Civil Procedure
Winter Term 2024

LECTURE NOTES NO. 4

III. PARTIES

'Status':

One must have **legal personality** to sue or be sued in Ontario, with some exceptions (e.g. the Crown, foreign states, 'Indian Bands', unions, statutory bodies, etc. – sometimes status for such actors is provided in another statute than the Rules).

'Standing':

One must have **a sufficient interest** in the dispute to have the right to participate in the litigation; i.e. a person's sufficient and protectable legal rights or interests are affected by the resolution of the dispute. However, this does not mean that just because a person may be affected by litigation, that he or she has the right to participate – there are considerations used by the Court to contain the litigation. In most private law disputes standing is clear – a person suffered a loss and has a claim recognized in substantive law. At other times, particularly with respect to public law, standing is less clear – but a person or organization may be permitted to participate as an **intervenor**.

A person might have standing *in a procedural aspect* of the litigation but not in the outcome; e.g. whether a business record (like a bank record or a medical record) must be produced by a third party (like a bank or hospital) so that one of the parties may adduce it in evidence. The third party has standing in respect of the motion for production but not 'in the cause'.

(a) Corporations

Corporations have artificial personality and thus may bring or defend proceedings. Those doing Business Associations will recognize such esoteric subjects as 'the rule in *Foss v. Harbottle'* dealing with who may or may not bring litigation in the name of the corporation. **Please note** that under sub-rule 15.01(2), a corporation must be represented by a lawyer in litigation absent leave from the court.

(b) Partnerships

The Partnerships Act, R.S.O. 1990, c. P.5, s.2 provides:

> Partnership is the relation that subsists between persons carrying on a business in common with a view to profit, but the relation between the members of a company or association that is incorporated by or under the authority of

> any special or general Act in force in Ontario or elsewhere, or registered as a corporation under any such Act, is not a partnership within the meaning of this Act.

Rule 8 of the Rules of Civil Procedure provides in part:

> 8.01 (1) **A proceeding by or against two or more persons as partners may be commenced using the firm name of the partnership.**
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> …
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> 8.02 Where a proceeding is commenced against a partnership using the firm name, the partnership's defence shall be delivered in the firm name and no person who admits having been a partner at any material time may defend the proceeding separately, except with leave of the court.
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> …
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> 8.06 (1) An order against a partnership using the firm name may be enforced against the property of the partnership.

Thus, a partnership may have status to sue or be sued in Ontario. This is useful in that it obviates the need to sue the partners individually. Depending on the circumstances one might prefer to bring the action against the names partners, or the partnership, or both – usually depending on what the assets are of the partners and the various individuals.

(c) Estates and Trusts

A dead person cannot sue or be sued because he or she is... well, dead. At the very least it would make oral examination for discovery quite unpleasant.

One can, however, sue the Estate Trustee and the Estate of the deceased, or, a person appointed to represent the Estate for the purposes of litigation. Thus **Rule 9 provides in part:**

> 9.01 (1) A proceeding may be brought by or against an executor, administrator or trustee as representing an estate or trust and its beneficiaries without joining the beneficiaries as parties.
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> …
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> 9.02 (1) Where it is sought to commence or continue a proceeding against the estate of a deceased person who has no executor or administrator, the court on motion may appoint a **litigation administrator** to represent the estate for the purposes of the proceeding.

(d) Parties Under a Disability

(i) Relationship Between Lawyer and Client

Rules of Professional Conduct

Rule 3.2-9
When a client's ability to make decisions is impaired because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship.

Commentary
[1] A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about their legal affairs and to give the lawyer instructions. A client's ability to make decisions, however, depends on such factors as their age, intelligence, experience, and mental and physical health, and on the advice, guidance, and support of others. Further, a client's ability to make decisions may change, for better or worse, over time.

[1.1] When a client is or comes to be under a disability that impairs their ability to make decisions, the impairment may be minor or it might prevent the client from having the legal capacity to give instructions or to enter into binding legal relationships. Recognizing these factors, the purpose of this rule is to direct a lawyer with a client under a disability to maintain, as far as reasonably possible, a normal lawyer and client relationship.

