FSCO A02–001766

BETWEEN:

H. I.

Applicant

and

AVIVA CANADA INC.

Insurer

DECISION ON PRELIMINARY ISSUES

Before: John Wilson

Heard: June, 22, 23, and 24, 2004, at Sudbury Ontario, with further written submissions.

Appearances: Carolyne Champaigne as "facilitator" for Ms. H.I.
Kadey B.J. Schultz for Aviva Canada Inc.

Issues:

The Applicant, Ms. H.I., was seriously injured in a motor vehicle accident on December 1, 1998. Her injuries included trauma to her head, resulting in brain injury. She applied for and received statutory accident benefits from a predecessor of Aviva Canada Inc. ("Aviva"), payable under the *Schedule*.[1] She was later found to be catastrophically impaired by her DAC assessors and began to pursue further accident benefit entitlements available to her under the *Schedul*e. Ms. H.I. applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

[1]The *Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended by Ontario Regulations 462/96, 505/96, 551/96, 303/98, 114/00 and 482/01.

The first preliminary issue is the capacity of Ms. H.I., specifically, to instruct counsel and/or represent herself and make decisions with regard to the conduct of a complex arbitration proceeding.

The second issue to be heard relates to the role of Ms. H.I.'s "facilitator", Ms. Champaigne, in this arbitration proceeding. While her stated role is that of "facilitator", there is no definition of such a role in the *Dispute Resolution Practice Code* or elsewhere. Given that Ms. Champaigne's participation, to date, has included many activities similar to that of an agent or representative, is she barred from appearing on behalf of Ms. H.I. by reason of her failure to register with FSCO as a *SABS agent*, or by reason of any conflict of interest due to her role as a paid support worker, whose services may be at issue in the arbitration?

Result:

1. Ms. H.I. is capable to instruct counsel and to carry on with her arbitration and does not require a litigation guardian in accordance with Rule 10 of the *Practice Code*.

2. Ms. Champaigne may not appear at the hearing as "facilitator" agent, representative, translator, or party. Nor may she appear as "support person" without a specific order by the presiding arbitrator.

EVIDENCE AND ANALYSIS:

These two preliminary issues, although dealing with procedural matters in an arbitration proceeding, touch at the heart of Ms. H.I.'s claim with the Insurer. For the Applicant the need to be independent and autonomous in her decision-making is at the heart of the issues before me. She believes that, notwithstanding a serious brain injury that has entailed long-term compromise of some of her cognitive functioning, she has the right to obtain the assistance she views as necessary, and to fully direct the process of enforcing that right against the Insurer.

For the purposes of these two inter-related, preliminary issues only, notwithstanding the objections of the Insurer, Ms. Champaigne was allowed to fully participate in the hearing as a "facilitator" even though her role strayed into that of agent or representative, and she was testifying as a witness.

Capacity

The issue of Ms. H. I.'s capacity was first, specifically, raised in this proceeding in January 2004. At that time, the Insurer, through its counsel, wrote to advise the Commission of its concerns.

Ms. Schultz, counsel for Aviva, alleged that there was a potential issue with regard to Ms. H.I.'s capacity to bring this matter without the appointment of a litigation guardian. She made reference to a capacity assessment taking place in the near future, and to the reports of Ms. H.I.'s physician and a speech-language pathologist in support of her concerns.

These reports note, *inter alia*, that "disability has occurred with respect to cognition, communication and executive reasoning" and that "as [Ms. H.I.] fatigues mentally her ability to process, comprehend and coordinate various thought processes becomes increasingly impaired" .

The current Rule 10 of the *Dispute Resolution Practice Code* (the *Practice Code*) sets out the Commission's practice with regard to parties under a disability. Subrule 10.2 states:

> A minor, or a person who has been declared mentally incapable, within the meaning of **Sections 6** or **45** of the *Substitute Decisions Act, 1992* (*SDA*) must commence a mediation or other proceeding through:
>
> (a) the Public Guardian and Trustee or a Court appointed guardian of property under the provisions of the *SDA*; or
>
> (b) an attorney under a valid continuing power of attorney that gives the attorney authority over all the property of the party; . . .

Section 6 of the *SDA* states:

> 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.[2]

Jurisprudence on this subject has made it clear that capacity is time and subject specific. Even a person who lacks global capacity according to section 6 (cited above) may still have the capacity required to marry or to appoint a substitute decision maker, while lacking in capacity to make a will.

The specific capacity in question in this matter is whether Ms. H.I.. currently has the requisite capacity to instruct counsel, or if unrepresented, to appreciate the reasonably foreseeable consequences of a decision to file and proceed with this arbitration application on an unrepresented basis.

