

THE SELF AND UN-REPRESENTED LITIGANT IN THE PROVINCIAL COURT

Justice Phil Downes, Ontario Court of Justice (Toronto)
Canadian Association of Provincial Court Judges
St. John's, NL, 2023

(With credit to Justices Kim Crosbie, Robin Finlayson and Katherine McLeod from whose presentations on this topic I have borrowed in preparing these slides)

TO COVER

- Who is the self-rep litigant?
- What is the problem?
- What are our duties?
- Strategies for coping with SRs
- Appointing *Amicus*

WHO IS THE SELF-REPRESENTED LITIGANT?

- *Self*-represented by choice; *un*represented by necessity
- Financial barrier to representation
- Mistrust of lawyers and the system
- Trust in their own ability
- Belief in the lack of merits of the case against them
- Mental health
- The outliers (Freemen on the Land)

WHAT IS THE PROBLEM?

The Nightmare Case: *Kirby v. Kirby*, 2018 ONSC 6958

A self-represented litigant. One who manages to try the patience of the Judge to a degree that is beyond description.

The trial was exhausting. It cannot be described in words; thankfully, the transcript will reveal the entire story. It was an excruciating experience for everyone involved. I have never witnessed anything like it. Even the Court's attempt to extract from the self-represented litigant what she ultimately wants at the end of the day was an exercise in near futility.

The Nightmare Case: *Kirby v. Kirby*, 2018 ONSC 6958

- Frequent interruptions and verbal outbursts
- Huffs and puffs, sighs, shaking of the head in disgust or disagreement.
- A ringing cellular telephone in the Courtroom
- Special (and unreasonable) requests
- Complaining about having no lawyer, having too many boxes of documents, not having enough time to prepare.
- Engaging in frequent lengthy diatribes.
- Asking witnesses irrelevant, repetitious, convoluted, incomprehensible, compound, disjointed and extremely lengthy questions.
- Getting bogged-down in the tiniest of details.
- Giving evidence from the counsel table.
- Failing or refusing to comply with clear and repeated warnings and directions from the Court.
- Direct examinations that meandered and were chock-full of improper questions.
- Being late for Court.

WHAT ARE OUR DUTIES?

- Judges have an overarching duty to protect the fairness of the proceedings before them. In the case of self-represented accused, there is a heavy onus placed upon judges to provide them with assistance: *R. v. Richards*, 2017 ONCA 424, 349 C.C.C. (3d) 284, at para. 112.
- That obligation arises from the judge's role as the ultimate guardian of fair proceedings": *R. v. Walker*, 2019 ONCA 765.
- The overriding concern is the fairness of the trial. The nature of the advice and assistance provided by the judge can only be assessed in light of the requirement for a fair trial in the particular case and cannot be captured by any specific, binding guidelines as to what that advice and assistance ought to consist of. ...": *R. v. Wolkins*, 2005 NSCA 2
- Duty to "help an unrepresented accused to ensure the proceeding respects their fundamental rights": *R. v. Kahsai* at para. 54

WHAT ARE OUR DUTIES?

- Regulate the conduct and nature of the defence.
- Prevent misuse of time and resources.
- Explain the trial process (in understandable and non-technical terms).
- “Identify the material issues”
- Frame questions to elicit relevant evidence for the defence.
- Raise potential *Charter* breaches, invite submissions, make an inquiry of the Crown: *R. v. A.H.*, 2018 ONCA 677; *R. v. Breton*, 2018 ONCA 753; *R v Burns* (1993), 136 NBR (2d) 166 (CA), at paras. 11-14.

PRACTICAL POINTS

- Aggressive case management
- Clear expectations and obligations
- Deadlines
- Anticipate issues
- Be alive to capacity e.g. literacy, understanding: *R. v. Cordeiro-Calouro*, 2019 ONCA 1002
- Place obligations on the Crown to assist, particularly with disclosure, opening statements, witness list etc.
- Beware the “ostrich” litigant
- Assist the prelim/trial judge if you are the case management judge
- Have some template instructions ready
- Be aware of your language
- Evidence v. submissions: *R. v. Hasanov*, 2019 ONSC 6959

WE ARE NOT THE LITIGANT'S COUNSEL

- Fairness does not require perfection.
- Cannot provide the accused with strategic advice or take over cross-examination for the defence
- The assistance and guidance that the trial judge had to provide was that necessary to ensure the appellant had a fair trial, not a perfect trial, nor the exact trial the appellant would have had if he continued to be represented by counsel.

