ACCESS TO ADMINISTRATIVE JUSTICE FOR PERSONS WITH DISABILITIES

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

A PRACTICAL GUIDE FOR ONTARIO LAWYERS AND PARALEGALS

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INTRODUCTION

The rights of persons with disabilities are more likely to be at stake in an administrative tribunal than in a court. People with disabilities experience a wide array of barriers in relation to their access to administrative tribunals. Many experiences are similar across different tribunals, and similar to the kinds of barriers experienced in Ontario's courts.

For some people with disabilities, one accessibility concern before tribunals relates to difficulties they may have in understanding information about their case. This might include the significance of hearings and how to prepare for them. This may arise for many reasons including an acquired brain injury, a mental health issue, dementia or an intellectual disability.

A person's right of self-determination is an important philosophical and legal principle. Personal autonomy and the right to make individual choices – even "bad" ones – are fundamental values. In fact, the determination of incapacity is a persistent label that has a severe impact on a person's dignity.

Lawyers who represent people with capacity issues must ensure that the process is fair, efficient and respectful of the party's autonomy as much as possible.

Tribunals, lawyers and policy makers must develop comprehensive and clear approaches to the barriers experienced by parties with capacity issues. *Ad-hoc* solutions allow barriers to remain.

Without access to fair processes at administrative tribunals, persons with disabilities are prevented from advancing their legal rights in the same manner as others. They will continue to face barriers and be excluded from full participation in work, social and community life.

This is a practical guide, offering options and strategies to lawyers and paralegals who represent persons with capacity issues before administrative tribunals. It is not meant to be a full exposition, but a practical starting point. It is set out in several parts:

1) The first section examines general principles about capacity.
2) The second offers a variety of practical strategies for lawyers who represent parties with capacity issues before administrative tribunals.
3) The third section examines the current processes available at select tribunals to deal with the capacity of parties.

This guide is a companion to the more detailed report, “Addressing the Capacity of Parties before Ontario’s Administrative Tribunals: Promoting Autonomy and Preserving Fairness”. For further detail, please also contact ARCH Disability Law Centre.

Some of the strategies and options provided in this Guide also apply to persons with disabilities without capacity issues.

Nevertheless, this Guide focuses on the situation of persons with capacity issues before administrative tribunals.

For more detail about the obligation of lawyers to accommodate persons with disabilities, see ARCH’s “Providing Legal Services to People with Disabilities”, available at <www.archdisabilitylaw.ca >.

SETTING THE STAGE

These scenarios demonstrate the importance of the issues of capacity for persons with disabilities before administrative tribunals.

Scenario: The Landlord Tenant Board

The Landlord Tenant Board (LTB) holds a hearing on an application to set aside an eviction order against a tenant. The tenant is unrepresented. When the hearing begins the tenant mumbles some words and does not look up at the LTB member. He refuses the assistance of duty counsel. He says that he has spoken with his personal support worker about the case. He says that his personal support worker had a medical emergency and could not attend the hearing. The member asks the tenant for his name, the date, what the weather is outside, and why he is at the tribunal. The tenant's answers to the questions satisfy the member that the tenant has capacity and the hearing proceeds. The member does not set aside the eviction order.

Questions that arise from this scenario at the LTB include:

- **Did the Tenant have capacity to bring and conduct the litigation before the LTB?**
- **Did the tenant have the capacity to proceed without counsel?**
- **Should the LTB have ordered an adjournment?**
- **Should the LTB have arranged to have the tenant's worker attend?**
- **Could the LTB arrange for the appointment of amicus curiae?**

Scenario: The Social Benefits Tribunal

The Social Benefits Tribunal (SBT) holds a hearing on the denial of Ontario Disability Support Plan (ODSP) benefits. The appellant's lawyer tells the member that she thinks that the appellant is "mentally ill", but the appellant refuses to see a psychiatrist. The lawyer is seated next to the appellant's brother during the hearing. Soon after the lawyer begins asking the appellant questions, the appellant starts speaking a language no-one understands. The SBT member turns to the lawyer and asks the lawyer to tell the tribunal the appellant's side of the story. Throughout the rest 'of the hearing, the lawyer appears to be reading notes passed to her by the appellant's brother.

