Representation of Persons Under Disability: The Legislative Framework

The *Substitute Decisions Act*, 1992, S.O. 1992, c.30

The *SDA* governs substitute decision making and capacity matters in Ontario, in addition to other interrelated statutes, *The Health Care Consent Act, 1996*, *S.O. 1996, c.2, Sched. A (the "HCCA")*; and the *Mental Health Act, R.S.O. 1990, c.M.7 (the "MHA").* These legislations affects the liberty and autonomy of certain individuals.

The *SDA* is a tool that may be used to help protect the interests of vulnerable adults.

Specifically, the *SDA* governs the appointment and obligations of attorneys and guardians both for property and for personal care; who act as substitute decision makers in the event of incapacity. Certain Court proceedings are authorized under the *SDA* and it contains additional protections for adults who are the subject matter of a guardianship application or capacity assessment.

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* pursuant to Section 2 provides for the presumption that a person eighteen years of age or more, is capable of entering into a contract.[1] There is also a presumption that a person sixteen years of age or more, is presumed to be capable of giving or refusing consent in connection with his/her own personal care.[2] There is a presumption that a person is deemed capable to retain and instruct Counsel in circumstances where capacity is in issue in proceedings under the *SDA*, and the PGT is ordered by the Court to arrange legal representation for the individual pursuant to Section 3.[3]

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[1] Sec. 2(1) of the SDA -"**2.** (1) A person who is eighteen years of age or more is presumed to be capable of entering into a contract."

[2] Sec. 2(2) of the SDA – "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."

[3] Sec. 3 of the SDA – "**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."

The SDA, Section 3: Representation of the Incapable Person

Hiltz and Szigeti in their publication with annotated commentary to the *SDA*,[4] in relation to the presumption of capacity and retaining Counsel and particularly on the appointment of Section 3 SDA Counsel contend:

> *"[…] in relation to the first two presumptions, 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.[5] 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 as follows:*
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> > ***"A health practitioner may have reason to believe that a person may be incapable with respect to a proposed treatment based on the following observations:***
> >
> > ***a. The person shows evidence of confused or delusional thinking;***
> > ***b. The person appears to be unable to make a settled choice about treatment;***
> > ***c. The person is experiencing severe pain or acute fear or anxiety;***
> > ***d. The person appears to be severely depressed;***
> > ***e. The person seems to be impaired by alcohol or drugs;***
> > ***f. Any other observations that give rise to a concern about the person's capacity, including observations about the person's behaviour or communication."***
>
> *The third presumption regarding capacity to retain and instruct Counsel can be extremely problematic. In the case of Banton and Banton,[6] Mr. Justice Cullity stated:*
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> > ***"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***

[4] A Guide to Consent and Capacity Law in Ontario, 2012 Edition, Darcy Hiltz/Anita Szigeti, LexisNexis, pages 24 and 25, An annotated guide
[5] S. 3(1)(a) of the SDA
[6] [1998] O.J. No. 3528, 164 D.L.R. (4th) 176 at 218 (Ont. Gen. Div.).

> ***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 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, is it 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?*
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> *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;[7] (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."*

The *SDA* requires that an individual's capacity which is at issue in a proceeding is required to 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, even if such appointment is pursuant to Section 3.

The importance of protecting individuals from a loss of freedom, and therefore their autonomy is highlighted in the context of giving rights advice as is required under the *SDA*[8] in the context of assessing capacity, and the extraordinary loss of liberty which was prevalent in Re Koch.[9] The express statutory provisions therefore are in recognition of the significance of the loss of an individual's autonomy.

The Koch judgment stands for a proposition pursuant to the view taken by the Consent and Capacity Board, that*: "to the extent the Koch judgment would import*

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[7] ss.55, 57, 22 and 24 set out the criteria to be considered by the Court to appoint guardians of the person and property.

[8] Sec 78(2)(b) of the SDA - **78.**(2) 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] Re Koch, 1997 CarswellOnt 824, 33 O.R. (3d) 485, 27 O.T.C. 16; and 1997CarswellOnt 2230, 35 O.R. (3d) 71, 28 O.T.C. 22

the right to Counsel, etc. to HCCA evaluations, it is obiter and not binding on the Board."[10] Similarly *"the assessment and evaluation were conducted in a manner which, according to Quinn J. breached the natural justice rights of the applicant. The Court held that the applicant had the right to be informed of the significance of the finding of incapacity if so made at the end of the evaluation, the right to have Counsel or a friend present during an evaluation, the right to be told that she may refuse the evaluation, and the right to refuse to be evaluated."*[11]

Guidelines from the Ministry of the Attorney General, Office of the Public Guardian and Trustee (the "PGT")

THE DUTY OF THE PUBLIC GUARDIAN AND TRUSTEE TO ARRANGE LEGAL REPRESENTATION UNDER SECTION 3 OF THE SDA

On the Ministry of the Attorney General website appears 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 (the "information Update").[12] The Information Update provides suggestions on the lawyer's role where a client for whom Section 3 Counsel has been appointed, will not or cannot give instructions.

Relevant excerpts are reproduced as follows:

> ***"What is the role of the lawyer when the client will not or cannot give instructions?***
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> *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*

[10] A Guide to Consent and Capacity Law in Ontario, 2012 Edition, Darcy Hiltz/Anita Szigeti, LexisNexis, page 196, footnote 165

[11] A Guide to Consent and Capacity Law in Ontario, 2012 Edition, Darcy Hiltz/Anita Szigeti, LexisNexis, page 196, footnote 163

[12] Ontario Information Update: Duty of the Public Guardian and Trustee to Arrange Legal Representation Under Section 3 of the Substitute Decisions Act, 1992, pages 5 and 6, # 3. http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/legalrepduty.pdf

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."*

ROLE OF THE PGT IN SDA MATTER

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 by the Court.[13] Upon direction of the Court, the PGT is responsible for arranging for legal representation pursuant to Section 3.

THE ROLE OF SECTION 3 COUNSEL CAN TRANSITION FROM COUNSEL TO A SECTION 3 APPOINTMENT

Where Counsel are already retained by the incapable person, that Counsel already retained, may seek an Order transitioning their retainer to a Section 3 appointment by an Order of the Court with the consent of the PGT.[14]

Additional authority exists for this proposition that already retained Counsel can transition to the role of Section 3 Counsel with the consent of the PGT as was the case in unreported decision in *The Power of Attorney of Violet Edith Righter.*[15]

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[13] Ontario Information Update: Duty of the Public Guardian and Trustee to Arrange Legal Representation Under Section 3 of the Substitute Decisions Act, 1992, page 2.
http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/legalrepduty.pdf

[14] *Bailey v Bailey,* 2009 CarswellOnt 8124, 55 E.T.R. (3d) 198 – Judgment: December 29, 2009 - "*Throughout these proceedings Kimberley Whaley has acted as Isabelle's Counsel. The parties now seek an order in the following terms: 2. THIS COURT ORDERS that Kimberley Whaley of Whaley Estate Litigation is appointed to provide legal representation for Isabelle Bailey as if such an appointment had been made by the Public Guardian and Trustee pursuant to Section 3 of the Substitute Decisions Act, 1992 and Isabelle Bailey shall be deemed to have capacity to retain and instruct Counsel. Isabelle Bailey's reasonable legal fees and disbursements shall be paid from her property unless a legal aid certificate is issued in connection with this proceeding. I voiced some concern to Counsel about this portion of the order because under Section 3(1) of the SDA Counsel for the person whose capacity is in issue is to be arranged by the PGT, not directly appointed by the Court, and the materials before me did not contain any indication of the PGT's position on this form of order."*

[15] Order of Madam Justice Kiteley dated August 6, 2008, where Sandra Schnurr already retained by Mrs. Violet Righter was subsequently appointed as Section 3 Counsel on the consent of the PGT

The Ministry of the Attorney General Information Update also references the following further obligations of the PGT:

> *"Legal Aid Ontario has a duty to arrange legal representation for persons alleged to be incapable in proceedings under the Health Care Consent Act, 1996 before the Consent and Capacity Board where so ordered by the Board. Information about Legal Aid Ontario can be obtained from their website.[16] Their address is set out at the end of this document."*

Legal Aid Ontario ("LAO") has developed standards of practice to provide guidance and assistance to lawyers.[17]

There is also a legal obligation to appoint Counsel in accordance with Section 81 of the *Health Care Consent Act, 1996*, which states as follows:

> "*1.* ***Counsel for incapable person*** *– 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.*
>
> *3. Nothing in this Section affects any right of the person to an assessment of a solicitor's bill under the Solicitors Act or other review of the legal fees and, if it is determined that the person is incapable of managing property, the assessment or other review may be sought on behalf of the person by,*
>
> *(a) the person's guardian of property appointed under the Substitute Decisions Act, 1992; or*

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[16] Ontario Information Update: Duty of the Public Guardian and Trustee to Arrange Legal Representation Under Section 3 of the *Substitute Decisions Act*, 1992, Ministry of the Attorney General website: www.legalaid.on.ca

[17] Ontario Information Update: Duty of the Public Guardian and Trustee to Arrange Legal Representation Under Section 3 of the Substitute Decisions Act, 1992,www.legalaid.on.ca/en/info/CCB Standards.asp for the English Standards

> *(b) the person's attorney under a continuing power of attorney for property given under the Substitute Decisions Act, 1992."*[18]

The processes and procedures for appointing Section 3 Counsel, as well as appointing S.81 Counsel under the *HCCA* are set out in the PGT Information Update as follows:

The PGT's role is limited to arranging Counsel for the individual, and not representing the individual, nor making payment for services rendered on behalf of the individual. [19]

An individual for whom Section 3 Counsel is appointed is deemed to have the capacity to retain and instruct Counsel.

Moreover, if Section 3 Counsel's services are terminated, the Court has the discretion under the SDA to direct the PGT to arrange legal representation for the person again. 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. [20]

As referenced above, Section s 81(1) and (2) of the HCCA have like provisions to that of Section 3 of the SDA. The responsibility for arranging legal representation by the PGT or the Children's Lawyer's Office has somewhat shifted to Legal Aid Ontario pursuant to more recent amendments to the Legislation.

The Role of the PGT in SDA matters

The PGT is a corporation sole under the *Public Guardian and Trustee Act, R.S.O. 1990, Chapter P. 51* (the "PGTA") The Public Guardian and Trustee is Louise Stratford, who was appointed by order-in-council on December 1, 1998. The office of the PGT is part of the Ministry of the Attorney General, Social Justice Programs and Policy Division.

