

**2014 NATIONAL DIALOGUE ON ADMINISTRATIVE LAW
SELF-REPRESENTED AND UNREPRESENTED LITIGANTS**

**WRAP-UP AND LESSONS LEARNED
CONCLUSIONS ET LEÇONS À RETENIR**

May 30, 2014/30 MAI 2014

Today, we had the great privilege of having the most prominent experts share their views on the issue of unrepresented or self-represented litigants. For Professor Trevor Farrow, one of the two leading experts on this topic in Canada (the other being Professor Julie Macfarlane) while there is no doubt that we have the best judicial system in the world, the question is: is it accessible? Professor Farrow's presentation provided telling statistics about unrepresented litigants in our judicial system:

- Well over 50% of individuals (depending on the case, court and jurisdiction) – represent themselves in judicial proceedings;
- That number is often higher in family court proceedings;
- These individuals do not do it by choice but because they do not have the financial resources to pay for legal representation;

- Those who receive legal assistance are between 17% and 1,380% more likely to achieve better results than those who do not.

Professor Farrow interviewed people on the street and asked them to share their views about the Canadian judicial system. One of them said something that I found particularly striking – that the justice system is as important as our health system, and should be as accessible.

In a recent SCC's case (*Hryniak v. Mauldin*, 2014 SCC 7) Justice Karakatsanis wrote that ensuring access to justice is probably the greatest challenge to the rule of law that our society is facing. She stated:

"there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just." (par. 2)

Professor Farrow spoke of the need for a shift in the way court procedures are handled. As one Canadian court worker said, this new normal" means we must

change the way we do business in the court system. The same conclusion was reached by the Action Committee on Access to Justice in Civil and Family Matters in their final report issued in October 2013.

The guiding principles for better access include a focus on the users instead of providers, on collaboration, education, and simplification, and on outcomes – recognizing what empirical studies have shown, that **litigants fare much better when they are represented**. Professor Farrow also cautioned that “private justice” (arbitration) may not be an effective solution for our access to justice challenge.

Finally, Professor Farrow emphasized that the time for change has come. Numerous recent reports have outlined the urgent need to address the access to justice “crisis” in Canada. The time for talk is over. There is a need for action.

PROFESSOR MACFARLANE

In her presentation, Professor Macfarlane informed us that the number of self-represented litigants (“SRLs”) now outnumbers represented parties in family courts in Canada and the US. Furthermore, the number continues to grow in family cases, and in all civil and appeal cases. Professor MacFarlane was clear – in her view, the

greatest barrier to retaining counsel is the cost of legal services. There is just no other reason.

It must be understood that SRLs are not "poor people": they come from all sectors of society. SRLs are just ordinary people who just can't afford to pay \$350 an hour for a lawyer. Over 53% of the study sample had begun with a lawyer, but ran out of funds or were unwilling to continue paying.

For Professor Macfarlane, the distinction between unrepresented and self-represented litigants is not clear – and it may be too simplistic – simply said, most SRLs litigants have no choice. Except for obvious cases of vexatious litigants, the vast majority of self-represented litigants represented themselves because they could not afford legal representation. SRLs are not rejecting lawyers, they just can't afford to have one - and they find that it was much more difficult than they had imagined.

In her conclusions, Professor Macfarlane stresses that we have to accept the "new normal",. that SRLs are a **reality that will not fade away**. We cannot count on publicly funded legal aid for help. It just will not happen. It is a systemic problem rather than the "fault" of any one group, inside or outside the justice system. The reality of SRLs is a new challenge that we have to face, and it is urgent.

Consequently, we have to develop options to make SRLs more functional in the tribunals and the courts. These options include providing more efficient legal information services and education for SRLs (through on-line resources for example – Educalois in Quebec, better guidelines for court workers so that they can help to complete complex forms, and legal coaching).

PROFESSOR RUSSEL ENGLER

For Professor Engler, Canadian statistics match the American ones; the "normal" » we used to know - adversarial system with lawyers on both sides of the bench - has now disappeared. Professor Engler emphasized that we have to distinguish more access to justice and meaningful access to justice; we have to make sense of the fact that representation is a variable that influences outcome.

Empirical studies conducted in the US have shown that legal representation makes a significant difference on the results parties may obtain in court cases; unrepresented parties, in many scenarios, achieve worse outcomes than represented parties do. In areas such as debt collection cases, studies consistently show that represented debtors obtain far better results than unrepresented ones. In family cases, where it is more difficult to assess a "favourable outcome" », represented parties are more likely

to obtain sole custody when the other side is without counsel, and shared custody when both are represented by counsel. The lesson to learn from those empirical studies is that representation matters, especially in settings of procedural complexity, where the lawyer's craft is the most needed. Regardless of the relative impact of legal representation in certain areas, we should accept as a starting point: where basic human needs are at stake (shelter, safety, child-custody), nothing less than full representation by a skilled representative should be provided. Some of Professor Engler's recommendations are that courts and tribunals take the lead in finding solutions, because the private bar won't, and that we put efforts where they are most needed.

