BETWEEN A ROCK AND A HARD PLACE: THE COMPLEX ROLE AND DUTIES OF COUNSEL APPOINTED UNDER SECTION 3 OF THE SUBSTITUTE DECISIONS ACT, 1992

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1. Introduction

This paper seeks to outline the unique role and responsibilities of counsel appointed pursuant to s. 3 of the *Substitute Decisions Act, 1992*[1] ("*SDA*"). It attempts to address the difficult question of the professional duties of lawyers called to represent individuals whose mental capacity is in question.

As will be evident below, this study tracks a number of Ontario legal sources, starting with the sparse, yet growing body of court and tribunal decisions dealing with the representation of allegedly incapable persons, as well as analogous legislative provisions and related case law to address a lawyer's role and responsibilities when representing clients whose capacity is in issue.

There is limited guidance for counsel appointed pursuant to s. 3 of the *SDA* ("s. 3 counsel"). This raises difficulties for those lawyers who act for persons whose capacity is in issue and find themselves torn between conflicting professional duties. In particular, there is little

1. S.O. 1992, c. 30 (hereafter "*SDA*").

indication of the parameters governing the standard of care to be discharged by such counsel.

Persons involved in proceedings where capacity is in issue, whether represented by counsel or lay persons, often do not understand the need for an appointment of counsel for the allegedly incapable person and do not appreciate the particular role and responsibilities of s. 3 counsel.

Of late, no doubt in part due to the lack of clear guidance available on the issue, there have been a number of complaints raised against lawyers acting as court-appointed s. 3 counsel, in the form of complaints to the Law Society of Upper Canada,[2] as well as claims alleging negligence.[3]

The lack of readily available information leads to misconceptions and fuels contention, and prolongs litigation which leads to increased legal costs and further frustration in the legal process.

This paper attempts to collate, as much as possible, judicial guidance on the role of s. 3 counsel, while reviewing analogous legal provisions that facilitate legal representation for individuals whose capacity is in issue, in an effort to assist in our understanding of the nature and scope of the role of s. 3 counsel appointed under the *SDA*.

2. Background on Capacity Proceedings

(1) The Legal and Legislative Framework

(a) Section 3 of the Substitute Decisions Act, 1992

Section 3 of the *SDA* provides that in cases where an individual whose capacity is in issue in proceedings under that legislation does not have counsel, the Ontario Public Guardian and Trustee ("PGT") may be directed by the court to arrange legal representation for that person.

The unedited provision reads 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,
>
> (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.

2. The Law Society of Upper Canada, Regulatory Proceedings, Complaints Services.
3. *Newell v. Felker* (August 7, 2012), Edward J., Doc. CV-11-422094 (Ont. S.C.J.).

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.

Same

(3) 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; or

(b) the person's attorney under a continuing power of attorney for property.

(b) The Governing Legislation

The *SDA* governs substitute decision-making and certain capacity matters in Ontario. The *Health Care Consent Act, 1996*[4] ("*HCCA*") and the *Mental Health Act*[5] ("*MHA*") also address issues of capacity and decision-making.

Together, the *SDA*, *HCCA* and *MHA* seek to protect the interests of vulnerable persons while at the same time providing them means to assert their autonomy by ensuring that they are part of the legal process that affects their interests.

The *SDA* governs the appointment of guardians and the obligations of attorneys and guardians for property and for personal care as well as for those who act as substitute decision makers ("SDM") in the event of incapacity. Certain court proceedings are authorized under the *SDA* which provide for additional protections for adults who are the subject matter of guardianship applications or capacity assessments.

(c) Capacity

In addressing capacity, the *SDA* defines capable as "mentally capable" and capacity as having a corresponding meaning. The *SDA* defines incapable as "mentally incapable" and incapacity as having a corresponding meaning.

The *SDA* incorporates tools that seek to protect the autonomy of individuals who find themselves subject to its provisions. The statutory provisions are in recognition of the significance

4. S.O. 1996, c. 2, Sch. A (hereafter "*HCCA*").
5. R.S.O. 1990, c. M.7 (hereafter "*MHA*").

attributable to the potential loss of an individual's autonomy as a result of proceedings under the *SDA*.

As part of the protections afforded individuals under the *SDA*, the legislation sets out presumptions of capacity. As at common law, the *SDA* presumes that individuals who are 18 years or older are capable of entering into a contract.[6] Individuals who are 16 years of age or older are presumed capable of giving or refusing consent in respect of their own personal care.[7]

Another example of these protections is the requirement that individuals undergoing capacity assessments be given rights advice, that is, fulsome information on their legal rights to refuse an assessment or challenge the outcome of an assessment.[8]

The *SDA* requires that an individual whose capacity is in issue in a proceeding be served with notice of the proceedings. The individual, regardless of capacity, has the right to take part in the proceedings and have access to a lawyer and, as noted above, if such person does not already have counsel, s. 3 of the *SDA* provides for the appointment of counsel.

Subsection 3(1)(b) provides for a further presumption of capacity. It sets out that a person who is represented by a lawyer appointed pursuant to s. 3 of the *SDA* is "deemed to have capacity to retain and instruct counsel".

(d) The Purposes of the Substitute Decisions Act, 1992

The dual purpose of the *SDA* to protect vulnerable individuals while, at the same time, respecting their autonomy is reiterated throughout cases citing this legislation.

In the 1998 decision of *Stickells Estate v. Fuller*,[9] Justice Lack noted that the purpose of the *SDA* is to protect the vulnerable.

In the 1999 decision of *Re Phelan*,[10] Justice Kitely outlined the purpose of the *SDA* as follows:

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6. *SDA*, s. 2(1): "A person who is eighteen years of age or more is presumed to be capable of entering into a contract."
7. *SDA*, s. 2(2): "A person who is sixteen years of age or more is presumed to be capable of giving or refusing consent in connection with his or her own personal care."
8. *SDA*, s. 78(2)(b): "Before performing an assessment of capacity, the assessor shall explain to the person to be assessed . . . (b) the significance and effect of a finding of capacity or incapacity".
9. *Stickells Estate v. Fuller* (1998), 24 E.T.R. (2d) 25, [1998] O.J. No. 2940 (Ont. Ct. (Gen. Div.)), at para. 15.
10. *Phelan (Re)* (1999), 29 E.T.R. (2d) 82, [1999] O.J. No. 2465 (Ont. S.C.J.), at paras. 22-23.

> *The Substitute Decisions Act is a very important legislative policy. It recognizes that persons may be become temporarily or permanently incapable of managing their personal or financial affairs.* It anticipates that family members or others will identify when an individual has lost such capacity. *It includes significant evidentiary protections to ensure that declarations of incapacity are made after notice is given to all those affected or potentially affected by the declaration and after proof on a balance of probabilities has been advanced by professionals who attest to the incapacity.* It requires that a plan of management be submitted to explain the expectations. It specifies ongoing accountability to the court for the implementation of the plan and the costs of so doing.
>
> The alternative to such a legislative framework is that incapable persons and their families might be taken advantage of by unscrupulous persons. *The social values of protecting those who cannot protect themselves are of "superordinate importance".* [Emphasis added.]

3. The Role of the Public Guardian and Trustee in Capacity Matters

The PGT is a corporation under the *Public Guardian and Trustee Act*.[11] The office of the PGT is part of the Ministry of the Attorney General, Social Justice Programs and Policy Division. The PGT is Ms. Louise Stratford ("Stratford"), who was appointed by order-in-council on December 1, 1998.

In a paper delivered in 2008, Stratford outlined the role of the PGT in proceedings under the *SDA* as follows:[12]

11. R.S.O. 1990, c. P.51.

12. Louise A. Stratford, Public Guardian and Trustee, "Protecting Vulnerable Adults – A Community Responsibility", The Chief Justice of Ontario's Advisory Committee on Professionalism, Eleventh Colloquium on the Legal Profession, *Professionalism and Serving Communities*, October 24, 2008 (hereafter the "Stratford Paper, 2008"), at p. 3. Also see s. 20(1) of the *Health Care Consent Act, 1996*:

    > 20. (1) If a person is incapable with respect to a treatment, consent may be given or refused on his or her behalf by a person described in one of the following paragraphs:
    >
    > 1. The incapable person's guardian of the person, if the guardian has authority to give or refuse consent to the treatment.
    > 2. The incapable person's attorney for personal care, if the power of attorney confers authority to give or refuse consent to the treatment.
    > 3. The incapable person's representative appointed by the Board under Section 33, if the representative has authority to give or refuse consent to the treatment.
    > 4. The incapable person's spouse or partner.
    > 5. A child or parent of the incapable person, or a children's aid society or other person who is lawfully entitled to give or refuse consent to the treatment in the place of the parent. This paragraph

> Under the Substitute Decisions Act, 1992, the primary responsibility of the PGT is to act as a guardian of last resort for individuals who have been found to be mentally incapable of making their own financial or personal care decisions, and who have no appointed attorney or family member available, capable and willing to step in to make necessary decisions. The Ontario PGT is also required to investigate allegations that a mentally incapable person is at risk of suffering serious financial or personal harm of such magnitude as to warrant a temporary guardianship application to the Ontario Superior Court of Justice, in order to protect the person.
>
> The PGT is the substitute decision maker of last resort, both for property and the person. The PGT conducts investigations into allegations of risks of serious adverse effects to incapable adults under the SDA. The PGT reviews private applications to the Ontario Superior Court of Justice for guardianship under the SDA. The PGT makes treatment and long-term care placement decisions under the HCCA. The PGT acts as litigation guardian or legal representative of last resort of incapable adults, in litigation under the Rules of Civil Procedure . . . The PGT represents incapable adults and absentees in passing of accounts before the Ontario Superior Court of Justice. The PGT approves guardianship management plans pursuant to the SDA.

In her 2008 paper, Stratford also explained that the PGT plays a role in decision-making for incapable persons in matters that arise under the *Health Care Consent Act*:[13]

> Under the HCCA the PGT as last resort decision maker may give consent or refuse consent to treatment for individuals who have been found to be incapable of making a treatment decision for themselves, and have no relative, guardian or attorney to act as their substitute-decision maker.
>
> . . . . .
>
> This decision-making role also includes the authority to make substitute decisions placements in a long-term care facility and personal assistance services.

(1) The Duty of the Ontario Public Guardian and Trustee to Arrange Legal Representation under Section 3 of the SDA

The PGT would in the ordinary course be served with application or motion materials seeking the appointment of s. 3 counsel.[14]

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does not include a parent who has only a right of access. If a children's aid society or other person is lawfully entitled to give or refuse consent to the treatment in the place of the parent, this paragraph does not include the parent.
6. A parent of the incapable person who has only a right of access.
7. A brother or sister of the incapable person.
8. Any other relative of the incapable person.

13. *Supra*, at pp. 3 and 11.

The Ministry of the Attorney General website provides an information update entitled: "Ontario Information Update: Duty of the Public Guardian and Trustee to Arrange Legal Representation under section 3 of the *Substitute Decisions Act, 1992*".[15]

The office of the PGT has a duty to arrange legal representation for persons alleged to be incapable in proceedings before the Ontario Superior Court of Justice, under the *SDA* where so ordered or directed by the court pursuant to s. 3 of the *SDA*. When an order or endorsement is made by the court under s. 3 of the *SDA*, counsel for any of the parties are expected to provide a copy of the endorsement or order to the Office of the PGT. Once the Office of the PGT receives the order or endorsement, the Office will take steps to arrange for a lawyer.[16]

The lawyer appointed is required to assist his or her client with an application for a legal aid certificate in time for the return date of the court proceeding. At times, Legal Aid Ontario will require the client to sign a payment agreement. If that is the case, the lawyer should assist the client with the payment agreement, informing Legal Aid if he or she is unable to obtain a signature from the client. If the client does not qualify for legal aid, then the lawyer must deal with a private retainer.[17]

The PGT Information Update explains that more than one s. 3 counsel may be appointed. That is, if the appointed s. 3 counsel's services are terminated by the client, the court has discretion under the *SDA* to direct the PGT to arrange legal representation for the individual once again. It is worth noting that "the Court is not obliged to make such a direction and may decide to continue the proceeding and adjudicate even if the person is unrepresented".[18]

(2) Guidance Provided by the PGT on the Role of Section 3 Counsel

The PGT Information Update sets out the following information on the role of lawyers appointed pursuant to s. 3 of the *SDA*:[19]

14. *SDA*, s. 69(0.1) para. 4, 69(1) para. 5, 69(2) para. 4, 69(3) para. 5, 69(4) para. 4.
15. Government of Ontario, Ministry of the Attorney General, "Ontario Information Update: Duty of the Public Guardian and Trustee to Arrange Legal Representation Under Section 3 of the *Substitute Decisions Act, 1992*", available at <www.attorneygeneral.jus.gov.on.ca/english/fmaily/pgt/legal-repduty.pdf> (hereafter "PGT Information Update"), at pp. 5-6, #3.
16. PGT Information Update, *supra*, at pp. 2 and 4.
17. *Ibid.*, at p. 4.
18. *Ibid.*, at p. 5.

> *What is the role of the lawyer when the client will not or cannot give instructions*
>
> Representing a client pursuant to an Order made under section 3 of the *Substitute Decisions Act, 1992* can be a particularly challenging role. The lawyer may wish to consider his/her obligations as set out in the *Rules of Professional Conduct* and the Commentaries to the *Rules*. The lawyer may wish to review case law, scholarly works and continuing education materials touching upon the subject of legal representation in this context and capacity law issues generally.
>
> *The lawyer should attempt to determine the client's instructions and wishes directly from the client wherever possible. In some situations, the lawyer may attempt to determine the client's wishes and directions through third party sources such as medical practitioners, family members, caregivers and friends of the client. If the client's wishes or directions in the past or at present have been expressed to others, then consideration should be given to presenting the evidence in Court.*
>
> *The lawyer must not become a substitute-decision maker for the client in the litigation; that is, the lawyer cannot act as litigation guardian to make decisions in the proceeding even if it appears to be in the best interests of the client. The lawyer should ensure that the evidentiary and procedural requirements are tested and met, even where no instructions, wishes or directions at all can be obtained from the client.* [Emphasis added.]

The role of s. 3 counsel is also guided in part by the *Rules of Professional Conduct* and the *Rules of Civil Procedure*.

Section 3 counsel may make enquiries where it would be helpful, to determine the client's wishes from others who know the client, which can be presented as evidence in court.

The PGT Information Update makes it clear that s. 3 counsel is not a litigation guardian or substitute decision-maker, and such counsel must take care to not take on that role even if it would arguably be in the best interests of the client to do so.

The role of s. 3 counsel – even where there are no instructions – is to ensure that legal, procedural and evidentiary requirements are tested in the proceedings.

4. The Rules of Civil Procedure

Whereas s. 3 of the *SDA* provides a mechanism by which individuals whose capacity is in issue and who do not already have legal representation may have counsel, Rule 7 of the *Rules of Civil Procedure*[20] sets out the rules respecting the representation of parties under disability.

19. *Ibid.*
20. R.R.O. 1990, Reg. 194.

The definitions at Rule 1.03 of the *Rules of Civil Procedure* set out the meaning of "disability" as circumstances where a person is a minor, or "mentally incapable within the meaning of section 6 or 45 of the *Substitute Decisions Act, 1992* in respect of an issue in the proceeding, whether the person has a guardian or not". The definition of a party under disability also includes a person who is an "absentee within the meaning of the *Absentees Act*".