In a paper delivered by our PGT, Louise Stratford, she speaks to the Role of the PGT and the SDA:

> *"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*

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[18] Ontario Information Update: Duty of the Public Guardian and Trustee to Arrange Legal Representation Under Section 3 of the Substitute Decisions Act, 1992,PGT Information Update, page 3. http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/legalrepduty.pdf

[19] PGT Information Update, page 5, #1

[20] PGT Information Update, page 5, # 2

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. [21]

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.[22] *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.* [23]

"*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.* [24]

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[21] The Chief Justice of Ontario's Advisory Committee on Professionalism, Eleventh Colloquium on the Legal Profession, Professionalism and Serving Communities, October 24, 2008, Protecting Vulnerable Adults – A Community Responsibility, Louise A. Stratford, Public Guardian and Trustee, page 3

[22]The Chief Justice of Ontario's Advisory Committee on Professionalism, Eleventh Colloquium on the Legal Profession, Professionalism and Serving Communities, October 24, 2008, Protecting Vulnerable Adults – A Community Responsibility, Louise A. Stratford, Public Guardian and Trustee Rules of Civil Procedure, RRO 1990, Reg 194

[23] The Chief Justice of Ontario's Advisory Committee on Professionalism, Eleventh Colloquium on the Legal Profession, Professionalism and Serving Communities, October 24, 2008, Protecting Vulnerable Adults – A Community Responsibility, Louise A. Stratford, Public Guardian and Trustee, Sec. 32(11) and 66(16) of the SDA -32(11) If there is a management plan, it may be amended from time to time with the Public Guardian and Trustee's approval, and 66(16) If there is a guardianship plan, it may be amended from time to time with the Public Guardian and Trustee's approval

[24] The Chief Justice of Ontario's Advisory Committee on Professionalism, Eleventh Colloquium on the Legal Profession, Professionalism and Serving Communities, October 24, 2008, Protecting Vulnerable Adults – A Community Responsibility, Louise A. Stratford, Public Guardian and Trustee, Sec 20(1) of the HCCA - **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.

This decision-making role also includes the ability to make substitute decisions replacements in a long-term care facility and personal assistance services. [25]

Under the Rules of Civil Procedure, the PGT:

> *"(a) acts as litigation guardian as last resort under Rule 7 for incapable adults for whom the Public Guardian and Trustee acts as guardian of property or personal care;*
>
> *(b) acts as litigation guardian under Rule 7 for incapable adults who have no other person able or willing to act as litigation guardian in the proceeding;*[26]
>
> *(c) Provides written Reports to the Superior Court of Justice under Rule 7.08(5) on motions for approval of a settlement involving an adult party under disability, where the materials are referred to the Public Guardian and Trustee by a Justice of the Superior Court;*
>
> *(d) Reviews notices under Rule 74.04(6) of the appointment of an estate trustee, where there is an incapable beneficiary of an estate who has no guardian or attorney or anyone not in a conflict of interest to protect the interests of the incapable person in the estate or on a passing of accounts under Rule 74.18(3.1);*
>
> *(e) responds to motions to discontinue proceedings by or against incapable adult parties under rule 23.01(2) and Rule 7.07(1);*

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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 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

[25] The Chief Justice of Ontario's Advisory Committee on Professionalism, Eleventh Colloquium on the Legal Profession, Professionalism and Serving Communities, October 24, 2008, Protecting Vulnerable Adults – A Community Responsibility, Louise A. Stratford, Public Guardian and Trustee, page 11

[26] The Chief Justice of Ontario's Advisory Committee on Professionalism, Eleventh Colloquium on the Legal Profession, Professionalism and Serving Communities, October 24, 2008, Protecting Vulnerable Adults – A Community Responsibility, Louise A. Stratford, Public Guardian and Trustee, *The Public Guardian and Trustee has a similar role under Rule 4 of the Family Court Rules, to act as a representative of a special party. The Rules of the Small Claims Court also provide for special representation of a party under disabil*ity.

(f) responds to motions to dismiss for delay where an incapable adult is a plaintiff, under Rule 24.02;

(g) responds to status hearings where there is an adult party under disability, under Rule 48.14(9).”

(h) responds to motions under Rule 15.04 to remove a solicitor of record where the party for whom the solicitor is acting is under a disability;

(i) responds to service upon incapable persons or absentees under Rule 16.02(i) and (k) of the Rules of Civil Procedure; and

(j) may act under a representation order under Rule 10 for incapable adults or as a friend of the Court under rule 13.02 in litigious proceedings, at the invitation of a Justice of the Superior Court.”[27]

The further provisions of the Ontario Rules of Civil Procedure contain a number of other provisions for the protection of incapable adults:

(a) Rule 19.01(4): a party under disability may only be noted in default with leave of a judge under Rule 7.07;

(b) an adult party under disability must be represented by a solicitor: Rule 15.01(1);

(c) motions for payment out of Court to a party under disability must be made on notice to the Children’s Lawyer or the Public Guardian and Trustee; and

(d) Motions for approval of settlements, whether or not a claim has been commenced, must be approved by a Justice of the Superior Court in accordance with Rule 7.08(1).

In 2004, amendments were made to the Solicitors’ Act regarding contingency fee agreements.[28] *O.Reg. 195/04 contains a specific provision affecting parties under disability:*

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[27] The Chief Justice of Ontario’s Advisory Committee on Professionalism, Eleventh Colloquium on the Legal Profession, Professionalism and Serving Communities, October 24, 2008, Protecting Vulnerable Adults – A Community Responsibility, Louise A. Stratford, Public Guardian and Trustee, pages 12 and 13

[28] The Chief Justice of Ontario’s Advisory Committee on Professionalism, Eleventh Colloquium on the Legal Profession, Professionalism and Serving Communities, October 24, 2008, Protecting Vulnerable Adults – A Community Responsibility, Louise A. Stratford, Public Guardian and Trustee, S.O. 2002, c. 24, Sched. A., Section 3.

"A solicitor for a person under disability represented by a litigation guardian with whom the solicitor is entering into a contingency fee agreement shall,

(a) apply to a judge for approval of the agreement before the agreement is finalized; or

(b) *include the agreement as part of the motion or application for approval of a settlement or a consent judgment under Rule 7.08 of the Rules of Civil Procedure."*[29]

THE HEALTH CARE CONSENT ACT, (THE "HCCA") SECTION 81(1) [30]

Section 81(1) states as follows:

Counsel for incapable person

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.

As with Section 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."

The difference between s. 81(1) of the *HCCA* and the *SDA* is that the latter requires the Court to direct the PGT, while the *HCCA* has the Board directing LAO to arrange for Counsel. The *HCCA* previously (until 2010) required the Board to direct the PGT or the Children's Lawyer to arrange for Counsel.[31]

It is the issue of capacity being in question that triggers the Consent and Capacity Board's (the "CCB") authority to direct LAO (or previously PGT/Children's Lawyer) to arrange for Counsel, i.e. this power does not appear

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[29] The Chief Justice of Ontario's Advisory Committee on Professionalism, Eleventh Colloquium on the Legal Profession, Professionalism and Serving Communities, October 24, 2008, Protecting Vulnerable Adults – A Community Responsibility, Louise A. Stratford, Public Guardian and Trustee, page 14 - O. Reg. 195/04, Section 5(1)

[30] Section 81(1) of the Health Care Consent Act, 1996, S.O. 1996

[31] 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 (ss. 81(2.1))

to apply to applications to the CCB regarding involuntary status or other matters addressed by the CCB.[32]

HCCA, s. 81 Court and Tribunal Decisions

Most of the cases reviewed below (except for *Paluska v Cava*) are CCB decisions, for example, not OSCJ. The CCB is the body that is authorized to appoint Counsel under Section *81* of the *HCCA* and is a specialized tribunal with particular focus on issues of capacity.

Paluska v Cava[33]

In *Paluska v Cava*, there was an appeal of a CCB decision upholding a finding of capacity. The relevant portions of the decision for the purposes of analogy to Section 3 Counsel refer to the appellant not having Counsel of record and being unable to retain Counsel because LAO were not forthcoming, yet showing the intention to proceed with an appeal, and wanting to retain Counsel. The Court found that the appellant needed Counsel and it was not his fault that he found himself in the position. [34]

> *"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."*[35]

> *"Further, I consider it appropriate to give notice to the Public Guardian and Trustee. I note that under s. 81(1) of the Act, the Board is empowered to direct the Public Guardian and Trustee to arrange for legal representation for a party to a proceeding before the Board. The Act then goes on to provide that where a legal aid certificate is not issued, the party is personally liable for the legal fees. There is no equivalent provision in respect of appeals. However, in light of the role of the Public Guardian generally and, in particular, under this legislation, I would appreciate any assistance that the Public Guardian is able to provide to the Court."*[36]

Justice Molloy therefore ordered that the PGT arrange for Counsel for Paluska, and that the Government of Ontario pay Counsel's fees. Counsel for the Attorney General attended and requested an adjournment to address the issue of Paluska's fees. The Court ultimately arranged for Paluska's Counsel, whose fees were to be paid by the Attorney General. The appeal by Paluska was

[32] C (SJ) Re, 2001 CarswellOnt 7955 (CCB)
[33] *Paluska v Cava*, 2001 CarswellOnt 3209, 55 OR (3d) 681 (SCJ)
[34] *Paluska v Cava*, 2001 CarswellOnt 3209, 55 OR (3d) 681 (SCJ), para 15, 19
[35] *Paluska v Cava*, 2001 CarswellOnt 3209, 55 OR (3d) 681 (SCJ), para 15
[36] *Paluska v Cava*, 2001 CarswellOnt 3209, 55 OR (3d) 681 (SCJ), para 19

dismissed.[37] The Attorney General appealed the Order of Greer J. appointing Counsel for Paluska and requiring the Attorney General to pay Counsel's fees to the Court of Appeal.[38]

M(G) Re [39]

The case of *M(G) Re*, was a hearing regarding capacity to consent treatment, which proceeded without Counsel for the applicant. At the first hearing the matter was adjourned and the CCB directed the PGT to arrange for Counsel. Appointed Counsel, a day before the rescheduled hearing, would not act for the applicant and the PGT arranged for other Counsel. On the ultimate hearing date, the new Counsel wrote the CCB stating that no LAO application had been made, and the hearing was thereafter rescheduled on a peremptory basis. Following this, new Counsel advised the CCB that he had been dismissed. Since Section 81(1)(b) of the HCCA deems a person *"to have capacity to retain and instruct Counsel"* that person is 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 Counsel based on the deemed capacity provisions under Section 81 of the HCCA.

