WORKING WITH SELF-REPRESENTED LITIGANTS:

IDEAS AND SUGGESTIONS FROM THE BENCH

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Introduction

Associate Chief Justice John D. Rooke
Alberta Court of Queen's Bench

Judges across Canada are dealing with the challenges presented by historic numbers of self-represented litigants (SRLs) in their courtrooms. The SRL phenomenon has had a very significant impact on the way judges perform their role and the work they do. The approaches and strategies described in this "First Edition" document – the result of a detailed exchange among five judges from across Canada about their experiences and practices - reflect the work, attention and care that judges are giving to this issue.

The intent of "Working with Self-Represented Litigants: Ideas and Suggestions from the Bench" is to contribute to this ongoing discussion, building on important work in judicial education by the Canadian Judicial Council, the National Judicial Institute and other judicial education institutions. We judges recognize that it is important to talk about best approaches at the level of both principle and practice. This document is oriented towards practical tips and strategies that we have used in our own courtrooms. We hope that other judges might find them useful, and that SRLs might also learn from them – in the spirit of an important and constructive dialogue.

This document has been developed collaboratively by a small "Working Group" made up of judges from jurisdictions across Canada, each of whom works with SRLs on a regular basis in their courtrooms. Each of us has begun to develop some strategies for improving the clarity and effectiveness of our interaction with SRLs in the courtroom. Each of us brought a

slightly different perspective and experience to the extended deliberations of the Working Group.

The presence of historic levels of SRLs challenges all involved in the justice system. We have no doubt that judges (and others) will continue to discuss, debate, and seek to proactively and constructively respond to, the demands this new reality imposes on access to justice issues. We anticipate – indeed, we hope - that the many suggestions and ideas contained in this document will be adopted and modified as appropriate for use in each court and jurisdiction, and that it will continue to evolve to reflect judicial experience. Through the NSRLP, we welcome comments and insights for consideration in future versions/editions.

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1. Overview: Our Role as Judges

In maintaining our commitment to professionalism, fairness and impartiality, it is important to:

- Respect the self-represented litigant (SRL) and their unique circumstances.
- Recognize that a SRL may feel nervous in an unfamiliar setting.
- Aim to be methodical and clear in our explanations, using plain language and avoiding legalese as much as possible.
- Explain the potential consequences of not having legal advice (for example, the SRL may not be aware of practice and procedure, may be unfamiliar with caselaw that would be helpful to their case, be unclear about what is and is not legally relevant, etc).
- Suggest other options (for example, unbundled legal services, student legal services if available, private or court mediation, collaborative family law, and if continuing self-represented, suggest they might spend time observing other cases, request case management by a single justice).
- Remind SRLs and everyone in the courtroom that this is a formal and respectful process. Even if they are unhappy with what they hear, they are required to listen – there will be turn-taking and everyone will get their time to speak and be heard.
- Ensure that a lawyer appearing for the other side and a SRL are courteous to one another, and that both are treated courteously by the court.

2. Practical Strategies for Judges

We recognize that our approach to managing the courtroom must be different in some important ways when there is a SRL present.

The Canadian Judicial Council Statement on Self-Represented Litigants and Accused Persons (2006) anticipates that judges working with SRLs may consider "…engaging in such case management activities as are required to protect the rights and interests of self-represented persons" (Principle B.3). Principle B.4 continues "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". The accompanying commentary states:

> "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."

Each judge will develop different strategies or ways of managing a courtroom that includes a SRL. Some of these strategies will depend on the particular conditions in the court, and may need to be adapted to this context.

Specific strategies identified and used by this group include:

- Where practical (not always), review the file before coming into the courtroom (this is not always practical depending on volume and schedule, and may depend on whether there is confirmation that the matter will proceed and the likelihood of an adjournment).
- Where practical (not always), spend the first few minutes of the hearing reviewing the history of the file, how we got to where we are today and what is currently before the court (including documents, procedure, possible outcomes).
- Explain the process that lies ahead of this immediate hearing (for example in the Ontario Superior Court, three conferences i.e. the case conference, the settlement conference, and the trial management conference).
- Explain the judge's role today in the immediate proceeding.
- Ensure that a SRL knows that if they have any relevant procedural questions (that a judge may answer without giving legal advice), they should ask.
- Ask for a confirmation of understanding following any explanation offered to the SRL.
- Consider using inclusive language i.e. identify what is it "we" have to decide, explain that our first step is to see what issues "we" have and what information "we" need to have to decide them, while establishing that the judge is the final decision-maker.
- Explain that each litigant and lawyer is expected to address remarks only to the judge (who is the "chair" of the hearing) and

not directly to the other litigant or lawyer.

