UNDERSTANDING CAPACITY
AND MANAGING CLAIMS
FOR MINORS

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INTRODUCTION

Incapacity, in the legal context, is a complex subject. Various authors have written many texts on the subject. Reviewing the entire state of the law of incapacity is a daunting task; however, it is necessary to have a basic understanding of capacity to properly address these issues when they arise.

In Ontario, findings of incapacity principally arise under two pieces of legislation: (a) the Substitute Decisions Act, 1992; and (b) the Mental Health Act. The Mental Health Act only addresses capacity with respect to patients in psychiatric facilities, whereas the Substitute Decisions Act, 1992 can apply in virtually all circumstances. As a result, we have provided you with an overview of the Substitute Decisions Act, 1992, since this will be the legislation that you will likely encounter. Be aware, however, that should an insured be placed in the care of a psychiatric facility, the entire scheme will change, including the assessments of capacity.

In addition to an overview of the Substitute Decisions Act, 1992, we have provided you with an overview on the related issue of litigation guardians, and the role they play in the litigation process. Finally, in an effort to assist you with claims handling, we have also prepared a suggested approach to addressing capacity issues.

OVERVIEW OF THE SUBSTITUTE DECISIONS ACT, 1992

The starting presumptions

The Substitute Decisions Act, 1992 starts off by establishing the two key presumptions for capacity: (1) a person who is 18 years or older is presumed to be capable of entering into a contract; and, (2) a person who is 16 years or older is presumed to be capable of making decisions with respect to their own care. Under the Act, parties are entitled to rely upon these presumptions, unless there are “reasonable grounds to believe that the other person is incapable”.

Of course, this begs the question: what are “reasonable grounds to believe that the other person is incapable”? As with other legal issues, the answer depends on the facts of the case. However, some authors in the field have suggested that criteria found in a regulation under the previous Consent to Treatment Act, 1992 can serve as a useful guide when addressing this issue. In the context of providing consent to treatment, that regulation provided that:

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1 S.O. 1992, c. 30.
3 Supra, note 1, s.2(1).
4 Supra, note 1, s.2(2).
5 Supra, note 1, s.2(3).
7 S.O. 1992, c.31. This act was repealed on March 29, 1996.
A health practitioner may have reason to believe that a person may be incapable with respect to a proposed treatment based on the following observations:

a. The person shows evidence of confused or delusional thinking;

b. The person appears to be unable to make a settled choice about treatment;

c. The person is experiencing severe pain or acute fear or anxiety;

d. The person appears to be severely depressed;

e. The person seems to be impaired by alcohol or drugs;

f. Any other observations that give rise to a concern about the person’s capacity, including observations about the person’s behaviour or communication.

Like the authors mentioned above, we would suggest that these criteria are useful indicators as to when capacity might be a concern, although they are not necessarily conclusive. We would suggest that, during the course of your claims, you be alert for evidence of: (a) confused or delusional thinking; (b) an inability to make settled choices; (c) severe pain, fear, anxiety or depression; (d) impairment due to alcohol or drugs; or (e) other troubling observations concerning behaviour or communication. As indicated later on in our recommendations, we also suggest that you take detailed notes of any criteria that are observed, as such details may play a key role should you be required to take steps to have an insured’s capacity assessed.

> **Incapacity**

After establishing that people of at least their late teenage years are presumed capable, the *Substitute Decisions Act, 1992* defines the situations in which people can be found to be incapable. Under the Act, there are two ways in which a person can be considered incapable: (1) with respect to the management of their property; and (2) with respect to their personal care.

Both types of incapacity have the same underlying focus: the ability of the person to understand the nature and consequences of their decisions. With respect to property, the *Substitute Decisions Act, 1992* defines incapacity as follows:

*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.*

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8 *Supra*, note 1, s.6.
Similarly, with respect to personal care, the Act defines incapacity as follows:

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 a decision.  

While the above definitions are helpful, further practical guidance is needed. How is one to know when a person is not able “understand information” or “appreciate the reasonably foreseeable consequences” of their actions?

Further assistance can be obtained from the findings of a report commissioned by the Government of Ontario on the issue of capacity, and some of the submissions made by medical professionals during the preparation of that report. For capacity with respect to property, the Enquiry on Mental Competency: Final Report\textsuperscript{10} states that a person is capable if he or she has the ability to:

1. Understand the nature of the financial decision and the choices available to him or her;
2. Understand his relationship to the parties and/or potential beneficiaries of the transaction or transactions which give rise to the decision; and,
3. Appreciate the consequences of making the decision.  

Likewise, in his submissions to the Government of Ontario, Dr. F.M. Mai of the University of Ottawa suggested that the following questions be posed to help determine whether a person had capacity:

1. Does the patient suffer from delusions or hallucinations which will likely materially affect the patient’s understanding and management of finances?
2. Is the patient oriented to time, place and person?
3. Is the patient’s memory sufficiently intact so as to allow the patient to keep track of financial matters and decisions?
4. Is the patient’s calculating ability sufficient in the circumstances?
5. Does the patient suffer specific thought process deficits which give rise to the conclusion that deficits in financial judgment exist?

\textsuperscript{9} Supra, note 1, s.45.
\textsuperscript{10} D. N. Weisstub, Enquiry on Mental Competency: Final Report (Toronto: Queen’s Printer, 1990), typically referred to as “The Weisstub Report”.
\textsuperscript{11} The conclusions of The Weisstub Report are cited with approval in supra, note 6, at 25 to 26.
6. Does the patient possess or have the capacity to learn skills necessary to make the sort of decision required in an estate of the size, nature and complexity that he or she possesses?\(^\text{12}\)

Although the above criteria were all provided in the context of dealing with property, the criteria can be adapted to issues relating to personal care as well.

> **Guardians and Powers of Attorney**

Where a person lacks capacity, either with respect to the management of their property or with respect of their personal care, someone else must step in to make decisions on that person’s behalf. The *Substitute Decisions Act, 1992*, provides three different types of substitute decision makers, depending on the circumstances: (1) attorneys; (2) statutory guardians; and (3) court appointed guardians. Each of these types of substitute decision makers is addressed below. Although not part of the *Substitute Decisions Act, 1992*, the *Rules of Civil Procedure*\(^\text{13}\) also provide for a litigation guardian, who is a voluntary substitute decision maker within the limited context of litigation. Litigation guardians are addressed further below.

> **Power of Attorney**

Attorneys are selected and appointed by the incapable person by way of a specific grant of power – aptly referred to as a power of attorney. Powers of attorney can be granted with respect to either property or personal care, and can either be broad or quite limited in nature.

A power of attorney is a document executed by a person (the grantor), granting another person (the attorney) the authority to make decisions and take actions on the grantor’s behalf. There are very few formal requirements for a power of attorney. No specific form is required,\(^\text{14}\) however the Public Guardian and Trustee has prepared a prescribed form that can be used.\(^\text{15}\) The power of attorney must be executed by the grantor in the presence of two witnesses, both of whom must also sign the power of attorney.\(^\text{16}\) The witnesses must be independent, and cannot include: (a) the attorney or the attorney’s spouse or partner; (b) the grantor’s spouse or partner; (c) a child of the grantor, or a person to whom the grantor has demonstrated a settled intention to treat as his or her child; (d) a person who is under guardianship or who has a guardian of the person; or (e) a person who is less than 18 years old (in the case of a property) or 16 years old (in the case of personal care).\(^\text{17}\) If the power of attorney is not executed in front of two witnesses, does not bear the signature of two witnesses, or is witnessed by someone who is not independent, the power of attorney is invalid, but can later be validated by the court.\(^\text{18}\) It should also be noted that, despite any flaw with respect to the witnesses, the actions of the attorney remain valid with respect to

\(^{12}\) Dr. Mai’s suggestions are cited with approval in *supra*, note 6, at 25 to 26.

\(^{13}\) R.R.O. 1990, Reg. 194.

\(^{14}\) *Supra*, note 1, s.7(7.1) and s.46(8).

\(^{15}\) *Supra*, note 1, s.7(8) and s.46(9).

\(^{16}\) *Supra*, note 1, s.10(1) and ss.48(1) and (2).

\(^{17}\) *Supra*, note 1, s.10(2) and s.48(2).