Q(I) Re[40]

In Q(I) Re, there was a hearing to appoint a representative where an applicant had been found incapable of consenting to treatment. The CCB had directed the PGT to arrange legal representation under Section 81 of the HCCA. Counsel appeared before the CCB and informed the CCB she could not obtain meaningful instructions and the she be appointed *amicus curiae* based on the authority from Section 25.0.1 of the *Statutory Power Procedure Act* (the "SPPA").[41] "*The SPPA applies to Ontario Tribunals created by statute which are required to hold hearings. The CCB is such a tribunal, since it is established under the HCCA, 1996, and is required to hold hearings*."[42]

This case also referenced ***Paluska*** to support the point that the CCB can appoint *amicus* to protect a person's fundamental rights where instructions cannot be obtained at all.[43]

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[37] 2001 CarswellOnt 3597 (SCJ), Greer, J.
[38] 2002 CarswellOnt 1457, 59 OR (3d) 469 (C.A.)
[39] M (G) Re, 2005 CarswellOnt 7738
[40] Q (I) Re, 2005 CarswellOnt 8588
[41] *Statutory Power Procedure Act*, R.S.O. 1990, c. S. 22
[42] A Guide to Consent and Capacity Law in Ontario, 2012 Edition, Darcy Hiltz/Anita Szigeti, LexisNexis, page 543
[43] Q (I) Re, 2005 CarswellOnt 8588, paras 24, 25, and 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.*

This tribunal decision raises the question as to whether or not there are limits on what constitutes "deemed capacity". In other words, is there a suggestion that Counsel should ask to be appointed as *amicus* in cases where no meaningful instructions can be obtained. This is not the case of the Insured who could receive limited instructions as identified. [44]

***Re Marks*[45]**

In this CCB matter, the CCB directed the PGT to arrange for legal representation pursuant to Section 81, HCCA. Counsel attended on the adjourned date and informed the CCB that the applicant did not want to be represented by Counsel, rather to represent himself. With the agreement of Counsel and of the applicant, the CCB allowed Counsel to remain and to "assist" the applicant.

***Re S(P)*[46]**

This hearing before the CCB was in respect of capacity to consent to treatment. In this matter Counsel attended the CCB hearing further to the request of the PGT and Order of the CCB, but had been unable to meet with the applicant, who did not attend the hearing. The applicant ultimately refused to attend the hearing and did not want Counsel to represent him.

***C(SJ) Re*[47]**

In ***C(SJ) Re,*** Counsel was appointed pursuant to Section 81 of the HCCA and argued that the Form 3 respecting voluntary status was void due to failure to receive proper rights advice and delay. The applicant was not informed of the importance of retaining Counsel for the hearing nor was the applicant given a list of lawyers. The applicant attended the hearing without Counsel. The CCB made an Order directing the PGT to arrange for legal representation.

***B. Re* [48]**

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 Board to determine the issues in this case."

[44] Q (I) Re, 2005 CarswellOnt 8588
[45] 2003 CarswellOnt 8348 (CCB)
[46] 2003 CarswellOnt 8389 (CCB)
[47] C (SJ) Re, 2001 CarswellOnt, 7955 (CCB)
[48] 2002 CarswellOnt 7774

In this hearing regarding the patient's involuntary status under the MHA, the applicant did not have Counsel and it was unclear as to whether he wanted Counsel. The CCB heard from an advocate on behalf of the patient. The CCB did not order Counsel under Section 81 of the HCCA because it does not apply to a hearing under the MHA and the hearing proceeded without Counsel for the applicant. The CCB's authority to direct the LAO to arrange for legal representation does not apply to hearings under the MHA. This seems somewhat contrary to the decision in C(SJ) Re above.

The CCB, a tribunal, is established under the HCCA.[49]

> *"it 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."*[50]

LEGAL REPRESENTATION FOR INCAPABLE PERSON UNDER HCCA

> *"If a person who is or may be incapable with respect to management of his or her own property,*[51] *a treatment, admission to a care facility or a personal assistance service is a party to a proceeding before the Board and does not have representation, the Board may direct Legal Aid Ontario*[52] *to arrange for legal representation to be provided for the person. The person is deemed to have capacity to retain and instruct Counsel."* [53]

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[49] Health Care Consent Act, 1996, C.2 Sched A, Section 70(1) and 70-80 generally

[50] A Guide to Consent and Capacity Law in Ontario, 2012 Edition, Darcy Hiltz/Anita Szigeti, LexisNexis, page 567

[51] The additional power of the Board to order Counsel for someone whose capacity with respect to management of his or her own property is in issue is new and results from amendments effective December 15, 2009 in Bill 212 (the *Good Government Act*, 2009)

[52] Section 81(1)(a) has been amended by Bill 212 such that Legal Aid Ontario is now the only entity that may arrange legal representation for applicants before the Board. Previously the legislation required the Board to Order either the Public Guardian and Trustee or the Children's Lawyer to provide this service. See note on page 615.

[53] 81(1). Legal Aid Ontario is not responsible for payment of Counsel's fees; the individual's estate is responsible for the fees or the person may make application for legal aid for assistance, if eligible. In the event that the individual for whom Counsel has been arranged through Legal Aid Ontario refused to instruct or accept the services of Counsel so assigned, the Court of Appeal for Ontario has left the door open for the "conversion" of Counsel arranged through Legal Aid Ontario (previously the OPGT) into amicus Counsel to the individual or the Board in Consent and Capacity Board proceedings; see *Pietrangelo v Balachandra,* Court of Appeal for Ontario Docket: C37729released August 21, 2004, which referred to in *re AM,* TO-04-1921, July 26, 2004, where the Board made such an appointment of amicus Counsel under similar circumstances. Guide to Consent and Capacity Law in Ontario, 2012 Edition, Darcy Hiltz/Anita Szigeti, LexisNexis, pages 569-570

The CCB have a policy guideline.[54] The purpose of the policy guideline is to outline the procedure and circumstances where the CCB should issue an Order for the appointment of Counsel.

As to the question of whether a lawyer has not been retained, withdraws, or whose services is terminated, the lawyer may then remain as *amicus* or in any other role is decided on a case by case basis. According to Hiltz/Szigeti[55] it remains unsettled for example whether *amicus* can be appointed over the objection of the applicant.

WHAT IS THE ROLE *AMICUS CURIAE* AND IS IT ANALOGOUS TO THE APPOINTMENT OF SECTION 3 COUNSEL

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.

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

Amicus does not represent the appellant or take instructions from the appellant for legal representation.

Both the unrepresented appellant and *amicus* can make submissions to the Court.

The unrepresented appellant cannot fire *amicus* and even if the appellant disagrees with the appointment of *amicus*, *amicus* must appear at the hearing and assist the Court.

The Psychiatric Patient Advocate Office issues an information memo on the appointment of *amicus curiae* Counsel for Ontario Review Board Appeals.[56]

R. v. Cunningham [57]

[54] Policy Guideline 2 ,September 1, 2007, Ordering Counsel Where the Subject of an Application Does Not Have Legal Representation.
[55] Guide to Consent and Capacity Law in Ontario, 2012 Edition, Darcy Hiltz/Anita Szigeti, LexisNexis, page 584, per *R v. Starson ,* [2004] O.J. No. 941 (Ont. C.A.) also in respect of the Ontario Review Board

[56] *Amicus Curiae* Counsel for Ontario Review Board Appeals
[57] *R v Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331

The case of *R. v. Cunningham* addresses the role of *amicus*, which is stated to be to "assist" the Court. In this Supreme Court of Canada decision it was noted that a Court cannot "force" Counsel upon an accused, but can in some cases appoint Counsel.[58]

OTHER ANALOGOUS PROVISIONS TO THAT OF SDA SECTION 3 COUNSEL AND ITS APPLICATION PURSUANT TO COURT DECISIONS

Child and Family Services Act[59]

Section 38(1) of the *Child and Family Services Act* (the "*CFSA*") addresses the legal representation of a child who (by definition under the *Rules of Civil Procedure*, Rule 7.04(1)(a) [60]) is a person under disability, provides as follows:

> *"**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. R.S.O. 1990, c. C.11, s. 38 (1-3).*
>
> ***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*

[58] R v Cunningham, 2010 SCC 10, [2010] 1 S.C.R. 331, "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)"

[59] Child and Family Services Act, R.S.O. 1990, c. C.11

[60] RCP, Rules 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;

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. R.S.O. 1990, c. C.11, s. 38 (4); 1999, c. 2, s. 10.

Where parent a minor
(5)Where a child's parent is less than eighteen years of age, the Children's Lawyer shall represent the parent in a proceeding under this Part unless the Court orders otherwise

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;"

Children's Lawyer v Goodis [61]

An excerpt from this case provides helpful guidance on the application of S.38 which is analogous to S. 3 of this Act:

"[54] Because the nature and role of the CLO is central to this case it is necessary to review its statutory framework and the evidence as to its functioning, with particular reference to its role as the Litigation Guardian and lawyer for children. Children cannot represent themselves nor retain Counsel to conduct civil litigation. As parties under disability, children must commence, continue or defend proceedings by a litigation guardian: R. 7.01. Where no other suitable person comes forward, the CLO is to be appointed as litigation guardian: R. 7.04(1)(a).

[61] 2003 CarswellOnt 3426, 231 D.L.R. (4th) 727, 177 O.A.C. 1, 66 O.R. (3d) 692, 8 Admin. L.R. (th) 251, 45 R.F.L. (5th) 285 , paras 54-57, 59, 60, 83

[55] The scope of the authority, and the concomitant responsibility, of a litigation guardian is described in R. 7.05(2):

A litigation guardian shall diligently attend to the interests of the person under disability and take all steps necessary for the protection of those interests, including the commencement and conduct of a counterclaim, cross claim or third party claim.

[56] In child protection proceedings the CLO may be appointed to act as legal representative for a non-party child under the Child and Family Services Act, s. 38. The CLO normally performs this function through a panel of specially trained members of the private bar. The applicant submits that the role of the CLO in that case is to "place the minor's interests, views and preferences before the Court and to provide context for those views and preferences."

[57] The CLO is appointed pursuant to s. 89 of the Courts of Justice Act, which requires the CLO to be a lawyer, but is silent as to the structure of the office. The applicant asserts that CLO is an "independent law officer of the Crown." The duties of the office are to be found in a wide variety of legislation. …

[. . .] Section 89(3) provides that the [CLO] shall act as litigation guardian for a minor person or other person who is a party to a proceedings, where another Act or the Rules of Court require it. As such, its responsibilities are scattered in disparate pieces of legislation. They are summarized below with the appropriate legislative references:

(a) To act as a litigation guardian on behalf of a minor in the context of civil litigation where the child is a party to the litigation; (see rules 7.04, 7.03, 7.06, Child and Family Services Act, Section 81(2))

(b) To represent a minor in a child protection hearing (see Section s 38(5) and 124(8) of the Child and Family Services Act).

(c) To represent a child in a custody and access matters up to an included drafting a report for the assistance of the Court where the child is not a party to the proceedings (see rules 7.04(2) and 69.16 and Section 112 of the Courts of Justice Act).

