The National Self-Represented Litigants Project

Pintea v Johns: 18 Months Later

The Self-Represented Litigants Case Law Database

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Table of Contents

A. Introduction

It has been 18 months since the Supreme Court of Canada's decision in *Pintea v Johns*.[1] NSRLP's SRL Case Law Database project is tracking the emerging jurisprudence on issues relating to the treatment and management of self-represented litigants by the courts, and we regard the impact of *Pintea* since that decision came down to be an important topic to address in our ongoing series of detailed reports. Specifically, we wanted to examine how the courts have been applying this landmark decision for self-represented litigants since April 2017.

In *Pintea v Johns*, the Supreme Court of Canada endorses the *Principles* established by the Canadian Judicial Council (CJC) regarding self-represented litigants (*Statement of Principles on Self-Represented Litigants and Accused Persons,* henceforth the *CJC Principles*).[2] These *Principles* outline the obligations and responsibilities owed by judges to SRLs and the obligations and responsibilities of SRLs when they participate in the court process. The *Principles* acknowledge the disadvantage SRLs are at in navigating the complexities of the legal system on their own and often facing counsel on the other side, and exhort judges to take this into consideration in managing cases and rendering decisions. Specifically, *Pintea* addressed the application of the law of contempt to an SRL and held that the individual in question, who was self-represented, could not be held in contempt of an order if he was not made aware of that order.[3]

As of October 2018, 38 cases reported in our source database (Westlaw) have referenced the *Pintea* decision in some way. We took a look at how these cases were decided, and how they applied or distinguished *Pintea* and the *CJC Principles*.

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[1] *Pintea v Johns*, 2017 SCC 23 [*Pintea*].

[2] *Statement of Principles on Self-represented Litigants and Accused Persons*, Canadian Judicial Council, September 2006, https://www.cjc-ccm.gc.ca/cmslib/general/news_pub_other_PrinciplesStatement_2006_en.pdf.

[3] *Pintea* at para 1.

B. Cases That Applied *Pintea* to Assist SRLs

There have been a number of reported cases over the past 18 months that have applied the *Pintea* decision to decisions involving SRLs, and attempted to flesh out the application of the *CJC Principles*.

In *PohQuong v Marks*, an Ontario Court of Justice decision, the Court was "mindful of [its] duty to deal with cases justly [. . .] under the *Statement of Principles on Self-Represented Litigants and Accused Persons*."[4] In that case, the Court allowed the SRL to call additional evidence as he had requested, holding that the *Principles* require that judges not deny relief based on an easily rectified deficiency.[5]

Other Ontario decisions have reflected similar support for the *Principles*. In *R v Tossounian*, a criminal case, the Ontario Court of Appeal found that "the trial judge in this case failed to carry out these duties to the unrepresented accused"[6] and ordered a new trial. The Court also discussed the responsibility the *Principles* impose on judges in respect of self-represented litigants[7] and stated that:

> "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."[8]

More recently, in an important clarification of applications for appeal that rely on *Pintea* and the *CJC Principles*, the Newfoundland Court of Appeal, in *Cabana v Newfoundland and Labrador*, noted that simply asserting a breach of the *Principles* is not sufficient grounds to appeal; the appellant must demonstrate how the failure to consider or apply the *Principles* affected their access to equal justice.[9] The *Cabana* decision also highlighted the relevance and importance of

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[4] *PohQuong v Marks,* 2017 ONCJ 706 at para 28.
[5] *Ibid* at para 29.
[6] *R v Tossounian*, 2017 ONCA 618 at para 39.
[7] *Ibid* at para 37.
[8] *Ibid* at para 38 (citing the *Principles*).
[9] *Cabana v Newfoundland and Labrador*, 2018 NLCA 52 at para 62 [*Cabana*].

the *Principles* with respect to how they inform the notions of trial fairness and exercise of procedural discretion.[10]

In *Henderson v Winsa*, the Ontario Court of Justice recognized its duties and obligations towards SRLs "… to explain the relevant law and its procedural implications, remaining sensitive to the interests of the [other party]."[11] In its decision, the Court explained that it wanted to ensure that in making "critical choices", the SRL understood the relevant law and procedure, citing to specific cases when dealing with each issue, in order that she could make an informed decision.[12]

Two Ontario cases involving Children's Aid Societies and self-represented parents have used *Pintea* to establish limits to the use of summary judgment. In *Children's Aid Society of Toronto v EB*, the Court dismissed the society's motion for summary judgment and based this decision partly on the fact that the mother was self-represented; "the stakes for her are very high and granting the motion will deprive her of the procedural safeguards of a trial."[13]

