ACCESS TO ADMINISTRATIVE JUSTICE FOR PERSONS WITH DISABILITIES

ADDRESSING THE CAPACITY OF PARTIES BEFORE ONTARIO'S ADMINISTRATIVE TRIBUNALS:

PROMOTING AUTONOMY AND PRESERVING FAIRNESS

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EXECUTIVE SUMMARY

The rights of people with disabilities are more likely to be at stake in an administrative tribunal than in a court. However, people with disabilities experience a wide variety of barriers in relation to their access to those tribunals. Many experiences are similar across different tribunals.

Without access to fair process at administrative tribunals, people with disabilities are prevented from advancing their legal rights in the same manner as other parties.

For some people with disabilities, one accessibility concern relates to difficulty understanding and appreciating information about their case. This may be due to an acquired brain injury, a mental health issue, dementia or an intellectual disability. Determinations of legal incapacity affect some people with disabilities.

Stakeholders – including lawyers, paralegals, tribunal staff, adjudicators and policy makers - have a legal obligation to ensure that their services are accessible to people with disabilities. In particular, there must be appropriate and fair processes in place for people who have been determined to be incapable of making specific decisions. This obligation flows from constitutional guarantees, anti-discrimination protections and international law. Additionally, the ability of a party to participate effectively in the proceeding touches at the core of procedural fairness.

People with disabilities experience a broad range of barriers which limit their access to tribunals. However, there are also a broad range of solutions for addressing such barriers. Often these are neither complicated nor expensive to implement. Law reform options include:

- Plain-language self-help resources assist parties with disabilities to make their own decisions about tribunal processes.
- An Accessibility Office, serving parties before all provincial tribunals, would act as a point for persons with capacity issues to seek advice or assistance.
- Prospective tribunal appointees should be required to participate in a highly competitive and accessible recruitment process.
- A lawyer has a duty to accommodate her or his client's disability related needs.
- A lawyer representing a person with capacity issues should consider creating a limited continuing power of attorney. The power of attorney would give authority to initiate an application and to instruct counsel in a specific tribunal matter.
- If a party is unrepresented or refuses a counsel in a tribunal matter, the tribunal should consider appointing an *amicus curiae*.

- A tribunal may appoint a “limited” litigation guardian, in effect only for the duration of the specific tribunal process.

A variety of options and strategies are offered here, given that one approach might work for some persons but not others. There are an infinite variety of disability-related needs and, accordingly, approaches must be flexible. It is also important to recognize and account for the differences of experience among specific disability groups.

It often happens that when a person is believed to be incapable, there is a search for a “quick fix”, a substitute decision maker. There are situations where a person who appears to be incapable may be able to participate effectively in a proceeding where appropriate accommodations are provided. If assistance is required to exercise capacity, then such assistance should be provided instead of holding a person to be legally incapable.

It is imperative that comprehensive and clear approaches are developed to address the barriers experienced by parties with capacity issues. Tribunal adjudicators may deal with the issues on an *ad-hoc* basis. Barriers persist.

Whatever solution is arrived at, it must be guided by the principles of respecting the individual’s autonomy as much as possible, as well as balancing the interests of procedural fairness and efficiency.

RÉSUMÉ

Les droits des personnes ayant un handicap sont plus susceptibles d'être défendus devant un tribunal administratif que devant une cour. Cependant, les personnes ayant un handicap rencontrent de multiples obstacles pour ce qui est de leur accès à ces tribunaux. De nombreuses expériences semblables sont vécues devant divers tribunaux.

Sans l'accès à un processus équitable devant ces tribunaux administratifs, les personnes ayant un handicap sont empêchées de faire reconnaître leurs droits légaux, contrairement aux autres parties.

Pour certaines personnes ayant un handicap, une préoccupation liée à l'accès est la difficulté à comprendre et à apprécier les informations relatives à leur cause. Cela peut être attribuable à une lésion cérébrale acquise, à un problème de santé mentale, à la démence ou à une déficience intellectuelle. L'incapacité juridique qui caractérise certaines personnes ayant un handicap peut les défavoriser.

Les intervenants, notamment les avocats, les techniciens juridiques, les membres du personnel rattachés au tribunal, les membres du jury et les décideurs, ont l'obligation légale de s'assurer que les personnes ayant un handicap peuvent avoir accès à leurs services. Plus particulièrement, des procédures appropriées et équitables doivent être prévues afin de tenir compte des personnes qui ont été jugées inaptes à prendre des décisions spécifiques. Cette obligation découle des garanties constitutionnelles, des dispositions protégeant contre la discrimination et du droit international. De plus, la capacité de participer de manière efficace à une procédure judiciaire pour une partie en cause constitue un élément fondamental du principe d'équité procédurale.

Les personnes ayant un handicap rencontrent de multiples obstacles pour ce qui est de leur accès aux tribunaux. Cependant, il existe également un éventail important de solutions permettant d'éliminer ces obstacles. Il s'agit souvent de solutions dont la mise en œuvre n'est ni compliquée ni coûteuse. Les options liées à la réforme du droit comprennent :

- Des ressources en matière d'initiative personnelle rédigées dans un langage clair et simple qui aident les parties en cause et ayant un handicap à prendre leurs propres décisions relativement aux procédures du tribunal.
- Un Bureau d'accessibilité, offrant des services aux parties en cause devant tous les tribunaux provinciaux, qui servirait de lieu où des personnes ayant des problèmes de capacité juridique pourraient demander des conseils ou de l'aide.
- Les candidats à une nomination au tribunal devraient être tenus de participer à un processus de recrutement très accessible et très compétitif.
- Un avocat a le devoir de tenir compte des besoins relatifs au handicap de son client.

- Un avocat dont le client a des problèmes de capacité juridique doit envisager de créer une procuration permanente et limitée. La procuration conférerait le pouvoir d'entamer une requête et de se constituer avocat relativement à une affaire spécifique portée devant le tribunal.
- Si une partie en cause n'est pas représentée par un avocat ou qu'elle refuse de l'être relativement à une affaire portée devant le tribunal, le tribunal doit envisager de nommer un *intervenant désintéressé*.
- Un tribunal peut nommer un tuteur à l'instance « limité », dont le rôle ne s'applique que pendant la durée de la procédure devant un tribunal spécifique.

Des options et des stratégies diverses sont proposées ici, étant donné qu'une approche est susceptible de fonctionner pour certaines personnes, mais non pour d'autres. Les besoins liés à une incapacité sont infiniment variés et les approches doivent en conséquence être souples. Il est également important de reconnaître et de tenir compte des différences liées au vécu entre des groupes spécifiques de personnes ayant un handicap.

Il arrive souvent que lorsqu'on croit qu'une personne est incapable, on fasse appel à une « solution rapide », un décideur substitut. Il existe des situations où une personne qui donne l'impression d'être inapte peut être en mesure de participer efficacement à une procédure judiciaire lorsque des dispositions appropriées sont prises pour l'aider. S'il est nécessaire de venir en aide à cette personne pour qu'elle puisse exercer sa capacité juridique, il faut lui fournir ladite aide plutôt que de la maintenir dans l'incapacité juridique.

Il incombe impérativement de mettre au point des approches complètes et claires afin de traiter du problème des obstacles auxquels les personnes ayant une incapacité juridique sont confrontées. Les membres du jury des tribunaux peuvent traiter ces problèmes sur une base *ad-hoc*. Les obstacles persistent.

Quelle que soit la solution qui sera apportée, les principes visant à respecter l'autonomie de la personne doivent autant que possible en guider l'élaboration, et l'on doit parvenir à un équilibre entre l'équité et l'efficacité en matière de procédure.

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FOREWORD

This is an ambitious project. Given its broad scope, we consider it a work in progress. There is a need for further research, particularly with respect to the practice in other jurisdictions.

This is an evolving area of law reform. The legal research here is current to December 2009.

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At a variety of stages of the development of this project, interviews were provided by key stakeholders and experts. We are extremely grateful for their valuable contributions and insights.

INTRODUCTION

Administrative tribunals play an important role in the lives of people with disabilities. They determine the most basic and fundamental requirements in a person's life: housing, the right to be free from discrimination, access to social assistance and the right to a safe workplace. These are necessary requirements in enabling persons with disabilities to live and work in the community, and avoid institutions or homelessness. Without access to fair processes at administrative tribunals, persons with disabilities will continue to face barriers and be excluded from full participation in work, social and community life.

It is clear that for marginalized communities generally, and persons with disabilities specifically, it is more likely that a person's rights and important interests will be at stake in an administrative proceeding than a judicial one.[1] In *Cooper*, the Chief Justice of Canada observed,

> Many more citizens have their rights determined by these tribunals than by the courts.[2]

Persons with disabilities experience a broad range of barriers which limit their access to tribunals. One accessibility concern, for example, relates to difficulties persons with disabilities may have in understanding and appreciating information about their case before an administrative tribunal. This may arise because of an acquired brain injury, a mental health issue, dementia or an intellectual disability.

It must be recognised however, that there are solutions for addressing the range of barriers that limit access to tribunals. Often, these are neither complicated nor expensive to implement. People with disabilities, in fact, have a legal right to be accommodated. Compliance with legal requirements means that efforts must be made to consider disability issues at all stages of tribunal processes.

I: About ARCH Disability Law Centre

ARCH Disability Law Centre (ARCH) is a community legal aid clinic dedicated to advancing the equality rights of persons with disabilities. ARCH provides free and confidential legal advice and information to persons with disabilities in Ontario. ARCH also represents groups and individuals in test case litigation, provides assistance to lawyers representing persons with disabilities and engages in public legal education, community development and law reform activities.

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[1] Lorne Sossin, "Access to Justice and Other Worries" in C. Flood and L. Sossin, eds., *Administrative Law in Context* (Toronto: Edmond Montgomery, 2008).

[2] *Cooper v. Canada (Human Rights Commission),* [1996] 3 S.C.R. 854 at 899-900 per McLachlin J. (as she then was) (dissenting).

As part of its mandate, ARCH hears concerns from persons with capacity issues and their family members and friends in Ontario and Canada. Please see http://www.archdisabilitylaw.ca for more information about ARCH.

II. Goals of the Project

This project aims to provide essential information about the consumer experience and legal context relating to capacity issues at administrative tribunals.

This report is written for the use by tribunals, policy makers, advocates for persons with disabilities and disability organizations. It raises policy questions and proposals for reform. In so far that it considers options for reform, it is also anticipated that it will assist the development and implementation of effective policy.

The report is set out in five parts:

1. The first chapter reviews the definition of capacity in its various contexts;
2. The second chapter summarizes the procedures available to persons with capacity issues before particular tribunals;
3. The third chapter summarizes barriers experienced by persons with capacity issues before administrative tribunals;
4. The fourth chapter describes various legal principles that apply to the barriers experienced by parties with capacity issues before administrative tribunals; and
5. The final chapter offers a variety of law reform options, set out in a continuum from least restrictive to most restrictive.

III: Breadth of the Project

Given that ARCH is an Ontario agency with a provincial mandate, this project focuses on Ontario. We are conscious of the fact that the laws and programs in other provinces and the territories are of equal importance and have therefore, offered brief attention to them. This research focuses on Ontario, although will consider other jurisdictions where it is appropriate to do so.

Research has been conducted from a cross-disability perspective. Accordingly, it represents the experiences of a diverse group of people who have been defined as having a disability. In so doing, ARCH emphasizes the importance of bringing together the perspectives of various disability communities, in order that they support each other. Additionally, it is important to be aware that there may be differences of experience among specific disability groups. For instance, the relevant issues may be different for people with mental health issues than for people with intellectual disabilities. Further consultation may be required to tease out different perspectives in these groups.

IV: Methodology

In the summer of 2008, ARCH Disability Law Centre conducted a review of the accessibility of three administrative tribunals in Ontario. The study examined whether the Landlord Tenant Board, Social Benefits Tribunal and Workplace Safety and Insurance Appeals Tribunal were providing services in a way that was accessible to people with disabilities. Using a survey available in paper and online versions, ARCH consulted persons with disabilities who had hearings before these tribunals or were waiting for hearings. The research also relied on interviews of community legal workers and staff lawyers at community legal clinics.

In the second phase of the research, we undertook to focus in detail on issues that arose from the scoping study. We conducted in-depth interviews with key players including tribunal members and people from relevant government offices. The consultations were carried out in the autumn and winter of 2008.

In the third phase of the research, we discussed the results of the research with disability organizations that represent or provide support to persons with cognitive disabilities, the elderly and persons with mental health issues. We also consulted persons with disabilities and their advocates. The goal was to seek input for better approaches.

The structure of consultations was flexible. Where they could not be conducted in person, consultations were conducted by telephone. Given that the interviews were not intended to represent a random sample, interviewees were selected to represent a broad range of views. The content of interviews identified the broad set of problems and concerns of persons with disabilities, advocates, tribunal members and government representatives.

V: Language and Perceptions

Language plays a central role in shaping perceptions about persons with disabilities. Language must be respectful, credible and consistent with current thinking in the disability community.[3] For example, it is preferential to put the person first; "persons with disabilities" is more appropriate than "the disabled". Also, the term "disability" is a more respectful term than "handicap". References that cause guilt, a sense of hopelessness or pity must be avoided, such as referring to someone as "suffering from" or "afflicted with" a disability. [4]

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[3] Human Resources and Social Development Canada, *A Way with Words and Images: Suggestions for the Portrayal of Persons with Disabilities* (Ottawa: Her Majesty the Queen in Right of Canada, 2002), online: HRSDC, <http://www.hrsdc.gc.ca/en/hip/odi/documents/wayWithWords/00_toc.shtml >.

[4] Lana Kerzner, *Providing Legal Services to People with Disabilities* (Toronto, 2008), online: Arch Disability Law Centre, <www.archdisabilitylaw.ca >.

Herein, we employ a broad understanding of the term "disability", as set out in the Ontario *Human Rights Code*[5] and the *Accessibility for Ontarians with Disabilities Act, 2005*.[6]

Determinations of incapacity impact many persons with disability, including persons with intellectual disabilities and persons with mental health issues. This report emphasizes that only some persons with disabilities may have capacity issues, or will be affected by determinations of incapacity.

This work has particular application to persons with intellectual disabilities and persons with mental health issues:

- Intellectual disabilities may be congenital, acquired through an accident, or related to a physical disability or a neurological disorder. An intellectual disability may affect learning, memory, problem solving, planning and other cognitive tasks. Individuals with intellectual disabilities vary widely in their abilities, and definitions of intellectual disability also differ.
- Mental health issues have no single cause. They can be biological, psychological, and social. There are a broad range of mental health or psychiatric diagnoses, including schizophrenia, depression, manic depression/ bipolar disorder, anxiety disorders such as obsessive compulsive disorders, panic disorders, phobias and others. A person with a mental health issue may exhibit no symptoms for long periods of time as mental health problems are often episodic. The type, intensity and duration of symptoms vary from person to person, making it difficult to predict symptoms and functioning.

This report focuses on the determination of capacity, rather than capacity itself. In that way, it emphasizes that the capacity is not a trait inherent in the person so labelled. The definition is contextually based. The determinations of capacity are value-laden, discretionary and culturally bound; it is an "exclusionary project".[7] In particular, the determination of capacity may rely (even unconsciously) on stereotypes about the capacity of persons of colour and older persons.

This report also uses the term "legal capacity" rather than "mental capacity", in order to avoid confusion that capacity is exclusively an issue for persons with mental health issues.

This report also uses the term "capacity issues" to reflect the fact the capacity exists on a spectrum. Determinations of incapacity do not reduce to a yes/no dichotomy.

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[5] *Human Rights Code,* R.S.O. 1990, c. H-19, s.10(1).
[6] *Accessibility for Ontarians with Disabilities Act,* S.O. 2005, c. 11.
[7] Stefan Susan, *Competence Issues in Self-Directed Care* (Newton, September 2004) at 6, online: Centre for Public Representation, <http://mentalhealth.samhsa.gov/publications/allpubs/NMH05-0195/default.asp> (Conference presentation Mental Health policy Roundtable).

CHAPTER ONE: LEGAL CAPACITY, GENERALLY

There are a variety of legal contexts where the determination of legal capacity applies: litigation capacity, capacity to instruct a lawyer, capacity to consent to treatment, capacity to make a will, capacity to marry, or capacity to manage property. [8]

There is considerable overlap between the definitions of legal capacity. In most legal contexts, the assessment of capacity focuses on (i) a person's ability to understand information relevant for making a decision, and (ii) a person's ability to appreciate the consequence of a decision or lack thereof.

Despite the overlap between definitions of legal capacity, it is important to consider the context of the decision. This chapter reviews a variety of those contexts. It is important that each of these definitions of legal capacity be distinguished.

Disability is not the same as incapacity. The presumption of incapacity of all persons with mental health issues or intellectual disabilities incorporates a paternalistic approach that views people with disabilities as in need of care and charity.

Capacity is issue specific. A person may be capable of consenting to some things but not others. For example, a person may be incapable of making a health care decision but capable of making a decision about litigation.

In *Calvert (Litigation Guardian of) v. Calvert,* Justice Benotto of the Ontario Court of Appeal found that "a person can be capable of making a basic decision and not capable of making a complex decision."[9] At issue in *Calvert* was the capacity of a woman in the early stages of Alzheimer's disease to leave her husband. Justice Benotto identified three relevant levels of capacity: capacity to separate, capacity to divorce, and capacity to instruct counsel. Whereas marriage, separation and divorce required a low level of capacity, instructing counsel required a higher level of capacity at which the person would need to understand financial and legal issues. Instructing counsel was on a "significantly higher" level on the "competency hierarchy." Benotto J. decided that, "While Mrs. Calvert may have lacked the capacity to instruct counsel, that did not mean that she could not make the basic personal decision to separate and divorce."[10]

Capacity fluctuates over time. There may be times in a person's life where a person is capable to make certain types of decisions and other times where this is not so. For example, an individual who becomes unconscious during a seizure will not be determined to be capable to make decisions; however, when he or she regains consciousness, he or she will likely regain legal capacity as well.[11] Mental health issues

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[8] W.L. Griesdorf (2004) A Review of the Various Tests of Capacity (Presentation to the Ontario Bar Association's *Estates and Trusts Conundrums in Cognition – Legal Issues in Capacity* on May 17, 2004)

[9] *Calvert (Litigation Guardian of) v. Calvert,* (1997) 27 R.F.L. (4th) 394 at para 52 (Ontario Court of Appeal).

[10] *Calvert, supra* note 9 at para. 56.

[11] Kerzner, *supra* note 14 at 340.

are generally cyclical: a person with a mental health issue may be capable at one time, but not another.

Incapacity is not the same as making a "wrong" decision. A person who makes a decision that others perceive as foolish, socially deviant or risky is not necessarily incapable. "The right to be foolish is an incident of living in a free and democratic society".[12] Capacity is not the same as intelligence, and can not be measured using cognitive tests.[13]

I: Litigation Capacity

Litigation capacity is defined here as the capacity to bring and conduct legal proceedings. Specifically it can be understood in two parts:

1. an ability to understand the nature of the tribunal proceeding (but not the specifics of the process); and
2. an ability to appreciate the consequence of the process.

Capacity to bring and conduct legal proceedings can exist even when the client requires explanation and assistance from relatives, friends or advocates. Litigation capacity does not require understanding the details of the litigation process. Instead, it is enough that the party understand basic information about the options that are available to her, as well the likely outcomes of each course of action.

It is presumed that everyone has competence personally to bring and conduct legal proceedings.[14] It is for those who challenge this presumption to prove on the balance of probabilities that an actual or potential litigant does not have capacity to bring or conduct legal proceedings.

II: Capacity to Instruct

Counsel must be confident in their client's capacity to give instructions. This requirement arises because the relationship of a lawyer to the client is one of agent to principal.[15] A valid relationship of agency requires that the principal have the requisite

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[12] *Re: Koch,* (1997), 33 O.R. (3d) 485 (Gen Div) at 512.
[13] Judith Wahl, *Capacity and Capacity Assessment in Ontario* (Toronto, 2006), online: Advocacy Centre for the Elderly, <http://www.practicepro.ca/practice/PDF/Backup_Capacity.pdf>.
[14] Lana Kerzner, "Mental Capacity through a Disability Law Lens" in Mary Ann Mccoll and Lyn Jongbloed eds., *Disability and Social Policy in Canada* (2ed) (Concord: Captus University Publications, 2006) at 347.
[15] *Scherer v. Paletta* (1966), 57 D.L.R. (2d) 532 at 534 (Ont. C.A.).

capacity to engage in the relationship.[16] Counsel may be held liable, where she or he knew or ought to have known about the incapacity.[17]

Determinations of incapacity particularly impact persons with disabilities. Nevertheless, the issue of capacity to instruct rarely arises, even for counsel who practice disability law.[18] Most clients, including those who have disabilities, have the ability to instruct counsel.[19]

The capacity to instruct includes two key elements:

1. the client's ability to understand information that is relevant to decisions that need to be made pursuant to the advice of counsel; and
2. the client's ability to appreciate the reasonably foreseeable consequences of those decisions.[20]

The definition of "capacity to instruct" is often confused with the definition of "litigation capacity". While the concepts are related, they must be distinguished with regard to the particular context. For instance, a party may be determined to be capable of bringing and conducting litigation, but not capable of instructing counsel.

In *Calvert,* in the Ontario Court of Appeal noted that the capacity to instruct counsel is "significantly higher on the competency hierarchy".[21]

III: Fitness to Stand Trial

Section 2 of the *Criminal Code* provides that a person is "unfit to stand trial" where she or he is unable on account of "mental disorder" to:

> (a) understand the nature or object of the proceedings,
>
> (b) understand the possible consequences of the proceedings, or
>
> (c) communicate with counsel.

The court will examine whether the accused understands the nature of the trial, who are the people involved, what is the process, whether she or he understands what could

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[16] *Godelie v. Pauli (Committee of)*, [1990] O.J. No. 1207 at 5 (Dist. Ct.).
[17] *Cronon Drilling Inc. v. Kokoska,* [1998] B.C.J. No. 1743 and *Aydin & Co. v. Scahber* [1999] B.C.J. No.863 (B.C.S.C.).
[18] Phyllis Gordon, *Notes on Capacity to Instruct Counsel* (Toronto, December 2003), online: ARCH Disability Law Centre, <http://www.archdisabilitylaw.ca/ARCH/liveaccess/documents/uploaded_file/01_capacity(2).pdf>.
[19] *Providing Legal Services to People with Disabilities, supra* note 4 at 13.
[20] Graham Webb and Pauline Rosenbaum, "Informed Consent to Legal Services: the Instructional Capacity of Cognitively Impaired Older Adults in the Context of a Solicitor-Client Relationship" (presentation to Conference on Elder Law) at 14.
[21] *Calvert, supra* note 9 at para 59.

happen at the end of the trial, and whether she or he can communicate effectively with her lawyer. It is noteworthy that the test for fitness to stand trial differs from other tests of capacity, in that it includes a requirement for ability to "communicate with counsel". A higher degree of competence is required to engage in self-representation at trial.