(d) To review the fairness of settlements on behalf of minors, participate in the appointment of guardians for children, comment on the sale of property of a minor, the removal of a

solicitor of record and the withdrawal of a special party's application (see rules 7.08(5), 66 and 67 and Section s 47 and 59 of the Children's Law Reform Act).

(e) The power to inspect, remove and disclose information in the register and confirm consents by a minor (see Section s 75(7) and 137(11) of the Child and Family Services Act.

[59] In the cases handled for the requester, the CLO was appointed as litigation guardian in two civil files, a statutory accident benefits proceeding arising from a head injury to Jane Doe and a Family Law Act claim arising from an injury to Jane Doe's mother. Pursuant to an order of the Superior Court, the CLO was appointed under s. 38 of the Child and Family Services Act to provide legal representation to protect Jane Doe's interest in child protection proceedings.

[60] Most of these statutory duties, and all that are involved in this case, are the duties of any lawyer who takes a case. The Amicus submitted that the CLO, in reviewing a proposed settlement, exercises a quasi-public function in reporting on the proposal to the Court. But 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 review is in no sense performed for the benefit of the Crown, or the Ministry of the Attorney-General. Even if the CLO 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.

[83] The respondent and the Amicus have both submitted that the CLO owes fiduciary duties to the minor, duties of loyalty and candour and to act in the minor's interests. The fiduciary nature of the duties imposed on the CLO by the Rules and legislation referred to above is surely clear. The Commissioner elaborates on them in his factum, citing numerous authorities for the proposition:

• The role of the CLO is to provide independent, zealous and competent representation with independent professional judgment. The duty of confidentiality that is central to the normal client-lawyer relationship applies.[FN11][62]

• In custody and access cases where the child is not a party, the Court of Appeal has held that the representation offered by the Official Guardian, now the CLO, must be "whole,

[62] *Catholic Children's Aid Society of Toronto v. N. (J.)*, [2000] O.J. No. 5093 (Ont. C.J.)

complete and independent." The function of Counsel retained by the CLO is to act as an advocate, calling evidence and making submissions.[FN12][63]

• The statutory scheme embodied in R. 7.05 is clearly fiduciary. The CLO is to "diligently attend to the interests" of the client and "take all steps necessary for the protection of those interests."

• The nature of the relationship was considered by Judge James of the then Provincial Division of the Ontario Court, who said that legal representation under s. 38 of the Child and Family Services Act, had the primary practical effect of dispensing with the concept of a retainer, without otherwise affecting the fiduciary ties in a solicitor and client relationship, which was now rooted in the Court's order under s. 38(3).[FN13][64]

• The CLO meets the criteria for the imposition of fiduciary duties, apart from doing so on the basis of the solicitor and client relationship. Even if (as the Amicus suggests) the relationship is only analogous to that of solicitor and client, it is nevertheless fiduciary. It has the classic indicia of a fiduciary relationship: the scope for the exercise of discretion or power, the opportunity to exercise that power unilaterally so as to affect the minor's legal or practical interests, a peculiar vulnerability due to the minority status of the client; and an expectation that the CLO will be concerned with the minor's interests and not its own.[FN14][65] In the light of the statutory directions to the CLO, the minor must be assumed to have expected no less than the CLO's loyalty."

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[63] *Strobridge v. Strobridge* (1994), 18 O.R. (3d) 753 (Ont. C.A.)
[64] *Children's Aid Society of Metropolitan Toronto v. D. (J.)*, [1993] O.J. No. 1148 (Ont. Prov. Ct.)
[65] *Hodgkinson v. Simms* (1994), 117 D.L.R. (4th) 161 (S.C.C.), at 176

CASE TREATMENT

Catholic Children's Aid Society of Metropolitan Toronto v M. (C.)[66]

This case demonstrates direct analysis of S. 38 and the conduct of Counsel to a minor, as defined as a person under disability, and that of an incapable adult.

> *[16] […] For written reasons to be delivered, in my opinion the affidavit evidence relating to the activities of Counsel for the child in this case, which the CCAS seeks to introduce, are inadmissible as they are not relevant to any issue properly before the Court.*
>
> > *"In my opinion:*
> >
> > *[1.] The relationship between a solicitor 'provided' per sec 38 C. & F.S.A. 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.*
> >
> > *[2.] A solicitor may not act for a client who is incapable of giving adequate instructions to his solicitor. Nothing in sec. 38 affects this rule.*
> >
> > *[3.] The child in this case is incapable of so instructing his solicitor.*
> >
> > *[4.] The solicitor for the child cannot continue to act for his child client, and must be removed from the record.*
> >
> > *[5.] A litigation guardian may be appointed for the child, if made a party, per Rule 9a. The O.G. should be so appointed, and the O.G. should retain and instruct Counsel to act on behalf of the O.G., as litigation guardian, in these proceedings.*
> >
> > *[6.] Even if the child's Counsel could continue to act in the absence of adequate instructions from his client, Counsel's personal opinions, or submissions based on his personal investigations, as to best interests of the child, the appropriate order per sec 53 C. & F.S.A. or the appropriate remedy per sec 24(1) of the Charter are all irrelevant and inadmissible. Counsel may only make submissions based on evidence properly adduced before the Court. Counsel for the child may call such evidence to support his submissions per sec 39(6) C. & F.S.A.*
> >
> > *[7.] Even if Counsel could put his own opinion before the Court, he could only do so as an 'expert'. Counsel would therefore have to be*

[66] *Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.),* 1991 CarswellOnt 307, 35 R.F.L. (3d) 1

qualified by the Court as an expert for the purpose of giving such expert evidence.

[8.] Even if Counsel is qualified as an expert, he can only put his opinion before the Court in the form of admissible evidence, e.g. by giving viva voce evidence or by filing his sworn affidavit (with the leave of the Court).

[9.] If Counsel does give evidence or files his own affidavit, he must be available for cross-examination by parties adverse in interest.

[10.] If Counsel does give evidence or submits to cross-examination, he must be removed from the record as Counsel for the child, as he cannot be both Counsel and witness in the same cause.

[11.] Since Counsel for the child in this case has not sought to be qualified as an expert, nor to give evidence, the contents of the above affidavits are not relevant and are therefore inadmissible."

[20] I now examine the role of child's Counsel. In my opinion, Counsel might only act directly for a child, that is, to have a solicitor and client relationship with that child, in proceedings under the Child and Family Services Act, 1984 in this Court by three possible means:

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

[21] It is clear from the authorities cited to me that the position of Counsel provided for the child under s. 38(3) has customarily been divided into two broad categories, depending upon whether the child was capable of giving instructions to that Counsel or was incapable of giving such instructions. I propose, therefore, to discuss the role of child's Counsel in three categories:

> *1. Counsel appointed by the Court;*
>
> *2. Counsel privately retained by or for a child capable of giving instructions, and Counsel provided under s. 38(3) for a child capable of giving instructions (an "instructing child"). These two situations are, in my opinion, identical; and*

> *3. Counsel provided under s. 38(3) for a child incapable of giving instructions (a "non-instructing child").*

PARENS PATRIAE JURISDICTION

The '*Parens Patria*' Jurisdiction is often cited in decisions where the subject matter of proceedings affects a person under disability. The essence of the power is described as follows:

> *"[23] Courts of superior jurisdiction appear to have the power to appoint Counsel for children by virtue of their parens patriae jurisdiction. In Reid v. Reid (1975), 25 R.F.L. 209, Galligan J., speaking for the Divisional Court, said, at p. 216:*
>
> *I think in addition to that statutory authority this Court, having the powers of a Court of equity, has inherent power representing the Sovereign in its capacity as parens patriae to protect the rights of any person under a legal disability, which of course includes infants.*
>
> *The statutory authority referred to by Galligan J. was s. 102(2) of The Judicature Act, R.S.O. 1970, c. 228, which provided that the Official Guardian shall be the guardian ad litem or next friend of infants. Those provisions have been carried forward as s. 102(3) of the Courts of Justice Act, 1984, S.O. 1984, c. 11:*
>
> > *The Official Guardian shall act as litigation guardian of minors and other persons where required by an Act or the Rules of Civil Procedure, and in other cases may be authorized by a Court to so act.*
>
> *[25] As stated by Galligan J. in Reid above, a Court of equity had inherent power as parens patriae to protect the rights of infants. However, the Ontario Court (Provincial Division) is not a Court of equity and does not have any parens patriae jurisdiction. In my opinion, then, there is no inherent jurisdiction in this Court to appoint Counsel to represent the rights of children. This Court only has jurisdiction to appoint Counsel for children that is given by legislation. In my opinion, no such legislative authority has been given to this Court.*
>
> *[35] In my opinion, then, the combined effects of ss. 39 and 38 of the Child and Family Services Act, 1984 and R. 9a of the Rules of this Court can be summarized as follows. A child, even though not a party, has the right to participate as if he or she were a party. The child may have legal representation and may either obtain Counsel by private retainer to act on the child's instructions in the normal*

way or may have Counsel provided upon the direction of the Court. Counsel may be retained and provided for, and instructed by a child in these proceedings, without a direction for representation under R. 9a.

[36] It is beyond doubt that the duty of the Counsel for an instructing child is to follow the child's instructions. Some judges and writers have attempted to place a condition upon the duty, where following the client's instructions might cause the child harm. See, for example, the comments of Karswick Prov. J. in C. (J.) v. C. (S.) (1980), 31 O.R. (2d) 53 (Fam. Ct.), at p. 54:

> *Mr. Glass agrees that where children have definite instructions, their Counsel should generally advocate those preferences.* ***However, where to do so may well result in placing the children in a dangerous situation, then Counsel have a duty to the children to protect them and to inform the Court of the danger.***

I disagree with that latter proposition*.*

[37] As the sub-committee report of the Law Society of Upper Canada points out at p. 9 of its report:

> *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.***

I agree.