Although the question of capacity was initially raised by the Insurer, the decision to formally enquire into Ms. H.I.'s status was mine, as an adjudicator acting pursuant to Rule 10 of the *Practice Code.* Such an enquiry is necessarily different from the normal adversarial process of litigation. Although both parties made submissions and fully participated in the process, the object of this portion of the hearing was to ensure that neither the integrity of the arbitration process, nor the rights of an individual suffering some sort of cognitive or mental impairment were compromised by this proceeding.

The presumed right of every person of full age to autonomy in decision-making may sometimes conflict with measures that, over the centuries, have been put in place to protect vulnerable persons from exploitation by others in society and the marketplace.

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[2] *Starson v. Swayze* S.C.R. 722 (Supreme Court of Canada) The decision of the Supreme Court in *Starson* strongly suggests that there must also be a consideration of whether any difficulty in appreciating outcome is due to the person's mental condition.

Rule 10 of the *Practice Code* was not created to merely provide yet another road block to applicants. It reflects similar wording in Rule 7 of the *Rules of Civil Procedure* of the Ontario Courts, which, in turn, has drawn from the common law responsibility of the King's courts to protect those whose intellect has been impaired.

Although the *Rules of Civil Procedure* do not apply, as such, to administrative tribunals, some of the underlying law does. Rule 7.08 of the civil *Rules*, makes it clear that the courts have a wide jurisdiction over persons under a disability, even to those who are not before the courts.

The mandatory aspect of this jurisdiction is conveyed succinctly by Sugden L. C., in *Re. Clare*, 3 Jo. & Lat. 571:

> If a party require protection, either for his person or his property, on the ground of imbecility of mind or lunacy, I am bound to give it to him, whatever be the demerits of the person applying for the commission... The jurisdiction is for the purpose of giving protection to the party.

It is also clear that mere lip service is not to be given to the principle of protection. As Chancellor Boyd stated in *Murphy v. Lampier* (1914) 31 O.L.R. 287:

> The solicitor may in some perfunctory way go far enough to satisfy himself as to capacity, but it is to be remembered that his duty is to go far enough to satisfy the Court that the steps he took were sufficient to warrant his satisfaction.

The archaic language of the common law decisions might strike the modern ear strangely. Words such as idiot and lunatic are no longer appropriate synonyms for those lacking capacity. However, many fundamental principles underlying the common law approach remain valid.

That is not to say that common law principles have not evolved to take into consideration a greater appreciation of the right of self determination.[3] It is of some significance that Rule 10 of the *Practice Code* adopts the modern legislative test for capacity contained in the *Substitute Decisions Act.*

Mr. Justice Quinn of the Ontario Court (General Division) in *Re Koch* (33 O.R. (3d) 485) outlined the effect of section 6 of the *SDA*:

> Compelling evidence is required to override the presumption of capacity found in s. 2(2) of the SDA (Substitute Decisions Act) and s. 4(1) of the HCCA (Health Care Consent Act). The nature and degree of the alleged capacity must be demonstrated to be sufficient to warrant depriving the appellant of her right to live as she chooses. Notwithstanding the presence of some degree of impairment, the question to be asked is whether the appellant has retained sufficient capacity to satisfy the statutes.

In a more recent case that has generated widespread publicity, the courts have underlined the primacy of individual decision-making autonomy, and the necessity of avoiding unnecessary paternalism in evaluating capacity. The *Starson* case[4] involved an appeal from the consent and capacity board of a finding that Professor Starson was incapable of consenting to certain proposed treatments. The Board, in its decision focussed, on Professor Starson's apparent failure to appreciate the consequences of declining the recommended treatment. In the first appeal of the Board's decision, Molloy J. observed:

> The Board's ... conclusions appear to be based on its perception that Professor Starson *failed* to understand the information or appreciate the consequences as evidenced by his refusal to agree that he should have the recommended treatment, rather than any evidence that his mental disorder prevented him from being *able* to understand and appreciate.

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[3] It is striking how the common law foreshadowed the modern concept of subject-specific capacity. John Nicholl noted in *Marsh v. Tyrell* (1828), 2 Hagg Ecc. 84: "(T)o suppose that because a person can understand a question put to him, and can give a rational answer to such a question, he is of perfect sound mind and is capable of making a will for any purpose whatever; whereas the rule of law; and it is the rule of common sense, is far otherwise: the competency of the mind must be judged by the nature of the act to be done, and from a consideration of all of the circumstances of the case."

[4] *Starson v. Swayze* [1999] O.J. No. 4483 (Superior Court), [2001] O.J. No. 2283 (Court of Appeal), [2003] 1 S.C.R. 722 (Supreme Court of Canada)

The Superior Court, the Court of Appeal, and the Supreme Court were all agreed that a mere apparent failure to appreciate the consequences of a decision or lack of decision is insufficient to impugn capacity without an actual inability to appreciate, linked to his mental state.