IV. Capacity to Proceed without Counsel

Historically, courts have applied a low standard for finding defendants competent to stand trial, requiring simply that they understand the nature of the charges against them and are capable of consulting with their lawyer. A slightly higher degree of competence is required to engage in self-representation at trial.

According to the Supreme Court in *R. v. Swain*, an accused has a constitutional right to represent herself if he wishes, regardless of whether he will do so effectively.[22] An individual who has not been declared unfit to stand trial has a right to self-representation. She or he cannot be forced to be represented by counsel.

The Court of Appeal of Ontario further commented on the right to self-representation in *R.* v. *Romanowicz.* A judge or tribunal member is obliged to enquire into whether the unrepresented party has made an informed choice to self-representation.[23] Once the judge or tribunal member finds that an informed decision has been made, there is no necessity to consider the wisdom of that decision. The Court cited Lacourciere J.A. in *R.* v. *Taylor:*

> An accused who has not been found unfit to stand trial must be permitted to conduct his own defence, even if this means that the accused may act to his own detriment in doing so. **The autonomy of the accused in the adversarial system requires that the accused should be able to make such fundamental decisions and assume the risks involved**.[24]

V: Capacity to Manage Property and Capacity to Make Personal Care Decisions

Tribunals will often rely on the *Substitute Decisions Act* to determine the capacity of a party to bring or conduct litigation before the tribunal. A capacity assessor may find that a person is incapable of managing one's property if she or he is not able to understand information relevant to making financial decisions or cannot appreciate the consequences of such decisions. If she is found to be incapable of managing her property, she has the right to challenge this finding before the Consent and Capacity Board.

> 6. A person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property,

[22] *R v. Swain*, [1991] 1 S.C.R. 9 (S.C.C).
[23] *R v. Romanowicz* (1999), 45 O.R. (3d) 506 (Ont C.A.).
[24] *R v. Romanowicz, supra* note 23 (citing *R. v. Taylor*).

> or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.[25]
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> 45. A person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.[26]

Generally, the capacity to manage property is most closely related to the litigation capacity of a party before an administrative tribunal. Issues before these tribunals usually involve damages or benefits. Although a tribunal proceeding is not exclusively a property matter, it is not likely to be an incident of personal-care decision-making either. See Section 5.IX on Powers of Attorney for more detail on this distinction.

VI: Capacity to Make Treatment Decisions

Pursuant to the *Health Care Consent Act*, a person is incapable of making a treatment decision if she or he is unable to understand the information relevant to making the decision or are unable to appreciate the consequences of a decision or lack of decision. The *Health Care Consent Act* provides that,

> 4(1) A person is capable with respect to a treatment, admission to a care facility or a personal assistance service if the person is able to understand the information that is relevant to making a decision about the treatment, admission or personal assistance service, as the case may be, and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.
>
> 4(2) A person is presumed to be capable with respect to treatment, admission to a care facility and personal assistance services.[27]

VII. Trusteeships under Ontario Disability Support Program or the Ontario Works program

Pursuant to Section 12 of the *Ontario Disability Support Program Act,* a representative of the Ontario Disability Support Program (ODSP) may appoint a person or organization to manage a recipient's income support from ODSP on her or his behalf. Pursuant to Section 17 of the *Ontario Works Act*, a representative of the Ontario Works program may also appoint a trustee. A trustee is responsible for the management of income for the recipient's benefit.

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[25] *Substitute Decisions Act*, S.O. 1992, c.30 at s. 6.
[26] *Substitute Decisions Act, supra* note 25 at s. 45.
[27] *Health Care Consent Act,* S.O. 1996, c.2, Schedule A.

A spouse, dependent adult, relative, friend, religious organization, community agency or the Ontario Public Guardian and Trustee (PGT) can act as a trustee.[28] A person cannot be a trustee if she or he is an employee of ODSP, the recipient's landlord or if there is another potential conflict of interest. Family members and friends do not receive compensation for acting as a trustee. Community agencies may receive compensation if the recipient is living independently in the community. The PGT is compensated for acting as trustee.

The recipient should be informed in writing of the reasons for the appointment, the appointment process and the impact it will have on her income. ODSP is required to periodically inquire into the need to continue the trusteeship and may revoke the appointment. A review may also be initiated at the recipient's request or the request of family members, friends or the trustee. The recipient should be told that the decision can be appealed. The first step in an appeal is to request an internal review in writing within ten days of receipt of the notice of trusteeship or being advised of the trusteeship. An appeal can be made to the Social Benefits Tribunal within thirty days of receipt of the internal review decision.

[28] Ontario Disability Support Plan, "Directive 10.2: Trustees", available online: ODSP, <http://www.mcss.gov.on.ca/NR/MCFCS/ODSP/ISDIR/en/10_2.pdf>.

CHAPTER TWO: HOW ADMINISTRATIVE TRIBUNALS ADDRESS THE CAPACITY OF PARTIES BEFORE THEM

This chapter examines how selected tribunals address (or do not address) the needs of parties with capacity issues. These tribunals were selected as deserving of particular attention, as they play important roles in the lives of persons with disabilities in Ontario.

I: Landlord Tenant Board

The *Residential Tenancies Act* (RTA) sets the rules for most residential rental housing in Ontario. In particular, this law sets out the rights and responsibilities of landlords and tenants who rent residential properties. The Landlord and Tenant Board (LTB) is responsible for the provision of information about the RTA and the resolution of disputes between residential landlords and tenants. Both landlords and tenants can file an application with the Board. Once an application is filed, the parties have an opportunity to have their problems addressed at a hearing. At the hearing, a Member of the Board will make a decision on the application based on the evidence presented by the landlord and tenant. The LTB was previously known at the Ontario Rental Housing Tribunal (ORHT).

The LTB is responsible for the enforcement of tenant rights, the termination of tenancies, rent regulation, protecting the rights against harassment and the right to repairs; issues that are especially important for persons with disabilities. The LTB also determines whether a tenant can be evicted for reasons that include disability-related behaviours that interfere with other tenants' reasonable enjoyment of the premises, or on the basis of non-payment of rent.[29]

The LTB's *Rules of Practice* and the RTA do not provide specific direction with respect to the issues that arise when a party has been determined to or appears to lack litigation capacity. The LTB's *Policy on Accessibility and Human Rights* provides the following example: "…a party with a cognitive disability who has had an application filed against them may need accommodation from the Board to participate in the application process."[30]

However, both the *RTA* and the LTB's *Rules of Practice* emphasize the importance of balancing the principles of "fairness" and "efficiency". According to Section 183 of the *RTA*, the Board "shall adopt the most expeditious method of determining the questions arising in a proceeding that affords to all persons directly affected by the proceeding an adequate opportunity to know the issues and be heard on the matter."[31] In addition, Rule 1.1 of the LTB's *Rules of Practice* provides:

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[29] *Residential Tenancies Act*, S.O. 2006, c. 17, s. 168(2).
[30] Landlord Tenant Board, *Policy on Accessibility and Human Rights*, (November 26, 2009), online: < http://www.ltb.gov.on.ca/en/About_Us/278923.html>.
[31] *Residential Tenancies Act, supra* note 29 [emphasis added].

> These Rules will be interpreted broadly to produce the fairest and most expeditious resolution of the application.[32]

Human Rights Guideline and the Policy on Accessibility and Human Rights

The LTB's *Human Rights Guideline* and the *Policy on Accessibility and Human Rights* both provide that a party must request accommodation from the LTB - and offer supporting evidence - as soon as possible, preferably in writing.[33] A Member may require a party who requests accommodation to provide evidence to establish that they are covered under the *Code*. Requiring proof of a party's disability may also be inconsistent with the approach to accommodation recommended by the Ontario Human Rights Commission in *Policy and Guidelines on Disability and the Duty to Accommodate*.[34] The LTB is required to accept the party's request for accommodation in good faith, unless there are legitimate reasons not to.

The *Guideline* also provides that other parties are entitled to examine all of that evidence, conduct cross-examination and make submissions with regard to the issue of accommodation.[35] It is not appropriate for the other party to examine the evidence or make submissions on the accommodation requested. If a party requests accommodation from the LTB, it is up to the LTB to obtain information relevant to the accommodation and determine whether and how it will accommodate that party. To do other may interfere with the LTB's ability to accommodate the party with a disability in a manner that protects her or his confidentiality and dignity.

The *Guideline* provides that a Member may request submissions from both parties to determine if the party understands the nature or purpose of the hearing, appreciates the possible consequences of the hearing, and can communicate with their legal representatives.[36] The views or comments of the other party are not relevant to the LTB's own determination of the party's capacity. The fact that a party may not have the legal capacity to participate in the hearing could be completely unrelated to the substantive issues in the case.

With respect to its determination of the party's instructional capacity, the LTB must rely on counsel to adhere to his or her professional obligations regarding the determination of the client's capacity to instruct, laid out in the *Rules of Professional Conduct*. Unnecessary interference by the LTB may lead distrust between counsel and client.

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[32] Landlord Tenant Board, *Rules of Practice*, (January 31, 2007) at Rule 1.1, online: LTB, <http://www.ltb.gov.on.ca/en/Law/STEL02_111324.html>.
[33] Landlord Tenant Board, *Human Rights Guideline* (October 15, 2009), online: http://www.ltb.gov.on.ca/en/Law/277715.html
[34] *Supra,* note 151 at 23-24.
[35] *Supra* note 33 at 4.
[36] *Ibid.* at 5.

Procedural Fairness Issues Raised Before the LTB

The recent case of *Bathurst Vaughan Mall Limited v Sigal Eini and Blain Kostyk,* involved a party with alleged capacity issues. The appellant argued that she did not receive a fair hearing before the LTB, particularly having regard to her mental health issues. The Superior Court denied her appeal, finding that the LTB Member provided adequate guidance to the appellant throughout the hearing. The Court found:

> [The Member] inquired into her competency which she confirmed…and ensured that she was able to present her case before him. He explained the onus she was required to meet and reviewed with her the material provisions of the governing Act.[37]

In March 2009, the Court of Appeal stayed the eviction, pending hearing on the leave to appeal.[38] In May 2009, the Court of Appeal dismissed the leave to appeal. [39]

In 2006, In *Homes First Society v. Lesseeleur,* the ORHT sent a matter to a hearing *de novo* where the tenant, who had mental health issues and was unrepresented at the initial hearing, was clearly unable to participate in the process.[40] The review adjudicator held that there had been a denial of natural justice in this instance, even though the tenant had refused assistance and the hearing adjudicator had assumed a more inquisitorial role in the circumstances. The review adjudicator held that the test was not whether everything that could be done had been done but whether the tenant was able to participate in the hearing process. Mere attendance at a hearing did not ensure meaningful participation in the resolution of an application. This was a natural justice issue, which was a fundamental principle of administrative law.

Appointment of Litigation Guardians by the LTB

The *Guideline* proposes that it does not have the authority to find that a party is incapable (within the meaning of the *Substitute Decisions Act*) or order that someone else represent that party.[41]

In 2008, *Housing York Inc. v. Braithwaite*, the Landlord Tenant Board considered the tenant's motion that the LTB has the jurisdiction to appoint a litigation guardian for a party under a disability. The Tenant's counsel argued that the *Residential Tenancies*

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[37] *Bathurst Vaughan Mall Limited v Sigal Eini and Blain Kostyk* (Jan 26 2009), Court File 590/07 (Ontario Divisional Court) at para 3.
[38] *Bathurst Vaughan Mall Limited v Sigal Eini and Blain Kostyk* (March 4 2009) Court File M37282 (Ontario Court of Appeal).
[39] *Bathurst-Vaughan Mall Limited v. Eini* (May 6 2009), Court File No. M37244 (Ontario Court of Appeal) (Weiler, Gillese and Epstein JJ. A.).
[40] *Homes First Society v. Lesseeleur* (31 August 2006; King), File No. TSL-83969-RV-IN (Ontario Rental Housing Tribunal).
[41] *Supra* note 33 at 5.

Act has the implied jurisdiction to do so, but that if the LTB found otherwise, it would violate Section 7, and Section 15 of the *Charter*, as well as Section 1 of the *Human Rights Code*. The Board was not satisfied that it had the jurisdiction to appoint a litigation guardian, and that this did not amount to a breach of natural justice and thus, did not amount of a violation of: either Sections 7 or 15 of the *Charter*, and did not amount to a violation of Section 1 of the Ontario *Human Rights Code*.

In 2005, an adjudicator held that ORHT had no authority to appoint a litigation guardian in *Brock King Properties v. Stewart*.[42] The ORHT held that it had no authority to appoint a litigation guardian but it granted a short adjournment for the purpose of attempting to obtain one.[43] Relying on s. 171 of the TPA, the adjudicator found that proceedings before ORHT were to be expeditious, subject to fairness and natural justice considerations.[44] The adjudicator was not satisfied the tenants understood the nature of the allegations or evidence in order to be able to instruct counsel. The matter could not, however, be delayed indefinitely. The matter was adjourned approximately one month. In that time the tenants were to make immediate arrangements with the Office of the Public Guardian and Trustee to have a litigation guardian appointed.

In *Glenview Corporation v. Piffard* (1999) the ORHT held that it would have the authority to appoint a litigation guardian in a proper case but it is not clear what the procedure would be.[45] Even though the decision maker stated that there was an authority to appoint a litigation guardian, the tribunal member decided that it was not appropriate to do so in that case given the previous member's decision to not appoint one in the first instance.

II: Social Benefits Tribunal

The Social Benefits Tribunal (SBT) hears appeals from people who disagree with a decision that affects the amount of, or their eligibility for the social assistance they receive under the *Ontario Works Act, 1997* or the *Ontario Disability Support Program Act, 1997*. A person may appeal to the SBT when she or he has been refused social assistance or when social assistance has been cancelled, suspended or reduced. The SBT has the power to review trusteeship, provided by Section 17(2) of *Ontario Works Act* or Section 12 of the Ontario Disability Support Program Act.

The Social Benefit Tribunal plays an important role in the lives of people with disabilities. This is evidenced through the increase in the number of people turning to the SBT for determination of their basic economic needs. In particular, between 2005-

[42] *Brock King Properties v. Stewart* (27 May 2005; Gagnon), File No. EAL-49419 (Ontario Rental Housing Tribunal).
[43] *Brock, supra* note 42.
[44] Section 171 has survived identically as Section 183 of the *RTA*.
[45] *Glenview Corporation v. Piffard* (13 July 1999; Guenette), File No. EAL-06256 (Ontario Rental Housing Tribunal).

2006 and 2006-2007 the SBT experienced a 52% increase in ODSP appeals.[46] For many, it is the last forum for determining eligibility for social assistance.

Despite this, the Social Benefit Tribunal's (SBT) *Practice Directions, Ontario Works Act, 1997* and the *Ontario Disability Support Program Act, 1997* do not provide specific direction with respect to the issues that arise when a party has been determined to, or appears to, lack litigation capacity.

The SBT process involves rigid deadlines. An internal review must be requested within 30 days. Appeal to the SBT must be made within 30 days of the date of the internal review decision. While the SBT will usually accede to requests for extensions, parties with capacity issues, in particular those who are unrepresented, may not know to ask for an extension.

In *A v. Director, Ontario Disability Support Program*, the SBT allowed A's mother to act as her personal representative at the hearing. A's mother had submitted an affidavit agreeing to be litigation guardian but the SBT noted that there was no provision for litigation guardians in the legislation. The Appellant was not present at the hearing. The SBT accepted her mother as her personal representative. The SBT was satisfied that the mother was the Appellant's personal representative for the purposes of the appeal.[47]

It is not appropriate for a lawyer or a tribunal to treat an OW or ODSP trustee as a litigation guardian. A trustee is not a substitute decision maker for the purposes of a tribunal hearing.

III: Workplace Safety and Insurance Appeals Tribunal

The *Workplace Safety and Insurance Act* provides the legislative scheme under which the Workplace Safety & Insurance Board ("WSIB") and the Workplace Safety & Insurance Appeals Tribunal ("WSIAT") operate. The WSIAT is the final level of appeal to which workers and employers may bring disputes concerning workplace safety and insurance matters in Ontario. The WSIAT is separate from and independent of the WSIB. The WSIAT has exclusive authority to hear and decide appeals from final decisions of the WSIB, which provides compensation benefits to workers who have a work-related injury or illness.[48]

While numerous persons with disabilities appear before the WSIAT, not many injured workers with capacity issues appear. In order to access the WSIAT, a worker must

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[46] Social Benefits Tribunal, *Annual Report 2006-2007*, at 1, online: SBT < http://www.sbt.gov.on.ca/userfiles/page_attachments/Library/1/3107529_SBT_Annual_Report_2006-2007_eg.pdf>.

[47] *A v. Director, Ontario Disability Support Program*, SBT 9911-08043 (23 June 2006; Scarff).

[48] *Workplace Safety and Insurance Act*, S.O. 1997, c. 16, Schedule A. Section 123 of the WSIA prescribes the types of final decisions of the WSIB that the WSIAT has jurisdiction to review.

meet the appeal requirements of both the WSIB and the WSIAT. This may be particularly difficult for a worker with a capacity issue. In addition, the "healthy worker effect" proposes that actively employed people tend to be healthier than the population at large.[49] That is, employment screens against persons who have capacity issues before starting employment. If a worker has sustained workplace injuries *serious* enough to result in capacity issues, the WCB is likely to have already granted benefits to the worker. In that way, the case would not make it to the WSIAT.

The Workplace Safety and Insurance Appeals Tribunal's (WSIAT) *Technical Guidelines*, *Practice Directions,* and the *Workplace Safety and Insurance Act,* 1997 *(WSIA)* do not provide specific direction with respect to the issues that arise when a party has been determined to or appears to lack litigation capacity.

The WSIAT has turned its mind to the protections from "abuse of process", although not particularly in the context of a party with a capacity issue. The WSIAT's *Code of Conduct for Representatives* does however, require that representatives appearing before the WSIAT refrain from behaviour that amounts to an abuse of process. Nevertheless, the application of these protections against abuse of process, where an incapable party is unable to participate in the hearing or instruct counsel, has not been determined.

There is no right of appeal from a decision of the Workplace Safety & Insurance Appeals Tribunal. A "privative" clause, Section 123(4) of the WSIA states that Tribunal decisions are not open to review in a court. (Of course, a decision of the WSIAT may be judicially reviewed in appropriate circumstances.) The finality of WSIAT's decision illustrates the importance of ensuring that that the parties involved understand the process and that the process itself is fair.

Section 131(3) of the *WSIA*, provides that the *Statutory Powers Procedure Act* does not apply with respect to decisions and proceedings of WSB or WSIAT.

In the case of an appeal involving a deceased worker, appeals may be brought by the worker's spouse, dependant or estate.[50] There does not appear to be a similar way for a family member of a person who does not have litigation capacity to bring an appeal forward.

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[49] Industrial Disease Standards Panel Report No. 3, *Report to the Workers Compensation Board on the Health Worker Effect* (Toronto: Queens Print, June 1998), online: <http://www.canoshweb.org/odp/html/jul1988.htm>.

[50] Workplace Safety and Insurance Appeals Tribunal, *Practice Direction: Appeals Involving Deceased Workers*, (2007), online: WSIAT < http://wsiat.on.ca/english/decisions/wsiatr/vol_81/Appeals%20Involving%20Deceased%20Workers.htm >.

Family and friends may attend the hearing in support of the worker.[51] However, the WSIAT does not provide for the coverage of transportation costs of a support person or a family member who provides support for an injured worker.[52]

In a 1995 case, the WSIAT ordered that the Tribunal Counsel Office appoint *amicus curiae* to ensure that an appellant's rights were represented.[53] The WSIAT found that the worker was unable to follow instructions or understand explanations. It was therefore determined that he was unable to represent himself as he did not understand the nature of his case and his requirements. Furthermore, the WSIAT found that it was impossible to conduct a hearing due to the worker's disruptive conduct. Concerned that the worker would "not be able to obtain a resolution of his case in accordance with the principles of natural justice," the WSIAT panel went on to find that "it was a fundamental duty of fairness to allow a party to be present at an administrative or quasi-judicial hearing." This was the only instance in which the WSIAT directed the appointment of *amicus curiae* to represent the interests of a certain appellant.

In another decision involving the same worker in 2002, the worker argued that the WSIAT should have appointed a representative for him at a hearing in 2001 because he was incapable of representing himself. The WSIAT did not grant the worker's reconsideration request, since the 2001 case involved less complex issues than those before the WSIAT in 1995.[54] In addition, the worker's behaviour had improved. The WSIAT found:

> This was an extraordinary measure that was precipitated mostly by the worker's poor behaviour, a feature which fortunately did not recur at the most recent hearing. [55]

The *Members' Code of Professional and Ethical Responsibilities* requires that members be sensitive to issues of ability which may affect the conduct of a hearing.[56] Furthermore, members are required to ensure that unrepresented parties are not unduly disadvantaged at the hearing. The *Code* provides that "it is appropriate to explain the hearing procedure or what is relevant to the issue in dispute".[57]

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[51] Workplace Safety and Insurance Appeals Tribunal, *Practice Direction: Who May Attend a Hearing* (2007), online: <www.wsiat.on.ca/englosh/appeals_2007/whoattend.htm> at 4.1.
[52] Workplace Safety and Insurance Appeals Tribunal, *Practice Direction on Fees and Expenses*, online: WSIAT < http://wsiat.on.ca/english/print/pracdir/pdFeesExpenses.pdf>.
[53] *Decision 325 - 95I* (1995) (June 19, 1995; Bigras, Sequin, Robillard).
[54] *Decision 975/01R* (2002) ONWSIAT 1544.
[55] *Ibid.*
[56] Workplace Safety and Insurance Appeals Tribunal, *Members' Code of Professional and Ethical Responsibilities* at s. 29, online: WSIAT *<http://wsiat.on.ca/english/appeals_2007/codemembers.pdf>.*
[57] *Ibid*. at s. 31.

IV: Human Rights Tribunal of Ontario

On June 30, 2008, the *Human Rights Code Amendment Act 2006* came into force. Since that date, all claims of discrimination under the *Human Rights Code* are dealt with through applications filed directly with the Human Rights Tribunal of Ontario (HRTO).[58] The HRTO deals with all claims of discrimination filed on or after June 30, 2008 under the *Human Rights Code*. The Tribunal has established new processes to provide for the mediation and adjudication of cases.