Catholic Children's Aid Society Toronto v CG[14] went further, suggesting that the Society sought to take advantage of the self-represented mother by attempting to admit evidence they knew would not meet the evidentiary standard required on a motion for summary judgment. The Ontario Court of Justice protected the mother's legal interests by challenging the Society's conduct and dismissing their motion, holding that "it was not realistic for the mother to be able to meaningfully respond to the volume of inadmissible evidence presented to her by the society and it was unfair of the society to place the mother in that position."[15] Justice Sherr continued that because of the practical difficulty and complexity of a SRL challenging inadmissible evidence, "the Society should have been even more vigilant in ensuring that its evidence was presented in a proper form."[16] The Court cites *Pintea v Johns* and notes the following from the *Principles* in their decision:

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[10] *Ibid* at para 59.
[11] *Henderson v Winsa*, 2018 ONSC 3378 at para 21.
[12] *Ibid* at para 24.
[13] *Children's Aid Society of Toronto v EB,* 2018 ONCJ 333 at para 58.
[14] *Catholic Children's Aid Society of Toronto v CG*, 2018 ONCJ 193 at para 34.
[15] *Ibid* at para 17.
[16] *Ibid* at para 28.

a. "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.
b. 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.
c. Judges should ensure that procedural and evidentiary rules are not used to unjustly hinder the legal interests of self-represented persons."[17]

Courts in other provinces have also reinforced *Pintea* and the *Principles* in their decisions. In *AAAM v Provincial Director of Adoption*, a British Columbia Supreme Court case, an SRL sought adjournment of a trial scheduled to take place four days following that hearing. Although the Court acknowledged that there was some evidence to suggest the SRL had previously sought to delay this matter, the adjournment was granted (with some conditions), because of his status as a self-represented litigant operating in a second language and with reference to the Supreme Court of Canada's guidance in *Pintea.*[18] Similarly, the Alberta Court of Queen's Bench in *Alberta Lawyers Insurance Association v Bourque* agreed to an adjournment in light of the SRL's inability to attend the hearing and, citing to *Pintea,* "being mindful of the Court's obligations to self-represented persons".[19]

Young v Noble,[20] a Newfoundland Court of Appeal case, reflects a similar rationale. In this case, the Court noted that it had "a duty to ensure that everyone is treated fairly and without discrimination."[21] Justice White continued: "It is impossible to deny that there is an inequality when a self-represented litigant must argue a case against experienced counsel" and that pursuant to the *Principles* endorsed in *Pintea* "the Court must take affirmative and non-prejudicial steps to address this."[22]

[17] *Ibid* at para 15.
[18] *AAAM v Provincial Director of Adoption,* 2017 BCSC 1878 at para 20.
[19] *Alberta Lawyers Insurance Association v Bourque*, 2018 ABQB 311 at para 6.
[20] *Young v Noble,* 2017 NLCA 48.
[21] *Ibid* at para 34.
[22] *Ibid* at para 34.

An interesting decision by the Alberta Court of Queen's Bench refusing a desk divorce determined that the *Principles* endorsed in *Pintea* impose obligations on the Court that are not relieved "merely because the Order is by consent."[23]

These cases highlight the importance of the *Principles* and the obligations they impose on courts to be mindful of the disadvantages inherent in the position of an SRL.

C. Limitations on *Pintea*

Aside from cases which factually distinguish *Pintea*, we have noted two strands of judicial reasoning that suggest limitations on the application of *Pintea* and the *Principles*.

(i) Judicial assistance under *Pintea* may be "forfeit" for previous bad behaviour

While the *Principles* present the court with duties and responsibilities, they also set expectations for SRLs. In the following cases, there is a suggestion that a court is not responsible to apply the *Principles* when a SRL has failed to keep their side of this "bargain".

In *Re Thompson*[24] and *Thompson v Alberta Labour Relations Board*[25], two Alberta Court of Queen's Bench cases involving the same SRL and the same judge, the SRL had previously been designated a vexatious litigant and was subject to court access restrictions.

In *Re Thompson*, the court denied the SRL's application because the SRL failed to file the affidavit he intended to rely upon and the decision he wished to challenge. The Court acknowledged the *Principles* endorsed in *Pintea*, "recogniz[ing] that self-represented persons have special characteristics that must be considered by judges, so as to properly reflect and appreciate the challenges faces by persons without lawyers who are confronted by a complex legal apparatus."[26] The Court then went on to emphasize that "the *Statement* [of

[23] *Orga v Smith*, 2018 ABQB 101 at para 8.
[24] *Re Thompson,* 2018 ABQB 87 [*Re Thompson].*
[25] *Thompson v Alberta Labour Relations Board*, 2018 ABQB 220 [*Thompson*].
[26] *Re Thompson* at para 23.