Questions that arise from this scenario at the SBT include:

- **Should the lawyer have divulged the client's (perceived) disability to the SBT?**
- **Was the lawyer taking instructions from her client or from her client's brother?**
- **Could the lawyer have arranged for the execution of a power of attorney?**

<u>Scenario: The Human Rights Tribunal of Ontario</u>

The Human Rights Tribunal of Ontario (HRTO) holds a hearing on an application by a person who claims to have experienced discrimination. The applicant is unrepresented. When the hearing begins the applicant remains silent, and seems confused. The respondent indicates her willingness to pursue mediation. The member asks the applicant for his name, the date, what the weather is outside, and why he is at the tribunal. His answers are confused and unclear. The tribunal member adjourns the hearing and sends the applicant to have a litigation guardian appointed by the Superior Court of Justice.

Questions that arise from this scenario at the HRTO include:

- **Could the HRTO have appointed a litigation guardian? Was there anyone in the applicant's life to act as a litigation guardian?**
- **Should the Public Guardian and Trustee get involved? What are the effects of getting the PGT involved?**
- **Does a litigation guardian appointed by the Superior Court of Justice have the authority to act before the HRTO?**
- **If a settlement is reached, should the Tribunal have to confirm that settlement? To whom are settlement monies paid?**

I. LEGAL CAPACITY: WHAT IT IS AND WHAT IT IS NOT

In this guide, we employ a broad understanding of the term "disability". **Disability is not the same as incapacity. Determinations of incapacity impact some persons with disability. Not all persons with disabilities will be affected by determinations of incapacity.**

The presumption of incapacity of all persons with mental health issues or intellectual disabilities leads to erroneous conclusions about a person's capacity. It incorporates a paternalistic approach that views people with disabilities as in need of care and charity.

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. Individuals with intellectual disabilities vary widely in their abilities. Although the definitions of intellectual disability differ, it can be broadly categorised as having an effect on learning, memory, problem solving, planning and other cognitive tasks.

- **Mental health issues** have no single cause. 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.

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. For instance, a lawyer representing a client with episodic mental health issues should consider requesting an adjournment or using a continuing power of attorney. It may be appropriate for a lawyer representing a client with an intellectual disability to consider arranging for the appointment of a litigation guardian.

In this guide, we use the term "capacity issues" to reflect the fact that determinations of capacity exist on a spectrum, and do not reduce to a simple dichotomy. **The provision of adequate accommodation can allow a person to exercise higher levels of autonomy.**

There are a variety of legal contexts where the determination of legal capacity applies: capacity to consent to treatment, capacity to make a will, to marry, to instruct a lawyer or to manage property. In most legal contexts, the assessment of capacity focuses on a person's ability to understand information relevant for making

a decision, and the ability to appreciate the consequence of a decision or lack thereof. There is considerable overlap between the definitions of legal capacity. Despite the overlap between definitions of capacity, it is important to consider the context of the decision.

Litigation capacity is defined here as the capacity to bring and conduct legal proceedings. Specifically it can be understood in two parts: (i) an ability to understand the nature of the tribunal proceeding (but not the specifics of the process); and (ii) 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, or the possession of extensive legal understanding. Instead, it is enough that the party understand basic information about the options that are available, as well the likely outcomes of each course of action.

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.

Capacity can fluctuate 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 they are incapable of doing so. For example, an individual who becomes unconscious during a seizure will not be capable to make decisions; however, when he or she regains consciousness, he or she will likely regain capacity as well.

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. **Capacity is not the same as intelligence, and can not be measured using psychological or cognitive tests.**

II. PRACTICAL TIPS FOR LAWYERS WHO REPRESENT PERSONS WITH CAPACITY ISSUES BEFORE ADMINSTRATIVE TRIBUNALS

Tribunals must ensure that appropriate and fair processes are in place for people who have been determined to be "legally incapable" or are incapable of making specific decisions. **Lawyers and paralegals also have a legal obligation to ensure that their services are accessible to persons with capacity issues.**

While people with disabilities experience a broad range of barriers which limit their access to tribunals, there are also solutions for addressing them. Often these solutions are neither complicated nor expensive to implement.

A variety of strategies are offered here. This reflects the broad range of capacity issues experienced by people, 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 respect for an individual's autonomy as much as possible, as well as balancing the interests of fairness and efficiency.

General Principles

Even when the tribunal process is designed to be accessible, some persons may require accommodation in order to participate fully. Persons with disabilities experience "disability" in different ways. Appropriate accommodation therefore, depends on the party's particular disability-related needs.

