

2017 CarswellOnt 19020
Ontario Licence Appeal Tribunal

16-004144 v. Aviva Insurance Company Canada

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**In the Matter of an Application pursuant to subsection 280(2) of the
Insurance Act, RSO 1990, c I.8., in relation to statutory accident benefits**

Applicant (Applicant) and Aviva Insurance Company of Canada (Respondent)

Terry Hunter V-Chair

Judgment: June 12, 2017

Docket: 16-004144/AABS

Counsel: Counsel — not provided

Subject: Insurance

Headnote

Insurance --- Automobile insurance — No-fault benefits — Practice and procedure on claim for benefits — General principles

Terry Hunter V-Chair:

Overview

- 1 On October 19, 2015 the applicant was catastrophically impaired as a result of a motor vehicle accident. The applicant sought certain benefits from the respondent which were denied. These form the subject matter of the application before the Tribunal.
- 2 The initial case conference was held March 8, 2017, Adjudicator Nemet, after being advised the applicant does not have capacity, rescheduled the case conference to March 29, 2017. The applicant's representative was instructed to file documents which would result in a formal finding of incapacity and the appointment of a litigation guardian.
- 3 On March 29, 2017, the case conference resumed before Adjudicator Truong. The adjudicator was advised that the applicant was impecunious and unable to afford the cost of proceeding with a guardianship application.
- 4 The case conference concluded with Adjudicator Truong stating the application could not proceed.
- 5 On May 23, 2017, the applicant's counsel wrote the Tribunal advising that their client was caught in a gap which was preventing her application from proceeding. The correspondence is treated as a motion to resume the case conference.
- 6 The Tribunal does not have a Rule that would specifically allow for the appointment of a litigation guardian. Rule 14.1 of the *Tribunal's Rules of Practice and Procedure* provides that the Tribunal "may make any such orders as the member considers proper for the conduct of the proceeding."

Result

- 7 The Tribunal is prepared to proceed adopting the process used by the Social Justices Tribunals of Ontario which includes the Human Rights Tribunal of Ontario and the Child and Family Services Review Board (See appendix A attached).

8 The case conference will resume when the parties provide mutually agreeable times for a case conference date. In addition the applicant will provide a signed declaration to the Tribunal from a person of the applicant's choice which contains the following information:

- 1) They consent and are prepared to act as a litigation guardian for the applicant in her appeal with the Licence Appeal Tribunal;
- 2) What their relationship is to the applicant;
- 3) Why they believe the applicant is not mentally capable of making decisions related to this appeal;
- 4) The nature and extent of the disability causing the mental in capacity;
- 5) They are at least 18 years of age and are capable of making decisions on behalf of the applicant;
- 6) They do not have any existing substitute decision making authority for the applicant;
- 7) To the best of their knowledge there is no other person who has the authority to be the litigation guardian for the applicant in this proceeding;
- 8) That any person who holds power of attorney or guardianship for the person for other matters has been provided with a copy of the materials in the proceeding;
- 9) They have no interest that would conflict with the interests of the applicant;
- 10) They will diligently attend to the interests of the applicant and shall take all steps necessary for the protection of these interest.

9 The Tribunal will review the declaration and may issue a procedural order appointing the litigation guardian and set out his or her responsibilities in that order.

Appendix A

Practice Direction on Litigation Guardians before Social Justice Tribunals Ontario

Practice Directions support the Social Justice Tribunals Ontario (SJTO) Common Rules of Procedure and provide guidance about what the Tribunal expects of the parties and in turn what the parties can expect of the Tribunal. They assist in understanding and applying the rules.

Purpose

This Practice Direction discusses how a person who does not have legal capacity can be a party to a case before the tribunals and boards of the Social Justice Tribunals Ontario ("tribunal") through a litigation guardian. It relates to Rule A10 of the SJTO Common Rules. The SJTO is committed to making its processes accessible and responsive to persons with disabilities, and in particular to persons with cognitive disabilities. Rule A10 is part of an ongoing effort to review tribunal processes to ensure that they are responsive to these needs.