In this matter, while the issue of capacity arises over whether Ms. H.I. has the capacity to properly instruct a solicitor, or to appreciate the consequences of proceeding with her arbitration in the absence of legal assistance, many of the principles remain the same. Ms. H.I. has the absolute right to make decisions which others might view as poor or ill-advised, provided that the "poor" choice is not a function of a mental disability. She is presumed to have the capacity to deal with her own matters, in the absence of evidence to the contrary. She has the right to have her decision-making autonomy respected in the absence of convincing evidence justifying such interference.

In Ms. H.I.'s situation, the balance against interference with autonomy has been reinforced by the report of Dr. Kaminska, a qualified capacity assessor, under the *SDA*. On Ms. H.I.'s own initiative she obtained this assessment of capacity to manage property and make self-care decisions, which found her to have the capacity to manage her affairs. This could deal conclusively with Ms. H.I.'s capacity but for three important concerns.

1. Ms. H.I. has advanced a claim for enhanced attendant care services which appears to be predicated on her need for decision-making assistance due to a brain injury. This claim is based on a severe and catastrophic impairment of Ms. H.I's cognitive capacity and behavioural skills such that she requires 24-hour attendant care services to ensure her personal safety.

2. The assessment of Ms. H.I by Dr. Kaminska finds that she meets the decision-making criteria of the *SDA*. specifically because of the support network available to her in the decision-making process. The primary support noted in the report is Ms. Champaigne, whose funding is one of the key features of Ms. H.I.'s claim at arbitration.

3. The assessment does not deal directly with the range of decisions necessary to instruct counsel or to direct an arbitration hearing

There remains also the potential for more than a little contradiction between Ms. H.I.'s assertion, for the purposes of this preliminary issue hearing, that she is fully capable of conducting her arbitration, and making the necessary decisions to bring it to a hearing, and her substantive claim that she requires twenty-four hour assistance in making decisions and avoiding the consequences of what can only be characterized as a diminished cognitive ability.

This preliminary issue hearing, although presented with some evidence relating to her cognitive impairments, will not decide her entitlement to the attendant care benefits issue, and the evidence supporting that claim. Consequently any determination of the issue of Ms. H.I.'s capacity is restricted to that issue alone and should not be generalized to her substantive claim.

For the purposes of this preliminary issue hearing only, I accept Ms. H.I.'s contention that she has suffered cognitive impairments that arise from brain damage suffered in the accident. These impairments are said to be reflected by difficulties with memory, concentration, dis-inhibition, and lack of concentration.[5]

If this condition deprives Ms. H.I. of the ability to appreciate the consequences of her decisions or lack of decision in the handling of her arbitration, then, pursuant to Rule 10 of the *Practice Code*, she may only conduct her arbitration through the intermediary of a litigation guardian.

As noted earlier, several witnesses appeared to give evidence on behalf of Ms. H.I. Among them were Ms. Champaigne, her facilitator, a speech language pathologist, and a chiropractor all of whom had personal knowledge of the Applicant. Ms. H.I. testified as well.

[5]See the CAT DAC Report prepared April 2, 2002, by Work Able Centres Inc. for a summary.

It is of note that Ms. H.I., with the assistance of her facilitator, represented herself through a three day hearing, examining and cross-examining witnesses, and filing significant material in support of her case, including the report of Dr. Kaminska, the capacity assessor. As a self-represented litigant, the mere fact that she was capable of navigating through the hearing process suggests a certain ability to engage in a complex decision-making process.

As with most self-represented applicants, there may be aspects of this case where a party might have been better served by the advice and services of a lawyer. There may have been strategies and positions taken in a case by a self-represented party that would not be taken by a lawyer. There may be mistakes made that the intervention of a lawyer might have avoided.

The law makes a generalized assumption that the intervention of a lawyer in a process is advantageous to the process. Hence the courts require that a litigation guardian for an incapable party under Rule 7[6] retain counsel to represent the incapable individual in the court-room setting. Likewise, in the criminal context, an individual accused has a substantive right to retain counsel. As the Court of Appeal noted in *R. v. Romanowicz*:[7]

> The constitutional right to the effective assistance of counsel recognizes that counsel, by virtue of their professional training, will bring to their task an expertise which others, including the accused, do not possess.

Ms. H.I. is adamant that she be permitted to proceed without a lawyer in this matter. Indeed, as noted in *Romanowicz*, this is a right, or an entitlement of any natural party. However, the court cautioned; "An accused cannot at the same time exercise the right to proceed without the assistance of counsel and yet demand the right to the effective assistance of counsel."