Principles] is not a unilateral document"[27] and that SRLs also have obligations: "they are expected to familiarize themselves with the relevant legal practices and procedures pertaining to their case; expected to prepare their own case; and are required to be respectful of the court process and the officials within it – vexatious litigants will not be permitted to abuse the process."[28] The Court noted that the omission in this case would not be fatal to some SRL applications, but that here, they understood the SRL to be experienced and thus familiar with the documentary and procedural requirements.[29]

In *Thompson v Alberta Labor Relations Board*, the same SRL was again denied leave to file an application because of omissions in his application. The SRL refers to the *Pintea* decision and the *Principles* in his materials, but the Court's decision refers to the fact that the SRL was previously designated a vexatious litigant, curtailing further discussion on *Pintea* and the *Principles*.

A similar concern that any history of litigation "abuse" should be considered in the application of the *Principles* is set out in *1985 Sawridge Trust v Alberta (Public Trustee),*[30] a Alberta Court of Queen's Bench decision on costs. The Court first noted that the effect of *Pintea* was "a substantial rejection by the Supreme Court of Canada of the traditional approach, that rules of procedure and evidence apply the same to everyone who appears before a Canadian court."[31]. The *Principles* were described as illustrative of "how the traditional formal rules of procedure and evidence bend to the new reality faced by trial courts, and what is required to provide a fair and just result for self-represented litigants", given the complexities faced by SRLs dealing with a legal system "whose workings are at times both arcane and unwritten". However the Court then goes on to note that ensuring a "fair and just result" also requires recognition that "the *Principles* [are] not a licence for self-represented persons to engage the courts as an exception to the rules."[32] and that "abusive litigation is not excused because someone is self-represented."[33]

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[27] *Ibid* at para 24.
[28] *Ibid*.
[29] *Ibid* at para 14.
[30] *1985 Sawridge Trust v Alberta (Public Trustee)* 2017 ABQB 530.
[31] *Ibid* at para 45.
[32] *Ibid* at paras 46.
[33] *Ibid* at para 47.

In *Gray v Gray*,[34] an Ontario Superior Court found in favour of an SRL seeking to set aside a previous decision, but consistent with *Sawridge* and the *Thompson* cases noted that in applying the *Principles* the history of an SRL's conduct is a relevant consideration. In this case, the SRL had failed to appear on the first day of trial. The Court noted that the SRL here had historically "…participated in the proceeding for the most part appropriately and, importantly, by the time of the Trial Management Conference, he had satisfied his disclosure obligations" pursuant to a previous endorsement of the court[35] and that he had "moved expeditiously to address the default order by commencing an appeal and by bringing this motion."[36] The Court held that the SRL's failure to appear should not be held against him because he had received poor advice from a paralegal and made a bad decision to attend work rather than appear. As a consequence, the Court set aside the earlier decision.[37]

These cases indicate that in some courts the *Principles* will not be applied to enable judicial assistance to a SRL if the judge feels that the SRL has not behaved appropriately during the litigation, or cannot justify earlier behaviour and choices. This may be reflected in earlier designations as a vexatious litigant, or earlier decisions that have rebuked the SRL for abuse of process.

While these cases explain their reasoning as an effort to ensure a balance between both the rights and the responsibilities of SRLs, the direction of these cases concerns us. The reason is the wide variation anf constantly shifting terrain in judicial practice in both formally designating SRLs as vexatious, and informally describing them as such in decisions.[38] Furthermore, while the *Principles* are clear that no litigant should be permitted to abuse the court process, there is nothing in either *Pintea* or the *Principles* to suggests that a SRL should be denied minimal judicial assistance - described in both sources as essential to ensure their meaningful participation - if they have previously "abused" the court process, or have been designated a vexatious litigant.

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[34] *Gray v Gray*, 2017 ONSC 5028.
[35] *Ibid* at para 63.
[36] *Ibid* at para 63.
[37] *Ibid* at para 69.
[38] See *Introducing the SRL Case Law Database* pp7-10 at https://representingyourselfcanada.com/introducing-the-self-represented-litigant-case-law-database/and our more detailed forthcoming report, *The Vexatious Litigant.*

(ii) Judicial assistance may be withheld from "sophisticated" SRLs

Another group of cases indicate that SRLs who appear to be intelligent, experienced, and generally more "sophisticated" should receive less judicial assistance.