…

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

…

[5] When a lawyer takes protective action on behalf of a person or client lacking in capacity, the authority to disclose necessary confidential information may be implied in some circumstances. (See Commentary under rule 3.3-1 (Confidentiality) for a discussion of the relevant factors). If the court or other

counsel becomes involved, the lawyer should inform them of the nature of the lawyer's relationship with the person lacking capacity.

The passage highlighted above means that there is an ethical obligation to accommodate intellectually disabled clients who have capacity to retain a lawyer and to take steps where the client loses capacity at some point thereafter.

(ii) What sort of disability?

Rule 1.03

"disability", where used in respect of a person, means that the person is,

(a) **a minor**,

(b) **mentally incapable** within the meaning of section 6 or 45 of the Substitute Decisions Act, 1992 in respect of an issue in the proceeding, whether the person has a guardian or not, or

(c) **an absentee** within the meaning of the Absentees Act;

(iii) Need for a Litigation Guardian

7.01 (1) Unless the court orders or a statute provides otherwise, a proceeding **shall** be commenced, continued or defended **on behalf of a party under disability by a litigation guardian**.

...

7.02 (1) **Any person who is not under disability may act, without being appointed by the court, as litigation guardian for a plaintiff or applicant who is under disability, subject to subrule (1.1).**

[(1.1) provides that disabled people with guardians, attorneys, etc already in place are presumptive litigation guardians absent the court ordering otherwise.]

(2) No person except the Children's Lawyer or the Public Guardian and Trustee shall act as litigation guardian for a plaintiff or applicant who is under disability until the person has filed an affidavit in which the person,

(a) consents to act as litigation guardian in the proceeding;

(b) confirms that he or she has given written authority to a named lawyer to act in the proceeding;

(c) provides evidence concerning the nature and extent of the disability;

(d) in the case of a minor, states the minor's birth date;

(e) states whether he or she and the person under disability are ordinarily resident in Ontario;

(f) sets out his or her relationship, if any, to the person under disability;

(g) states that he or she has no interest in the proceeding adverse to that of the person under disability; and

(h) acknowledges that he or she has been informed of his or her liability to pay personally any costs awarded against him or her or against the person under disability.

... and the Litigation Guardian's need to retain a lawyer:

15.01 (1) A party to a proceeding who is under disability or acts in a representative capacity **shall** be represented by a lawyer.

(iv) Approval of Settlement

7.08 (1) No settlement of a claim made by or against a person under disability, whether or not a proceeding has been commenced in respect of the claim, is binding on the person without the approval of a judge.

Gronnerud (Litigation Guardians of) v. Gronnerud Estate
2002 SCC 38 (S.C.C.)

This leading case deals with one of the main criteria for appointment, the litigation guardian's disinterest in the results of the litigation. It also considers whether the Court can, and should, fetter the discretion of the Public Guardian and Trustee when appointed as Litigation Guardian.

The context of this dispute is how the assets of the deceased husband of an incapable woman should be treated. Here the deceased was survived by his wife (an older woman who suffered from Alzheimer's Disease and was mentally incapable) and his children.

The husband owned land upon which he and his wife farmed. She had made a Will 35 years before her husband's death (which was never revoked) and in which she expressed her wish that the farm land stayed together. In her husband's Will, the

wife was beneficiary of only a $100,000 trust as she was already in long term care when that document was executed.

A question arose as to whether the wife's interests in her Husband's Estate were sufficient - should she apply for equalization of property in preference to the gifts given to her in the Will? Should she sue for dependant's support?