Rule 7.01(1) provides that, unless the court or statute provides otherwise, parties under disability must be represented by a litigation guardian in proceedings. Rule 7.01(2) provides a specific exception for applications under the *SDA* where the appointment of a litigation guardian is not required:

> REPRESENTATION BY LITIGATION GUARDIAN
>
> *Party under Disability*
>
> 7.01 (1) Unless the court orders or a statute provides otherwise, a proceeding shall be commenced, continued or defended on behalf of a party under disability by a litigation guardian.
>
> *Substitute Decisions Act Applications*
>
> (2) Despite subrule (1), an application under the *Substitute Decisions Act, 1992* may be commenced, continued and defended without the appointment of a litigation guardian for the respondent in respect of whom the application is made, unless the court orders otherwise.

Litigation guardians for defendants or respondents generally must be court-appointed and Rule 7.03 sets forth the procedure and evidence required for a motion to appoint a litigation guardian.[21]

Where no litigation guardian is available, either the Children's Lawyer ("OCL") or the PGT is appointed as litigation guardian, depending on the age of the person under disability.[22]

Rule 15 of the *Rules of Civil Procedure* requires that a litigation guardian must be represented by counsel.[23]

Settlement of litigation involving parties under a disability requires court approval, with the terms of settlement being reviewed by the OCL or the PGT, depending on the nature of the disability. The OCL or the PGT may provide a report on the merits of the settlement for the court's consideration.[24]

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21. *Rules of Civil Procedure*, Rule 7.03(1): "No person shall act as a litigation guardian for a defendant or respondent who is under disability until appointed by the Court, except as provided in subrule (2), (2.1), or (3)."
22. *Ibid.*, Rule 7.04.
23. *Ibid.*, Rule 15.01(1).

5. The Law Society of Upper Canada Rules of Professional Conduct

As noted in the PGT Information Update, s. 3 counsel are to refer to the requirements set out in the Law Society of Upper Canada's ("LSUC") *Rules of Professional Conduct*.

The following Rules and accompanying commentary provide guidance in establishing the role and duties of s. 3 counsel:[25]

> 2.02 QUALITY OF SERVICE
>
> . . . . .
>
> *Client under a Disability*
>
> (6) When a client's ability to make decisions is impaired because of minority, *mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship.*
>
> *Commentary*
>
> *A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions.* A client's ability to make decisions, however, depends on such factors as his or her age, intelligence, experience, and mental and physical health, and on the advice, guidance, and support of others. Further, a client's ability to make decisions may change, for better or worse, over time. When a client is or comes to be under a disability that impairs his or her ability to make decisions, the impairment may be minor or it might prevent the client from having the legal capacity to give instructions or to enter into binding legal relationships. *Recognizing these factors, the purpose of this rule is to direct a lawyer with a client under a disability to maintain, as far as reasonably possible, a normal lawyer and client relationship.*
>
> A lawyer with a client under a disability should appreciate that *if the disability of the client is such that the client no longer has the legal capacity to manage his or her legal affairs, the lawyer may need to take steps to have a lawfully authorized representative appointed, for example, a litigation guardian, or to obtain the assistance of the Office of the Public Guardian and Trustee or the Office of the Children's Lawyer to protect the interests of the client. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned.*
>
> . . . . .
>
> 2.03 CONFIDENTIALITY
>
> *Confidential Information*

24. *Ibid.*, Rule 7.08.
25. Law Society of Upper Canada, *Rules of Professional Conduct*, amendments current to April 28, 2011 (hereafter "*Rules of Professional Conduct*").

2.03 (1) A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so.

Commentary

A lawyer cannot render effective professional service to the client unless there is full and unreserved communication between them. At the same time, the client must feel completely secure and entitled to proceed on the basis that, without any express request or stipulation on the client's part, matters disclosed to or discussed with the lawyer will be held in strict confidence.

This rule must be distinguished from the evidentiary rule of lawyer and client privilege concerning oral or documentary communications passing between the client and the lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge.

A lawyer owes the duty of confidentiality to every client without exception and whether or not the client is a continuing or casual client. The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, whether or not differences have arisen between them.

. . . . .

2.09 WITHDRAWAL FROM REPRESENTATION

Withdrawal from Representation

2.09 (1) A lawyer shall not withdraw from representation of a client except for good cause and upon notice to the client appropriate in the circumstances.

Commentary

Although the client has the right to terminate the lawyer-client relationship at will, the lawyer does not enjoy the same freedom of action. Having undertaken the representation of a client, the lawyer should complete the task as ably as possible unless there is justifiable cause for terminating the relationship.

No hard and fast rules can be laid down about what will constitute reasonable notice before withdrawal. Where the matter is covered by statutory provisions or rules of Court, these will govern. In other situations, the governing principle is that the lawyer should protect the client's interests to the best of the lawyer's ability and should not desert the client at a critical stage of a matter or at a time when withdrawal would put the client in a position of disadvantage or peril.

Optional Withdrawal

(2) Subject to the rules about criminal proceedings and the direction of the tribunal, where there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw.

Commentary

A lawyer who is deceived by the client will have justifiable cause for withdrawal, and the refusal of the client to accept and act upon the lawyer's advice on a significant point might indicate a loss of confidence justifying withdrawal. However, the lawyer should not use the threat of withdrawal as a device to force a hasty decision by the client on a difficult question.

. . . . .

Mandatory Withdrawal

(7) Subject to the rules about criminal proceedings and the direction of the tribunal, a lawyer shall withdraw if

(a) discharged by the client,
(b) the lawyer is instructed by the client to do something inconsistent with the lawyer's duty to the tribunal and, following explanation, the client persists in such instructions,
(c) the client is guilty of dishonourable conduct in the proceedings or is taking a position solely to harass or maliciously injure another,
(d) it becomes clear that the lawyer's continued employment will lead to a breach of these rules,
(d.1) the lawyer is required to do so pursuant to subrules 2.02 (5.1) or (5.2) (dishonesty, fraud, etc. when client an organization), or
(e) the lawyer is not competent to handle the matter.

. . . . .

RULE 4 - ADVOCACY

4.01 (1) When acting as an advocate, *a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect*.

Commentary

The lawyer has a duty to the client to raise fearlessly every issue, advance every argument, and ask every question, however distasteful, which the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. *The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing where justice can be done.* [Emphasis added.]

The *Rules of Professional Conduct* require that, despite a client's disability, a lawyer attempt to maintain as much as possible, a normal solicitor-client relationship with a client. This applies equally to s. 3 counsel. If, however, the client can no longer make the requisite

decisions, the lawyer may have to take steps to have a litigation guardian appointed.

All lawyers are bound by the rule of confidentiality and this rule expressly applies to "every client without exception" which would include clients with capacity challenges.

Rule 4.01 requires that a lawyer act honestly and fairly and take steps to ensure a fair hearing.

6. Professional Responsibility of Section 3 Counsel

(1) Presumption of Capacity

In *A Guide to Consent and Capacity Law in Ontario*,[26] authors and lawyers D'Arcy Hiltz and Anita Szigeti address the presumptions of capacity found in the *SDA*:

> . . . the Act entitles a person to rely upon these presumptions unless there are reasonable grounds to believe the person is not capable of entering into the contract or giving or refusing consent as the case may be.[27] What constitutes reasonable grounds will of course depend on the particular facts of any case. A useful guide in determining when reasonable grounds may exist in the context of a treatment decision was contained in a regulation to the former Consent to Treatment Act, 1992, (proclaimed in 1995) of Ontario.

Hiltz and Szigeti continue by noting that the built-in statutory presumptions of capacity can prove difficult for lawyers:[28]

> The third presumption regarding capacity to retain and instruct Counsel can be extremely problematic. In the case of *Banton and Banton*, Mr. Justice Cullity stated:
>
> > "The position of lawyers retained to represent a client whose capacity is in issue in proceedings under the Substitute Decisions Act 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 that the client's wishes may be in conflict with his or her best interests and counsel's duty to the Court."
>
> The difficulty of counsel acting for clients in this area of law is increased by the obvious fact, that in the majority of cases and by most standards: (a) capacity

26. Hiltz, D'Arcy and Anita Szigeti, *A Guide to Consent and Capacity Law in Ontario, 2012 Edition* (Toronto: LexisNexis, 2012), at p. 24.
27. *SDA*, s. 3(1)(a).
28. *Ibid.*

> of the client to give instructions is significantly diminished or lacking; and (b) given that it is not appropriate for counsel to make decisions in the client's interest as would a litigation guardian it is also not appropriate for Counsel to determine what he or she believes to be in the best interest of the client. What then is the role of counsel?
>
> At the minimum, counsel who act pursuant to a section 3 appointment must: (1) identify the requirements of the law in relation to the particular issue; (2) ensure that the law has been complied with; and (3) to the extent possible, present evidence to the Court that reflects the wishes of the client and the circumstances in which those wishes were expressed. Appointed Counsel should not make decisions or express their personal view to the Court as to what he or she feels to be in the best interest of the client.

(2) The Role of Counsel and the "Best Interests" of a Client

In a 2009 paper, Marshall Swadron[29] wrote on the issue of professional representation of a client in proceedings involving s. 3 of the *SDA* as well as s. 81 of the *HCCA*:[30]

> There is no statutory authority to support the position that a lawyer's role is to pursue what the lawyer considers to be in the client's best interest.
>
> . . . . .
>
> Moreover the legitimacy of the adjudicative process depends on lawyers refraining from imposing their personal views respecting their client's best interests upon their client's.

Swadron also wrote further on the role of a lawyer who is faced with instructions that are counter to the client's best interests:[31]

> 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 interest. The same applies where a client is under a disability. Once instructions are obtained, the lawyer must "represent the client resolutely and honourably within the limits of the law."

Therefore, as with any solicitor-client relationship, s. 3 counsel is required to act pursuant to the instructions of the client. This requires clarification and emphasis because s. 3 counsel act for those whose capacity is in question such that a counsel may hesitate to follow the

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29. Marshall Swadron, Barrister and Solicitor, practising at Swadron Associates.
30. Marshall Swadron, "Representing the Incapable Client in Capacity Proceedings", in Law Society of Upper Canada, *12th Annual Estates and Trusts Summit*, November 13, 2009, at pp. 9-10 (hereafter, the "Swadron Paper").
31. *Supra*, and *Rules of Professional Conduct*, *supra*, footnote 25, Rule 4.01.

client's instructions. The situation is different where there are no instructions, which is addressed subsequently.

(3) Where There Are No Instructions

In a normal solicitor-client relationship, termination by the client or a failure to give instructions are grounds for a lawyer to withdraw from the record.[32]

Section 3 of the *SDA* does not expressly or otherwise, permit a lawyer to act without instructions. Rather, it permits the solicitor to consider any instructions received to have been instructions received from a capable person as opposed to an incapable person.[33]

7. Court and Tribunal Decisions Involving Section 3 Counsel

The following section canvasses case law on the role and duties of s. 3 counsel. While most of the cited decisions involve the appointment of s. 3 counsel, some of the case law does not directly involve s. 3 counsel, but nevertheless raises issues that are relevant to counsel who act for individuals whose capacity is in issue.

(1) Banton v. Banton[34]

The 1998 Superior Court of Justice decision in *Banton* has been the primary reference on the role and duties of s. 3 counsel. Interestingly, there was no s. 3 counsel appointed in this case.

In that case, the court was asked to determine whether the deceased had testamentary capacity to make the wills in question, whether the wills had been procured by undue influence, whether the deceased had capacity to marry and whether a trust established by the deceased was valid.

In the context of the dispute, during the deceased's lifetime there had been guardianship proceedings brought under the *SDA*. The lawyer who had represented the deceased in those matters testified in the proceedings following the death of the deceased. Justice Cullity made comments on the challenges facing lawyers who act for allegedly incapable persons in *SDA* proceedings, as follows:[35]

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32. *Rules of Professional Conduct*, *supra*, footnote 25, Rule 2.09(7).
33. *SDA*, s. 3.
34. *Banton v. Banton* (1998), 164 D.L.R. (4th) 176, 66 O.T.C. 161, 1998 CarswellOnt 3423 (Ont. Gen. Div.), additional reasons 164 D.L.R. (4th) 176 at 244, 1998 CarswellOnt 4688 (Ont. Gen. Div.).
35. *Banton*, supra, at para. 91.

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

In *Banton*, the court found that counsel for the person whose capacity was at issue allowed himself to be unduly influenced when not taking instructions from the client, engaging in discussions about representation of the alleged incapable person with another interested party rather than his own client's interest, and the court stated that counsel should have been alerted to the presence of undue influence. Although Mr. Banton had retained his own counsel and not s. 3 counsel, the court noted that the counsel had exhibited "excessive zeal".[36]

It then turned out that the lawyer actually communicated with his client's wife and not his client throughout the retainer. The court also noted that the lawyer had allowed evidence to be submitted in court by the client's wife that the client was doing well despite the fact that the lawyer knew that the client was hospitalized. The court found that the lawyer did not effectively act for the client as he was guided by the wife's instructions and not the client's instructions.

In an analysis of the *Banton* decision,[37] D'Arcy Hiltz summarized some of the propositions made by Cullity J., as follows:

> Proposition 1 *Even in cases where the client is deemed to have capacity to retain and instruct counsel pursuant to section 3(1) of the Substitute Decisions Act, counsel is not in the position of a litigation guardian with authority to make decisions in the client's interests.*
>
> . . . . .
>
> It is clear from proposition 1 that without instructions, counsel cannot act, it is even clearer that counsel cannot act as litigation guardian on their own instructions.
>
> Proposition 2 *Counsel must take instructions from the client and must not act if satisfied that capacity to give instructions is lacking.*

36. *Ibid.*, at para. 92.
37. D'Arcy Hiltz, "The Role of Counsel Pursuant to Section 3 of the *Substitute Decisions Act*", Trusts and Estates Division of the Ontario Bar Association, November 29, 2009 (hereafter the "Hiltz Paper"), at pp. 9-11.

. . . .

In fact, proposition 2 appears inconsistent and contradictory to the provisions of deemed capacity found in section 3 of the *Substitute Decisions Act*.

Proposition 2 states that counsel must not act if satisfied that capacity to give instructions is lacking – Section 3 of the *Substitute Decisions Act* states that the individual is deemed to have capacity to give instructions . . .

A possible resolution involves interpreting section 3 as a statutory right of the person whose capacity is in issue, to be represented by legal counsel, without allowing for objection that the person lacks capacity to retain and instruct counsel. In essence, the deeming provision of section 3 acts as a shield to any attack on the person's capacity to instruct counsel, thus ensuring the right to counsel. This statutory right however does not: (a) remove the professional obligation of section 3 counsel to ensure that the individual has the requisite capacity to instruct counsel; or (b) obligate counsel to represent the individual in the absence of instructions.[38] If an individual suffers from severe cognitive impairment or is in a coma, the ability to provide instructions is absent. In the absence of instructions, it is clear that counsel cannot act. The deeming provisions of section 3 cannot be interpreted as having the effect of creating instructions when no instructions exist.

. . . . .

Proposition 3 *A very high degree of professionalism may be required in borderline cases where it is possible that the client's wishes may be in conflict with his or her best interests and counsel's duty to the Court*.

. . . . .