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[6] *Rules of Civil Procedure*

[7] *Regina v. Romanowicz* 45 O.R. (3d) 506

Ms. H.I.'s choice to proceed in this matter, unrepresented, is an important decision in the management of her arbitration. Indeed, to return to *Romanowicz*, the Court of Appeal has noted an obligation of the judge or adjudicator to enquire into whether the unrepresented party has made an informed choice in so doing. It is clear, however, that once an informed choice has been made, there is no necessity to consider the objective wisdom of that choice. Indeed, the court cited the words of Lacourcière J.A. in *R. v Taylor*[8]:

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

I see no reason why the same respect for the autonomy of the individual should not inform the interpretation of Rule 10 of the *Practice Code* in arbitrations at the Commission.

While I accept that Ms. H.I. may well be better served by the services of a lawyer acting on her behalf during the hearing process, I also accept her evidence that her preference for self-representation in legal disputes antedates her catastrophic head injuries. Consequently, I find that her choice to be self-represented in this matter is not a function of her cognitive impairments, however real they may be.

With regard to the logical tension between Ms. H.I's assertion in the context of her substantive claim that she requires constant supervision to control impulsivity and to avoid danger to herself, and her concurrent assertion that she is fully able to make decisions and to appreciate the consequences of those decisions, in the context of the arbitration I recognize that there is a potential for inconsistency. Given that much of the evidence underlying the first assertion remains to be heard and accepted, I am prepared to make a finding in the limited context of the capacity to instruct counsel or not, and the capacity to make decisions with respect to this arbitration. Capacity is, after all, task and time specific.

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[8] *Regina v. Taylor* (1992), 11 O.R. (3d) 323

Dr. Kaminska's assessment, while dealing with generalized capacity to manage property and to deal with personal care, observed that Ms. H.I. "has sufficient knowledge of basic money management tasks, appropriately delegates some of these tasks or engages in consultations suitable to her needs in order to ensure effective management of her finances on a daily basis." The same skills, transposed from a financial setting to a litigation context, would be useful in making decisions about the conduct of an arbitration.

As noted earlier, however, I have some reservations concerning the appropriateness of Dr. Kaminska's identification of Ms. Champaigne as an appropriate support in Ms. H.I.'s decision-making process. It is, of course, quite proper that a person use aids to assist him or her in tackling difficult tasks. The very awareness that outside assistance is available, and can be usefully employed, is a strong indicator that the individual has an appreciation of the importance and consequences of a decision.

In light of Ms. Champaigne's evidence concerning remuneration, and the evidence of the peculiar role she has taken in Ms. H.I.'s life, I hesitate to endorse the assessor's confidence in the appropriateness of consulting the facilitator "regarding complex financial matters." Notwithstanding this quibble, the assessment does confirm my own impression from the hearing that Ms. H.I. has "sufficient knowledge of basic (money management) tasks, appropriately delegates some of these tasks or engages in consultations suitable to her needs in order to ensure effective management". Since Rule 10 of the *Practice Code* essentially adopts the *SDA* definition of capacity, I am prepared to accept Dr. Kaminska's opinion.

Based on the evidence of Ms. H.I.'s conduct of this preliminary issue hearing, the capacity assessment issued by Dr. Kaminska, and the evidence of witnesses at the preliminary hearing, I find that Ms. H.I. has shown an ability to understand the nature of the process, the necessity for making decisions, and an appreciation that consequences follow from such decisions or lack of decision.

While it may be preferable for Ms. H.I. to retain counsel, and the absence of such counsel may impede Ms. H.I. in the pursuit of her claim, I have heard no evidence that could link such a potentially improvident decision to Ms. H.I.'s mental status or her cognitive impairments.

However, should certain allegations be accepted or findings made in the context of the substantive hearing that would contradict this finding of capacity, it may be necessary to re-examine this issue in light of such information. At present, in the absence of a final determination of the extent and effect of Ms. H.I's impairments, such considerations are speculative and, while potentially unsettling, shed little light on Ms. H.I.'s current capacity to engage in the arbitration process.

I find therefore that, at the time of the preliminary issue hearing, Ms. H.I. possessed the necessary capacity to direct her arbitration and to make the necessary decisions with regard to its conduct, including the decision to appoint or not appoint counsel to assist her in this matter. She may proceed through the arbitration process without the appointment of a litigation guardian.

The Role of Ms. Champaigne

Throughout the arbitration process, Ms. H.I. has been assisted by Ms. Carolyn Champaigne. On the most recent application for arbitration, Ms. Champaigne has placed her name in the space reserved for "Applicant's Representative"[9], crossing out the word "representative" and writing in "facilitator."

The use of the word "facilitator" has raised some significant problems in this arbitration and others. To Ms. H.I., the use of a "facilitator" is akin to the provision of an interpreter, in that a "facilitator" may assist a brain-injured person in expressing him or herself, prompt responses, and assist the individual in framing questions and answers. As an assistive service, facilitation is not without some controversy. Indeed, there is no provision for facilitation in either the *Practice Code*, which governs hearings at the Commission, nor in the *Rules of Civil Procedure*, which govern matters before the courts.