[43] To my knowledge, none of the cases dealing with this issue have ever dealt directly with the dilemma faced by a Counsel who is acting for a client in proceedings before the Court and who is unable to obtain any instructions from that client. It was agreed by all Counsel before me, and in my opinion it is trite law that a Counsel acting for a party in a proceeding who is unable to obtain instructions from that party cannot continue to act and must ask to

be removed from the record. As was stated by the sub-committee of the Law Society of Upper Canada at p. 8 of its report above:

> *In the absence of capacity to give instructions, **the lawyer is under a duty not to accept the instructions, and to advise the Court that the infant in his opinion is incapable of giving instructions, at which point the Official Guardian should be notified by either the lawyer or the Court. ...** in any event, the Sub-Committee cannot accept the view that there is any difference in the type of legal representation to be afforded under Section 20(2) than as ordinarily afforded by a solicitor to his client as contemplated under Section 20(1) and the relationship of the solicitor to the infant should be governed by the same rules, particularly the rules of confidentiality.*

*[46] In my opinion, there is nothing in s. 38 of the Child and Family Services Act, 1984 or R. 9a of the Rules of this Court which indicates that the "legal representation" to which the child is entitled and which is to be provided by direction of the Court is anything other than the traditional legal representation of a client by his or her solicitor. Indeed, Courts have consistently held that, because of the solicitor and client relationship between Counsel **and a non-instructing child is the same as that of an adult, the solicitor and client communications are privileged**. For example, in M. v. Children's Aid Society of Metropolitan Toronto (Municipality), an unreported decision of Associate Chief Judge Walmsley, decided on February 26, 1985, [Doc. Toronto C5954/80] in this Court, Associate Chief Judge Walmsley stated, at p. 3:*

> *The net result, as I see it, is that when a lawyer appears under the scheme legislated by Section 20, that lawyer is in every sense Counsel for the child — no more and no less. It is the child that is represented, not the Official Guardian. While a child is not a party, yet in essence, the child has all the rights and protections of a party, and is a party in all but name.*
>
> *Now, given that relationship, assuming that I am correct in that analysis, then there arises a mantle of confidentiality between that child and that solicitor. In this case, of course, obviously the child is not in a position to waive that right of confidentiality or privilege."*[67]

[67] *Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.),* 1991 CarswellOnt 307, 35 R.F.L. (3d) 1, paras 16, 20,21,23,25,35,36,37,43,46

THE LAW SOCIETY OF UPPER CANADA RULES OF PROFESSIONAL CONDUCT PROVIDES GUIDANCE TO S. 3 SDA COUNSEL DISCHARGING A SOLICITOR'S DUTY OF CARE TO ITS CLIENT

The following rules provide guidance:

Rule 2.02(6) of the Rules of Professional Conduct provide as follows:

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.*

The commentary to Rule 2.02(6) provides as follows:

> *"**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.****"*[68]

[68] The LSUC Rules of Professional Conduct, Amendments current to April 28, 2011, Rule 2.02(6)

RULE 2.03 OF THE RULES OF PROFESSIONAL CONDUCT

Confidentiality

> ***"Confidential Information***
> *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 lawye****r.* ***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.*
>
> *Generally, the lawyer should not disclose having been consulted or retained by a particular person about a particular matter unless the nature of the matter requires such disclosure.*
>
> *A lawyer should take care to avoid disclosure to one client of confidential information concerning or received from another client and should decline employment that might require such disclosure. […]"*[69]

RULE 2.09 OF THE RULES OF PROFESSIONAL CONDUCT

Withdrawal from Representation

[69] The LSUC Rules of Professional Conduct, Amendments current to April 28, 2011, Rule 2.03

"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.
[Amended – March 2004]

Commentary

When a law firm is dissolved it will usually result in the termination of the lawyer-client relationship as between a particular client and one or more of the lawyers involved. In such cases, most clients will prefer to retain the services of the lawyer whom they regarded as being in charge of their business before the dissolution. However, the final decision rests with the client, and the lawyers who are no longer retained by that client should act in accordance with the principles here set out, and, in particular, should try to minimize expense and avoid prejudice to the client."[70]

RULE 4 OF THE RULES OF PROFESSIONAL CONDUCT

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."***

The Commentary to Rule 4.01 (1) provides as follows:

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.*** *Maintaining dignity, decorum, and courtesy in the courtroom is not an empty formality because, unless order is*

[70] The LSUC Rules of Professional Conduct, Amendments current to April 28, 2011, Rule 2.09(1), 2.09(2), 2.09(7)

maintained, rights cannot be protected. This rule applies to the lawyer as advocate, and therefore extends not only to Court proceedings but also to appearances and proceedings before boards, administrative tribunals, arbitrators, mediators, and others who resolve disputes, regardless of their function or the informality of their procedures. [..]"

"In civil matters, it is desirable that the lawyer should avoid and discourage the client from resorting to frivolous or vexatious objections, or from attempts to gain advantage from slips or oversights not going to the merits, or from tactics that will merely delay or harass the other side. Such practices can readily bring the administration of justice and the legal profession into disrepute.

In civil proceedings, the lawyer has a duty not to mislead the tribunal about the position of the client in the adversary process. Thus, a lawyer representing a party to litigation who has made an agreement or is party to an agreement made before or during the trial by which a plaintiff is guaranteed recovery by one or more parties notwithstanding the judgment of the Court, should immediately reveal the existence and particulars of the agreement to the Court and to all parties to the proceedings."[71]

THE RULES OF CIVIL PROCEDURE AND THE LSUC RULES OF PROFESSIONAL CONDUCT CONSIDERED TOGETHER

Standard of Care

The LSUC Rules and the Rules of Civil Procedure provide the best indication of the Standard of Care expected of Section 3 SDA Counsel.

The LSUC Rules of Professional Conduct and the Rules of Civil Procedure may require the appointment of a litigation guardian to make decisions for the client. The SDA does not require a litigation guardian to be appointed for a person whose capacity is in issue.[72]

Persons under a disability must litigate by representatives except for respondents in applications under the SDA unless the Court rules otherwise in accordance with Rule 7.01.

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[71] The LSUC Rules of Professional Conduct, Amendments current to April 28, 2011, Rule 4

[72] RCP, Rule 7.01(2) - (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.[73]

Where no litigation guardian is available, either the Children's Lawyer or Public Guardian and Trustee is appointed, depending on the nature of the disability.[74]

Settlement of litigation involving parties under a disability requires Court approval, which is given on the basis of facts and opinions put forward by the parties and reports of the Children's Lawyer or Public Guardian and Trustee if directed by the Court.[75]

Rule 15 of the Rules of Civil Procedure concerning representation by a lawyer, where a solicitor is required, provides as follows:

> *"A party to a proceeding who is under disability or acts in a representative capacity shall be represented by a lawyer."*[76]

COURT AND TRIBUNAL DECISIONS INVOLVING S. 3 OF THE SDA

There is not a great deal of case law to date which is available to provide Section 3 Counsel with guidance on their role, obligations and responsibilities; and on the standard of care expected.

The 1998 decisions in *Banton* has been the primary reference to the role of Section 3 SDA Counsel for years. Ironically, there was no Section 3 appointment in this case. The salient points from this case tell us that under the Section 3 SDA Counsel 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 interests;
- Must take instructions from the client
- Must not act if capacity to instruct is lacking
- Must conduct themselves with a high degree of professionalism particularly where wishes conflict with best interests and Counsel's duty to the Court. [77]

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[73] RCP, Rule 7.03- **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).
[74] RCP, Rule 7.04
[75] RCP, Rule 7.08
[76] RCP, Rule 15.01(1)
[77] *Banton v Banton,* 1998 CarswellOnt 3423, 164 D.L.R. (th) 176, 66 O.T.C 1998 Judgment of Justice Cullity, at paras 89.92 - *[89] After George Banton moved in with Muna, contact with his family virtually ceased. Early in April, Joan had a pleasant conversation with him by phone. The next time she phoned he*

Banton v. Banton[78]

was less anxious to talk and, thereafter, although she called from different numbers on numerous occasions, the phone was never picked up. She said she suspected that Muna had a telephone with a display panel that allowed her to monitor calls. Muna confirmed that she had such a device but denied that she used it for that purpose. Patricia phoned once or twice a week but the phone was never picked up. Once when George Jr. phoned, the receiver was lifted but, when he asked to speak to his father, there was no response. John McFater knocked on the door of the apartment on one occasion and called out for his grandfather. He heard rumblings from inside but no one came to the door. On a second occasion, when he was in the building for other purposes, he knocked on the door again. When Muna answered it, he asked to see George. She said that George didn't want to see his family and slammed the door in John's face. John McFater also tried to phone George Banton but testified that, when he asked for his grandfather, the receiver was put down instantly. [90] Andrew Lee was adamant that, during the course of the guardianship proceedings, he took instructions only from George Banton and that, although his "antenna was up" for the purpose of detecting undue influence, he said he didn't feel at all uncomfortable about this or the relationship between George and Muna. In cross-examination, however, he admitted that on most occasions, instructions by telephone were conveyed by Muna and not by George. This was also admitted by Muna. Mr. Lee said that he always understood that she was, in effect, acting as her husband's mouthpiece. Even when instructions were received from her, it was always his understanding that they were communicated from George. The law firm's dockets for the period between January 13 and May 30, 1995, indicate that there were very few meetings with George and Muna, or telephone conversations with him. There were many telephone conversations with her. Mr Lee stated that he always made George review his affidavits in draft and that George made suggestions and alterations. Under cross-examination, Mr. Lee conceded that Muna was involved in preparing the guardianship case, that, until later in the year when she became independently represented, she attended all meetings with her husband and that the affidavit sworn by George on August 3, 1995, that contained numerous errors with respect to the spelling of names and with respect to other facts that should have been well with George's knowledge, had been forwarded to Muna's apartment for its review by George. Mr. Lee testified that, when he became aware of the mistakes in that affidavit, he had a slight concern about his client's memory but was not "overly concerned". He did not discuss the errors with George. [91]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. [92] Mr. Lee was called to the bar in February 1994. It is clear that he sought to achieve what he understood to be George Banton's wishes and, to that extent, to protect and advance his interests, with great energy. In the last stage of the guardianship proceedings to be completed, he showed, in my judgment, excessive zeal. Muna was cross-examined on her affidavit on November 16, 1995. George Banton was, at the time, comatose and seriously ill with kidney failure in the Sunnybrook Hospital. He had not recognized Muna, or Mr Lee, when each had visited him. Mr. Lee testified that George was not in a good mental state the day before Muna's cross-examination. These facts, and that of George's admission to hospital, were withheld by Muna at the cross-examination without any intervention from Mr Lee or her own Counsel. She testified both generally and specifically in the present tense to the effect that her husband was able to take care of his own needs without difficulty. Mr. Lee testified that he had not disclosed that his client was seriously ill in hospital because Muna had told him that George's instructions were to that effect. The following day Mr. Lee visited George Banton in hospital and, the same day, wrote to him to confirm his instructions to withhold the information from his family.

the words of Cullity, J.: “and must not, in my view, act if satisfied that capacity to give instructions is lacking” is consistent with the decision in *CAS v. M.C. (1991 CarswellOnt 307, 35 R.F.L. (3d) 1)*

[78] *Banton v. Banton,* 1998 CarswellOnt 3423, 164 D.L.R (4th) 176, 66 O.T.C. 161, 1998 judgment of Justice Cullity, at para. 89 - 92

Justice Cullity's decision references a paper written by Professor Albert Oosterhoof and the relevant excerpts of Professor Oosterhoff's paper is as follows: [79]

> *"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 SDA Counsel or otherwise, to take reasonable steps to ascertain instructions are free of undue influence, that instructions can be obtained and only if instructions free of suspicion and influence can be obtained, can a solicitor act on the instructions received.