The trial court appointed two of her children, J and B, her Guardians. J and another child, G, were appointed to be her Litigation Guardians. **On first appeal, the appointments were vacated in favour of the Public Trustee (as two of the children would inherit more after their mother died than if the farm was disposed of as set out in the husband's will) but that appointment was limited by the condition that a division of matrimonial property (which would cause the farm to be sold) should not be made. Was that restriction valid?**

Per Major J:

> 18 A litigation guardian is responsible for commencing, maintaining or defending an action on behalf of a person... **The test to remove and replace a litigation guardian turns on the "best interests" of the dependent adult**.
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> ...
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> **18 A litigation guardian is responsible for commencing, maintaining or defending an action on behalf of a person**. Under The Queen's Bench Rules of Saskatchewan, the litigation guardian can be the property guardian appointed under The Dependent Adults Act or any other individual appointed by the court: Rules 46(2)(a) and 46(2)(f). Under Rule 49, the court can remove a litigation guardian and appoint a substitute, if it appears to the court that the guardian is not acting in the best interests of the disabled adult. The test to remove and replace a litigation guardian turns on the "best interests" of the dependent adult.
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> 19 **The leading Saskatchewan case on the criteria to appoint a litigation guardian is *Szwydky v. Magiera* (1988), 71 Sask. R. 273 (Sask. Q.B.), at pp. 276-777... The six criteria are:**
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> **- the evidence must establish that the incompetent is unable to act for himself or herself;**
>
> **- evidence should be verified under oath as to the incompetent's mental condition and his or her inability to act as plaintiff;**
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> **- evidence must demonstrate that the litigation guardian is both qualified and prepared to act, and in addition is indifferent as to the outcome of the proceedings;**

- the applicant should provide some evidence to support the claim being made;

- the applicant should obtain the consents of the next-of-kin or explain their absence;

- if the applicant has a personal representative or power of attorney whose status is not being challenged in the proceedings, some explanation should be offered as to why the attorney or representative has not been invited to bring the claim.

20 The *Szwydky* criteria provide guidance in defining the "best interests" test set out in Rule 49. The third criterion, that of **"indifference" to the result of the legal proceedings, essentially means that the litigation guardian cannot possess a conflict of interest vis-à-vis the interests of the disabled person. Indifference by a litigation guardian requires that the guardian be capable of providing a neutral, unbiased assessment of the legal situation of the dependent adult and offering an unclouded opinion as to the appropriate course of action. In essence the requirement of indifference on the part of a litigation guardian is a prerequisite for ensuring the protection of the best interests of the dependent adult. A litigation guardian who does not have a personal interest in the outcome of the litigation will be able to keep the best interests of the dependent adult front and centre, while making decisions on his or her behalf. Given the primacy of protecting the best interests of disabled persons, it is appropriate to require such disinterest on the part of a litigation guardian.**

21 **It is acceptable in most cases, and perhaps desirable in some cases, to have a trusted family member or a person with close ties to the dependent adult act as litigation guardian... However, there are exceptions. One such exception is the situation currently presented by this appeal, in which there is a particularly acrimonious and long-standing dispute among the children concerning their dead parent's estate. In such cases, the indifference required to be a litigation guardian is clearly absent.**

22 In my opinion, the Court of Appeal was correct in removing Judy and Glenn as Cherie Gronnerud's litigation guardians and replacing them with the Public Trustee. Judy and Glenn could not act in their mother's best interests because... **they were not indifferent as to the outcome of the proceedings surrounding the estate of Harold Gronnerud... As residuary beneficiaries under Harold's will, Judy and Glenn have an interest in proceedings that could result in the movement of assets from Harold's estate to Cherie's estate. As Cherie's 1967 holograph will is not broad enough to cover all potential assets passing from Harold's estate, those new assets would be distributed to all four of Cherie's children equally in accordance with**

the laws of intestacy. If proceedings brought by Cherie's litigation guardian against Harold's estate are successful, Judy and Glenn could stand to gain more as beneficiaries with one-quarter interest each in Cherie's newly increased estate, as opposed to residuary beneficiaries under Harold's will. It is obvious that Judy and Glenn cannot be said to be disinterested in the results of the legal proceedings. The Court of Appeal was correct to remove them as litigation guardians.

...

29 It is my opinion that, in appointing the Public Trustee as litigation guardian for a disabled adult, the Court of Appeal for Saskatchewan has the jurisdiction to restrict the Public Trustee to litigating some types of claims and not others. This authority of the appellate court is apparent from the plain wording of the relevant statute...

...