Section 34(1) of the *Code* allows applications from substitute decisions makers, including a person who has a continuing power of attorney, court appointed guardian of property or a statutory guardian of property.[59]

Section 34(5) of the *Code* permits applications on behalf of someone else. Applications on behalf of another person may be filed if the other person would be entitled to bring their own Application under the Code and consents to the application.[60]

The HRTO has provided direction on these issues:

> A person may lack legal capacity to file a human rights application on their own behalf for a number of reasons, including mental incapacity, as defined in the *Substitute Decisions Ac*t, or because he or she is a minor….
>
> A Section 34(1) application may also be filed by a Litigation Guardian or a Substitute Decision-Maker on behalf of a person who lacks legal capacity to apply on their own behalf. A Litigation Guardian must be appointed by the Superior Court of Justice. A Substitute Decision-Maker is someone with a continuing power of attorney, or is a court-appointed or statutory guardian of property under the *Substitute Decisions Act*…
>
> Applications on behalf of another person may be filed under Section 34(5) of the *Human Rights Code* if the other person would be permitted to bring their own Application under the *Code* and consents to the application.[61]

There are significant barriers for an applicant with a capacity issue to file an application with the HRTO. A person determined to be incapable is not permitted to make her own

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[58] The Ontario Human Rights Commission no longer is responsible for receiving discrimination complaints from individuals and then referring them on to the Tribunal.
[59] *Code, supra* note 5 at s. 34(1).
[60] *Code, supra* note 5 at s. 34(1).
[61] Human Rights Tribunal of Ontario, *Practice Direction on Applications to the Human Rights Tribunal of Ontario on behalf of Another Person under section 34(1) or 34(5) of the Human Rights Code*. Available online: HRTO <http://www.hrto.ca/NEW/law_policies/onbehalf.asp> [emphasis added].

application under Section 34(1), unless she or he has a continuing power of attorney, court appointed guardian of property or a statutory guardian of property. Section 34(5) provides that another person can not make an application on behalf of a person who is incapable of bringing her own application.[62] If a party is determined to be incapable of bringing her own application, a party with capacity issues is also unlikely not have the capacity to give a power of attorney. If the applicant does not have a substitute decision maker and does not have the capacity to make an appointment themselves, someone has to be appointed for them.

The appointment of a statutory or court-appointed guardian is invasive. It impacts the autonomy to make one's own decisions about other property-based issues. The appointment extends beyond the end of the HRTO process.

There are other barriers to the appointment of guardians. If a family member wishes to replace the Public Guardian and Trustee as the statutory guardian of property, she or he must pay a fee ($401.10) and the cost of the assessment (from $300 and upwards). The appointment of a statutory guardian takes about three months. The party must agree to the assessment for the purposes of a statutory guardian.

The HRTO guidelines apply only to the commencement of an application. It is unclear what happens if a party develops a capacity issue during the course of the HRTO process, or if a party previously determined to be incapable becomes capable again.

In some situations, HRTO registrars, members and employees may deal with the issues on an *ad-hoc* basis. This is not an effective response, as it allows the systemic barriers to persist.

In *Romanchook v. Garda Ontario* (2009), the HRTO required the appointment of a litigation guardian for a person who did not have capacity to bring and conduct litigation before the HRTO.[63] The PGT was the Applicant's guardian of property. The Chair conducted a preliminary investigation into the Applicant's capacity to make decisions about the litigation. The Chair determined that that it was reasonable to assume that if the Applicant was incapable of managing property, he is likely incapable of instructing a representative in complex legal proceedings challenging the validity of the government legislation. The Chair found strong reasons to believe that the applicant does not have capacity to conduct the litigation without a litigation guardian.

The Chair found that it did not have the authority to appoint a litigation guardian. Nevertheless, the Chair held that continuing the process without a litigation guardian would "undermine the integrity of the administration of justice and be an abuse of process". The Chair ordered the suspension of the HRTO proceedings unless and until a litigation guardian is appointed, or there is new evidence that the Applicant is competent to make decisions about the litigation. The Chair commented on the lack of

[62] *Code, supra* note 5 at s. 34.5.a.

[63] *Romanchook v. Garda Ontario*, 2009 HRTO 1077 (online: CanLii, <http://www.canlii.org/en/on/ onhrt/doc/2009/2009hrto1077/2009hrto1077.html>).

process - in particular the silence of the SPPA on the issue - available to persons with capacity to engage in litigation before administrative tribunals:

> In our contemporary justice system, in which many important decisions that affect the lives of individuals are often made by administrative tribunals and not courts, **this is a significant, and in my view, unfortunate gap**.[64]

In the interim decision of *Khagram v. Ontario* (2009), the Chair found that the mother of an adult with an intellectual disability did not have standing to bring an HRTO application, since the PGT was the guardian of the person for the applicant.[65] The PGT were also the Respondent. The Chair found that the guardian of the person may be the person's litigation guardian, "except in respect of litigation that relates to the person's property or to the guardian's status or powers", as set out by the *Substitute Decisions Act*. The Chair went on to find:

> …[T]he Court Order effectively gives the PGT full guardianship, except in respect of litigation that relates to the person's property. In my view, these Applications are not litigation that relate to the applicant's property. Accordingly, the PGT is the applicant's litigation guardian and the only entity which may bring an application alleging breach of the applicant's rights under the *Code*.

The Chair commented that it is unlikely that the PGT would bring a human rights application against itself. The Chair offered that the applicant's mother may seek to vary the Court Order for guardianship. [66]

V: Financial Services Commission of Ontario

The Financial Services Commission of Ontario (FSCO) oversees the insurance and pension industries in Ontario. The Dispute Resolution Group was established to resolve disputes about the entitlement for benefits under the *Statutory Accident Benefits Schedule* (SABS) arising out of motor vehicle accidents after 1990. The Dispute Resolution Group provides mediation, arbitration and neutral evaluation. The parties are generally the insured party involved in the accident and the first party insurer.

Often, capacity arises at the Dispute Resolution Group at FSCO. Persons who appear before the Dispute Resolution Group are often marginalized and unlikely to have collateral benefits through employment. Where the person involved in the accident has workplace benefits, they would not appear at FSCO.

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[64] *Romanchook* ,supra note 63 at para 39 [emphasis added].
[65] *Khagram v. Ontario (Attorney General)*, 2009 HRTO 1874 (online: CanLii, <http://www.canlii.org/en/on/onhrt/doc/2009/2009hrto1874/2009hrto1874.html >).
[66] *Khagram, supra* at paras 8 and 9.

Among other issues, the *Dispute Resolution Practice Code* (DRPC) considers and sets out who will act for a party who lacks capacity to participate in the proceedings. It also sets up a scheme for an adjudicator to appoint a representative in certain circumstances.[67] The Dispute Resolution Group will routinely appoint parents of minor children as representatives.

Where an adult has not already been determined to be incapable within the meaning of the *Substitute Decisions Act*, the adjudicator can direct a hearing on the preliminary issue of whether the party has the capacity to proceed in the dispute resolution process.[68] Either party can request such a preliminary hearing. The adjudicator can appoint a representative, where there is no power of attorney and no guardian of property. Section 10.5 provides that the adjudicator may appoint "a spouse, same sex partner or near relative of the party on the party's behalf." [69]

Rule 10 also relies on Rule 7.08 of the *Rules of Civil Procedure* (See Section 4.VIII). A judge must approve a settlement, where a representative has been appointed to represent a party determined to lack capacity.

There is no overt statutory language that grants FSCO the jurisdiction to appoint representatives. Nevertheless, FSCO has seized jurisdiction, relying on principles of natural justice and their authority to control proceedings flowing from Section 25.1 of the SPPA.[70] To date, FSCO's jurisdiction to appoint representatives has not been challenged.

There are few decisions on the subject of Rule 10, as cases involving a party with a capacity issue are often settled. Insurance providers are not likely to object to the appointment of representative pursuant to Rule 10, as it is usually to their advantage to ensure that the settlement remains in effect. Representation provides certainty to the parties.

The case of *M. v. Pembridge Insurance Co* is an example of the difficulties of determining "capacity". In that case, the arbitrator found that the party did not have capacity to proceed in the dispute resolution process. Under 10.6, the arbitrator notified the Ontario Public Guardian and Trustee (PGT). However, a representative of the PGT found that the applicant was capable for the purposes of the hearing.[71]

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[67] Financial Services Commission of Ontario, *Dispute Resolution Practice Code* (October 2003), online: FSCO, <http://www.fsco.gov.on.ca/english/insurance/auto/drs/DRPC/4thEdition/DRCode4thEd-updated-EN.pdf>.

[68] *Dispute Resolution Practice Code, supra* note 67 at Rule 10.3.

[69] *Dispute Resolution Practice Code*, *supra* note 67.

[70] John Wilson, "Approaches to the Appointment of a Litigation Guardian" (Toronto: FSCO, undated).

[71] *M. v. Pembridge Insurance Co,* [2007] O.F.S.C.D. no. 135.

A number of arbitration and appeal decisions have had to determine whether someone was acting as a representative pursuant to Rule 10 and, therefore, subject to the filing requirements – the "facilitator cases". [72]

In the series of *Wilson* cases, the applicant was involved in a motor vehicle accident and experienced a brain injury. She was unrepresented in the process. She argued that she should have the right to have a "facilitator" present and active in the hearing on her behalf. She relied on *Charter of Rights and Freedoms* and Ontario *Human Rights Code*, to argue that she required the participation of a "facilitator" to accommodate her disability related needs. There is no provision for facilitation in the DRPC.

The arbitrator refused the participation of a proposed "facilitator" given that she may be a witness to the proceeding. The applicant was not determined to be incapable pursuant to Rule 10.5 of the DRPC. The Director of Arbitrations, on appeal, found that the proposed facilitator was, in fact, providing representation.[73]

The applicant later proposed that her lawyer (who acted for her in the tort matter) act as *amicus curiae*. The arbitrator agreed to the appointment, and "accept[ed] that it is both necessary to protect the rights of the parties to a fair process and useful to the efficient proceeding of this matter to appoint an amicus curiae."[74] The arbitrator also found that "the provision of an *amicus curiae* is an appropriate … accommodation... and sought to provide a level playing field."[75] The Ontario Divisional Court confirmed the arbitrator's decision.[76]

Following an adjournment, the amicus requested that he be relieved of his duties. In the final decision, the applicant proposed that another person - the law clerk of the lawyer who had been appointed as amicus - be appointed as a "facilitator". The arbitrator limited the law clerk's participation to that of a "friend or assistant", which did not include the right to become directly involved in the proceedings, question witnesses or make submissions.[77] The arbitrator emphasized that a facilitator cannot be seen to impede or obstruct the arbitration process.

> The use of the word "facilitator" has raised some significant problems in this arbitration and others. To Mrs. Wilson, the use of a "facilitator" is an accommodation akin to the provision of an interpreter, in that a "facilitator" may assist a brain-injured person in expressing him or herself, prompt response,

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[72] David Draper, "Dispute Resolution Service at FSCO: Trends and New Initiatives 2006", online: Financial Services Commission of Ontario, <http://www.fsco.gov.on.ca/ENGLISH/insurance/auto/drs/outreach/DRS-TRENDS_000.pdf>.
[73] *Wilson v. Liberty Mutual Insurance Company,* Appeal P04-0007 (July 2 2004; Draper) (FSCO ARb).
[74] *Ibid.*
[75] *Ibid.*
[76] *Wilson v. Ontario* [2006] OJ No. 1420 (Div Ct) per Swinton J.
[77] *Wilson v. T.D. Home & Auto Insurance*, (2006) WL 3851185 (FSCO ARb) at para 40.

> and assist the individual in framing questions and answers. As an assistive service, such facilitation is not without some controversy since it interposes another person between the witness and his or her interlocutor.[78]

The arbitrator continued on to find,

> While a request to have the assistance of a trusted friend and support person present during the hearing may be accepted by a hearing arbitrator, the active involvement of such a support person would be subject to the approval and conditions set by the hearing arbitrator.[79]

In another arbitration hearing at FSCO, *H.I. v. Aviva Canada,* the applicant had been involved in a motor vehicle accident. She requested that a "facilitator" be appointed. The arbitrator found that the applicant was capable to instruct counsel and to carry on with her arbitration. She did not require a representative in accordance with Rule 10 of the DRPC. The arbitrator also found that the proposed person may not appear as a "facilitator", and that she may only appear as a "support" person with the specific order by the presiding arbitrator. The arbitrator continued on,

> It must be assumed that Ms. H.I., being capable of testifying, is the best and most reliable source of information relating to her own memories, thoughts and recall. If during examination in chief the witness requires "prompting" and "advocacy" to enable her to retrieve information from her memory, then, perhaps that is an appropriate role for counsel acting within the framework of the rules of evidence and the practice at quasi-judicial hearings.[80]

Both *Wilson* and *H.I*. v. *Aviva*, left open the possibility of the appointment of a facilitator, where deemed appropriate by the arbitrator.

VI: Consent and Capacity Board

The Consent and Capacity Board (CCB) is a tribunal created under the *Health Care Consent Act*. It conducts hearings under the *Mental Health Act*, the *Health Care Consent Act,* the *Personal Health Information Protection Act*, and the *Substitute Decisions Act*. The CCB is responsible for the review of capacity to consent to treatment, admission to a care facility or personal assistance service. It is also responsible for the review of a decision to admit an incapable person to a hospital, psychiatric facility, nursing home or home for the aged for the purpose of treatment.

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[78] *Ibid*, at para 31.
[79] *Ibid*, at para 35.
[80] *H.I. v. Aviva Canada,* (November 12, 2004; Wilson) FSCO A02-001766 at para 66.

Section 81 of the *Health Care Consent Act* (HCCA) allows the CCB to order the PGT to arrange for legal representation. The CCB does not arrange for payment by Legal Aid Ontario. Where the party is unrepresented, the CCB will conduct an "mini-inquiry" into the issue of whether the applicant has made an informed decision to refuse representation.[81] The purpose of the "mini-inquiry" is to determine whether the applicant can go ahead without representation. The mini-inquiry usually lasts about 10 minutes. CCB members do not generally receive training on the subject of Section 81, nor on the nature and process of the mini-inquiry.

If the CCB orders counsel, the applicant shall be deemed to have capacity to retain and instruct that counsel.[82] The CCB will not investigate whether the client is capable of instructing counsel. It is not clear how the CCB will deal with a situation where a person is unable to instruct counsel. Ontario's Public Guardian and Trustee has provided direction to counsel that represent parties, whose capacity is at issue, before the CCB:

> The lawyer should attempt to determine the client's wishes and directions from third party sources such as medical practitioners, family members, caregivers and friends of the client. If the client's wishes or directions in the past or at present have been expressed to others in a clear and consistent manner, then the evidence should be presented in Court or to the Board. **The lawyer must not become a substitute decision maker for the client in the litigation**; that is, the lawyer cannot consent to the proposed action or treatment even if it appears to be in the best interests of the client. The lawyer must ensure that the evidentiary and the procedural requirements are tested and met, even where no instruction, wishes or direction at all can be obtained from the client.[83]

A person deemed to have capacity to instruct counsel would also have capacity to fire counsel.[84] A party before the CCB may represent himself or herself despite the appointment of counsel under Section 81. At first glance, the client's right to self-representation would be inconsistent with the lawyer continuing to have a role. The client may wish, however, to speak and ask questions on his or her own behalf and to have a lawyer advocate in support of his or her position.

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[81] Consent and Capacity Board, "Policy Guideline No. 2 – Ordering Counsel Where the Subject of the Application Does Not Have Legal Representation", online: CCB, <http://www.ccboard.on.ca/english/legal/documents/policyguideline2.pdf >.

[82] *Health Care Consent Act, supra* note 27 at s. 81(1)(b).

[83] Public Guardian and Trustee, *Information Update: Duty of the Public Guardian and Trustee to Arrange Legal Representation*, online: PGT <www.attorneygeneral.jus.gov.on.ca/english/family/pgt/legalrepduty.pdf> [emphasis added].

[84] Marshall Swadron "Representing the Allegedly Incapable Client before the Consent and Capacity Board" *Conference Proceedings: Capacity, Consent and Substitute Decisions – An Essential Update* (October 2004) at page 12- 7.

In *Pietrangelo v Balachandra,* the Court of Appeal was asked to address the issue of the role of counsel appointed by the Board of the HCCA where the client insists on self representation.[85] Mr. Pietrangelo challenged a finding of treatment incapacity. He refused to meet with counsel appointed by the Board pursuant to Section 81. Mr. Pietrangelo walked out of the hearing. The hearing proceeded in the absence of counsel. The counsel, appointed as amicus before the Court of Appeal, argued that the CCB should have invited the counsel to serve as *amicus*. The issue was moot when Mr. Pietrangelo was later found capable of making treatment decisions. [86]

VII: Immigration and Refugee Board

The Immigration and Refugee Board of Canada (IRB) is Canada's largest administrative tribunal. It is responsible for making decisions on immigration and refugee matters. The Immigration and Refugee Board of Canada is made up of three divisions: the Refugee Protection Division, the Immigration Division, and the Immigration Appeal Division.

- The Refugee Protection Division (RPD) decides claims for refugee protection made by people already in Canada.
- The Immigration Division (ID) decides cases that include immigration admissibility hearings for foreign nationals or permanent residents who are believed to have contravened the *Immigration and Refugee Protection Act* (IRPA)
- The Immigration Appeals Division (IAD) hears appeals including, appeals by sponsors whose applications to bring family members to Canada have been refused and appeals of removal orders made against permanent residents or refugees.

i) The Appointment of designated representatives

While each division of the IRB is responsible for making decisions on different immigration or refugee matters, they follow similar administrative tribunal process. All three divisions of the IRB have a unique authority to appoint "designated representatives". The *IRPA* requires the appointment of a designated representative if an applicant is not able to "appreciate the nature of the proceeding".[87]

According to commentary, "unable to appreciate the nature of the proceedings" means that the person cannot understand the reason for the hearing or why it is important or

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[85] *Pietrangelo v Balachandra* (August 12, 2004) Toronto c37729 (Ont. C.A.) (www.canlii.org/on/cas/onca/2004/2004onca11275.html).
[86] Swadron, *supra* note 84 page 12-9.
[87] *Immigration and Refugee Protection Act* (2001, c. 27), s.167(2)). Section 167 (2) provides: "If a person who is the subject of proceedings is under 18 years of age or unable, in the opinion of the applicable Division, to appreciate the nature of the proceedings, the Division shall designate a person to represent the person."

cannot give meaningful instructions to counsel about his or her case. An opinion regarding competency may be based on the person's own admission, the person's observable behaviour at the proceeding, or on expert opinion on the person's mental health or intellectual or physical abilities.[88]

The Rules of each of the three divisions set out a variety of requirements for being designated. It is up to the presiding member to determine who is most suitable to act as designated representative.

There is confusion about the role of the Designated Representative. It is unclear whether the designative representative is a substitute decision maker or is a support for persons to make their own decisions. As described by the Legal Services Branch of the Immigration Division, the designated representative acts "as a sort of litigation guardian in relation to the proceeding concerning the person who is unable to appreciate the nature of those proceedings".[89] That is, the designated representative acts in the represented person's best interests, and does not necessarily represent that persons expressed wishes. In the same document, however, the Legal Services Branch of the Immigration Division also imagined a supportive role, rather than an entirely substitute role:

> A designated representative must act in the best interests of the persons he or she is representing by helping the person make decisions concerning the proceedings of which he or she is subject, especially to retain and instruct counsel….[90]

The role of a designated representative varies depending on the represented person's level of understanding. [91] A person who is unable to appreciate the nature of the proceedings and who has a temporary attention deficit should be consulted more than a person who has a serious cognitive impairment.[92]

There is a requirement that the party with a capacity issues be consulted. The *Guide to Proceedings before the Immigration Division* provides,

> Unless the nature of the illness prevents it, the member should always talk to the person who is the subject of the proceeding before designating a representative.[93]

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[88] Legal Services, Immigration and Refugee Board, "Chapter 7 – Designated Representatives" in *Guide to Proceedings before the Immigration Division* (August 2005), online: IRB <http://www.cisr.gc.ca/eng/brdcom/references/legjur/idsi/guide/Pages/idguide07.aspx>.
[89] *Guide to Proceedings, supra* note 88 at s. 7.2.12 [emphasis added].
[90] *Guide to Proceedings, supra* note 88 at s. 7.2.1 [emphasis added].
[91] *Guide to Proceedings, supra* note 88 at s. 7.2.3.
[92] *Guide to Proceedings, supra* note 88 at s. 7.2.3.
[93] *Guide to Proceedings, supra* note 88 at s. 7.5.1.

The role of the designated representative is not the same as counsel. The role of counsel is to provide legal advice, prepare the case and present the evidence and make oral submissions.[94] Commentaries to the *Rules* state that counsel may act as designated representative at the same time. The designated representative may testify at the hearing, but counsel may not.[95]

Someone must be designated as a representative, even if the person has counsel.[96] In *Kissoon*, the Federal Court of Appeal rules that the member erred in law by failing to designate a representative for a 17 year old who was accompanied by counsel. [97] This principle was reiterated in *Csonka*.[98]

There is wide regional variation in the practice of the appointment of the designated representative. In some jurisdictions, it is more common that the designated representative is a lawyer. In other jurisdictions, it is more common that a social worker or a family member act as the designated representative. The value of having a lawyer act as a designated representative depends on the role of the designated representative. Is the role to act as a substitute decision maker? Is the role to support a person to make her or his own decision? The determination of a person's "best interests" is not a legal role. Lawyers are not expert at determining the best interests of the person subject to the designated representative.

One law firm has developed a pro bono project, recruiting lawyers to act as designated representatives for unaccompanied minors. A legal aid clinic in Toronto runs a program to have law students appointed as designated representatives for unaccompanied minors. There does not appear to be a parallel program for persons with disabilities. Consideration must be paid to the danger of relying on volunteer-based programs, and *ad hoc* responses to systemic barriers.

The appointment of designated representatives by tribunals is less invasive for persons with disabilities, than having to apply for statutory or court appointed guardianship or to apply to act as a "litigation guardian". The designated representative appointment is in effect only for the duration of the IRB process. Guardianship appointments have longer-lasting effects. It is also quicker to have the IRB appoint the designated representative.

The following are examples of additional safeguards to the designated representative process:

- The party subject to the designated representative must agree to the appointment.
- She or he should be able to fire the designated representative.