\(^{18}\) *Supra*, note 1, s.10(4) and s.48(4).
any third party who has contracted with the attorney in good faith, and without knowledge of any flaws with the power of attorney.\textsuperscript{19}

A power of attorney will take effect either on the date it was executed or, if the power is contingent on a specific event, such as the incapacity of the grantor, on the date of such event.\textsuperscript{20} Once a power of attorney has been granted, it will remain valid until: (a) the attorney dies or becomes incapable (unless the power of attorney provides for multiple or successive attorneys); (b) the Court appoints a statutory guardian; (c) the grantor executes a new power of attorney (and does not provide for multiple powers of attorney); (d) the grantor revokes the power of attorney; or (e) the grantor dies.\textsuperscript{21}

Powers of attorney are revoked in the same manner in which they are created.\textsuperscript{22} Like the power of attorney itself, the revocation must be: (a) in writing; and (b) executed in the presence of two independent witnesses. Assuming that the person has capacity to grant a power of attorney, then the person also has capacity to revoke the power of attorney as well.\textsuperscript{23}

Although it does not result in the termination of a power of attorney, the attorney may also resign, provided that the attorney provides a copy of the resignation to: (a) the grantor; (b) any other attorneys appointed under the power of attorney; (c) any substitute attorneys identified in the power of attorney; and (d) unless otherwise provided, the spouse and relatives of the grantor who are known to the attorney and reside in Ontario, assuming that the grantor remains incapable.\textsuperscript{24}

\section*{Powers of Attorney for Property}

For a power of attorney for property to remain in effect following the incapacity of the grantor, the power of attorney must either state that it is a \textit{continuing power of attorney} or express the intention that it is to be in effect while the grantor is incapable of managing their property.\textsuperscript{25} Ideally, a power of attorney itself will provide a method to determine when the grantor has become incapable. However, if the power of attorney is silent, then it takes effect when the attorney receives either a notice that a capacity assessor has determined the grantor to be incapable, or a certificate of incapacity under the \textit{Mental Health Act}.\textsuperscript{26}

Once in effect, an attorney for property can typically take any action on behalf of the grantor, other than making a will.\textsuperscript{27} However, the grantor can include restrictions on the powers of the attorney in the document itself, so long as those restrictions are not inconsistent with the \textit{Substitute Decisions Act, 1992}.\textsuperscript{28}

\begin{footnotes}

\textsuperscript{19} \textit{Supra}, note 1, s.13.

\textsuperscript{20} \textit{Supra}, note 1, s.7(7).

\textsuperscript{21} \textit{Supra}, note 1, s.12(1) and s.53.

\textsuperscript{22} \textit{Supra}, note 1, s.12(2).

\textsuperscript{23} \textit{Supra}, note 1, s.8(2) and s.53.

\textsuperscript{24} \textit{Supra}, note 1, s.11(1) and s.52.

\textsuperscript{25} \textit{Supra}, note 1, s.7(1).

\textsuperscript{26} \textit{Supra}, note 1, s.9(3).

\textsuperscript{27} \textit{Supra}, note 1, s.7(2).

\textsuperscript{28} \textit{Supra}, note 1, s.7(6).
\end{footnotes}
In order to be valid at the time it was given, the grantor must have had capacity to give the power of attorney. Under the provisions of the Act:

8. (1) A person is capable of giving a continuing power of attorney if he or she,

(a) knows what kind of property he or she has and its approximate value;

(b) is aware of obligations owed to his or her dependents;

(c) knows that the attorney will be able to do on the person’s behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;

(d) knows that the attorney must account for his or her dealings with the person’s property;

(e) knows that he or she may, if capable, revoke the continuing power of attorney;

(f) appreciates that unless the attorney manages the property prudently its value may decline; and

(g) appreciates the possibility that the attorney could misuse the authority given to him or her.\textsuperscript{29}

The capacity to grant a power of attorney is a lower standard than the capacity that is required to manage property. A person may be “incapable of managing property”, but nonetheless still have the capacity to grant a power of attorney.\textsuperscript{30}

\textbf{Powers of Attorney for Personal Care}

As with decisions concerning property, a person can also provide a power of attorney for personal care.\textsuperscript{31} However, a person cannot act under a power of attorney for personal care if the person provides health care or residential, social, training or support services to the grantor for compensation (unless the person is also the grantor’s spouse, partner or relative).\textsuperscript{32} The Public Guardian and Trustee cannot be appointed as attorney for personal care, unless prior consent was obtain in writing before the execution of the power of attorney.\textsuperscript{33}

\textsuperscript{29} \textit{Supra}, note 1, s.8(1).
\textsuperscript{30} \textit{Supra}, note 1, s.9(1).
\textsuperscript{31} \textit{Supra}, note 1, s.46(1).
\textsuperscript{32} \textit{Supra}, note 1, s.46(3).
\textsuperscript{33} \textit{Supra}, note 1, s.46(2).
Similar to powers of attorney for property, a power of attorney for personal care can be limited by the terms of the document itself.\textsuperscript{34} The power of attorney may also specify the method of confirming whether the grantor is incapable. If not, attorney can request that a capacity assessment be conducted of the grantor.\textsuperscript{35} Incapacity can then be confirmed to the attorney by way of a notice from an assessor who has determined the grantor to be incapable.\textsuperscript{36}

Like powers of attorney for property, the test for the capacity to provide a power of attorney for personal care is a lower standard than the test for capacity for personal care itself. To grant a power of attorney for personal care, the grantor need only: (a) have the ability to understand whether the proposed attorney has a genuine concern for the grantor’s welfare; and (b) appreciates that the grantor may need to have the proposed attorney make decisions for him or her.\textsuperscript{37} So long as the grantor had capacity to grant the power of attorney for personal care, the power of attorney will remain valid even if the grantor did not have capacity to make their own decisions with respect to their personal care.\textsuperscript{38} It should be noted, however, that any instructions contained within the power of attorney may not be valid if the grantor did not have capacity to give those instructions at the time that the power of attorney was executed.\textsuperscript{39}

A power of attorney for personal care allows the attorney to make decisions on behalf of the grantor, if the \textit{Health Care Consent Act, 1996}\textsuperscript{40} applies and authorizes the attorney to make the decision; or if the \textit{Health Care Consent Act, 1996} does not apply to the decision, the attorney has reasonable grounds to the grantor is incapable of making the decision and there are no conditions in the power of attorney preventing the attorney from making that decision.\textsuperscript{41}

\textbf{Court Appointed Guardians}

While granting a power of attorney is a practical and efficient way of addressing incapacity, it also requires a certain amount of forethought. In many cases, a person may not have prepared a power of attorney in advance, and may no longer have the capacity to grant a power of attorney. In these circumstances, the \textit{Substitute Decisions Act, 1992}, provides a mechanism whereby the Superior Court of Justice may appoint another person as guardian for the incapable person. As with powers of attorney, guardians may be appointed with respect to property, or with respect to personal care.

\textbf{Guardians for Property}

Under the \textit{Act}, the request for the appointment of a guardian of property can be made by anyone when it appears that a person is no longer capable of managing their property, and decisions need to be made with respect to that property:

\begin{itemize}
  \item \textsuperscript{34} \textit{Supra}, note 1, s.46(6) and (7).
  \item \textsuperscript{35} \textit{Supra}, note 1, s.51.
  \item \textsuperscript{36} \textit{Supra}, note 1, s.49(2)
  \item \textsuperscript{37} \textit{Supra}, note 1, s.47(1).
  \item \textsuperscript{38} \textit{Supra}, note 1, s.47(2).
  \item \textsuperscript{39} \textit{Supra}, note 1 SDA, s.47(4)
  \item \textsuperscript{40} S.O. 1996, c. 2, Sched. A.
  \item \textsuperscript{41} \textit{Supra}, note 1, s.49(1)
\end{itemize}
22. (1) The court may, on any person’s application, appoint a guardian of property for a person who is incapable of managing property if, as a result, it is necessary for decisions to be made on his or her behalf by a person who is authorized to do so.\textsuperscript{42}

It should also be noted that, in the case of minors, guardians for property can be appointed under the \textit{Children’s Law Reform Act}.\textsuperscript{43} However, for our purposes, we will only focus on appointments under the \textit{Substitute Decisions Act, 1992}.

