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Capacity Assessments: The What, When, Who, Why and How in SDA Proceedings

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For: Canadian Bar Association, "Your Comprehensive Guide to Section 3 Counsel Under the *Substitute Decisions Act*"

October 26, 2020

Outline

1. Introduction

> *It is mental capacity and not wisdom that is the subject of the SDA.... The right knowingly to be foolish is not unimportant; the right to voluntarily assume risks is to be respected. The State has no business meddling with either. The dignity of the individual is at stake.*
>
> ~Justice Quinn, 1997, *Re Koch*[1]

A capacity assessment under the *SDA* is a formidable tool. It has the power to fundamentally alter a person's legal status, stripping away their ability to make choices about basic aspects of their daily life, such as their body, their health care and where and with whom they will live. In that sense, the mechanisms of the *SDA* can be as life-altering as that of the criminal law. Unlike the criminal law, however, the loss of liberty and autonomy often occurs swiftly, with little or no notice, behind closed doors, with few procedural safeguards, and without access to legal counsel for the affected person. As Justice Quinn observed in the 1997 case of *Re Koch,* a capacity assessment can best be understood as akin to a trial –

> "a trial for which the [person] has no preparation for at which he or she sits alone at the counsel table."[2]

Fortunately, this need not be the case when an individual has section 3 counsel appointed for proceedings under the *SDA*. Section 3 counsel may play a variety of different roles in relation to capacity assessments, including:

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[1] *Re Koch*, 1997 CanLII 12138 ("*Koch*").
[2] *Koch*.

- if a capacity assessment is requested or advisable, advising the client on the purpose of the assessment, the significance and possible effect of evidence of capacity or incapacity, and the client's right to resist the assessment;

- arranging assessments or letters of opinion if the client consents to undergo the assessment process;

- if the client is undergoing a capacity assessment (voluntarily or under court order), preparing the client for the assessment;

- obtaining the client's instructions respecting the release of information requested by other parties, such as health or financial records;

- responding to a motion by an opposing party for a section 79 assessment order – the nature and rigour of the response will depend on the client's instructions, but at the very least will likely involve advising the Court of the client's wishes respecting the motion (one of the *Abrams* factors discussed below);

- gathering medical evidence or non-medical evidence that may advance the client's interests in responding to a request for a court-ordered assessment, or in the assessment itself;

- identifying any communication or disability accommodation needs for the capacity assessor; and

- disputing or challenging the conclusions of the assessor if instructed to do so.

2. Statutory Framework

Under the *SDA*, a capacity assessment is a formal assessment of a person's mental capacity to make decisions about property and personal care, conducted by a qualified assessor and in accordance with statutory requirements.

In guardianship proceedings under the *SDA*, a court cannot appoint a guardian unless it makes an express finding that the person is incapable with respect to property and/or 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.[3]

The law starts with a statutory presumption that every person is capable.[4] The onus is on the party asserting incapacity to displace the presumption through evidence. Notably, there is no statutory requirement in the *SDA* that evidence from a capacity

[3] *SDA*, ss. 25(1), 58(1).
[4] *SDA*, s. 2.

assessor is required to prove incapacity. Ultimately, capacity is a legal test, not a clinical one. However, in *SDA* proceedings, lawyers and courts have generally come to rely on assessments conducted by assessors as the primary method for establishing incapacity.

A person has a right to refuse an assessment, other than an assessment ordered by the court (or, rarely, unless their Power of Attorney for Personal Care contains a provision that authorizes the use of force to permit a capacity assessment under the *SDA*).[5]

The *SDA* provides for two main categories of capacity assessments: (1) assessments to determine whether the Public Guardian and Trustee should become the statutory guardian of property for a person; and (2) court-ordered capacity assessments relating to property and/or personal care. Assessments in the first category are non-coercive in the sense that individuals have a right to refuse to be assessed. By contrast, individuals subject to court assessment orders are be compelled to submit to the assessment and may be apprehended for that purpose.