JUSTICE KATHERINE SWINTON

For Justice Swinton, some distinctions can be made between unrepresented and self-represented litigants: 15 to 25% of unrepresented litigants are self-represented litigants. These litigants chose to do it themselves, instead of being represented by a lawyer. The "SELFs" are usually plaintiffs. Sometimes, they introduce actions in multiple jurisdictions. In some cases, it may be difficult to assess whether there are mental disorders involved. For courts, this reality means more time for the hearing of the case, more requests for adjournment, more explanations – and this has an

impact on others waiting in line to have their day in court. Our adversarial system expects these individuals to present their case as a lawyer would. SELF-represented litigants present risks for judges – allegations of bias, more appeals, more complaints to the Canadian Judicial Council. What is proposed by the National Judicial Council is fair access and equal treatment – but how do you implement that?

A self-represented litigant must have a fair opportunity to present their case, but not necessarily as a lawyer would do it. Even when there is general information provided to SRLs, how do we transform that general information into court practice? In any event, it often falls to the judge – as Justice Stratas also puts it. In reality, self-represented litigants do not want legal information; they want legal advice from the judge. This presents a great challenge to a judge who must be fair to the represented party as well as the unrepresented party. One solution is to employ case management in order to prevent undue delay for those waiting in line for their day in court. Cost orders may also be used as a method of control, although it is not the ideal solution.

JUSTICE ANN MACTAVISH

In her presentation, Justice MacTavish spoke about a particular class of self-represented litigants – particularly, the Freemen on the Land, or OPCA (Organized Pseudo-Commercial Argument). This special class is very disruptive of court procedures, as they consume an enormous quantity of resources. In essence, Freemen on the Land argue that the legal system, which includes the court system, does not have jurisdiction over them. Some members of this group are not intentionally disruptive, and may just want to “get rid of” their legal problems which may be mostly financial. Justice MacTavish suggested some strategies in dealing with these litigants:

- Get familiar with how they proceed and identify a judge or judges who can be assigned to hear these cases;
- In some situations, security should be strengthened;
- Impose measures to limit disruptive behavior;
- Courts should not allow a “guru” to represent an OPCA litigant;
- Never try to argue with them.

But above all, do not lose sight of the fact that these litigants are unrepresented, and that behind their unusual arguments, they may have a case.

Me PASCALE GAUTHIER

Me Gauthier spoke about her experience as an administrative judge at the Commission des lésions professionnelles, Quebec's worker's compensation appeals tribunal. Overall, Me Gauthier's experience with unrepresented litigants (25% of litigants at the tribunal) has been a positive one. One key factor explaining that might be the flexibility with which a member of the CLP may conduct a hearing. The core value of the CLP is service to every person. It is acknowledged in Canadian administrative law that administrative tribunals are "masters of their own houses" and that, subject to the duty of procedural fairness, they have control of their own procedures. The specificity of administrative proceedings in comparison with judicial proceedings is reflected in the *Quebec Act Respecting Administrative Justice*. Paragraph 12 (3) of that Act provides that the tribunal must "provide fair and impartial assistance to each party during the hearing".

Another factor maybe the accessibility of information about the conduct of the hearing on the CLP website, which even includes a video showing the steps of a typical application – illustrating the possibility of filing online. Unrepresented litigants who had the opportunity to view the CLP videos are more informed and generally more relaxed at the hearing. It is noteworthy also that applicants do not have to complete their file – that is already done for them at the level of the CSST (Commission de la santé et de la sécurité du travail) whose decisions are subject to review by the CLP. On the other hand, other measures like security for costs are not available to tribunals as they to courts.

The Board member can be more active at the hearing stage – sometimes, just an explanation of the steps that will be followed may be helpful to an unrepresented litigant, or an explanation of the difference between a leading question and a direct one. With the collaboration of the lawyer for the other party, the experience can be much easier. For instance, even if the unrepresented litigant has the burden of proof, letting them present their argument at the end of the hearing permits them to see how the lawyer for the other party does it. But in the end, there is a limit to the help a Board member can offer to unrepresented litigants. The Board member cannot act as a substitute to the lack of representation.

JUSTICE STRATAS

In his presentation, Justice Stratas spoke of reforms that are possible and ways we can implement them. The Report of the Subcommittee on Global Review of the Federal Court Rules made propositions for reforms that may help increase access to justice for unrepresented litigants. The inclusion of the proportionality principle in court proceedings and the increasing use of case management, are part of them. Some helpful reform may also come with a change from the "one size fits all" approach in the drafting of court rules which results in the same rules being applied to very different types of cases – cases where multinationals represented by big law firms are fighting on issues of copyright and others where one party is unrepresented. However, even when reforms are adopted, it is the judge who has to do the job. The bottom line message is not only do we have to think about reforms, but also how we implement them.

LESSONS LEARNED

If there are lessons to retain from today's roundtable, they are that 1) SRLs are the new reality, and this will become increasingly so; 2) The time is for action based on the findings brought by empirical studies showing that unrepresented litigants

achieve worse outcomes than represented ones; and 3) Access to justice is not a preoccupation for politicians. Solutions will have to come from the courts and the tribunals. The challenges will come from how we implement solutions, given the lack of resources that courts and tribunal can rely on.