

Select Bibliography: Active Adjudication

BOOKS, ARTICLES & REPORTS

Active Adjudication/Hearing Innovations:

Farrow, Trevor and Lesley A. Jacobs (eds.), *The Justice Crisis: The Cost and Value of Accessing Law* (UBC Press, 2020)

Flaherty, Michelle, "Best Practices in Active Adjudication", July 2015, <http://ssrn.com/abstract=2631175>

Flaherty, Michelle, "Self-represented Litigants, Active Adjudication and the Perception of Bias: Issues in Administrative Law", (2015) 38:1 *Dalhousie Law Journal* 119 <http://ssrn.com/abstract=2586049>

Kristjanson, Freya and Sharon Naipaul, "Active Adjudication or Entering the Arena: How Much is Too Much?", (2011) 24 *Canadian Journal of Administrative Law & Practice* 201

Kristjanson, Freya, "'Hot-Tubs' and Concurrent Evidence: Improving Administrative Proceedings", *Canadian Journal of Administrative Law & Practice* (Vol. 25, March 2012)

Mackenzie, Ian, Posts on Slaw:

["The Limits of Active Adjudication: Tales from the Front Lines"](#), March 17, 2016
["Active Adjudication and Impartiality"](#), January 15, 2014

Marvy, Leonard and David Wright, "'Master of Its Own House': Procedural Fairness and Deference to Ontario Labour Relations Board Procedure: Case Comment on *International Brotherhood of Electrical Workers, Local 1739 v. International Brotherhood of Electronical Workers and Amalgamated Transit Union Local 113 v. Ontario Labour Relations Board*", (2008) 21 *CJALP* 361

Sossin, Lorne, "I Can See Clearly Now: Videoconference Hearings and the Legal Limit on how Tribunals Allocate Resources" (2007) *Windsor Yearbook of Access to Justice* 247-272 (with Zimra Yetnikoff)

Zorza, Richard, "Some First Thought on Court Simplification: The Key to Civil Access and Justice Transformation", *Drake Law Review* [Vol. 61 2013] p.845

Self-Representation:

Cardi, "Litigation as Violence", (2014) 49 *Wake Forest Law Review* 677 (20

Flaherty, Michelle, "Self-represented Litigants, Active Adjudication and the Perception of Bias: Issues in Administrative Law", (2015) 38:1 *Dalhousie Law Journal* 119 <http://ssrn.com/abstract=2586049>

Macfarlane, Dr. Julie, [*The National Self-Represented Litigants Study: Identifying and Meeting the Needs of Self-Represented Litigants*](#), May 2013
[Executive summary](#)

Other resources: [The National Self-Represented Litigants Project](#)

Zorza, Richard, "Self-Represented Litigants and the Access to Justice Revolution in the State Courts: Cross-Pollinating Perspectives Toward a Dialogue for Innovation in the Courts and the Administrative System", (2009) 29 *Journal of the National Association of the Administrative Law Judiciary* 63
Available at: <http://digitalcommons.pepperdine.edu/naalj>

CASELAW

Cases involving courts:

Pintea v. Johns, [2017 SCC 23](#)

R. v. Tossounian, [2017 ONCA 618](#)

Chippewas of Mnjikaning First Nation v. Chiefs of Ontario, [2010 ONCA 47](#)

R. v. Stucky, [2009 ONCA 151](#)

Tran v. Financial Debt Recovery, [2001] O.J. No. 4013 (Div.Ct.)

Cicciarella v. Cicciarella, [2009 ONSCDC 34988](#)

Wehbe v. Wehbe, [2007] O.J. No. 1053 (ONSC)

Bidart v. MacLeod, [2005 NSSC 100](#)

Barrett v. Layton, [2004 ONSC 32185](#)

Cases involving Tribunals:

Power to make rules to control hearings:

Gill v. Human Rights Tribunal of Ontario, [2014 ONSC 1840](#)

Non-traditional hearing processes:

IBEW v. Guild Electric Limited et al, [2007 ONSCDC 65617](#)

The Board reached a decision on a jurisdictional dispute following a “consultation” between the parties. Consultations are permitted under the *Labour Relations Act’s* Rules of Procedure and are meant to resolve labour disputes in an expeditious and informal manner. The Divisional Court held that the Local was neither denied natural justice nor procedural fairness in this case because:

“...a consultation of the type provided for under the Board’s Rules does provide the parties with ‘the right to be heard’ as this term is used in the administrative law sense, just as a ‘hearing’ provides that opportunity.”