The relevant statutory provisions are contained in **sections 16 and 78 to 81 of the *SDA***, as follows:

- **Section 16** – provides a mechanism by which "a person" may request an assessor to perform an assessment of another person's capacity to manage property for the purpose of having the PGT become the statutory guardian of property. If the person is found incapable, the PGT automatically becomes the person's statutory guardian. Statutory guardianship may be terminated through the mechanisms contained in sections 20 or 20.3 of the *SDA*.

- **Section 78** – provides procedural safeguards for the benefit of the subject of the assessment respecting property or personal care: the right to refuse an assessment; the right to receive information about the purpose and significance of the assessment, and the right to refuse, prior to the assessment occurring; the use of a prescribed form by the assessor; and the right to written notice of the assessor's findings.

- **Section 79** – provides for court-ordered capacity assessments if a person's capacity is in issue in a proceeding under the *SDA* and the court is satisfied that there are reasonable grounds to believe the person is incapable.

- **Section 80** – allows the court to make an order restraining an individual (other than the person whose capacity is in issue) from hindering or obstructing an assessment that has been ordered pursuant to section 79.

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[5] *SDA*, s. 78(1), (3).

- **Section 81** – allows the court to order the apprehension of a person for the purpose of enforcing an assessment order.

Although beyond the scope of this paper, it should be noted that capacity assessments may also arise in the context of other statutes, including the following:

- *Health Care Consent Act, 1996* – contains provisions relating to assessments of capacity to make decisions respecting treatment, admission to a care facility and personal assistance services. These assessments are conducted by health practitioners or evaluators as defined in that *Act*;[6]

- *Mental Health Act* – allows for assessments of capacity to manage property when an individual is admitted to a psychiatric facility under that statute. These assessments are done by physicians in the psychiatric facility;[7]

- *Courts of Justice Act* – allows the court to order a party to a proceeding to undergo a physical or mental examination by one or more health practitioners;[8] and

- *Personal Health Information Protection Act, 1994* – allows health information custodians to determine an individual's capacity to consent to collection, use or disclosure of personal health information.[9]

Capacity assessments under the *HCCA, MHA* and *PHIPA* may be conducted concurrently to *SDA* proceedings. That is, the existence of a proceeding under the *SDA* does not oust the authority of evaluators, health practitioners or health information custodians to assess capacity under those statutes. For instance, a person who is the subject of an ongoing application for guardianship of property might be admitted to a psychiatric facility pursuant to the *MHA* and, in that context, found incapable of managing property by his or her attending physician, following which the Public Guardian and Trustee becomes the statutory guardian of property.

In contrast, courts have affirmed that they lack jurisdiction to grant assessment orders under the *CJA* when the essential capacity issue is one that falls under the *SDA*.[10] The rationale for this approach is that assessment orders under section 105 ought not to be made as a way of circumventing the requirements of section 79 of the *SDA*. An order under the *CJA* might be appropriate in the context of litigation between parties seeking civil redress from one another, but capacity litigation under the *SDA* is fundamentally "a

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[6] *HCCA*, s. 2.
[7] *MHA*, s. 54.
[8] *CJA*, s. 105.
[9] *PHIPA*, s. 22.
[10] *Ranieri v. Ranieri*, 2009 CanLII 59682 (ON SC), at paras. 7-8. *Abrams v. Abrams*, *infra,* at paras. 54-58.

different species if not a different genus"[11], as it involves a person's autonomy and rights to make choices regarding their person and property.

3. When Will a Court Order a Capacity Assessment under the SDA?

The *SDA* contemplates that the court, on motion by a party or of its own motion, may order an individual to submit to a capacity assessment against their will. If a client is faced with such a a motion, section 3 counsel must seek instructions from the client and advocate in support of the client's position and interests on the motion.

The courts are keenly aware that capacity assessment orders ought not be made lightly. A judge faced with a request to order a capacity assessment will have in mind that a "capacity assessment is an intrusive and demeaning process"[12] and that "[t]he appointment of an assessor to conduct what is essentially a psychiatric examination is a substantial intervention into the privacy and security of the individual."[13]

Section 79 of the *SDA* provides:

> (1) If a person's capacity is in issue in a proceeding under this Act and the court is satisfied that there are reasonable grounds to believe that the person is incapable, the court may, on motion or on its own initiative, order that the person be assessed by one or more assessors named in the order, for the purpose of giving an opinion as to the person's capacity.
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> (2) The order may require the person,
> (a) to submit to the assessment;
> (b) to permit entry to his or her home for the purpose of the assessment;
> (c) to attend at such other places and at such times as are specified in the order.