In an analysis by D'Arcy Hiltz,[80] he summarizes the propositions that Justice Cullity makes as follows:

> **"*Proposition 1.*** ***Even in case 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.***

[…] ***In fact, proposition 2 appears inconsistent and contradictory to the provisions of deemed capacity found in Section 3 of the SDA. Since 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.***

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[79] Every Child's Nightmare: January /December Marriages – The Banton Case, by Albert H. Oosterhoff
[80] The Role of Counsel pursuant to Section 3 of the *Substitute Decisions A*ct, Trusts and Estates Division of the Ontario Bar Association, November 29, 2009, D'Arcy Hiltz

Mr. Hiltz offers as a possible resolution as follows: "…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."[81] 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."[82]

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, the Court felt that Counsel should have been alerted to the presence of undue influence. Although Mr. Banton had retained his own Counsel and not Section 3 Counsel, the Court noted that the Counsel had exhibited *"excessive zeal"*[83]. The facts emerged that the lawyer actually communicated with Muna, not Mr. Banton, throughout the retainer. Also, the lawyer did not disclose information that Mr. Banton was hospitalized and allowed Muna to state unchallenged that Mr. Banton was doing well. Mr. Banton's lawyer did not effectively act for Mr. Banton, rather he effectively acted on Muna's instructions.

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[81] *"This position is not entirely consistent with the guidelines published by the Public Guardian and Trustee on the role of Section 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 interest 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."*

[82] 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, D'Arcy Hiltz, pages 9-11

[83] *Banton v. Banton,* 1998 CarswellOnt 3423, 164 D.L.R (th) 176, 66 O.T.C. 161, 1998 judgment of Justice Cullity, at para. 92

PROFESSIONAL RESPONSIBILITY

On professional responsibility, Marshall Swadron in a 2009 paper, wherein he writes on the representation of a client in proceedings involving S. 81 HCCA and S. C. SDA contends:

> *"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."*[84]
>
> *"[…] 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"*.[85]

Marshall Swadron, also states:

> *"In a normal solicitor-client relationship, a client is free to give instructions that may be considered contrary to the client's bests 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".*[86]

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.[87]

Section 3 of the SDA does not expressly 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.[88]

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[84] *Representing the Incapable Client in capacity proceedings", 12th Annual Estates and Trusts Summit, the Law Society,* November 13, 2009, by Marshall Swadron, page 9, in In *Re L.*, 2009 CanLII 47225 (ON C.C.B.), objection was taken to submissions being made by Counsel appointed under Section 81 of the *HCCA* who was unable to obtain instructions but who supported one of two competing substitute decision-makers based on his view of the client's best interests. An appeal to the Superior Court of Justice is pending. The author wishes to disclose that he is Counsel for the appellant in this case

[85] *Representing the Incapable Client in capacity proceedings", 12th Annual Estates and Trusts Summit, the Law Society,* November 13, 2009, by Marshall Swadron , page 9-10

[86] *Representing the Incapable Client in capacity proceedings", 12th Annual Estates and Trusts Summit, the Law Society,* November 13, 2009, by Marshall Swadron , and Rules of Professional Conduct, Rule 4.01

[87] Rule 2.09(7) of the RCP

[88] Section 3, SDA

GUIDELINES AND CONSIDERATIONS FROM COURT AND TRIBUNAL DECISIONS:

The Roles of Section 3 Counsel

Role of Section 3 Counsel as a means of facilitating resolution

Sly v Curran[89]

In this case, 3 excerpts indicate that a role of Section 3 Counsel is to facilitate a resolution of the litigation involving the incapable person.

> *"Para. 17:*
> *What is apparent to me is that Mr. Curran has a loving wife and loving children and they are concerned about his well-being.* ***The parties need 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. Unnecessary energy and costs are being expended on the conflict between the parties****. For this reason, I deem this an appropriate case to order the following:*
>
> *1.* ***Rule 75.1 of the Rules of Civil Procedure provides for mandatory mediation for proceedings brought under the SDA. ….****The parties are referred to Rule 75.1 for the relevant provisions concerning mandatory mediation and the consequences for non-compliance.*
>
> *2.* ***This is an appropriate case to direct the Public Guardian and Trustee under Section 3 of the SDA to arrange for legal representation to be provided for Mr. Curran and I make such an order so that his Counsel may participate in the mediation as well****."*[90]

Courts have the discretion to appoint Section 3 Counsel even where not requested and the appointment of Section 3 Counsel is a means of facilitating resolution and avoiding conflict between parties.

DeMichino v DeMichino [91]

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[89] *Sly v Curran* , 2008 CarswellOnt 4301
[90] *Sly v Curran* , 2008 CarswellOnt 4301, para 17
[91] *DiMichino v DiMichino,* 2011 CarswellOnt 742, 2011 ONSC 142

(b) In *DeMichino* the role of Section 3 Counsel was deemed to be helpful in facilitating settlement and repairing damage done by Counsel who did not properly represent the incapable person in prior proceedings. [92]

Lawyers have a professional obligation to encourage mediation and settlement.[93]

Settlement on behalf of a person under disability requires judicial approval.[94]

Settlement affecting a person alleged to be incapable in proceedings under the SDA and in particular where guardianship is sought, requires service upon the PGT who examines whether or not the settlement is in the person's best interests, either of her own initiative or at the direction of the Court.

The role of Section 3 Counsel to provide a voice to the allegedly incapable person and to uphold the purpose of the SDA which is to protect vulnerable individuals while at the same time recognizing their autonomy

THE ROLE OF SECTION 3 COUNSEL IS TO TAKE INSTRUCTIONS FROM A CAPABLE CLIENT SO DEEMED

The role of Section 3 Counsel is to convey wishes of the incapable person.

The purpose of the SDA is to protect the vulnerable.

Abrams v Abrams[95]

In *Abrams*, we learn three very import principles which govern the role of Section 3 Counsel.

The first is the over-riding purpose of the SDA to protect the vulnerable.

The second, is the acknowledgement that though: *"Ida [Abrams] did not in fact have capacity to instruct and retain Counsel, she is deemed by clause 3(1)(b) to have capacity."*[96]

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[92] *DiMichino v DiMichino,* 2011 CarswellOnt 742, 2011 ONSC 142, para 104 which states: *[104] Mr. Swadron's time is fair and reasonable and is allowed in full. He provided exemplary service to Mr. DeMichino and was of invaluable assistance to this Court and the other parties during the settlement process. I order that his fees and disbursements be paid on a full indemnity basis: the amount of $14,018.88 shall be paid from the settlement funds payable by Mr. Neinstein; and the balance shall be paid from Mr. DeMichino's funds."*

[93] Rule 2.09(7) of the Rules of Professional Conduct

[94] Rule 7 of the *Rules of Civil Procedure*

[95] *Abrams v Abrams, 2*008 CarswellOnt 7788

[96] *Abrams v Abrams, 2*008 CarswellOnt 7788, para 14

The third principle is that Section 3 Counsel can convey an incapable party's wishes in the litigation.[97]

Section 3 Counsel can convey incapable party's wishes in respect of how the litigation is to proceed.

Section 3 of the *SDA* is one of the tools that protects the legal rights of individuals. It supports the underlying purpose of the legislation which is to protect the "dignity, privacy and legal rights" of individuals, including allegedly incapable persons.

> *"[47] 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: See Stickells Estate v. Fuller, 24 E.T.R. (2d) 25, [1998] O.J. No. 2940 (Ont. Gen. Div.)*
>
> *[49] 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)."*[98]

[97] *Abrams v Abrams, 2*008 CarswellOnt 7788, Brown J.
[98] *Abrams v Abrams,* 2010 CarswellOnt 2915, 2010 ONSC 2703, paras 47, 49

THE ROLE OF SECTION 3 COUNSEL TO PROVIDE A STATEMENT OF POSITION

***Cherry v Cherry*[99]**

In this case Section 3 Counsel was appointed and was able to put forward "statement of position". This is less than an affidavit, yet allows for person's position to be expressed.

THE ROLE OF SECTION 3 COUNSEL TO CONVEY THE INCAPABLE PERSON'S "FEELINGS"

***Messesnel (Atorney of) v Kumer*[100]**

Relevant from Messesnel is the "feelings" of the incapable person received by Section 3 Counsel that the Court took into consideration as evidenced by the following excerpts:

> *"[5] 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.*

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[99] Cherry v Cherry, 2011 CarswellOnt 7292, "Section 3 Counsel filed a "statement of position" on behalf of Mr. Cherry that he wished to remain married, that he was worried about his financial position and agreed on some payments as suggested by the interim guardian but no further payments as Mrs. Cherry had her own money.Based on position of Mr. Cherry and evidence from interim guardian that monies could be paid, Court agreed to amount as recommended by interim guardian of property (and agreed to by Mr. Cherry)" paras 7

[100] *Messesmel (Attorney of) v Kumer,* 2000 CarswellOnt 1926

> *[11] It is for these reasons that I so Order that a new assessment of Mesesnel is to take place within the parameters of paragraphs (i) and (ii) and (iii) of the Notice of Motion. While I am aware that it will perhaps cause Mesesnel some anguish, I am of the view that it is essential to have it in order that there be full and fair medical and neurological data before the Court when the issues are to be determined."*[101]

Abrams v Abrams[102]

Similarly, in *Abrams,* Section 3 Counsel conveyed the feelings of his client to the Court which were considered as evidenced by the following excerpts:

> *[14] 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 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.***
>
> *[56] 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 proceeded 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.*
>
> *[59] In my view, ordering an assessment of Ida would not strike an appropriate balance between the autonomy of the individual and the duty of the state to protect the vulnerable. The "level playing field" argument should not be a consideration in a proceeding of this nature."*[103]

THE ROLE OF SECTION 3 COUNSEL CAN APPLY TO PROCEEDINGS NOT COMMENCED UNDER THE SDA

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[101] *Messesmel (Attorney of) v Kumer,* 2000 CarswellOnt 1926, para 5 and 11
[102] *Abrams v Abrams,* 2008 CarswellOnt 7788
[103] *Abrams v Abrams,* 2008 CarswellOnt 7788, paras 14, 56, 59

Section 3 Counsel is permissive in nature affording broad discretion to the Court.