Proposition 3 speaks of the high degree of professionalism required of counsel in those cases where the client's wishes may be in conflict with his or her best interests and counsel's duty to the Court . . .

. . . . .

It is clear that in those cases where a client has capacity to instruct, what counsel feels to be in the best interests of the client, should not play a role on the representation of the individual. [Emphasis added.]

In *Banton v. CIBC Trust Corp.*,[39] Justice Cullity heard a motion that was brought in respect of the 1998 judgment. As part of that

38. "This position is not entirely consistent with the guidelines published by the Public Guardian and Trustee on the role of section 3 counsel. When the client will not or cannot give instructions, the guidelines indicate that the lawyer must not become a substitute-decision maker for the client in the litigation; that is, the lawyer cannot consent to the proposed action or treatment even if it appears to be in the best interests of the client. The lawyer must ensure that the evidentiary and procedural requirements are tested and met, even where no instructions, wishes or directions at all can be obtained from the client."

39. *Banton v. CIBC Trust Corp.* (1999), 182 D.L.R. (4th) 486, 30 E.T.R. (2d) 138, 1999 CarswellOnt 2596 (Ont. S.C.J.), affd 197 D.L.R. (4th) 212, 38 E.T.R.

motion, Justice Cullity further addressed issues relating to capacity and representation. Cullity J. wrote:[40]

> . . . In my reasons for judgment I expressed the opinion that solicitors who are satisfied that an individual lacks capacity to give instructions should not accept the retainer unless this has been arranged with the Public Guardian and Trustee pursuant to a direction of the Court given under the authority conferred by subsection 3(1) of the *Substitute Decisions Act*. The correctness of this view has been challenged by Professor A.H. Oosterhoff in a paper delivered at a conference conducted by the Canadian Bar Association earlier this year. Professor Oosterhoff's opinions on the subject are worthy of the utmost respect and it is not necessary now to decide whether the additional safeguard provided by the participation of the Public Guardian and Trustee is, as I as suggested, required in such a case.
>
> While it may be prudent for solicitors who have doubts with respect to an individual's capacity to seek an order directing the intervention of the Public Guardian and Trustee, I do not think this should be considered to be necessary merely because doubt exists and there is a triable issue . . .

The paper referred to by Justice Cullity and authored by Professor Albert H. Oosterhoff is entitled "Every Child's Nightmare: January /December Marriages – The Banton Case". In that paper, Professor Oosterhoff wrote as follows:[41]

> It is certainly true that a solicitor, if satisfied that a client clearly lacks testamentary capacity (or is being subjected to undue influence, or both) should refuse to draw a will for the client. However, a solicitor does not warrant capacity and if the solicitor has taken reasonable steps to ascertain whether the client has capacity and concluded that he or she does, the solicitor should prepare the will. A solicitor cannot refuse to draft a will merely because he or she has some suspicions about testamentary capacity or undue influence. Only if the suspicions prove to be well-founded, should the solicitor refuse to prepare the will . . .

Professor Oosterhoff's comments further suggest that it is the role of counsel, whether s. 3 counsel or otherwise, to take reasonable steps to ascertain that a client has capacity and his or her instructions are free of undue influence, and only then should a solicitor act on the instructions received.

The salient points to be taken from the *Banton* decision are that s. 3 counsel:[42]

(2d) 167, 53 O.R. (3d) 567 (Ont. C.A.), leave to appeal refused 201 D.L.R. (4th) vi (S.C.C.).

40. *Banton v. CIBC Trust Corp.*, *supra*, at paras. 16-17.
41. Albert H. Oosterhoff, "Every Child's Nightmare: January/December Marriages - The Banton Case", a paper presented to the Ontario Bar Association at a conference in 1999.
42. *Banton v. Banton*, *supra*, footnote 34.

- must not act as litigation guardian to the client;
- must not make decisions for the client;
- must not make decisions even in the client's best interests;
- must take instructions from the client;
- must not act if capacity to instruct is lacking;
- must conduct him/herself with a high degree of professionalism particularly where wishes conflict with best interests and counsel's duty to the court.

(2) Mesenel (Attorney of) v. Kumer[43]

In this decision, the court was asked to order a further capacity assessment of Mr. M. Mesesnel. In the course of the proceedings, Mr. Mesesnel had undergone two previous capacity assessments. Mr. Mesesnel was represented by s. 3 counsel who informed the court of his client's personal objections to being subjected to a further capacity assessment.

Justice Greer described the submissions of section 3 counsel as follows:[44]

> Mr. Rabinowitz, Counsel for Mesesnel, tells the Court that he is not, on behalf of his client, challenging Dr. Hoffman's finding that Mesesnel is incapable of managing his property. Further, Mr. Rabinowitz notes that it is not his job to say who is or who is not right about details regarding certain of Mesesnel's assets over which Mills and the Kumers have differing opinions. *Mr. Rabinowitz tells the Court that Mesesnel, when told of the Motion to have him reassessed, "sobbed" and told Mr. Rabinowitz that he did not want to be reassessed again. Mr. Rabinowitz supports Mesesnel's position and does not want to see Mesesnel placed in that position.* Mr. Rabinowitz has met with Mills and his counsel, Mr. Newbould, on numerous occasions to discuss and deal with Mesesnel's financial affairs. Notwithstanding this, Mr. Rabinowitz openly told the Court that he received instructions from Mesesnel to prepare a new Power of Attorney for him, which he has, revoking the Mills' Power of Attorney and appointing the Canada Trust Company in his place and stead. Whether or not that new Power of Attorney was validly made by Mesesnel, is not before the Court today. Further, Mr. Rabinowitz tells the Court that Mesesnel realizes that he must rely on others and is dependent on others for his care; and Mr. Rabinowitz wants the Court to ensure that all who help Mesesnel are accountable for their actions.
>
> Mr. Rabinowitz concedes, in response to my concerns about the lack of detail presented by Dr. Hoffman in his personal case report of Mesesnel, and its failure to fully follow the provisions of the SDA regarding personal care, that this report leaves something to be desired. He acknowledges that Dr. Hoffman must either

43. *Mesesnel (Attorney of) v. Kumer*, 2000 CarswellOnt 1926, [2000] O.J. No. 1897 (Ont. S.C.J.).
44. *Supra*, at paras. 5-6.

> be asked to extend that report to comply with the SDA provisions, or that a new report must be done. Mr. Rabinowitz is also concerned that Mills is taking the position that Mesesnel should not be allowed to make a new will until a further assessment is done to determine Mesesnel's capacity in that regard. He points out that the test is different than the test for capacity to manage one's affairs, and that one's inability to change one's will can vary from time to time, depending on the testator's state of mind at the time the change is made. Mr. Rabinowitz would like the parties to go forward with the Canada Trust Company and Mills acting as co-attorney together, given Mills' knowledge of Mesesnel's assets over many, many years as Mesesnel's friend and attorney. [Emphasis added.]

While s. 3 counsel addressed the quality of the earlier assessment, he was also able to convey the personal "*feelings*" of the individual whose capacity was in question.

In the end Justice Greer ordered that a further capacity assessment be conducted. However, she made clear that she was making such decision having considered "Mesesnel's personal feelings that he should not have to endure another assessment".[45]

In these proceedings, without the presence of s. 3 counsel there would have been no way for the court to receive indications of the allegedly incapable person's feelings. Section 3 counsel provides a means by which the perspective and feelings of an allegedly incapable person may be conveyed to the court.

(3) Tepper v. Branidis[46]

In the case of *Tepper* the court was asked to address an application under the *SDA* in respect of Pantelis (Peter) Branidis. The application arose in the context of an interpleader application respecting sale proceeds of a house owned by Mr. Branidis jointly with his son. The parties reached a resolution on the issues in dispute, which was submitted to court. Justice Molloy praised the parties for working to seek resolution but expressed concerns that Mr. Branidis, who was most affected by the dispute had not consented to the terms and there was no way of knowing whether he understood the proceedings. Justice Molloy was concerned about Mr. Branidis's capacity and vulnerability, due to his poor health and inability to speak English, and possible susceptibility to influence by others.

Justice Molloy wrote:[47]

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45. *Ibid.*, at para. 10.
46. *Tepper v. Branidis* (2001), 102 A.C.W.S. (3d) 1043, 2001 CarswellOnt 307 (Ont. S.C.J.) .
47. *Supra*, at para. 15.

> . . . I have a responsibility to ensure in this situation that the father's rights are protected. I recognize that the steps I am ordering will have the likely effect of diminishing the estate of the father to some extent. However, I consider it would be irresponsible for me to do otherwise in this situation.

To address the court's concerns about Mr. Branidis's vulnerability, Justice Molloy ordered the appointment of s. 3 counsel, with the added condition that the lawyer speak Greek:[48]

> An Order shall also issue under s. 3 of the Substitute Decisions Act directing the PG&T to arrange for legal representation for Pantelis, (Peter) Branidis by a solicitor who is Greek speaking.

In this decision, Justice Molloy when faced with a settlement declined to approve it, and used the provisions of s. 3 of the *SDA* to ensure that the potentially incapable person had representation, to assist with the settlement and proceedings. Justice Molloy added the condition that the appointed lawyer speak Greek so as to ensure that the representation was effective.

(4) Canada Trust Co. v. York[49]

In this case, a person who was subject to a guardianship order brought an application to vary the original guardianship order such that he could have a new guardian of property appointed. As a preliminary matter, counsel for the incapable person sought an order pursuant to s. 3 of the *SDA* directing the PGT to arrange legal representation for the incapable person.

Counsel for the trust company who was acting as guardian of property argued that s. 3 did not apply as capacity was not in issue in the specific proceeding. Justice Cross allowed for the appointment of s. 3 counsel and held as follows:[50]

> In all proceedings under the Act, capacity, broadly defined, is an issue. Section 3 is important because it allows the person to advance his or her interests before the court, and in my view, it is consistent with the spirit of the Act that Mr. York should have this opportunity. Accordingly, the Public Guardian and Trustee is directed to arranged legal representation for Mr. York.

Therefore the appointment of s. 3 counsel is appropriate where it is in keeping with the purposes of the *SDA* and would allow the individual with capacity concerns to put his or her view forward.

48. *Ibid.*, at para. 17.
49. *Canada Trust Co. v. York* (February 7, 2002), Doc. 086/93, [2002] O.J. No. 435 (Ont. S.C.J.).
50. *Supra*, at para. 3.

Section 3 of the *SDA* is to be applied by the court in a flexible, purposive manner.

(5) Ziskos v. Miksche[51]

Although not a decision where s. 3 counsel was appointed, this case offers interesting points on the issue of the representation of potentially incapable clients.

In this case, the court was asked to address costs in respect of competing applications for guardianship for personal care and property of a then-deceased person, Ms. J. Miksche. The claims for costs by the various parties were in excess of the funds in the deceased's estate.

Ms. Miksche's nephews had met with her at a lawyer's office where she signed a power of attorney naming one nephew and his sister as attorneys for property and personal care. The nephews also had the deceased sign a retainer with the law firm to address competing guardianship applications. The law firm retained by the deceased also acted for her nephews and niece.

At some point after the deceased retained the first law firm, she later retained another lawyer who served a Notice of Change of Solicitor. Despite the fact that the deceased had retained another lawyer, the first lawyers (who continued to act for her nephews and niece) posited that they continued to act for the deceased and claimed their fees, in excess of $1,000,000 from the estate of the deceased. Justice Spies rejected this position and held that the deceased's nephews were responsible for those costs.[52]

As part of her analysis, Justice Spies noted that it was difficult to assess what value the deceased obtained from the steps taken by the first lawyers.

Justice Spies also made comments on the decision of the first lawyers to act aggressively in the face of strong evidence that the deceased lacked capacity throughout the retainer. Justice Spies wrote:[53]

> . . . Although arguably Mrs. Miksche was competent to retain Polten & Hodder and then Mr. Silverberg, there is no doubt that there were at all material times serious capacity issues with respect to her ability to make property and personal care decisions. Mrs. Miksche was never in a position to make fully informed and capable decisions about the reasonableness of the legal costs being incurred

51. *Ziskos v. Miksche* (2007), 161 A.C.W.S. (3d) 651, 2007 CarswellOnt 7162, [2007] O.J. No. 4276 (Ont. S.C.J.).
52. *Supra*, at para. 92.
53. *Ibid.*, at para. 63.

> pursuant to the retainers and as a result the reasonableness of those costs is a matter that I must consider before awarding any costs payable from her estate pursuant to those retainers.

Spies J. also noted that the deceased would not have instructed counsel to act in the manner they did, had she been capable.[54]

Justice Spies noted that there is a positive obligation on counsel who learn that their client may have capacity challenges, to address those issues:[55]

> Although I have not found that Johanna Miksche was incapable of executing a retainer, I should also say that once the firm started to receive reports from those assessing Mrs. Miksche that in addition to the capacity concerns, Mrs. Miksche had no recall of signing these documents and did not appreciate their legal significance, Polten & Hodder should have been very cautious about relying on the retainer or the April 2005 powers of attorney to justify any work they intended to do on her behalf. It was irresponsible for the nephews and Polten & Hodder to ignore this evidence.

The lawyer in this case relied on the legal presumption of capacity to justify the costs incurred. Justice Spies noted that this is insufficient in the face of evidence of incapacity:[56]

> Mr. Polten argued that he was entitled to rely on the presumption of capacity but that presumption did not entitle him to ignore credible and reliable evidence that Johanna Miksche was not capable to make personal care and property decisions . . .

The court reviewed at length the lawyers' refusal to acknowledge the incapacity of the deceased. Indeed, at one point, her lawyers stated that they were "prepared to be the advocates for the competence of Johanna Miksche". Justice Spies admonished the lawyers for taking such a position and taking on significant costs to dispute findings of incapacity.[57]

The court also criticized the first lawyers for claiming they acted for the deceased, when she had subsequently retained a separate lawyer, all while the first lawyers also acted for the deceased's nephews.

This case highlights the importance of independent counsel acting for someone whose capacity is in issue, and the duty of counsel to act cautiously when capacity may be in question.

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54. *Ibid.*, at para. 74.
55. *Ibid.*, at para. 76.
56. *Ibid.*, at para. 104.
57. *Ibid.*, at paras. 145-146.

(6) Sly v. Curran[58]

In this case the four adult children of Alfred Curran, an allegedly incapable person, brought an application for an order for directions respecting their contact with Mr. Curran and the role played by Mr. Curran's wife and named attorney for personal care. Justice Himel noted that all of Mr. Curran's children and his wife cared for him and were concerned about his well-being. Importantly, however it was also noted that there was a need for all of the parties to "place the interests of Mr. Curran ahead of their own agendas and learn to co-operate for the balance of Mr. Curran's lifetime".[59]

To that end, Justice Himel ordered that mediation be convened, and that the PGT arrange for legal counsel pursuant to s. 3 of the *SDA*, and that such counsel participate in the mediation.

There is no indication in reviewing the decision as to whether any of the parties had requested the appointment of s. 3 counsel. The court has jurisdiction to appoint s. 3 counsel even where such appointment is not requested. The appointment of s. 3 counsel can be a means of facilitating resolution between the parties and ensuring that the allegedly incapable person's interests are conveyed in the proceedings.

(7) Abrams v. Abrams[60]

In this decision, one of several in long-standing litigation amongst family members, Justice Strathy set out three very important principles that govern the role of s. 3 counsel.