There are several notable elements of these statutory provisions:

1. A person's capacity must be "in issue in a proceeding under this Act".

   The court lacks jurisdiction to grant a section 79 order as "stand-alone" relief, in the absence of another proceeding being commenced under the *SDA*.[14] The types of "proceedings under this Act" are set out in sections 20.3 (to terminate a statutory guardianship), 22 (to appoint a guardian of property), 26 (to vary or substitute a guardian of property), 27(3.1) and 27(9.1) (temporary guardianship of

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[11] *Abrams v. Abrams*, *infra*, at para. 56.
[12] *Flynn v. Flynn* (December 18, 2007, unreported, Ont. S.C.J., Court file no. 03-66/07), cited in *Abrams*, *infra*, at para. 50. *Zheng v. Zheng*, 2012 ONSC 3045 (Div. Ct.) ("*Zheng*") at para. 24.
[13] *Abrams*, at para. 50.
[14] *Neill v. Pellolio*, 2001 CanLII 6452 (CA) ("*Neill*") at paras. 17-18.

property), 28 (to terminate a court-appointed guardian of property), 42 (to pass accounts), 55 (to appoint a guardian of the person), 61 (vary or substitute a guardian of the person), 62(3.1) and 62(11) (temporary guardianship of the person) and 63 (termination of a court-appointed guardian of the person).[15]

2. The Court must be satisfied that there are reasonable grounds to believe that the person is incapable.

3. The language is permissive ("may"), such that the court retains discretion to refuse to grant the order even if it has been established that the person's capacity is in issue and there are reasonable grounds to believe the person is incapable.

Apart from the statutory preconditions, the court in exercising its discretion will consider the list of criteria set out in the leading case of *Abrams v Abrams*.[16] In that case, Justice Strathy emphasized that *SDA* proceedings are fundamentally different from other types of private litigation. These proceedings are not a contest between the interests of the litigants, but instead require the court to balance the interests and rights of an alleged incapable person against the court's duty to protect the vulnerable.[17] He set out the following list of factors for courts to consider in determining whether to order a capacity assessment:

> (a) the purpose of the *SDA*, as discussed above [to protect the vulnerable while also protecting the dignity, privacy and legal rights of the individual];
>
> (b) the terms of section 79, namely:
> (i) the person's capacity must be in issue; and
> (ii) there are reasonable grounds to believe that the person is incapable;
>
> (b) the nature and circumstances of the proceedings in which the issue is raised;
>
> (c) the nature and quality of the evidence before the court as to the person's capacity and vulnerability to exploitation;
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> (d) if there has been a previous assessment, the qualifications of the assessor, the comprehensiveness of the report and the conclusions reached;

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[15] *SDA; Neill*, at paras. 10, 18.
[16] *Abrams v. Abrams*, 2008 CanLII 67884 ("*Abrams*").
[17] *Abrams*, at paras. 47-50.

(e) whether there are flaws on the previous report, evidence of bias or lack of objectivity, a failure to consider relevant evidence, the consideration of irrelevant evidence and the application of the proper criteria;

(f) whether the assessment will be necessary in order to decide the issue before the court;

(g) whether any harm will be done if an assessment does not take place;

(h) whether there is any urgency to the assessment; and

(i) the wishes of the person sought to be examined, taking into account his or her capacity.