[9] A December 19, 2002 application, however, lists Ms. Champaigne as "representative"

In the case at hand, a question about the exact role Ms. Champaigne plays in this arbitration has arisen because of substantial blurring of the boundaries between different functions. In fulfilling her role as "facilitator", Ms. Champaigne has performed tasks that appear to be similar to those performed by counsel or by an agent.

By way of explanation for Ms. Champaigne's participation in this matter, there is also, as noted, at least an analogy to the role of the interpreter, who assists a person in communicating with the tribunal.

There is also possibly the function of "support person" allowed for youthful witnesses by section 18.5(1) of the *Evidence Act*.

Of critical importance to these questions is the fact that Ms. Champaigne is also an interested party and a supplier of services to Ms. H.I. whose services are the subject of the substantive arbitration.

Since it was not clear exactly what the boundaries of Ms. Champaigne's role as facilitator were in this matter, I allowed Ms. Champaigne to participate fully in the preliminary issue hearing process, subject to the objections of the Insurer. I also permitted her to give testimony about her role as "facilitator."

Translator

Ms. H.I. has put forward her claim to have Ms. Champaigne appear as a "facilitator" in the context of the constitutionally protected right to an interpreter in a legal proceeding. In this context she served and filed a "Notice of Constitutional Question" pursuant to Rule 80 of the *Practice Code*. The constitutional question identified related any restriction on Ms. Champaigne's role as a facilitator to the protected right to interpretation identified by the Supreme Court in the *Tran* decision.[10]

[10] *R. v. Tran* (1994), 92 C.C.C. (3d) 218 in which the Supreme Court held that a right to an interpreter was guaranteed by s. 14 of the *Charter*.

A party has a right to be able to understand a proceeding and to communicate with a tribunal. Such a right may extend beyond the mere translation of words from one spoken language to another to the provision of sign interpreters for the deaf. Therefore, it is not entirely outrageous to suggest that an analogous service to brain-injured persons should be not only permissible but encouraged. After all, Lamer J. stated in *Tran* (supra), that "a party must have the same basic opportunity to understand and be understood as if he or she were conversant in the language."

I have no evidence that Ms. H.I. is not conversant in English, nor that she presently has any difficulty in expressing herself in English, which was the language of this hearing. Indeed, the transcript speaks eloquently to Ms. H.I.'s capacity of self-expression.[11]

In this matter, the role of Ms. Champaigne does not lend itself to characterization as simple translation. In addition to helping Ms. H.I. communicate through the rendering of her thoughts into basic English, Ms. Champaigne has been noted to intervene with the expression of her own impressions, comments and interjections that appear to draw on her own internal thoughts rather than something being expressed by Ms. H.I.

The duty of a translator is expressed by the interpreter's oath, to be administered to interpreters at hearings. In addition to swearing to the requisite knowledge of the language involved, the interpreter undertakes to "well and truly interpret the oaths to the witnesses and all questions put to the witnesses and their answers thereto." In other words, the interpreter is a mere conduit for the words of the witness. He or she is not expected to interject, modify, explain, or otherwise add to the words communicated by the witness.[12]

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[11] The April 21 2004 report by Barbara Baptiste, relied upon by Ms. H.I., identified the reasons for retaining a facilitator as the "nature of her communication deficits (expression and reception of information) as well as the executive function losses she sustained, including deficits in regard to the organization of her thoughts, her ability to process new information efficiently enough to respond to issues effectively, and her deficits in regard to management of multiple-stimuli and attention control." None of these are directly analogous to simple translation or even "signing."

[12] Sopinka Lederman & Bryant in *The Law of Evidence in Canada*, interpreting *Tran*, identify precision as a hallmark of an interpreter's task, posing the question at p. 904 "Was the interpretation word for word?"

A facilitator, on the other hand, appears to play a much different role. When asked by Ms. H.I. as to her view of the role of a facilitator, Ms. Champaigne gave the following response:

> At that time (some months after the motor vehicle accident) I identified that you had communication problems. When you used to say things to me you would give me half a sentence and then I would ask questions through the end a bit, it would turn out that the rest of the stuff that was in your head that went with it, you assumed that I knew what was in your head. So you asked me to come with you to your lawyer to try to communicate to them what it was you were looking for and what it was you wanted.

Ms. H.I also filed documents to shed light on the role of a facilitator including excerpts from a web page created by an organization called the "Planned Lifetime Advocacy Network", and a letter from Ms. Barbara Baptiste, president of Rehabilitation Management Inc. In her letter, Ms. Baptiste defined a "facilitator" as "someone who knows the individual with the injury and is able to advocate and communicate on their behalf, as needed."

