NSRLP

The National Self-Represented Litigants Project

Critical Judicial Decisions for Self-Represented Litigants

Using important case law that establishes rights for self-represented litigants

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THE CANADIAN BAR ASSOCIATION

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About the Critical Judicial Decisions primer

Lawyers, judges, mediators, and other professionals have long been accepted within the legal system. As a self-represented litigant, you're a new player. While some courts have accepted and supported the role of self-represented litigants (SRLs), other courts are slower to do so.

The Supreme Court of Canada case *Pintea v Johns*, 2017 SCC 23, is significant, because it demonstrates how the legal system treats SRLs as "outsiders". It also sets precedent for the fair treatment of SRLs in the courtroom, and clarifies what SRLs must do to meet their obligations.

Over the years, SRLs have asked us to create a reliable and clearly expressed summary of the *Pintea v Johns* case that that they could use to present in their own cases. This primer contains a concise summary of *Pintea v Johns*. It also demonstrates a number of ways that *Pintea* may be successfully applied in a legal argument – and highlights specific limitations as well.

This primer also includes summaries of two other very important decisions for SRLs that you can use in your own arguments, depending on the relevance to your case. One is *Jonsson v Lymer*, 2020 ABCA 167 from Alberta, which restricts the ways in which SRLs can be penalized as "vexatious litigants". If you are facing a claim that you are "vexatious", this is an important case for you. A second decision we are highlighting here is the *Girao v Cunningham*, 2020 ONCA 260 case from Ontario. This decision underscores the principles in *Pintea*, but also goes further to describe ways in which the SRL in the case was unfairly treated by both the trial judge and opposing counsel, and calls this behaviour out.

If you have comments or suggestions for ways to improve this primer, let us know at representingyourself@gmail.com.

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How and when to use this primer

As an SRL, it's important to familiarize yourself with *Pintea v Johns* no matter what type of case you're involved in. It's appropriate to review this primer as you're learning about precedent and preparing your arguments.

Pintea v Johns could be applied to most cases if you're an SRL. But it'll be especially important if the other side files a "**motion to strike**" your case because of **mistakes you made**, or if the judge orders you to **pay costs for your mistake**.

Some examples of mistakes might include:

- Filing late
- Filing "too much"
- Missing pieces of evidence
- Missing a hearing

If you make an easily fixable technical mistake, *Pintea v Johns* argues that the court should be lenient with you as an SRL, and further, that the court should not penalize you with costs, as it might when it's the lawyer who's made the same mistake.

This primer will help you argue for leniency and flexibility from the judge, if you made the mistake unknowingly.

And it'll help you understand your obligations as an SRL, and the specific situations where you may **not** be able to successfully apply the decisions in *Pintea v Johns*.

Pintea v Johns

Why *Pintea v Johns* is significant

Pintea v Johns is significant because this was the first time the Supreme Court of Canada considered the situation of an SRL, and ruled that they could not simply be treated as "equal" to someone coming to court with a lawyer.

The NSRLP was an "intervenor" in this case. This means that, through our lawyer, we were able to:

- address the court with expert evidence about SRLs and the reality of "insiders and outsiders" in the court system, and
- argue that SRLs are not in the same place of power as someone coming to court with a lawyer.

The Supreme Court of Canada unanimously accepted this argument.

A template to use for *Pintea v Johns*

We've written parts of this primer in the first person, so that you can **use excerpts as a script** in court if you like.

"Your Honour, I would like to respectfully draw your attention to *Pintea v Johns*, 2017 SCC 23. This case was decided unanimously by the Supreme Court of Canada.

In this case, the case management judge found that:

- the plaintiff, a self-represented litigant, was in contempt of court because he failed to attend two case management conferences as ordered, and
- the statement of claim filed by the plaintiff should be struck, and the plaintiff should pay $83,000 in costs.

The plaintiff appealed to the Alberta Court of Appeal, where he was unsuccessful, and then further appealed to the Supreme Court of Canada.

The Supreme Court found that the case management judge, in her decision to find the plaintiff in contempt of court, failed to consider that the plaintiff had not actually received the orders to attend the case managements conferences, which were mailed to him.

It is disputed as to whether or not the plaintiff filed a change in address form with the court in accordance with the Rules of the court. The court continued to send notices and orders to his old address, which were not forwarded to him and not otherwise brought to his attention.

The Supreme Court found that under the common law of civil contempt it must be proved beyond a reasonable doubt that a person had actual knowledge of the orders. The respondents did not satisfy this requirement.

The justices focused on ensuring that:

- the plaintiff was not unfairly penalized as a self-represented litigant, and
- sufficient effort had been made by the court to ensure he understood and could participate in the court process.