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[94] *Guide to Proceedings, supra* note 88 at s. 7.2.2.
[95] *Guide to Proceedings, supra* note 88 at s. 7.2.2.
[96] *Guide to Proceedings, supra* note 88 at s. 7.3.2.
[97] *Kisson v. Canada (M.E.I.)* [1979] 1 F.C. 301 (C.A.).
[98] *Csonka, Miklos v. M.C.A.*(August 17, 2001; Lemeiux). F.C.T.D. IMM-6268-99.

- She or he should have the opportunity to challenge the appointment of a designated representative.

ii) Guideline 8: "Vulnerable" persons appearing before the IRB

In December 2006, the IRB issued the *Guideline 8: Guideline on the Procedures with Respect to Vulnerable Persons Appearing before the IRB*. The Guideline is intended to provide procedural accommodations for persons identified as "vulnerable" by the IRB. The Guideline is meant to assist decision makers to identify and implement appropriate procedural accommodations.

For the purposes of the *Guideline*, vulnerable persons are defined as "individuals whose ability to present their cases before the IRB is severely impaired".[99] Vulnerability is established as a result of experience or witness of torture or genocide, but it may also be due to an "innate or acquired personal characteristics such as physical or mental illness". [100]

The *Guidelines* offers a variety of examples of procedural accommodations, including the provision of evidence by videoconference excluding non-parties from the hearing room and allowing a support person to participate in the hearing.

Counsel for a person who wishes to be identified as "vulnerable"- and have disability-related needs accommodated - must make an application under the Rules of the particular Division.[101] In *Duale v. Canada (Minister of Citizenship and Immigration*), the Federal Court found that all parties where obliged to notify the IRB of the need for a designated representative at the earliest possible time. Vulnerability is identified early in the process, before the presentation of evidence. The Guidelines provides that "it is preferable to identify vulnerable persons at the earliest opportunity".[102]

Vulnerability must be established by independent evidence, and filed with the IRB Registry. *Guideline 8* provides that medical, psychiatric, psychological or other expert evidence is "an important piece of evidence that must be considered".[103] Despite its value, the IRB will not order or pay for expert reports. There are no funds available to parties who can not afford to pay for an expert report. However, *Guideline 8* provides that the absence of expert evidence does not necessarily lead to a negative inference about whether the person is in fact vulnerable.[104]

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[99] Immigration and Refugee Board of Canada, *Guideline 8: Guideline on Procedures with Respect to Vulnerable Persons Appearing Before the IRB*, (December 15 2006) para 1.5, online: IRB, <http://www.cisr.gc.ca/Eng/brdcom/references/pol/guidir/Pages/vulnerable.aspx>.
[100] *Guideline 8, supra* note 99 at para 2.1.
[101] *Guideline 8, supra* note 99 at para 2.4.
[102] *Guideline 8, supra* note 99 at para 5.1.
[103] *Guideline 8, supra* note 99 at para 8.1.
[104] *Guideline 8, supra* note 99 at para 8.6.

The formal requirements set out by *Guideline 8* may create additional barriers for persons with disabilities before the IRB. These formal requirements may pose particular challenges for unrepresented parties. The additional step – to prove "vulnerability" before the proceeding even begins – requires extra time, effort and funds. A person with a capacity issue may not know that she requires accommodation until the hearing begins. However, *Guideline 8* does set out that the IRB will waive or modify the requirements or time limits set out in the Rules, as appropriate." [105]

Guideline 8 conceives of vulnerability as a "black or white" issue. It reflects an understanding that determination of vulnerability is set, and that a person can not move in and out of "vulnerability".

The definition of capacity in that Section of the IRPA ("appreciate the nature of the proceedings") is less stringent than the definition from the *Substitute Decisions Act,* which includes the ability to understand and appreciate. Further research will identify the implications of this discrepancy.

Guideline 8's use of the term "vulnerable" both imposes and reflects the stereotype of persons with disabilities as in need of charity. The term "vulnerable" situates the need for "assistance" within the person. In *Eldridge v. British Columbia (Attorney General*), the Supreme Court commented on prevalence of "paternalistic attitudes of pity and charity" towards persons with disabilities.[106] It is also problematic that *Guideline 8* does not address the IRB's obligations pursuant to the *Canadian Human Rights Act* or the *Charter of Rights and Freedoms*.

VIII: Health Services Appeal and Review Board

The Health Services Appeal and Review Board (HSARB) was established by the *Ministry of Health Appeal and Review Boards Act* in 1998. Most relevant to persons with disabilities, the HSARB is responsible for the appeal of:

- decisions of the Ontario Health Insurance Plan respecting eligibility and payment; and
- decisions of agencies under the *Long Term Care Act* respecting eligibility for service.

The governing legislation depends on the context of the decision appealed from. For instance, according to the *Health Insurance Act*, a person may request a review of a decision by OHIP to refuse coverage of a health care service.[107] Any appeal from OHIP decisions must be made within 15 days of receiving the decision. The appellant can request an extension from HSARB if needed. Furthermore, the appellant must also inform OHIP of the review.

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[105] *Guideline 8, supra* note 99 at para 7.5.
[106] *Eldridge v. British Columbia*, [1997] 2 S.C.R. 624 at 668 (S.C.C.).
[107] *Health Insurance Act*. R.S.O. 1990, c.H.6.

Oral hearings usually last about one and half hours.[108] The appellant can request an oral, written or electronic hearing. HSARB will make the final decision about the form of the hearing. Generally HSARB hearings are public, except by way of application of Rule 14 of the HSARB *Rules of Practice and Procedure*. A lawyer is generally not considered to be necessary, but if an appellant wants a friend or social worker to act on his or her behalf, written authorization must be sent to HSARB.

The *Ministry of Health Appeal and Review Boards Act* and HSARB *Rules of Practice and Procedure* do not provide specific direction with respect to the issues that arise when a party has been determined to, or appears to, lack litigation capacity.

HSARB is subject to the *Statutory Powers Procedure Act*. Rule 1.02(3) of HSARB's *Rules of Practice and Procedure* provides that the Board may dispense with compliance with any Rule, and may make a procedural ruling to govern the conduct of the proceeding. HSARB *Rules of Practice and Procedure* should be "liberally construed to secure the just, most expeditious and cost-effective determination of every proceeding on its merits."[109]

IX: Health Professions Appeal and Review Board

The Health Professions Appeal and Review Board (HPARB) was established by the *Ministry of Health Appeal and Review Boards Act* in 1998. It is an adjudicative body with a review and appeal mandate set out by the *Regulated Health Professions Act, 1991.* The *RHPA* regulate Ontario's self-regulated health professions. The practice of each of these health professions and its members is governed by a College, pursuant to the provisions of the *Health Professions Procedural Code ("Code").*

Most important to persons with disabilities, HPARB is responsible for reviewing decisions of the Colleges' Complaints Committees. The parties to these reviews are the individual complainant(s) and the health professional(s) who are the subject(s) of the complaint. Many complainants appear before the Board without legal counsel. Health professionals who are the subject of a complaint are often legally represented. The College, while generally represented at the review, is not a party to it. Complaint reviews are oral or written proceedings, to which some provisions of the *Statutory Powers Procedure Act,* apply.[110] A party can request that HPARB reconsider its decision.[111] The complaint can be referred for review by the Divisional Court of the Ontario Court of Justice.[112]

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[108] Health Services Appeal and Review Board, "Frequently Asked Questions", online: HSARB, http://www.hsarb.on.ca/english/faq.htm>.
[109] Health Services Appeal and Review Board, *Rules of Practice and Procedure* (2007), online: HSARB < http://www.hsarb.on.ca/english/rules/default.htm> at Rule 1.02(4).
[110] *Health Professions Procedural Code,* 1991, Schedule 2 to the *Regulated Health Professions Act, 1991* S.O. 1991, c. 18 at section 34(2).
[111] *HSARB Rules of Practice, supra* note 109 at Rule 13 .
[112] *Health Professions Procedural Code,* supra note 110 at s. 70(1).

The *Ministry of Health Appeal and Review Boards Act, the Health Professions Procedural Code* and HPARB *Rules of Practice and Procedure* do not provide specific direction with respect to the issues that arise when a party has been determined to or appears to lack litigation capacity.

Rule 8 of the HPARB's *Rules of Practice* does, however, provide for the participation of a non-party at the hearing. The person may, with the permission of the Board, make oral or written submissions or present evidence or information. Such an order is made where the Board finds that it is in public interest to have the person participate and the Board believes that doing so would be assistance to the Board. In particular, Rule 8 may allow for the participation of an *amicus curiae* where a party with a capacity issue refuses counsel.

A complainant's personal representative may act as the complainant for the purposes of a review by HPARB if the complainant dies or becomes incapacitated.[113] The definition of "incapacity" set out by the Code applies to members of the College, and not to complainants. "Incapacitated" refers to situations wherein "the member is suffering from a physical or mental condition or disorder that makes it desirable in the interest of the public that the member's practice be subject to terms, conditions or limitations, or that the member no longer be permitted to practice". [114]

[113] *Health Professions Procedural Code,* supra note 110 at s. 31.
[114] *Health Professions Procedural Code,* supra note 110 at s. 1.

CHAPTER THREE: A SUMMARY OF THE BARRIERS EXPERIENCED BY PARTIES WITH CAPACITY ISSUES BEFORE ADMINISTRATIVE TRIBUNALS

People with disabilities experience a wide array of barriers in relation to their access to tribunals. Many experiences are similar across different tribunals, and are not dissimilar to the kinds of barriers experienced in Ontario's courts. In 2008, ARCH undertook to survey barriers to the accessibility of various administrative boards. Examples of barriers include:

BARRIERS BEFORE THE HEARING:

- Parties with capacity issues may have difficulty navigating the process, including the significance of hearings and how to prepare for them.
- Many people, not only people with disabilities, have difficulty understanding tribunal forms.
- Parties may have difficulty accessing help to fill out forms. It is often difficult to reach tribunals for assistance. Parties may not have reliable access to telephone or internet connections.
- Meeting application deadlines may be a particular problem for persons with capacity issues.

BARRIERS AT THE HEARING:

- Little training is provided to tribunal members about conducting barrier-free hearings.
- Parties with capacity issues do not know what accommodations they can receive or how to request them
- Parties may be uncomfortable about requesting accommodations.
- Parties may be reluctant to request accommodation because they may not want to disclose the fact of their disability, for fear of negative reactions based on stigma and stereotypes.
- Parties may not know that they have a right to accommodation. They may assume that accommodation applies only to physical disabilities.
- Parties may feel rushed at hearings and intimidated from taking needed breaks.
- It may be difficult for a party with a capacity issue to find a hearing room.
- It may be difficult for a party with a disability to have to sit at all times in the hearing room.
- The pace of the tribunal proceedings is often fast, making it hard to follow.
- If accommodations are offered, it may be on an *ad-hoc* basis.

BARRIERS AFTER THE HEARING:

- Tribunal correspondence may not communicate the right of appeal in a simple and clear language.
- The appeal forms contain language that is complicated

- Parties with capacity issues may assume that a tribunal decision is final. In particular, many unrepresented parties do not understand that they have a right to appeal the decision of the tribunal.

BARRIERS TO REPRESENTATION:

- Many persons with capacity issues appear unrepresented before administrative tribunals.
- For cases where clients are eligible for legal aid certificates, lawyers are not paid for the extra time that is required to serve clients with capacity issues.
- Because of the added work, lawyers may avoid representing clients who may have capacity issues.
- Persons with capacity issues before administrative tribunals often rely on their friends, family, and health care or social workers for advice. There may be potential for conflict of interest.

CHAPTER FOUR: UNDERLYING LEGAL PRINCIPLES

This chapter examines principles that apply to the barriers experienced by parties with capacity issues, before administrative tribunals.

I: Natural Justice, Procedural Fairness and Abuse of Process

Natural justice principles are incorporated into the procedural duty of fairness, otherwise known as the "duty to be fair", "duty of fairness", or "procedural fairness". The historical principles of "natural justice" are two, the first of which is the root of many common law procedural fairness obligations:[115]

1) *audi alteram partem* [hear the other side] – hearing and participatory rights; and

2) *nemo judex in sua causa debet esse* [no man can be a judge in his own cause] – right to an impartial decision-maker.

The common law imposes a duty of fairness in certain administrative proceedings.[116] The courts have held that there is a duty of procedural fairness on the part of public authorities – including tribunals - when they make decisions affecting rights, privileges or interests of an individual.

In *Baker v. Canada*, the Supreme Court of Canada explained this duty as follows:

> The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly and have decisions affecting their rights, interests and privileges made using a fair, impartial and open process, appropriate to the statutory institutional and social context of the decision.[117]

The content of the duty of fairness depends on the type of right and the circumstances of the case. It requires a fact-sensitive analysis. There are several factors that affect the content of this duty, as set out by the Supreme Court in *Baker*:

- the nature of the decision being made and process followed in making it;
- the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
- the importance of the decision to the individual or individuals affected;

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[115] David Jones, Q.C. and Anne S. de Villars, *Principles of Administrative Law*, 4th ed. (Toronto: Carswell, 2004) at 204.
[116] *Nicholson v. Haldimand-Norfolk Reg. Police Commissioners*, [1979] 1 S.C.R. 311 (S.C.C.).
[117] *Baker v. Canada,* [1999] 2 S.C.R. 817 at para. 28 [emphasis added] (S.C.C.).

- the legitimate expectations of the person challenging the decision;
- the choices of procedure made by the agency itself. [118]

Sara Blake in *Administrative Law in Canada* offered the following commentary:

> …[I]f a party is mentally unable to understand the proceedings, a tribunal ought, in fairness, not to proceed until the party is adequately represented. [citations] Notice of the proceeding should be given to a person authorized to act on behalf of the mentally incapable person or to the official guardian.[119]

In *Cardinal v. Kent Institution***,** the Supreme Court found that every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual has a duty to ensure procedural fairness. The question, of course, is what the duty of procedural fairness may reasonably require of an authority in the way of specific procedural rights in a particular legislative and administrative context and what should be considered to be a breach of fairness in particular circumstances.[120]

In *Blanchard v. Millhaven Institution Disciplinary Board***,** the Federal Court found that the contents of the "rules of natural justice" are flexible and will change depending upon the circumstance of each case. [121] In particular, the Court found that the duty to act fairly requires that the person who is being examined and who may be subject to some penalty be aware of what the allegations are, be aware of the evidence and the nature of the evidence against him, and be afforded a reasonable opportunity to respond to the evidence and give his version of the matter;

From *Burroughs v. CUPE*, the Newfoundland Supreme Court (Trial Division) considered the application for certification to the Labour Relations Board on behalf of five persons who provided care to a person with a disability.[122] The parties agreed that person with a disability did not have capacity to appreciate or comprehend the certification proceedings, and that she lacked capacity to be an employer. The Court found that once the Board is aware that a "party" is unable to comprehend an application because of disability, it is not in accordance with the principles of natural justice, to proceed with the application without ensuring that notice is given to a persons authorized to represent the interests of the individual in question. The Court went to find that the Labour Relations Board could have appointed a representative:

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[118] *Ibid.*
[119] Sara Blake, *Administrative Law in Canada*, 3rd ed. (Toronto: Butterworths, 2001) at 53 [emphasis added].
[120] *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643.
[121] *Blanchard v. Millhaven Institution Disciplinary Board*, [1983] 1 F.C. 309 (F.C.T.D.).
[122] *Burroughs (Guardian ad litem of) v. CUPE*, [1999] 184 Nfld & PEIR 191 (N.S.C.T.D.).

> …It may be that, for the purposes of consideration of a certification application, the Board itself could appoint a representative, or alternately could apply to court for such an appointment. This is of course a burden on the Board. But it is not a burden imposed out of a need to satisfy a mere technicality; rather it is necessary to protect the foundation of fairness which much support a proceeding with such potential consequences.[123]

Abuse of process is a common law principle, and engages the power of the Tribunal to prevent the misuse of its procedure in various ways. It is usually invoked to argue for a stay proceedings where to allow them to continue would be oppressive.[124] For there to be an "abuse of process", the process must be "unfair to the point they are contrary to the interests of justice".[125] An abuse of process is "tainted to such a degree that to allow it to proceed would tarnish the integrity of the court".[126] In *Canam Enterprises Inc. v. Coles*, Justice Goudge of the Ontario Court of Appeal held:

> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a manner that could be manifestly unfair or in some other way bring the administration of justice into disrepute.[127]

Litigation capacity before administrative tribunals touches at the core of natural justice, the ability to participate in the proceeding. In that way, the capacity issues of parties to administrative tribunals is an issue of natural justice. Given the monumental importance of decisions made by tribunals – including where one lives, access to social assistance benefits and the right to be free from discrimination - the duty of procedural fairness is particularly applicable to these decisions.

II: Parens Patriae jurisdiction

The power to appoint a litigation guardian for a minor or an incapable adult stems from the *parens patriae* jurisdiction belonging to superior courts of general jurisdiction.[128] Case law and commentary indicate that *parens patriae* jurisdiction originated as a power of the English sovereign and was later transferred to the English Lord Chancellor,

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[123] *Ibid* at para 59.
[124] *Blenoce v British Columbia (Human Rights Commission),* [2000] 2 S.C.R. 307 at para 116.
[125] *R v. Power,* [1994] 1 S.C.R. 601.
[126] *R v. Conway,* [1989] 1 S.C.R. 1659 at 1667.
[127] *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 at para 55, approved [2002] 2 S.C.R. 307.
[128] R*e Marquis of Salisbury v. Ecclesiastical Commissioners,* [1876] 2 Ch. D 29 at 36. *Parens patriae* jurisdiction included the power to appoint a person to act as a child's guardian *ad litem* for the duration of court proceedings.

exercised through the English Court of Chancery. *Re Eve* and *Wright v. Wright* are two key Supreme Court cases on the origins and nature of *parens patriae* jurisdiction. The Court in *Re Eve* provided as follows:

> The *parens patriae* jurisdiction is…founded on necessity, namely the need to act for the protection of those who cannot care for themselves. The courts have frequently stated that it is to be exercised in the "best interest" of the protected person, or again, for his or her "benefit" or "welfare". …the jurisdiction is a carefully guarded one. The courts will not readily assume that it has been removed by legislation where a necessity arises to protect a person who cannot protect himself.[129]

In *Auton* v. *British Columbia*, Justice Saunders of the B.C. Court of Appeal applied *parens patriae* jurisdiction to the Section 15 analysis.[130] The decision of the B.C. Court of Appeal was overturned by the Supreme Court of Canada.

Neither a **provincial court nor a tribunal may apply the *parens patriae* jurisdiction.** Only courts of inherent jurisdiction have the *parens patriae* jurisdiction. In *H. (J.) v. A. (D.),* the Ontario Superior Court of Justice found that only the Superior Court of Justice in Ontario is a court of inherent jurisdiction.

In *H. (J.) v. A. (D.),* the Ontario Superior Court of Justice overturned a Provincial Court order granting the mother custody and ordering the non-removal of her child from Ontario. The mother and her child were subject to a deportation order. The mother brought a motion before a Provincial Court judge, asking the Court to assume custody jurisdiction. The mother asked the Court to apply the best interests test under the *Children's Law Reform Act* and order the child to stay in Ontario. The Ontario Superior Court of Justice found the decision could not stand. There was no genuine issue between the mother and father over custody. Justice Czutrin held that the Provincial Court judge, although well-intentioned, committed a material error by assuming jurisdiction and attempting to overrule the immigration removal order. In so doing, the Provincial Court attempted to use *parens patriae* jurisdiction. Justice Czutrin held:

> In Ontario, only the Superior Court of Justice is a court of inherent jurisdiction with the power to assert *parens patriae* jurisdiction over a matter….A judge of the Ontario Court of Justice cannot rely on *parens patriae* jurisdiction…The Ontario Court of Justice is not a court of inherent jurisdiction, and as such cannot apply *parens patriae* jurisdiction….[131]

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[129] *E. (Mrs.)* v. *Eve,* [1986] 2 S.C.R. 388 at paras 73 and 75.
[130] *Auton (Guardian ad litem of)* v. *British Columbia* (2002), 220 D.L.R. (4th) 411 at para. 60, overturned [2004] 3 S.C.R. 657 (Supreme Court of Canada).
[131] *J.H. v. D.A,* (2008) 290 D.L.R. (4th) 732 at paras 59 and 63.

III: Fiduciary Duty

Common law tort values, including the breach of fiduciary duty, may bolster tribunals' responsibilities to persons with disabilities.[132]

Recent judicial activity has been devoted to the application of such a fiduciary duty in the child protection setting. In her dissenting opinion in *M.B* v. *British Columbia*, Justice Arbour held the relationship between the State and foster parents is sufficiently intimate that it is capable of attracting vicarious liability. The Province's empowerment of foster parents materially increased the risk of the sexual abuse suffered by the complainant.[133]

In both *K.L.B.* v. *British Columbia* and *M.B.*, Chief Justice McLachlin held that the Superintendent of Child Welfare in British Columbia has a limited non-delegable duty to ensure that *specific actions* are performed in connection with the child's care, including a duty to place a child in a foster home as meets his or her needs.[134]

In addition, in *E.D.G.* v. *Board of School Trustees (North Vancouver)*, Chief Justice McLachlin held for the Court that a school board has a fiduciary duty, albeit a restricted one.[135]

Further research should examine whether a fiduciary relationship exists between administrative tribunals and parties with capacity issues. At first glance, it is a power-dependent relationship characterized by an overriding influence and unilateral discretion. On account of the special protection that persons with disabilities, and in particular persons with capacity issues, are owed, it is the tribunals' responsibility to ensure that the interests of parties with capacity issues are vigorously protected.

IV: Charter of Rights and Freedoms

The *Canadian Charter of Rights and Freedoms* ("*Charter*"), as a constitutional document, is part of the fundamental law of Canada. It guarantees political and civil rights to persons physically present in Canada with respect to the policies and actions of all levels of government. The *Charter* binds the federal government, the territories under its authority, and the provincial governments.[136] The *Charter* applies to the operation of all tribunals, including provincial and federal administrative tribunals. Consideration of the values given expression in the *Charter* must inform any review of the law relating to substitute decision making.[137]

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[132] See generally, Lorne Sossin, "Public Fiduciary Obligations, Political Trusts and the Equitable Duty of Reasonableness in Administrative Law" (2003) 66 Sask. L. Rev. 129.
[133] *M.B.* v. *British Columbia,* [2003] S.C.J. No. 53 at para. 17 (S.C.C.).
[134] *K.L.B.* v. *British Columbia,* [2003] S.C.J. No. 51 (S.C.C.).
[135] *E.D.G.* v. *Board of School Trustees (North Vancouver),* [2003] S.C.J. No. 52 at para. 22 (S.C.C.).
[136] *Canadian Charter of Rights and Freedoms,* Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11. at section 32.
[137] S.V. Fram, "Final Report of the Advisory Committee on Substitute Decision-Making for Mentally Incapable Persons" in *Advisory Committee on Substitute Decision-Making*

i) Section 15

Section 15 guarantees equal treatment before and under the law, and equal protection and benefit of the law without discrimination, including on the ground of "disability".[138] The Supreme Court in *Law v. Canada (Minister of Employment and Immigration)* described the overall purpose of Section 15 as the prevention of the violation of essential human dignity through the imposition of disadvantage, stereotyping or prejudice.[139]

Recognition of the importance of substantive equality is the first step to understanding Section 15. In contrast to formal equality ("treating likes alike"), substantive equality is concerned with the actual distribution of resources, opportunities and choices within a society. While rules, policies, procedures, requirements, eligibility criteria or qualifications may appear neutral, they may, nonetheless, amount to constructive or "adverse effect" discrimination. The protections from discrimination apply to the way that persons with disabilities are treated at tribunals.