Self-Representation and Non-legal Representatives:

Challans v Timms-Fryer, [2017 ONSC 1300](#)

Hansen v. Toronto (City), [2010 HRTO 13](#)

Moore v. Apollo Health & Beauty Care, [2017 ONCA 383](#)

Im v. BMO Investorline Inc, [2017 ONSC 95](#)

Boundaries between Hearing Management and Bias:

Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General), [2015 SCC 25](#)

Stuart Budd & Sons Limited v. IFS Vehicle Distributors ULC, [2016 ONCA 60](#)

Questioning, Engaging with Witnesses and/or Counsel:

Canadian College of Business and Computers Inc. v. Superintendent, Under The Private Career Colleges Act, [2009 ONSCDC 38499](#)

The applicant judicially reviewed the revocation of its registration, alleging that the adjudicator's comments during the hearing demonstrated that she had "prejudged the honesty and integrity of its principal", resulting in a reasonable apprehension of bias. The transcript showed that the adjudicator had frequently questioned the witness, which the Court noted was generally appropriate. However, the adjudicator crossed the line by asking about possible connections to the Tamil Tigers, and by commenting that the appellant was "misleading the Tribunal". As some of the comments and questions were "irrelevant, inappropriate, and improper" in the context, there was a denial of procedural fairness.

Toronto (City) v. Ng, [2007 ONSCDC 9608](#)

The Court confirmed that frequent interruptions by a Tribunal adjudicator during the questioning of a claimant is to be expected in administrative tribunal hearings and that it does not necessarily give rise to an apprehension of bias. In fact, "[a]n adjudicator is entitled to intervene to clarify the evidence and has a responsibility to assist self-represented litigants by bringing rules of evidence and procedure to their attention", and tribunal proceedings are intended to be less formal and more active.

Advising of legal or procedural pitfalls

Audmax Inc. v. Ontario Human Rights Tribunal, [2011 ONSC 315](#)

The Tribunal refused to permit a self-represented Respondent to introduce into evidence a photograph, because it was raised late in the hearing and had not been put to the Applicant in cross-examination. The Court found on judicial review that exclusion in these circumstances was an overly rigid approach to the rule in *Browne v. Dunn*; exclusion of the evidence should be a last resort and only exercised where any other remedy would be unduly prejudicial to the other party. As well, the adjudicator should have taken into account the fact that a self-represented party would not have understood the rule, and should have advised her of the opportunity to request an adjournment.



Statement of Principles on Self-represented Litigants and Accused Persons

Adopted by the Canadian Judicial Council
September 2006

CANADIAN JUDICIAL COUNCIL
STATEMENT OF PRINCIPLES
ON SELF-REPRESENTED LITIGANTS AND ACCUSED PERSONS*

PREAMBLE

Whereas the system of criminal and civil justice in Canada is predicated on the expectation of equal access to justice, including procedural justice, and equal treatment under the law for all persons;

Whereas the achievement of these expectations depends on awareness and understanding of both procedural and substantive law;

Whereas access to justice is facilitated by the availability of representation to all parties, and it is therefore desirable that each person seeking access to the court should be represented by counsel;

Whereas those persons who do remain unrepresented by counsel both face and present special challenges with respect to the court system;

Therefore, judges, court administrators, members of the Bar, legal aid organizations, and government funding agencies each have responsibility to ensure that self-represented persons are provided with fair access and equal treatment by the court; and

Therefore, it is desirable to provide a statement of principles for the guidance of such persons in the administration of justice in relation to self-represented persons.

*Notes:

1. Throughout this document, the term “self-represented” is used to describe persons who appear without representation. The use of this term is not meant to suggest inferences about the reasons the individual is without representation, nor the quality of their self-representation, and recognizes that some individuals prefer to represent themselves.
2. The Statements, Principles and Commentaries are advisory in nature and are not intended to be a code of conduct.

A. PROMOTING RIGHTS OF ACCESS

STATEMENT:

Judges, the courts and other participants in the justice system have a responsibility to promote opportunities for all persons to understand and meaningfully present their case, regardless of representation.

PRINCIPLES:

1. Access to justice for self-represented persons requires all aspects of the court process to be, as much as possible, open, transparent, clearly defined, simple, convenient and accommodating.
2. The court process should, to the extent possible, be supplemented by processes that enhance accessibility, informality, and timeliness of case resolution. These processes may include case management, alternative dispute resolution (ADR) procedures, and informal settlement conferences presided over by a judge.
3. Information, assistance and self-help support required by self-represented persons should be made available through the various means by which self-represented persons normally seek information, including for example: pamphlets, telephone inquiries, courthouse inquiries, legal clinics, and internet searches and inquiries.
4. In view of the value of legal advice and representation, judges, court administrators and other participants in the legal system should:
 - (a) inform any self-represented parties of the potential consequences and responsibilities of proceeding without a lawyer;
 - (b) refer self-represented persons to available sources of representation, including those available from Legal Aid plans, *pro bono* assistance and community and other services; and
 - (c) refer self-represented persons to other appropriate sources of information, education, advice and assistance.