The onus is on the moving party to satisfy the court that the test for ordering an assessment has been met.[18] The types of evidence considered by the court may include:

- *Prior assessments* – generally, further assessments are not ordered when positive assessments of capacity exist, in recognition of the intrusive nature of the process. Additional assessments may be ordered, however, if there are circumstances such as significant deficits in the past assessments, serious remaining questions about the person's capacity, or questionable behaviour post-dating the assessments.[19]

- *Medical evidence* – this may include the opinions or clinical records from sources such as family doctors, other treating physicians, hospital records, long-term care home records, and others. Courts will decide how much weight to place on this type of evidence. On the one hand, medical evidence can be seen as a neutral source from clinicians independent of the litigation process. On the other hand, the court will consider the length and nature of the relationship between the alleged incapable person and the clinician, the level of detail or specificity in the records and other indicia of their reliability. For instance, a family doctor's letter saying simply, "Mrs. Wong is not able to manage her affairs and requires assistance from her daughter," without more, will likely be given little weight.[20]

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[18] *Abrams* at para. 45. *Zheng,* at para. 10.
[19] *Zheng*, at para. 24.
[20] Compare to *Erlich v. Erlich*, *infra*, at para. 23, where considerable weight was given to the opinion of a family physician even in the face of opposing psychiatric expert reports.

In *Erlich v. Erlich*,[21] Justice Pattillo declined to grant capacity assessments of a 93- and 95-year-old couple. With respect to Mrs. Erlich, the Court reviewed medical records from her treating physicians and her retirement home. While accepting that the evidence showed she had suffered a series of mini-strokes, had vision issues, was deaf, frail, and had exhibited cognitive impairment, confusion and memory loss, His Honour relied on the fact that there was no evidence that her doctors required a substitute decision-maker for her treatment decisions. In other words, although there was evidence of *medical* issues, the court was appropriately careful not to equate this with evidence of *capacity* issues.

- *Non-medical evidence* – this may include anecdotal evidence about an individual's behaviour. This type of evidence, particularly when put forward by a party with an interest in the proceeding, is unlikely to suffice alone to establish incapacity. Courts will, quite rightly, hesitate to accept such evidence at face value to displace the statutory presumption of capacity.[22]

In exercising its discretion respecting whether to order a capacity assessment, the court will need to be satisfied that the primary motivating factor is the protection or benefit of the vulnerable person. An assessment order should not be made if its sole purpose is to flesh out the evidentiary record in the proceeding or resolving differences in opinion between family members.

This principle was recently highlighted in *Adler v Gregor*.[23] This case involved a contentious dispute between two sisters over the validity of Power of Attorney documents executed by their 90-year-old mother. Each sister obtained and filed capacity assessments that supported their respective position about their mother's capacity. Justice Penny ultimately rejected both assessments as unreliable due to the "bias and interference" of each sister in providing information to the assessors, as well as shortcomings in the reports themselves. Justice Penny had strong critical words respecting the use of capacity assessments as weapons in litigation, stating:

> The capacity assessment regime under the SDA was instituted in 1992 for the protection of vulnerable persons. The Ministry of the Attorney General produced "Guidelines for Conducting Assessments of Capacity" in May 2005. Under Part I: Ethical and Legal Considerations, the Guidelines state (p. I.1):
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> > Assessments of legal capacity are undertaken under the SDA in those situations where it may be appropriate to change the legal status or restrict the legal rights of the individual in order to protect him or her from personal or financial harm. In a sense, guardianship legislation

[21] *Erlich v. Erlich,* 2018 ONSC 2911.
[22] *Koch*.
[23] *Adler v. Gregor*, 2019 ONSC 3037 ("*Adler*").

> is about risk management for incapable people. When an assessment of legal capacity is undertaken, the fundamental issue under consideration is the person's right to decide. If judged incapable, the person may be assigned a substitute decision-maker or a guardian whose role is to make the decisions necessary to protect his or her personal and/or financial health.

It is abundantly clear from a review of the Guidelines and the relevant provisions of the SDA itself that **capacity assessments were not designed, nor were they ever contemplated, to be used as weapons in high conflict litigation such as this**. Yet, this is exactly what both assessments regarding capacity to grant powers of attorney were obtained for in this case.