An application can be made for a court-appointed guardian even if a statutory guardian (described further below) has already been appointed.\textsuperscript{44} The appointment of a guardian is only made as a last resort. The court will not appoint a guardian if it is satisfied that an alternative course of action that does not require a finding of incapability and is less restrictive than appointing a guardian will nonetheless satisfy the need for decisions.\textsuperscript{45}

To be appointed by the court, the proposed guardian cannot be someone who provides health care or residential, social, training or support services to the incapable person for compensation, unless the proposed guardian is also the incapable person’s spouse, partner, relative, or attorney.\textsuperscript{46} The proposed guardian must either be a resident of Ontario, or must, subject to the court’s discretion,\textsuperscript{47} provide security for the value of the incapable person’s property.\textsuperscript{48} The Public Guardian and Trustee will not be appointed by the court, unless the application specifically proposes the appointment of the Public Guardian and Trustee, the Public Guardian and Trustee has provided written consent to the appointment, and there is no suitable person available and willing to be appointed.\textsuperscript{49}

In making the determination whether to appoint a guardian, the court shall consider: (a) whether the guardian is already an attorney; (b) the incapable person’s wishes, if they can be ascertained; and (c) the closeness of the relationship between the proposed guardian and the incapable person.\textsuperscript{50}

If the court determines that a guardian should be appointed, the court shall make a finding that the person is incapable of managing property, and that it is necessary for decisions to be made on their behalf.\textsuperscript{51} The court may impose conditions on the appointment, such as: (a) the posting of security; (b) a limited duration for the appointment; or (c) such other conditions as the court considers appropriate.\textsuperscript{52}

\textsuperscript{42} \textit{Supra}, note 1, s.22(1).
\textsuperscript{43} R.S.O. 1990, c. C.12, s.47.
\textsuperscript{44} \textit{Supra}, note 1, s.22(2).
\textsuperscript{45} \textit{Supra}, note 1, s.22(3).
\textsuperscript{46} \textit{Supra}, note 1, s.24(1) and (2).
\textsuperscript{47} \textit{Supra}, note 1, s.24(4).
\textsuperscript{48} \textit{Supra}, note 1, s.24(3).
\textsuperscript{49} \textit{Supra}, note 1, s.24(2.1).
\textsuperscript{50} \textit{Supra}, note 1, s. 24(5).
\textsuperscript{51} \textit{Supra}, note 1, s.25(1).
\textsuperscript{52} \textit{Supra}, note 1, s.25(2).
After a guardian has been appointed by the court, the court retains the power to vary the appointment, or substitute the guardian, by way of motion.\(^{53}\) Such a motion can be brought by: (a) the guardian; (b) the applicant who initially sought the appointment of the guardian; (c) the incapable person; (d) the incapable person’s attorney or guardian of the person; (e) the Public Guardian and Trustee; or, (f) the proposed new guardian of property.\(^{54}\) Similarly, the court may also terminate the guardianship by way of a motion by the same parties.\(^{55}\)

Like attorneys, guardians of property have the power to do anything on behalf of the incapable person, except make a will, unless other limitations are imposed by the court.\(^{56}\) Guardians and attorneys are placed in fiduciary positions with respect to the incapable person, and must exercise all of their duties diligently for the benefit of the incapable person, with honesty and integrity and in good faith.\(^{57}\) Guardians and attorneys are entitled to compensation for the exercise of their duties,\(^{58}\) and can be liable for damages should they fail to exercise their duties appropriately.\(^{59}\) To protect themselves from liability, guardians and attorneys can apply for directions from the court on any questions that arise in connection with their duties.\(^{60}\)

> **Guardians of the person**

As with guardians of property, the Superior Court of Justice can also appoint guardians for the personal care of incapable individuals. Under the Act, guardians for the person can be appointed, again on any person’s application, where the person appears to be incapable of personal care, and decisions need to be made for the person in that regard:

55. (1) *The court may, on any person’s application, appoint a guardian of the person for a person who is incapable of personal care and, as a result, needs decisions to be made on his or her behalf by a person who is authorized to do so.*\(^{61}\)

As with guardians of property, the court will not appoint a guardian of the person if it is satisfied that alternative options are available that do not require a finding of incapacity and are less restrictive of the incapable person’s rights.\(^{62}\) The same types of restrictions are placed on guardians of the person, in that persons who provide health care or residential, social, training or support services to the incapable person for compensation cannot be appointed, unless they are also the spouse, partner, relative, guardian for property, or attorney for the incapable person.\(^{63}\) The court may also limit the powers of the guardian by imposing conditions with respect to the duration of the guardianship, the extent of the decisions that can be made by the guardian, or any other conditions that the court deems to be appropriate.\(^{64}\) Any order made be the court can

\(^{53}\) *Supra*, note 1, s.26(1).

\(^{54}\) *Supra*, note 1, s.26(2) and 69(1).

\(^{55}\) *Supra*, note 1, s.28.

\(^{56}\) *Supra*, note 1, s.31(1) and (3).

\(^{57}\) *Supra*, note 1, s.32 and 38.

\(^{58}\) *Supra*, note 1, s.40

\(^{59}\) *Supra*, note 1, s.40.

\(^{60}\) *Supra*, note 1, s.33.

\(^{61}\) *Supra*, note 1, s.39.

\(^{62}\) *Supra*, note 1, s.55(1).

\(^{63}\) *Supra*, note 1, s.55(2).

\(^{64}\) *Supra*, note 1, s.57.

\(^{65}\) *Supra*, note 1, s.58 and 59.
subsequently be varied on a motion by the guardian, the applicant or a party entitled to notice of the application.\(^{65}\)

Once appointed, a guardian of the person or attorney for personal care is required to exercise their powers diligently, and in good faith.\(^{66}\) The guardian or attorney is empowered to make decisions on behalf of the incapable person with respect to treatment and care, that fall within the \textit{Health Care Consent Act, 1996}.\(^{67}\) For decisions that fall outside of the \textit{Health Care Consent Act, 1996}, the guardian or attorney is required to: (a) use reasonable diligence in ascertaining whether the incapable person expressed any wishes or instructions as to their treatment while they were capable; (b) make decisions in accordance with the expressed wishes or instructions of the incapable person, giving priority to the latest wishes and instructions; and (c) make decisions in the incapable person’s best interests if the attorney or guardian cannot ascertain any of the incapable person’s wishes or instructions.\(^{68}\)

Where a guardian or attorney is left to make decisions in the incapable person’s best interest, they are to consider: (a) the incapable person’s values and beliefs that they believe the person would still act upon, if capable; (b) the incapable person’s current wishes, if they can be ascertained; (c) whether the decision is likely to improve the incapable person’s quality of life, prevent their quality of life from deteriorating, or reduce/slow any deterioration in the incapable person’s quality of life; and (d) whether the anticipated benefits of a decision outweigh the risk of harm associated with alternative decisions.\(^{69}\) The guardian or attorney are to choose the least restrictive course of action that is appropriate in the circumstances.\(^{70}\) The guardian or attorney are then required to keep records of any decisions made on behalf of the incapable person.

The guardian or attorney is required to explain to the incapable person what their powers and duties are,\(^{71}\) and encourage the incapable person’s participation in making any decisions.\(^{72}\) The guardian or attorney is also required to consult with the incapable person’s family, friends and treatment providers,\(^{73}\) and to promote regular personal contact between the incapable person and their family and friends.\(^{74}\)

As with guardians for property, a guardian of the person must prepare a guardianship plan that will guide the care of the incapable person,\(^{75}\) and which can only be amended with the Public Guardian and Trustee’s approval.\(^{76}\) When in doubt, the guardian or attorney may apply to the court for directions with respect to the incapable person’s care.\(^{77}\)

\(^{65}\) \textit{Supra}, note 1, s.61.
\(^{66}\) \textit{Supra}, note 1, s.66(1) and 67.
\(^{67}\) \textit{Supra}, note 1, s.66(2.1) and s.67.
\(^{68}\) \textit{Supra}, note 1, s.66(4) and s.67.
\(^{69}\) \textit{Supra}, note 1, s.66(4) and s.67.
\(^{70}\) \textit{Supra}, note 1, s.66(9) and s.67.
\(^{71}\) \textit{Supra}, note 1, s.66(2) and s.67.
\(^{72}\) \textit{Supra}, note 1, s.66(5) and s.67.
\(^{73}\) \textit{Supra}, note 1, s.66(7) and s.67.
\(^{74}\) \textit{Supra}, note 1, s.66(6).
\(^{75}\) \textit{Supra}, note 1, s.66(15) and s.70(2).
\(^{76}\) \textit{Supra}, note 1, s.66(16).
\(^{77}\) \textit{Supra}, note 1, s.68.
Statutory Guardians

Where a person suffers from a lack of capacity, but there are no appropriate individuals to be appointed as guardians, the Substitute Decisions Act, 1992 provides a regime whereby public guardians (typically the Public Guardian and Trustee) can be appointed. Unlike court appointed guardians, the Public Guardian and Trustee can be appointed without an application to the Superior Court of Justice. Under the Act, the entire appointment process begins with a request for a capacity assessment.