Compliance with legal requirements means that efforts must be made to consider disability issues in all stages of the tribunal process. Both the tribunal and counsel are obliged to accommodate a person's disability–related needs to the point of undue hardship. This obligation has four sources: (i) the duty of procedural fairness, (ii) *Charter* principles/values, (iii) quasi-constitutional anti-discrimination protections, and (iv) other statutory protections.

The common law imposes a duty of fairness in administrative proceedings. The content of the duty of fairness depends on the type of right and the circumstances of the case. In so far as it affects the ability to state one's case, the capacity of parties before administrative tribunals is an issue of natural justice. For instance, the Newfoundland Supreme Court found that the principles of natural justice required that Labour Relations Board appoint a representative for a party with a disability, given the particular circumstances. (*Burroughs (Guardian ad litem of) v. CUPE*, [1999] 184 Nfld & PEIR 191*)*

The *Canadian Charter of Rights and Freedoms* applies to the operation of all tribunals, including provincial and federal tribunals. Section 15 engages the "duty to accommodate", illustrating the legal obligation that service providers, including tribunals, have under the *Charter* to meet the needs of persons with disabilities. Section 7 enshrines the right to life, liberty, and security of the person. While

Section 7 is typically applied in the criminal law context, it has been increasingly applied in non-criminal contexts. (*New Brunswick (Minister of Health and Community Services) v. G. (J.),* [1999] 3 S.C.R. 46)

Provincial tribunals must operate within the context of Ontario's *Human Rights Code*, which provides that every person has the right to equal treatment with respect to services without discrimination because of disability. Tribunals are under a legal obligation to adopt rules of practice and procedures that comply with the *Code*. Indeed, the *Code* is paramount over all other provincial laws. Federal tribunals, including the Immigration and Refugee Board, operate within the context of the *Canadian Human Rights Act.*

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* (AODA). The *Accessibility for Ontarians with Disabilities Act* establishes a system for developing, enacting and enforcing mandatory accessibility standards. The *Customer Service Standard* will require tribunals to establish policies and practices on providing services to people with disabilities. These policies should address measures that the tribunals offer to parties with capacity issues. The *AODA* operates provincially, and as such does not apply to the Immigration and Refugee Board.

At the Outset, a Lawyer Must Provide Accommodations to the Client

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, the need for legal representation becomes more pressing. Nevertheless, many persons with capacity issues appear unrepresented before administrative tribunals.

Before considering issues about the capacity to litigate or the capacity to instruct, the lawyer or paralegal must CAREFULLY consider who the client is. The client is not the client's family member, for instance.

The lawyer or paralegal must ensure that she or he has spoken DIRECTLY with the client.

Before considering other available options, a lawyer or paralegal for a party with capacity issues should explore accommodations that allow the party to understand

and appreciate the tribunal proceeding. Lawyers and paralegals should consider making accommodations to the way they communicate with a client.

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 clients nervous, and interfere with their ability to understand and appreciate the nature of the tribunal proceeding. There are situations where a person who appears to be incapable may be able to participate effectively in a proceeding where appropriate accommodations are made and assistance is provided.

Given that there are in infinite variety of disability-related needs, there is no one formula for providing accommodation. Lawyers and paralegals should employ the following accommodation practices, where appropriate:

- Where possible, a lawyer or paralegal should meet with the client in a comfortable environment.
- A lawyer or a paralegal should use plain language when explaining technical matters.
- A lawyer or a paralegal should encourage clients to ask questions.
- A lawyer or a paralegal should develop a realistic time-line for case preparation.
- A lawyer or a paralegal should allow the client to bring a support person to meetings.

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 or a paralegal provides legal representation and advice and takes instructions from her client, or the substitute decision maker. **Counsel must not become a substitute decision maker for the client.**

Lawyers who represent persons with capacity issues should educate themselves about their professional responsibilities when taking instructions from clients with capacity issues. Rule 2.06 requires that where a client's ability to make decisions is "impaired because of… mental disability", the lawyer should maintain a normal lawyer and client relationship, as far as reasonably possible. 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. Rule 4.01 provides that a 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 client's case".

The Law Society's *Rules of Professional Conduct* state that lawyers have a special responsibility to respect human rights laws. In particular:

- The duty to accommodate extends throughout the retainer. For instance, a lawyer should explain in clear language the client's appeal rights after the tribunal hearing.
- Lawyers may not avoid representing clients who may have capacity issues, and require additional work. Lawyers may not refuse to represent persons with capacity issues, or withdraw representation once problems arise.
- A lawyer may not decline to represent a person because she or he is unsure that the person has the capacity to instruct.
- The costs of accommodations must be borne by lawyers. Expenditures on accommodations are not disbursements that may be charged back to clients.