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Both parties sought capacity assessments of Mrs. Adler for the purpose of attacking or defending powers of attorney the obtaining of which they were each involved in as well. **Both parties prevailed upon their mother to submit to these assessments for the purpose of obtaining ammunition to use in their fight with one another, not for their mother's benefit.** Both parties were guilty of providing biased or incomplete histories and background to the assessors. Neither assessor undertook any material investigation of other sources of information. Both parties interfered with, and had a hand in drafting, the final assessment reports. **This kind of use of capacity assessments by parties or their lawyers is improper and should be discouraged in the strongest possible terms by counsel and the Court.**[24] [emphasis added]

It is important to note that Justice Penny's admonishment relates not only to the litigants in the proceeding, but also to lawyers acting for opposing parties in *SDA* matters. It should always be remembered that *SDA* matters address, at their core, the well-being of a vulnerable person. This includes the protection of a vulnerable person, but equally the preservation of their rights and dignity. All lawyers, including section 3 counsel, are called upon to maintain this ethical perspective when advising clients respecting litigation strategy and the obtaining of capacity assessments.

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[24] *Adler*, paras. 46, 47, 52.

4. What if the Client Refuses to Participate in a Court-Ordered Assessment?

If the court has made a section 79 assessment order, section 3 counsel should explain to the client that the order has been made and what the client can expect in the assessment process that follows.

The client should also be made aware of possible remedies available to the other parties if he or she refuses to cooperate with a court-ordered assessment. As noted above, section 81 allows the court, on motion, to make a further order authorizing the apprehension and forced assessment of the person, subject to certain statutory preconditions:

> **81** (1) When an order for an assessment has been made under section 79, the court may, on motion, order the applicant in the proceeding in which the person's capacity is in issue, together with a police officer, to apprehend the person, take him or her into custody and bring him or her to a specified place to be assessed there, if the court is satisfied that,
>
> (a) the assessor named in the order under section 79 has made all efforts that are reasonable in the circumstances to assess the person;
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> (b) the assessor was prevented from assessing the person by the actions of the person or of others;
>
> (c) a restraining order is not appropriate in the circumstances, or has already been used without success; and
>
> (d) there is no less intrusive means of permitting the assessment to be performed than an order under this subsection.
>
> (2) The order is valid for seven days.
>
> (3) The person named in the order and a police officer may enter the place specified in the order, between 9 a.m. and 4 p.m. or during the hours specified in the order, and may search for and remove the person, using such force as may be necessary.
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> (4) An order under subsection (1) that specifies a health facility as the place where the assessment is to be conducted authorizes the person's admission to the facility and his or her detention there, for the purpose of the assessment.
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> (5) The person shall not be held in custody longer than is necessary for the purpose of the assessment, and in any case not for a period exceeding 72 hours, and while in custody shall not be confined in a manner that exceeds what is necessary for the purpose of the assessment.

There is a dearth of reported case law respecting the use of section 81 orders. It can be expected that such orders will be extremely rare and only made with significant caution.

Section 3 counsel facing such a situation may advocate for less intrusive options to avoid the prospect of the client being apprehended by a police officer and detained to be subjected to an assessment under section 81. Other authors have suggested that the Court order production of the client's medical records and direct the assessor to conduct the assessment based on a paper review.[25] Another option might be advising the court that the client is prepared to accept that the court may choose to draw an adverse inference from their refusal to participate in the assessment.[26]

5. Who Conducts the Capacity Assessment? Who Pays for It?

Under the *SDA*, a capacity assessment is conducted by an "assessor." An "assessor" is a member of a class of persons designated as being qualified to do assessments under the relevant Regulation, in this case O. Reg. 460/05 "Capacity Assessment."

Assessors may be physicians, psychologists, social workers or social service workers, occupational therapists, or nurses. They must be a member in good standing in the relevant professional college. In addition, they must have successfully completed a training course for assessors, provided through the Ministry of the Attorney General. Assessors must maintain professional liability insurance of at least $1,000,000, meet continuing education requirements, and conduct a minimum number of annual assessments.[27]

Assessments are not covered by OHIP. Assessors are not government employees, but are usually health professionals in private practice or otherwise employed. As such, they bill privately for capacity assessments. The person requesting the assessment is typically responsible to pay the assessor's fees, and the fees are negotiated directly between the assessor and the requestor. Typically, the cost of an assessment may run anywhere from $500 to $2,000 per capacity issue, but varies widely depending on the complexity of the matter.