16. (1) A person may request an assessor to perform an assessment of another person’s capacity or of the person’s own capacity for the purpose of determining whether the Public Guardian and Trustee should become the statutory guardian of property under this section.

(2) No assessment shall be performed unless the request is in the prescribed form and, if the request is made in respect of another person, the request states that,

(a) the person requesting the assessment has reason to believe that the other person may be incapable of managing property;

(b) the person requesting the assessment has made reasonable inquiries and has no knowledge of the existence of any attorney under a continuing power of attorney that gives the attorney authority over all of the other person’s property; and

(c) the person requesting the assessment has made reasonable inquiries and has no knowledge of any spouse, partner or relative of the other person who intends to make an application under section 22 for the appointment of a guardian of property for the other person.78

If the assessor finds the person to be incapable, he or she may issue a certificate of incapacity in a form prescribed under the Act.79 The assessor must then forward the certificate both to the incapable person and to the Public Guardian and Trustee.80 The Public Guardian and Trustee is appointed as soon as it receives a copy of the certificate,81 and must advise the person of this fact as well as of the person’s right to apply for a review of the assessor’s finding.82

Once the Public Guardian and Trustee has been appointed, it retains statutory guardianship over the person’s property until the statutory guardianship is terminated, or the Public Guardian and Trustee is replaced. Statutory guardianship will be terminated if: (a) the incapable person gave a continuing power of attorney prior to the issuance of the certificate of incapacity; (b) the

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78 Supra, note 1, s.16(1) and (2).
79 Supra, note 1, s.16(3).
80 Supra, note 1, s.16(4).
81 Supra, note 1, s.16(5).
82 Supra, note 1, s.16(6).
continuing power of attorney granted authority over all of the incapable person’s property; and
(c) the Public Guardian and Trustee is provided with a copy of the power of attorney along with
an undertaking signed by the attorney to act in accordance with the power of attorney.83

Alternatively, the incapable person’s spouse or partner, relative, attorney (under a power of
attorney given prior to issuance of the certificate of incapacity, but which only grants authority
over some property), or a trust corporation within the meaning of the Loan and Trust
Corporations Act,84 may apply to replace the Public Guardian and Trustee.85 If the applicant is
an attorney, then they must provide the Public Guardian and Trustee with a copy of the power of
attorney and an undertaking to act in accordance with the power of attorney.86 The applicant
must prepare and submit a management plan for the property with the application.87 Upon
considering the wishes of the incapable person and the relationship between the applicant and the
incapable person,88 the suitability of the applicant to manage the incapable person’s property,89
and the appropriateness of the management plan,90 the Public Guardian and Trustee can appoint
the applicant as the incapable person’s statutory guardian of property.91 If appropriate, the
Public Guardian and Trustee can also require that the applicant provide security as a condition of
the appointment.92 If the Public Guardian and Trustee refuses the application for a substitution,
the Public Guardian and Trustee must provide the applicant with written reasons for the refusal,93
which can then be reviewed by the Superior Court of Justice.94 Once appointed, the replacement
statutory guardian of property is obligated to manage the incapable person’s property in
accordance with the management plan.95

> **Capacity Assessments**

Capacity assessments can only be performed with the consent of the person,96 or by court
order.97 Where the assessment is being conducted on consent, the person being assessed has the
right to be advised of: (a) the purpose of the assessment; (b) the significance and effect of a
finding of capacity or incapacity; and (c) the person’s right to refuse to be assessed.98 Special
powers can be granted by court order to ensure that the assessment is not hindered, including:

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83 *Supra*, note 1, s.16.1.
85 *Supra*, note 1, s.17(1).
86 *Supra*, note 1, s.16.1(d).
87 *Supra*, note 1, s.17(4).
88 *Supra*, note 1, s.17(5).
89 *Supra*, note 1, s.17(4).
90 *Supra*, note 1, s.17(4).
91 *Supra*, note 1, s.17(6).
92 *Supra*, note 1, s.17(4).
93 *Supra*, note 1, s.18(1).
94 *Supra*, note 1, s.18.
95 *Supra*, note 1, s.17(12).
96 *Supra*, note 1, s.78(1).
97 *Supra*, note 1, s.79.
98 *Supra*, note 1, s.78(2).
restraining orders against third parties,\textsuperscript{99} arrest orders for the person being assessed,\textsuperscript{100} and warrants of entry.\textsuperscript{101}

Capacity assessments can only be performed by qualified assessors. To be qualified, a capacity assessor must: (a) be a member of good standing in one of the listed professional colleges; (b) complete a requisite qualifying course approved by the Attorney General; (c) participate in continuing education courses; (d) perform the minimum annual number of capacity assessments; and (e) maintain the appropriate amount of liability insurance.\textsuperscript{102} The list of qualified capacity assessors can be obtained from the Capacity Assessment Office.\textsuperscript{103}

Capacity assessors set their own hourly rates, which typically vary between $70.00 to $160.00 per hour. The costs associated with the capacity assessment are typically paid by the party requesting the assessment. If the person is found to be incapable for property, and a guardian for property is appointed, the guardian may sometimes reimburse the costs associated with the assessment. Additionally, financial assistance can sometimes be available to those who cannot afford the associated fees.

\textbf{Litigation Guardians}

A distant cousin of the attorney and guardian is the litigation guardian, which is established under the \textit{Rules of Civil Procedure}.\textsuperscript{104} The litigation guardian plays a far more limited role in situations of incapacity, and is restricted to making decisions with respect to the litigation itself.

\textbf{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.

\textbf{(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.

\textbf{(3)} A litigation guardian other than the Children’s Lawyer or the Public Guardian and Trustee shall be represented by a lawyer and shall instruct the lawyer in the conduct of the proceeding.

Under the \textit{Rules of Civil Procedure}, “disability” is defined as including: minors; the mentally incapable within the definitions provided in the \textit{Substitute Decisions Act, 1992}; and absentees.

As with other types of guardians, the litigation guardian owes a duty of good faith to the person for whom they are acting. The litigation guardian is expected to make decisions with respect to

\textsuperscript{99} Supra, note 1, s.80.
\textsuperscript{100} Supra, note 1, s.81.
\textsuperscript{101} Supra, note 1, s.82.
\textsuperscript{102} O. Reg. 460/05.
\textsuperscript{103} Capacity Assessment Office, 800 – 595 Bay St., Toronto, ON, M5G 2M6, Tel: (416) 327-6676, (416) 327-6424, (866) 521-1033, Fax: (416) 327-6724.
\textsuperscript{104} R.R.O. 1990, Reg. 194.
the conduct of the litigation in the best interests of the person under disability, and instruct counsel accordingly.\textsuperscript{105} Should the litigation guardian fail in their duty, they can be removed by the court.\textsuperscript{106} The litigation guardian also accepts personal liability for any costs awarded against the person under disability.\textsuperscript{107} Where the litigation is settled, the litigation guardian is required to provide affidavit evidence in support of the proposed settlement, as is outlined below.

\textbf{> Payments In Capacity Situations}

The issue of payments to an incapable or potentially incapable person can be problematic, and can depend on the nature of the incapacity, the type of payment being made, and whether there is a dispute concerning the obligation for payment.