Before accepting the instructions of a substitute decision maker, a lawyer or paralegal should verify a proposed decision maker's authority. A power of attorney for property may have provisions about when it enters into force. The power of attorney may also have restrictions about the kinds of decisions that the attorney can make. Where possible, the lawyer or paralegal should examine the document directly. The Ontario Public Guardian and Trustee is required to keep a "Register of Guardians", a list of all guardians of property and guardians of the person.

For more information, see ARCH's "Providing Legal Services to Persons with Disabilities" available online at www.archdisabilitylaw.ca.

Determining Capacity to Instruct: Practical Considerations

Counsel must be confident in their client's capacity to give instructions. Nevertheless, the question of capacity to instruct rarely arises even when one practices disability law.

Some commentators have found that capacity to instruct includes two key elements: (i) the client's ability to understand information that is relevant to decisions that need to be made; and (ii) the client's ability to appreciate the reasonably foreseeable consequences of those decisions.

Counsel must be cautious about making informal assessments of about the client's capacity to instruct.

The context of each case and the degree of capacity required in each instance will vary. The level of understanding and appreciation that is needed to retain and instruct counsel depends on the subject-matter of the retainer. It is up to the lawyer or paralegal to make this determination, and it is inappropriate for tribunals to inquire into the determination of the capacity to instruct.

There are no definitive tools available to provide counsel with support to make decisions about capacity to instruct. The test for instructional capacity does not rely

on the result of cognitive or psychological tools, such as the Mini-Mental State Examination (MMSE). This is a misunderstanding of the legal definition of capacity, which is not a medical or clinical one.

An investigation into the capacity of a client can not be done unless the lawyer meets with the client in person, and the lawyer has met his or her legal obligations to accommodate the client to the point of undue hardship. 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 judgement of the client's capacity to instruct.

Lawyers should keep records of conversations with clients – or prospective clients - about capacity. Such notes should be kept on record, should a question about capacity arise during the course of the retainer. If it is available, lawyers should conduct investigations in the presence of another person, who acts as an independent observer.

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, a client's ability to make decisions may change, for better or worse, over time.

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.

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.

For further guidance on the issue of capacity to instruct counsel, reference may be made to "Notes on Capacity to Instruct Counsel", authored by Phyllis Gordon. This document is available on ARCH's website at www.archdisabilitylaw.ca.

Request Accommodations from the Tribunal

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 the lawyer should request that such assistance should be provided by the Tribunal.

Included here are examples of kinds of accommodations that a person with a capacity issue may request. **Lawyers and paralegals should consider providing examples of accommodations to their clients.**

- Tribunal members should excuse missed deadlines, where appropriate.
- Tribunal members should schedule breaks, rather than wait for requests from a party.
- Tribunal correspondence should communicate the right of appeal in clear language. Parties may assume that tribunal decisions are final.
- A party should be permitted to change positions in the hearing room.
- Parties and tribunal members should repeat questions or instructions as required.
- Hearings may be held over the phone at the request of the person with a capacity issue.
- A party may require that the lights be dimmed in the hearing room.
- The tribunal should take into account party's need for a slower pace when scheduling hearings.
- 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.
- A party may require that white noise or distracting noises be eliminated.
- A party should be permitted to use alternate formats, such as whiteboards and flipcharts.
- Where required, a party may require the circulation of a written agenda prior to the hearing.

These accommodations should be available at all stages, not just the hearing.

Lawyers and paralegals 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. **Even last minute adjournments should be considered.**

Parties may be reluctant to request accommodation. They may not want to disclose the fact of their disability, for fear of negative reactions based on stigma and stereotypes.

Lawyers and paralegals 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.

Where Appropriate, Use Continuing Powers of Attorney for the Limited Purposes of Litigation

A lawyer representing a person with capacity issues may consider creating a limited power of attorney for property. The power of attorney would give authority to initiate an application and to instruct counsel in the tribunal matter.

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 she is at least 18 and capable of doing so. A different lawyer must draft and execute the power of attorney.

The donor must have the capacity to give a power of attorney of this type. 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 a flexible instrument. 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.