Bon Hillier v Milojevic[104]

The appointment of Section 3 Counsel can be broad enough to include proceedings that are not commenced under the SDA *per se*, but relate to provisions under the SDA and in which the person's capacity is in question. The following excerpts are instructive:

> *"[10] Mr. Bon Hillier has clearly stated that he does not want a lawyer; he wants to represent himself on his appeal so that his voice is heard.*
>
> *[11] Section 3(1) of the SDA provides that "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 PGT arrange for legal representation to be provided to the person." If such legal representation is provided and no Legal Aid certificate is issued, then the person whose capacity is in issue is responsible for the legal fees: SDA, s. 3(2). Where legal representation is arranged, Section 3(1)(b) of the SDA deems the person to have capacity to retain and instruct Counsel.*
>
> *[12] Counsel for the PGT and the Committee submitted that Section 3(1) of the SDA should not be used by the Court to direct the PGT to arrange legal representation for Mr. Bon Hillier because of the appearance of a possible conflict of interest by the PGT - his appeal will involve the review of a finding of incapacity which created the statutory guardianship by the PGT over Mr. Bon Hillier's property.*
>
> *[13] 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*

[104] *Bon Hillier v Milojevic,* 2010 CarswellOnt 203

> *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.*
> *[14] 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 appropriate for me to direct the PGT to arrange for legal representation of Mr. Bon Hillier."*[105]

THE ROLE OF SECTION 3 COUNSEL TO ADVANCE THE INTEREST OF THE INCAPABLE PERSON

Canada Trust Co. v. York[106]

"In this case, the Court held that in all proceedings under the SDA, capacity, broadly defined, is an issue, and the appointment of Section 3 Counsel is important because it allows the person to advance his or her interests."[107]

THE ROLE OF SECTION 3 COUNSEL ON PGT AND COURT APPROVAL IS NOT TO BE A WITNESS

THE ROLE OF SECTION 3 COUNSEL IS TO REPRESENT THE NATURE OF THE INCAPABLE PERSON'S INSTRUCTIONS

THE ROLE OF SECTION 3 COUNSEL IS TO TEST THE JURISDICTION AND AUTHORITY OF THE COURT IN ORDERS SOUGHT

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[105] *Bon Hillier v Milojevic,* 2010 CarswellOnt 203, paras 10, 11, 12, 13, 14,
[106] *Canada Trust Co. v York,* [2002] O.J. No. 435
[107] *Canada Trust Co. v York,* [2002] O.J. No. 435, para 3

In *Righter et al v Righter et al*[108]

> *"[11] The motion before the Court requests an Order terminating Ms. Schnurr's appointment as Counsel under s. 3 of the Substitute Decisions Act. The basis for this request is that her role under s. 3 of the Substitute Decisions Act is exhausted and at an end upon completion of the capacity assessment. Ms. Whaley submits that the capacity assessment confirms that Violet has no capacity to instruct Counsel or to make personal decisions, so Ms. Schnurr is effectively unable to present evidence or speak for Violet.*
>
> *[12] I accept the unchallenged evidence of Dr. Silberfeld.*
>
> *[13] However, s. 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.*** *The Powers of Attorney already effectively take away from Violet any real control over her life. I agree with Ms. Schnurr that to further restrict Violet's ability to associate with, or communicate with, Howard Pearson is a serious further infringement on her liberty. If the suspicion is borne out that Mr. Pearson may have ulterior motive in this matter relating to Violet's wealth, that has already been addressed through Orders securing Violet's assets and preventing Violet, or anyone else on her behalf, from accessing those assets, signing contracts, granting a Power of Attorney or making any testamentary disposition. There is no further Order that is necessary to protect Violet's property from the designs of Mr. Pearson or anyone else.*
>
> *[15] For the reasons that follow, I am not prepared to make an Order as against Mr. Pearson at this time. 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 terminate Ms. Schnurr's appointment at this point is dismissed, without prejudice to the applicants' ability to renew that request at a later date."*[109]

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[108] *Righter v Righter,* Court File 03-20/08, Endorsement of J. Ashton , 20081105
[109] *Righter v Righter,* Court File 03-20/08, Endorsement of J. Ashton , 20081105, paras 11, 12, 13, 15

THE ROLE OF SECTION 3 COUNSEL IS TO BE INDEPENDENT IN REPRESENTING THE INCAPABLE PERSON AND SECTION 3 COUNSEL ARE TO BE PAID BY THE INCAPABLE PERSON, NOT THE PGT

a. Woolner v. D'Abreau[110]

> ***" [8] I directed Mr. Koven to deliver a copy of my endorsement to the Public Guardian and Trustee and to Ms. D'Abreau. He did so. As a result the PGT requested Mr. D'Arcy Hiltz to act as independent Counsel for Ms. D'Abreau.***
>
> *[33] Independent Counsel submitted that Messrs. Marcovitch and Koven incurred costs on behalf of Ms. D'Abreau 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.*
>
> *[56] Independent Counsel advised that Ms. D'Abreau, and not the PGT, would be responsible for his costs, and he wished an opportunity to make submissions on costs. Accordingly, Mr. Hiltz may serve and file with my office written cost submissions, including a Bill of Costs, no later than Tuesday, February 17, 2009. Messrs. Marcovitch and Koven may serve and file responding written cost submission no later than Wednesday, February 25, 2009. The written submissions shall not exceed three pages in length, excluding any Bill of Costs."*[111]

b. Woolner v. D'Abreau[112]

> *"[4] Messrs. Koven and Marcovitch make several points in their submissions. Let me consider each in turn.*
>
> *[7]* ***Third, 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-***

[110] *Woolner v D'Abreau,* 2009 CarswellOnt 664 (Feb. 10, 2009)
[111] *Woolner v D'Abreau,* 2009 CarswellOnt 664 (Feb. 10, 2009), paras 8, 33, 56
[112] *Woolner v D'Abreau, 2009 CarswellOnt 2264*

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 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.[113]

c. Woolner v. D'Abreau[114]

Appeal order on consent of the parties issued

2. ON READING the Consent of the appellant Paul D. Koven and the respondent Norah D'Abreau, filed:

1.THIS COURT ORDERS that the appeal is allowed and that the orders of Justice Brown dated February 10, 2009, April 26, 2009 and April 29, 2009 be set aside.

2. THIS COURT ORDERS no costs of this appeal.

[Note: the endorsement appointing independent Counsel was dated December 17, 2008 and is <u>not</u> overturned by this appeal.
Appeal set aside the following:
Feb 10/09 order: Justice Brown disallowed costs as between attorney for property and former Counsel apart from nominal amount.
Apr 26/09 endorsement: awarded incapable person her costs (for "independent Counsel") to be paid by attorney for property and previous Counsel;
Apr. 29/09 request to reconsider costs award of Apr 26/09.
Therefore, Div Court ruling does not deal with appointment of independent Counsel, only the cost issues.
i.e. independent Counsel could still be appointed – only issue, how to be paid.]"[115]

Although these decisions were overturned by the Divisional Court, the various endorsements are interesting on the issue of "*independent Counsel"* appointed under the *"parens patriae jurisdiction of the Court"*, and in a manner that is analogous to Section 3 appointments. The Divisional Court ruling does not

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[113] *Woolner v D'Abreau, 2009 CarswellOnt 2264, paras 4, 7*
[114] *Woolner v D'Abreau*, 2009 CarswellOnt 6479, 53 e.t.r. (3d) 18, 82 C.P.C. (6th) 167
[115] *Woolner v D'Abreau*, 2009 CarswellOnt 6479, 53 e.t.r. (3d) 18, 82 C.P.C. (6th) 167, para 1, 2

comment on the issue of *"independent Counsel"* so it is not clear as to whether that part, that is, the appointment of independent Counsel is also overturned. The cases stand for the proposition that the role of independent Counsel for the allegedly incapable person is important and the PGT can assist with the appointment of independent Counsel. In this case, Ms. D'Abreau had been found capable but there were still concerns about her vulnerability.

THE ROLE OF SECTION 3 COUNSEL IS TO PROTECT THE RIGHTS OF THE VULNERABLE PERSON THROUGHOUT REPRESENTATION

Tepper v. Branidis[116]

In the case of *Tepper* the alleged incapable person's children and the PGT had representation, but the alleged incapable person did not. The Court held:

> *[15] The parties are to be commended for trying to resolve their differences in a responsible manner. However, I cannot agree to the proposal advanced. Pantelis (Peter) Branidis (the father) is a party to this proceeding and the subject matter of the proceeding is money that clearly belongs to him. He has not consented to any of the terms proposed. There is conflicting evidence from different doctors as to the extent to which he may or may not be incapable of managing his property.* ***He was not represented by Counsel in this matter and I have no way of determining whether he knows about or understands the matters raised in these proceedings, much less how he wishes his property to be handled.*** *There are very troubling allegations made in the affidavit of Zoe Gymnopolous (the daughter) as to misappropriation of funds by her brother while he held a Power of Attorney for their father. These are not vague allegations. Considerable corroborative detail is provided which gives me serious concern about whether the father's estate has been properly administered by his son.* ***No accounting has been provided by the son for the period of his Power of Attorney. The father is clearly in a vulnerable position. He is elderly, not in good health, unsophisticated and not fluent in English. He may also be incapable of managing his own affairs. There is also reason to be concerned that he may be susceptible to pressure and/or manipulation by his children****. In these circumstances I cannot simply sit by and allow his property to be managed under what may or may not be a valid Power of Attorney, allow payments to be made out of his funds on credit card debts which may or may not be his personal expenses, and ignore what may or may not be substantial mismanagement of his property and possible misappropriation of his funds over a three year period. I* ***have a***

[116] *Tepper v Branidis*, [2001] O.J. No. 367

> ***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.***
>
> *[17] 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."*[117]

THE ROLE OF SECTION 3 COUNSEL CAN BE A PROACTIVE ONE

Teffer v. Schaefers[118]

Section 3 Counsel can take an active role in proceedings: In this instance, the incapable person was the moving party in a motion that other parties supported, and that was ultimately successful. Affidavit evidence was provided not by the incapable person but by colleague of Section 3 Counsel. The motion was for failure to account, an accounting, removal of the attorney, and appointment of a Guardian of Property.

THE ROLE OF SECTION 3 COUNSEL IS TO ENSURE SEPARATE REPRESENTATION FOR PARTIES THAT ARE IN POTENTIAL CONFLICT

PGT v Hawkins[119]

In this case, it was found not to be appropriate for the allegedly incapable person to be represented by the same Counsel as the attorney for property. The Court directed the PGT to arrange for Counsel pursuant to Section 3 of the SDA. The Court however would not remove the already acting retained Counsel.