There is a suggestion of this in some of the cases already described (for example *R v Thompson*, above[39]), but the idea is made explicit in *Clark v Pezzente*, an Alberta Court of Appeal case.[40] The SRL appellant argued that he should not be denied the ability to appeal because of his failure to comply with a procedural rule governing appeals, and cited to the *Principles*.[41] The Court instead found that the SRL was sophisticated, articulate, well-informed and capable of advancing his arguments – "not a neophyte in the civil justice system."[42] The Court continued that under the *Principles*, "self-represented litigants also have a responsibility to familiarize themselves with the relevant legal practices and procedures pertaining to their case and make reasonable efforts to comply with the *Rules of Court*, in a manner consistent with their abilities."[43]

CJD v RIJ, an Alberta Queen's Bench case, followed *Pintea* in finding that a SRL could not be found in contempt for failing to comply with a court order when they had not received notice of the order. However, Graesser J. goes on to make *obiter* comments that a burden is placed on judicial resources when SRLs "who are intelligent, who have familiarized themselves with court process" take advantage of the ease of filing applications and appeals.[44] Many of these litigants believe they "will always be able to fall back on their 'disadvantaged' position as a self-represented litigant, not learned in the law, and unfazed by cost awards either because cost awards are rarely made where both parties are self-represented, or when costs are unlikely to be collected even if awarded."[45] Justice Graesser continues that it "is an obvious frustration for the courts to be in situations where *games are being played,*[46] large amounts of valuable court time and resources are being consumed, and few effective remedies are granted. It is also frustrating for the litigants on the other side (and their

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[39] *Re Thompson,* 2018 ABQB 87 and see para 14.
[40] *Clark v Pezzente*, 2017 ABCA 220.
[41] *Ibid* at para 12.
[42] *Ibid* at para 14.
[43] *Ibid* at para 19.
[44] *Ibid* at para 51.
[45] *Ibid* at para 51.
[46] Our italics.

lawyers) to see the system being abused in this fashion, and the court appearing toothless and powerless."[47] Justice Graesser concludes that "'gaming the system' by intelligent and sophisticated SRLs may undermine access to justice."[48]

While these comments are *obiter*, they suggest skepticism about the principle that lies at the heart of *Pintea*; that SRLs need judicial assistance in order to understand the legal process and meaningfully participate.

D. Extending the Ruling

In *Moore v Apollo Health Care*, the Ontario Court of Appeal described in some detail how a judge should make the necessary enquiries to ensure that the position being taken by a SRL is clear, and that a SRL understands the outcomes of their crucial choices. The Court in *Apollo* helpfully spells this out. It is critical that:

> "(i) the trial judge is left in no doubt about the party's position; (ii) the self-represented person clearly understands the legal implications of the critical choice she faces about whether to pursue or abandon a claim; and (iii) the self-represented person clearly understands from the trial judge which of her claims he will adjudicate."[49]

Justice Brown also observes that "while self-represented persons vary in their degree of education and sophistication, I think it safe to say that most find court procedures complex, confusing and intimidating." [50]

This approach stands in contrast to the cases described above where other courts have noted that a SRL well-versed in the court process and who is intelligent and sophisticated does not require the benefit of the court's obligations as outlined in the *Principles.*

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[47] *Ibid* at para 52.
[48] *CJD v RIJ*, 2018 ABQB 287 at para 47, 50-51.
[49] *Ibid* at para 47.
[50] *Moore v Apollo Health & Beauty Care*, 2017 ONCA 383 at para 44.

E. Cases That Distinguish *Pintea*

A number of decisions have considered *Pintea* but have distinguished it on the facts.

In *Alberta Health Services v Wang,* the Alberta Court of Appeal dismissed the SRL's application to review the decision of the case management officer. The Court distinguished this case from *Pintea* by finding that the case management officer was available and willing to assist the applicants and that they have an obligation to comply with and familiarize themselves with the Rules.[51]

Other cases have distinguished *Pintea* with respect to its holding on contempt.[52] For example, in *Mayfield Television Production Ltd. v Stange,* the Alberta Queen's Bench found that the individual had personal knowledge of all the orders, unlike in *Pintea*, and therefore found the SRL in contempt.[53] Similarly, in *Al-Ghamdi v Alberta*, another Alberta Queen's Bench decision, the SRL was found in contempt because the Court believed beyond a reasonable doubt that he was aware of the order and the order was clear in stating what was required of him.[54] The SRL in this case argued that he was not served with the order[55]; however the Court noted that since the SRL appeared *ex parte* before the judge who issued the order that he would not have been served with an Order, and that he was also advised by the clerk of the court of how to obtain a copy of the order.[56]