A capacity assessor can be found through the Capacity Assessment Office, operated by the Ministry of the Attorney General and established over 20 years ago. The CAO maintains an up-to-date roster of the qualified capacity assessors in Ontario. A searchable list of assessors and their contact information is posted on its website,

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[25] Brian Schnurr, Felice Kirsh and Rob Levesque, "When can a Court compel a Capacity Assessment?", Law Society of Upper Canada, *15th Annual Estates and Trusts Summit* (2012).
[26] Marshall Swadron, "Capacity Assessments in Contested Guardianship Proceedings", OBA, *The Challenges Posed By the Issue of Capacity: The Impact Upon Estate Planning, Estate Administration and Estate Litigation* (2012).
[27] O. Reg. 460/05, s. 2, 5, 6.

showing geographic region, languages spoken, and any special expertise of each assessor.[28] The website also contains FAQs respecting assessors and capacity assessments generally.[29] The CAO is also responsible for training assessors, providing ongoing education and consultation services to assessors, answering questions about capacity assessments, and assisting in locating assessors who speak certain languages.

In practice, the CAO is comprised of two staff who share office space with the Office of the Public Guardian and Trustee.[30] The training program provided to qualify capacity assessors takes two days.

Counsel should approach the choice of capacity assessor with care. The CAO has no mandate to oversee or vouch for the quality of work done by assessors. Indeed, the Auditor General of Ontario's 2018 annual report noted that:

> Many professionals in the community, such as social workers and occupational therapists (assessors), still perform capacity assessments of potential clients despite repeated concerns about the quality of their assessments. The Capacity Assessment Office (Office), which reports to the Public Guardian and Trustee, provides training to and maintains a roster of health care professionals who assess the capacity of potential clients to manage property. Persons found incapable of managing property will become clients of the Public Guardian. External evaluations of the assessors conducted in 2016 and 2017 identified quality concerns in about half of them. However, the Office did not refer these assessors to their regulatory colleges, and has not delisted any assessor from its roster. Public Guardian caseworkers who responded to our survey indicated that they believed certain people in their caseloads were capable of managing their own finances; the Consent and Capacity Board overturned over 80% of the cases it heard, indicating the community assessors were unable to provide sufficient evidence to establish the finding of incapacity in 2016/17 and 2017/18.[31]

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[28] Online: https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacity/rosters/central.php.
[29] Online: https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacityoffice.php#caodo.
[30] Auditor's annual report (2018), online: https://www.auditor.on.ca/en/content/annualreports/arreports/en18/v1_309en18.pdf at p. 418.
[31] Auditor's annual report (2018), online: https://www.auditor.on.ca/en/content/annualreports/arreports/en18/v1_309en18.pdf at p. 414-415.

In choosing an assessor, counsel should consider factors including: the assessor's knowledge of the applicable law and legal tests; the scope of their expertise; level of experience; whether past assessments have held up to scrutiny; and the quality of their written product.[32]

6. Assessments vs Letters of Opinion

Assessments are formal processes resulting in an assessor's statement that alters a person's legal status under the *SDA*. For instance, an assessor may find a person incapable with respect to property under section 16 of the *SDA*, triggering a statutory guardianship.

Following an assessment under the *SDA*, the assessor will issue a Statement respecting their determination of capacity or incapacity, on a prescribed form. Prescribed forms are required for the assessor's conclusions respecting assessments of capacity for property and personal care, and capacity to grant or revoke powers of attorney with special provisions under section 50 of the *SDA*.[33]

In contrast, for other types of capacity assessments (e.g., capacity to grant or revoke a power of attorney, testamentary capacity), the assessor's opinion does not result in a formal change in the person's legal status. Rather, the assessor is simply rendering their opinion on the capacity issue in question. No prescribed forms are required. Assessors will provide "letters of opinion" setting out the elements of their assessment and their opinions on these issues.