Being legally incapable means that, under the law a person is unable to make certain decisions for himself or herself. A party may be legally incapable in a tribunal proceeding for one of two reasons: either they are a minor (under the age of 18) or they do not have the mental capacity to make decisions about the issues in the case.

General

Rule A10 only applies where another person wants to be a litigation guardian for a party in a case. The tribunal has no power to require the Public Guardian and Trustee or the Children's Lawyer to be a litigation guardian. For a discussion of tribunals' powers to appoint a litigation guardian, see *Yuill v. Canadian Union of Public Employees*, 2011 HRTO 126 (Ont. Human Rights Trib.). This Practice Direction and Rule A10 do not address situations where one party believes that another party does not have capacity to conduct the proceeding. The relevant legal principles applicable to that situation are discussed in *Romanchook v. Garda Ontario*, 2009 HRTO 1077 (Ont. Human Rights Trib.) and *Collier v. Freeland*, 2011 HRTO 399 (Ont. Human Rights Trib.).

Rule A10 also does not apply where a litigation guardian is not needed.

Everyone 18 years of age and over is presumed, unless there is a reason to believe otherwise, to have legal capacity to make decisions. This includes the decisions to start a case before a tribunal and to decide what to do during the case. If someone does not have the capacity to bring or respond to a case then they may need a litigation guardian to do so for them.

As discussed below, the litigation guardian must file the appropriate tribunal form and provide the relevant supporting documents. Normally, this is done at the start of the case. However, if a case is already underway, it can be done later when the need for a litigation guardian is clear.

The litigation guardian must agree to take on this role. Litigation guardians must be at least 18 years of age and must understand the nature of the case before the tribunal.

Minors

Depending on the type of case, a minor who is a party may require a litigation guardian. There are some situations where it is not necessary for a minor to have a litigation guardian. Applications at the Human Rights Tribunal of Ontario are the only cases at the SJTO where litigation guardians for minors are typically necessary and used.

A parent or a legal guardian will usually be a minor's litigation guardian. Others who may act as a litigation guardian for a minor include a parent with legal custody of the minor, a court appointed guardian of the minor's property under the *Children's Law Reform Act*, R.S.O. 1990, c. C.12, or the Children's Lawyer. If this applies, the litigation guardian must file a document proving this.

A litigation guardian for a minor must file a signed form confirming the minor's date of birth, the nature of his or her relationship to the minor, and various declarations. The litigation guardian must send a copy of the documents in the case (for example, the application or appeal, and response if any) and a copy of this Practice Direction to any other person with custody or guardianship rights of the minor (for example, another parent with joint custody). Form 4A at the Human Rights Tribunal of Ontario should be used for the declaration. If you seek to become a litigation guardian for a minor in a proceeding before another tribunal, provide your declaration the form of a letter.

Parties with Mental Capacity Issues

If a party does not have the mental capacity to make decisions in the tribunal proceeding someone else (such as a friend, family member, or support worker) may be their litigation guardian and bring or defend a case for them.

The term "mental incapacity" in this context means someone who cannot understand information needed to make decisions about the case or cannot understand the consequences of such decisions.

There may already be someone with the power to be the litigation guardian in the tribunal process, for example, a substitute decision maker. A substitute decision maker is someone with a continuing power of attorney, or a court-appointed or statutory guardian of property under the *Substitute Decisions Act*, 1992. The authority of a substitute decision maker may cover different things. It is important to check whether a substitute decision maker has the power to be the litigation guardian in the litigation

before the tribunal. If so, only the person who has this power can be the litigation guardian at the tribunal. A person who is already a litigation guardian usually does not need to file evidence about the disability with their declaration.

A litigation guardian for a person who lacks capacity to make decisions in a tribunal proceeding must file a signed form confirming the nature of his or her relationship to the person, why he or she believes that the person lacks the mental capacity to make decisions in the proceeding, a description of the disability causing the mental incapacity, and various declarations.