Section 15 engages the "duty to accommodate", the legal obligation that government (including tribunals) have under the *Charter* to meet the needs of persons with disabilities. The goal of accommodation is to allow equal benefit from and participation in services. Even when facilities and services are designed as inclusively as possible, some persons with disabilities may still require an accommodation to meet their individual needs. An example of an accommodation includes providing sign language interpreters or real time captioning for parties who are deaf, deafened or hard of hearing. In *Andrews v. Law Society of British Columbia,* the Supreme Court expressly recognized that "the accommodation of differences....is the essence of true equality" (at 169). The Court also found in *R. v. Big M Drug Mart Ltd,* that "the interests of true equality may well require differentiation in treatment."[140]. The *Charter* requires that tribunals accommodate persons with disabilities (including persons with capacity issues) so that they can participate in the administrative hearings that affect them so deeply.

ii) Section 7

Section 7 of the *Charter* provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".[141] While Section 7 is typically applied in the criminal law context, it is increasingly applied in non-criminal contexts.[142]

The Section 7 "liberty" interest protects an individual's personal autonomy, and the right to make inherently private choices. The Supreme Court in *Blencoe* provided that

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for Mentally Incapable Persons (Toronto: Queens Printer, 1987) at 41.
[138] *Charter, supra* note 136 at section 15.
[139] *Law v. Canada (Minister of Employment and Immigration),* [1999] 1 S.C.R. 497.
[140] *R. v. Big M Drug Mart Ltd*., [1985] 1 S.C.R. 295 at 347.
[141] *Charter, supra* note 136 at s. 7.
[142] *New Brunswick (Minister of Health and Community Services) v. G. (J.),* [1999] 3 S.C.R. 46.

"liberty" is engaged not only in the case of physical restraint, but also where state compulsions or prohibitions affect important and fundamental life choices.[143] In *Godbout*, Justice LaForest set out:

> "… the right to liberty enshrined in s. 7 of the *Charter* protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference… [T]he autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence."[144]

Section 7 "security of the person" interest also protects against serious state-imposed psychological stress.[145] The "security of the person" interest does <u>not</u> protect from the "ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action".[146]

There is a two-step test to determine whether the Section 7 right has been breached. First, there must first be a finding that there has been a deprivation of the right to "life", "liberty" or "security of the person". Secondly, that deprivation must be found to be contrary to the principles of fundamental justice.

The limitations clause allows governments to justify certain infringements of *Charter* rights (Section 1). Infringements are upheld if the purpose for the government action is to achieve what would be recognized as an urgent or important objective in a free society, and if the infringement can be "demonstrably justified".

V: Ontario Human Rights Code

Ontario's *Human Rights Code* provides that every person has the right to equal treatment with respect to services without discrimination because of disability. Provincial tribunals must operate within the context of the *Code*.[147] The *Code's* protections apply to services provided by tribunals, pursuant to Section 1 of the *Code*.[148] Because tribunals provide services to the public, they are under a legal obligation to adopt rules of practice and procedures that comply with the *Code*.

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[143] *Blencoe, supra* note 124 at para 49.
[144] *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 66 (S.C.C.).
[145] *New Brunswick (Minister of Health and Community Services) v. G. (J.),* [1999] 3 S.C.R. 46.
[146] *G.(J.), supra* note 145 at para 59.
[147] *Code, supra* note 5 at s.47(1).
[148] *Walmer Developments v. Wolch* [2003] 67 O.R. (3d) 246 (Ont. Div. Ct.) at para 18.

Federal tribunals, including the Immigration and Refugee Board, operate within the context of the *Canadian Human Rights Act.*

There is a relationship between the common law duty of fairness and *Code* requirements. Judith Keene observes,

> To an extent, tribunals' *Code*-related duties overlap with the duty of fairness that is a requirement of administrative law generally. Code requirements, however, clearly exceed requirements imposed by the common law or the *Statutory Powers Procedure Act*.[149]

When exercising its authority to delay or refuse an eviction, the Landlord Tenant Board must consider and apply the *Code*, to determine whether the landlord has accommodated the tenant to the point of undue hardship. The *Code* may also apply to certain applications filed by tenants against landlords. For example, the Ontario Rental Housing Tribunal ruled some of its procedural requirements discriminatory.[150] Indeed, the Code is paramount over all other provincial laws.

Although services and facilities may be designed to be accessible, some persons may require accommodation from tribunals in order to access its services and facilities. Full participation at administrative tribunals may require accommodation. For example, in order to accommodate tenants who are unable to attend full-day hearings, an administrative tribunal could implement a policy allowing that hearings be scheduled for shorter blocks when needed to accommodate a tenant's disability.

Rules that apply to everyone can discriminate because they can have an adverse effect upon people with disabilities. The prohibition from discrimination includes an obligation to accommodate people with disabilities to the point of undue hardship. Accommodation must be provided in a manner that is most consistent with the dignity interest of the person being accommodated.[151] The essence of accommodating people with disabilities is individualization: no two people with the same disability experience it in the same way.[152]

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[149] Judith Keene, "Human Rights Legislation and Section 15 of the Charter – Establishing a Prima Facie Case of Discrimination" (June 17 2008).
[150] *Karoli Investments v. Reid* (22 September 2005; DeBuono), File No. TNL-68501-SA (ORHT). Note that this decision was overturned on review by the ORHT (23 June 2006; Graham), File No. TNL-68501-RV-IN (ORHT).
[151] Ontario Human Rights Commission, *Policy and Guidelines on Disability and the Duty to Accommodate* (Toronto: OHRC, 2000) at 12*ff*, online: OHRC <http://www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2>.
[152] Relevant cases include: *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 at para. 22; *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employee's Union,* [1999] 3 S.C.R. 3 at para. 54 [*Meiorin*].

The Law Society's *Rules of Professional Conduct* state that lawyers have a special responsibility to respect human rights laws.[153]

VI: UN Convention on the Rights of Persons with Disabilities

The *Convention on the Rights of Persons with Disabilities* and its Optional Protocol was adopted in December 2006 and was opened for signature in March 2007.[154] There are 139 signatories to the *Convention* (including Canada), 82 signatories to the Optional Protocol, 59 ratifications of the *Convention* and 37 ratifications of the Optional Protocol. The Convention received the highest number of signatories in history to a UN Convention on its opening day. It is also remarkable that the *Convention* was the fastest negotiated human rights treaty.

The *Convention* reaffirms that persons with disabilities must enjoy all human rights and fundamental freedoms. It identifies areas where accommodations have to be made for persons with disabilities to effectively exercise their rights.

Article 12 to the *Convention* ("Equal Recognition before the Law") provides that States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. Section 3 of Article 12 continues on to require parties to accommodate persons with capacity issues.

> 3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

The fourth Section of Article 12 offers further detail to the protections of the exercise of legal capacity.

> 4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

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[153] Law Society of Upper Canada, *Rules of Professional Conduct* (Toronto: LSUC, 2000), online: LSUC <http://www.lsuc.on.ca/regulation/a/profconduct/ > at Rule 5.04.
[154] *International Convention on the Rights of Persons with Disabilities*, UN GAOR, 7th Sess., Annex II, A/AC.265/2006/2 (2006).

Anita Dhanda reported that the committees to the *Convention* debated the inclusion of guardianship provisions in Article 12, but ultimately remained silent on the issue. Noteworthy is the exclusion of guardianship provisions. Dhanda continues,

> Article 12 of the *UN Convention* establishes a clear right to support in decision making, without requiring a person to forego his or her full legal capacity – as would be the case under any form of guardianship or substitute decision making.[155]

Dhanda went on to find that Article 12 acknowledges that, "if assistance is required to exercise capacity, then such assistance should be provided instead of holding a person to be incompetent." [156]

Article 13 ("Access to Justice") of the *Convention* also applies to the participation of parties with capacity issues before administrative tribunals.

> 1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
>
> 2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

Canada has signed the *Convention*, but has not ratified it. Canada is not legally bound to implement the *Convention* until it is ratified. Nevertheless, the *Convention* can be used to strengthen and support arguments on behalf of parties with capacity issues before administrative tribunals. The *Convention* applies in the context of tribunals. The seminal case of *Baker* involved a case before the Immigration and Refugee Board. Justice L'Heureux-Dube stated that the "…values reflected in international human rights law may help inform that contextual approach to statutory interpretation…"[157]

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[155] Michael Bach, "Supported Decision Making under Article 12 of the UN Convention on the Rights of Persons with Disabilities – Elements of a Model" (November 2007).
[156] Amita Dhanda, "Legal Capacity and the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?" (2006) 34 *Syracuse Journal of International Law and Commerce* 429 at 434.
[157] *Baker, supra* note *117 at para 70.*

VII: Accessibility Standards for Customer Service

As of January 1, 2010, public sector organizations – including provincial tribunals – will be required to comply with the standards created under the *Accessibility for Ontarians with Disabilities Act, 2005*.[158] The *Accessibility for Ontarians with Disabilities Act* establishes a system for developing, enacting and enforcing mandatory accessibility standards.

Most notably, the *Customer Service Standard* will require tribunals to establish policies and practices on providing services to people with disabilities, including a policy on allowing people to use their own personal assistive devices to access the services offered by the tribunal and on any situations where such use may not be permitted. These policies should address any measures that the tribunals offer to parties with disabilities to access the tribunal process, including provision of alternative formats of documents. The tribunals should use reasonable efforts to ensure that these policies, practices and procedures are consistent with the principles of dignity, independence, integration and equal opportunity. These principles are described in detail in the *Guide to the Customer Service Standard*.[159]

It is important to note that the *Accessibility for Ontarians with Disabilities Act* operates provincially, and as such does not apply to the IRB (which is part of the federal jurisdiction).

VIII: Rules of Civil Procedure

In Ontario, the power to appoint litigation guardians has been codified in the *Rules of Civil Procedure.* Rule 7 applies to civil procedures, and requires a litigation guardian for every "party under disability," defined as a minor, mentally incapable person, or absentee, in proceedings at the Superior Court of Justice and the Court of Appeal.[160] The term "litigation guardian" replaced guardian *ad litem* and next friend for a defendant and plaintiff respectively.[161]

The court must appoint a litigation guardian for defendants. The only exceptions are a guardian or an attorney under a power of attorney, who, if their duties already include the authority to act as litigation guardian, shall do so unless the court orders otherwise. In the absence of "some other proper person willing and able" to act as litigation

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[158] *Accessibility Standards for Customer Services* made under the *Accessibility for Ontarians with Disabilities Act,* O. Reg 429/2007, online: < http://www.e-laws.gov.on.ca/html/source/regs/english/2007/elaws_src_regs_r07429_e.htm>.

[159] Ministry of Community and Social Services, "Guide to the Customer Service Standard", at 22-33, online: MCSS <http://www.mcss.gov.on.ca/mcss/english/pillars/accessibilityOntario/accesson/compliance/customer/accessibility_guide>.

[160] *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194, made under the *Courts of Justice Act,* Rules 1.02(1) and 1.03.

[161] Garry D. Watson, *Holmested and Watson: Ontario Civil Procedure, Volume 2 Supplement*. (Toronto: Carswell, July 2004) at 7-10.

guardian, the court shall appoint the Public Guardian and Trustee for a mentally incapable party if there is no guardian or attorney with authority to act as a litigation guardian.[162]

The onus is on the moving party to establish mental incapacity.[163] In *Bilek v. Constitution Insurance,* the Court found that "[t]he test [for Rule 7.01(1)(c)] is whether the plaintiff properly understands the nature and effect of what he is and may be called up to participate in and decide upon." [164] The Rules' test for mental incapacity simply refers to Section 6 or 45 of the *Substitute Decisions Act*.

A litigation guardian must be represented by counsel.[165] The litigation guardian instructs the lawyer on the party's behalf, and ensures that the lawyer is receiving instructions from someone who understands and appreciates the legal process. The litigation guardian "shall diligently attend to the interests of the person under disability and take all steps necessary for protection of those interests."[166]

The Rules do not apply to administrative tribunal proceedings. The appointment of a litigation guardian under Rule 7 has no application to a tribunal process. A litigation guardian appointed by the Court does not have legislative authority to act before a tribunal.

In *Brown v. AGF Trust*[167], counsel reached a settlement of a case before the Ontario Rental Housing Tribunal (ORHT)[168] on behalf of a group of tenants with mental health issues. Some members of the group were under the guardianship of the Public Guardian and Trustee. Counsel for the landlord insisted that no settlement or order could be binding unless approved by a judge under rule 7.08 of the *Rules of Civil Procedure*. Because the settlement was in the interests of the tenants, their counsel agreed to place the matter before the Ontario Superior Court of Justice in an application under Rule 14.05, without raising the issue as to the jurisdiction of the court or of the ORHT to approve the settlement in these circumstances. The Court approved the settlement. At the hearing, the Public Guardian and Trustee declined to take any position on whether approval under Rule 7 was necessary. The issue of whether a settlement involving persons under the guardianship of the Public Guardian and Trustee would be binding without approval of the Court remains unsettled.

Rule 4 of the *Rules of the Small Claims Court* also provides a process for the appointment of a litigation guardian for a party under a disability.[169]

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[162] *Rules of Civil Procedure, supra* note 160 at Rule 7.04(1).
[163] *Bilek v. Constitution Insurance*, (1990) 49 C.P.C. (2d) 304.
[164] *Ibid*.
[165] *Rules of Civil Procedure, supra* note 160 at Rule 7.05(3).
[166] *Rules of Civil Procedure, supra* note 160 *at* 7.05(2).
[167] *Brown v. AGF Trust* (11 September 2001), Court File No. 01-CV-216716 (Ont. S.C.J.).
[168] The name of the tribunal (pursuant to the *Tenant Protection Act*, 1997) that predated the Landlord Tenant Board.
[169] *Rules of the Small Claims Court*, O. Reg 258/98.

IX: Rules of Professional Conduct

There are ethical issues that arise in respect of capacity issues. The Law Society of Upper Canada's *Rules of Professional Conduct* extend not only to court proceedings, but also to administrative tribunal proceedings.[170]

Rule 2.02(6) of the *Rules of Professional Conduct* provides that where a client has a capacity issue, the lawyer should try to maintain a "normal lawyer and client relationship". The Rule's commentary continues on to outline various factors that influence the client's ability to make decisions about his or her legal affairs. It prescribes that if a lawyer feels as though the client no longer has the capacity to manage her or his legal affairs, the lawyer may need to take steps to have a representative appointed, for example, a litigation guardian, or to obtain the assistance of the Office of the Public Guardian 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**.

Rule 4.01 provides that 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."[171] The commentary to the Rule sets out that the "lawyer has a duty to the client to raise fearlessly every issues, advance every argument and ask every question, however distasteful, which the lawyer thinks will help the clients case". Marshall Swadron comments on the obligations attached to Rule 4.01(1) of the *Rules of Professional Conduct*.[172]

> Effective advocacy is not accomplished by half measures. Procedural arguments that may further a client's interests can not be waived. …Advocacy extends beyond the hearing to obtaining the decision and reasons, explaining these to the client and advising him or her of the applicable rights of appeal.

The Law Society's *Rules of Professional Conduct* state that lawyers have a special responsibility to respect human rights laws.[173]

The Law Society of Upper Canada has the authority to deal with complaints against lawyers and licensed paralegals, pursuant to the *Law Society Act*.[174] In particular, the LSUC is empowered to deal with complaints of discriminatory behaviour, including refusal to accommodate a client's disability related needs. The complaint form provides that if someone is filing the complaint on behalf of another person, an authorization form

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[170] Gavin McKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline* (Toronto: Carswell, 2001) at 2.12.
[171] *Rules of Professional Conduct, supra* note 153 at Rule 4.01.
[172] *Swadron, supra* note 84.
[173] *Rules of Professional Conduct, supra* note 153 at Rule 5.04.
[174] See generally *Law Society Act,*. R.S.O. 1990, c. L.8.

is required.[175] Signed authorization is required in order to proceed with the complaint. If the person filing the complaint holds a power of attorney, he is directed to attach it to the Complaint Form.

Similarly, the Law Society of Upper Canada's *Paralegal Rules of Conduct* govern the ethical practice of paralegals. In particular, Rule 3.02(7) provides that if a client's ability to make decisions is impaired because of disability, the paralegal shall maintain a normal professional relationship as far as possible. Rule 3.02(8) also provides:

> 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 paralegal shall take such steps as are appropriate to have a lawfully authorized representative appointed.[176]

X: Statutory Powers Procedure Act

The *Statutory Powers Procedure Act* (SPPA) has no specific provisions regarding the appointment of *amici* or litigation guardians. Legislation and rules relevant to particular tribunals are largely silent.

The SPPA applies to the process of and the decisions made by many administrative boards and tribunals in Ontario.[177] The *Statutory Powers Procedure Act* does not apply with respect to decisions and proceedings of the Workplace Safety and Insurance Appeals Tribunal (WSIAT) [178] or the Immigration and Refugee Board (IRB) and other tribunals.

The SPPA addresses the importance of representation before tribunals. Section 10 provides that "…a party to a proceeding may be represented by a representative".[179]

The SPPA provides direction about the prevention of abuse of power. Section 23(1) grants a tribunal the ability to make orders or directions as it considers proper to prevent abuses of power. If a party is unable to understand the administrative hearing or does not have the ability to state his or her case, it is clearly unfair to the point that it is "contrary to the interests of justice".

Section 25.0.1 provides that a tribunal have the power to determine its own procedures and practices in a particular hearing.

Section 25.1(1) provides that tribunals have the authority to issue r**ules of practice**. A tribunal may "make rules governing the practice and procedure before it" and also

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[175] The authorization form is available at <http://www.lsuc.on.ca/media/complaint_authorization.pdf>.
[176] Law Society of Upper Canada, *Paralegal Rules of Conduct* (Toronto: LSUC, 2007), online: LSUC < http://www.lsuc.on.ca/paralegals/a/paralegal-rules-of-conduct/ >
[177] *Statutory Powers Procedure Act,* R.S.O. 1990, c. S.22. at section 3(1).
[178] *WSIA, supra* note 48 at s.131(3).
[179] *SPPA, supra* note 177 at s. 10 [emphasis added].

stipulates that when a tribunal does so, it must make those rules available to the public.[180]

XI: Guardianship under the Substitute Decisions Act

This section focuses on guardianship options in the case of a person who has been determined to be incapable to manage property. This section does not focus on guardian options in the case of determinations of incapacity to manage personal care. The issues are slightly different in respect of determinations of incapacity to making personal care decisions.

If a person is incapable of making property decisions, there are three possible ways for a decision-maker to be appointed: (i) a continuing power of attorney, (ii) a statutory guardianship or (iii) a court appointed guardianship.

A continuing power of attorney is a written authorization in which a person specifies the decision-maker of her choice. The power of attorney must be made before the person becomes incapable. No additional procedures are necessary to activate the power of attorney unless the individual making the document provides them in the power of attorney.

A statutory guardianship may be appointed where the person has not made a continuing power of attorney for all of her property and is assessed as incapable. Assessments of incapacity may only be made by qualified assessors. Capacity assessors charge fees for the assessments that they undertake. These fees range anywhere from $300 to fairly substantial sums. The person requesting the assessment is usually responsible for the payment for the assessment.[181]

The statutory guardian of property will be the Public Guardian and Trustee unless a family member or other authorized person applies to the Public Guardian and Trustee to assume this role. Although the Public Guardian and Trustee aims to have it done in 30 days[182], the appointment usually takes about 2 to 3 months. The fee for the application to replace the PGT as statutory guardian are payable by the applicant. The fee is currently $401.10 including GST.[183]

A court may appoint a guardian of property. The *Substitute Decisions Act* describes the material that must be submitted to the court. It also specifies who may be appointed and under what circumstances. For instance, the court appointment applies where the

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[180] *SPPA, supra* note 177 at section 25.1.
[181] There is also a Financial Assistance Program to cover the costs of an assessment. These fees are not covered by provincial health insurance. See generally, <http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacityoffice.asp#12>.
[182] See generally, <http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/propguard.asp>.
[183] See generally, <http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/fees/section-a.asp>.

allegedly incapable person refuses assessment.[184] The amount of time that it takes for a court to appoint a court appointed guardian of property varies.

Section 22(3) b of the *SDA* provides that a court *shall not* appoint a guardian of property if there is an alternative course of action that: "is less restrictive of the person's decision-making rights than the appointment of a guardian." [185] **It is not clear how Section 22(3) would operate if there was a process that allowed an administrative tribunal to appoint a *de facto* litigation guardian limited to the tribunal proceeding.**

XII. Payment into Court

Section 36(6) of the *Trustee Act* requires that money owed to a mentally incapable person be paid into court.[186] An affidavit should accompany the payment, and include details of the entitlement, the incapable person's date of birth, and postal address. The affidavit should also set out whether there is a guardian of the property for the incapable person, or whether a power of attorney has been granted by the incapable person.

The *Trustee Act* does not explicitly provide that it applies where an incapable person is awarded payment in resolution of a case before an administrative tribunal.

[184] *Substitute Decisions Act, supra* note 25. Section 24(1) of the SDA provides that a provider of health care or other supports or services can not be appointed as a court appointed guardian, except in limited situations.
[185] *Substitute Decisions Act, supra* note 25 at s. 22(3).
[186] *Trustee Act*, RSO 1990, c. T.23 at s. 36(6).

CHAPTER FIVE: REFORM PROPOSALS

Tribunals must ensure that appropriate and fair decision-making processes are in place for people who have been determined to be incapable of making specific decisions.

People with disabilities experience a broad range of barriers which limit their access to tribunals, it must be recognised however, that there are also a broad range of solutions for addressing such barriers. Often these are neither complicated nor expensive to implement. The principles of respecting the individual's autonomy as much as possible, as well as the balance of fairness and efficiency should guide the process of arriving at a solution.