COMMENTARY:

1. Informed opinion and research suggests that the numbers of self-represented persons in the courts are increasing. However, the average person may be overwhelmed by the simplest of court procedures.
2. Self-represented persons are generally uninformed about their rights and about the consequences of choosing the options available to them; they may find court procedures complex, confusing and intimidating; and they may not have the knowledge or skills to participate actively and effectively in their own litigation.¹
3. Many self-represented persons have limited literacy skills, and many speak Canada's official languages as a second language, if at all. As a result, many self-represented persons tend to access information about the courts through means other than the written word. For this reason, it is essential that information be provided using other means, including videos and pictures. Further, having an official available to answer questions posed by self-represented persons should, to the extent possible, supplement pre-packaged materials.
4. Given these factors, it is important that judges, court administrators and others facilitate, to the extent possible, access to justice for self-represented persons.
5. Providing the required services for self-represented persons is also necessary to enhance the courts' ability to function in a timely and efficient manner.

¹ Hann, Robert *et al.* *A Study of Unrepresented Accused in Nine Canadian Courts.* Ottawa: Department of Justice, 2003.

B. PROMOTING EQUAL JUSTICE

STATEMENT:

Judges, the courts and other participants in the justice system have a responsibility to promote access to the justice system for all persons on an equal basis, regardless of representation.

PRINCIPLES:

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, non-prejudicial 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.

COMMENTARY:

1. It is consistent with the requirements of judicial neutrality and impartiality for a judge to engage in such affirmative and non-prejudicial steps as described in Principles 3 and 4. A careful explanation of the purpose of this type of management will minimize any risk of a perception of biased behaviour.
2. Judges must exercise diligence in ensuring that the law is applied in an even-handed way to all, regardless of representation. The Council's statement of *Ethical Principles for Judges* (1998) has already established the principle of equality in principles governing judicial conduct. That document states that, "Judges should conduct themselves and proceedings before them so as to ensure equality according to law."
3. However, it is clear that treating all persons alike does not necessarily result in equal justice. The *Ethical Principles for Judges* also cites *Eldridge v. British Columbia (Attorney General)*² on a judge's duty to "rectify and prevent" discriminatory effects against particular groups.
4. Self-represented persons, like all other litigants, are subject to the provisions whereby courts maintain control of their proceedings and procedures. In the same manner as with other litigants, self-represented persons may be treated as vexatious or abusive litigants where the administration of justice requires it. The ability of judges to promote access may be affected by the actions of self-represented litigants themselves.

² [1997] 3 S.C.R. 624 *per* LaForest, J. for the court at 667.

C. RESPONSIBILITIES OF THE PARTICIPANTS IN THE JUSTICE SYSTEM

STATEMENT:

All participants are accountable for understanding and fulfilling their roles in achieving the goals of equal access to justice, including procedural fairness.

PRINCIPLES:

For Both the Judiciary and Court Administrators

1. Judges and court administrators should meet the needs of self-represented persons for information, referral, simplicity, and assistance.
2. Judges and court administrators should develop forms, rules and procedures, which are understandable to and easily accessed by self-represented persons.
3. To the extent possible, judges and court administrators should develop packages for self-represented persons and standardized court forms.
4. Judges and court administrators have no obligation to assist a self-represented person who is disrespectful, frivolous, unreasonable, vexatious, abusive, or making no reasonable effort to prepare their own case.

For the Judiciary

1. Judges have a responsibility to inquire whether self-represented persons are aware of their procedural options, and to direct them to available information if they are not. Depending on the circumstances and nature of the case, judges may explain the relevant law in the case and its implications, before the self-represented person makes critical choices.
2. In appropriate circumstances, judges should consider providing self-represented persons with information to assist them in understanding and asserting their rights, or to raise arguments before the court.
3. Judges should ensure that procedural and evidentiary rules are not used to unjustly hinder the legal interests of self-represented persons.
4. The judiciary should engage in dialogues with legal professional associations, court administrators, government and legal aid organizations in an effort to design and provide for programs to assist self-represented persons.