It is important to keep in mind that the training process to become a designated capacity assessor covers only the required assessments under the *SDA*. For instance, this training does not address testamentary capacity. An assessor may be well-versed in assessments for property and personal care, but may not be familiar with the legal test for testamentary capacity. Counsel should therefore exercise caution when selecting an assessor to provide opinions on areas outside of the required *SDA* assessments.

Section 3 counsel may also consider obtaining a "letter of opinion" instead of a formal assessment respecting property and personal care. Many capacity assessors offer this option, often for a lower fee. This may be a good choice where the client does not wish to assume the risks and uncertainties of a formal capacity assessment. Such letters of opinion obtained by section 3 counsel may be subject to lawyer-client privilege.

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[32] See also Jan Goddard's paper: "Can we rely on Ontario's capacity assessors?" (2019), www.ggwlawyers.com.

[33] Online: https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacity.php.

7. Before the Capacity Assessment

Section 3 counsel has an important role to play in preparing the client for the capacity assessment. There is nothing untoward about counsel educating their client respecting the legal tests and the assessment process, as well as reviewing with the client the relevant facts at issue. If a client has memory deficits, counsel should re-orient them to the relevant matters or events in question.

Clients with diminished capacity are not required to undergo the assessment as if it is a closed book examination with no preparation. For instance, an individual with memory deficits may use a computer or other way of recording information, as a memory aide or way of organizing their thoughts.[34]

With the client's consent, section 3 counsel should provide relevant information or documentation to the assessor. For instance, this may include prior assessments, medical records and pleadings in the litigation, as well as contact information for family members or third parties.

Counsel should identify for the assessor any particular language, communication or disability-related needs of the client. It should be ensured that the client has access to basic needs such as eyeglasses, hearing aids, or other assistive devices for communication during the assessment. The assessor should be told if a particular time of day is better for the client's level of alertness or energy.

Section 3 counsel may also assist in identifying the appropriate location of the assessment. The *SDA* provides that the assessment shall be performed in the person's home "if possible."[35] However, the client should be physically comfortable, as well as psychologically comfortable to speak freely in a private space. If the client lives with family members, particularly family members who are involved in the litigation, the home may not be a suitable location, depending on the circumstances. Counsel should canvass arrangements to ensure that no other parties to the litigation are present immediately before or during the assessment.

Section 3 counsel should also take steps to insulate the assessment process from influence from third parties. Once other parties are aware that a capacity assessment will be performed, the client may be bombarded with information and perspectives attempting to sway the outcome in one direction or another. This type of influence undermines the reliability of the assessment report, which is not in the client's interests. Section 3 counsel should consider putting safeguards in place, such as asking that no other party contact the client directly or indirectly within a certain period of time prior to the scheduled assessment time, or other steps as may be appropriate in the circumstances.

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[34] *Hillier v. Milojevic*, 2010 ONSC 4514 (SCJ) at para. 51.
[35] *SDA*, s. 79(4).

8. During the Capacity Assessment

In conducting assessments, assessors are required to comply with prescribed guidelines: the "Guidelines for Conducting Assessments of Capacity," published in 2005.[36] Failure to comply may result in a complaint to the assessor's professional college. These Guidelines contain directions for how assessors should receive referrals, conduct the capacity interview and report conclusions. They set out the legal and ethical considerations that apply when conducting an assessment. The Guidelines also include sample interview questions and worksheets respecting property and personal care issues. Further, they include a list of considerations respecting special populations: the elderly and persons with neurological disorders, psychiatric challenges, intellectual disabilities. The Guidelines caution assessors respecting common myths or stereotypes about these populations and the need to be on guard against possible ageist or discriminatory views.

The capacity assessment always builds around an interview with the individual. In addition to face-to-face dialogue, the assessor is required to review collateral information to gain an understanding of whether the individual's perceptions or reports are consistent with objective information.[37] For instance, an individual may report no difficulties in managing their finances, but this may be contradicted by financial records, debt collection notices, improvident contracts or otherwise. A strong assessment will involve giving the individual an opportunity to respond or explain objective information that appears concerning on its face.