In this decision, Justice Strathy was asked by the applicant, Stephen Abrams, to order assessments of his mother, Ida Abrams's capacity to manage property, personal care, and to grant powers of attorney. The applicant also sought an order that his father, Philip Abrams undergo an assessment of his capacity to manage Ida's property pursuant to a power of attorney.[61]

Justice Strathy undertook a review of the relevant principles and provisions of the *SDA*.

The first identifiable principle is that the appointment of s. 3 counsel is one of the means by which the rights of vulnerable individuals are protected in the *SDA*.

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58. *Sly v. Curran* (2008), 168 A.C.W.S. (3d) 855, 2008 CarswellOnt 4301 (Ont. S.C.J.).
59. *Supra*, at para. 17.
60. *Abrams v. Abrams* (2008), 173 A.C.W.S. (3d) 606, 2008 CarswellOnt 7788, [2008] O.J. No. 5207 (Ont. S.C.J.).
61. *Supra*, at paras. 1-2.

Justice Strathy wrote:[62]

> Before examining the issues and the submissions of Counsel, some general observations are in order. *First, the purpose of the SDA is to protect the vulnerable* . . . [Emphasis added.]

Later, Justice Strathy set out the means by which the rights of vulnerable persons are protected under the *SDA*:[63]

> *The SDA contains a number of provisions that indicate that the dignity, privacy and legal rights of the individual are to be assiduously protected. For example:*
>
> *(a) there is a presumption of capacity (section 2);*
>
> *(b) a person whose capacity is in issue is entitled to legal representation (section 3);*
>
> (c) a person alleged to be incapable is entitled to notice of the proceedings (ss. 27(4) and ss. 62(4));
>
> (d) the court must not appoint a guardian if it is satisfied that the need for decisions to be made can be met by an alternative course of action that is less restrictive of the person's decision making rights (ss. 22(3) and ss. 55(2));
>
> (e) in considering the choice of guardian for property or personal care, the court is to consider the wishes of the incapable person (cl. 24(5)(b) and cl. 57(3)(b));
>
> (f) subject to exceptions, a person has a right to refuse an assessment, other than an assessment ordered by the court (section 78). [Emphasis added.]

The second principle is that the legislation deems an allegedly incapable person to have capacity to give instructions to counsel, despite the possibility that he or she may not have such capacity.[64]

The third principle is that the wishes and feelings of an incapable person can be effectively communicated by s. 3 counsel to the court, and ought to be taken into account in the proceedings.[65]

Justice Strathy made reference to the submissions of s. 3 counsel and noted that Ida was "anxious and upset"[66] and "agitated" by the proceedings.[67] Justice Strathy made reference as follows to s. 3 counsel's submissions:[68]

> Mr. Schnurr represents Ida. He has been appointed on Ida's behalf by the Public Guardian and Trustee under section 3 of the SDA. Although it is

62. *Ibid.*, at para. 47.
63. *Ibid.*, at para. 49.
64. *Ibid.*, at para. 14.
65. *Ibid.*, at para. 53.
66. *Ibid.*, at para. 14.
67. *Ibid.*, at para. 56.
68. *Ibid.*, at paras. 14 and 56.

> acknowledged that Ida does not in fact have capacity to retain and instruct counsel, she is deemed by clause 3(1)(b) to have capacity. *Mr. Schnurr says that he has spent considerable time with his client, and that she is anxious and upset by these proceedings. Mr. Schnurr submits that it would be oppressive and intrusive to order an assessment.*
>
> . . . . .
>
> There is no dispute that Ida's capacity is in issue in this proceeding. There is also no dispute that Ida lacks capacity to manage her property and to make complex personal care decisions. Mr. Schnurr submits that that there are no reasonable grounds to believe that Ida was incapable of giving the powers of attorney at issue, given what he describes as compelling medical evidence. *He says that his client is anxious and agitated by this proceeding and that ordering an assessment would be an unfair intrusion into her basic civil rights.* He urges me not to accept the argument that "it won't do any harm" to order an assessment. [Emphasis added.]

In his decision, Justice Strathy reviewed the whole of the evidence and took into account Ida's position on the assessment, yet ultimately did not order the assessment for the following reasons:[69]

> (f) Ida's opposition to an assessment has been clearly stated and her position has been forcefully argued by her counsel. Considering her age, her mental condition, and the distress she has endured as a result of the loss of her relationship with two or her children and her grandchildren, not to mention these proceedings, it would be an unreasonable intrusion into her privacy to order an assessment.

Therefore, in sum, the appointment of s. 3 counsel, with the built-in presumption of capacity is one of the tools of the *SDA* to protect the "dignity, privacy and legal rights" of individuals, including allegedly incapable persons. Section 3 counsel, in consulting with the allegedly incapable person is in a unique position to convey that person's wishes and feelings to the court, which are to be taken into account by the court in rendering its decision.

(8) Righter v. Righter[70]

In this unreported decision, the court was asked to terminate the appointment of s. 3 counsel on the basis that there had been a capacity assessment confirming that Violet Righter (the person who was the subject of the proceedings) was incapable of instructing counsel and making personal decisions. It was argued that in light of the finding of incapacity, s. 3 counsel would be effectively unable to present evidence or speak for Mrs. Righter.

69. *Ibid.*, at para. 58.
70. *Righter v. Righter* (November 5, 2008), Doc. 03-20/08 (Ont. S.C.J.).

Justice Aston accepted the finding of incapacity but noted that s. 3 of the *SDA* deems Mrs. Righter capable of instructing her lawyer. Justice Aston also explained the parameters of the role of s. 3 counsel:[71]

> I accept the unchallenged evidence of Dr. Silberfeld.
>
> However, *section 3 of the Substitute Decisions Act by its own terms, provides that Violet is deemed to be capable of instructing Counsel for the purposes of the s. 3 appointment. Ms. Schnurr has forcefully and effectively communicated to the Court through her submissions the wishes of Violet. Ms. Schnurr's clear instructions are to oppose any Order limiting Violet's ability to communicate with or associate with Howard Pearson. Ms. Schnurr is in a difficult position in presenting evidence. She cannot be a witness herself while acting as Counsel. However, I am satisfied that she has represented to the Court the nature of the instructions she would have if Violet were in fact capable of giving clear instructions* . . . [Emphasis added.]

Justice Aston made the following comments on the role of s. 3 counsel:[72]

> . . . *I make no finding as to Ms. Schnurr's ongoing standing in this matter, except to say that it is apparent to me that she could have an ongoing role in testing the jurisdiction or authority of the Court to make the Orders sought by the applicants against Mr. Pearson and making submissions on the evidence.* The request to teminate Ms. Schnurr's appointment at this point is dismissed, without prejudice to the applicants' ability to renew that request at a later date. [Emphasis added.]

In this case, the court noted that s. 3 of the *SDA* deems a person capable of instructing counsel, which will be upheld in spite of definitive evidence of incapacity.

The court also noted that part of the role of s. 3 counsel is to test the jurisdiction and authority of the court in the orders sought.

However, the presumption of capacity places s. 3 counsel in a difficult position in that counsel cannot act as a witness while acting as counsel. Therefore the role of s. 3 counsel is qualified by a further duty to also represent the nature of the incapable person's instructions.

(9) Woolner v. D'Abreau

This court docket involved a number of decisions which did not include the appointment of s. 3 counsel. However, the court took similar steps to protect the interests of a vulnerable person that

71. *Supra*, at paras. 12-13.
72. *Ibid.*, at para. 15.

included the appointment of independent counsel, similar to s. 3 of the SDA, such that it warrants review.

(a) December 17, 2008 Endorsement[73]

In this endorsement, Justice Brown addressed the issue of the costs of parties in an application in which a former attorney sought an order that Norah D'Abreau undergo an assessment of her capacity to grant a power of attorney.

Although agreement had been reached between the parties whereby Ms. D'Abreau consented to the capacity assessment and was ultimately found capable of granting a power of attorney, the litigation continued between the former and later named attorneys.

Justice Brown made special note of Ms. D'Abreau's vulnerability and the absence of her perspective in the materials.

Justice Brown wrote as follows:[74]

> As to Ms. D'Ambreau, although I have ruled that she cannot recover her costs against Mr. Woolner, I harbour serious concerns about the legal fees incurred on her behalf in this application. I have noted the absence of any affidavit from her. She is 82 years old. From the evidence before me she does not have any immediate family or friends with whom she can consult. *I think some obligation rests on the court, when, as here, it has strong concerns about the incurrence of disproportionate costs, to see that the interests of the vulnerable in our society are protected* . . . [Emphasis added.]

Justice Brown ordered that the Rule 57.07 hearing be adjourned, and that Ms. D'Abreau was to have "independent counsel". The endorsement was to be sent to PGT.

This decision is interesting in that the court appointed counsel whose role is analogous to s. 3 counsel, is that the counsel is "independent", his or her role is to protect the interests of a vulnerable person, and the PGT is charged with arranging for such counsel.

(b) February 10, 2009 Judgment[74]

At the costs hearing, the independent counsel filed an affidavit by Ms. D'Abreau in which she deposed that she did not recall meeting or speaking with the lawyer retained on her behalf by the second

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73. *Woolner v. D'Abreau* (2008), 74 C.P.C. (6th) 260, 173 A.C.W.S. (3d) 1024, 2008 CarswellOnt 8240 (Ont. S.C.J.).
74. *Supra*, at para. 46.
75. *Woolner v. D'Abreau* (2009), 70 C.P.C. (6th) 290, 50 E.T.R. (3d) 59, 2009 CarswellOnt 664 (Ont. S.C.J.), revd 82 C.P.C. (6th) 167, 53 E.T.R. (3d) 18 (Ont. S.C.J. (Div. Ct.)) (see heading (d) below for reversal information).

attorney for property and that both attorneys had incurred costs with limited utility for Ms. D'Abreau.

Justice Brown held that the costs were incurred "without reasonable cause and without her instructions and, as a result, a substantial reduction should be made to the costs claimed by the lawyers against Ms. D'Abreau".[76]

The evidence of the vulnerable person and the submissions of independent counsel were key in the judge's ruling on costs. Had there been no independent counsel appointed it would have been very difficult for the presiding judge to discern Ms. D'Abreau's views.

Independent counsel for Ms. D'Abreau also noted that his fees were payable by Ms. D'Abreau and not the PGT, such that he wished an opportunity to make submissions on his own costs.[77]

(c) April 29, 2009 Judgment[78]

In an endorsement dated April 26, 2009, Justice Brown had ordered the two attorneys to pay Ms. D'Abreau's costs for her independent counsel. In part, Justice Brown noted that he had not received costs submissions from the two attorneys.

Following the issuance of the April 26, 2009 endorsement, the two attorneys forwarded their costs submissions (which had previously been delivered) to Justice Brown and requested reconsideration of the April 26 endorsement.

In this April 29, 2009 decision, Justice Brown addressed the two attorneys' concerns about the previous ruling on costs.

In part, the attorneys challenged whether Justice Brown had the jurisdiction to appoint "independent counsel" to act for Ms. D'Abreau. Addressing that issue, Justice Brown pointed to the *parens patriae* jurisdiction of the court and drew on s. 3 of the *SDA* by analogy. Justice Brown wrote in part:[79]

> . . . they questioned my authority to appoint independent counsel to represent Ms. D'Abreau at the Rule 57.07 hearing. The *parens patriae* jurisdiction of this court is well-established, based as it is in the court's power to protect the vulnerable. I specifically referred to the duty of the court to protect the vulnerable in paragraph 46 of my reasons dated December 17, 2008. *Section 3(1) of the Substitute Decisions Act, 1992 authorizes the court to direct the Public Guardian and Trustee to arrange for independent representation of a person whose capacity is*

76. *Supra*, at para. 33.
77. *Ibid.*, at para. 56.
78. *Woolner v. D'Abreau* (2009), 176 A.C.W.S. (3d) 629, 2009 CarswellOnt 2264 (Ont. S.C.J.), revd 82 C.P.C. (6th) 167, 53 E.T.R. (3d) 18 (Ont. S.C.J. (Div. Ct.)) (see heading (d) below for reversal information).
79. *Supra*, at para. 7.

> *in issue in a proceeding. While not applicable to the Rule 57.07 hearing, that section provides an appropriate analogy upon which this court can draw in deciding to direct the appointment of independent counsel, through the PGT, for a vulnerable person in an appropriate case.* [Emphasis added.]

This decision is interesting as it allows for an extension of the principles underlying s. 3 of the *SDA* – that is, representation for vulnerable persons in court proceedings – and applies it to circumstances outside of where s. 3 of the *SDA* is applied.

This treatment suggests a flexible approach to how courts may deal with vulnerable persons and ensure that their interests are represented in court proceedings by appointing independent counsel.

(d) Divisional Court Decision (September 29, 2009)[80]

In this decision, the Divisional Court overturned Brown J.'s decisions of February 10, April 26 and April 29, 2009. Though brief (and reached on consent), the order makes no issue of the December 17, 2008 endorsement that saw the appointment of independent counsel.

Therefore, although the costs decisions were overturned by the Divisional Court, the various endorsements are interesting on the issue of "independent counsel" appointed pursuant to the *parens patriae* jurisdiction of the court, and in a manner that is highly analogous to s. 3 appointments.

The December 17, 2008 endorsement which was not overturned stands for the propositions that the role of independent counsel for the allegedly incapable person is of such importance that a court can so order counsel, and the PGT can assist with the appointment of independent counsel.

(10) Teffer v. Schaefers[81]

This case was a guardianship application brought by two individuals, seeking appointment as guardians of property and the person for Johanna Schaefers and to set aside 2006 POAs naming another individual as attorney for personal care and property.

The court appointed s. 3 counsel for Johanna Schaefers. In the course of the proceedings, s. 3 counsel brought a motion respecting the prior attorney's failure to account, seeking his removal as attorney and pointing to evidence that the previous attorney had not

80. *Woolner v. D'Abreau* (2009), 82 C.P.C. (6th) 167, 53 E.T.R. (3d) 18, 2009 CarswellOnt 6479 (Ont. S.C.J. (Div. Ct.)).

81. *Teffer v. Schaefers* (2008), 93 O.R. (3d) 447, 169 A.C.W.S. (3d) 658, 2008 CarswellOnt 5447 (Ont. S.C.J.).

exercised his powers and duties diligently and in the best interests of the incapable person. The motion was supported by affidavit evidence sworn not by the incapable person but by s. 3 counsel's colleague. The applicants and the PGT supported the motion.

Based on the evidence provided, the court held that the prior attorney had not acted in Schaefers's best interests. A trust company was appointed interim guardian of property and the balance of the guardianship application was adjourned.

This case is interesting in that it demonstrates the active role that s. 3 counsel can take in a proceeding, such that even an incapable person may be a moving party and seek remedies on his or her own behalf.

(11) Bailey v. Bailey[82]

In this case, the person who was at the centre of *SDA* proceedings had previously retained her own counsel. Subsequently, as the proceedings progressed, her counsel requested that the court allow for her appointment as s. 3 counsel. The court allowed it with the proviso that PGT approval was required.