It is clear from Ms. Champaigne's testimony that her concept of facilitation includes the supplementation of information communicated by Ms. H.I. with her own perception of "what was in your head." However helpful such additions and interjections may be, they do not fall within the role of a traditional interpreter. I find that the role of a "facilitator" as conceived by Ms. H.I. and Ms. Champaigne does not fit squarely within the parameters of interpretation as envisaged by *Tran* (supra), and is not protected by section 14 of the *Charter*.

There is another strong reason for not allowing Ms. Champaigne to appear as a translator in this matter. While translators are expected to be impartial between the parties, Ms. Champaigne has testified that she has a specific interest in the outcome of this arbitration and related litigation. Her services as "facilitator" in fact constitute some of the issues in dispute in this arbitration. In *Benka v. Benka,*[13] Vogelsang J. reproduced the *Interpreter's Guidelines* produced by the Ministry of the Attorney General in 1991. Paragraph 2 of the guidelines reads as follows:

[13] [1998] O.J. No. 3979

No person shall act as an interpreter in any proceeding in which he or she

(a) will appear as,
(i) counsel, (ii) agent for counsel, or (iii) a witness; or

(b) has an interest

In *Benka* (supra), Vogelsang J., citing the above guidelines, and a decision of Daudlin J.[14], rejected an affidavit, finding that "the deponent offering himself up as a translator of the evidence of his mother, with whom he shares a common purpose, is clearly grounds for rejecting his affidavit." I find that Ms. Champaigne's involvement as a witness, and an interested party, would preclude her involvement as an interpreter and facilitator, even if the role of "facilitator" were to be found to be congruent with that of interpreter, and protected by section 14 of the *Charter*.

From a practical point of view, given that Ms. H.I testified at the preliminary issue hearing, the involvement of a "facilitator" creates significant problems for the hearing process. As part of the adversarial process, an opposing party is entitled to cross-examine Ms. H.I. on her evidence. If, as indeed happened, Ms. H.I.'s evidence is supplemented by Ms. Champaigne's interjections, reformulating Ms. H.I's evidence and supplementing it at times, it is not readily apparent exactly whom should be subject to cross-examination.

Courts and tribunals, as part of the truth-seeking process, have long displayed a preference for original and primary, rather than secondary evidence. This preference helps explain many complex rules of evidence including those against hearsay. It also underlines the "best evidence rule."[15]

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[14] *O'Neill v. Boeck and Boeck* London Doc. No. 24530 (Ont. Gen Div.) (June 10, 1993)

[15] "The law does not permit a man to give evidence which from its very nature shows that there is better evidence within his reach, which he does not produce." Baron Parke in *Doe d. Gilbert v. Ross* 151 E.R. 696 (Exch.)

It must be presumed that Ms. H.I., being capable of testifying, is the best and most reliable source of information relating to her own memories, thoughts and recall. If during examination-in-chief the witness requires "prompting" and "advocacy" to enable her[16] to retrieve information from her memory, then, perhaps that is an appropriate role for counsel acting within the framework of the rules of evidence and the practice at quasi-judicial hearings.[17]

Consequently, when any information elicited is tested on cross-examination, the witness herself should be the only individual subject to cross-examination. Anything that a "facilitator" could add would be at best secondary evidence, and of dubious probative value. I need not add as well, that such interventions could well create an appearance that the witness is bolstering her own testimony through the intervention of the "facilitator", thus perhaps unnecessarily, bringing her own testimony into disrepute.

Having observed "facilitation" as envisaged by Ms. H.I. and Ms. Champaigne in action at this preliminary hearing, I can also note that it is a poor fit with the adversarial adjudicative process used at arbitration hearings, and has the potential for rendering a hearing unnecessarily difficult and complex. While that, in itself, is not enough to decide this issue, it reinforces my conviction of the undesirability of permitting Ms. Champaigne to appear in the role of "facilitator" throughout this hearing process.

For the above reasons I find that Ms. Champaigne may not appear under the guise of a translator in this hearing process. While Ms. H.I. would have an unquestioned right to a translator should her communication skills necessitate it, I find that she has not met the burden of proving that a "facilitator" is to be provided, and permitted to participate on an analogous basis. Nor has she demonstrated that, even if a "facilitator" were to be provided, Ms. Champaigne would be an appropriate candidate for the role.

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[16] Counsel may properly "prompt" by the nature of the questions asked of a witness, without necessarily being leading. Likewise documents, records, or devices may properly be used to "refresh" the memory of a witness.

[17] See letter from Barbara Baptiste cited earlier.

