

Incapable Hearing Participants

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What is the tribunal's duty where a self-represented person does not appear to be capable (because of a disability) to participate in a hearing before a regulator? (This is to be distinguished from situations in which the participant is unskilled.)

That is the question the Ontario Superior Court of Justice answered in *Hillier v. Milojevic*, 2010 ONSC 4515 (CanLII) at <http://www.canlii.org>. The Court was dealing with the appeal of Mr. Bon Hillier from the ruling of the Consent and Capacity Board ("the Board") affirming the decision of Ms. Milojevic, the capacity assessor, that Mr. Bon Hillier was incapable of managing his property.

Mr. Bon Hillier is 28 years old. While living in British Columbia, he suffered a traumatic brain injury as a result of a serious car accident. Mr. Bon Hillier was 21 years old at that time.

According to the medical practitioners in British Columbia, Mr. Bon Hillier underwent significant behavioural and personality changes as a result his brain injury. In addition to his cognitive impairments, he became impulsive, verbose and prone to periodic, violent outbursts as well as inappropriate sexual comments and behaviour. Mr. Bon Hillier was also said to exhibit grandiosity in his interactions with others and in descriptions of his life plan. Overall, this caused significant dysfunction in his interpersonal and occupational relationships. Mr. Hillier was incapable of keeping jobs and stable accommodation, moving from one to another. This pattern of behaviour continued when Mr. Bon Hillier moved to Toronto in 2008.

As a result of the accident, Mr. Bon Hillier received a settlement of \$150,000. As of September 2009, there was approximately \$19,000 in funds being held for Mr. Hillier.

Mr. Bon Hillier also received two monthly disability pensions amounting to just over \$2100.

In 2005, Mr. Bon Hillier was found to be incapable of managing his affairs by a B.C. physician. As a result, the Public Guardian and Trustee for the Province of British Columbia became the committee of Mr. Bon Hillier's estate.

Ms. Milojevic conducted a capacity assessment in September of 2009. She concluded that Mr. Bon Hillier did not meet the legal standards for capacity in Ontario. Ms. Milojevic concluded that Mr. Bon Hillier was incapable of managing his property. She issued a Certificate of Incapacity to that effect. The Ontario Public Guardian and Trustee became the statutory guardian of Mr. Bon Hillier's property.

Mr. Bon Hillier applied to review that finding before the Board. The Board affirmed the decision of Ms. Milojevic. Mr. Bon Hillier then appealed the Board's decision to the Ontario Superior Court of Justice.

The Court noted many procedural anomalies during Mr. Hillier's assessment interview and the hearing of the Board. The first issue relates to representation. According to the Court, the Board failed to dispel Mr. Hillier's misunderstanding on the role of counsel at the hearing. The Board also failed to exercise its power and accommodate representation by counsel, in the form of an *amicus curiae* (a friend of the court), while maintaining Mr. Hillier's right to make his personal representations.

The second issue relates to the manner in which the hearing was conducted. The Court noted that the Board interrupted Mr. Hillier on so many occasions that he failed to present his case effectively. For example, he was unable to challenge the opinion of Ms. Milojevic through evidence and submissions. This was a serious shortcoming. Mr. Hillier was already disadvantaged because of his cognitive impairments, including his short-term memory problems, as a result of his brain injury. The Court concluded that fairness could only have been achieved by the involvement of counsel at the hearing

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The Court allowed the appeal, set aside the decision of the Board and ordered the Board to conduct a new hearing. The Court also ordered the Board to make available the services of an *amicus* counsel during the hearing.

This decision has significant implications for tribunals conducting discipline or incapacity hearings where a self-represented person appears to have medical difficulties that interfere with his or her ability to defend themselves. The tribunal has to provide as much assistance as it can. In an extreme case the tribunal would be obliged to appoint a lawyer to present assistance to the tribunal from the member's perspective.

Amicus counsel are not defence counsel; they do not obtain their instructions from the member. Rather, they are there to assist the tribunal by ensuring that the member's perspective is effectively presented.

The result, however, is that the regulator would be paying for three lawyers, the prosecution, independent legal counsel and *amicus* counsel. Those roles cannot be combined. For example, independent legal counsel is neutral and cannot both advise the tribunal and advocate from the perspective of the member.

To be clear, *Hillier* does not require a tribunal to provide legal counsel to a capable member, even if the member cannot afford to pay for a lawyer.

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