Thus, where a lawyer was previously independently retained by the allegedly incapable person he or she can subsequently be appointed s. 3 counsel for that person if the PGT consents and the court so orders. This arrangement allows for counsel who has previously represented a person to continue to act for him or her when issues of his or her capacity arise.[83]

(12) PGT v. Harkins[84]

In this case, the PGT requested that Gregory Harkins, who was the husband and named attorney for property for Lila Harkins pass his accounts and that the PGT be appointed as guardian of property in his place. Justice Aston noted that there were serious concerns about Lila Harkins's capacity to manage property and there were indications that Ms. Harkins's assets had been significantly diminished in the time they had been managed by Gregory.

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82. *Bailey v. Bailey* (2009), 55 E.T.R. (3d) 198, 183 A.C.W.S. (3d) 930, 2009 CarswellOnt 8124 (Ont. S.C.J.).
83. *Righter v. Righter*, *supra*, footnote 70: counsel previously retained by party whose capacity was in question was subsequently appointed as s. 3 counsel on the consent of the PGT.
84. *Ontario (Public Guardian and Trustee) v. Harkins* (2009), 175 A.C.W.S. (3d) 1203, 2009 CarswellOnt 1535 (Ont. S.C.J.).

As Gregory and Lila were represented by the same lawyer, Justice Aston ordered that s. 3 counsel be appointed for Lila, such that she could have "separate and independent legal representation".[85]

It is worth noting that the wording of the s. 3 provision reads "if the capacity of a person who does not have legal representation is in issue in a proceeding under this Act". In this case, the allegedly incapable person already had counsel. However, the court elected to apply s. 3 of the *SDA* to ensure not only that the allegedly incapable person had a lawyer, but that she had counsel who would be separate and independent and act only for her.

This decision stands for the point that a s. 3 appointment is appropriate where counsel for an allegedly incapable person is not considered to be independent, or potentially acting in conflict. The court notably did not remove counsel from the proceedings, but ordered additional counsel for the allegedly incapable person.

(13) Bon Hillier v. Milojevic[86]

This case involved an appeal of a finding of the Consent and Capacity Board that Isaac Bon Hillier was incapable of managing property. The appeal was brought pursuant to s. 80 of the *Health Care Consent Act, 1996*. The capacity assessment had been conducted pursuant to s. 16(1) of the *SDA*. The capacity assessor found that Mr. Bon Hillier was incapable of managing property and subsequent to s. 16(5) of the *SDA*, the PGT became his statutory guardian of property.

Justice Brown had determined that *amicus curiae* should be appointed for Mr. Bon Hillier. Disagreement ensued between the Attorney General of Ontario and the Mental Health Legal Committee as to whether the court could set the rate of remuneration for the *amicus*.

Throughout the proceedings, Mr. Bon Hillier stated that he did not want counsel, as he preferred to represent himself.

Justice Brown characterized the appeal of the capacity finding and the role of the PGT as statutory guardian of property as a "proceeding under the *SDA*" in which Mr. Bon Hillier's capacity was in question such that counsel could be appointed pursuant to s. 3 of the *SDA*. This is significant, in that most cases in which s. 3 counsel is appointed deal with guardianship applications or proceedings relating to powers of attorney. Justice Brown expanded the

85. *Supra*, at para. 7.
86. *Bon Hillier v. Milojevic* (2010), 184 A.C.W.S. (3d) 688, 2010 ONSC 435, 2010 CarswellOnt 203 (Ont. S.C.J.).

application of s. 3 of the *SDA* to include proceedings before the Consent and Capacity Board and appeals therefrom. Justice Brown wrote as follows:[87]

> *In my view Mr. Bon Hillier's appeal to this Court is a proceeding under the SDA in which his capacity is in issue*. Ms. Milojevic conducted a capacity assessment of Mr. Bon Hillier under Section 16 of the SDA and her assessment resulted in the issuance of a certificate of incapacity, thereby triggering the appointment of the PGT as Mr. Bon Hillier's statutory guardian: SDA, Section s 16(3) and (5). Section 20.2(1) of the SDA afforded Mr. Bon Hillier the right to apply for a review of the finding of incapacity to the CCB, which he exercised. Section 20.2(6) of the SDA provides, inter alia, that Section 80 of the HCCA – the right to appeal to this Court from a decision of the CCB – applies to applications under Section 20.2. *In light of these provisions, I regard the process of applying to the CCB for a review of the finding of incapacity creating a statutory guardianship, as well as appealing to this Court from the CCB, as a "proceeding under the SDA" in which Mr. Bon Hillier's capacity was in issue*. [Emphasis added.]

However, the PGT and the Mental Health Legal Committee had argued that applying s. 3 of the *SDA* would place the PGT in a potential position of conflict. Mr. Bon Hillier was objecting to the PGT's role as statutory guardian of property, and s. 3 of the *SDA* requires that the PGT arrange for counsel for an allegedly incapable person.[88]

Justice Brown took the argument into account in noting that s. 3 of the *SDA* is not directive and simply gives the court discretion to order representation, and determined that it would not be appropriate in those circumstances to order the appointment of s. 3 counsel. Justice Brown wrote as follows:[89]

> Nevertheless, *Section 3(1) of the SDA is permissive in nature, giving the Court the discretion to request the PGT to arrange legal representation* for Mr. Bon Hillier. An argument advanced by the PGT as to why I should not exercise that discretion in this case strikes me as a sound one. Although it was not a party to Mr. Bon Hillier's appeal, the PGT submitted that in a sense it stood in a position of conflict of interest because it was acting as his statutory guardian of property by reason of the finding of incapacity that was in issue in the appeal. The PGT argued that Mr. Bon Hillier might lack confidence in any Counsel it chose for him since Mr. Bon Hillier has one simple goal on his appeal - to remove the PGT from his life. I think the point made by the PGT is a sensible one, and in the circumstances of this case I conclude that it would not be

87. *Supra*, at para. 13.
88. *Ibid.*, at para. 12.
89. *Ibid.*, at para. 14.

> appropriate for me to direct the PGT to arrange for legal representation of Mr. Bon Hillier. [Emphasis added.]

In the end, Justice Brown ordered the appointment of *amicus curiae* and fixed the rate of compensation.

In this case, the court demonstrates flexibility in its application of s. 3 of the *SDA* and declines to apply it in circumstances where it is inappropriate. Section 3 of the *SDA* is therefore to be applied at the discretion of the court.

(14) Cherry v. Cherry[90]

In this case, Alan Cherry had been found incapable of managing his property. In the context of litigation respecting the management of Mr. Cherry's affairs, his wife brought a motion for interim support from his assets.

Section 3 counsel had been appointed for Mr. Cherry. In response to the motion for interim support, s. 3 counsel submitted a "statement of position" on behalf of Mr. Cherry. The statement of position explained that Mr. Cherry wished to remain married, had concerns about his finances, and that he agreed to limited payments to his wife.[91]

Justice Brown made his decision on the motion for interim support in consideration of the statement of position as well as other evidence.[92]

The statement of position as presented by s. 3 counsel, although less than a sworn affidavit, provided an opportunity for the incapable person to effectively provide his perspective to the court.

(15) Farrell (Re)[93]

In this unreported endorsement, counsel for the applicant in *SDA* proceedings relating to the applicant's mother, Margaret Farrell, sought the appointment of s. 3 counsel on the basis that the lawyer acting for his mother was also counsel acting for some of the other parties, who were also attorneys appointed under successive power of attorney documents, the validity of which were contested.

The court declined to order s. 3 counsel, noting that "[t]he Court is only authorized to do so where a person "does not have legal representation".[94] The court then indicated that the only issue to be

90. *Cherry v. Cherry* (2011), 205 A.C.W.S. (3d) 868, 2011 ONSC 4574, 2011 CarswellOnt 7292 (Ont. S.C.J.).
91. *Supra*, at para. 7.
92. *Ibid.*, at para. 23.
93. *Farrell (Re)* (October 21, 2011), Doc. 03-089/11 (Ont. S.C.J.).

addressed on that point was whether the lawyer acting for Mrs. Farrell was in a position of conflict. The court indicated that further evidence was required in that regard such that a decision could not be made as to whether the representation for the allegedly incapable person was appropriate.

This decision is in stark contrast to the decision in *PGT v. Harkins*[95] where the court determined that the joint representation between an attorney for property and an allegedly incapable person was inappropriate and the appointment of s. 3 counsel could effectively remedy that situation.

(16) DeMichino v. DeMichino[96]

This decision addressed a settlement of a complicated tort matter as well as guardianship proceedings. The incapable person had been represented in the guardianship matter by s. 3 counsel. As the matter concluded, Justice Roberts noted the importance of the role of s. 3 counsel in facilitating resolution and noted that s. 3 counsel had provided "exemplary service to Mr. DeMichino and was of invaluable assistance to this Court and the other parties during the settlement process".[97]

Section 3 counsel can play a role that is of assistance to the court and the parties by clarifying issues, as well as putting forth the perspective and position of the incapable person. That role is not restricted to court proceedings and is equally important during settlement negotiations.

Indeed, lawyers have a professional obligation to encourage mediation and settlement and that duty is no less important for s. 3 counsel.[98]

(17) Salzman v. Salzman[99]

In this case, s. 3 counsel had a meeting with its allegedly incapable client which, unbeknownst to counsel, had been recorded by the applicant (the allegedly incapable person's son). The son filed

94. *Supra*, at para. 17.
95. *Supra*, footnote 84.
96. *DeMichino v. DeMichino*, 2011 ONSC 142, 2011 CarswellOnt 742 (Ont. S.C.J.), reversed (*sub nom. DeMichino v. Musialkiewicz*) 292 O.A.C. 385, 217 A.C.W.S. (3d) 709, 2012 ONCA 458, 2012 CarswellOnt 8130 (Ont. C.A.).
97. *Supra*, at para. 104.
98. Rule 2.09(7) of the *Rules of Professional Conduct*, *supra*, footnote 25.
99. *Salzman v. Salzman* (2011), 77 E.T.R. (3d) 301, 2011 CarswellOnt 15786, 2011 ONSC 3555 (Ont. S.C.J.).

affidavit evidence of the surreptitiously recorded meeting with the court as evidence in the proceedings. Section 3 counsel sought to have the evidence struck on the basis that it violated solicitor-client privilege as well as client confidentiality.

In reviewing the issues, Justice Hoy (as she then was) ruled that the evidence of the solicitor-client meeting could be admitted on the basis that it was relevant to the issue of capacity. That decision was explained as follows:[100]

> One of section 3 counsel's colleagues, Mr. Wayne [*sic*] Swadron, attended on Ms. Salzman on April 7, 2011. Although the materials in the Court file indicated Ms. Salzman's apartment is monitored, through a "baby monitor", by caregivers based in an adjacent apartment, Mr. Swadron was not aware that the monitor was on 24/7. He did not ask the caregivers to turn the monitor off, and they overheard his conversation with Ms. Salzman. They did not appreciate that they should not have listened. Section 3 counsel argues that to the extent that the affidavits recount what transpired when Mr. Swadron was with Ms. Salzman, they should be struck. *They say the evidence is not relevant, or to the extent relevant, its prejudicial effect exceeds it probative value, and, because neither Ms. Salzman (who is not aware that she is monitored) nor Mr. Swadron waived confidentiality or privilege, should be waived.*
>
> The evidence at issue is essentially that Ms. Salzman did not understand who Mr. Swadron was and why he was there, wanted him to leave and, at that time, refused to sign anything.
>
> The evidence is relevant to the issue of capacity, and the prejudicial effect does not exceed its probative value.
>
> I indicated to section 3 counsel when this matter was before me on April 29, 2011, that it appeared to me that whether or not the evidence at issue was excluded or included would ultimately have no bearing on the application. I remain of the same view. Assuming (but not determining) that the evidence in question should not be admitted because of the violation of solicitor-client privilege, having regard to all of the other evidence addressing capacity, the outcome of the application is unaffected. [Emphasis added.]

The applicant also sought to challenge the legal fees of s. 3 counsel. Hoy J. invited the parties to make written costs submissions or potentially schedule a hearing on costs.[101] As s. 3 of the *SDA* is clear in setting out that the incapable person is responsible for his or her fees (unless a Legal Aid Certificate issues), those fees are required to be paid, and the proper remedy for costs concerns is to have any account assessed by an assessment officer pursuant to the *Solicitors Act*.[102]

The court's treatment of privileged evidence and the probative value attached may be in error given the provision and application of

100. *Supra*, at paras. 15-18.
101. *Ibid*, at para. 20.
102. R.S.O. 1990, c. S.15.

the *Rules of Professional Conduct* on the responsibility of counsel. As noted above, the Commentary to Rule 2.03 of the *Rules of Professional Conduct* provides that "[a] lawyer owes the duty of confidentiality to every client without exception".[103]

Furthermore, the decision of *Children's Lawyer v. Goodis*,[104] (addressed in more detail below) sets out an interesting counterpoint to this decision, and holds that a lawyer who acts for a minor (who is legally defined as lacking in capacity) is equally bound by the duty of confidentiality as a lawyer who acts for any other client.[105]

It is unclear why s. 3 counsel would not similarly be bound by the duty of confidentiality. Section 3 of the *SDA* sets out that an allegedly incapable person is capable of instructing counsel, such that one would expect a normal solicitor-client relationship to follow.

This treatment raises the question of whether, when capacity is in question, a different standard applies and if so, whether that standard should be provided for in the legislation. The lack of clarity and apparent contradiction is highly problematic.

On July 20, 2011, Mrs. Salzman passed away.[106] However, the issues stemming from this decision are ongoing. Section 3 counsel brought a motion pursuant to Rule 75.06 of the *Rules of Civil Procedure* to have costs paid by Mrs. Salzman's estate, and the applicant brought a motion seeking costs personally against s. 3 counsel. The motions have been considered and have not yet been determined.

8. Counsel of Analogous Appointment: Section 81 of the Health Care Consent Act

Section 81 of the *Health Care Consent Act, 1996*[107] ("*HCCA*") sets out an analogous provision to s. 3 of the *SDA*. Section 81 of the *HCCA* authorizes the Consent and Capacity Board (the "CCB" or the "Board") to appoint counsel for a person whose capacity is in issue and provides as follows:

Counsel for incapable person

103. *Supra*, footnote 25.

104. *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)* (2003), 231 D.L.R. (4th) 727, 8 Admin. L.R. (4th) 251, 45 R.F.L. (5th) 285 *sub nom. Ontario (Children's Lawyer) v. Goodis* (Ont. S.C.J. (Div. Ct.)), affd 253 D.L.R. (4th) 489, 29 Admin. L.R. (4th) 86, 17 R.F.L. (6th) 32 (Ont. C.A.).

105. *Supra*, at para. 83.

106. *Salzman v. Salzman* (2012), 212 A.C.W.S. (3d) 645, 2012 ONSC 1733, 2012 CarswellOnt 3497 (Ont. S.C.J.), at para. 6.

107. *Supra*, footnote 4.

> 81. (1) If a person who is or may be incapable with respect to a treatment, managing property, 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,
>
> (a) the Board may direct Legal Aid Ontario to 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.
>
> (2) *Responsibility for legal fees* – 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.

Similar to s. 3(1)(b) of the *SDA*, under s. 81(1) of the *HCCA*, the person "shall be deemed to have capacity to retain and instruct counsel".