Agent or Representative

As noted earlier, Ms. Champaigne checked off the box for "representative" on Ms. H.I.'s first arbitration application. On a subsequent application she checked the same box, but changed the notation from "representative" to "facilitator." Co-incident with this change in descriptor was the amendment of the requirements for non-lawyer agents appearing at FSCO. These amendments created requirements that non-lawyer representatives for compensation be registered with the Commission, carry errors and omissions insurance and maintain the standards of practice set out in the *Code of Conduct for Statutory Accident Benefit Representatives*.[18] While an exception was made for unpaid representation by family members, section 19(2) of Ontario Regulation 664 makes it clear that anyone who receives "directly or indirectly from any source, a financial benefit in connection with the representation of the party, whether the financial benefit is wages, fees or another form of consideration or remuneration" is to be considered a representative for compensation.

Both Ms. H.I. and Ms. Champaigne take the position that Ms. Champaigne is not acting as a representative, paid or otherwise.

Aviva asserts, however, that Ms. Champaigne's current role, whatever she calls it, is one of a representative. It asserts that "Ms. Champaigne performs the tasks normally associated with representation, including writing letters, drafting an application and statement of claim, acting as a liaison between Ms. (H.I.) And her insurer, requesting medical legal documentation and advising Ms. (H.I.) On issues of law."[19] I might add as well, that in the context of this preliminary issue hearing, Ms. Champaigne conducted the examination-in-chief of Ms. H.I., and fully participated in the hearing process to the degree that was permitted.

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[18] Issued by the Superintendent of Financial Services, November 1, 2003.

[19] Insurer's submissions at p. 20.

It is important to note also that Ms. Champaigne's role as "facilitator" is not restricted to Ms. H.I.'s claim. On the appeal of another matter involving Ms. Champaigne as "facilitator", Director Draper concluded:[20]

> Reviewing the material before me, I find that Ms. Champaigne is not simply helping Mrs. Wilson communicate with others; she is providing representation. The definition of facilitator in Mrs. Wilson's submissions specifically includes advocacy. It is also difficult to ignore the fact that Mrs. Wilson's submissions are from "Julie Wilson/Carolyn Champaigne" and refer to Mrs. Wilson in the third-person. As well, at least one of the paragraph(s) uses "we" to refer to the source of the submissions.

The similarities between the services performed by Ms. Champaigne in the two cases are compelling.

I find that among the services provided to Ms. H.I. by Ms. Champaigne, were services traditionally performed by a representative or agent in representing a party before this tribunal. While undoubtedly Ms. Champaigne did not restrict her activities to that of a representative, her role in this arbitration process can be so characterized.

Anyone is entitled to ask a family member, as defined by the regulation, to represent him or her at the Commission. Ms. Champaigne is not a family member. Anyone may retain a lawyer, or hire a *SABS Representative* to represent him or her at a hearing. Ms. Champaigne is neither.

As noted by the Insurer, however, Ms. Champaigne is not only acting as a representative, but is also receiving consideration for her activities. It is not even necessary to consider whether the hours of attendant care services billed by Ms. Champaigne constitute some sort of round-about compensation. Ms. Champaigne testified in examination-in-chief that she had been promised a payment by Ms. H.I. that appears to be contingent on the success of Ms. H.I.'s claim. She said:

> I have a financial interest. Upon full and final settlement of (H.I.)'s claim, (H.I.) will be giving me a hundred thousand dollars to cover the costs of the last five years.

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[20] *Wilson and Liberty Mutual* Appeal Order (FSCO P04-00007, July 2, 2004).

When questioned on the same issue in cross-examination she confirmed:

> Q. Was your expectation that you would receive one hundred thousand dollars regardless of the amount of the settlement entered into by Ms. (H.I) if there were even to be a settlement?
>
> A. Was my expectation I'd be receiving a hundred thousand dollars, yes.

I find that this "expectation" constitutes a "financial benefit in connection with the representation of the party" as defined by Regulation 664. Consequently, Ms. Champaigne, to appear before the commission must be registered as a *SABS* agent, and obtain errors and omission insurance.

It is common ground that Ms. Champaigne has not applied for such registration, since she sees her role as a "facilitator rather than an agent." Consequently, she is barred from appearing before the Commission, or carrying out the function of a representative on this or any other matter before the Commission.

Even if Ms. Champaigne were to complete her registration process, or a finding was made that the registration process was inapplicable to her, she would still be barred from appearing as a representative in this matter. There is a general proposition of law that a lawyer or a representative cannot appear for a client in a case where he or she is also giving evidence.[21] Patently, this applies to Ms. Champaigne, especially since her evidence appears to be central to the Applicant's claim for attendant care benefits.

Finally, I note that having been found by a CAT DAC to be catastrophically impaired, Ms. H.I., if she is to be represented at an arbitration hearing, must be represented by a lawyer. As noted, Ms. Champaigne is not a lawyer.

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[21] See *Bell Engine Co. v. Gagne* 20 D.L.R. 235 (Sask. C.A.) And *R. v. Baxter* (1975) C.C.C. (2d.) 96.