Even where a party has given a continuing power of attorney, the lawyer or paralegal can not assume that she or he can communicate directly with the attorney. Until the party is determined to be incapable, the lawyer or paralegal must take instructions from the donor.

Generally, the capacity to manage property is most closely related to the litigation capacity of a party before an administrative tribunal. Generally, issues before these tribunals involve damages or benefits. Although tribunal proceedings are not exclusively a property matter, they are not usually an incident of personal-care decision-making either. As set out in the *Powers of Attorney Act*, a power of attorney for property has a broader authority than a power of attorney for 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. 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.

Where a Party Refuses Representation, Request the Appointment of Amicus Curiae by the Tribunal

If a party refuses a lawyer's representation in a tribunal matter, that lawyer can request that the Tribunal appoint *amicus curiae*. This strategy only applies where

the administrative process is already underway. It is less easily applies in the case of the application for a benefit.

Amicus curiae assists 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 represent the party, or take instructions from the party.

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 for a tribunal to appoint amicus. However, the Workplace Safety and Insurance Appeals Tribunal has hired an amicus in the case of a person who was not capable of presenting his case, but refused counsel. (*Decision 325 - 95I* (1995) June 19, 1995; Bigras, Sequin, Robillard) The Financial Services Commission of Ontario has appointed amicus at arbitration. (*Wilson v. Liberty Mutual Insurance Company,* (2004) Appeal P04-0007; *Wilson v. Ontario* [2006] OJ No. 1420; *Wilson v. T.D. Home & Auto Insurance*, (2006) WL 3851185) The Consent and Capacity Board has recognized counsel as amicus. (*A.M. (Re),* 2004 CanLII 6726)

The Court of Appeal has sanctioned counsel's role as amicus curiae before the Ontario Review Board in a case where all the parties at the hearing consented. (*R v. Starson* (2004), 183 C.C.C. (3d) 538) 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.

Where Appropriate, Arrange for the Appointment of a Limited Litigation Guardian by the Tribunal

Before considering options that include substitute decision making, counsel for a party with capacity issues should explore accommodations that allow the party to understand and appreciate the proceeding. Nevertheless, some marginalized persons will require substitute decision makers. It may be the only adequate opportunity for a party to be heard.

Substitute decision-making should be considered as a LAST resort.

It often happens that when a person is believed to be legally incapable, there is a search for a "quick fix", including a substitute decision maker.

In Ontario, the power to appoint litigation guardians has been codified in the *Rules of Civil Procedure.* Rule 7 requires a litigation guardian for every "party under disability". 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 Rules do not apply to administrative tribunal proceedings.**

A lawyer or paralegal representing a client with a capacity issue before an administrative tribunal may consider creating a limited litigation guardianship. Counsel would receive instructions from the limited litigation guardian. The role of the limited litigation guardian should be in effect only for the duration of the specific tribunal process.

In the same way as is set out by Rule 7.05 of the *Rules of Civil Procedure*, a limited litigation guardian for the purposes of a tribunal hearing must be represented by counsel.

The appointment of litigation guardian raises particular concerns. First, the tribunal should oversee the settlement of a case that involves a limited litigation guardian. Second, there are issues about the authority of a limited litigation guardian to accept monies in settlement of a case before an administrative tribunal. Also, a very high degree of professionalism is required in these cases, especially where it is possible that the client's wishes may be in conflict with her or his best interests, as determined by the limited litigation guardian.

It is important that the lawyer consult with her client before exploring this option. Even if the party is determined to be incapable of making specific decisions, she or he should agree to the appointment of a litigation guardian.

If a lawyer or paralegal is considering creating a limited litigation guardianship, he or she should contact ARCH for more information. This is an evolving area of law. Accordingly, it is very important that a lawyer or a paralegal receive up-to-date expert advice.

III. HOW SELECTED TRIBUNALS HAVE DEALT WITH THE CAPACITY OF PARTIES BEFORE THEM

This chapter describes the ways that select tribunals deal with the situations where a party has been determined not to have litigation capacity.

The *Statutory Powers Procedure Act* (SPPA) applies to processes and decisions of many administrative boards and tribunals in Ontario. The SPPA is silent on the issue of the capacity of parties. Section 23(1) offers direction about the prevention of abuse of power. 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 provides that tribunals have the authority to issue rules of practice.