The forms for the declaration are:

- Human Rights Tribunal of Ontario: *Form 4B*
- Landlord and Tenant Board: *Request to be a Litigation Guardian: Mental Incapacity*
- Child and Family Services Review Board: *Application for Litigation Guardian: Mental Incapacity*

Forms have not been created for the other SJTO tribunals since litigation guardians are not typically necessary and used. If you seek to become a litigation guardian for a party with mental capacity issues in a proceeding before a tribunal without a form, provide your declaration in the form of a letter.

It is helpful to provide further evidence to show that the person cannot make the needed decisions. For example, a capacity assessment, medical or other evidence of the person's mental health or intellectual disabilities, or a statement from a trained community or support worker. If the litigation guardian already has the legal power to conduct legal proceedings, the document confirming this power is usually all that needs to be attached.

If there is someone who has the power to make decisions for the person, but this does not include the power to act in the tribunal case, the litigation guardian must send a copy of the materials (for example, the application or appeal, and any response) to this person together with a copy of this Practice Direction. A person cannot ask to be a litigation guardian if there is already some other person with legal power to be the litigation guardian, see Rule A10.4e.

Declaration and Responsibility of Litigation Guardians

Litigation guardians must declare (promise) that they will fulfil the responsibilities set out in Rule A10.8.

Litigation guardians must make decisions in the interests of the party they represent. They must learn about the case and the tribunal's processes. Litigation guardians must diligently look out for the interests of the person they are representing. They must do everything needed to protect those interests. Before filing a case, the litigation guardian must consider the impact it would have on the person they are representing.

As much as possible, the litigation guardian must inform and consult the person when making decisions about the case. This will depend upon the person's understanding and ability.

The litigation guardian must decide whether to hire a lawyer or paralegal. The litigation guardian must provide instructions to the lawyer or paralegal, if there is one. To the extent possible, the represented person should also consult with the representative directly. The litigation guardian must assist in finding evidence to put forward the best possible case.

No one can be paid to be a litigation guardian unless this is provided for by law or in a pre-existing agreement. Litigation guardians cannot negotiate a settlement of a party's case that pays them for their work as litigation guardian. When a litigation guardian receives settlement monies, the money generally belongs to the person they are representing.

Naming and Removing a Litigation Guardian

Once the completed form, including the declaration is filed, the person is the litigation guardian. There is no need for the tribunal to make an order "appointing" the litigation guardian.

The tribunal will review the materials when they are filed, and if it has concerns that the litigation guardian is not appropriate, it may ask for submissions on whether the litigation guardian should be refused under Rule A10.7.

The tribunal can also, at any other time during the proceeding, decide whether a litigation guardian should be removed. The tribunal may do so on its own initiative, or on request of a party or other person, including the person who is represented by the litigation guardian.

The reasons a litigation guardian may be refused or removed include:

- a. the litigation guardian has an interest that conflicts with the interests of the person represented;
- b. the appointment conflicts with the substitute decision making authority of another person;
- c. the person has capacity to conduct or continue the proceeding;
- d. the litigation guardian is unable or unwilling to continue in this role;
- e. a more appropriate person seeks to be litigation guardian; or
- f. no litigation guardian is needed to conduct the proceeding.

Conflict of Interest

A litigation guardian cannot have a conflict of interest with the person he or she is representing. Where a person believes that a litigation guardian has a personal interest that conflicts with the interest of the person they are representing, then that person can file a request asking the tribunal to remove the litigation guardian.

For a further discussion of what it means to have a conflict of interest, please see *Gronnerud (Litigation Guardian of) v. Gronnerud Estate*, 2002 SCC 38 (S.C.C.) and *Yuill (Litigation guardian of) v. CUPE*, 2012 HRTO 366 (Ont. Human Rights Trib.).

Conflict with Another Person's Decision Making Authority

The litigation guardian must declare that he or she has provided a copy of the materials in the proceeding to any other person who has substitute decision making authority, such as through a continuing power of attorney, court or tribunal order, or custody of a child. If allowing the litigation guardian to act would conflict with this other person's authority to make decisions for the represented person, then the tribunal may refuse or remove the litigation guardian. This may occur, for example, where a court or the Consent and Capacity Board has already appointed some other person as a litigation guardian for the party. Where another person believes they are the proper litigation guardian they can request that the tribunal appoint him or her instead.