F. Conclusions

The *Pintea* decision was intended to promote fair and equal access to justice. The Supreme Court's endorsement of the CJC's *Principles* recognizes that SRLs are at a significant disadvantage in a number of ways when they are navigating what many judges have acknowledged to be a complex and archaic legal system. Moreover, the legal system contains many "arcane and unwritten"[57] conventions that are unknown and unknowable to SRLs. In effect, *Pintea* says

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[51] *Alberta Health Services v Wang,* 2017 ABCA 60 at para 11.
[52] *Pintea v Johns*, 2017 SCC 23 at para 1.
[53] *Mayfield Television Production Ltd. v Stange*, 2018 ABQB 294 at para 54.
[54] *Al-Ghamdi v Alberta,* 2017 ABQB 684 at para 456.
[55] *Ibid* at para 424, 430.
[56] *Ibid* at para 430.
[57] *1985 Sawridge Trust v Alberta (Public Trustee)* 2017 ABQB 530 at para 45.

that there is no "formal equality" between represented and represented litigants.

Tracking the subsequent jurisprudence across the country since the decision in *Pintea* 18 months ago, we see a number of cases that address how the courts discharge their obligations to ensure a fair outcome in accordance with the *Principles*. Clarifying decisions include *Young v Noble,*[58] and *Catholic Children's Aid Society Toronto v CG.*[59] In some cases, most notably the Ontario Court of Appeal decision in *Apollo,*[60] the Court has usefully expanded on the practical application of *Pintea,* consistent with the *Principles.*

On the other hand, we also see a number of decisions that suggest that SRLs are exploiting their position as confused, uneducated and unaware of the complexities of the legal process to 'game' or 'abuse' the legal system, in light of the *Pintea* decision. As we have suggested in previous reports,[61] it is often far from clear whether SRL behaviours that do not comply with the rules are deliberate and intentional, or if they are the natural result of a lack of awareness or understanding of the process.

It appears that some courts are adopting a default to assume "intentionality", while others are more willing to see mistakes as inadvertent and the consequence of lack of knowledge. There have been a number of cases in which the *Principles* have been deemed to be inapplicable in circumstances where the SRL has, in the view of the court, behaved inappropriately or was assessed as a sophisticated and experienced litigant, implying that they ought not to have made mistakes or omissions. It is difficult to ignore the fact that the majority of these cases that appear to be creating "exceptions" to *Pintea* come from a single jurisdiction – Alberta. In fact, of the 38 cases total that have cited to the *Pintea* decision, just over 50% are from Alberta. We can only speculate that this may be because *Pintea* originated in the Alberta courts.

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[58] *Young v Noble,* 2017 NLCA 48.

[59] *Catholic Children's Aid Society of Toronto v CG*, 2018 ONCJ 193 at para 34.

[60] *Moore v Apollo Health & Beauty Care*, 2017 ONCA 383.

[61] See *Introducing the SRL Case Law Database* pp7-10 at https://representingyourselfcanada.com/introducing-the-self-represented-litigant-case-law-database/ *Substantial and Punitive Costs Awards Against Self-Represented Litigantss*, Ashley Haines and Julie Macfarlane, July 2018, https://representingyourselfcanada.com/costs-awards-against-srls and our more detailed forthcoming report, *The Vexatious Litigant.*

Neither *Pintea* nor the *Principles* address a trade-off of obligations, with an SRL who is considered not to have lived up to their responsibilities forfeiting a right to minimal judicial assistance. Whatever the past history of the SRL, *Pintea* stands for the principle that the court has an obligation to ensure fair and equal access to justice even where this means treating a self-represented litigant differently than a represented litigant. Where there are easily rectifiable deficiencies in cases SRLs should be afforded judicial assistance and should not be denied relief.

Also noteworthy is the recent decision of the Newfoundland Court of Appeal that there is no an automatic right to appeal a decision for a court's failure to consider or apply the *Principles*. The appellant SRL must be able to demonstrate that their access to fair justice was impeded, for example whether that failure to apply the *Principles* affected trial fairness or resulted in the unfair or unequal treatment of the SRL.[62]

We shall continue to track the emerging jurisprudence following *Pintea*, and especially any ongoing regional variations in its application.

[62] *Cabana* at para 62.