35 **On my review, it appears that underlying the Court of Appeal's decision must be the implicit recognition that the best interests of Cherie Gronnerud are protected by the trust account in Harold's will.** This is supported by evidence of: Cherie's intentions regarding the family farm; Cherie's relationships with her children and her husband; Cherie's present physical and mental condition; and the fact that a public facility best suits Cherie's present needs. While none of these factors is determinative on its own, taken together they serve to illuminate the best interests of Cherie Gronnerud.

36 First, in terms of Cherie's intentions regarding the estate, the evidence shows that both Cherie and Harold wished to keep their assets together and also wanted to give the majority of their assets to their son Bud. If a claim under The Matrimonial Property Act was brought that resulted in an equal division of the matrimonial property, then the family farm and house would have to be sold to permit the payment to Cherie's estate. This would be antagonistic to the testamentary intention of Harold, who wanted to bequeath almost everything to Bud in part to ensure the farm land so labouriously acquired was retained. Harold's intentions are only relevant in that they may assist one in discerning Cherie's intentions, which in turn are useful in establishing her best interests.

37 That Cherie shared her husband's view is evident in her holograph will. Although this will was drafted a number of years ago, it nevertheless indicates Cherie's desire that Bud have the bulk of the family assets primarily to ensure protecting the family farm...

38 It is also significant that Harold Gronnerud drafted his will in 1999, after Cherie had been diagnosed with Alzheimer's disease in 1997. Given their lengthy and satisfactory marriage, it is likely that had Cherie been competent

in 1999, Harold would not have drafted his will in the manner that he did. It is apparent that he knew Cherie was terminally ill and permanently disabled mentally by Alzheimer's disease. In the result, it was pointless to provide for her in any other way. His will not only expressed his intentions but reflected those of his wife expressed in her holograph will some 35 years ago. We do not know if or how Cherie would have changed her original will had she not become medically incompetent. While not significant on its own, the evidence of the testamentary intentions of Cherie and Harold Gronnerud is relevant in that it provides additional clues as to what would be in Cherie's best interests, the latter being the central inquiry.

39 At present, Cherie's condition, both mental and physical, is dire. As noted above, the Court of Queen's Bench has twice found that Cherie's needs are best met in the publicly funded facility in Regina, rather than in a private home or in an expensive private facility. She has no chance of recovery, she suffers from dementia, and she requires assistance with most basic activities. It is reasonable to assume that, in deciding to leave a $100,000 trust fund to his wife of 57 years, Harold had in mind the fact that Cherie is suffering from a debilitating and incurable disease, and believed that the trust fund would provide for her particular needs. This appears to be supported by the findings of the Court of Queen's Bench that Cherie's needs as an Alzheimer's patient are best met in a publicly funded facility. We believe that, given this factual record, the Court of Appeal must have recognized this as well.

Per Arbour J. (dissenting):

49 One of the main difficulties with this case is that there is not much of a record constructed around that critical issue. The most there is to ascertain what would be the wishes of Mrs. Gronnerud were she capable of formulating any such wishes is essentially a holographic will dating back some 35 odd years, and the fact that nothing since shows a change of heart on her part. In the absence of reasons by the Court of Appeal, I cannot say how the court felt that this was sufficient to dispose of the issue of her best interests. **For myself, I cannot be persuaded, again on this record, that I am in a better position than the Public Trustee to make that determination. It is obviously rarely in a person's best interests to forgo a statutory entitlement to as much as possibly half a million dollars. I cannot say that this is not such an unusual case. However, considerably more investigation should be done, as the Public Trustee is fully ready, able and willing to do, to ascertain whether this is in fact the case...** In the circumstances I think it would be far preferable to leave the decision as to whether an action for division of assets under The Matrimonial Property Act should proceed to those who are better placed to make that decision.

[One would think that the Public Trustee would not make an equalization election in the circumstances of this case. I think Arbour J.'s criticism more strongly sounds in ensuring that spousal entitlements are not easily abandoned by third parties on behalf of a surviving spouse. See also the dicta of Cullity J. in *Dolmage v. Ontario*, 2010 ONSC 1726 (Ont. S.C.J.) on 'indifference'.]