One distinction between s. 81 of the *HCCA* and s. 3 of the *SDA* is that the latter provides that the court may direct the PGT, while the *HCCA* provides that the Board may direct Legal Aid Ontario ("LAO") to arrange for counsel for the person whose capacity is in issue. Until 2010, the *HCCA* provided that the CCB could direct the PGT or the OCL to arrange for counsel.[108]

It is the issue of capacity being in question that triggers the CCB authority to direct LAO (or previously PGT/Children's Lawyer) to arrange for counsel. The wording of s. 81 of the *HCCA* sets out the authority to appoint counsel in matters respecting capacity only, that is not in respect of involuntary status or other matters governed by the mandate of the CCB.[109] However, as a matter of practice, it appears that the CCB interprets this provision generously to include reviews of involuntary status; and the PGT and LAO have consistently as a matter of practice arranged counsel for such hearings.

9. Decisions Involving Section 81 Counsel

The cases reviewed in the within section are decisions of the CCB or appeals therefrom.

The CCB is a specialized tribunal established under the *HCCA* with particular focus on issues of capacity and involuntary admission. As Hiltz and Szigeti explain:[110]

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108. Note that the amendments also expanded the parties who could have counsel appointed to include persons found incapable of managing property, which was not previously provided for. The amendments also added a provision allowing for the solicitor's account to be assessed by the incapable person and that assessment may be brought by the incapable person's guardian or attorney for property (s. 81(2.1)).

109. *C. (S.J.) (Re)*, 2001 CarswellOnt 7955 (Ont. Cons. & Capacity Bd.).

> . . . [the Consent and Capacity Board] is the administrative tribunal which adjudicates issues of involuntary committal and committee treatment orders under the MHA, consent and capacity issues in relation to treatment, admission to care facilities, and personal assistance service under the HCCA, and management of property under both the SDA and the MHA.[111]

The CCB has a policy guideline that directly addressed the issue of the ordering of counsel where the subject of an application does not have legal representation.[112] This policy guideline sets out s. 81 of the *HCCA* but notes that "[p]arties have a constitutional right to represent themselves if they wish, regardless of whether or not they are likely to represent themselves effectively".[113] Therefore, the Board is not to issue an order under s. 81 of the *HCCA* where it is notified that the applicant seeks to represent him or herself.

As to whether a lawyer who has not been retained, or who withdraws, or whose services are terminated, may subsequently remain as *amicus* counsel, or in another role, is a matter to be decided on a case by case basis. According to Hiltz and Szigeti it remains unsettled for example whether *amicus* can be appointed over the objection of the applicant.[114]

(1) Paluska v. Cava[115]

This case was an appeal to the Superior Court of Justice of a CCB decision upholding a finding of incapacity. The appellant had counsel at the CCB hearing who assisted him with the notice of appeal but was not on the record for the appeal. The appellant had attempted to retain counsel but had been unable to do so due to delays by LAO.

The court held that the appellant required counsel and that it was not his fault that he was without counsel. As the issue related to incapacity, the court noted that the appellant's "constitutional right to freedom of the person is . . . at issue".[116]

Justice Molloy noted the importance of legal representation in the circumstances:[117]

110. Hiltz and Szigeti, *op. cit.*, footnote 26, at p. 567.
111. *HCCA*, s. 70(1) and ss. 70 to 80 generally.
112. Policy Guideline 2, September 1, 2007, "Ordering Counsel Where the Subject of an Application Does Not Have Legal Representation".
113. *Supra*, Section 3: General Principles.
114. Hiltz and Szigeti, *op. cit.*, footnote 26, at p. 584, *per R. v. Starson* (2004), 183 C.C.C. (3d) 538, 2004 CarswellOnt 963, [2004] O.J. No. 941 (Ont. C.A.), also in respect of the Ontario Review Board.
115. *Paluska v. Cava* (2001), 55 O.R. (3d) 681, 2001 CarswellOnt 3209 (Ont. S.C.J.).
116. *Supra*, at para. 13.
117. *Ibid.*, at para. 15.

> It seems to me that the solution lies not in dismissing the appeal or ordering treatment in the interim, but rather in ensuring that the appeal proceeds as mandated by the legislation and in a manner that is consistent with Mr. Paluska's constitutional right to life, liberty, and security of the person. That requires that he have legal representation.

Molloy J. therefore ordered that the PGT arrange for counsel for Mr. Paluska, and that the Government of Ontario pay counsel's fees.

The appeal of the CCB decision was heard and dismissed by Justice Greer.[118]

The Attorney General appealed the Order of Greer J., on the issue of the appointment of counsel for Paluska and the requirement that the Attorney General pay Mr. Paluska's legal fees.[119] Although the appeal was moot as the fees had already been paid, the Court of Appeal allowed the appeal on the basis that insufficient notice had been provided to the Attorney General on the issue of legal fees.

The overriding message gleaned from this decision is that where the rights of a person to life, liberty and security of the person are affected, the court can order the appointment of counsel. As for the payment of the lawyer's fees, it is possible that they could be ordered payable by the Attorney General, as long as sufficient notice is given to the Attorney General to address the issue.

(2) C. (S.J.) (Re)[120]

This was a hearing respecting involuntary status under the *MHA*, and not a capacity proceeding pursuant to the *HCCA*.

At the first attendance, the applicant attended the hearing without counsel. Despite the fact that this was not a capacity hearing *per se*, the CCB made an order directing the PGT to appoint counsel pursuant to s. 81 of the *HCCA*.

The appointed counsel argued that the Form 3 under which the applicant was held involuntarily was void due to the fact that the applicant had not received proper rights advice, that she had not been informed promptly of her right to retain counsel, that there had been extraordinary delay in the hearing process and that overall, the requirements of the legislation had not been met.

The CCB held that the certificate under which the applicant was held was void due to the failure to comply with the requirements for rights advice, and a prompt hearing, pursuant to the *MHA*.

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118. *Paluska v. Cava*, 2001 CarswellOnt 3597, [2001] O.J. No. 4010 (Ont. S.C.J.).
119. *Paluska v. Cava* (2002), 212 D.L.R. (4th) 226, 59 O.R. (3d) 469, 2002 CarswellOnt 1457 (Ont. C.A.).
120. *C. (S.J.) (Re)*, *supra*, footnote 109.

In this case, the CCB applied s. 81 of the *HCCA* in a case where capacity was not strictly in issue and where on a straight-forward reading of s. 81, that provision was not applicable. No explanation was provided by the CCB as to its decision to direct the appointment of counsel. It is possible that the appointment of counsel was employed as a remedy to deal with the failure to provide the statutorily mandated rights advice.

This case is an indication of the flexible approach in applying s. 81 of the *HCCA* to ensure that the legal rights of individuals are respected and defended.

(3) B. (Re)[121]

In this CCB hearing regarding the patient's involuntary status under the *MHA*, the applicant did not have counsel and it was unclear whether he wanted counsel. The CCB heard from a patient advocate (who is not a lawyer) who spoke on behalf of the patient. The patient advocate explained that she had informed the patient of his right to have counsel but could not get direction from him on whether he wanted to retain counsel.

The CCB considered the applicability of s. 81 of the *HCCA* in these circumstances. The CCB took the position that s. 81 of the *HCCA* was not applicable in hearings brought under the *MHA* and therefore did not order the appointment of counsel for the applicant.

This decision is contrary to the earlier Board decision of *C. (S.J.) (Re)*, and appears contrary to the otherwise flexible approach employed by the CCB to facilitate, as much as possible, representation for vulnerable parties.

121. *B. (Re)*, 2002 CarswellOnt 7774 (Ont. Cons. & Capacity Bd.).

(4) Marks (Re)[122]

In this CCB matter, the CCB directed the PGT to arrange for legal representation pursuant to s. 81 of the *HCCA*. Counsel attended on an already adjourned date and informed the CCB that the applicant did not want to be represented by counsel, and sought instead to represent himself. With the agreement of counsel and of the applicant, the CCB permitted the applicant to represent himself but asked appointed counsel to remain and to "assist" the applicant.[123] Counsel asked questions and participated in the hearing.

Notably, the role of s. 81 counsel can be adjusted by the tribunal to a role of "assistance" for the allegedly incapable person at the direction of that person. That is to say that there is flexibility on how the provision for appointed counsel under s. 81 of the *HCCA* is applied. This decision emphasized the need for flexibility in situations where capacity and the protection of legal rights are at issue.

(5) S. (P.) (Re)[124]

In the CCB decision of *Re S. (P.)*, capacity to consent to treatment was at issue. Counsel attended the CCB hearing further to the order of the CCB and request of the PGT, but had been unable to meet with the applicant, who did not attend the hearing. The applicant did not want the lawyer to represent him.

The appointed counsel recommended that he restrict his role to making arguments on the CCB's jurisdiction and not on the merits of the application itself. The CCB agreed to the suggestion. Following s. 81 counsel's submissions, the CCB held that it did not have jurisdiction to rule on the issue of capacity as appeals were pending on another capacity finding.

As such, the role of s. 81 counsel can be modified so that the lawyer deals solely with legal or jurisdictional issues and not the merits of the case, in situations where the alleged incapable person does not wish to have representation. This decision supports the proposition that s. 81 of the *HCCA* is intended to be flexible in its application.

(6) M. (G.) (Re)[125]

The applicant challenged a finding that he was incapable of consenting to treatment to the CCB.

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122. *Marks (Re)*, 2003 CarswellOnt 8348 (Ont. Cons. & Capacity Bd.).
123. *Supra*, at para. 7.
124. *S. (P.) (Re)*, 2003 CarswellOnt 8389 (Ont. Cons. & Capacity Bd.).
125. *M. (G.) (Re)*, 2005 CarswellOnt 7738 (Ont. Cons. & Capacity Bd.).

At the first hearing date, the matter was adjourned and the CCB directed the PGT to arrange for counsel for the applicant. One day prior to the rescheduled hearing, the appointed counsel indicated he would not be acting for the applicant. The PGT arranged for another lawyer. On the rescheduled date of hearing, the new counsel wrote the CCB that no Legal Aid application had been made. The hearing was rescheduled, on a peremptory basis.

On the date of the hearing, the new counsel advised the CCB that he had been dismissed. Since s. 81(1)(b) of the *HCCA* deems a person "to have capacity to retain and instruct counsel" that person is likewise considered capable of refusing to retain and instruct counsel and has the right not to attend his own hearing. The hearing was held in the absence of the applicant and of counsel based on the deemed capacity provisions under s. 81 of the *HCCA*.

Notably, the deemed capacity to retain and instruct counsel pursuant to the legislation also implies the presumption of capacity to dismiss counsel and to choose not to attend the hearing. This point is further echoed recently by the Ontario Court of Appeal in *Gligorevic v. McMaster*[126] which will be addressed in more detail below.

(7) Q. (I.) (Re)[127]

In *Q. (I.) (Re)*, a hearing was held to appoint a representative where an applicant had been found incapable of consenting to admission to a care facility.

The CCB had directed the PGT to arrange legal representation for the incapable person under s. 81 of the *HCCA*. Counsel appeared before the CCB and informed the CCB she could not obtain meaningful instructions and suggested that she may be appointed *amicus curiae* based on the authority of s. 25.0.1 of the *Statutory Powers Procedure Act*[128] (the "*SPPA*").

The CCB noted the importance of representation on the issue of placement in a care facility which affects an individual's liberty, and that the appointment of proposed counsel as *amicus curiae* would allow for counsel to bring forward information that would assist the CCB in determining all the issues in the hearing. The panel wrote as follows:[129]

126. *Gligorevic v. McMaster* (2012), 347 D.L.R. (4th) 17, 109 O.R. (3d) 321, 2012 ONCA 115 (Ont. C.A.).
127. *Q. (I.) (Re)*, 2005 CarswellOnt 8588 (Ont. Cons. & Capacity Bd.).
128. R.S.O. 1990, c. S.22.
129. *Supra*, footnote 127, at paras. 24-26.

> . . . The overarching principle, however, is that where a person's fundamental rights are affected and they have no capacity to represent themselves against potentially serious consequences, counsel must be available to play a meaningful role. The inability to receive instructions would leave Ms. Perez unable to protect her client's rights.
>
> On this particular case the ability to object to appointment of a particular representative may affect whether IQ lives in the community or is placed in a nursing home. This choice represents a fundamental liberty of a person in a free society.
>
> The appointment of Ms. Perez as Amicus will allow her to act without specific instructions to bring out all information that may be necessary for the CCB to determine the issues in this case.

This case stands for the principle that where a person cannot give meaningful instructions, counsel could instead be appointed as *amicus curiae*. The CCB accepted this proposal as a helpful compromise.

This case also stands for the principle that a lawyer cannot act without instructions.

The message appears to be that counsel, as officer of the court should disclose and make submissions to the court where unable to obtain instructions. Similarly, as noted in *M. (G.) (Re)*[130] and *Gligorevic*,[131] counsel should identify where their instructions are not to act and seek direction in those circumstances from the court or tribunal.

(8) Gligorevic v. McMaster[132]

This matter involved a decision by the CCB in respect of capacity to consent to treatment. That decision was appealed to the Superior Court of Justice and subsequently to the Court of Appeal for Ontario.

At the first attendance before the CCB, the appellant informed the CCB that he wished for his own lawyer to be present. The CCB adjourned the hearing for a limited period. The CCB also, pursuant to s. 81(1) of the *HCCA*, directed the PGT to arrange legal representation for the impending hearing to proceed with the counsel retained by the applicant, or the appointed counsel under s. 81 of the *HCCA*.

The PGT arranged for counsel in accordance with the order of the CCB. When the appointed lawyer met with the applicant, the applicant told her that he had his own Serbian-speaking lawyer whom he preferred to have represent him. The appointed lawyer suggested

130. *Supra*, footnote 125.
131. *Supra*, footnote 126.
132. *Ibid.*

that she attend the hearing in the event the client's counsel was not present.

On the date of the hearing, the applicant's own counsel did not attend. In the course of the hearing, the CCB referred to the appointed lawyer as counsel to the applicant. The appointed lawyer did not inform the CCB that her services had been declined by the applicant and that she had no instructions in respect of the hearing.

As the hearing was beginning, the applicant requested an adjournment so that he could have his own lawyer attend. The CCB denied the adjournment request and indicated that he could be represented by the appointed counsel.

In final submissions the appointed lawyer conceded that her client was incapable with respect to the proposed treatment.

In its decision the CCB held that the client was incapable with respect to treatment.

The applicant appealed the CCB decision to the Superior Court of Justice. The court held that the CCB hearing had not been unfair in spite of the fact that appointed counsel acted without instructions, failed to inform the CCB that she did not have instructions and made submissions that conceded the issue of capacity. The court found that the presumption of the appointed counsel's competence had not been rebutted.[133]

In the appeal to the Superior Court of Justice and the Court of Appeal, counsel for the appellant argued that the court should rule on the issue of ineffective assistance of counsel, which is grounded in the criminal law. Cronk J.A., writing for the Court of Appeal, noted that while claims of ineffective assistance of counsel are readily advanced in criminal appeals, they are more difficult to make out in civil matters. Still, the court acknowledged that there is a possibility of bringing such claims, particularly where the person in question is vulnerable, and in cases where the person has a mental disability:[134]

> The right to advance an ineffective assistance claim on a criminal appeal is well-established. In *R. v. B. (G.D.)*, 2000 SCC 22, [2000] 1 S.C.R. 520 (S.C.C.), the Supreme Court confirmed that the right to effective assistance of counsel extends to all accused persons. Justice Major, writing for the court, explained at para. 24: "In Canada that right is seen as a principle of fundamental justice. It is derived from the evolution of the common law, s. 650(3) of the *Criminal Code of Canada* and ss. 7 and 11(d) of the [*Charter*]." . . . The effective assistance of counsel is an important aspect of an accused's right to make full answer and defence and right to a fair trial . . . As a result, ineffective assistance claims are

133. *Ibid.*, at para. 40.
134. *Ibid.*, at paras. 52-54.