\textbf{> Payments where there is no dispute concerning the obligation to pay}

When a minor is involved, there is no issue as to the obligation for payment, and the amount being paid is $10,000.00 or less, payment can be made to the minor’s parent or legal guardian pursuant to the \textit{Children’s Law Reform Act}:

\begin{quote}
51. (1) If no guardian of a child’s property has been appointed, a person who is under a duty to pay money or deliver personal property to the child discharges that duty, to the extent of the amount paid or the value of the personal property delivered, subject to subsection (1.1), by paying money or delivering personal property to,

(a) the child, if the child has a legal obligation to support another person;
(b) a parent with whom the child resides; or
(c) a person who has lawful custody of the child.

(1.1) The total of the amount of money paid and the value of personal property delivered under subsection (1) shall not exceed the prescribed amount or, if no amount is prescribed, $10,000.

(2) Subsection (1) does not apply in respect of money payable under a judgment or order of a court.

[…]
\end{quote}

However, it is important to note that this section only applies when there is a “\textit{duty to pay money}”, and does not apply “\textit{in respect of money payable under a judgment or order of a court}”. As a result, in the accident benefits context, simple amounts such as dependant’s death benefits under s.25(2)\textsuperscript{2} of the \textit{SABS} can be paid directly to the parent or guardian, if there is no issue surrounding the “\textit{duty to pay}”. In the accident benefits context, this section will not apply if the

\begin{footnotes}
\item[105] \textit{Supra}, note 104, Subrule 7.05.
\item[106] \textit{Supra}, note 104, Subrule 7.06(2).
\item[107] \textit{Supra}, note 104, Paragraph 7.02(2)(h).
\end{footnotes}
dispute resolution mechanism under the Insurance Act\textsuperscript{108} has been triggered, even by way of a FSCO mediation.

In the case of incapable persons who have either an attorney or guardian acting on their behalf, and there is an admitted obligation to pay the benefits, the benefits can be paid to the person’s attorney or guardian.

\textbf{Payments where there is a dispute concerning the obligation to pay}

If, however, there is a dispute surrounding the obligation to pay funds, then any settlement must be approved by the court, and payment must be made into court, unless the court orders otherwise. These requirements are found in the Rules of Civil Procedure, and apply regardless of whether litigation has been commenced. Unless court approval is obtained, the settlement is not binding.

\begin{footnotesize}
\begin{enumerate}
\item 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.
\item Judgment may not be obtained on consent in favour of or against a party under disability without the approval of a judge.
\item 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.
\item 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,
\begin{enumerate}
\item 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;
\item an affidavit of the lawyer acting for the litigation guardian setting out the lawyer’s position in respect of the proposed settlement;
\item where the person under a disability is a minor who is over the age of sixteen years, the minor’s consent in writing, unless the judge orders otherwise; and
\end{enumerate}
\item a copy of the proposed minutes of settlement.
\end{enumerate}
\end{footnotesize}

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.

\textsuperscript{108} R.S.O. 1990, c.I.8.
Once a settlement is approved, the settlement funds are required to be paid into court, unless the court orders otherwise.

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.

(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.

Notwithstanding the general requirement that funds be paid into court, the court will grant exceptions to that rule where the applicant can establish that to do so would be in the best interests of the incapable person. Typically, the court will insist that the applicant provide a detailed financial plan for the funds, which will provide a similar degree of security and some kind of a greater return (either in terms of ownership of property or rate of investment). When assessing a proposed financial plan, the court will typically consider questions along the following lines:

(a) Why is the litigation guardian opposed to payment of the funds into court?

(b) Is there evidence that the litigation guardian has the ability to manage the funds?

(c) What are the financial circumstances of the litigation guardian including his or her income and expenses, and the number of dependents for whom he or she is responsible?

(d) What is the plan advanced by the litigation guardian for the management of the funds?

(e) What are the merits and demerits of the plan?

(f) What criteria will be employed for periodic encroachments, if any?

(g) What is the likelihood that the funds (or the remaining balance, if there have been encroachments), plus accrued interest, will be secure until the minor attains his or her majority?

(h) Does the plan permit a transfer to the minor of the balance of the funds immediately upon the attainment of his or her majority?

(i) What is the amount to be managed?

(j) What is the duration of the plan?

(k) Should the litigation guardian be required, at some point, to pass accounts in respect of his or her management of the funds?

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(l) Should the litigation guardian be required to post a bond as security for the performance of his or her duties in the management of the funds?

(m) What are the views of the child (to the extent that he or she is of an age where such views can reasonably be ascertained)?

(n) If there is a request for part of the funds to be transferred to the litigation guardian now (with the balance to be paid into court), are the requested funds to be used for the direct and reasonable benefit of the child and in circumstances where the parents of the child are unable to meet the expense involved?

(o) In all of the circumstances, has the litigation guardian established, on a balance of probabilities, that it is in the best interests of the minor that payment be made to the litigation guardian rather than into court?\textsuperscript{110}

The \textit{Rules of Civil Procedure} do not distinguish between incapacity by virtue of age and other types of incapacity. Thus, these same criteria can be considered in any circumstances, with necessary modifications.

\textbf{How should an insurer approach the issue of capacity?}

While an overview of the law is helpful, we recognize that you require practical suggestions on how to address capacity issues in day-to-day claims handling. To assist you, we have prepared the following 7-step approach to addressing claims where capacity is an issue.

The steps outlined below have been prepared in the context of negotiating a full and final settlement, where concerns related to capacity become crucial. However, with slight modification, the approach that we have suggested can easily be applied to day-to-day claims handling, or negotiating partial settlements.

At the outset, it should be noted that issues of capacity are far more problematic when the party is unrepresented. There is less cause for concern where the party is represented, either by a lawyer or by a paralegal registered with the Law Society of Upper Canada, because the Law Society imposes obligations upon both lawyers and registered paralegals to monitor their client’s ability to make decisions, and to seek the appointment of a substitute decision maker where appropriate. For lawyers, this duty is outlined in Rule 2.02(6) of the \textit{Rules of Professional Conduct},\textsuperscript{111} and the associated commentary:

\textit{Client Under a Disability}

\begin{quote}
\textit{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.}
\end{quote}


\textsuperscript{11} \textit{Rules of Professional Conduct}. 
Commentary:

A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions. A client’s ability to make decisions, however, depends on such factors as his or her age, intelligence, experience, and mental and physical health, and on the advice, guidance and support of others. Further, a client’s ability to make decisions may change, for better or worse, over time. When a client is or comes to be under a disability that impairs his or her ability to make decisions, the impairment may be minor or it might prevent the client from having the legal capacity to give instructions or to enter into binding legal relationships. Recognizing these factors, the purpose of this rule is to direct a lawyer with a client under a disability to maintain, as far as reasonably possible, a normal lawyer and client relationship.

A lawyer with a client under a disability should appreciate that if the disability of the client is such that the client no longer has the legal capacity to manage his or her legal affairs, the lawyer may need to take steps to have a lawfully authorized representative appointed, for example, a litigation guardian, or to obtain the assistance of the Office of the Public Guardian and Trustee or the Office of the Children’s Lawyer to protect the interests of the client. In any event, the lawyer has an ethical obligation to ensure that the client’s interests are not abandoned.

The Law Society places virtually identical obligations on registered paralegals. However, it should always be remembered that not all paralegals are in fact registered with the Law Society.

Since the lawyer or registered paralegal is required to take instructions from the claimant, they are likely in a far better position to consider whether or not the claimant has capacity. Given their obligations to monitor the capacity of their clients, you can likely rely upon opposing counsel’s presumably calculated decision not to seek out a substitute decision maker as evidence that there is no cause for concern.

However, in any situation where the client is unrepresented (or if there are concerns notwithstanding representation), we would recommend that you proceed with caution. The golden rule should be: when in doubt, seek court approval. We would suggest that you use the following steps to guide your approach.

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112 The Paralegals Rules of Conduct, 3.02(7) and (8) contain similar wording. Subrule 3.02(7) states: “If a client’s ability to make decisions is impaired because of minority, mental disability or for some other reason, the paralegal shall, as far as reasonably possible, maintain a normal professional relationship with that client.” Similarly, subrule 3.02(8) states: “If the disability of the client is such that the client no longer has the capacity to manage his or her legal affairs, the paralegal shall take such steps as are appropriate to have a lawfully authorized representative appointed.”
(1) **Request details as to any attorneys or guardians that the insured may have.**

Obviously, you will want to ensure that you are negotiating with the correct person. If the insured has already been found to be incapable, then you want to be dealing with the attorney or guardian in the insured’s stead.