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For an example of a motion to oust the PGT in favour a family member, see ***Lochner v Callanan*, 2016 ONSC 1705 (Ont. S.C.J.)** Here a claim was brought against police in respect of the arrest of a man with mental health issues which rendered him mentally incapable. The family members retained a number of lawyers who were granted leave to withdraw as counsel of record. Eventually the PGT was appointed. The former Litigation Guardians sought to oust the PGT who had reached a tentative settlement on the theory that the case was strong; the evidence was that the case was weak and the Court denied the motion to replace the PGT. Justice Faieta held:

> [29] The moving parties submit that Mr Kim's affidavit sworn January 18, 2016 contains a "litany of unfounded opinions". This affidavit appears comprehensive (28 pages plus over 30 exhibits) in respect of both liability and damages. The moving parties dispute whether 2 or 3 tasers were used. The evidence explicitly addresses Silvano's theory that three tasers were used. It appends various records, including taser reports, related to the use of tasers that evening.
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> [30] The moving parties also assert that George was tasered on both his front torso and his back. This point was also expressly addressed by the Mr. Kim's affidavit sworn January 18, 2016. In doing so, it references various police records and a report obtained from a forensic pathologist who provided an opinion regarding the number of taser impacts as well as the location, seriousness and permanency of the injuries suffered by George as a result of this incident, including the injuries caused by being tasered. This report also provides the pathologist's opinion regarding the number of times that George was tasered as well as the location of impact caused by the tasers as well as whether the impacts caused by taser being used in probe mode or drive-stun mode.
>
> [31] The PGT's management of the litigation seems to stem from the fact that they feel that the PGT has not adopted their position on the circumstances of this incident. The PGT has no such obligation to the moving parties. A Litigation Guardian is obliged to disclose all material facts so that the Court considering the settlement can determine whether it is in the best interests of the party under disability. I agree with the following statement:
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> Before approving a settlement for a party under disability, the court will require that the motion record include full disclosure of the entire settlement including

the total amount to be received from all of the defendants and how it is proposed that the global amount be allocated if there is more4 than one plaintiff. The court expects and requires full disclosure of all facts which might bear on any material aspect of the case, including liability, damages and fees, so that the court will be able to make a reasoned decision on the appropriateness of the settlement in every aspect. The applicants should provide sufficient evidence to demonstrate that: (1) an appropriate investigation with respect to both liability and damages has been completed; (2) an appropriate assessment of liability issues has been made; (3) an appropriate assessment of damages issues has been made, and (4) the fees and disbursements which the plaintiffs' lawyers propose to charge are reasonable in all the circumstances.[5]

[32] These circumstances do not establish that the PGT is not acting in George's best interests.

[33] Further, the moving parties have not demonstrated that the PGT has a conflict of interest vis-à-vis George. There is no evidence that the PGT has a relationship, pecuniary or otherwise, with the defendants.

[34] Further, the moving parties have not demonstrated that the PGT has a personal interest in the outcome of George's action. The fact that the PGT did not seek this appointment underscores that it does not have a personal interest in the outcome.

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(e) Intervenors

Rule 13.01

13.01 (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,

(a) an interest in the subject matter of the proceeding;

(b) that the person may be adversely affected by a judgment in the proceeding; or

(c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.

(2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.

> 13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

Halpern v. Toronto (City) Clerk
2000 CanLII 29029 (Ont. Div. Ct.)

Egale ("Equality for Gays and Lesbians Everywhere"), a human rights advocacy group which sought to intervene in a proceeding concerning the issuance of marriage licences to same sex couples and whether certain City of Toronto procedures were contrary to the Charter.

Lang J.:

