

Workshop #2
The Self-Represented Party

Moderator: Robert Owen, Immigration and Refugee Board
Speakers: David Wiseman, National Judicial Institute
Chisanga Puta-Chekwe, Social Benefit Tribunal
Lori Coleman, Health Boards Secretariat
Elizabeth Brückmann, Parkdale Community Legal Services

David Wiseman spoke from his knowledge of how the court system is approaching the issue of self represented litigants. A Statement of Principles was released by the Canadian Judicial Council which asserted that it is desirable that each person seeking access to court should have counsel.

He gave an overview of what the National Judicial Institute is doing on this topic. He said that the self-represented person is a significant concern. He indicated that self-represented litigants are a significant concern for judges, as they are for Tribunals. Mr. Wiseman discussed the judges' need to find a balance between assisting and accommodating self-represented litigants while maintaining impartiality. A recent survey of judges had indicated this was a concern.

Mr. Wiseman discussed the division of self-represented litigants into two groups. One group is made up of the voluntary self-represented litigants, who could afford a lawyer but have chosen to represent themselves. The other group is composed of those who are involuntarily self-represented as they could not access a lawyer.

The National Judicial Institute has developed an electronic bench book to address these concerns. This resource contains the law with regard to self-represented litigants and provides suggested language to use with self-represented litigants. Website guides have also been developed for self-represented litigants.

Mr. Wiseman spoke about the educational programs that were being offered to judges. Information was provided to judges on the substantive law relating to self-represented litigants. Skills were also provided in judgment writing, courtroom management and communication which related to self-represented litigants. A course on criminal law dealt with unrepresented accused. Tips from the mental health field were provided in that session.

Mr. Wiseman touched on the problems that present themselves in family law cases and self-represented parties. He noted that self-representation is often one sided and this creates an imbalance of power. Maintaining impartiality in this context is a challenge.

The Moderator asked a question of Mr. Puta-Chekwe at this point. His question was, does the principle that representation is desirable for all people seeking access to the courts hold true for tribunals?

Mr. Puta-Chekwe answered that representation is desirable at a tribunal, especially in addressing the three areas of understanding the law, literacy and confidence. A lawyer is however not necessary. Tribunals are different from courts. They are set up to perform specific functions and the issues are generally clear. No one is more familiar with the issue than the litigant. She is the one who knows what she wants. Tribunals are meant to be easier and more accessible than courts. As an example, Mr. Puta-Chekwe mentions the Landlord and Tenant Board. When matters that were dealt with in court moved to the Board the number of litigants increased. There is a presumption of accessibility.

Mr. Puta-Chekwe stated that lawyers are helpful with procedures but Tribunals are more flexible and are designed to be easier. The critical difference in Mr. Puta-Chekwe's opinion is that between effectively and ineffectively represented litigants. This encompasses the situation where a qualified lawyer is before a Tribunal but is not familiar with the Tribunal and not familiar with the litigant's problem. Mr. Puta-Chekwe questioned what one is to do in this situation where the representative is qualified but is not offering effective representation.

The Moderator's next question was for Ms. Brückmann. His question was, what is your experience with self-represented litigants? Who are they and what are the limits of self-help?

Ms. Brückmann's experience as a legal aid lawyer with self-represented litigants is that they are *un*-represented rather than self-represented. Her experience is she finds these litigants before tribunals such as the Landlord and Tenant Board,

the Social Benefit Tribunal, the Human Rights Tribunal and the Workplace Safety and Insurance Appeals Tribunal. These tribunals are engaging with the litigant's most basic human needs and rights and their decisions will affect the individual's life in a fundamental way.

In her experience, un-represented litigants are more likely to be poor, to be people of colour, to have a disability, to have mental health problems, to be women, to be elderly and to be new to Canada. They are often dealing with more than one barrier. Their other characteristic is that they are used to being treated as second-class citizens, not taken seriously and they do not expect to be understood.

Ms. Brückmann described what legal aid can do to help. Many people are turned away due to a lack of resources. Funding for legal aid has remained stagnant while demand and the number of un-represented litigants has increased. As a legal aid lawyer at her clinic, she tries to help those who end up as un-represented litigants. They provide self-help kits and guides. They provide people to talk to who have gone through the experience themselves in order to boost the litigant's confidence so that they feel they can approach a tribunal. At the clinic they speak to the un-represented litigants about their fear and frustration. They provide coaching sessions, role-playing, workshops and reviews of presentations. These individuals are also told that they may need an interpreter and they are informed of the cultural norms that are expected at a tribunal. Ms. Brückmann promotes a critical approach at her clinic. Litigants are told that they should not expect it to be easy.

Ms. Brückmann described what she thinks are the limits of self-help. She said that it is just not the same as being represented and it is not an acceptable alternative. There are many people who should not be expected to represent themselves given the many barriers they face and they cannot be expected to navigate the system alone. She notes that Tribunals are trying to make the system easier and she suggests that a more meaningful approach would be to record that the increasing number of un-represented litigants is unacceptable. Tribunals should be advocating that no one is forced to be an unrepresented litigant.

The Moderator's next question was for Lori Coleman. His question was, what do you do to level the playing field for self-represented litigants? How far can you go without becoming an advocate?

Ms. Coleman responded by discussing the important role of tribunal staff in providing helpful and reliable information to litigants. She discussed the importance of continuing staff training to ensure that staff, especially those very familiar with their legislation, do not cross the line into providing legal advice. Staff also needs to remember that the tribunal experience is unique to the litigant, though it may appear routine to tribunal personnel. Ms. Coleman suggests that tribunals should provide scripts to staff for common questions. This way, messages sent to self-represented litigants will be clear and consistent. Staff should be encouraged to attend hearings as it will give them a context for their work and they will see a self-represented litigant try to deliver his or her case.

Ms. Coleman also discussed the importance of the tribunal website. She suggested using it for videos where mock hearings could be shown and that information could be provided in several languages. She also described a project with Pro Bono Students Canada that is aimed at making the tribunal process more accessible and will be providing information to self-represented litigants. She reiterated that no tribunal wants its self-represented litigants to withdraw because the process is too complicated. Staff need to help these litigants without crossing the line by providing legal advice.

The Moderator's next question was for Mr. Puta-Chekwe. He asked, given that legal proceedings are formal, how do we make procedure less intimidating and how do we put a party at ease without crossing the line?

Mr. Puta-Chekwe explained that the process starts when the litigant begins thinking of applying to a tribunal. He described a pamphlet used by his Board that explains to litigants in plain language what they should do and what the process will be like. Once they apply, the litigant is then assigned to a particular staff member. It is at this stage that there is the greatest danger that the line between providing information and providing legal advice will be crossed. This is also when alternative resolution options should be brought to the appellant's attention. Mr. Puta-Chekwe explained that 28% of the files at his Board had been resolved through an early resolution process.

The setting of the Tribunal also plays a role in putting litigants at ease. Mr. Puta-Chekwe described changes made in the reception area that made it easier for litigants to sit in groups with their friends and supporters. He also reminded us that an adjudicator can explain the procedure in plain language at the beginning of the proceedings to put the litigants at ease.

The Moderator asked that each panelist provide a “tool” that the audience could take with them to assist in dealing with self-represented litigants.

Ms. Brückmann suggested the use of cultural interpreters to explain not just language but cultural differences as well. Ms. Coleman suggested scripts, drafted for staff, to give a consistent message to litigants. Mr. Puta-Chekwe suggested providing plain language pamphlets as well as a referral list for legal aid clinics. Mr. Wiseman suggested providing resources such as examples and scripts to staff and adjudicators as well as translations of complicated forms for the litigants.