Represented Person Has Capacity

When a minor turns 18, he or she will become the party in his or her own name and the role of the litigation guardian will automatically end. If a party who initially lacked mental capacity to participate becomes capable of making decisions in the proceeding, the litigation guardian will be removed or refused.

Since capacity can vary and fluctuate, it is important for a litigation guardian to think carefully about whether a party can represent him or herself. Persons with capacity issues may be able to participate in a tribunal proceeding by themselves with appropriate accommodations. The tribunal will accommodate parties' needs in accordance with the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended ("*Human Rights Code*") and the tribunal's policies on accessibility and accommodation.

Tribunal processes facilitate the involvement of others who may support a person in making decisions or in representing himself or herself before the tribunal. An unpaid friend or family member may act as a representative, and may also appear as a support person: see the Practice Direction on Representation before Social Justice Tribunals Ontario.

Litigation Guardian Unable to Continue

A litigation guardian has to be able to make decisions about the case. If the litigation guardian cannot continue in this role, he or she may be removed.

A More Appropriate Person seeks to be Litigation Guardian

The tribunal may refuse or remove a litigation guardian if there is someone else who would be more appropriate. If someone (for example a parent or substitute decision maker) believes that he or she is a more appropriate person to act as a litigation guardian then a request can be made that the tribunal remove the current litigation guardian and appoint him or her.

No Litigation Guardian Required

In some cases a minor will not need a litigation guardian as they can participate directly in a tribunal proceeding as a party. In these cases the tribunal may refuse the litigation guardian because no litigation guardian is required due to the nature of the proceeding.

At the Child and Family Services Review Board and Custody Review Board, a child can participate in proceedings without a litigation guardian. These tribunals do not typically require or use litigation guardians for children and youth because of the statutory provisions governing their proceedings.

At the Social Benefits Tribunal a person who is under 18 years of age can participate in proceedings as a party without a litigation guardian. For example, minors may file an appeal of a decision regarding whether or not they are eligible for income assistance under the *Ontario Works Act, 1997* because there are special circumstances that justify the assistance. A minor who has a dependent child may file an appeal of a decision regarding that minor's eligibility for assistance on behalf of his or her dependent child.

At the Human Rights Tribunal of Ontario a 16 or 17 year old who has withdrawn from parental control, and is making a claim of discrimination in housing, can file an application on his or her own behalf (see section 4(1) of the *Human Rights Code*). Similarly, at the Landlord and Tenant Board a person who is a 16 or 17 years old, who has withdrawn from parental control and who is a tenant, may file an application on his or her own behalf (see section 4(1) of the *Human Rights Code*).

The tribunal may also refuse or remove a litigation guardian where a litigation guardian is unnecessary because the person has a sufficient level of capacity to participate in the proceeding without one. At the HRTO, if a party has some capacity then he or she can be assisted in bringing an Application under s.34(5) of the *Human Rights Code*. This section of the *Code* allows persons to consent to have someone else file an application on their behalf and make decisions in the case for them (see Form 27) and the HRTO's Practice direction on filing applications on behalf of another person). In this way a friend, organization or family member can file an application on behalf of any person.

The HRTO has found that a person does not have to be able to make all decisions about the case to consent to an application being brought on their behalf under section 34(5) of the *Code*. Rather, it is sufficient that they understand what it means to file a human rights application, to give someone the power to make the decisions for them, and to end their case. For a discussion of section 34(5) of the *Code* please see *Kacan v. OPSEU*, 2010 HRTO 795 (Ont. Human Rights Trib.) and the HRTO's Practice Direction on filing applications on behalf of another person.

If a litigation guardian has been removed, the tribunal may either order that the party will conduct the proceeding in his or her own name, substitute a new person as litigation guardian, or order that the proceeding cannot continue until someone else comes forward to be the litigation guardian.

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