> 5 EGALE seeks intervener status under rule 13.01(1) as an added party with rights to file material, to cross-examine, to submit a factum and to present argument and to otherwise conduct the proceeding as a full party. While the Attorney General of Canada opposes the motion, it submits that, if EGALE is granted intervener status, it should be as a "friend of the court" under rule 13.02, with the permitted intervention limited to presenting legal argument to the court.
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> 6 The onus rests on EGALE to establish that it has met the requirements of the rule and should therefore be permitted to intervene in this proceeding: Ontario (Attorney General) v. Dieleman (1993), 16 O.R. (3d) 32 (Ont. Gen. Div.) at 38; M. v. H. (1994), 20 O.R. (3d) 70 (Gen. Div.) at 79.
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> …
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> **9 It is important to note the different consequences between intervener status at an appeal level, and intervener status before a court of first instance. When a proceeding reaches the appellate level, the record before the court is set. Intervention is generally limited to the preparation of facta and to the presentation of argument. Even then, the appellate court usually limits the length of the intervener's factum and the duration of argument. See *M. v. H.* and *Little Sisters*, *supra*.**
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> 10 At this level and in this case, the proposed intervener is asking for substantial input into the formation of the record, including the unrestricted ability to file affidavits and to cross-examine all affiants. The potential scope of intervention is far greater where the intervener wishes to participate fully in setting the record. Such an intervention would potentially result in a dramatic increase in delay and expense for all parties.

…

12 A distinction must be made between rules 13.01 and 13.02. Under rule 13.01, an intervener as added party has the rights of a party to participate fully in the litigation. Under rule 13.02, the intervener is a "friend of the court" who renders "assistance to the court by way of argument."

13 As EGALE is seeking added party status under rule 13.01(1), I begin with the criteria set out in that rule, which permit a party to move for leave to intervene if the party claims any one of the following:

> (a) an **interest in the subject matter** of the proceeding;
>
> (b) that the person may be **adversely affected** by a judgment in the proceeding; or
>
> (c) that there exists between the person and one or more of the parties to the proceeding a question of **law or fact in common** with one or more of the questions in issue in the proceeding. [Emphasis added]

14 If the moving party establishes that it meets any of these criteria, the court must then consider, under rule 13.01(2), "whether the intervention will unduly delay or prejudice the determination of the rights of the parties". If the court is satisfied that any such delay or prejudice will not be undue, it *may* then exercise its discretion to add the party "and may make such order as is just". Such an order will usually specify conditions of added party status.

…

[After reviewing some of the jurisprudence and arguments made to the Court, Lang J. continued:]

40 I turn then to consider what conditions should be imposed under the rule 13.01(2) rubric of "may make such order as is just".

41 In doing so, I reiterate that EGALE is being granted intervener status because it can bring a different perspective to the proceeding. To be specific, I am satisfied that it can do so from the perspective of relationship options or choices and from the national perspective of gays and lesbians in diverse communities and environments across Canada. I am not persuaded, at this early stage, that EGALE can usefully add more to the contextual and expert record being created by the applicants.

42 It is important that this proceeding advance to determination without undue delay and I am satisfied that this can be done if EGALE's role is limited to those issues and its participation is restricted so that it does not unduly

prolong cross-examinations. Accordingly, subject to what I will shortly say about variation of these terms, EGALE will have leave to file affidavits in reference to the different perspectives I have set out above. EGALE's role in cross-examination will be sharply limited to control any delay that might otherwise result.

43 On the argument before the Divisional Court panel, EGALE could add to the proceeding with a factum outlining its different perspectives. At this stage, it is too early to know whether or not oral submissions by the intervener will usefully contribute to the argument. That will be left for later consideration as the application approaches readiness for hearing and a better informed decision can be made.

44 Subject to further order by me or by the panel hearing the application for judicial review, EGALE is added as a party under rule 13.01(1) on the following terms:

1) EGALE's undertakes not to repeat perspectives and arguments advanced by the applicants;

2) EGALE will adhere to all timetables set by the judge case managing this proceeding;

3) EGALE may represent perspectives on the issues of limited relationship options for gays and lesbians and any resulting stigma from such limitation, and on a non-Toronto contextual perspective in relation to same sex marriage issues;

4) EGALE is limited to filing two affidavits touching on these issues;

5) EGALE may participate in cross-examinations only to the extent that affidavits touch on these designated issues;

6) EGALE may file a factum on these designated issues limited to 20 pages in length and to be filed within three weeks after the applicants have served their factum; and

7) EGALE may present oral argument at the judicial review if so ordered by me or by the panel hearing the judicial review.