Party

If Ms. Champaigne were a party to this matter, she would, of course, be permitted to be present throughout the proceedings, notwithstanding any order excluding witnesses. Party status would not, however, permit her to prompt Ms. H.I, nor to intervene in proceedings on her behalf as "facilitator. Unfortunately, Ms. Champaigne is neither an insurer nor an insured, and is hence not a statutory party. Although she may have an "interest" in the subject matter, as a service provider, the claim to the benefit remains Ms. H.I.'s and cannot be assigned to another person.

While I note that pursuant to Rule 10 of the *Code* a person acting as a litigation guardian, or an attorney under a power of attorney for property may have the right to participate in all aspects of a hearing, given Ms. H.I.'s position on the capacity issue, Ms. Champaigne could not avail herself of that option.

It would appear, as well, that even if Ms. H.I. were to grant to Ms. Champaigne a power of attorney to conduct this arbitration, Ms. Champaigne would not have the status to appear personally on Ms. H.I's behalf. In *Gagnon v. Pritchard*,[22] Stinson J. held that a holder of a power of attorney cannot step into the shoes of the grantor and conduct litigation personally in the same fashion that a party to a proceeding may act. While Stinson J. was applying the *Law Society Act* and the *Solicitors Act*, which together limit the ability of non-lawyers to practice in the superior courts, his reasoning would apply equally to appearances by non-lawyers and unregistered *SABS* representatives in an arbitration proceeding. At best such an attorney could justify his or her presence in the hearing instructing counsel, if such was within the powers delegated by the grantor. He or she would, however, be obliged to retain a lawyer or registered *SABS* representative to take part in the proceedings.

[22] *Gagnon v. Pritchard* 58 O.R. (3d) 557

Support Person

Director Draper noted in the *Wilson* case that a third party might appear informally as a "support person." As noted earlier, there is no direct provision in the *Insurance Act*, its supporting regulations, nor in the *Practice Code* for such a person. The *Evidence Act*, however, identifies the role in the context of minors participating in the court process.

While section 18.5(1) permits the appointment of a support person to this class of vulnerable persons, section 18.5(2) also reserves the right to reject an inappropriate support person. Significantly, one criterion for rejection is if the support person is also a witness in the matter.

Even if, by analogy, as a potentially vulnerable person,[23] Ms. H.I. has the right to have a support person present to assist her, it would appear that Ms. Champaigne, as a necessary witness to the proceeding, would be precluded from performing that role.

Conclusions

Capacity

Ms. H.I. is fully capable of conducting her arbitration, in accordance with Rule 10 of the *Practice Code*.

[23]I note that, notwithstanding the CAT DAC report, Ms. H.I., for the purposes of this hearing, does not consider herself among the categories of vulnerable persons identified in Rule 10 of the *Practice Code*.

Facilitator

While there may be strong medical and functional reasons that Ms. H.I. can benefit from the interaction of a "facilitator" in most social and work situations, the adversarial nature of a court or hearing makes the use of such supports difficult. In fact, there is no precedent for allowing the intervention of a "facilitator" in the manner envisaged by Ms. H.I and Ms. Champaigne, especially when the party who is to be assisted by the facilitator proposes to testify with the assistance of the "facilitator."

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

I have no doubt that an arbitrator would attempt to give effect to the party's choice of a support person. That choice, however, cannot be seen to impede or obstruct the arbitration process. For the reasons covered already in this decision, I do not accept that Ms. Champaigne would be a good candidate for such a support person, whatever laudable personal attributes she may have.

As a person deeply involved in the claims process, with a financial interest in the outcome of the hearing, and an almost certainty of appearing as a witness in the arbitration, Ms. Champaigne is too personally involved to appear under any of the headings enumerated above, or indeed as a "facilitator."

Although for the purposes of deciding these preliminary issues Ms. Champaigne has been accorded a status akin to that of a representative, from this point forward she shall not appear as a representative, or undertake any function that is normally performed by a representative without the express permission of the presiding arbitrator.

As noted earlier, Ms. H.I. is free to request that some other, less involved person be permitted to assist her during the hearing process, subject to the permission, and any limitations and conditions placed on that support person by the presiding arbitrator.

EXPENSES:

I leave the question of expenses to the hearing arbitrator in this matter.

November 12, 2004

John Wilson
Arbitrator

Date

FSCO A02–001766

BETWEEN:

H.I.

Applicant

and

AVIVA CANADA INC.

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. Ms. H.I. is capable to instruct counsel and to carry on with her arbitration and does not require a litigation guardian in accordance with Rule 10 of the *Dispute Resolution Practice Code*.

2. Ms. Champaigne may not appear at the hearing as "facilitator," agent, representative, translator, or party. Nor may she appear as "support person" without a specific order by the presiding arbitrator .

November 12, 2004

John Wilson
Arbitrator

Date