However, assuming that the insured has yet to be found incapable, details as to any attorneys or guardians (either for property or personal care) will assist with any court applications that may be required.

(2) **Take detailed notes.**

To the extent that there are any concerns with respect to an insured’s capacity, detailed notes should be taken as to the basis of the concerns. Make particular note of any of the criteria discussed above, namely: confused or delusional thinking; inability to make settled choices; severe pain, fear, anxiety or depression; impairment due to drugs or alcohol; and observations about the insured’s behaviour or communications. If the insured is having difficulty understanding questions or conversations, make note of the subject matter or specific questions or issues with which the insured is having difficulty.

Assuming the claim is being settled on a full and final basis, be sure to note a specific breakdown of the benefits being settled, and the amounts being paid for each benefit. Also be sure to note which amounts are for past benefits, and which are for future benefits in order to deal with interest (which will be dealt with below).

(3) **Advise the insured that you have concerns about their capacity, and suggest independent legal advice.**

Typically, all settlement documentation include a clause whereby the insured acknowledges that they have had the opportunity to seek independent legal advise. When you suspect an insured may lack capacity, you should actively encourage them, in writing, to take advantage of that opportunity. As indicated above, there is an ethical obligation placed upon lawyers and registered paralegals with respect to the capacity of their clients. Directing the insured for independent legal advice may start the necessary chain of events to have the issue raised.

Additionally, remember that the threshold for capacity to grant a power of attorney is lower than the threshold for capacity itself. As part of the suggestion to seek and obtain legal advice concerning the settlement, you may also want to suggest that the insured seek advice about whether an attorney should be appointed. Again, we would suggest that these steps also be in writing.
Alternatively, as outlined above, a capacity assessment under the *Substitute Decisions Act, 1992* can only be performed either with the person’s consent or by way of a court order. Should the insured be unwilling to obtain independent legal advice, you should advise the insured that you feel that a need to obtain a capacity assessment in order to obtain court approval of any settlement agreement that you have made. You can also explain that court approval is also in their best interests, as it will ensure that the settlement agreement is fair for them as well.

If the insured is willing to consent to the assessment, proceed with the necessary arrangements. However, if the insured refuses, you will have to bring a court application for the assessment, and a subsequent application for court approval (see below).

(4) **Agree to pay benefits and interest on the settlement funds pending approval, if appropriate.**

You can likely expect delays in obtaining both a capacity assessment, and, if necessary, court approval of the settlement. Depending on the length of the delay, and whether court approval is required, you can expect a judge to be concerned about ongoing benefits and interest. Where the settlement involves attendant care or med/rehab benefits (or even disability benefits depending on the circumstances), you will want to make sure that the insured continues to receive necessary services pending the approval of the settlement. Any settlement agreement that you reach should specify that benefits continue uninterrupted pending approval, with the amounts paid being deducted from the appropriate portion of the settlement amount. This way, the insured is not only protected against delays, but also against any problems should the court fail to approve the settlement. Any such agreement will need to be specified in the Settlement Disclose Notice and the release.

For lump sums, keep in mind that the insurer will be maintaining the benefit of the funds pending approval, which may not sit well with the judge, especially if the insured is ultimately found to be capable at the end of any assessment. An agreement to pay interest on the settlement funds at the appropriate rate of post-judgment interest defined under the *Courts of Justice Act* should be sufficient to satisfy any judge that ultimately is asked to approve the settlement, and sufficient to protect the insurer from any suggestions of bad faith. However, if the settlement predominantly consists of past benefits, a judge might be inclined to award interest at the *SABS* rate, so you may want to consider offering *SABS* interest on any portions that relate to past benefits.

As a general guide, we would suggest offering to pay interest at the *Courts of Justice Act* rate, but keeping careful track of the amounts being paid for past benefits under the *SABS*. That way interest on past benefits could easily be calculated at the *SABS* rate if required by the court.

(5) **Bring a court application for an order compelling the capacity assessment.**

Assuming that the insured does not consent to participate in a capacity assessment, bring an application before the court for an order compelling a capacity assessment. As outlined above, the application will determine whether there are “reasonable grounds” to doubt that the insured
has capacity. The detailed notes that you have taken outlining the basis for your concerns will form the basis for the determination of the court. Additionally, your agreement to pay ongoing benefits and/or interest pending the results of the assessment should ease any concerns that the court will have concerning prejudice to the insured.

If the court concludes that reasonable grounds do not exist, that determination should be sufficient to protect the insurer, and the settlement can be finalized. If the court concludes that reasonable grounds do exist, the court should order a capacity assessment.

If the capacity assessment concludes that the insured is capable, that assessment should be sufficient to protect the insurer, and the settlement can be finalized. If the capacity assessment concludes that the insured is incapable, then court approval of the settlement will have to be obtained.

(6) Apply for court approval, and request that a litigation guardian be appointed.

Assuming that the insured lacks capacity, a further application will have to be brought to obtain court approval of the settlement. Although either party can bring an application for court approval, the Rules of Civil Procedure require that affidavits be filed on behalf of the lawyer and litigation guardian of the person under a disability, explaining why the settlement is appropriate for the claimant. Obviously, you will not want to be put in the position of having to advise the court what benefits are available to the insured, and why the settlement is fair to the insured. Such an affidavit would become fodder for cross-examination if the court refused to approve the settlement.

In order to avoid such a dilemma, we would suggest that the court be asked to appoint a litigation guardian for the insured. The Rules of Civil Procedure specifically state that the Public Guardian and Trustee can be appointed where a party has been found incapable under the Substitute Decisions Act, 1992, and no other suitable litigation guardian can be found. The capacity assessment will satisfy the first requirement, and your inquiries into the existence of any attorney or guardian should be sufficient to satisfy the second requirement. While the court will likely make its own inquiries of the insured to ascertain whether another possible litigation guardian might be available, the court will likely appoint the Public Guardian and Trustee if no suitable litigation guardian can be found.

Once a litigation guardian (or Public Guardian and Trustee if need be) is appointed, they will be required to review the settlement, and appoint counsel (if it is not the Public Guardian and Trustee). Counsel and the litigation guardian will then be required to provide affidavits outlining their positions concerning the settlement. You will want to ensure that counsel and/or the litigation guardian are aware of the interest that you have agreed to pay on the settlement funds.
(7) Renegotiate the settlement, if need be.

If counsel and/or the litigation guardian support the settlement, it will go before the court for approval. If counsel and/or the litigation guardian do not support the settlement, however, it will need to be renegotiated in order to obtain court approval. While renegotiating a settlement agreement may not seem to be an attractive option, it is important to remember that the settlement agreement is not binding without court approval, and it will be practically impossible to obtain court approval without counsel and/or the litigation guardian supporting the application. In the circumstances renegotiation, while certainly not ideal, is presumably better than no settlement. In accident benefits cases, of course, you retain the ultimate leverage of calling off negotiations, and keeping the insured’s claim open if either counsel and/or the litigation guardian are unreasonably. Of course, any renegotiated settlement would ultimately have to be approved by the court on a subsequent application.
Areas of Practice
Civil Litigation
Insurance Defence
Personal Injury and Wrongful Death

Education
1981   B.A. Sc., University of Guelph
1994   LL.B., McGill University
1997   Call to Ontario Bar

Professional Activities and Organizations
Canadian Bar Association
County of Carleton Law Association

Susan (Sue) Bromley completed her articles with Nelligan O’Brien Payne in 1996 and commenced practising law at the firm upon her call to the Ontario Bar in 1997.

Since then, she has specialized in civil litigation with an emphasis on personal injury and insurance-related matters. Sue has developed an expertise in statutory accident benefit claims arising under the standard motor vehicle insurance policy including, accident benefit claims under OMPP, Bill 164, Bill 159, and Bill 198 as well as loss transfer and priority disputes.

Sue is a member of the Insurance Law Section of the Canadian Bar Association and a member of the County of Carleton Law Association.

