

CLOSING PLENARY:
Self-Represented Litigants – From Challenges to Solutions

Moderator: Caroline King, Landlord and Tenant Board

Speaker: Madame Justice Gloria Epstein, Court of Appeal for Ontario

The major point that Justice Epstein emphasized in her presentation was the importance of working towards attitudinal change with respect to self-represented litigants. She also highlighted some of the practices and procedures that adjudicators can engage in to welcome self-represented litigants into their hearings and reflect this attitudinal change.

Self-represented litigants as an opportunity instead of a problem

At the outset, Justice Epstein urged the audience to use the term “self-represented”, rather than “unrepresented” litigants. She noted that this terminology is reflected in the Canadian Judicial Council’s *Statement of Principles on Self-Represented Litigants*. Justice Epstein described how self-represented litigants are often thought of as a systemic problem, or what she referred to as an “eye rolling problem.” However, she suggested that the better view is not to look at them as a problem, but rather as an opportunity. She went on to explain why an attitudinal change is necessary. Self-represented litigants are here to stay and we are only going to see them appearing more frequently in our hearings. If we consider them as a problem, then we are considering a big part of our system as a problem. She also addressed why we should look at self-represented litigants as an opportunity. First of all, self representation is an access to justice issue. If we welcome, instead of simply accommodating or tolerating self-represented individuals, then we are increasing access to justice. Secondly, dealing with self-represented litigants gives rise to self examination. Explaining to someone who is not legally trained how and why we do what we do can cause us to examine our system, and this is always healthy even if it doesn’t lead to change. Finally, it is an opportunity to increase public confidence, maintain public trust, and improve how we are viewed by the general public. The justice system needs to continually strive to ensure that it is meeting the needs of Canadians.

Who are self-represented litigants?

Justice Epstein then addressed the question of why people represent themselves. She suggested that there are two categories of self-represented litigants: 1. those that want to be represented but can’t, either because they don’t qualify for legal aid or nobody will act for them; and 2. those that don’t want to be represented. She noted that there are a number of different subsets of people in the second category, including:

i) recreational litigants: these are people that put a lot of time and work into the case. These people present special challenges to adjudicators because they are often unwilling to negotiate and they consume a lot of resources.

ii) do-it-yourselfers: these are people who can afford a lawyer but think they’ll do a better job instead. This may be a deliberate strategy so that the person can connect directly with judge themselves. These types of people present different challenges, for instance they frequently have exaggerated expectations.

iii) people who have had bad experience with lawyers and feel that they must do it themselves because they don’t trust lawyers.

iv) people with mental disabilities: our job here is to accommodate these people as best we can.

In light of these different situations and motivations, we can't treat all self-represented litigants the same. There is no one-size-fits-all solution. She suggested instead that we need to modify our reaction based on which category a particular person fits into.

How can we welcome self-represented litigants into our hearings?

Justice Epstein then turned to a discussion of the different combinations and possibilities that exist to enable us to do a better job of welcoming self-represented litigants into our hearings.

i) Pre-Hearing Stage

The pre-hearing stage is when the self-represented person first enters the system and interacts with the administrative staff. Often the person will not be familiar with the roles of those involved in the process or the practices and procedures that will be followed. She suggested that a tribunal can develop various materials to help increase the self-represented person's understanding of the process, for example brochures, self help packages, plain language forms, websites, or videos of mock hearings. Another option is to develop educational programs for administrative staff. The administrative staff are the first connection with the self-represented litigant, and they are often charged with the task of educating these people on the process. Therefore, providing support to the staff in dealing with these people is an important step. Administrative staff can help to make self-represented people aware of other possible resources, for example by informing them of Legal Aid Ontario's resources, or the existence of community and specialty legal clinics or student legal aid societies. They can also inform the person of any tribunal specific resources that exist, for example the Human Rights Tribunal, the Landlord Tenant Board, and the Immigration and Refugee Board all have specific resources designed to help people within their systems. She suggested that the next step towards improvement may be to modify and customize some of the materials to focus on the nature of self-represented litigants.

ii) Hearing Stage

Justice Epstein also described procedures that could be incorporated at the hearing stage. On the day of hearing, the emotional state of a person often presents a challenge. The court staff has to try to understand the person's mind set, for example intimidated, nervous, angry, in order to be able to deal with them effectively. She suggested dealing with and giving support to self-represented people in plain language, for example do not talk to the person as though he or she already understands what an adjournment is. Often, the person does not understand a lot of the process and it is important to recognize this and act accordingly. She also emphasized that treating people with patience, respect, and politeness is another way to make them feel welcome.

i) Role of Counsel

Justice Epstein discussed the roles that court staff, counsel and adjudicators can play in dealing with self-represented litigants. She suggested that opposing counsel in a hearing can assist a self-represented person with the rules and procedures of the tribunal without jeopardizing their position. This assistance can contribute a great deal towards de-stressing the situation. She emphasized that it is important for counsel to always be respectful towards the self-represented person and to use plain language that the person will be able to understand. She suggested that counsel should explain to their own client that there is a self-represented person on the other side who may need

assistance with various rules and procedures, so that the client does not think that the adjudicator is being unfair. At the same time, it is appropriate to speak up if counsel thinks that an adjudicator is being too lenient with a self-represented person.

iv) Role of Adjudicators

With respect to adjudicators, it is their responsibility to ensure that every aspect of the hearing is conducted fairly and that justice is not only done but is also perceived to be done. She suggested that the challenge for adjudicators is that self-represented litigants often look to the adjudicator for help. As an adjudicator, you need to ensure that you hear everything that needs to be heard, but you must also avoid creating any real or perceived disadvantage to the other parties. She noted that a represented party has a right to have the procedural and substantive law adhered to, and as long as this is done, it is appropriate to assist a self-represented person. She suggested ways that an adjudicator can give assistance to a self-represented individual through increased communication, such as questioning whether the individual wants a lawyer, identifying the issues that will be involved in the proceeding, for example the statutory test to be met, and explaining the hearing procedure. It is appropriate for an adjudicator to intervene in a hearing to elicit evidence from a self-represented person, but not to go into the issues. The adjudicator must control the hearing and make sure that the process is as fair as possible. She noted that this idea also applies to the introduction of evidence. Self-represented litigants may not be familiar with the rules of evidence and may attempt to introduce improper evidence. An adjudicator should not allow any evidence that is inadmissible. However, if a self-represented person is attempting to admit something that is borderline admissible, she suggested that it may be appropriate to allow the evidence, provided it does not prejudice the opposing parties. She also stressed the benefit of recording or reporting whatever discussions the adjudicator has with a self-represented person to protect the adjudicator if it later arises as an issue.

Justice Epstein concluded by sharing an anecdote of one of her own experiences with self-represented litigants and the value that she felt this individual brought to the particular hearing. She emphasized the fact that self-represented litigants are an important part of our system and although we have done a lot of work already, she suggested that there is still a lot more that we can do to welcome these people into our system.