> encountered frequently as a ground for a new trial in appeals from conviction in criminal cases.
>
> In contrast, ineffective assistance claims are rare in civil appeals . . . this is not surprising since the law affords other remedies for a losing litigant in a civil case if ineffective assistance at trial can be established, most notably, the right to sue for damages arising from solicitor negligence.
>
> *Nonetheless, this court has left open the possibility of an ineffective assistance argument as a ground of appeal in a civil case, on an exceptional basis, especially where the interests of vulnerable people are engaged.* In *D.W.*, Catzman J.A. of this court stated, at para. 55:
>
> > *"I would not be prepared to close the door to the viability of ineffective assistance of counsel as a ground for a new trial in a civil action.* But . . . *I would limit the availability of that ground of appeal to the rarest of cases, such as (and these are by way of example only) cases involving some overriding public interest or cases engaging the interests of vulnerable persons like children or persons under mental disability*". [Emphasis added.]

Cronk J.A. writing for the court noted that a finding of incapacity "engages a patient's liberty, dignity and right of self-determination with respect to medical treatment".[135] Cronk J.A. continued that the "effective assistance of counsel at a Board capacity hearing is no less important than at a criminal trial".[136] Cronk J.A. explained as follows:[137]

> . . . Adapting Doherty J.A.'s reasoning in *Joanisse*, at p. 57, to the mental health context, *effective assistance by counsel at such hearings enhances the adjudicative fairness of the process. It ensures that a patient who has been found incapable by his or her physician has a champion who has the same skills as counsel for the health care practitioner who can use those skills to ensure that the patient receives the full benefit of procedural protections available to the patient. Moreover, effective assistance ensures that the case for incapacity is thoroughly and skilfully tested and evidence tending to support capacity is advanced on behalf of the patient*. [Emphasis added.]

There were two grounds for the complaint of ineffective assistance of counsel in the appeal. The first was that the appointed counsel acted without instructions. The second ground was that the appointed lawyer conceded the appellant's incapacity in submissions to the CCB.

On the issue of acting without instructions, Cronk J.A. made reference to the PGT Information Update for counsel appointed to provide representation for allegedly incapable persons.[138] Cronk

135. *Ibid.*, at para. 60.
136. *Ibid.*, at para. 61.
137. *Ibid.*, at para. 61.
138. *Op. cit.*, footnote 15.

J.A. cited the requirements that the lawyer "not become a substitute decision maker for the client" and that the "lawyer must ensure that the evidentiary and procedure requirements are tested and met, even where no instructions, wishes or directions at all can be obtained from the client".[139]

The Court of Appeal held that the appointed lawyer was obliged to inform the Board that her retainer had been denied by the applicant and that she had no authority to act for him, and then to withdraw from acting as counsel in the matter.[140] The court was clear that a person for whom counsel is appointed, is a "client" and is deemed capable of retaining and instructing such that he or she can also discharge counsel.[141]

On the basis that the appointed lawyer acted improperly without instructions, the court ordered a new CCB hearing for the appellant.[142]

Following this decision, individuals in capacity proceedings may avail themselves of claims of ineffective assistance of counsel. The Court of Appeal emphasized that capacity proceedings encompass a person's liberty, dignity and right of self-determination and therefore carry significant consequences which the courts are required to protect.

The Court of Appeal also emphasized that individuals who have counsel appointed pursuant to s. 81 of the *HCCA* are capable of retaining, instructing and discharging appointed counsel, and that any such counsel who is discharged must withdraw from representation and inform the tribunal that he or she has been discharged.

10. The Analogous Role of Amicus Curiae

The Court of Appeal has an *amicus* program that allows for the appointment of *amicus* for unrepresented persons appealing decisions of the Ontario Review Board ("ORB"). In appeals of ORB decisions, where an appellant does not have counsel, and is a patient at a facility where the Psychiatric Patient Advocate Office ("PPAO") provides services, the Court of Appeal will inform the PPAO who will determine whether the appellant intends to retain counsel. If the appellant does not retain counsel, then *amicus* will be appointed, even if the appellant wishes to represent him or herself.[143]

139. *Gligorevic*, *supra*, footnote 126, at para. 98.
140. *Ibid.*, at paras. 102 and 103.
141. *Ibid.*, at paras. 104 and 105.
142. *Ibid.*, at paras. 107 and 114.

The role of *amicus* in those cases is to present arguments or advise the court of relevant legal principles that can strengthen the appellant's case, and to provide the appellant with information about the court process.

Both the unrepresented appellant and *amicus* may make submissions to the court in the appeal.

The role of *amicus* is somewhat comparable to that of s. 3 counsel in that the appointment is facilitated by a court, however, the distinction is that *amicus* does not represent the appellant, nor take instructions from the appellant for legal representation. The unrepresented appellant cannot discharge *amicus* and even if the appellant disagrees with the appointment of *amicus*, *amicus* must appear at the hearing and assist the court.

In *R. v. Cunningham*[144] the Supreme Court noted that a court cannot "force" counsel upon an accused, but can in some cases appoint *amicus* to assist the court.[145]

The role of *amicus* is to assist the court on legal, jurisdictional, and procedural issues, and not the merits of the case. The comparison between s. 3 counsel and *amicus* lies essentially in the fact that both roles provide a means to ensure legal protections for a vulnerable person.

11. Other Analogous Provisions: Section 38 of the Child and Family Services Act

Section 38(1) of the *Child and Family Services Act*[146] (the "*CFSA*") addresses the legal representation of a child. By definition of Rule 7.04(1)(a) of the *Rules of Civil Procedure*,[147] a child is a person under disability.

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143. Psychiatric Patient Advocate Office, "*Amicus Curiae* Counsel for Ontario Review Board Appeals", available at <www.sse.gov.on.ca/mohltc/ppao/en/Pages/InfoGuides/CriminalCodeAdmissions_D.aspx?openMenu=smenu_-CriminalCodeAdm>.

144. *R. v. Cunningham*, [2010] 1 S.C.R. 331, 317 D.L.R. (4th) 1, 2010 SCC 10 (S.C.C.).

145. *Supra*, at para. 9: "An accused has an unfettered right to discharge his or her legal Counsel at any time and for any reason. A Court may not interfere with this decision and cannot force Counsel upon an unwilling accused (see *Vescio v. The King*, [1949] S.C.R. 139, at p. 144; though exceptionally the Court may appoint an amicus curiae to assist the Court)".

146. R.S.O. 1990, c. C.11.

147. *Rules of Civil Procedure*, Rule 7.04(1)(a): 7.04(1) Unless there is some other proper person willing and able to act as litigation guardian for a party under disability, the Court shall appoint, (a) the Children's Lawyer, if the party is a minor . . .

Section 38(1) of the *CFSA* makes the following provisions for the representation of children:

> *Legal representation of child*
>
> 38.(1) A child may have legal representation at any stage in a proceeding under this Part.
>
> *Court to consider issue*
>
> (2) Where a child does not have legal representation in a proceeding under this Part, the court,
>
> (a) shall, as soon as practicable after the commencement of the proceeding; and
>
> (b) may, at any later stage in the proceeding,
>
> determine whether legal representation is desirable to protect the child's interests.
>
> *Direction for legal representation*
>
> (3) Where the court determines that legal representation is desirable to protect a child's interests, the court shall direct that legal representation be provided for the child.
>
> *Criteria*
>
> (4) *Where*,
>
> *(a) the court is of the opinion that there is a difference of views between the child and a parent or a society, and the society proposes that the child be removed from a person's care or be made a society or Crown ward under paragraph 2 or 3 of subsection 57 (1)*;
>
> *(b) the child is in the society's care and,*
>
> *(i) no parent appears before the court, or*
>
> *(ii) it is alleged that the child is in need of protection within the meaning of clause 37 (2) (a), (c), (f), (f.1) or (h); or*
>
> *(c) the child is not permitted to be present at the hearing,*
>
> *legal representation shall be deemed to be desirable to protect the child's interests, unless the court is satisfied, taking into account the child's views and wishes if they can be reasonably ascertained, that the child's interests are otherwise adequately protected.* [Emphasis added]

(1) Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)[148]

This case involves an analysis of s. 38 of the *CFSA*, and the conduct of counsel to a minor.

The Ontario Court of Justice (Provincial Division) was asked to consider the admissibility of evidence concerning the relationship

148. *Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)* (1991), 35 R.F.L. (3d) 1, 1991 CarswellOnt 307 (Ont. Ct. (Prov. Div.)).

between a lawyer appointed to act for a minor by the Official Guardian. The Catholic Children's Aid Society of Metropolitan Toronto sought to admit evidence relating to the lawyer's relationship with the child and steps taken by the lawyer in that capacity.

In making its decision, the court made general observations about the role of s. 38 counsel:[149]

> . . . The relationship between a solicitor provided per section 38 of the *Child and Family Services Act* and his child client is the same in all respects as that between a solicitor and his adult client, and is subject to the same rules, including those relating to solicitor-client privilege.

The court pointed out that a lawyer appointed under s. 38 of the *CFSA* may only act pursuant to instructions, and cannot act for a "client who is incapable of giving adequate instructions to his solicitor".[150] A solicitor who finds him or herself with a child client who cannot provide instructions must be removed from the record.[151]

In such cases, if the child is a party to the proceedings, then a litigation guardian may be appointed, and that litigation guardian should be the Official Guardian (presently such litigation guardian would be the Children's Lawyer) who would, in turn retain and instruct counsel.[152]

The court placed strict limits on the role of a lawyer appointed pursuant to s. 38 of the *CFSA* and specifically noted that such a lawyer's "personal opinions, or submissions based on his personal investigations, as to best interests of the child, the appropriate order per section 53 of the *Child and Family Services Act*, or the appropriate remedy per section 24(1) of the Charter are all irrelevant and inadmissible".[153]

Section 38 counsel "may only make submissions based on evidence properly adduced before the Court".

The court outlined the three ways in which a lawyer could act directly for a child in proceedings pursuant to the *Child and Family Services Act, 1984*, which are as follows:[154]

> 1. *the Court, by order, appoints a specific solicitor counsel to represent* the child in the particular proceedings;

149. *Supra*, at para. 16.
150. *Ibid.*
151. *Ibid.*
152. *Ibid.*
153. *Ibid.*
154. *Ibid.*, at para. 20.

> 2. Counsel is retained by, or on behalf of, the child *to act in accordance with the instructions of the child in the same manner as an adult* would retain and instruct counsel; or
>
> 3. a direction is made under s. 38(3) of the *Child and Family Services Act*, 1984 that legal representation be provided for the child. [Emphasis added.]

The court noted that the roles of counsel privately retained by or for the child and counsel provided for the child under s. 38 of the *CFSA* where the child is capable of giving instructions are identical.[155] The court makes the distinction between appointed counsel who acts for a child who can give instructions, and for a child who cannot give instructions and notes that where the child can give instructions, the appointed lawyer is obliged to follow the child's instructions.[156] The decision notes as well that those instructions should be followed even if the instructions are not in the best interests of the child.[157]

The court writes in part, referring to a sub-committee report of the Law Society of Upper Canada:[158]

> The Sub-Committee especially rejects the suggestion that there is a duty on the solicitor to make any disclosure to the Court, or to anyone with respect to information in his position acquired in the course of the solicitor and client relationship, even when, in the opinion of the solicitor, it is in the best interests of the child to act contrary to the child's instructions. *The solicitor is not the judge of the best interests of the child, and is not, under any circumstances, to be excused for a breach of the solicitor and client relationship. If the solicitor does not believe he can accept the instructions of the child, then he should withdraw from the matter. He should, in all events, conduct himself as if he were acting for an adult.* [Emphasis added.]

Where an appointed lawyer acts for a child who cannot give instructions, the court noted that such lawyer must ask to be removed from the record at which point the Official Guardian would be notified by the court or the lawyer.[159]

The court noted that overall the regular duties of a lawyer and in particular the duty of confidentiality apply to such relationships.[160]

155. *Ibid.*, at para. 21.
156. *Ibid.*, at paras. 21 and 36.
157. *Ibid.*, at paras. 36 and 33.
158. *Ibid.*, at para. 37.
159. *Ibid.*, at para. 43.
160. *Ibid.*

(2) Children's Lawyer for Ontario v. Goodis[161]

This decision by the Divisional Court provides helpful guidance on the application of s. 38 of the *CFSA*, which is analogous to s. 3 of the *SDA*.

In this case an adult formerly represented in proceedings by the OCL had sought disclosure of her files held by the OCL. The OCL disclosed a portion, but not all, of the legal files relying on solicitor-client privilege and Crown counsel exemptions. The client appealed the OCL's decision to the information and privacy commissioner who ordered that the OCL must disclose most of the outstanding information. The OCL sought judicial review of the commissioner's decision which was heard by the Divisional Court.

The Divisional Court ordered that the applicant was entitled to her legal file on the basis that the OCL had been her counsel and that the OCL was not prevented from releasing the file on the basis of Crown privilege.

The court reviewed the role of the OCL when appointed legal representative under s. 38 of the *CFSA*. The lawyers who act are specially trained lawyers in private practice.[162]

In response to argument that the OCL performed a "quasi-public function in reporting on the proposal to the Court", the court noted that "the review is done for the protection of the minor, and only secondarily as a protection of the judicial system, ensuring that justice is both done and seen to be done". The court was clear in noting that "[t]he review is in no sense performed for the benefit of the Crown, or the Ministry of the Attorney-General. Even if the OCL does have some quasi-public aspects to her duties, the major part of her duties involve actual or potential litigation in which she acts in the same manner that a member of the private bar is obliged to act."[163]

Therefore the fact that lawyers appointed pursuant to s. 38 of the *CFSA* are required to report to court does not diminish their independent duty to their client, regardless of the client's legal incapacity.

The court favourably cites the following duties owed by the OCL to the minor it represents:[164]

> - To provide independent, zealous and competent representation with independent professional judgment

161. *Supra*, footnote 104.
162. *Ibid.*, at para. 56.
163. *Ibid.*, at para. 60.
164. *Ibid.*, at para. 83.

> - The duty of confidentiality that is central to the normal client-lawyer relationship applies
> - . . . the representation . . . must be . . . whole, complete and independent
> - The function of Counsel retained by the OCL is to act as an advocate, calling evidence and making submissions.[165]
>
> "The statutory scheme embodied in R. 7.05 is clearly fiduciary. The OCL is to "diligently attend to the interests" of the client and "take all steps necessary for the protection of those interests."

The need for independent and vigorous representation of children clients by counsel appointed by the OCL is emphasized by the court as follows:[166]

> We agree with the conclusion of the respondent as to the impact of these fiduciary duties on the issue before us in the respondent's factum, para. 53:
>
> > "The Children's Lawyer's duties include independent representation, acting in the interests of the minor and relinquishing her own interests. The fiduciary nature of the relationship carries with it the duty to act with utmost good faith and loyalty, and the obligation to grant access to information received or created by the Children's Lawyer in relation to the minor's cases. An interpretation of section 19 which would prevent disclosure of the client's file to her on the grounds of the Children's Lawyer's relationship to the Crown/government, would be inconsistent with the Children's Lawyer's fiduciary duties of loyalty and candour, and raises the spectre of conflicting interests."