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JAMES M. BROWN

Areas of Practice
Civil Litigation
Insurance Defence
Personal Injury and Wrongful Death

Education
1999  B.A. (High Honours in Law), Carleton University
2002  L.L.B., University of Ottawa
2003  Call to Ontario Bar

Professional Activities and Organizations
Canadian Bar Association
County of Carleton Law Association
Osgoode Society for Canadian Legal History
The Advocates' Society
Canadian Defence Lawyers Association

James articled with Nelligan O'Brien Payne in 2002, and joined the firm as an associate following his Call to the Bar in 2003. James practises in the areas of civil litigation, insurance defence and personal injury and wrongful death.

Since his call to the Bar, James has practised exclusively in the area of civil litigation, with a special focus on insurance-related matters. James has a broad range of experience in the property and casualty field, including claims involving motor vehicle liability, product liability, occupier's liability, fire loss, and property damage. James has also acted in various professional liability matters, defending insurance brokers, home inspectors, and alternative healthcare providers.

Additionally, James represents both individuals and insurers in first party insurance claims for accident benefits, disability insurance, and bad faith. James is regularly involved in complex claims concerning catastrophic impairment, entitlement and quantum of income replacement benefits, and claims for bad faith. James also represents insurers in disputes regarding coverage, priority for accident benefits, and loss transfer.

He regularly appears before the Superior Court of Justice, the Financial Services Commission of Ontario, and private arbitrators handling litigation, arbitration and appellate matters.

James has also authored and co-authored various papers for the County of Carleton Law Association, the Lawyers' Weekly and the Advocates' Quarterly.

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Areas of Practice
Civil Litigation
Personal Injury and Wrongful Death
Professional Negligence
Medical Malpractice
Insurance Defence
Commercial Litigation
Intellectual Property and Technology Litigation

Education
1973 B.A., University of Western Ontario
1977 LL.B., University of Ottawa
1979 Call to Ontario Bar

Professional Activities and Organizations
The Advocates’ Society
Director (2001-2004)
Executive (2004-2008)
President (2008-2009)
Bar Admission Course – Instructor
University of Ottawa – Assistant Professor (1992-2001)
Ontario Centre for Advocacy Training – Instructor
The Medical-Legal Society of Ottawa-Carleton
Canadian Bar Association
County of Carleton Law Association
Trustee (1986-91)
Executive (1991-93)
President (1994)

Public Organizations
United Way
Legal Section Chair (1986-88)
Professional Division Chair (1997-2000)
Ottawa Hospital Foundation Legacy Campaign (2005-08)

Peter Cronyn is leader of our Litigation Group. He has been practicing advocacy exclusively since 1979 and has appeared at all levels of our Court system.

Throughout his career, he has represented individuals, insurers and corporate clients on a broad range of matters including personal injury, wrongful death, product liability, occupiers liability, property and damage loss, business interruption, fire loss, arson, fraud and bad faith. In addition, he has extensive experience in the professional liability field, representing plaintiffs in medical malpractice cases and providing defences for architects, engineers and members of the dental professions.

(see page 2 – cont’d)
Peter also has broad experience in representing clients in commercial disputes, including contract disputes, directors’ and officers’ liability, breach of fiduciary duty and securities litigation. He has also represented our clients in intellectual property and technology related disputes and litigation.

Peter has been the President of The Advocates’ Society in 2008-09. He was the President of the County of Carleton Law Association (the bar association for the City of Ottawa) in 1994-5. He was actively involved in these organizations as a director and member of their Executive Committees leading up to becoming the President of both.

Peter was also selected to be included in the 2008 and 2010 editions of The Best Lawyers in Canada in the areas of Corporate and Commercial Litigation, Personal Injury Litigation and Insurance Litigation.

Peter has delivered numerous papers at conferences convened by the Law Society of Upper Canada, the Canadian Bar Association, The Advocates’ Society, the County of Carleton Law Association and the University of Ottawa. He is a co-author of a text published by Carswell entitled Personal Injury Actions and was the author of Product Liability Update: Current and Emerging Trends in the 1998 Law Society of Upper Canada Special Lectures.

He has taught trial advocacy to lawyers and law students for several years at the Law Society Bar Admission Course, The Advocates’ Society, the University of Ottawa Law School, Ontario Centre for Advocacy Training and the Intensive Trial Advocacy Program at Osgoode Hall Law School.

Peter has been actively involved with the United Way/Centraide Campaign in Ottawa for many years and was Chair of the Professional Division and a member of the Campaign Cabinet from 1997 to 2000. Peter was also actively involved in raising funds for the Ottawa Hospital Foundation Legacy Campaign from 2005 to 2008.

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Areas of Practice
Civil Litigation
Equine Litigation
Personal Injury and Wrongful Death
Insurance Defence
Professional Negligence
Class Actions

Education
1987 B.A., University of Ottawa
1994 LL.B, University of Ottawa
1996 Call to Ontario Bar

Professional Activities
County of Carleton Law Association
CCLA Civil Litigation Updated Planning Committee (2000-2002)
CBAO Executive Committee Member (1999)
Canadian Bar Association
The Advocates’ Society

Stacey Cronyn is a partner at Nelligan O’Brien Payne and member of our Personal Injury and Wrongful Death Practice Group as well as our Insurance Defence Practice Group. She has practised exclusively in the area of civil litigation since her call to the Bar in 1996. Stacey has appeared as counsel at various court levels, as well as before administrative tribunals.

Stacey’s main area of practice is civil litigation, with an emphasis on insurance-related matters. She has a broad range of experience in the property and casualty field, including motor vehicle, product liability, occupier’s liability, fire loss, property and damage loss, business interruption, fraud and bad faith claims. Stacey also has extensive experience as counsel in personal injury litigation, professional liability, and class proceedings. Stacey is a horse lover and has a growing practice in the area of equine litigation.

Stacey is actively involved in the County of Carleton Law Association, and is a member of the Canadian Bar Association and The Advocates’ Society.

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Colin Dubeau is a partner at Nelligan O'Brien Payne and the leader of our Insurance Defence Group. He is also a member of our Personal Injury and Wrongful Death practice group. Since his call to the Bar in 1999, Colin has practised exclusively in the areas of civil litigation and advocacy with an emphasis on insurance-related matters. Colin has appeared before all levels of Ontario courts and also has experience before the Federal Court of Appeal, Supreme Court of Canada and a diverse array of administrative tribunals.

Colin has broad experience in the property and casualty insurance fields including motor vehicle claims, accident benefit litigation, personal injury claims, bad faith claims, construction law, defamation claims, social and commercial host claims, fire loss claims and coverage related issues. Colin also has extensive experience in professional liability claims against lawyers, accountants, architects, engineers, school officials and health care practitioners, along with broad experience in the ecclesiastical and municipal litigation.

In his practice Colin has acted for clients in a diverse range of commercial disputes including construction claims, building deficiency claims, environmental claims, debt collection matters and a vast array of insurance contract interpretation and dispute claims.

Colin is actively involved in the County of Carleton Law Association, The Advocates’ Society and is an instructor in the civil litigation and personal responsibility sections of the Law Society of Upper Canada’s Bar Admission Course.

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Areas of Practice
Civil litigation
Insurance defense
Personal injury and wrongful death
Municipal Law

Education
1994    B.A., Carleton University
1997    LL.B, University of Windsor
1999    Call to Ontario Bar

Professional Activities
Canadian Bar Association
County of Carleton Law Association
The Advocates’ Society
Ottawa Valley Adjusters Association
Areas of Practice
Personal Injury and Wrongful Death
Insurance Defence
Civil Litigation

Education
2004 B.A., (Highest Honours) Law and Political Science, Carleton University
2007 LL.B. University of Ottawa
2008 Call to the Ontario Bar

Professional Activities
Canadian Bar Association
County of Carleton Law Association
The Advocates’ Society

Jessica articled with Nelligan O’Brien Payne in 2007-2008 and joined the firm as an associate following her Call to the Bar in 2008. Jessica practises in the areas of insurance defence, personal injury and wrongful death and civil litigation.

Prior to joining the firm, Jessica worked as a Legal Researcher for the Canada Revenue Agency Investigations Directorate. She also worked for professors from Carleton University as a research assistant and a teacher’s assistant.

Throughout her legal studies, Jessica was actively involved with the University of Ottawa Community Legal Clinic. In 2006-2007, Jessica was a division leader in the civil division and served on various committees, including the Steering Committee, the Legal Aid Committee and the Hiring Committee. In 2007, Jessica’s peers awarded her the outstanding contribution award for her involvement with the University of Ottawa Community Legal Clinic.

