Notes on self-representation

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I will focus on the civil justice system but much of what I say will work more broadly in the justice system. I believe SRLs are a permanent feature of our system but we have not accommodated them well. It is an access to justice issue.

We need to acknowledge the complexity that the presence of increasing numbers of SRL folks poses for our courts. The system was not built for them, quite obviously, and it needs to be fixed.

We see four types of SRL, each posing different levels of challenge, to whom the system must respond.

The first muddles through reasonably well and some are excellent.

The second has no idea what they are doing and make a mess that requires much staff and judicial time to straighten out.

The third are people who develop an intimate knowledge of the text of the rules but have no context. They take odd positions by reading words out of context, they undertake appeals that have no merit, and they take procedural steps that often require some work to straighten out.

The fourth, a minority, are those with mental health issues who eventually head towards vexatious litigant status under s 140 of the CJA. They consume many judicial and other resources on their way.

But there is no doubt that for the SRL the legal system is very complex. Given that complexity, workers in the justice system should be hospitable. Currently, there is a lack of hospitality that needs to be remedied. Self represented litigants are entitled to be treated as citizens who have a right to be heard, not as inconveniences.

The Problems for Judges

Judges want to do the right thing, for the right reason, in the right way, at the right time, and in the right words. We need and want admissible evidence in order to make the

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decision on the true merits of a case. But, if a self-rep is involved that can be difficult, because they usually don't know the difference between admissible evidence and argument. I touched on this issue in *Grand River Conservation Authority v Ramdas* (2021) 160 O.R. (3d) 348**,** where I noted that one option for the judge would be to swear in the party and allow the party to make submissions from the witness box, and then to permit cross-examination by opposing counsel on the evidentiary parts (20). I did this on summary judgment motions as a trial judge. This should be standard fare.

But we need more formal fixes. What might those be?

My view is that the Byzantine Rules of Civil Procedure are an impediment to effective SR. The amount of time spent in instructing SRLs, for example, on the difference between interlocutory and final judgments, which sets the appeal routes, is astonishing, especially since we judges still ponder that distinction.

Part of the solution must be **a root and branch re-writing of the Rules so that they can be read, understood, and followed by a person with a grade 10 education**. Such a re-writing would entail a simplification of the processes in the rules. To do that well, we need a comprehensive scan of the best practices around plain language rules across North America. That would be a good start.

We also need an increase in the monetary jurisdiction of the Small Claims Court to $100k. And, how about the adoption of a med/arb approach by deputy judges? That is or should be the friendliest forum for SRLs, so these changes would increase access to affordable justice.

If you think these are good ideas, let people know.

Another part of the solution is to train judges in active adjudication – this is the quasi-inquisitorial approach that is needed to get the evidence from a party or witness and do justice when one or both parties are SRLs.

So what is **active adjudication**?

It is a method of active judicial participation in various stages of the litigation process. There is debate about how much active judicial participation is too much. The key problem is to avoid active adjudication that gives rise to a perception of judicial bias. That happens most often when a judge cross-examines a witness.

As I said in **Ramdas** (21):

21 It is also open to a judge to engage in active adjudication in order to obtain relevant evidence from a self-represented party who might not fully understand what is relevant and what is not. That said, the principle of impartiality constrains a judge's obligation to help make the judicial process accessible to self-represented parties. A judge must not cross the line between assisting self-represented litigants in the presentation of their evidence and becoming their advocate.

The key orientation question for a judge heading into a proceeding where a self rep is present is whether the judge will play on the one hand, an active role, or, on the other hand, a passive role, in the proceeding. Is the trial judge going to sit back and let the case unfold as in a normal trial, intervening only as required by the ordinary rules to determine points of evidence, etc., or is the judge going to take a more active role?

I advocate the adoption of active adjudication as a norm when self-represented litigants are parties to a lawsuit.

There's a recent academic article by Michelle Flaherty and Morgan Teeple Hopkins entitled "Self-Represented Litigants and Active Adjudication: the Duties of Adjudicators", (2022) 35 C J A L & P 177 that's worth reading. The authors argue that active adjudication has to some extent become an obligation for adjudicators in our justice system. I will tell a war story to give you some idea of how active adjudication can work.