In its decision, the Supreme Court unanimously allowed the appeal, restored the action, and vacated the costs award. As well, the Supreme Court of Canada endorsed the Principles on Self-Represented Litigants and Accused Persons published by the Canadian Judicial Council in 2006[1]."

[1] Canadian Judicial Council, Dec 12, 2006, https://www.cjc-ccm.gc.car/english/news_selMenu=news_2006_1212_en.asp

Jonsson v Lymer

Why *Jonsson v Lymer* is significant

Over the past few years, judges in Alberta have been using what is called the Court's "inherent jurisdiction" as a basis for imposing court restrictions on litigants they designate "vexatious". This meant that these litigants cannot file without special permission or even cannot come to court without a lawyer. "Inherent jurisdiction" is a legal term meaning that the court has the power to make an order as they wish, without referencing a court rule or statutory provision to do so. Generally speaking, courts can't use inherent jurisdiction to override specific statutory laws or rules. In Alberta, vexatious litigant orders are governed by a statute, the *Judicature Act*, and so it became a concern that the inherent jurisdiction procedure was being used to avoid the safeguards and procedures in the *Judicature Act*.

Most of the litigants that the Alberta courts designated "vexatious" under the inherent jurisdiction approach were self-represented. The inherent jurisdiction approach differed from the Judicature Act in several important ways, including:

- It removed the procedural right for litigants to appear in person before court access is restricted, as well as the need for notice to the Minister of Justice and Solicitor General of Alberta;
- It was "prospective", meaning that it could be used when the court thought that a litigant might be vexatious in future – while the *Judicature Act* requires "persistent" previous bad behaviour; and
- It used broad indicators of vexatiousness, including behaviour by a litigant outside of court or outside of the particular court action.

In *Lymer*, the Court of Appeal of Alberta restricted the use of the inherent jurisdiction approach. The Court decided that vexatious litigant orders should only be used in the most extreme cases, where there has been a clear pattern of previous abuse by the litigant. The Court also pointed out that there are a number of other more appropriate procedural techniques (such as case management interventions by a judge) to make sure litigation is conducted fairly. The court also cautioned that it should be the litigants, and not the judge, who initiate vexatious litigant proceedings: judges must not "enter the fray" (para 44). Further, the Court made clear that it is not appropriate to impose conditions that are impossible to meet for litigants lacking financial means, such as requiring legal representation, and in some cases, the payment of legal costs.

A template to use for *Jonsson v Lymer*

We've written parts of this primer in the first person, so that you can **use excerpts as a script** in court if you like.

"Your Honour, I would like to respectfully draw your attention to *Jonsson v Lymer*, 2020 ABCA 167. This case was decided unanimously by the Alberta Court of Appeal.

At the trial level, the lower court had declared the self-represented litigant a "vexatious litigant" under the court's "inherent jurisdiction". *Lymer* appealed to the Alberta Court of Appeal.

The Alberta Court of Appeal decided that vexatious litigant orders should only be used in the most extreme cases, where there is a clear pattern of abuse by the litigant. The Court also held that there are a number of other more appropriate procedural techniques available to ensure litigation is conducted in a proportionate matter.

The Alberta Court of Appeal remarks that there is concern in imposing "blanket limits on court access", and refers to *Pintea v Johns*, 2017 SCC 23. The Court notes the Principles on Self-Represented Litigants and Accused Persons published by the Canadian Judicial Council in 2006, endorsed by the Supreme Court of Canada in *Pintea*, acknowledges that self-represented litigants must not "abuse" court processes. However, the mere assertion of rights of a self-represented litigant is not reason in itself to restrict future court access for that individual."

Girao v Cunningham

Why *Girao v Cunningham* is significant

In *Girao v Cunningham*, the Ontario Court of Appeal stressed the important role that trial judges, as well as opposing counsel, need to play to ensure trial fairness where one party is self-represented. The judgment remarks that in this case, the judge and lawyers failed to do their best to uphold the *Principles on Self-Represented Litigants and Accused Persons* as endorsed and outlined in *Pintea*. These principles need to be followed throughout an entire proceeding – this includes how the self-represented litigant is treated in the courtroom, as well as needing the court to be flexible (while ensuring impartiality) in terms of procedures and the admissibility of evidence when one party is self-represented.

A template to use for *Girao v Cunningham*

We've written parts of this primer in the first person, so that you can **use excerpts as a script** in court if you like.

"Your Honour, I would like to respectfully draw your attention to *Girao v Cunningham*, 2020 ONCA 260. This case was decided unanimously by the Ontario Court of Appeal.

In this case, the self-represented litigant (the appellant), Ms. Girao, was injured in a car accident where the respondent was at fault. Liability was accepted by her insurer and the only issue was quantum, which is the amount of compensation that Ms. Girao should receive.