Section 3 counsel should not be present during the assessment interview itself. Where appropriate, counsel may attend at the outset to introduce the assessor to the client and assist with the rights advice portion of the assessment, but should avoid remaining during the substantive portion of the assessment.

9. How to Challenge Capacity Assessments Reports

If the client has undergone a capacity assessment, section 3 counsel should review the assessment reports or letters of opinion with the client. Counsel should explain the outcome to the client, as well as the import of the assessor's conclusions for the client's daily life as well as for the litigation.

The client may instruct section 3 counsel to challenge the assessor's conclusions. The manner in which this is done will depend on the client's instructions and ability to provide affidavit evidence in the proceeding. Approaches to impugning a capacity assessor's conclusions include:

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[36] O. Reg. 460/05, s. 3. Guidelines available online: http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacity/2005-06/guide-0505.pdf.
[37] Guidelines, p. 14-15.

- Confirm that the assessor was duly qualified to conduct the assessment.

- Review the assessor's independence as an expert in the litigation context. In *Adler*, Justice Penny reminds lawyers and assessors that nothing in the *SDA* detracts from the usual rules respecting expert evidence, contained in *R v Mohan* and Rule 53.03 of the Rules of Civil Procedure, including the expert's duty of independence, for assessments are done "where litigation is reasonably likely or actually contemplated."[38]

- Obtain the assessor's files. Given the significance of the task, courts require that "the assessor … must maintain meticulous files."[39] The files should contain information about how the assessor came to be retained, copies of collateral documents or background information reviewed, the assessor's notes from interviews including the questions asked and answered, any standardized cognitive tests administered by the assessor, drafts of assessment reports, and correspondence with other parties regarding draft reports.

- Examine whether the assessor complied with the statutory procedural protections contained in section 78. The report should expressly and specifically note the rights advice given to the client and the client's response.

- Scrutinize the information provided to the assessor from others. It is not inappropriate for the assessor to receive information from collateral sources, provided that the assessor is alive to the possibility of improper motives and self-interest, particularly litigation self-interest, in the information provided. If the assessor merely accepted the complaints of an opposing party, without forming their own view or relying on their own observations, the assessment will be vulnerable to attack.[40] Likewise, if the assessor was not provided with the material background information, or was given only one-sided information on critical points, then this may undermine the validity of their conclusions.[41]

- Look for language that suggests the assessor does not understand or know the applicable legal test. For example, an assessor may refer to an individual failing to appreciate the consequences of a personal care decision. Of course, this is not the legal test, which requires the assessor to turn their mind to whether the person *has the ability* to appreciate consequences, even if they *fail* to do so.

- Consider whether the assessor placed the onus on the client to demonstrate capacity. Such an error can fatally infect the assessor's entire reasoning

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[38] *Adler*, at paras. 48-51.
[39] *Koch*.
[40] *Koch*.
[41] *Adler*, at paras. 41-43.

process. The law requires assessors to start with a presumption of capacity, with no onus on the individual to prove their capacity.

- Peruse evidence of the assessor's *probing* into the individual's thought process. It is not enough for an assessor to merely record the person's answers to questions. Rather, the assessor must *probe to determine the thought process by which the person arrived at an answer or statement.*[42] The assessment report will be vulnerable if it does not show the assessor's analysis of the client's answers in the necessary context.

10. Conclusion

As outlined above, section 3 counsel may encounter the question of capacity assessments in a number of ways in *SDA* proceedings. Depending on the circumstances, the issues in play, and the client's instructions, section 3 counsel may be called upon to advocate with vigour against the client being ordered to submit to a capacity assessment. In other cases, counsel may assist a willing client to arrange a capacity assessment. Regardless, section 3 counsel must bring an ethical perspective to bear on this role, recognizing the intrusive and demeaning nature of assessments, the rights and dignity of the vulnerable individual, and the need to guard against the prospect that the client fall prey to invasive assessments that serve only to advance the litigation interests of other parties without benefit to the client.

[42] *Saunders v Bridgepoint Hospital*, 2005 CanLII 47735 at para. 154.