45 I impose these terms appreciating that different considerations may well apply at a later stage of this proceeding, or at the appellate levels. When intervener status is granted at this early stage of the proceeding, it is important to maintain flexibility. As this proceeding matures affidavits are filed and cross-examinations progress, any party, including EGALE, may move before me to vary these intervener terms as changes in circumstances might warrant.

Hollinger Inc. v. Ravelston Corp.
2008 ONCA 207 (Ont. C.A.)

Conrad Black faced criminal charges in the United States. A number of pre-trial proceedings arose and the court records were sealed. *The Globe & Mail* sought to intervene to challenge the sealing order.

Jurianz J.A.:

> 36 While the decision to recognize an intervenor is largely discretionary, in my view the motion judge erred in principle in refusing to grant the Globe intervenor status. **He failed to give sufficient weight to the Globe's constitutionally guaranteed freedom of the press and to the fact the Globe sought standing to assert a position coincident with the public's interest that would not be raised otherwise.**
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> **37 Public access to the court system promotes confidence in the judicial system and enables oversight of the functioning of the courts. In this case, the parties to the action asked the motion judge for an order that the protective order continue. The public had an interest in whether it was continued or set aside, but that interest was not represented. Except for the Globe, there was no one, first to raise the issue whether the protective order should be set aside and then to advocate the position that it unnecessarily violated the open court principle.**
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> ...
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> 40 Given these factors and their importance, the motion judge erred by refusing the Globe intervenor status for the purpose of dealing with the question whether the protective order should be continued or set aside.
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> 41 It may be suggested that the error was one of form rather than substance since the motion judge did allow the Globe to make submissions. I do not accept the suggestion. In my view, the motion judge's perception that the Globe lacked sufficient connection to challenge the sealing order would have undermined the force of the Globe's position. The procedure he adopted and the conclusions he reached might have been different had he appreciated the Globe's status. It might have been less likely that he would have lost sight of the fact the onus was on the respondents. The Globe, as an intervenor, would have had a stronger claim to review the material for the limited purpose of making informed argument. If the rights of an intervening party were at stake, the judge might have been persuaded to undertake a review of the material. If the judge had undertaken a review, he may have concluded that some or all of it could be released.
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> 42 I would conclude that the motion judge's refusal to accord intervenor status to the Globe was not merely an error of form, and must be set aside.

[cf. **CUPW v. A.G. Canada, 2013 ONSC 7532 (Ont. S.C.J.)** where the proposed intervention was denied on the basis that the proposed intervenor would not be able to make a “useful contribution to the resolution” of the dispute before the Court (the constitutionality of back-to-work legislation to end a postal strike.]

Gligorevic v. McMaster
2010 ONSC 3842 (Ont. S.C.J.)

Can a lawyer intervene on an appeal where the appellant, whom she acted for at the hearing, alleges lack of competent and effective representation? Yes.

Brown J.

A. Has the proposed intervenor met one of the conditions in Rule 13.01(1)?

11 What is the subject-matter of this proceeding, and what interest might Ms. McCullough have in it? As to the subject-matter, Mr. Gligorevic appeals from the September 29, 2005, decision of the CCB which found him incapable in respect of psychiatric treatment by antipsychotic medication. Although he advanced several grounds of appeal, the one of concern on this motion is his allegation that Ms. McCullough failed to provide him with effective representation at the hearing before the CCB.

12 Counsel advised that they were not aware of a Canadian case in the mental health context in which an allegation of ineffective representation was made on an appeal from a finding of incapacity in respect of treatment. Amicus pointed to the jurisprudence from criminal appeals as providing guidance as to the nature of the issues raised on an appeal involving an ineffective representation claim. I would note that the jurisprudence in the criminal context has been informed by the common law, the statutory obligation in section 686(1)(a)(iii) of the Criminal Code to quash convictions which are the product of a miscarriage of justice, and the fair trial (s. 11(d)) and fundamental justice (s. 7) requirements of the Canadian Charter of Rights and Freedoms: R. v. Joanisse (1995), 102 C.C.C. (3d) 35 (Ont. C.A.), at p. 57. The scope and content of a successful inadequate legal representation claim in the context of an appeal from a decision of the CCB will be a matter for the appeal judge to determine in this case.