For Court Administrators

1. Court administrators should seek to provide self-represented persons with the assistance necessary to initiate or respond to a case and to navigate the court system.
2. In particular, court administrators should be given sufficient resources to be able to:
 - (a) provide, on request, all public information contained in dockets or calendars, case files, indexes and existing reports;
 - (b) provide, on request, access to or a recitation of relevant common, routinely employed rules, court procedures, and fees and costs;
 - (c) provide, on request, information about where to find applicable laws and rules
 - (d) identify and provide, on request, applicable forms and written instructions;
 - (e) answer questions about how to complete forms, but not about how answers should be phrased;
 - (f) define, on request, terms commonly used in court processes;
 - (g) provide, on request, phone numbers for Legal Aid, lawyer referral services, local panels, or other assistance services, such as Internet resources, known to court staff; and
 - (h) provide, to the extent possible, and in compliance with applicable law, appropriate aids and services for individuals with disabilities.
3. Court administrators shall not provide legal advice.
4. Court administrators should educate court personnel regarding the importance of public access to the courts and should provide training to court personnel as to how they should assist self-represented persons.
5. Court administrators should allocate the necessary resources to allow court personnel to provide meaningful assistance.

For Self-Represented Persons

1. Self-represented persons are expected to familiarize themselves with the relevant legal practices and procedures pertaining to their case.
2. Self-represented persons are expected to prepare their own case.
3. Self-represented persons are required to be respectful of the court process and the officials within it. Vexatious litigants will not be permitted to abuse the process.

For the Bar

1. Members of the Bar are expected to participate in designing and delivering legal aid and *pro bono* representation to persons who would otherwise be self-represented, as well as other programs for short-term, partial and unbundled legal advice and assistance as may be deemed useful for the self-represented persons in the courts of which they are officers.
2. Members of the Bar are expected to be respectful of self-represented persons and to adjust their behaviour accordingly when dealing with self-represented persons, in accordance with their professional ethical obligations. For example, members of the Bar should, to the extent possible, avoid the use of complex legal language. Members of the Bar may be guided by the Canadian Bar Association's *Code of Professional Conduct* and the codes of each jurisdiction (see Guiding Principle XIX (8)) and references therein.

For Others

1. Government departments with overall responsibility for court administration should provide Legal Aid plans with sufficient resources to provide a proper range of required services for financially eligible persons, including: education, short-term information and advice, and representation.
2. In addition to providing representation, Legal Aid organizations should be encouraged to create flexible options and models for addressing the challenges of self-represented persons, including programs providing education and short-term information and advice.
3. Providers of judicial education should develop educational programs for judges and court administrators on broad-based methods of assisting and managing the cases of self-represented persons.
4. Government agencies with overall responsibility for court administration should provide courts with the resources and assistance necessary to train court administrators and to provide the funding necessary for them to provide meaningful, broad-based assistance to self-represented persons, including awareness and communications training.
5. Government agencies with overall responsibility for court administration should provide funding for self-help programs for self-represented persons, as well as for programs of assistance to self-represented persons, which falls short of representation.

COMMENTARY:

1. The adoption of these principles in individual courts should be guided, as much as possible, by statistical information about self-represented persons and their cases in each particular court jurisdiction.
2. The design of programs to assist self-represented persons should be a collaborative effort among the judiciary, the courts, the Bar, Legal Aid providers, the public, and relevant governmental agencies.
3. A key requirement is that court personnel understand the distinction between legal information and legal advice, which they are forbidden from providing. Legal advice would include, among other things, advising someone on whether or how to best pursue a case, and explaining the law (as opposed to the process, or distributing information on how to access the law). Research suggests that many court officials may be uncomfortable with providing assistance to self-represented persons for reasons that include uncertainty about how far they may go in answering questions from self-represented persons. Training of court personnel helps them to give meaningful assistance without giving legal advice. Training packages may include such elements as multi-step “protocols” for court personnel and scripts for answering frequently asked questions.
4. Education packages for judges may also include multi-step “protocols” which may include possible scripts for commonly experienced situations. Suggested language for judges typically covers the need to explain the process, the elements and potential consequences, the burden of presenting evidence, the types of evidence which may be presented, the rules governing non-lawyers assisting self-represented persons, and so on.
5. Self-help support for self-represented persons may include such elements as conveniently accessible (e.g., online) forms; “virtual libraries” containing Rules of Court, relevant law, and guidelines to the judiciary in issuing key types of orders or rulings; directions to courthouses; summaries of key areas of law; e-filing; clearinghouses for access to legal services; how-to pamphlets on how to prepare and present a case; and the like.
6. Scheduling should take into account the special challenges and needs of self-represented persons.