The SPPA does not apply with respect to decisions and proceedings of the Workplace Safety and Insurance Appeals Tribunal (WSIAT) or the Immigration and Refugee Board (IRB)

Tribunals will often rely on the definition of incapacity set out in the *Substitute Decisions Act*. Section 6 of the SDA provides the following definition of the capacity to manage property:

> 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. [Emphasis added]

Landlord Tenant Board

The Landlord Tenant Board's (LTB) *Rules of Practice* and the *Residential Tenancies Act* (RTA) do not include specific provisions addressing the issues that arise when a party has been determined to or appears to lack litigation capacity.

Both the *Residential Tenancies Act* (RTA) and LTB's *Rules of Practice* emphasize the importance of balancing the principles "fairness" and "efficiency". Section 183 of the RTA provides that the LTB "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" [emphasis added].

Social Benefits Tribunal

The Social Benefit Tribunal's (SBT) *Practice Directions, Ontario Works Act, 1997* and the *Ontario Disability Support Program Act, 1997* do not include specific

provisions addressing the issues that arise when a party has been determined to, or appears to, lack litigation capacity.

Pursuant to Section 12 of the *ODSP Act,* a representative of the Ontario Disability Support Program (ODSP) may appoint a trustee 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 (OW) program may appoint a trustee. A trustee can be set up without a capacity assessment. **It is not appropriate for a lawyer 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.**

Workplace Safety and Insurance Appeals Tribunal

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

The WSIAT's *Code of Conduct for Representatives* requires that representatives appearing before the WSIAT refrain from behaviour that amounts to an abuse of process. 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.

In an appeal involving a deceased worker, appeals may be brought by the worker's estate. There is no similar procedure for a family member of a party who has been determined to be incapable to bring an appeal to the WSIAT.

Human Rights Tribunal of Ontario

Section 34(1) of the Ontario *Human Rights 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.

In addition, Section 34(5) of the *Code* permits a person to make a complaint on behalf of another person. Applications on behalf of another person may be filed if the other person would be permitted to bring their own application under the *Code* and consents to the application.

Where a lawyer finds that a client does not have capacity to bring her or his own application, he or she should investigate whether the client has a continuing power of attorney, a statutory guardian of property or a court-appointed guardian of property

These guidelines apply only to the <u>commencement</u> of an application. A lawyer or a paralegal should consult ARCH where a client develops capacity issues during the course of the HRTO process, or if a party previously determined to be incapable becomes capable again.

<u>Immigration and Refugee Board</u>

While each of the three divisions of the Immigration and Refugee Board of Canada (IRB) is responsible for making decisions on different immigration or refugee matters, they follow similar administrative processes.

All three divisions of the IRB have a unique authority to appoint "designated representatives". Section 167 of the *Immigration and Refugee Protection Act* requires the appointment of a designated representative if an applicant is not able to "appreciate the nature of the proceeding".

The role of a designated representative varies depending on the represented person's level of understanding. The party subject to the appointment of a designated representative should be consulted. In addition, the IRB member should always talk to the person with a capacity issue before designating a representative.

The role of the designated representative is distinct from the role of counsel. IRB policies however, provide that counsel may act as designated representative at the same time. Someone must be designated as a representative, even if the person has counsel.

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

A person who wishes to be identified as a vulnerable person must make an application under the rules of the particular IRB division. For the purposes of the *Guideline*, vulnerable persons are defined as "individuals whose ability to present their cases before the IRB is severely impaired". Vulnerability may be due to an "innate or acquired personal characteristics such as physical or mental illness".

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". Despite its necessity, the IRB will not order or pay for expert reports.

IV. NEXT STEPS

It often happens that when a person is believed to be incapable, there is a search for a "quick fix", a substitute decision maker. Before considering other available options, a lawyer or paralegal must explore accommodations that allow the client to make **her or his own informed choices**.

Lawyers, community legal workers and paralegals working with people with disabilities may contact ARCH to discuss disability issues that arise. ARCH Disability Law Centre is a community legal aid clinic dedicated to advancing the equality rights of persons with disabilities. As part of its mandate, ARCH hears concerns from persons with capacity issues and their family members and friends in Ontario and Canada. ARCH provides free, confidential, basic legal information and advice to people with disabilities. Our contact information is below.

FOR MORE INFORMATION, PLEASE CONTACT ARCH DISABILITY LAW CENTRE

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425 Bloor Street East, Ste. 110
Toronto, Ontario M4W 3R5
Tel: 416-482-8255 or 1-866-482-2724 x 234
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Please see http://www.archdisabilitylaw.ca for more information about ARCH.