- Explain that the SRL should stand up to speak and encourage them to use the microphone.
- Suggest that litigants may want to make notes, while listening to the remarks of the other litigant or their lawyer, of points they wish to make when their turn comes.
- Identify any missing information, what documentation needs to be filed, and set out time frames.
- Suggest that a SRL who wishes to negotiate with a lawyer representing the other side should do so in writing. It may be useful to explain that a lawyer representing the other side may be concerned about negotiating in person with a SRL to avoid the possibility of a misunderstanding developing over what was said during such a discussion, and the risk that they may become a witness required to testify about the discussion.
- Explain that communication (including email) directed to a judge or to the judge's office following a hearing asking for clarification cannot be answered, unless and until all the parties are back before the judge. All communication should be by affidavit or by argument in open court and other communication with the judge is not allowed.
- Encourage the exchange of email addresses and other communication means between the parties – and remind them that emails must be on point and respectful.
- Explain the resources that are available to help SRLs with decision-making in your jurisdiction, including secure electronic tracking systems to facilitate the service of court documents and the production of documents to be disclosed, experts (private or publicly funded) for parenting education, parenting coordination, therapeutic re-integration counseling for parents and children, other forms of counseling, or assessment of the children's needs, collaborative family law, and mediation services.
- Suggest relevant books and other resources that may help SRL inform and enhance their decision-making.
- Remind counsel, where appropriate, that it may take more time to explain something to a SRL than to someone with legal training, and while we must also be mindful of limited judicial resources including time, these adjustments may be important to ensure the most effective use of courtroom time and resources when one

party is a SRL (and see the CJC commentary, above).

- Where appropriate, we may need to explain to a represented party why assistance is being provided to the SRL, and that we are obliged to make every attempt to ensure that the represented party does not face additional time, cost and effort (and see the CJC commentary, above).
- If the application is brought by a SRL and there is counsel on one side, we may ask counsel to frame the nature of the application but not hear their detailed submissions until turning back to the SRL and asking them to confirm (or contradict) what counsel has said – and then ask the SRL for a summary of their affidavit.
- If there is counsel on one side and a consent order is being made, it is important to review the content of the order and ensure that there is agreement between the parties. Where the order is not yet prepared, some of us will also ask for the SRL to review an order drafted by opposing counsel before it is sent back to the court for signature (this is the default under some but not all Rules).
- If a new date is given or if there are tasks to be done, some of us like to use a form setting this out clearly which can be completed by the clerk and provided to the SRL before they leave the courtroom, or as soon as possible thereafter.
- If a direction or order is given at the conclusion of a hearing it is often helpful to check understanding by asking a SRL to tell the judge – in summary - what they have been asked to do. The judge can also invite any further relevant questions.
- If a lawyer for a represented litigant asks the judge to endorse a direction dispensing with the approval of the formal order that the lawyer prepares, the judge may explain to the SRL the procedure for having a draft order approved by the opposing lawyer as to form and content, to ensure that it accurately reflects the handwritten endorsement that the judge has made. The judge may then ask the SRL whether s/he wants to be asked for his/her approval (in which case a judge may give directions as to how and within what time frame that must be done) or whether the SRL is content to dispense with that procedural step.

3. How can Self-Represented Litigants Work more Effectively with Judges?

- If an application is being made, the applicant party should present the proposed order at the beginning of the hearing.
- Take advantage of template orders prepared by the court and provided to SRLs, as well as programs for court-generated orders.
- Focus on the simple (summary) relevant evidence, rather than telling the whole story of your relationship or conflict.
- Consider settlement whenever and wherever you can. Use mediation and court or institutional settlement conferences to explore the ideas you have for a reasonable settlement (see also (4) below).
- Confirm that you have understood what the outcome of the hearing is and any next steps.
- Make a "To Do" list at the end of the hearing.

4. Future Possibilities for Working with Self-Represented Litigants

We see a number of possibilities for improving interactions between SRLs and the court. Some of these ideas implicate the role of judges, while others are suggestions for wider system change.

- Offer clearer direction and orientation for SRLs via educational programs such as Ontario's Mandatory Information Programs or other orientation or information sessions - would assist judges by better preparing SRLs.
- Continue to expand documentation prepared by the court that answers Frequently Asked Questions by SRLs and which can better prepare SRLs to the benefit of all.
- Consider expanding the use of template orders prepared by the court and provided to SRLs, as well as programs for court generated orders, which may enable SRLs to more competently and completely prepare their documentation before (and after) a hearing.
- Explore ways to encourage and support SRLs in considering settlement. For example:

- A judge can explain to a SRL the inherent advantages of a settlement. Depending on the case, these include: the quality of the decision (litigants know more about the facts of their case than their lawyers since the lawyers know only what the clients tell them); the expense of the legal process; closure (if the parties can reach a result they both can live with, it is less likely that they shall return later for further litigation); and (especially in family matters) the effect of ongoing conflict on their children.
- In a settlement conference, judges can assist SRLs to consider settlement by using private caucus to discuss the issues (note that these may need to be recorded to ensure clarity and to create a record).
- Unbundled legal services or limited scope representation may be helpful to a SRL who is exploring settlement but would benefit from advice on evaluating settlement options
- Access to Legal Aid counsel (either to represent them or to prepare them, for example as duty counsel) can overcome the lack of confidence that may impede a SRL from entering into a settlement with a party who is represented by a lawyer (and enable a lawyer representing the other side to negotiate without fear of becoming a witness if the negotiation breaks down).
- Access to Legal Aid counsel also allows the SRL to obtain independent legal advice with which to appraise a settlement offer. This may help to ensure that a settlement will withstand future scrutiny by the court.