The court concluded that the standard of vigorous representation and accountability to the child client is consistent with "fundamental notions of justice".[167]

(3) Summary

The analogies between s. 3 counsel and s. 38 counsel are these. There are issues of capacity inherent in both types of retainers, counsel in both situations are counsel for the party, each have a solicitor-client relationship and each are required to take instructions from his or her client.

There are also distinctions between the roles of s. 3 and s. 38 counsel in that s. 3 of the *SDA* provides that a person for whom counsel is appointed is deemed capable of retaining and instructing counsel. However, as noted above, this provision is not applied literally and, in

165. *Strobridge v. Strobridge* (1994), 115 D.L.R. (4th) 489, 4 R.F.L. (4th) 169, 18 O.R. (3d) 753 (Ont. C.A.).
166. *Goodis*, *supra*, footnote 104, at para. 87.
167. *Ibid.*, at para. 100.

cases where s. 3 counsel cannot obtain instructions, they are to inform the court of such.

Another difference is that s. 38 of the *CFSA* provides that counsel may be provided for children in cases where they are not parties to the proceedings. In *SDA* matters, the (allegedly) incapable person is always a party to the proceedings.

However, generally, s. 3 of the *SDA* and s. 38 of the *CFSA* are highly analogous and set out similar duties for counsel so appointed. Both s. 3 counsel and s. 81 counsel are required to:

- advocate for the incapable person in circumstances where the incapable person is able to give instructions and to advocate those instructions;
- not act where instructions cannot be received;
- advocate that a litigation guardian be appointed where appropriate, who may retain counsel to act on behalf of the litigation guardian, if there is no guardian, attorney or other to so act and who is not in conflict, and where such appointment is deemed necessary;
- communicate preferences, wishes, if such can be received, and not to substitute Counsel's opinion, or evidence as to the best interests of the person; and
- not to provide an "opinion" to the court. Such is not the role of such appointed counsel, despite the incapacity of the client.

The court's analysis reviewed under s. 38 of the *CFSA* provides insight into the role of s. 3 *SDA* counsel. The further duties elicited include:

- the duty of confidentiality;
- the duty to maintain privilege attached to solicitor and client relationships;
- the duty of the solicitor to act as if in a normal solicitor-client retainer so far as is reasonably possible and to hold communications in confidence.

12. Guidelines and Best Practices for Section 3 Counsel

In his 2009 paper on the role of s. 3 counsel, D'Arcy Hiltz suggested a list of guidelines for the best practices to be exercised by s. 3 counsel as follows:[168]

Guidelines and Best Practices

168. Hiltz Paper, *supra*, footnote 37, at pp. 12-15.

1. Maintain as far as reasonably possible a normal lawyer and client relationship.
2. Meet and take instructions from the client in person, in the absence of anyone who may have the potential of influencing the client.
3. Assure the client that your presence is as a result of the Court believing it appropriate that they have legal representation.
4. Advise the client of the nature of the Court proceedings, the allegations and the relief requested . . .
5. Advise the client of the rights afforded to them under the law . . .
6. In appropriate circumstances, assist the client in preparing and submitting an application to Legal Aid. In the event that client does not qualify for Legal Aid, provide the client with an estimate of your fees. A written retainer should be prepared and provided to the client for signing if appropriate and/or provided to the individual who has lawful authority to manage the property of the client during the course of the proceedings . . . Ensure transparency in relation to your fees.
7. In the event the client does not want you to act, attempt to determine why. The individual may have been provided with incorrect or misleading information and in this regard you should ensure that the individual knows that you are there to represent their interest only; that what they say to you will be maintained in confidence unless they permit you to disclose the information; and that you will act to the best of your ability on the instructions, provided those instructions do not interfere with your duty to the Court. If the individual prefers that another lawyer represent them, ask for the identity of the other lawyer to determine whether or not that lawyer would in fact be in a position to represent the individual. In the event the individual simply wishes to represent himself or indicates that they do not want you to represent them, then it is clear that you should not act. You must advise the Court and the PGT accordingly.
8. In the event the client is unable to instruct, do not act. Advise the PGT and the Court. In certain circumstances, you may be able to obtain instructions based on wishes expressed by the client from the sources such as Powers of Attorney, Wills or individuals who have no vested interest in the outcome of the proceedings. Again, the Court should be made aware of your inability to obtain instructions directly from the client and you may wish to seek directions from the Court as to whether you should continue to represent the client as section 3 counsel or whether an appointment as amicus curiae is warranted or for that matter, whether a litigation guardian should be ordered, keeping in mind the Court does retain power to appoint a litigation guardian notwithstanding the deeming provisions set out in section 3.
9. In the event instructions are provided and you are not satisfied that the instructions are capable instructions, again you must not act. Ensure, however, that you do not equate capacity of the individual with what you feel to be in the "best interests" of the individual. Remember, even capable individuals make unwise or foolish decisions.

10. Be vigilant of circumstances which may give rise to undue influence and take steps which are appropriate.
11. At the earliest opportunity, contact all counsel with a view to narrowing the issues in the proceeding and to determine which issues are capable of resolution and which are not.
12. Keep your client informed.
13. Discuss avenues of resolution and settlement with your client and to the extent possible, encourage settlement. A position of section 3 counsel lends itself to this.
14. Ensure that your costs are reasonable considering the issues at stake.

13. Concluding Summary

(1) Role

Upon review of the applicable case law on the role of s. 3 counsel, the analogous legislative provisions, the governing rules and commentary of the bench and bar, and guidance provided by the PGT, the following is a summary of the role of s. 3 counsel:

(a) The role of s. 3 counsel is to identify the requirements of the law with respect to the proceedings.[169]
(b) The role of s. 3 counsel is to ensure the law is complied with.[170]
(c) The role of s. 3 counsel is to establish, to the extent possible, a normal lawyer-client relationship with the person alleged to be incapable.[171]
(d) The role of s. 3 counsel is to present evidence, to the extent possible that reflects the wishes of the client and the circumstances in which those wishes were expressed.[172]
(e) The role of s. 3 counsel is to obtain a person's instructions based on wishes and to advance those instructions within the proceedings.[173]
(f) The role of s. 3 counsel is to attempt to determine client wishes and directions from third parties such as medical practitioners, family members, caregivers and friends or others.[174] If the client's wishes or directions in the past or in present have been expressed to others, then consideration should be given to presenting the evidence in court.[175]

169. Hiltz and Szigeti, *op. cit.*, footnote 26, at pp. 24-25.
170. *Ibid.*
171. *Rules of Professional Conduct*, Rule 2.02(6).
172. Hiltz and Szigeti, *op. cit.*, footnote 26, at pp. 24-25.
173. *Sly v. Curran*, *supra*, footnote 58.
174. PGT Information Update, *op. cit.*, footnote 15, pp. 5-6, #3.

(g) The role of s. 3 counsel is to take instructions from the client and not to act if satisfied that capacity to give instructions is lacking.[176]
(h) The role of s. 3 counsel is to ensure that the evidentiary and procedural requirements are tested and met, even where no instructions, wishes or directions at all can be obtained from the client.[177]
(i) The role of s. 3 counsel is not to make decisions, or express personal views to the court felt to be in the best interests of the client.[178]
(j) The role of s. 3 counsel is not to become a substitute decision-maker for the client.[179]
(k) The role of s. 3 counsel is to not become a litigation guardian for the client.[180]
(l) The role of s. 3 counsel is not to make decisions for the client.[181]
(m) The role of s. 3 counsel can transition from counsel initially retained by the client to a s. 3 appointment of the same counsel.[182]
(n) The role of s. 3 counsel is not to act if dismissed by the client with deemed capacity.[183]
(o) The role of s. 3 counsel may be limited to addressing jurisdiction and procedure and not making representations on the merits of the case.[184]
(p) The role of s. 3 counsel may be adjusted to a role of assistance to the allegedly incapable person.[185]
(q) The role of s. 3 counsel is to place the client's interests, views, and preferences before the court and to provide context for those views and preferences.[186]
(r) The role of s. 3 counsel is to provide independent and zealous representation for the client.[187]

175. *Ibid.*, Section 3 Duties.
176. *Banton*, *supra*, footnote 34.
177. PGT Information Update, *op. cit.*, footnote 15.
178. Hiltz and Szigeti, *op. cit.*, footnote 26, at pp. 24-25.
179. PGT Information Update, *op. cit.*, footnote 15, pp. 5-6, #3.
180. *Ibid.*
181. *Ibid.*
182. *Bailey*, *supra*, footnote 82.
183. *M. (G.) (Re)*, *supra*, footnote 125.
184. *S. (P.) (Re)*, *supra*, footnote 124.
185. *Marks (Re)*, *supra*, footnote 122; *M. (G.)*, *supra*, footnote 125.
186. *Goodis*, *supra*, footnote 104.
187. *Ibid.*

(s) The role of s. 3 counsel is provide independent professional judgment to the client.[188]
(t) The role of s. 3 counsel can be to review the fairness of settlements.[189]
(u) The role of s. 3 counsel where instructions cannot be obtained, is to consider the appointment of a litigation guardian; and to consider whether there is a person with authority to represent the alleged incapable person's interest.[190]
(v) The role of s. 3 counsel is to ensure procedural requirements have been complied with under the relevant rules and governing statute.[191]
(w) The role of s. 3 counsel is to consider evidentiary requirements in the context of substitute decision-making proceedings and the guiding principles of the *SDA*.[192]
(x) The role of s. 3 counsel is to take instructions from a capable client so deemed.[193]
(y) The role of s. 3 counsel can be to provide a statement of position.[194]
(z) The role of s. 3 counsel can be to convey the incapable person's feelings.[195]
(aa) The role of s. 3 counsel can apply to proceedings not commenced under the *SDA*.[196]
(bb) The role of s. 3 counsel is not to be a witness.[197]
(cc) The role of s. 3 counsel is to only make submissions based on evidence properly adduced by the court.[198]
(dd) The role of s. 3 counsel is to represent the nature of the incapable person's instructions.[199]
(ee) The role of s. 3 counsel is to test the jurisdiction and authority of the court in any order sought.[200]

188. *Ibid.*
189. *Ibid.*
190. *Ibid.*
191. *Ibid.*
192. *Abrams*, *supra*, footnote 60.
193. *Ibid.*
194. *Cherry*, *supra*, footnote 90.
195. *Mesenel*, *supra*, footnote 43; *Abrams*, *supra*, footnote 60.
196. *Bon Hillier*, *supra*, footnote 86.
197. *Righter*, *supra*, footnote 70.
198. *Catholic Children's Aid Society*, *supra*, footnote 148.
199. *Righter*, *supra*, footnote 70.
200. *Ibid.*

(ff) The role of s. 3 counsel is to advance the interests of the incapable person, as indicated by the person.[201]
(gg) The role of s. 3 counsel is to be independent in representing the incapable person.[202]
(hh) The role of s. 3 counsel is to provide effective assistance to an allegedly incapable person.[203]
(ii) The fees of s. 3 counsel are to be paid by the person whose capacity is in question, or LAO, not the PGT.[204]
(jj) The role of s. 3 counsel is to protect through advocacy the rights of the vulnerable person through representation.[205]
(kk) The role of s. 3 counsel can be a proactive one where instructions are ascertained in the litigation.[206]
(ll) The role of s. 3 counsel is to ensure separate representation for parties that are in potential conflict, and to ensure counsel is independent.[207]
(mm) The role of s. 3 counsel is to facilitate resolution.[208]
(nn) The role of s. 3 counsel includes the duty of confidentiality to the client.[209]

(2) Responsibilities and Obligations

The responsibility and obligation of s. 3 counsel is to consider not acting where no meaningful instructions can be obtained and consider an *amicus curiae* appointment arising out of the *SPPA*, or otherwise the jurisdiction of the court.[210]

It is the responsibility and obligation of s. 3 counsel to:

- act with a high degree of professionalism;
- ensure independence;
- not act in the best interests of the allegedly incapable person;

201. *Canada Trust Co*, *supra*, footnote 49.
202. *Woolner*, *supra*, footnote 73.
203. *Gligorevic*, *supra*, footnote 126.
204. *Ziskos*, *supra*, footnote 51.
205. *Tepper*, *supra*, footnote 46.
206. *Teffer*, *supra*, footnote 81.
207. *PGT*, *supra*, footnote 84; but *note* the conflicting unreported decision of Grace J. in *Farrell*, *supra*, footnote 93.
208. *Sly*, *supra*, footnote 58.
209. *Goodis*, *supra*, footnote 104.
210. *Q. (I.)*, *supra*, footnote 127; *Statutory Powers Procedure Act*; Hiltz and Szigeti, *op. cit*, footnote 26; and *Banton*, *supra*, footnote 34.

- not act as litigation guardian, guardian, attorney or substitute decision-maker for the allegedly incapable person;
- ensure *SDA* requirements are met;
- ensure proportionality in costs;
- not make decisions for the client.[211]

(3) Standard of Care of Section 3 Counsel

- The duty of s. 3 counsel is to the court pursuant to Rule 4.01(2) of the *Rules of Professional Conduct*;
- A duty to the court includes acting in accordance with the *Rules of Professional Conduct*;[212]
- A duty not to put counsel's own opinion before the court unless qualified as an "expert";[213]
- A duty of confidentiality to the client;[214]
- A duty of solicitor-client privilege;[215]
- A duty of competence;[216]
- A duty not to act without instructions;[217]
- A duty not to deceive or mislead a tribunal or court or influence the course of justice;
- A duty as an officer of the judicial system to ensure that justice is both done and seem to be done;[218]
- A duty of a fiduciary;[219]
- A duty of loyalty;[220]
- A duty to act as an advocate, call evidence and make submissions;[221]
- A duty to encourage mediation and settlement;[222]
- A duty to the client under disability to act as far as reasonably possible in maintaining a normal relationship;[223]

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211. *Banton*, *supra*, footnote 34.
212. *Rules of Professional Conduct*, *supra*, footnote 25, available at <www.lsuc.on.ca>.
213. *Goodis*, *supra*, footnote 104.
214. *Rules of Professional Conduct*, Rule 2.03.
215. *Ibid.*
216. *Gligorevic*, *supra*, footnote 126.
217. *Ibid.*
218. *Goodis*, *supra*, footnote104.
219. *Ibid.*
220. *Ibid.*
221. *Ibid.*
222. *Rules of Professional Conduct*, Rule 2.09(7).
223. *Rules of Professional Conduct*, Rule 2.02.

- A duty not to withdraw from representation without directions, or unless in breach of the *Rules of Professional Conduct*;[224] and
- A duty to act resolutely, honourably within the limits of the law while treating the court or tribunal with candour, fairness, courtesy and respect.[225]

14. Concluding Remarks

The *SDA* is likely to undergo scrutiny and revision on a number of fronts in the next few years because of societal and demographic pressures. If and when change is contemplated, it would certainly be helpful if the legislation were to include provisions clarifying all aspects of s. 3 counsel appointments.

Until then, counsel would be wise to keep a careful watch on the approaches taken by our courts, some of which are conflicting, to elicit whatever guidance can be gleaned.

224. *Rules of Professional Conduct*, Rule 2.09.
225. *Rules of Professional Conduct*, Rule 4.01(1).