When tribunal adjudicators are faced with a party with capacity issues, they tend to deal with issues that arise on an *ad-hoc* basis. Uncertainty continues, and barriers persist. It is imperative that tribunals, adjudicators, clinics, lawyers and policy makers work towards developing comprehensive and clear approaches. In the absence of these, parties with capacity issues are prevented from advancing their legal rights in the same manner as others.

I: The Importance of Consultation

The search for better approaches must include further consultation with the disability community. The proposals herein are a starting point for further, necessary, consultation.

In the development of change strategies, each tribunal must seek input from its community. The approach should be tailored to the interests and disability-related needs of persons who appear before the tribunal.

II: Balancing Fairness, Expense and Efficiency

Administrative processes must be efficient. Administrative tribunals address issues that pertain to basic needs, such as housing and social assistance, and thus must be resolved very quickly.

Administrative processes must be fair. Fair policies and procedures ensure finality. An order resulting from a proceeding where the party does not have capacity may be determined to be without legal effect. For instance, in *Duong v. Ratia* an application for eviction to the Ontario Rental Housing Tribunal (ORHT) named the two minor children of the tenant as respondents. The Divisional Court found that the OHRT orders were unenforceable, as the landlord had failed to obtain the required order for their representation necessary in any proceeding against a minor. [187]

Reform to administrative processes will cost less in the long run. Tribunal administrators may balk at the expense of reforms. In the long run however, reforms to the manner in which tribunals appoint substitute decision makers would cost less than if the parties

[187] *Duong v. Ratia and Vuuguyeu,* [2002] OJ No. 1758 (Div Ct.).

were required to go through civil procedures to appoint a litigation guardian. Reforms to the tribunal process would be more efficient, and would also serve to ensure administrative fairness. Without reform, cases that involve parties with capacity issues before administrative tribunals are likely to become bogged down in arguments about proper process and thus be unfairly delayed.

There is danger in overemphasizing the importance of efficiency. The pursuit of efficiency must not erode the fairness of the proceeding. Reforms must carefully balance efficiency and fairness.

III: The Importance of a Continuum Approach

The law reform proposals included here are premised on the principle that the least restrictive forms of accommodation must be applied first.

It often happens that when a person is believed to be mentally incapable, there is the search for a quick fix. This may involve searching for a substitute decision maker or a lawyer, and if available, duty counsel. The search for an outsider to solve the problem may be necessary but should not be the starting point.

There are situations where a person who appears to be incapable of making decisions may be able to effectively participate in a proceeding where appropriate accommodations are made and assistance is provided. In this way, he makes her own decisions regarding the proceeding. Such accommodations reveal the extent of the party's capacity. Nevertheless, there are some marginalized persons that will require substitute decision makers.

A variety of strategies are offered here. This reflects the fact that people experience a broad range of capacity issues, in a variety of administrative contexts. One approach might work for some persons but not others. Whatever solution is arrived at, it must be guided by the principles of respecting the individual's autonomy as much as possible, as well as balancing the interests of fairness and efficiency.

In short, tribunals should accommodate first, and appoint later.

IV: Accommodations that Permit Persons with Capacity Issues to Exercise their Capacity

There are situations where a person who appears to be incapable may in fact be capable to participate effectively where appropriate accommodations are made by the Tribunal. If assistance is required to exercise capacity, then such assistance should be facilitated by the Tribunal. Adequate accommodations will reduce the number of litigants who have difficulty participating in tribunal proceedings or are thought to be incapable to do so.

Examples of accommodations should be provided to the party, who should choose what suits their needs best.

Parties – and counsel, if they are represented - should consider making requests for accommodation ahead of the hearing. Nevertheless, parties must be able to request accommodation on the day of the hearing, as the need for accommodation may not be clear until the hearing starts.

Tribunals should be sensitive to the fact that some parties with capacity issues may be unable or unwilling to request accommodation. Accommodation must be respectful of need for confidentiality and privacy. The accommodation needs of a party should not be disclosed until that person consents to it.

Placing the onus on the parties to request accommodation can be inappropriate, especially where the party is not aware of her right to accommodation. In that way, tribunal members should do their best to anticipate accommodation needs.

Included here are examples of kinds of accommodations that a person with a capacity issue may request. Because abilities and functional limitations are individualized so too must be approaches to accommodation; there is no single formula. In other words, the essence of accommodation is individualization.[188] These accommodations should be available at all stages, not just the hearing.

Before the Hearing:

- Tribunals should provide correspondence, including forms, in alternate formats and languages.
- Tribunals should provide assistance to complete forms, and publicize the availability of that assistance.
- The use of "clear language" in all communications (including the website) is vital.
- Tribunal correspondence should use underlines and bold headlines.
- Tribunals should be lenient with respect to technical errors in filling out forms, and meeting appeal timelines.
- Parties should be informed about the availability of accommodations in advance of the hearing. Correspondence, including Notices of Hearing, should provide information about accommodations, including how to request them and examples.
- Tribunals should encourage parties to make requests for accommodation ahead of the hearing, although parties must be able to request accommodation on the day of the hearing. The need for accommodation may not be clear until the hearing starts.
- The tribunal should take into account party's need for a slower pace when scheduling hearings.
- Hearings should also be scheduled in a way that takes into account issues that affect users of specialized transit. Early morning hearings or block hearings may be particularly difficult for users of specialized transit.

[188] Ontario Human Rights Commission, *Policy and Guidelines on Disability and the Duty to Accommodate* (Toronto: Queen's Printer, 23 November 2000), online: OHRC <www.ohrc.on.ca> at 13.

During the Hearing:

- The tribunal may permit a party to bring a support person to the hearing.
- The hearing should be held in a comfortable environment, such as a community centre.
- Tribunal members should start the hearing with an announcement that parties could ask for accommodation, describe "accommodation" and give examples. This serves to create an accessible environment and puts the parties at ease.
- Tribunal members should use "clear language" throughout the hearing.
- A party should be permitted to change positions in the hearing room.
- A party should be allowed to sit or stand, as suits their needs.
- Tribunal members should schedule breaks as needed, rather than wait for requests from a party.
- Parties and tribunal members should repeat questions or instructions as required.
- A party with a capacity issue should be permitted to redo examinations or cross-examinations, especially where he or she is not represented.
- Hearings may be held over the phone if it suits the party's disability-related needs.
- A party may require that the lights be dimmed in the hearing room.
- A party may require that white noise or distracting noises be eliminated.
- Adjournments should be permitted where required, even at the last minute.

After the Hearing:

- Parties should be notified in clear language of their appeal rights.
- Parties should be able to commence appeals in person, without having to use overly legalistic means.

V: The Development of Self-Advocacy Resources

Access to justice does not exclusively depend on access to lawyers. The development of self-help support networks and resources play an important role in the access to administrative justice. The development of self help resources is an empowering solution, and has impacts far beyond the tribunal hearing itself. It provides a sense of mastery.

In 2007, the Council of Canadian Administrative Tribunals published "Administrative Tribunals in Canada: Plain-Language Guide for People with Low Literacy Skills."[189] This guide is written for people who read at a grade 4 level. It is generally applicable throughout Canada. The guide includes detail about the role of administrative tribunals, the rules of evidence, and the obligations of parties.

[189] Council of Canadian Administrative Tribunals, "Administrative Tribunals in Canada: Plain-Language Guide for People with Low Literary Skills" online: CCAT, <http://www.ccat-ctac.org/en/pdfs/literacy/SimpifiedGuideEngABT.pdf >.

ARCH hopes to develop a program for public legal education for parties before administrative tribunals. A clear language guide will be developed that includes a list of resources. It will also include a clear language guide about where to find a lawyer, how to work with their lawyer and how to complain about a lawyer to the Law Society of Upper Canada. The project may build on and expand ARCH's relationships with disability organizations.

VI: Access to Effective Counsel

The availability of adequate legal representation is an important concern for all parties, but especially those with capacity issues. As tribunal processes become more legalistic, it is increasingly important that parties are represented by effective and well-trained counsel.

In the criminal justice sphere, a right to state-funded legal representation has been long recognized. In *New Brunswick (Minister of Health and Community Services) v. G. (J.),* the Supreme Court of Canada affirmed that the constitutional right to legal assistance extends beyond criminal justice settings.[190] While the principle in *G.(J.)* has application in the context of administrative tribunals[191], the reach of constitutionally mandated legal aid may be modest. Provincial legal aid statutes fund legal representation before some administrative tribunals, where the party meets strict financial criteria.

i) Role of a lawyer who represents a person with a capacity issue

Lawyers who represent persons with capacity issues are personally responsible for educating themselves about their professional responsibilities with regard to taking instructions from clients with capacity issues. Where a client has difficulty making decisions, the lawyer should maintain a normal lawyer and client relationship, as far as reasonably possible.[192] Lawyers have a special responsibility to enforce human rights.[193] Even where a substitute decision maker must be appointed, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned.[194]

The role of a substitute decision maker is distinct from the role of counsel. A substitute decision maker makes decisions on behalf of someone who is incapable. A lawyer provides legal representation and advice and takes instructions from the client, or the substitute decision maker. **The lawyer must not become a substitute decision maker for the client in the litigation.** These are two distinct roles and, in fact, the *Rules of Civil Procedure* requires that litigation guardians must obtain and instruct a lawyer. [195]

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[190] *New Brunswick (Minister of Health and Community Services) v. G. (J.),* [1999] 3 S.C.R. 46.
[191] *Christie v. British Columbia* (Attorney General), [2007] 1 S.C.R. 873.
[192] *Rules of Professional Conduct, supra* note 153 at Rule 2.06.
[193] *Rules of Professional Conduct, supra* note 153 at Rule 5.04.
[194] *Rules of Professional Conduct, supra* note 153 at Rule 4.01.
[195] *Rules of Civil Procedure, supra* note 160 at 7.05(3).

Some tribunals have the authority to order counsel where it is suspected that the party would be determined not to have litigation capacity. This is a difficult position for counsel, and requires extra vigilance. If the party does not have litigation capacity, then she or he may not have the capacity to instruct counsel. For instance, Section 81 of the *Health Care Consent Act* provides that the Consent and Capacity Board (CCB) can order the appointment of counsel, and that the party is deemed to have capacity to instruct that counsel.[196] Section 3 of the *Substitute Decisions Act* has similar provisions.

In *Banton v Banton*, Justice Cullity considered the representation of a person whose capacity was implicated, but where the Ontario Public Guardian and Trustee (PGT) was ordered to arrange for counsel.

> 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 her or her best interests and counsel's duty to the Court.[197]

ii) Accommodations before determining capacity to instruct

Lawyers and law firms are legally obliged to ensure that services are offered in way that is accessible, up to a point of undue hardship.[198]

Persons with capacity issues may have difficulty communicating with their lawyers – this does not mean that they are incapable of bringing or conducting legal proceedings or of instructing counsel. The formality of the relationship may make a client nervous, and interfere with her or his ability to understand and appreciate the nature of the tribunal proceeding.

Lawyers must consider making accommodations to the way they communicate with a client. Accommodations must be tailored to meet the particular disability-related needs of the client; there is no single formula. [199] Examples of accommodations should be

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[196] *Health Care Consent Act, supra* note 27 at s. 81.
[197] *Banton v Banton* (1998) 164 DLR (4th) 176 at para 91.
[198] "Providing Legal Services to Persons with Disabilities", *supra* note 4 at 14.
[199] *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 S.C.R. 504 at para. 81. In *Martin*, the Supreme Court of Canada confirmed the need to take an individualized approach to the accommodation of persons with disabilities.

provided to the party, who should choose what suits their needs best. Examples of accommodations include:

- Meeting in a comfortable environment may allow the client to exercise her capacity.
- A lawyer should use clear language when explaining technical matters, in order that the client is encouraged to make their own informed choices.
- The client may reveal her or his true capacity if meetings with the lawyer are conducted in an informal setting.
- A lawyer should explain in clear language the client's appeal rights after the tribunal hearing.
- The client should be offered enough time to consider her or his options.

The duty to accommodate extends throughout the retainer.

iii) Capacity to instruct

Counsel must be confident in their client's capacity to give instructions. The LSUC's *Rules of Professional Conduct* as well as the common law require that clients have legal capacity to instruct.[200] Nevertheless, the question of capacity to instruct seldom arises even when one practices disability law.[201] When the capacity of a client does arise, it is of immediate and practical importance.

There are no definitive tools available to provide counsel with support to make decisions about capacity to instruct. Capacity assessments are not an exact science.[202] The test for instructional capacity does not rely on the result of psychological tools, such as the Mini-Mental State Examination (MMSE). ARCH has heard reports of lawyers administering short forms of the MMSE before drafting a retainer, or consenting to represent a potential client. Legal capacity is a legal determination, not a clinical assessment.[203]

Counsel must be cautious about making informal assessments about their clients' capacity to instruct. An investigation into the capacity of a client can not be done unless the lawyer meets with the client in person. While there may be cases where it might not be possible to do so, the lawyer should communicate directly with the client in order to make an informed preliminary judgement of the client's capacity to instruct.

Where a substitute decision maker is involved, the person on whose behalf the case is pursued must continue to be consulted. Especially in the case of episodic disabilities,

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[200] *Rules of Professional Conduct, supra* note 153 at Rule 2.02(6).
[201] Gordon, *supra* note 18
[202] *Knox v. Burton ,* (2004) 6 E.T.R. (3d) 285 (Sup. Ct.) aff'd (2005), 14 E.T.R. (3d). 27 (Ont. C.A.) at 290.
[203] Wahl, *supra* note 13 at page 5.

the determination of a client's capacity may change through the course of the hearing. A client's ability to make decisions may change, for better or worse, over time.

The degree of capacity required in each case will vary, and depends on the subject-matter of the retainer. [204] The level of understanding and appreciation that is needed to retain and instruct counsel depends on the context. Accordingly, it is possible that the same client will have capacity in respect of one set of tribunal proceedings, but not in respect of another.

Poor judgment or acting against lawyers' recommendations is not the same as incapacity. While a lawyer may disagree with a client's instructions, this does amount to a determination of incapacity to instruct.[205] It should not be assumed that the question of capacity arises simply because the client requires assistance from friends or family in order to make decisions in respect of the particular case in question.

It is up to the lawyer to make this determination. It is not appropriate for tribunals to inquire into the nature of the relationship between party and counsel.

VII: Accessibility Office at all Provincial Tribunals

The province should establish an Accessibility Office to serve all provincial tribunals and parties before them. The Office would act as a point for persons with capacity issues to seek advice or assistance. Tribunals would be able to access the specialized expertise of the Office, and develop consistent solutions to the barriers experienced by parties with capacity issues. It would not apply in the case of federal tribunals such as the Immigration and Refugee Board.

The Accessibility Office would be responsible for the following:

- the provision of clear language rights advice for parties before the tribunal.
- assist in the preparation of forms.
- accept requests for accommodations at the hearings.
- publicize the types of accommodations that are available at tribunals.
- maintain a roster of counsel or paralegals available to act as *amicus curiae*.
- provide support to tribunals, and provide training for tribunal members about conducting barrier-free hearings.
- establish a process for parties to provide feedback on the tribunal's policy and practice with respect to accommodation.
- monitor or track requests for accommodation.

[204] Webb and Rosenbaum, *supra* note 20 at 14.
[205] Gordon, *supra* note 18 at 5.

- maintaining a list of interveners or interpreters, available on a short notice, who are recommended by the community.

All correspondence, not just correspondence to persons already identified as having a disability, from the tribunal must identify the availability and contact information of the Accessibility Office. The Office's resources would be available in a variety of accessible formats, including clear language

Staff of the Accessibility Office should receive comprehensive training on accommodating a full range of disabilities. They should be educated about the definition of a disability and the identification of barriers. Additionally, each designated person should be trained in the application of the *Charter*, the Ontario *Human Rights Code* and the *Accessibility for Ontarians with Disabilities Act, 2005.* Persons with disabilities should participate in that training. Accessibility Office staff do not need to be lawyers, but they should be trained on these *particular* legal issues.

VIII: Selection of Tribunal Members

ARCH relies on the recommendations set out by the Administrative Justice Working Group in its final report, "Recommendations to Improve the Appointments Process for Ontario Adjudicative Tribunals". [206]
The proposals that follow build on those recommendations, and focus on the access to administrative justice for persons with disabilities. These recommendations improve the quality of adjudication provided to Ontarians by administrative tribunals. Enhancing the way that tribunal members are appointed has a long lasting impact beyond the individual hearing. It is important not just for persons with disabilities, but for other marginalized communities who appear before tribunals.

Prospective tribunal appointees should be required to participate in a competitive recruitment process. Section 32(3) of the Ontario Human Rights Code provides that the criteria for selecting Tribunal members should include the following:

> 1. Experience, knowledge or training with respect to human rights law and issues.
>
> 2. Aptitude for impartial adjudication.
>
> 3. Aptitude for applying the alternative adjudicative practices and procedures that may be set out in the Tribunal rules.[207]

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[206] Administrative Justice Working Group, *Recommendations to Improve the Appointments Process for Ontario Adjudicative Tribunals* (April 16, 2004), online: <http://www.law-lib.utoronto.ca/Conferences/Administrative_Justice_Bibliography/AJWG_Proposal_for_new_appointments_regime_Apri_16.doc>.
[207] *Code*, *supra* note 5 at s. 32(3).

ARCH recommends the inclusion of similar criteria for the appointment of members of other tribunals, provincially and federally. This ensures that potential tribunal members are qualified, and are not appointed as a result of patronage.

The Public Appointments Committee should seek out prospective appointees with disabilities. The recruitment process must be accessible and free from barriers for persons with disabilities. This can not amount to tokenism.

ARCH also advocates the establishment of an advisory committee to the Public Appointments Secretariat with representatives from the disability community. Persons with disabilities should have an effective voice on the committee.

Tribunal members must ensure that the tribunal is run in a barrier-free, efficient and fair manner, with regard to their obligations pursuant to the *Charter*, *Code* and the *AODA*. Tribunal members should be trained on accommodations for common disability related needs. Persons with disabilities should direct this training. This training may be coordinated by the Society for Ontario Adjudicators and Regulators (SOAR).

IX: The Use of Continuing Powers of Attorney for the Limited Purposes of Litigation

A lawyer representing a person with capacity issues may consider creating a limited continuing power of attorney. The power of attorney would give authority to initiate an application and to instruct counsel in the tribunal matter. It would be clearly limited to the specific proceeding.
A continuing power of attorney is a legal document in which a person is named to make decisions about money and other assets on another's behalf. A person may create a continuing power of attorney if he or she is at least 18 and capable to do so.

A power of attorney is a flexible instrument, and can include a variety of types of provisions:

- It may include a provision that the attorney be represented by counsel at the tribunal.
- The power of attorney may also include the donor's instructions to the attorney about the tribunal matter.
- The power of attorney can have **immediate** or **delayed** effect. If the power of attorney provides for delayed effect, it can set out precisely who and how the donor will be found to be incapable.
- The power of attorney may include details about the periodic reassessment of capacity during the hearing.

The donor has to agree and have capacity to give a power of attorney. This strategy is appropriate for persons with episodic disabilities, including mental health issues. The power of attorney must be made before the donor becomes incapable. A power of attorney is not available to persons who do not have capacity to give a power of attorney.

Generally, the capacity to manage property is most closely related to the litigation capacity of a party before an administrative tribunal. Even though the substance of an administrative tribunal is not strictly financial, it would fall under the more general authority given by a power of attorney for property rather than the statute-limited authority of a power of attorney for personal care.

- Section 2 of the *Powers of Attorney Act*, provides that a general power of attorney for property "is sufficient authority for the donee of the power . . . to do on behalf of the donor anything that the donor can lawfully do by an attorney".[208] This would include instructing counsel in an administrative proceeding.
- On the other hand, under s. 46 of the *Substitute Decisions Act*, an attorney for personal care is only authorized "to make, on the grantor's behalf, decisions concerning the grantor's personal care."

Because a power of attorney is based on the capable wishes of the donor, it is more respectful than solutions that require a substitute decision maker. Where the donor is capable to do so, she or he may revoke the power of attorney at any time.

This strategy may be useful where there is no process available at the tribunal that addresses the issues that arise when a party is determined to be incapable. For instance, the Human Rights Tribunal of Ontario allows Section 34(1) applications from a person who has a continuing power of attorney.[209]

Even where there the party has given a power of attorney, the Tribunal and the lawyer must first satisfy their duty to accommodate the party with a capacity issue. In particular:

- Tribunal members may be tempted to deal with the attorney, rather than going through the process of accommodating the person with a capacity issue.
- The lawyer must take instructions from the person with a capacity issue until the power of attorney enters into the effect.

X: Appointment of Amicus Curiae for an Unrepresented Party

If a party is unrepresented or refuses a counsel in a tribunal matter, the tribunal can appoint *amicus curiae*. *Amicus curiae* assist the unrepresented person by clarifying information and providing information about the tribunal process. Amicus assists the tribunal by presenting arguments or advising the tribunal of relevant legal principles that may strengthen the party's case.

Amicus does not take instructions from the party. The amicus does not represent the party, but advances the interests of the party. The Ontario Court of Appeal in *R v.*

[208] *Powers of Attorney Act* R.S.O. 1990, c. P.20, s. 2 [emphasis added].
[209] *HRTO Practice Direction*, *supra* note 61.

Lepage, found that the role of the amicus is "…to act for the accused."[210] An amicus should be distinguished from an "intervener", the latter having an interest in the proceedings, and the former being disinterested and merely a friend of the Court.

The Accessibility Office should keep a roster of counsel prepared to act as amicus. The Office would provide the party the prospective amicus' name and contact information. The amicus should be appointed only on the consent of the party with a capacity issue. Tribunal should avoid the appointment where the party with a capacity issue refuses the participation of amicus.

The level of the amicus' involvement would depend on the needs of the party. The process should be flexible. The role of amicus should be least intrusive, and suited the party's accommodation needs. Where appropriate, the amicus should be permitted to examine witnesses, make closing arguments and provide written submissions. In some circumstances, the amicus would act like a duty counsel. It would be up the tribunal to determine what level of involvement suits the party's disability related needs, and would be most helpful to the tribunal.