The jury found the respondent liable and awarded Ms. Girao $45,000 in general damages and $30,000 in special damages for past loss income. However, after the respondent's lawyer moved to dismiss the action on the basis that the appeal had not met the statutory threshold to qualify for general damages, the trial judge:

- Allowed this motion and dismissed Ms. Girao's claim for general damages,
- Reduced her damages award for loss of income to $0 because she had received statutory accident benefits from her insurer, and
- Awarded partial indemnity costs *against* Ms. Girao totaling $311,845.

Ms. Girao successfully appealed to the Ontario Court of Appeal. The Court of Appeal found that there were numerous substantial trial unfairness elements that the trial judge and opposing counsel were complicit in. The Court also addressed the trial judge's refusal to strike the jury.

The Court of Appeal focused on the evidentiary issues raised in the case in light of the appellant's status as a self-represented litigant at trial (particularly one who used a translator). The Court held that the judges and lawyers failed to uphold the *Principles on Self-Represented Litigants and Accused Persons* published by the Canadian Judicial Council in 2006 as endorsed and outlined in *Pintea*. These principles need to be followed throughout the entire proceeding, including how the self-represented litigant is treated in the courtroom, as well as the requirement that the court should be flexible (while ensuring impartiality) in terms of procedures and the admissibility of evidence when one party is self-represented."

Highlights of the *Principles on SRLs and Accused Persons*

We've written parts of this primer in the first person, so that you can **use excerpts as a script** in court if you like.

"Your Honour, the Canadian Judicial Council *Statement of Principles on Self-represented Litigants and Accused Persons* promotes access to justice for self-represented litigants. It is also used to ensure SRLs are provided with fair and equal treatment in the courts.

The *Principles* require:

- **Fair access to justice** – This requires all aspects of the court process to be, as much as possible, open, transparent, clearly defined, simple, convenient, and accommodating. 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.
- **Some leniency for minor deficiencies** – Self-represented persons should not be denied relief on the basis of a minor or easily rectified deficiency in their case.
- **Judges have a responsibility to inquire** – 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.
- **Rules should not be used to hinder** – Judges should ensure that procedural and evidentiary rules are not used to unjustly hinder the legal interests of self-represented persons.

I would respectfully ask this court to ensure that the *Principles*, where relevant, are used to guide your management of my case."

Courts that have referred to the decision in *Pintea*

We've written parts of this primer in the first person, so that you can **use excerpts as a script** in court if you like.

"Your Honour, there are a number of decisions from courts across the country that have since considered the decision of *Pintea* and the endorsement of the Principles when crafting opinions that deal with self-represented litigants.

I can refer you to, for instance:

- *Girao v Cunningham*, 2020 ONCA 260 (Ontario)
- *Gray v Gray*, 2017 ONSC 5028 (Ontario)
- *R v Tossounian*, 2017 ONCA 618 (Ontario)
- *Moore v Apollo Health & Beauty Care*, 2017 ONCA 383 (Ontario)
- *PohQuong v Marks*, 2017 ONCJ 706 (Ontario)
- *Children's Aid Society of Toronto v EB*, 2018 ONCJ 333 (Ontario)
- *Catholic Children's Aid Society of Toronto v CG*, 2018 ONCJ 193 (Ontario)
- *Henderson v Winsa*, 2018 ONSC 3378 (Ontario)
- *Jonsson v Lymer*, 2020 ABCA 167 (Alberta)
- *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 530 (Alberta)
- *Alberta Lawyers Insurance Association v Bourque*, 2018 ABQB 311 (Alberta)
- *Re Thompson*, 2018 ABQB 87 (Alberta)
- *Young v Noble*, 2017 NLCA 48 (Newfoundland and Labrador)
- *Cabana v Newfoundland and Labrador*, 2018 NLCA 52 (Newfoundland and Labrador)
- *AAAM v Provincial Director of Adoption*, 2017 BCSC 1878 (British Columbia)"

A few highlights

The Ontario Court of Justice in *Henderson v Winsa*, 2018 ONSC 3378, noted that the **court's obligations towards SRLs** include the duty,

> "... to explain the relevant law and its procedural implications, remaining sensitive to the interests of the [other party]" (para 21)

In addition, the Newfoundland Court of Appeal in *Young v Noble*, 2017 NLCA 48, noted that,

> "It is impossible to deny that there is an inequality when a self-represented litigant must argue a case against experienced counsel" (para 34)

and that pursuant to the Principles endorsed in *Pintea,*

> "the court must take affirmative and non-prejudicial steps to address this." (para 34)

The court in *Moore v Apollo Health Care*, 2017 ONCA 383, states that **a judge should make the necessary enquiries** to ensure that the position being taken by an SRL is clear, and that an SRL understands the outcomes of their crucial choices.