My last family trial was *Warsh v. Warsh*, [2012] O.J. No. 6246. The spouses were highly intelligent individuals who had worked in computers. At the trial, the wife was self-represented; the husband had a lawyer.

The central issue in the case was whether the wife should be required to contribute to her son's medical school education in the United States. If that had been the outcome, then she would have had nothing to show for her years of marriage and all of the assets of the marriage would have been devoted to the education of the son.

The wife gave her evidence first. I realized, shortly after she got into the witness box, that her evidence would be relatively short even though there were bankers' boxes of documents. I could see that I was going to get no help from Mrs. Warsh in sorting through the evidence if I simply sat back and let her proceed in the ordinary way.

That was my problem as a trial judge responsible for making a decision on the merits.

So, on the spur of the moment, I decided to take a different approach. I took out her application, which is the basic pleading in a family case, and started at paragraph one. I went through her entire application, paragraph by paragraph. Then I turned to her

husband's answer and did the same thing. Next, I went through her financial statement line by line, and finally I went through her husband's financial statement line by line. Throughout the exercise, I questioned her, as we say, "in chief". That means that I did not ask her any leading questions, which is the basic method of cross-examination. The questions I asked her were open-ended and sequential, and were designed to get her sworn evidence about the particular line or paragraph we were looking at.

I did not cross-examine Mrs. Warsh but, where she gave evidence that seemed to contradict earlier evidence, I simply pointed out what she had said earlier, and what she was saying now, and asked her for an explanation of the difference.

The trial took about five days and it was reasonably smooth. I found in the wife's favour on the main issue and did not require her to contribute to her son's education. There was no appeal.

In this case I benefitted from the fact that the wife had had a lawyer who prepared the application in a competent fashion. The husband's answer was similarly well prepared. The financial statements were also in reasonable shape. The husband's lawyer was courteous and reasonable in the best tradition of the bar.

It does happen, however, when it comes to self-represented individuals, that sometimes the pleadings are very poor. Further, document production can be either incomplete or irrelevant and excessive. This can create significant complications for active adjudication.

Active Listening in Hearing Submissions

Let me turn to the taking of submissions. One of the formative experiences I had as a lawyer was in acting in a highly contentious case involving multiple parties. The motion judge engaged in a technique known as "active listening". In this technique, the person who is listening feeds back to the person making the argument. It goes like this:

> I hear you saying this… Have I got that right?

If the judge can manage that the active listening technique in such a way that he or she restates the submissions accurately, then the lawyer or person making the submission has some confidence that the judge understands it. That impression is enhanced if the judge can restate the position more persuasively than the lawyer or person making the submission, who is then even more convinced that the judge gets it. When that happens, both sides have some confidence that the case has been well understood and

are less likely to appeal a negative result, assuming that the reasons for decision are of expected quality.

Training judges

Judges schooled in the adversarial system are sometimes uncomfortable with active adjudication, if they are even familiar with the technique at all. They stay in the normal umpire mode and fail to police lawyers. An example is *Girao v Cunningham,* 2020 ONCA 260, where the trail judge simply did not step out of the umpire mode when he should have. Active adjudication is not about reducing the burden of proof or the standard of proof. It's about making sure the SRL has an adequate opportunity to put their best foot forward, and that the judge has the evidence needed to decide the case. Flaherty and Hopkins, for example, in their article that I mentioned before, discuss the developing "duty to inquire" that adjudicators have toward self-represented litigants. This, they argue, includes "a duty to inquire into what remedy the SRL is seeking, whether they understand the legal consequences of certain courses of action, and a duty to make best efforts to understand their evidence and legal positions."

In *Girao*, I cited the Supreme Court's landmark decision in *Pintea*.

149 Numerous trial fairness concerns arise for self-represented litigants. In *Pintea v. Johns*, 2017 SCC 23, [2017] 1 S.C.R. 470, at para. 4, the Supreme Court endorsed the Statement of Principles on Self-represented Litigants and Accused Persons (2006) issued by the Canadian Judicial Council. That Statement provides guidance to the judiciary on how to ensure litigants "understand and meaningfully present their case, regardless of representation": at p. 2. The enumerated principles appear under the following headings: promoting rights of access, promoting equal justice, and responsibilities of the participants in the justice system. The Statement sets out directions for the judiciary, court administrators, self-represented persons, and members of the bar. The section on promoting equal justice is particularly relevant. It states:

1. Judges and court administrators should do whatever is possible to provide a fair and impartial process and prevent an unfair disadvantage to self-represented persons.