There are no express provisions of authority of tribunal to appoint amicus in the SPPA or in the governing legislation of administrative tribunals examined here. However, the WSIAT has hired an amicus in the case of a person who was not capable of presenting his case, but refused counsel. [211]

In addition, the Financial Services Commission of Ontario appointed amicus at an arbitration hearing. In *Wilson*, the arbitrator found:

> Given the complexity of this matter, the expressed desire, and indeed the absolute right of Mrs. Wilson to not retain counsel, I accept that it is both necessary to protect the rights of the parties to a fair process and useful to the efficient proceeding of this matter to appoint an *amicus curiae*. [212]

In *Re: A.M.,* the Consent and Capacity Board recognized counsel as "friend of the Board" where all the parties at the hearing consented.[213]

In *R.* v. *Starson*, the Court of Appeal sanctioned counsel's role as amicus curiae before the Ontario Review Board. The Court commented on issues of procedural fairness raised by the appointment of amicus:

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[210] L*ePage v. Ontario* (2006), 214 C.C.C. (3d) 105 at para 29. In *Lepage*, the Court of Appeal found that the Ontario Review Board could have appointed amicus, where the appellant persistently refused to participate in the hearing.
[211] *Decision 325 - 95I, supra* note 53.
[212] *Wilson, supra* note 76.
[213] *A.M. (Re),* 2004 CanLII 6726 (ON C.C.B.), online: CanLii, <http://www.canlii.org/en/on/onccb/doc/2004/2004canlii6726/2004canlii6726.html>.

> …[Counsel] raised the question of the Board's power to appoint amicus curiae. She also submitted that the appointment of amicus contributed to an unfair proceeding. I do not intend to address the first question; the issue was not raised by the appellant in this court, and the Board adopted the procedure it did with the consent of all parties and in an effort to ensure that the appellant had a fair hearing while respecting his wishes to represent himself. More importantly, I am satisfied that the appellant did have a fair hearing and that the appellant's rights were not impaired because of the presence and intervention of amicus before the Board. [214]

In 2001, the Court of Appeal established an amicus program for persons who were appealing decisions from the Ontario Review Board (ORB). The Psychiatric Patients Advocacy Office (PPAO) has called for the establishment of an amicus program for appeals from CCB at the Superior Court. For appeals from decisions of the Ontario Review Board at the Court of Appeal, the Ministry of the Attorney General pays the fees of the amicus. [215]

The appointment of amicus by administrative tribunals is valuable in a number of ways:

- A lawyer has a professional responsibility to ensure that a client's interests are not abandoned after the client refuses the lawyer's representation.[216]
- The appointment of amicus can safeguard against abuse of process that may arise where the party is unrepresented.
- The appointment of amicus does not require that a party accept counsel, if they refuse it. It is more empowering than ordering counsel.

On the other hand, the appointment of amicus by the tribunal is subject to the following limitations:

- The appointment of amicus only applies where the party is unrepresented or refuses counsel.
- It is unclear how an amicus would work with duty counsel at tribunal, such as Landlord Tenant Board.
- The appointment of amicus only applies where the administrative process is already underway. It is unclear how it would address barriers in the context of an

[214] *R v. Starson* (2004), 183 C.C.C. (3d) 538, online: CanLii, <http://www.canlii.org/en/on/onca/doc/2004/2004canlii17501/2004canlii17501.html>.
[215] Psychiatric Patient Advocacy Office, "Amicus Curiae Counsel at Court of Appeal Hearings from the Ontario Review Board "(January 2009), online: PPAO < http://www.ppao.gov.on.ca/inf-ami.html>.
[216] *Rules of Professional Conduct, supra* note 153 at Rule 2.01.

originating process, such as an initiation of a complaint or an application to the tribunal.

- The tribunal must ensure that it does rely on the amicus' submissions to the exclusion of the party's submissions.

XI: The Appointment of a "Limited" Litigation Guardian by the Tribunal

Before options that include substitute decision making are considered, the Tribunal as well as counsel for a party with capacity issues should explore accommodations that allow the party to understand and appreciate the proceeding.

In exceptional cases, the only adequate opportunity for an incapable party to be heard is through a litigation guardian. This Report emphasizes that the appointment of a litigation guardian should be a last resort. It should not be used where a person is likely to be later determined to be capable.

The appointment of a litigation guardian ensures that the lawyer is receiving instructions from someone who understands and appreciates the legal process. Counsel would receive instructions from the litigation guardian. The litigation guardian represents the party's interests. A very high degree of professionalism is required in these cases, especially where it is possible that the client's wishes are in conflict with her or her best interests (as determined by the litigation guardian). The appointment of a litigation guardian relies on the vigilance of counsel.

There is no process for the appointment of litigation guardians at most tribunals. However, Financial Services Commission of Ontario's *Dispute Resolutions Practice Code* allows for the appointment of representatives.[217] In addition, the *Immigration and Refugee Protection Act* allows for the appointment of "designated representatives".[218]

The following general principles should guide the development of a process for prospective litigation guardians to apply to the tribunal to act for the limited purposes of the hearing. These principles provide safeguards to ensure the rights of the party with capacity issues.

The prospective "limited litigation guardian" would sign an affidavit, executed by independent counsel.

- In the affidavit, the prospective "limited litigation guardian" would set out that there are no conflicts of interest, and that she or he is not a service provider or a landlord.
- The affidavit should provide that the prospective litigation guardian has received legal advice from independent counsel.

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[217] *Dispute Resolution Practice Code*, *supra* note 67 at Rule 10.
[218] *IRPA, supra* note 87 at s. 167.

- The affidavit should provide that the prospective litigation guardian understands that she or he shall diligently attend to the interests of the party with capacity issues.

The litigation guardian **must be represented by counsel** during the tribunal process. If the litigation guardian can not afford legal fees, the tribunal should arrange for payment of those fees.

Counsel would sign an affidavit, executed by independent counsel.

- The affidavit shall set out that counsel has met with the party with a capacity issue in person.
- The affidavit shall set out that counsel has advised the party about the possible appointment of a litigation guardian, and what that means.
- In the affidavit, counsel shall offer the Tribunal her opinion about the party's capacity to instruct counsel.

The tribunal will receive the affidavit of the prospective limited litigation guardian, and the affidavit of the counsel.

- Upon receipt, the tribunal would conduct a preliminary inquiry, making a determination about the party's ability to participate meaningfully in the process.
- During that preliminary inquiry, the tribunal member should speak directly to the party.
- Given that tribunal processes are summary, the tribunal should adjourn the hearing to conduct a formal investigation of capacity in exceptional cases only.
- Although no formal capacity assessment should be required, the tribunal may consider expert evidence.

The tribunal must approve a settlement reached by the limited litigation guardian.

There must be an opportunity for the party to challenge the appointment of a litigation guardian. She or he must be able to challenge the appointment at any time.

The appointment of "limited litigation guardians" by tribunals is <u>less invasive</u> than having to apply for statutory or court appointed guardianship (pursuant to the *Substitute Decisions Act*) or to apply to court to act as a "litigation guardian" pursuant to Rule 7 of the *Rules of Civil Procedure*. Advantages include:

- The appointment of the litigation guardian is limited to the administrative tribunal hearing. It is in effect <u>only</u> for the duration of the specific litigation. On the other hand, statutory guardianship or court appointed guardian are longer-lasting.

- It is quicker to have the tribunal appoint the litigation guardian. This is an important consideration where basic rights are at stake at the tribunal, which must be resolved quickly.
- It is a simple and flexible process, and can be suited to meet the needs of the party who is subject to the litigation guardianship.
- Rule 7 of the *Rules of Civil Procedure* does not apply in the context of tribunal. A Litigation Guardian appointed by Rule 7 would have no authority before an administrative tribunal.

The tribunal should carefully consider how monetary awards or settlements will be paid to a party with a capacity issue. It is not appropriate for the monies to be paid to the limited litigation guardian, unless she or he also holds a continuing power of attorney or is a statutory or court-appointed guardian of property. Section 36(6) of the *Trustees Act* requires that monies owed to incapable persons be paid into court.

It is not clear what would happen in instances where the party with capacity issues does not have someone to act as a litigation guardian. It is not appropriate to involve the Ontario Public Guardian and Trustee, without careful thought to its unintended consequences. Involvement in the PGT processes may lead to more invasive substitute decision making schemes. In any case, it is not clear whether the PGT would have the authority (or the resources) to get involved in cases before administrative tribunals.

XII: The Jurisdiction of a Tribunal to Appoint a Litigation Guardian or an Amicus

The reform proposals included in this report raise the question of the jurisdiction of tribunals to appoint litigation guardians or *amicus curaie*. This section is not intended to examine the full scope of the case law on these points. It is meant as a starting point only.

i) Is there grant of jurisdiction? Is that grant permissible?

Counsel must first demonstrate that that there is a grant of jurisdiction. A legislative grant of jurisdiction must be "express" when read in context and given its ordinary meaning. [219] In *Chrysler Canada Ltd. v. Canada (Competition Tribunal),* Justice Gonthier found that a verbatim grant of jurisdiction is not required.

> Barring constitutional considerations, if a statue, read in context and given its ordinary meaning**,** clearly confers upon an inferior tribunal a jurisdiction that is enjoyed by the superior court at common law, while not depriving the superior court of its jurisdiction, it should be given effect.[220]

[219] *Chrysler Canada Ltd v. Canada* (1992) 2 SCR 394 at para 11.
[220] *Ibid.* at para 12 [emphasis added].

In addition, a legislative grant of superior court jurisdiction (implied or express) to an inferior tribunal must comply with Section 96 of the *Constitution Act*, 1867.[221] Section 96 case law has primarily been concerned with the federal or provincial governments from setting up "shadow courts". This is drawn from concerns of the "emasculation" of provincial superior courts.

The test for Section 96 is two fold: First, is the grant of jurisdiction permissible? ("*Residential Tenancies"* test). If the jurisdiction *was not exclusive to the superior courts* at confederation, there is no need to go to the second step, and the grant does not violate Section 96.

a. Is it identical or analogous to a power or jurisdiction exercised by superior courts at Confederation? Does the power or jurisdiction still function judicially in its present setting?

b. Is the impugned power or jurisdiction merely subsidiary or ancillary to general administrative function assigned to the tribunal? Or are they necessarily incidental to the achievement of a broader policy goal of the legislature?

Secondly, if the grant of jurisdiction is exclusive, then is the removal of jurisdiction from the superior court permissible? No part of the core jurisdiction of a provincial superior court may be conferred on another court.

ii) Necessity by implied jurisdiction

The doctrine of necessary by implied jurisdiction applies to administrative tribunals, and allows tribunals to extend their jurisdiction beyond the precise words of the enabling statute. The jurisdiction must be found to be required for the effective exercise of a tribunal's mandate. In *ACTO Gas and Pipeline v. Alberta (Energy and Utilities Board*), the Supreme Court enumerated the circumstances when the doctrine of jurisdiction by necessary implication may be applied:

1. [when] the jurisdiction sought is necessary to accomplish the objectives of the legislative scheme and is essential to the Board fulfilling its mandate;
2. [when] the enabling act fails to explicitly grant the power to accomplish the legislative objective;
3. [when] the mandate of the Board is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;
4. [when] the jurisdiction sought must not be one which the Board has dealt with through use of expressly granted powers, thereby showing an absence of necessity; and

[221] *Charter, supra* note 136. Section 96 of the Charter provides, "The Governor General shall appoint the Judges of the Superior, District and County Courts in each Province, except those of the Courts of the Probate in Nova Scotia and New Brunswick."

5. [when] the Legislature did not address its mind to the issue and decide against conferring the power upon the Board.[222]

Ontario v. 974649 Ontario (2001), the Supreme Court commented on the doctrine of "jurisdiction by necessary implication".

> 70 It is well established that a statutory body enjoys not only the powers expressly conferred upon it, but also by implication all powers that are reasonably necessary to accomplish its mandate: *Halsbury's Laws of England* (4th ed. 1995), vol. 44(1), at para. 1335. In other words**,** the powers of a statutory court or tribunal extend beyond the express language of its enabling legislation to the powers necessary to perform its intended functions: *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722.
>
> 71 Consequently, the function of a statutory body is of principal importance in assessing whether it is vested with an implied power to grant the remedy sought. Such implied powers are found only where they are required as a matter of practical necessity for the court or tribunal to accomplish its purpose: *National Energy Board Act (Can.) (Re)*, [1986] 3 F.C. 275 (C.A.). While these powers need not be absolutely necessary for the court or tribunal to realize the objects of its statute, they must be necessary to effectively and efficiently carry out its purpose… [references]…[223]

iii) Jurisdiction of tribunals to appoint amici and litigation guardians

There is no express legislative grant to tribunals that permit the appointment of litigation guardians or *amicus curaie* directly by the Tribunal. The *Statutory Powers Procedure Act* (SPPA) has no specific provisions regarding the appointment of amici or litigation guardians.

Many tribunals have statutory provisions that relate to persons with disabilities. Read in context, this must mean that the tribunals have been granted the jurisdiction to address issues that arise for persons with disabilities. This grant should include the power to appoint of amicus or a litigation guardian.

The Landlord Tenant Board (LTB) enjoys the broad power to determine "all questions of law and fact with respect to all matters within its jurisdiction."[224] Determinations of the capacity of parties are questions of law that arise in tenancy questions. The plain and

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[222] *ACTO Gas and Pipeline v. Alberta (Energy and Utilities Board),* [2006] 1 S.C.R. 140 at para 73.
[223] *Ontario v. 974649 Ontario,* [2001] 3 S.C.R. 575 [emphasis added].
[224] *Residential Tenancies Act, supra* note 29 at 174.

ordinary meaning of "all questions of law" must include those that arise with respect to the capacity of parties before the LTB.

The Human Rights Tribunal of Ontario's *Arzem* decision states that administrative tribunals, unless specifically provided for in their enabling statutes, do not have the jurisdiction to appoint litigation guardians.[225] The adjudicator found that "[t]he Tribunal has neither [inherent *parens patriae* nor statutory jurisdiction]"[226], either of which could give it the power to appoint a litigation guardian. She goes on to explain that, "..as a creature of statute, the Tribunal has no inherent jurisdiction at all. The Tribunal's absolute discretion to control its own process is quite different from inherent jurisdiction"[227]. She relied on *Lang No. 5*, and found that "[b]ased on the state of common law, and absent clear and precise language in the *Code* or the *SPPA*… the Tribunal concludes that it has no jurisdiction to appoint a litigation guardian…"[228]. The *Arzem* decision has limited application as tribunal decisions do not bind other HRTO panels.

The authority to appoint amici or litigation guardians may also be read into the general language of the *SPPA*. Section 23(1) of the *SPPA* grants tribunals the ability to make orders or directions as it considers proper to prevent abuses of power. It is unfair to the point that it is contrary to the interests of justice, if a party is unable to participate in the hearing. Section 25.0.1 provides that a tribunal has the power to determine its own procedures and practices in a particular hearing.

Another approach would be to find authority based on general administrative law principle such as procedural fairness and, specifically, the right to be heard. The *SPPA* should be seen through the lens of *Charter* principles and quasi-constitutional human rights legislation. Tribunals require the jurisdiction to appoint amici or litigation guardian in order to avoid discriminatory results such as the inability of parties with disabilities to have their cases heard.

In either way, a specific grant of legislative (by way of legislative reform) is not necessary to allow for tribunals to appoint amici or litigation guardians.

In the alternative, a tribunal could consider making rules in relation to substitute decision making pursuant to its power to establish rules under the *SPPA* (s. 25.1). These rules should provide a complete scheme for addressing parties who are determined to be incapable.

Much confusion might be eased, however, by amendments to the *SPPA*. An amendment would include specific provisions that address parties who are determined to be incapable of bringing or conducting litigation. This would necessarily require extensive exploration of all of the legal and practical ramifications, and a canvassing of the views of the stakeholders who have expertise in and are affected by the problem.

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[225] *Arzem v. R (Ontario),* 2005 HRTO 11 [April 14, 2005].
[226] *Ibid.* at 229.
[227] *Ibid.* at 230.
[228] *Ibid.* at 236.

OPPORTUNITIES FOR ACTION:

ARCH has developed a practical guide entitled “Addressing the Capacity of Parties before Administrative Tribunals: A Guide for Ontario Advocates”. It offers a variety of practical strategies to assist lawyers who represent parties with capacity issues before administrative tribunals. The *Practical Guide* is companion piece to this more fulsome report.

Both the *Practical Guide* and this report will be disseminated to Ontario and federal tribunals, ARCH’s community partners, community legal clinics, the broader legal professional, and other disability organizations.

ARCH will develop clear language documents for persons with disabilities to advocate for themselves. The document would include information about how to get assistance with tribunal matters, types of questions to ask lawyers and how to complain about lawyers.

ARCH will undertake law reform efforts. In particular, ARCH will engage with tribunals, assisting them to develop processes that are more responsive to the needs of parties with capacity issues.

CONCLUSION:

Personal autonomy and the right to make individual choices – even "bad" ones – are fundamental values. A person's right of self-determination is an important philosophical and legal principle. [229] In fact, the determination of incapacity is a persistent label that has a severe impact on a person's dignity. [230] There must be a move from viewing persons with disabilities as "objects" of charity and social protection towards viewing persons with disabilities as "subjects" who are capable of making decisions for their lives based on their free and informed consent.

But some people, due to disability, lack the ability to make autonomous choices. Substitute decision processes – with adequate safeguards - before administrative tribunals ensure that the process is fair and meaningful. In its absence, parties with capacity issues are prevented from advancing their legal rights in the same manner as others.

Balance must be struck between respecting the autonomy of parties before administrative tribunals, while protecting those who can not make their own decisions.

It is imperative that decision makers, tribunals, clinics, lawyers and policy makers work towards developing comprehensive and clear approaches to the barriers experienced by parties with capacity issues. The more an organization addresses disability as an ordinary circumstance of life the more everyone benefits.

[229] *Calvert, supra* note 9 at para 52.
[230] D.N. Weisstub, *Enquiry on Mental Competency: Final Report* (Toronto: Queen's Printer, 1990).

LEGISLATIVE RESOURCES:

Constitution Act, 1982, s. 96

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

Charter of Rights and Freedoms, 1982, ss. 7 and 15

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

15.(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Statutory Powers Procedure Act, 1990, ss. 2, 4, 9(2), 23(1), 25.0.1 and 25.1

2. This Act, and any rule made by a tribunal under subsection 17.1 (4) or Section 25.1, shall be liberally construed to secure the just, most expeditious and cost-effective determination of every proceeding on its merits.

4.(1) Any procedural requirement of this Act, or of another Act or a regulation that applies to a proceeding, may be waived with the consent of the parties and the tribunal.

4(2) Any provision of a tribunal's rules made under Section 25.1 may be waived in accordance with the rules.

9.(2) A tribunal may make such orders or give such directions at an oral or electronic hearing as it considers necessary for the maintenance of order at the hearing, and, if any person disobeys or fails to comply with any such order or direction, the tribunal or a member thereof may call for the assistance of any peace officer to enforce the order or direction, and every peace officer so called upon shall take such action as is necessary to enforce the order or direction and may use such force as is reasonably required for that purpose.

23.(1) A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.

25.0.1 A tribunal has the power to determine its own procedures and practices and may for that purpose,

(a) make orders with respect to the procedures and practices that apply in any particular proceeding; and

(b) establish rules under Section 25.1.

25.1(1) A tribunal may make rules governing the practice and procedure before it.

25.1(2) The rules may be of general or particular application.

***Health Care Consent Act, 1996,* ss. 4(1) and 81(1)**

4.(1) A person is capable with respect to a treatment, admission to a care facility or a personal assistance service if the person is able to understand the information that is relevant to making a decision about the treatment, admission or personal assistance service, as the case may be, and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

4.(2) A person is presumed to be capable with respect to treatment, admission to a care facility and personal assistance services.

81.(1) If a person who is or may be incapable with respect to a treatment, admission to a care facility or a personal assistance service is a party to a proceeding before the Board and does not have legal representation,

(a) the Board may direct the Public Guardian and Trustee or the Children's Lawyer to arrange for legal representation to be provided for the person; and

(b) the person shall be deemed to have capacity to retain and instruct counsel.

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

***Substitute Decisions Act, 1992,* ss. 3(1), 6 and 45**

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.

6. A person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

45. A person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

***Ontario Works Act, 1997,* s. 17**

17.(1) An administrator may appoint a person to act for a recipient 18 years of age or older if there is no guardian of property or trustee for the recipient and the administrator is satisfied that the recipient is using or is likely to use his or her assistance in a way that is not for the benefit of a member of the benefit unit.

17.(2) An administrator shall appoint a person to act for a recipient who is under the age of 18 years if there is no guardian of property or trustee for the recipient.

17.(3) An administrator may provide assistance for the benefit of a recipient to the recipient's guardian of property or trustee or to a person appointed under subsection (1) or (2).

***Ontario Disability Support Program Act, 1997,* ss. 12(1), 12(3) and 23(1)**

12.(1) The Director may appoint a person to act for a recipient if there is no guardian of property or trustee for the recipient and the Director is satisfied that the recipient is using or is likely to use his or her income support in a way that is not for the benefit of a member of the benefit unit.

12.(3) A person to whom income support is provided under subsection (2) is not entitled to a fee or other compensation or reward or to reimbursement for costs or expenses incurred by acting under this section, except as prescribed.

23.(1) An applicant or recipient may appeal a decision of the Director within the prescribed period after an internal review by filing a notice of appeal that shall include reasons for requesting the appeal

***Residential Tenancies Act, 2006,* ss. 168.2, 176.2, 177, 183, 184(1) and 209(1)**

168.2 The Board has exclusive jurisdiction to determine all applications under this Act and with respect to all matters in which jurisdiction is conferred on it by the Act.

176.2 The Committee shall adopt rules of practice and procedures governing the practice and procedure before the Board under the authority of this section and section 25.1 of the Statutory Powers Procedure Act.

177. The Board shall provide information to landlords and tenants about their rights and obligations under this Act.

183. The Board shall adopt the most expeditious method of determining the questions arising in a proceeding that affords to all persons directly affected by the proceeding an adequate opportunity to know the issues and be heard on the matter.

184.(1) The *Statutory Powers Procedure Act* applies with respect to all proceedings before the Board.

209.(1) Except where this Act provides otherwise, and subject to section 21.2 of the *Statutory Powers Procedure Act*, an order of the Board is final and binding.

209.(2) Without limiting the generality of section 21.2 of the *Statutory Powers Procedure Act*, the Board's power to review a decision or order under that section may be exercised if a party to a proceeding was not reasonably able to participate in the proceeding.

***Landlord Tenant Board, Rules of Practice, 2007,* Rules 1.5, 2.1 and 2.2**

Rule 1.5: A member may waive a Rule where appropriate, provided that the Rule does not have a non-waiver provision. If a Member waives a Rule, the Member shall give reasons for waiving the Rule in the order or decision.

Rule 2.1: Members may exercise any of their powers under these Rules or under the RTA on their own initiative or at the request of a party.

Commentary: If a Rule applies to a case, it need not be raised by a party. The Member may decide on his or her own to apply the Rule.

