professional Conduct*, subrule 2.08(1)

[52] *Solicitors Act*, R.S.O. 1990, c. S.15

[53] Please see note 15, above.

[54] *Legal Aid Services Act, 1998*, S.O. 1998, c. 26

Legal Aid Ontario has considerable experience in proceedings before the Board and has established a tariff for such services such that payment, if poor, is nonetheless predictable. The treatment of lawyers' accounts by Legal Aid Ontario in guardianship proceedings, however, warrants a caveat to lawyers who might consider accepting such retainers. Legal Aid has no tariff applicable to guardianship proceedings and funds them so infrequently that it lacks the expertise required to assess the value of the services rendered. In addition to accepting hourly rates that may be less than a quarter of their usual rates, lawyers should be prepared to have their accounts reduced by Legal Aid to the actual time spent in court or mediation plus a small number of hours of preparation time regardless of the amount of time actually required. Many disbursements, particularly relating to travel, are also disallowed. Legal Aid may maintain its position respecting payment despite the agreement of the contributing client and the parties to the guardianship application.[55] Lawyers asked to act in court proceedings under the *SDA* might reasonably insist upon alternate arrangements for the payment of their fees.

Conclusion

Representing incapable persons in capacity-related proceedings can be both challenging and rewarding. It is essential, however, that all participants in the proceedings appreciate the role of the lawyer whose client is deemed capable of instructing him or her. Through understanding, parties can move together toward better outcomes more respectful of the dignity and autonomy of the incapable client.

[55] Legal Aid may also insist upon receiving prior notice of any hearing in which a lawyer's fees might be fixed by the court before recognizing the amount that the court orders be paid.