

## Civil Litigation

# Court's obligations in dealing with self-represented litigants: Limits to assistance

By Barb Cotton and Christine Silverberg



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(September 16, 2020, 10:33 AM EDT) -- In the first part of this series we looked at the overall obligations of the court in dealing with self-represented litigants (SRLs). We noted that certain boundaries to this overarching obligation are carved out in the case of sophisticated SRLs, and they are required to adhere to the rules of court and procedure more scrupulously.

The *Alberta Rules of Court* are explicit that the rules "govern all persons who come to the Court for resolution of a claim, whether the person is a self-represented litigant or is represented by a lawyer" (rule 1.1(2)).

Moreover, there are a number of authorities providing a reasonable basis for arguing that whatever leeway may be accorded to an SRL should not extend to permitting the SRL to flout the court's rules or practice notes dealing with the filing and admission of evidence.



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To do so, when the represented litigant is expected to comply, would create a situation of imbalance and violate the represented client's right to a fair hearing.

What further boundaries are suggested by the case law?

*Williams v. Williams* 2015 ABCA 246 suggests that the court is not obliged to give an SRL a "do-over." In that case, the husband, an SRL, sought leave to appeal a decision dismissing his application to terminate spousal support.

In the judgment under appeal, the husband had been unable to establish the basis for the income that was imputed to him at the time of the original order, and therefore could not demonstrate a material change permitting variation. The court addressed the question of whether, as an SRL, the husband should have an opportunity for a do-over to go back and try to fill the evidentiary gap.

The court held that the chambers judge had correctly refused to grant that opportunity to the husband, noting that he had previously had legal advice in relation to the spousal support issue and that many resources were available to assist him as an SRL, including online and written materials and the assistance of duty counsel.

The trial judge must not allow assistance to an SRL result in the represented side's rights being overridden. Noting that the SRL was a sophisticated litigant, the appellate court held that the trial judge had not erred in refusing to give the SRL an adjournment in order to allow him to better present his application.

In *Cicciarella v. Cicciarella* [2009] O.J. No. 2906, the court noted the limits to the scope of assistance that judges should provide to SRLs and emphasized that any leeway granted should nonetheless respect the right of the represented party to a fair trial. While a judge should afford an SRL additional leeway, there is a line to be drawn and the judge cannot descend into the arena from the bench and

advocate for the SRL.

Fairness does not demand that the SRL be able to present their case as effectively as a competent lawyer; rather, fairness demands that the SRL have a fair opportunity to present their case to the best of their ability. The judge must attempt to accommodate the SRL's unfamiliarity with the process to permit them to present their case, but the rights of the represented party must be respected. Both sides are entitled to a fair trial.

The decision in *Malton v. Attia* 2016 ABCA 130 represents a case in which in the first instance the judge went too far in attempting to assist the self-represented plaintiff.

The Court of Appeal overturned the decision and ordered a new trial, finding that the trial judge erred in advancing her own theory of liability and damages in her reasons for judgment, on a basis not pleaded during the trial, and in deciding on her own motion to amend the statement of claim to permit an award of punitive damages, which deprived the defendants of an adequate opportunity to respond to the case against them.

The court emphasized that in providing assistance to an SRL, judges must never lose sight of the concomitant right of the represented party to a fair hearing and must ensure that that right is not overridden.

The appellate court emphasized that although SRLs had proliferated in the courts, the fundamentals of trial process had not changed. The court held: "A fair hearing requires an impartial, independent adjudicator. It requires that parties know the case they have to meet, have the opportunity to marshal evidence to meet it, and the opportunity to make submissions with respect to it. These are core elements of our justice system." The trial judge could not allow assistance to an SRL to override the right of a represented litigant to a fair trial.

The decision in *McCallum v. Edmonton Frame and Suspension (2002) Ltd.* 2016 ABQB 271 provides some guidance as to the extent of leeway that may or may not be granted to an SRL in relation to evidentiary issues.

In that case, the self-represented defendant appealed a decision refusing his action against a mechanic's shop that he alleged had performed unauthorized repairs or had damaged components of his truck such that the repairs became necessary. Justice Robert A. Graesser found that the trial judge had conducted the trial in a manner that limited both parties from offering hearsay evidence and from offering expert opinions in areas where they were not qualified as experts.

Justice Graesser held that there was no error in doing so and that allowances to SRLs did not extend to relaxing the rules of evidence. The SRL could not expect the trial judge to relax the rules of evidence or to conduct the trial in an informal way. Consistently applying the rules of evidence does not lead to an unfair trial.

Thus, although the court is obliged to assist an SRL, there are boundaries to the assistance to be proffered. A trial judge cannot descend into the arena and advocate for the SRL, and the rules of court and of evidence are not to be relaxed. At all times, the trial judge must remain cognizant of the rights of the represented party to a fair trial as well.

This is part two of a three-part series. Part one: What are the court's obligations in dealing with self-represented litigants?

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