2. Self-represented persons should not be denied relief on the basis of a minor or easily rectified deficiency in their case.

3. Where appropriate, a judge should consider engaging in such case management activities as are required to protect the rights and interests of self-represented persons. Such case management should begin as early in the court process as possible.

4. When one or both parties are proceeding without representation, nonprejudicial and engaged case and courtroom management may be needed to protect the litigants' equal right to be heard. Depending on the circumstances and nature of the case, the presiding judge may: a. explain the process; b. inquire whether both parties understand the process and the procedure; c. make referrals to agencies able to assist the litigant in the preparation of the case; d. provide information about the law and evidentiary requirements; e. modify the traditional order of taking evidence; and f. question witnesses.

150 In *Morwald-Benevides v. Benevides*, 2019 ONCA 1023, 148 O.R. (3d) 305, I surveyed some of the responsibilities that trial judges have to self-represented litigants, and noted, at para. 34:

It is no longer sufficient for a judge to simply swear a party in and then leave it to the party to explain the case, letting the party flounder and then subside into unhelpful silence. As this court has noted, "it is well-accepted that trial judges have special duties to self-represented litigants, in terms of acquainting them with courtroom procedure and the rules of evidence": *Dujardin v. Dujardin*, 2018 ONCA 597, 423 D.L.R. (4th) 731, at para. 37, repeated in *Gionet v. Pingue*, 2018 ONCA 1040, 22 R.F.L. (8th) 55, at para. 30. The court added, at para. 31 of *Gionet*: "In ensuring that a self-represented litigant has a fair trial, the trial judge must treat the litigant fairly and attempt to accommodate their unfamiliarity with the trial process, in order to permit them to present their case", citing *Davids v. Davids* (1999), 125 O.A.C. 375, at para. 36. See also *Manitoba (Director of Child and Family Services) v. J.A.*, 2006 MBCA 44, at paras. 19-20.

151 Although fairness concerns may animate how a trial judge exercises control over their courtrooms, there are clear limits to a trial judge's duty to assist a self-represented litigant. The actuality and the appearance of judicial impartiality must be maintained.

I am happy to report that the Canadian Judicial Council is aware of the issue. The revised 2021 *Ethical Principles for Judges* now make reference to self-represented litigants. The new principles call on the judiciary to re-evaluate their ethical duties: “Today, judges’ work includes case management, settlement conferences, judicial mediation and frequent interaction with self-represented litigants. These responsibilities invite further consideration with respect to ethical guidance.” Moreover, Principle 2 on Integrity and Respect now includes a comment section entitled “Access to Justice and Self-Represented Litigants.” Comment 2.D.2 reads:

> Passive neutrality and treating everyone in the same manner may not always be appropriate. Parties often appear before the court as self-represented litigants. Judges should provide information and reasonable

> assistance, proactively where appropriate, on procedural and evidentiary rules, while being alert not to compromise judicial impartiality and the fairness of the proceeding.

Perhaps the CJC should update its 2006 Statement of Principles on Self-Represented Litigants and Accused Persons and add a set of guidelines for judges on conducting active adjudication.

Lawyers also need to be educated about their responsibilities as officers of the court and ministers of justice not to take undue advantage of a self-represented party, as in *Ramdas* and *Girao*.

Properly playing the adversarial role must be understood as fully disclosing to the court what has gone on in the case, since the SRL is often not able to articulate that well enough, as in ***Ramdas***, and in taking a helpful approach both to the court and to the SRL. As I said, the court's ultimate decision should be made on the true merits. This does not involve a reduction in the rigour of cross-examination, but it does require a different style, especially when married to active adjudication.

Finally, the justice system needs to provide training resources to self represented litigants to familiarize them with the system and equip them to participate effectively in the litigation process. Useful resources could include videos that show the different scenarios self-represented litigants face, and examination in chief, cross examination, and making arguments.