Limitations on how *Pintea* can be applied

If you're thinking about using *Pintea* in your arguments, you should be aware that there are some limitations on how it can be applied.

An SRL's obligations and responsibilities

In *Re Thompson*, 2018 ABQB 87, the court acknowledged the *Principles* and stated that it's not a unilateral document – SRLs have obligations they are responsible for as well. These obligations include:

- familiarizing themselves with relevant legal practices and procedures,
- preparing their own cases, and
- being respectful of the court process and the officials within it.

The Alberta Court of Appeal in *Alberta Health Services v Wang*, 2018 ABCA 60, distinguished *Pintea* by ruling that SRLs are obligated to comply with and familiarize themselves with the *Rules* of the court. For example, if assistance is available, in this case from a case management officer, an SRL has a responsibility to seek this assistance.

Cases such as *Mayfield Television Production Ltd v Stange*, 2018 ABQB 294, and *Al-Ghamdi v Alberta*, 2017 ABQB 684, distinguish *Pintea* further, ruling that an SRL may be held in contempt if they have not responded to an order that **they were aware of**.

The obligation to be respectful in court

A number of decisions suggest that a court is not responsible to apply the *Principles* of leniency toward an SRL when the SRL has behaved poorly in court.

- *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 530, noted that the Principles do not give SRLs license to simply ignore the rules of court and that **abusive litigation** is not excused because someone is self-represented.

- The court in *Gray v Gray*, 2017 ONSC 5028, states that **past conduct** in court may be a consideration in applying the *Principles*.

Even considering the above, there's nothing contained in the *Principles* that would deny an SRL minimal judicial assistance, even if they've previously "abused" the court process, or have been designated a vexatious litigant.

A judge may consider perceived intelligence

While the *Principles* and *Pintea* do acknowledge an SRL's lack of experience in the court system, the court decisions warn that SRLs should not rely on *Pintea* as an excuse to ignore their obligations.

Clark v Pezzente, 2017 ABCA 220, notes that judges may also take into account whether SRLs appear intelligent, experienced, and generally more "sophisticated".

Determining fair access to justice

It is important to note that the Newfoundland Court of Appeal, in *Cabana v Newfoundland and Labrador*, 2018 NLCA 52, noted that simply asserting a breach of the *Principles* is not sufficient grounds to appeal. An SRL must demonstrate **how** the failure to consider or apply the *Principles* affected their access to equal justice.

A template to use in closing your submissions

We've written parts of this primer in the first person, so that you can **use excerpts as a script** in court if you like.

"Your Honour, notwithstanding the limitations and obligations set out in Canadian case law, The Supreme Court of Canada's endorsement of the Canadian Judicial Council *Principles* is relevant and important for me in my present case as a self-represented litigant.

I would ask that this Honourable Court give due consideration to both the application of the *Principles,* and the spirit of the *Pintea* decision in my case."

A list of the primers we offer

Here are the primers we currently offer

They're free for you to download here: https://representingyourselfcanada.com/our-srl-resources/

Step 1: Getting ready and starting the legal process

- **So you're representing yourself:** A primer to help you get ready to represent yourself in family or civil court
- **A guide for SRLs with disabilities:** Understanding your rights and requesting the assistance you need
- **A Courtroom Companion (McKenzie Friend)**
- **The McKenzie Friend: Canadian cases and additional research**
- **Considering Mindfulness:** How you can use Mindfulness to increase your focus and relieve the stress of representing yourself

Step 2: Doing your research and preparing your arguments

Doing Your Research

- **Part 1:** Understanding precedent and navigating the CanLII legal database (available in English and French)
- **Part 2:** Assessing CanLII case reports, and using them to build your legal argument
- **Reference Guide:** Legal definitions, court abbreviations and Canada's court systems at-a glance
- **Critical Judicial Decisions for Self-Represented Litigants:** Using important case law that establishes rights for self-represented litigants and how the justice system should protect you from bias
- **Settlement Smarts** Tips on effectively using negotiation, mediation and Judge-led settlement processes
- **What you need to know about affidavits**

Step 3: Presenting your case in court

- **Coping with the courtroom:** A primer to help you navigate the written (and unwritten) rules of the courtroom
- **How to order a court transcript**
- **Working with opposing counsel:** Building constructive working relationships between self-represented litigants and opposing counsel
- **Tips from the bench:** Advice for SRLs, and the judges who work with them

To keep up with what's happening at the National Self-Represented Litigants Project (NSRLP), visit **RepresentingYourselfCanada.com**.

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