R. v. P.D.C., 2021 ONCA 134 at para. 55.

R. v. Landry, 2003 NSCA 44

R. v. Taubler, (1987), 20 O.A.C. 64 at 71

THE DUTIES SPECIFIED

- To guide them through trial in such a way that defence is brought out with full force and effect: *R. v. McGibbon* (1989), 45 C.C.C. (3d) 334, at para. 58 (Ont. C.A.)

- Context is everything:
 - the seriousness of the offence;
 - the attributes of the accused;
 - the accused's ability to effectively examine witnesses;
 - the nature of the available defences;
 - The potential assistance of the Crown and Court.

R. v. Phillips, ABCA 4 aff'd 2003 SCC 57; and *R. v. Chemama*, 2016 ONCA 579.

THE PARTICULAR PROBLEM OF THE DIRECTED VERDICT

- Does an accused have the right to convict themselves?
- Do you or don't you?
- What about the accused testifying?

APPOINTING *AMICUS CURIAE*

R. v. Kahsai, 2023 SCC 20

- In exceptional circumstances, the trial judge retains wide discretion to appoint amicus *with adversarial functions* that can respond to the needs of a particular case.
- While the role of amicus therefore has limits, and *amicus* can never fully assume the role of defence counsel, the scope is broad enough that they can discharge many adversarial functions typically performed by defence counsel in order to assist the judge *where necessary to permit a particular proceeding to be successfully and justly adjudicated.*
- Timing of the appointment
- Nature and limits of the appointment
- Payment

JURISDICTION & SCOPE OF AUTHORITY

- Provincial Court is a statutory court so no general inherent jurisdiction
- We do have **jurisdiction to control our process** “in order to maintain the integrity of that process”, “in furtherance of the rule of law” and to maintain our “dignity and respect”
- The power of a statutory court to appoint *amicus* is necessarily implied from the court’s authority to control its own process and function as a court of law.
- The discretionary power to appoint *amicus* should be used “sparingly and with caution, in response to specific and exceptional circumstances” that arise.
- The defining feature of *amicus* is that they owe their duty of loyalty exclusively to the court, regardless of the circumstances or the specific terms of their appointment.
- *Amicus* role may incidentally advance the interests of the accused.

WHAT *AMICUS* CAN DO?

- The role of amicus is highly adaptable and can encompass duties that exist on a broad spectrum of functions.
- The precise role for amicus will depend on the particular needs identified by the trial judge.
- Can have “defence-like functions”
- Help the court by providing a perspective or performing a function that the judge considers necessary to decide the issues in dispute.
- Examine and cross-examine witnesses and make submissions in a manner that does not conflict with the key strategic choices of the accused.
- Help the accused by explaining the strategic choices available to them, along with the potential implications of those decisions.

AMICUS CANNOT...

- Be defence counsel by another name – rooted in constitutional right of accused and duty of loyalty to the Court, not the litigant.
- Merely circumvent legal aid or judicial funding decisions.
- Maintain a solicitor-client relationship.
- Take instructions.
- Advise an accused on strategic litigation decisions.
- Supersede key strategic decisions by an accused.
- Call evidence or advance a position undermining that put forward by the accused
- Be discharged.

THE EXCEPTIONAL CASE FOR ADVERSARIAL *AMICUS*

- Where the accused was unwilling to retain a lawyer and did not actively participate in the proceeding.
- Could not advance a competent defence.
- Accused is disruptive, abusive of court process, or determined to derail the proceedings.
- Where complex issues or serious criminal charges made an adversarial perspective necessary.
- Only after explicitly determining that the dangers identified in CLAO would not materialize.

THE PRACTICALITIES OF APPOINTING *AMICUS*

- Canvass the parties for their perspectives about the necessity and scope of an amicus appointment.
- Consider whether an appointment that is limited in duration or scope would suffice:
 - Only for certain witnesses
 - For a particular motion or application
- Put the terms of the appointment in writing as an order or endorsement.
- Consider a “Confidentiality Order”.
- Where complex issues or serious criminal charges made an adversarial perspective necessary.
- Only after explicitly determining that the dangers identified in CLAO would not materialize.