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Fabrice Gouriou is a member of the Insurance Defence Group. He practises civil litigation in the areas of insurance defence, personal injury & wrongful death and class actions.

Fabrice was called to the Bar in Ontario in 2005. Prior to joining Nelligan O’Brien Payne, Fabrice practised civil litigation in Toronto, including the prosecution of product liability and sexual abuse class actions, and employment law.

He has experience before the Ontario Superior Court of Justice and the Ontario Court of Appeal. He also appeared before the Supreme Court of Canada in the *Pecore v. Pecore* case, a seminal case on the issue of the competing presumptions of advancement and resulting trusts.

Fabrice was a lawyer in France before coming to Canada. He provides legal services to clients in both official languages.

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JOSEPH W. L. GRIFFITHS

Areas of Practice
Civil Litigation
Insurance Defence
Personal Injury and Wrongful Death
Professional Negligence
Medical Malpractice
Disability Claims
Commercial Litigation

Education
1997 B.A., Carleton University
2000 LL.B., University of Ottawa
2002 Call to Ontario Bar

Professional Activities and Organizations
University of Ottawa – Trial Advocacy Course – Sessional Lecturer
Canadian Bar Association
County of Carleton Law Association
The Advocates’ Society
American Trial Lawyers Association
Canadian Defence Lawyers Association

Joseph has successfully acted in a variety of civil litigation matters on behalf of individuals, corporations and municipalities. In particular, Joseph has been retained to act in construction and building deficiency claims, debt collection matters, personal injury and medical malpractice disputes, shareholder disputes, intellectual property claims, environmental problems, breaches of privacy claims, property/boundary disputes and corporate/commercial litigation.

Since joining Nelligan O’Brien Payne in 2004, Joseph has also acted for several insurance companies in matters involving personal injury, coverage disputes and professional liability claims. In addition, Joseph has also successfully prosecuted and defended claims involving breaches of trust, sexual abuse and exploitation against government agencies, physicians, clergy and non-profit organizations. More recently, Joseph has been actively assisting members of the aboriginal community with claims associated with the Indian residential school settlement process.

Over the course of his practice, Joseph has appeared before all levels of Courts in Ontario including the Ontario Court of Appeal, Divisional Court and Superior Court. Joseph has also appeared in the Federal Court of Canada and a host of administrative tribunals including the Criminal Injuries Compensation Board, the Financial Services Commission of Ontario, the Ontario Human Right Commission, the Health Appeal and Review Board and the Ontario Municipal Board.

Joseph is presently an instructor at the University of Ottawa where he teaches the Trial Advocacy Course.

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PATRICIA LAWSON

Areas of Practice
Civil Litigation
Personal Injury and Wrongful Death
Insurance Defence
Conflict of Laws

Education
1980  B.A. (Translation), Université du Québec à Trois-Rivières
1985  B.C.L., LL.B., McGill University
1987  Call to Ontario Bar
1987  Call to Quebec Bar

Professional Activities and Organizations
Canadian Bar Association – Insurance Law and Private International Law sections
County of Carleton Law Association
Association des juristes d’expression française de l’Ontario (AJEFO)

Patricia Lawson was called to the Bars of Quebec and Ontario in 1987. She is fluently bilingual, having worked as a translator prior to commencing her law career, and she serves her clients in both official languages. She regularly conducts examinations for discovery in both languages, and has appeared before the Superior Courts and Courts of Appeal in both Ontario and Quebec, pleading in both French and English. Many of her files are complex and document-intensive, with documents in both languages, and she often deals with clients, insureds, opposing parties and experts who speak French.

Patricia specializes in civil litigation, with an emphasis on insurance defence work and personal injury. She has expertise in matters relating to conflict of laws (in particular Ontario-Quebec matters), environmental law, property losses and liquor liability defence work. She has represented clients on claims involving automobile accidents, slips and falls, breach of fiduciary duties, fuel oil spills, construction defects, professional negligence (engineers, surveyors, lawyers and others), officers’ and directors’ liability, disability insurance and life insurance policies, defamation, commercial host, fire losses, flood damage, sewer back up damage and occupier liability.

Patricia taught courses at Algonquin College, including civil procedure, wills and estates and debtor-creditor, from 1992 to 1994. From 1990 to 1994, she served on the Board of Directors of The Good Companions, a senior citizens organization in Ottawa. She also served as the vice president and president of the School Committee at École Saint-Hugues from 1998 to 2002, and has coached recreational soccer for seven years in the Cumberland United Soccer League. Recently, she was director of a competitive hockey team in Cumberland.

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RAYMOND MURRAY

Areas of Practice
Civil Litigation
Commercial Litigation
Class Actions
Insurance Defence
Personal Injury and Wrongful Death
Professional Negligence

Education
1999  B.A., University of McGill
2004  LL.B., University of Ottawa
2005  Call to Ontario Bar

Professional Activities and Organizations
Canadian Bar Association
County of Carleton Law Association
The Advocates’ Society
Canadian Association of Black Lawyers

Raymond articled with Nelligan O'Brien Payne, and joined the firm following his Call to the Bar in 2005. Since then Raymond has focused his practice primarily in the areas of civil and corporate/commercial litigation, representing both corporations as well as individuals.

Raymond’s experience includes claims related to environmental issues such as mould exposure and oil/sewage contamination and spills, building construction including Ontario Building Code violations, negligence relating to municipalities, host liability, contractual liability, occupiers liability and personal injury including motor vehicle accidents and slips and falls. He has appeared before the Superior Court of Ontario, the Ontario Divisional Court, and the Small Claims Court of Ontario. Raymond has also appeared in a host of administrative tribunals including the Criminal Injuries and Compensation Board, the Financial Services Commission of Ontario, and the Ontario Landlord and Tenant Board (formerly known as Ontario Rental Housing Tribunal).

More recently, Raymond has been actively assisting members of the aboriginal community with claims associated with the Indian residential school settlement process.

Prior to joining Nelligan O'Brien Payne, Raymond worked as a caseworker for the University of Ottawa Community Legal Clinic.

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CRAIG O’BRIEN

Areas of Practice
Civil Litigation
Personal Injury and Wrongful Death
Professional Negligence
Commercial Litigation
Insurance Defence
Class Actions

Education
2001  B.Hum., Carleton University
2005  LL.B., University of Ottawa
2006  Call to Ontario Bar

Professional Activities and Organizations
Canadian Bar Association
County of Carleton Law Society
The Advocates’ Society

Craig was called to the Bar in 2006 and has worked exclusively in civil litigation since that time with an emphasis on insurance defence and professional liability litigation.

He has worked in a variety of insurance claims and has experience in slip and fall, building deficiency claims, improper road and sidewalk maintenance claims, environmental spill claims and occupiers’ liability claims. He also has experience in the area of accident benefits, including Bill 164, claims. He acts and has acted on behalf of an insurer for building inspectors. He has appeared before the Superior Court of Ontario, Small Claims Court of Ontario, and various administrative tribunals, including the Financial Services Commission of Ontario.

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TOM S. W. YEN

Area of Practice
Civil Litigation
Insurance Defence
Personal Injury and Wrongful Death

Education
2005 Hon. B. Sc. (with High Distinction), Psychology and Cognitive Neuroscience, University of Toronto
2008 LL. B. (cum laude), University of Ottawa
2009 Call to the Bar of Ontario

Professional Activities and Organizations
Canadian Bar Association
County of Carleton Law Association
The Advocate’s Society
Golden Key International Honours Society

Tom S. W. Yen completed his articles with Nelligan O’Brien Payne and joined the firm as an associate lawyer following his Call to the Bar of Ontario in 2009. Tom practises in the area of civil litigation, including insurance defence and personal injury.

During his legal studies, Tom served as a teaching assistant for the alternative dispute resolution program for first year law students. He also worked at the University of Ottawa Community Legal Clinic as a caseworker in the Civil Division. Moreover, Tom completed an internship with Treasury Board of Canada Secretariat where he conducted legal research and assisted in the preparation of legal opinions.

Prior to joining the firm, Tom worked as a Probation and Parole Officer with the Ministry of Community Safety and Correctional Services. In addition to fulfilling his regular duties, he assisted in the supervision of probationers in the Ottawa Drug Treatment Court rehabilitation program.

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