13 That said, for the purposes of this motion **I think it reasonable to draw on the criminal appeals jurisprudence to glean the essential subject-matter of an inadequate representation claim. To establish a claim of ineffective representation in a criminal proceeding, an appellant must demonstrate that (i) counsel's acts or omissions constituted incompetence, and (ii) a miscarriage of justice resulted. The object of an**

ineffectiveness claim is not to grade counsel's performance or professional conduct, but to ascertain whether a miscarriage of justice occurred in the sense that counsel's performance might have resulted in procedural unfairness, or the reliability of the trial's result might have been compromised: R. v. B. (G.D.), [2000] 1 S.C.R. 520 (S.C.C.), at paras. 26 to 29.

14 **Amicus submitted that since assessing counsel's competence is not the ultimate objective when considering a claim of ineffective representation, the lawyer against whom such an allegation is made has no interest in the subject-matter of the appeal. I disagree. In Butty v. Butty (2009), 98 O.R. (3d) 713 (Ont. C.A. [In Chambers]), leave to intervene as an added party was granted to former trial counsel on the appeal from the trial judgment. The trial judge had been highly critical of trial counsel in his judgment, writing that trial counsel had attempted to mislead opposing counsel and the court. In granting leave to intervene, LaForme J.A. accepted that the trial counsel's reputational interests were at stake on the appeal and that neither party to the appeal was likely to represent trial counsel's interests adequately on the appeal: Butty, at para. 9.**

15 In an earlier decision in W. (D.) v. White [2003 CarswellOnt 5199 (Ont. C.A.)], 2003 CanLII 24622, the Court of Appeal afforded trial counsel an opportunity to make written or oral submissions on the appeal from a trial judgment in which the appellant contended that trial counsel had been incompetent.

16 These two decisions of the Court of Appeal indicate that trial counsel against whom allegations of ineffective representation are made by his former client on appeal possess an interest in the subject-matter of the appeal sufficient to meet the condition contained in Rule 13.01(1)(a). Although intervention by former trial counsel is not the practice under the Court of Appeal's 2000 Procedural Protocol Regarding Allegations of Incompetence of Trial Counsel in Criminal Cases, Rule 13.01 is available in civil appeals, whereas it is not in criminal appeals. I therefore conclude that Ms. McCullough has satisfied the criterion in Rule 13.01(1)(a).

B. Consideration of the factors set out in Rule 13.01(2)

17 Let me turn, then, to consider whether Ms. McCullough's intervention would unduly delay or prejudice the determination of the rights of the parties to this appeal. In her factum Ms. McCullough submitted that if granted leave to intervene, she would limit her submissions at the hearing of the appeal to 15 minutes, limit any factum to 5 pages, file no further material on the appeal, rely on her previously filed affidavit, and seek no costs of the appeal.

18 As I noted in my Appeal Management Memorandum No. 1, in her November 5, 2007, order Mesbur J. directed that the preparation of the ineffective representation allegations in the appeal roughly follow the 2000 Court of Appeal Procedural Protocol Regarding Allegations of Incompetence of Trial Counsel in Criminal Cases. As a result, Ms. McCullough filed an affidavit giving her version of events and she was examined on that affidavit. That process strikes me as a reasonable and practical one to follow on appeals to this Court from decisions of the CCB where ineffective legal representation before the CCB is raised as a ground of appeal.

19 Against that background, I consider the additional participation sought by Ms. McCullough on this appeal to be proportionate and unlikely to cause undue delay or prejudice to the determination of the rights of the parties to this appeal.

C. Conclusion

20 Consequently, **I grant Ms. McCullough leave to intervene on this appeal as an added party with the following specific rights: (i) she may deliver a factum of no more than 5 pages on or before November 15, 2010, and (ii) she may make oral submissions of up to 15 minutes in length at the hearing of the appeal scheduled for November 25, 2010. Ms. McCullough must take the Appeal Record as it stands, subject to the inclusion of her affidavit sworn December 13, 2007; she may not bring any further motions on this appeal; she may not seek her costs of the appeal; and, she does not possess the right to appeal the decision of this Court disposing of the appellant's appeal.**

Note the limitations on the intervention allowed.