Rule 2.2: The Member may decide the procedure to be followed for an application and may make specific procedural directions or orders at any time and may impose such conditions as are appropriate and fair.

Commentary: Members should make procedural directions or orders to assist the parties and bring the proceedings to a fair and expeditious conclusion.

***Workplace Safety and Insurance Act, 1997*, s. 131(3)**

131.(3) The *Statutory Powers Procedure Act* does not apply with respect to decisions and proceedings of the Board or the Appeals Tribunal.

***Health Services Appeal and Review Board, Rules of Practice, 2007*, ss. 1.01, 1.02(2), 14.05(1) and 15.07**

Rule 1.01 "applicant" means anyone who has sent notice requesting a hearing before the Board and includes a parent or guardian of a minor.

Rule 1.02 (2) These Rules apply subject to the *Statutory Powers Procedure Act* and any other legislation governing the Board.

Rule 1.02(3) The Board may, at any time, as it deems necessary, dispense with compliance with any Rule, save and except those prescribed as mandatory by the Statutory Powers Procedure Act and any other legislation governing the Board, and may make a procedural ruling to govern the conduct of the proceeding which shall prevail over any provision of these Rules that is inconsistent with the procedural ruling.

Rule 1.02(4) These Rules shall be liberally construed to secure the just, most expeditious and cost-effective determination of every proceeding on its merits.

Rule 14.05(1) A party to a proceeding may be represented by counsel **or an agent**.

Rule 14.05(2) Where an applicant to the Board is a minor, the Board may require that the minor be represented by a parent or legal guardian and that the parent or legal guardian provide the Board with a sworn affidavit declaring his or her relationship to the minor and evidencing that there is no conflict of interest between them.

Rule 14.05(3) If the Board is not satisfied that the minor's interests are adequately protected by the person claiming to represent the minor, the Board may notify the Children's Lawyer and postpone the hearing until the Board is of the opinion that the minor is adequately represented.

Rule 15.07(1) The Board may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.

***Health Professions Appeal and Review Board, Rules of Practice, 2007,* Rules 2.10, 8.1, 8.2 and 8.3**

Rule 2.10 The Board, may, in the interest of justice, dispense with compliance with any of these Rules at any time.

Rule 8.1 The Board may, in its discretion, allow a person who is not a party to a proceeding the opportunity to make oral or written submissions on any party of the proceeding.

Rule 8.2 The Board may, on request of a person or on its own motion, in its discretion allow a person who is not a party to a proceeding the opportunity to participate in the proceeding or any part of it including presenting such evidence, information and. or oral or written submissions as the Board may permit.

Rule 8.3 The Board may do so under the following circumstances:

(2) where is may be in the public interested to have the person participate and the Board believe that doing so would be assistance to the Board.

***Immigration and Refugee Protection Act, 2001,* s. 167(1)**

167.(1) Both a person who is the subject of Board proceedings and the Minister may, at their own expense, be represented by a barrister or solicitor or other counsel.

167.(2) If a person who is the subject of proceedings is under 18 years of age or unable, in the opinion of the applicable Division, to appreciate the nature of the proceedings, the Division shall designate a person to represent the person.

***Ontario Human Rights Code, 1990*, ss. 34(1) and 34(5)**

34.(1) If a person believes that any of his or her rights under Part I have been infringed, the person may apply to the Tribunal for an order under section 45.2,

(a) within one year after the incident to which the application relates; or

(b) if there was a series of incidents, within one year after the last incident in the series. 2006, c. 30, s. 5.

34(5) A person or organization, other than the Commission, may apply on behalf of another person to the Tribunal for an order under section 45.2 if the other person,

(a) would have been entitled to bring an application under subsection (1); and

(b) consents to the application.

Human Rights Tribunal of Ontario – "Practice Direction on Applications to the Human Rights Tribunal of Ontario on Behalf of Another Person under Section 34(1) or 34(5) of the Human Rights Code"

"A person may lack legal capacity to file a human rights application on their own behalf for a number of reasons, including mental incapacity, as defined in the Substitute Decisions Act….

A section 34(1) application may also be filed by a Litigation Guardian or a Substitute Decision-Maker on behalf of a person who lacks legal capacity to apply on their own behalf. A Litigation Guardian must be appointed by the Superior Court of Justice. A Substitute Decision-Maker is someone with a continuing power of attorney, or is a court-appointed or statutory guardian of property under the Substitute Decisions Act.
….

Applications on behalf of another person may be filed under section 34(5) of the Human Rights Code if the other person would be permitted to bring their own Application under the Code and consents to the application.

Where an application is brought on behalf of another person, the Next Friend, Litigation Guardian or Substitute Decision-Maker under section 34(1) or the Applicant under section 34(5) is expected to take the steps required of any Applicant or necessary to the proceeding before the Tribunal."

***Financial Services Commission of Ontario's Dispute Resolution Practice Code, 2003,* Rules 10.1, 10.2, 10.3, 10.4, 10.5, 10.6 and 10.7**

10.1 Subject to Rule 10.2, a party to a mediation, settlement discussion, neutral evaluation or proceeding is presumed to have the mental capacity to manage his or her property, appoint and instruct a representative, and conduct his or her own case.

10.2 A minor, or a person who has been declared mentally incapable, within the meaning of Sections 6 or 45 of the *Substitute Decisions Act*, 1992, (SDA) must commence a mediation or other proceeding through:

(a) the Public Guardian and Trustee or a Court appointed guardian of property under the provisions of the SDA; or

(b) an attorney under a valid continuing power of attorney that gives the attorney authority over all the property of the party; or

(c) in the case of a minor,
- (i) a parent with whom the minor resides;
- (ii) a person with lawful custody of the minor;
- (iii) a court appointed guardian of the minor's property under the provisions of the Children's Law Reform Act; or,
- (iv) the Children's Lawyer, in the event there is no person available under subparagraphs (i), (ii), (iii) or if there is a conflict of interest between the minor and such person.

10.3 Where an adult party has not been declared mentally incapable under the provisions of the SDA, but exhibits signs of mental difficulty during the course of a mediation, settlement discussion, neutral evaluation or proceeding, either party may request a hearing on a preliminary issue, or the Dispute Resolution Group may direct a hearing on a preliminary issue to determine whether:

(a) the party has the mental capacity to proceed in the dispute resolution process;

(b) there is an attorney with a valid continuing power of attorney over the party's property; or

(c) there is a person such as a spouse, same sex partner, near relative, close friend or a professional such as a doctor, lawyer or business entity, such as a trust company, who has made or intends to make arrangements for the appointment of a guardian over the party's property under the provisions of the SDA.

10.4 Parties shall be given written notice of the hearing on a preliminary issue to inquire into a party's mental capacity to proceed in the dispute resolution process.

10.5 Where an adjudicator is not satisfied that a party has the mental capacity to

proceed in the dispute resolution process, and there is no attorney or person such as described in Rule 10.3(b) and (c), the adjudicator may appoint a spouse, same sex partner or near relative of the party to act on the party's behalf if that person, in the adjudicator's opinion, is suitable, willing and able to proceed in the dispute resolution process and to receive and administer statutory accident benefits on behalf of the party who has exhibited signs of mental difficulty. The adjudicator may place such conditions or restrictions upon appointments pursuant to this section, as the adjudicator considers reasonable and necessary to protect the interests of the person exhibiting mental difficulty, the other parties to the proceeding and the dispute resolution process.

10.6 Where there is no person such as described in Rules 10.2, 10.3 or 10.5 available to act, the adjudicator may notify the Public Guardian and Trustee to request that appropriate steps be taken pursuant to the provisions of the SDA.

10.7 The representative of a person under a disability under Rule 10.2 or the representative of a party who has been found to lack the mental capacity to proceed in the dispute resolution process under Rule 10.5, shall comply with the approval of settlement requirements of Rule 7.08 of the Rules of Civil Procedure.

***United Nations' Convention on the Rights of Persons with Disabilities, 2006,* Preamble, Articles 12 and 13**

Preamble:
(o) Considering that persons with disabilities should have the opportunity to be actively involved in decision-making processes about policies and programs, including those directly concerning them,

Article 12- Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Article 13: Access to justice

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

Law Society of Upper Canada, Rules of Professional Conduct, 2000, **Rules 2.02, 4.01 and 5.04**

2.02(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.

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.

5.04(1) A lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences (as defined in the Ontario *Human Rights Code*), marital status, family status, or disability with respect to professional employment of other lawyers, articled students, or any other person or in professional dealings with other licensees or any other person.

Rules of Civil Procedure, 1990, **Rule 7**

7.01(1) Unless the court orders or a statute provides otherwise, a proceeding shall be commenced, continued or defended on behalf of a party under disability by a litigation guardian.

> (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.

(3) A committee named by order or statute before April 3, 1995 is the litigation guardian of the person in respect of whom the committee was named, and shall be referred to as the litigation guardian for all purposes.

(4) Subrule (3) also applies to the Public Guardian and Trustee acting under an order made under subsection 72 (1) or (2) of the *Mental Health Act* as it read before April 3, 1995.

7.02(1) Any person who is not under disability may act, without being appointed by the court, as litigation guardian for a plaintiff or applicant who is under disability, subject to subrule (1.1)

7.02(1.1) Unless the court orders otherwise, where a plaintiff or applicant,

(a) is mentally incapable and has a guardian with authority to act as litigation guardian in the proceeding, the guardian shall act as litigation guardian;

(b) is mentally incapable and does not have a guardian with authority to act as litigation guardian in the proceeding, but has an attorney under a power of attorney with that authority, the attorney shall act as litigation guardian;

(c) is an absentee and a committee of his or her estate has been appointed under the *Absentees Act*, the committee shall act as litigation guardian;

(d) is a person in respect of whom an order was made under subsection 72 (1) or (2) of the *Mental Health Act* as it read before April 3, 1995, the Public Guardian and Trustee shall act as litigation guardian.

7.02(2) No person except the Children's Lawyer or the Public Guardian and Trustee shall act as litigation guardian for a plaintiff or applicant who is under disability until the person has filed an affidavit in which the person,

(a) consents to act as litigation guardian in the proceeding;

(b) confirms that he or she has given written authority to a named lawyer to act in the proceeding;

(c) provides evidence concerning the nature and extent of the disability;

(d) in the case of a minor, states the minor's birth date;

(e) states whether he or she and the person under disability are ordinarily resident in Ontario;

(f) sets out his or her relationship, if any, to the person under disability;

(g) states that he or she has no interest in the proceeding adverse to that of the person under disability; and

(h) acknowledges that he or she has been informed of his or her liability to pay personally any costs awarded against him or her or against the person under disability.

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).

7.03(2) Where a proceeding is against a minor in respect of the minor's interest in an estate or trust, the Children's Lawyer shall act as the litigation guardian of the minor defendant or respondent, unless the court orders otherwise.

7.03(2.1) Unless the court orders otherwise, where a proceeding is against,

(a) a mentally incapable person who has a guardian with authority to act as litigation guardian in the proceeding, the guardian shall act as litigation guardian;
(b) a mentally incapable person who does not have a guardian with authority to act as litigation guardian in the proceeding but has an attorney under a power of attorney with that authority, the attorney shall act as litigation guardian;

(c) an absentee, and a committee of his or her estate has been appointed under the *Absentees Act*, the committee shall act as litigation guardian;

(d) a person in respect of whom an order has been made under subsection 72 (1) or (2) of the *Mental Health Act* as it read before April 3, 1995, the Public Guardian and Trustee shall act as litigation guardian.

7.03(2.2) A person who has authority under subrule (2.1) to act as litigation guardian shall, before acting in that capacity in a proceeding, file an affidavit containing the information referred to in subrule (10).

7.03(3) A litigation guardian for a plaintiff may defend a counterclaim without being appointed by the court.

7.03(4) A person who seeks to be the litigation guardian of a defendant or respondent under disability shall move to be appointed by the court before acting as litigation guardian.

7.03(5) Where a defendant or respondent under disability has been served with an originating process and no motion has been made under subrule (4) for the appointment of a litigation guardian, a plaintiff or applicant, before taking any further step in the proceeding, shall move for an order appointing a litigation guardian for the party under

disability.

7.03(6) At least ten days before moving for the appointment of a litigation guardian, a plaintiff or applicant shall serve a request for appointment of litigation guardian (Form 7A) on the party under disability personally or by an alternative to personal service under rule 16.03.

7.03(7) The request may be served on the party under disability with the originating process.

7.03(8) A motion for the appointment of a litigation guardian may be made without notice to the party under disability.

7.03(9) A plaintiff or applicant who moves to appoint the Children's Lawyer or the Public Guardian and Trustee as the litigation guardian shall serve the notice of motion and the material required by subrule (10) on the Children's Lawyer or the Public Guardian and Trustee.

7.03(10) A person who moves for the appointment of a litigation guardian shall provide evidence on the motion concerning,

(a) the nature of the proceeding;

(b) the date on which the cause of action arose and the date on which the proceeding was commenced;

(c) service on the party under disability of the originating process and the request for appointment of litigation guardian;

(d) the nature and extent of the disability;

(e) in the case of a minor, the minor's birth date;

(f) whether the person under disability ordinarily resides in Ontario and,

except where the proposed litigation guardian is the Children's Lawyer or the Public Guardian and Trustee, evidence,

(g) concerning the relationship, if any, of the proposed litigation guardian to the party under disability;

(h) whether the proposed litigation guardian ordinarily resides in Ontario;

(i) that the proposed litigation guardian,

(i) consents to act as litigation guardian in the proceeding,
(ii) is a proper person to be appointed,
(iii) has no interest in the proceeding adverse to that of the party

under disability, and

(iv) acknowledges having been informed that he or she may incur costs that may not be recovered from another party.

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;

(b) the Public Guardian and Trustee, if the party is mentally incapable within the meaning of section 6 or 45 of the *Substitute Decisions Act*, 1992 in respect of an issue in the proceeding and there is no guardian or attorney under a power of attorney with authority to act as litigation guardian;

(c) either of them, if clauses (a) and (b) both apply to the party.

7.04(2) Where, in the opinion of the court, the interests of a minor who is not a party require separate representation in a proceeding, the court may request and may by order authorize the Children's Lawyer, or some other proper person who is willing and able to act, to act as the person's legal representative.

7.04(3) Where, in the opinion of the court, the interests of a mentally incapable person who is not a minor and not a party require separate representation in a proceeding, the court may appoint as the mentally incapable person's litigation guardian the Public Guardian and Trustee or some other proper person who is willing and able to act.

7.05(1) Where a party is under disability, anything that a party in a proceeding is required or authorized to do may be done by the party's litigation guardian.

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, crossclaim or third party claim.

7.05(3) A litigation guardian other than the Children's Lawyer or the Public Guardian and Trustee shall be represented by a solicitor and shall instruct the solicitor in the conduct of the proceeding.

7.06(1) Where, in the course of a proceeding,

(a) a minor for whom a litigation guardian has been acting reaches the age of majority, the minor or the litigation guardian may, on filing an affidavit stating that the minor has reached the age of majority, obtain from the registrar an order to continue (Form 7B) authorizing the minor to continue the proceeding without the litigation guardian;

(b) a party under any other disability for whom a litigation guardian has been acting ceases to be under disability, the party or the litigation guardian may move without notice for an order to continue the proceeding without the litigation

guardian,

and the order shall be served forthwith on every other party and on the litigation guardian.

7.06(2) Where it appears to the court that a litigation guardian is not acting in the best interests of the party under disability, the court may substitute the Children's Lawyer, the Public Guardian and Trustee or any other person as litigation guardian.

7.07(1) If a party to an action is under a disability, the party may be noted in default under rule 19.01 only with leave of a judge.

7.07(2) Notice of a motion for leave under subrule (1) shall be served,

(a) on the litigation guardian of the party under disability; and

(b) on the Children's Lawyer, unless,

(i) the Public Guardian and Trustee is the litigation guardian, or

(ii) a judge orders otherwise.

7.07.1(1) If a party to an action is under a disability, the action may be discontinued by or against the party under rule 23.01 only with leave of a judge.

7.07.1(2) Notice of a motion for leave under subrule (1) shall be served,

(a) on the litigation guardian of the party under disability; and

(b) on the Children's Lawyer, unless,

(i) the Public Guardian and Trustee is the litigation guardian, or

(ii) a judge orders otherwise.

7.08(1) No settlement of a claim made by or against a person under disability, whether or not a proceeding has been commenced in respect of the claim, is binding on the person without the approval of a judge.

7.08(2) Judgment may not be obtained on consent in favour of or against a party under disability without the approval of a judge.

7.08(3) Where an agreement for the settlement of a claim made by or against a person under disability is reached before a proceeding is commenced in respect of the claim, approval of a judge shall be obtained on an application.

7.08(4) On a motion or application for the approval of a judge under this rule, there shall be served and filed with the notice of motion or notice of application

(a) an affidavit of the litigation guardian setting out the material facts and the reasons supporting the proposed settlement and the position of the litigation guardian in respect of the settlement;

(b) an affidavit of the solicitor acting for the litigation guardian setting out

the solicitor's position in respect of the proposed settlement;

(c) where the person under disability is a minor who is over the age of sixteen years, the minor's consent in writing, unless the judge orders otherwise; and

(d) a copy of the proposed minutes of settlement.

7.08(5) On a motion or application for the approval of a judge under this rule, the judge may direct that the material referred to in subrule (4) be served on the Children's Lawyer or on the Public Guardian and Trustee as the litigation guardian of the party under disability and may direct the Children's Lawyer or the Public Guardian and Trustee, as the case may be, to make an oral or written report stating any objections he or she has to the proposed settlement and making recommendations, with reasons, in connection with the proposed settlement.

7.09(1) Any money payable to a person under disability under an order or a settlement shall be paid into court, unless a judge orders otherwise.

7.09(2) Any money paid to the Children's Lawyer on behalf of a person under disability shall be paid into court, unless a judge orders otherwise.

***Accessibility Standards for Customer Services, 2007*, ss. 1, 2, 3, 6 and 7**

1.(1) This Regulation establishes accessibility standards for customer service and it applies to every designated public sector organization and to every other person or organization that provides goods or services to members of the public or other third parties and that has at least one employee in Ontario.

1.(2) In this Regulation,

"designated public sector organization" means the Legislative Assembly and the offices of persons appointed on the address of the Assembly, every ministry of the Government of Ontario, every municipality and every person or organization listed in Schedule 1 or described in Schedule 2 to this Regulation;

2. The accessibility standards for customer service apply to the designated public sector organizations on and after January 1, 2010 and to other providers of goods or services on and after January 1, 2012.

3.(1) Every provider of goods or services shall establish policies, practices and procedures governing the provision of its goods or services to persons with disabilities.

3.(2) The provider shall use reasonable efforts to ensure that its policies, practices and procedures are consistent with the following principles:

1. The goods or services must be provided in a manner that respects the dignity and independence of persons with disabilities.

2. The provision of goods or services to persons with disabilities and others must be integrated unless an alternate measure is necessary, whether temporarily or on a permanent basis, to enable a person with a disability to obtain, use or benefit from the goods or services.

3. Persons with disabilities must be given an opportunity equal to that given to others to obtain, use and benefit from the goods or services.

3.(4) When communicating with a person with a disability, a provider shall do so in a manner that takes into account the person's disability.

6.(1) Every provider of goods or services shall ensure that the following persons receive training about the provision of its goods or services to persons with disabilities:

1. Every person who deals with members of the public or other third parties on behalf of the provider, whether the person does so as an employee, agent, volunteer or otherwise.

2. Every person who participates in developing the provider's policies, practices and procedures governing the provision of goods or services to members of the public or other third parties.

3. (2) The training must include a review of the purposes of the Act and the requirements of this Regulation and instruction about the following matters:

1. How to interact and communicate with persons with various types of disability.
2. How to interact with persons with disabilities who use an assistive device or require the assistance of a guide dog or other service animal or the assistance of a support person.
3. How to use equipment or devices available on the provider's premises or otherwise provided by the provider that may help with the provision of goods or services to a person with a disability.
4. What to do if a person with a particular type of disability is having difficulty accessing the provider's goods or services.

7.(1) Every provider of goods or services shall establish a process for receiving and responding to feedback about the manner in which it provides goods or services to persons with disabilities and shall make information about the process readily available to the public.

12. Consent and Capacity Board.
21. Financial Services Commission of Ontario.
30. Human Rights Tribunal of Ontario.
31. Landlord and Tenant Board
87. Social Benefits Tribunal
91. Workplace Safety and Insurance Appeals Tribunal.

***Trustee Act, 1990*, s. 36(6)**

36.(6) If a minor or mentally incapable person is entitled to any money, the person by whom the money is payable may pay it into court to the credit of the minor or mentally incapable person.

36.6.1) The payment shall be made to the Accountant of the Superior Court of Justice.

36.(6.2) If the person entitled to the money is a minor, the person by whom it is payable shall deliver an affidavit containing the following to the Accountant at the time of the payment into court:

1. A statement that the money is being paid into court under subsection (6).

2. A statement of the facts entitling the minor to the money.

3. If the affidavit deals with more than one minor beneficiary's entitlement, the amount of each individual entitlement.

4. If the amount being paid into court differs from an amount specified in a document that establishes the minor's entitlement, an explanation of the difference.

5. The minor's date of birth.

6. The full name and postal address of,

    i. the minor,
    ii. the minor's parents, or the parent with lawful custody if it is known that only one parent has lawful custody,
    iii. any person, if known, who has lawful custody of the minor but is not his or her parent, and
    iv. any guardian of property, if known, appointed under section 47 of the *Children's Law Reform Act*. 2000, c. 26, Sched. A, s. 15 (1).

36.(6.3) If the person entitled to the money is a mentally incapable person, the person by whom it is payable shall deliver an affidavit containing the following to the Accountant at the time of the payment into court:

1. A statement that the money is being paid into court under subsection (6).

2. A statement of the facts entitling the mentally incapable person to the money.

3. The mentally incapable person's date of birth.

4. The full name and postal address of,

i. the mentally incapable person,
ii. the mentally incapable person's guardian of property, if any, under the *Substitute Decisions Act, 1992*,
iii. the person, if known, who holds a continuing power of attorney for property for the mentally incapable person.

36.(6.4) An affidavit under subsection (6.2) or (6.3) shall have attached to it, as a schedule, a copy of any document that establishes,

(a) the person's entitlement to the money;
(b) the amount to which the person is entitled;
(c) any conditions to be met before the person is entitled to receive the money, including, in the case of a minor, the attainment of a specified age.

36.(6.5) Payment into court in accordance with subsection (6), (6.2) or (6.3), as the case may be, and with subsection (6.4) is a sufficient discharge for the money paid into court.