> *"[7]: Finally, it is apparent that Lila Hawkins ought to have separate and independent legal representation. An order is granted in the usual form pursuant to the provisions of Section 3 of the Substitute Decisions Act. I decline to remove Mr. Nemetz as solicitor of record for Gregory Hawkins at this time, but that issue may be addressed once Counsel is appointed for Lila Hawkins."*[120]

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[117] *Tepper v Branidis*, [2001] O.J. No. 367, paras 15, 17
[118] *Teffer v Schaefers,* 2008 CarswellOnt 5447, 93 OR (3d) 447
[119] *Ontario (Public Guardian and Trustee) v. Hawkins,* 2009 CarswellOnt 1535
[120] *Ontario (Public Guardian and Trustee) v. Hawkins,* 2009 CarswellOnt 1535, para 7

THE RELATIONSHIP BETWEEN SECTION 3 COUNSEL AND CLIENT AND COURT'S ROLE IN PROTECTING THAT RELATIONSHIP

The Court admitted evidence of a solicitor-client meeting on the basis that it was relevant to the issue of capacity. The Court also agreed to hear a challenge of costs in spite of the fact that Section 3 provides for Counsel's costs to be paid from the incapable person's assets.

a. Salzman v. Salzman[121]

> *"[15] 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.*
>
> *[16] 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.*
>
> [17] *The evidence is relevant to the issue of capacity, and the prejudicial effect does not exceed its probative value.*
>
> [18] 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

[121] *Salzman v Salzman*, 2011 ONSC 3555

> privilege, having regard to all of the other evidence addressing capacity, the outcome of the application is unaffected."[122]

The treatment of privileged evidence and prohibitive value may be in error given the *Rules of Professional Conduct* on responsibility and precedent particularized in *Goodis.*

b. Salzman v. Salzman[123]

> *"[20]* ***The Applicant disputes the costs sought by Section 3 Counsel.*** *The parties agreed that no costs issues would be addressed at this time. They may make written cost submissions not exceeding 4 pages to me, within 14 days, or may make arrangements through the Estate Office to schedule a hearing on the costs issue, which need not be set down before me."*[124]

COSTS

The PGT is not responsible for the payment of Section 3 legal fees. In the absence of a Legal Aid certificate, the person whose capacity is in issue is responsible for payment pursuant to S. 3 SDA. In the event there is any disagreement regarding the accounts, payment may be made subject to the right to have the account assessed by an assessment officer pursuant to the *Solicitor's Act*.

The *Rules of Professional Conduct* require that fees be fair and reasonable and disclosed in a timely fashion.[125]

THE ROLE OF SECTION 3 COUNSEL MUST BE INDEPENDENT

[122] *Salzman v Salzman*, 2011 ONSC 3555, paras 15, 16, 17, 18
[123] *Salzman v Salzman,* 2011 ONSC 3555
[124] *Salzman v Salzman,* 2011 ONSC 3555, para 20
[125] Rule 2.08(1), *Rules of Professional Conduct*

WHALEY
ESTATE LITIGATION

THE FEES OF SECTION 3 COUNSEL MUST BE PROPORTIONATE

Ziskos v Miksche[126]

In *Ziskos v Miksche* the Court was critical of lawyers that had run up large legal bills in acting for the alleged incapable person. In *Ziscos v. Mishka* representation of Johanna Miksche, incapable so found, wherein the Court agreed with the position of the PGT that it was imperative that Johanna Miksche be represented by Counsel of her own to ensure that her rights were fully protected in both applications. This followed Johanna Miksche retaining new Counsel. The prior Counsel was acting for Johanna Miksche as a respondent and other clients as applicants in the same cross-application in conflict.

D'Arcy Hiltz elicits a list of guidelines for the Best Practices to be exercised by Section 3 Counsel in a 2009 paper.

"Guidelines and Best Practices

1. *Maintain as far as reasonably possible a normal lawyer and client relationship.*

[126] Ziskos v Miksche, 2007 CarswellOnt 7162, paras, 63, 74, 76, 104- [63] I have considered however whether the principles for fixing the costs in this case should be different in that Polten & Hodder and Mr. Silverberg claim to have acted on behalf of Johanna Miksche pursuant to a written retainer. To the extent that work was properly authorized by the retainer I have approached the approval of the costs claimed for that work as a judge approving a lawyer's costs when approving a settlement involving a party under a disability. 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 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." [74] In my view, before a lawyer can claim costs in a proceeding for particular work done for a client pursuant to a written retainer, where there are issues of the competency of the client as there were in this case from the outset, there is an onus on the lawyer to satisfy the Court that the client was competent to and did instruct the lawyer to undertake particular work on her behalf. This will include satisfying the Court that the precise nature of the work and the estimated cost of the work to be done and an analysis of the benefits to be achieved were fully explained to the client. Aside from concerns about competency, there is no question that that was not done in this case by Polten & Hodder. I should add that there could be no doubt that even if fully capable and informed, Johanna Miksche would never have reasonably instructed Polten & Hodder to incur legal fees that eclipsed the value of her assets and which if paid by her estate would put her on social assistance. [76] 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.[104] 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.[FN11][126]To put this in context I have considered what information the nephews and Polten & Hodder had concerning the capacity of Johanna Miksche and when that information became known to them."

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."*[127]

SUMMARY

1. Role of Section 3 Counsel

The role of Section 3 Counsel is to establish, to the extent possible, a normal lawyer-client relationship with the person alleged to be incapable.[128]

a. The Role of Section 3 Counsel is to obtain a person's instructions based on wishes and to advance those instructions within the proceedings.

[91] 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

[127] 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, D'Arcy Hiltz, pages 12-15
[128] Rule 2.02(6) of the LSUC Rules of Professional Conduct

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."[129]

b. The Role of *Section 3 Counsel may be to attempt to determine the client's wishes and directions from a third party source such as medical practitioners, family members, caregivers and friends of the client. 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*.[130]

c. *The Role of the lawyer is not to 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 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.*[131]

d. Note at b. and c. above, the difference in the Public Guardian and Trustee Memo in that it suggests that Counsel can determine a client's wishes and directions from third party sources as weighed against Justice Cullity's comments that Counsel must take instructions from the client and must not, act […] if satisfied that capacity to give instructions is lacking. Also consider the deeming provisions of Section 3. But subsequent case law has made this role clearer in application.

e. If Counsel cannot obtain instructions, consider the appointment of a litigation guardian, consider whether there is a person with authority to represent the alleged incapable person's interest.

f. Ensure procedural requirements have been complied with under the relevant rules and governing statute.

g. Consider evidentiary requirements in the context of substitute-decision making proceedings and the guiding principles of the SDA.

h. The Role of Section 3 Counsel can transition from Counsel to Section 3 appointment.

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[129] *Banton v Banton*, 1998 CarswellOnt 3423, para 91
[130] PGT Information Update, Section 3 Duties
[131] PGT Information Update

i. The Role of Section 3 Counsel is to take instructions from a capable client so deemed.

j. The Role of Section 3 Counsel is to provide a statement of position.

k. The role of Section 3 Counsel is to convey the incapable person's "feelings".

l. The role of Section 3 Counsel can apply to proceedings not commenced under the SDA.

m. The Role of Section 3 Counsel on PGT and Court approval is not to be a witness

n. The Role of Section 3 Counsel is to represent the nature of the incapable person's instructions.

o. The Role of Section 3 Counsel is to test the jurisdiction and authority of the Court in order sought.

p. The Role of Section 3 Counsel to advance the interest of the incapable person.

q. The Role of Section 3 Counsel is to be independent in representing the incapable person and Section 3 Counsel are to be paid by the incapable person, not the PGT

r. The Role of Section 3 Counsel is to protect the rights of the vulnerable person through representation

s. The Role of Section 3 Counsel can be a proactive one.

t. The Role of Section 3 Counsel is to ensure separate representation for parties that are in potential conflict.

u. The Role of Section 3 Counsel must be independent

2. RESPONSIBILITIES/OBLIGATIONS OF SECTION 3 COUNSEL

- Act with high degree of professionalism
- Ensure independence
- Do not act in best interests
- Do not act as Litigation Guardian, Guardian or Attorney

- Ensure SDA requirements met
- Ensure proportionality in costs
- The fees of Section 3 Counsel must be proportioned.

3. STANDARD OF CARE OF SECTION 3 COUNSEL

- Section 3 Counsel has a duty to the Court pursuant to Rule 4.01(2) of the *Rules of Professional Conduct* which provide that:

4.01 THE LAWYER AS ADVOCATE

(2) When acting as an advocate, a lawyer shall not
(a) abuse the process of the tribunal by instituting or prosecuting proceedings which, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party,
(b) knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable,
(c) appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with the officer that give rise to or might reasonably appear to give rise to pressure, influence, or inducement affecting the impartiality of the officer,
(d) endeavour or allow anyone else to endeavour, directly or indirectly, to influence the decision or action of a tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate,
(e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed, or otherwise assisting in any fraud, crime, or illegal conduct,
(f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument, or the provisions of a statute or like authority,
(g) knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence or as a matter of which notice may be taken by the tribunal,
(h) deliberately refrain from informing the tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by an opponent,
(i) dissuade a witness from giving evidence or advise a witness to be absent,

(j) knowingly permit a witness or party to be presented in a false or misleading way or to impersonate another,
(k) needlessly abuse, hector, or harass a witness,
(l) when representing a complainant or potential complainant, attempt to gain a benefit for the complainant by threatening the laying of a criminal charge or by offering to seek or to procure the withdrawal of a criminal charge, and
(m) needlessly inconvenience a witness.

Commentary: A lawyer representing an accused or potential accused may communicate with a complainant or potential complainant, for example, to obtain factual information, to arrange for restitution or an apology from the accused, or to defend or settle any civil claims between the accused and the complainant. However, where the complainant or potential complaint is vulnerable, the lawyer must take care not to take unfair or improper advantage of the circumstances. Where the complainant or potential complainant is unrepresented, the lawyer should be governed by the rules about unrepresented persons and make it clear that the lawyer is acting exclusively in the interests of the accused or potential accused and, accordingly, the lawyer's comments may be partisan. When communicating with an unrepresented complainant or potential complainant, it is prudent to have a witness present."[132]

- Duty to the Court includes acting in accordance with the *Rules of Professional Conduct*[133]
- Duty of confidentiality to the client
- Solicitor- client privilege
- Competence
- Do not act without instructions
- Do not deceive a tribunal/Court or influence the course of justice

Please not the Rules of Professional Conduct were updated in 2014 and this information does not reflect any updates which may be applicable.

Our Article on Section 3 Counsel was published "Between A Rock And A Hard Place: The Complex Role and Duties Of Counsel Appointed Under Section 3 of the *Substitute Decisions Act*, 1992" by Kimberley A.Whaley and Ameena Sultan, Advocates Quarterly, November 2012, Volume 40, Number 3 can be accessed here:

KEN PLEASE NOTE THE WAIVER OF LIABILITY PARA SHOULD BE EVIDENT ON ALL THESE PRACTICE ARE DESCRIPTIONS

[132] *Rules of Professional Conduct*, Rule 4.01(2)
[133] Rules of Professional Conduct - http://www.lsuc.on.ca