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Entering the Fray for Self-Represented Litigants

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Case Commented On: *R v Crawford,* 2015 ABCA 175

Judicial interventions are common in trials involving self-represented litigants, especially in family and civil courts. According to a report authored by Dr. Julie Macfarlane in 2013, self-represented litigants face a range of negative consequences as a result of representing themselves, including "descriptions of negative experiences with judges, some of which suggest basic incivility and rudeness." However some judicial interventions are more positive, such as advice on court procedure or coaching on presentation. (The *National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants* at 13) Judges find themselves in a difficult position when one party is represented by counsel, and the other is not. Some interventions are necessary.

Although the accused in *Her Majesty the Queen v Kimani Gavin Crawford,* 2015 ABCA 175, was not a self-represented litigant, the case is interesting because the Alberta Court of Appeal ordered a new trial on the grounds that the trial judge's numerous interruptions rendered the trial unfair. The multiple interventions by the court led to the appearance that the trial judge had entered the fray and left judicial impartiality behind (at para 7).

Facts

The appellant, Kimani Crawford, was convicted of theft of an automobile and being a party to a robbery committed with the use of a firearm. Crawford appealed his conviction on two grounds: first, that the trial judge interfered too often in the examination and cross-examination of witnesses and thus compromised the fairness of the trial, and second, that the judge erred in finding that the pellet gun used in commission of the offence was a firearm for the purpose of s 344(1)(a.1) of the *Criminal Code,* RSC 1985, c C-46.

The Court of Appeal Decision

The Alberta Court of Appeal allowed the appeal on both grounds and ordered a new trial. Martin J.A., writing for the majority, referred to several inappropriate judicial interventions that undermined the appearance of a fair trial.

Martin J.A. considered the appropriate level of judicial advocacy during a trial. He noted that the judicial process is not compromised by interventions from the court to clarify an unclear answer,

to resolve a misunderstanding of testimony or to correct inappropriate conduct by counsel or witnesses (at para 17). Nor is the appearance of impartiality undermined when a judge asks questions that should have been asked by counsel (at para 8). Yet such situations are rare, and as the Court pointed out, the task of posing questions to a witness that counsel should have asked must be approached with care (at para 13).

Martin J.A. relied (at para 12) on the decision of Lamer J (as he then was) in *R v Brouillard,* [1985] 1 SCR 39 at 42-43, 16 DLR (4th) 447, for instructions on when a trial judge descends into the arena of counsel:

> When this happens, [that a judge steps down from the bench and assume the role of counsel] and, a fortiori, when this happens to the detriment of an accused, it is important that a new trial be ordered, even when the verdict of guilty is not unreasonable having regard to the evidence, and the judge has not erred with respect to the law applicable to the case and has not incorrectly assessed the facts.

The Court of Appeal, after reviewing the transcript, indicated concern both with the number and the nature of the interventions throughout the trial. The trial judge's interventions in leading Crown witnesses during cross-examination were found to be inappropriate. Of particular concern to the Court of Appeal was the trial judge's cross-examination of the Appellant on his involvement in an unrelated robbery, on which the Crown and defence declined to examine the appellant (at para 22). The Court also referred (at para 18) to *R v Stewart* (1991), 62 CCC (3d) 289, 43 OAC 109 (ONCA), suggesting that the cumulative effect of the trial judge's interventions combined to create an overall appearance of unfairness.

The Court of Appeal followed (at para 16) the test respecting the fairness of the trial process, as is outlined in *R v Valley* (1986), 13 OAC 89, 26 CCC (3d) 207 (ONCA). The question to ask is not whether the accused was in fact prejudiced but "whether he might reasonably consider that he had not had a fair trial or whether a reasonably minded person who had been present throughout the trial would consider that the accused had not had a fair trial."

In reply to the Respondent's argument, the Court gave little weight to the fact that defence counsel did not object to the interventions at trial. As Martin J.A. pointed out (at para 20), "[o]bjecting to questions put by a trial judge whose responsibility it is to decide the appellant's fate, is a delicate task at best, and counsel may be forgiven for not rising to the challenge."

Martin J.A. added that any harm caused by the trial judge's questioning could not be cured by the judge asking counsel whether they had any questions arising. An invitation to ask further questions, on a topic that should not have arisen, does not restore the apparent loss of neutrality by the trial judge (at para 22).

Finally, the second ground of appeal, whether the pellet gun was a "firearm" for the purpose of s 344(1)(a.1) of the *Criminal Code*, was also allowed (at paras 24-37). The case, however, is more notable for its instructions to trial judges on inappropriate court interventions.

Application to Self-Represented Litigants

A judge's role within a trial is primarily to ensure a fair trial. To do this, a trial judge often has to interrupt court proceedings. At times this will be to the benefit of the self-represented accused, for example, when the accused does not have the skills to question a witness properly. Other

times, interventions will benefit the interests of the Crown, so as to prevent the accused from derailing the trial.

In *Crawford* (at para 23), Martin J.A. wrote "I wish to emphasize that this was a trial where the accused was represented by counsel; a judge may have a somewhat greater latitude to question witnesses when the accused is unrepresented by counsel."

When allowing a trial judge "a somewhat greater latitude", Martin J.A. meant more leeway should be afforded to a trial judge when questioning a witness for the benefit of a self-represented accused. But the Court of Appeal's paucity of instructions to judges when handling self-represented litigants is troubling. Ideally, the Court of Appeal could have provided a protocol, or a step-by-step process, to guide a judge in their treatment of self-represented accused. Certainly, such a process would not only help future self-represented litigants, but also legal counsel and poverty law clinics such as Student Legal Assistance. The Court had an opportunity to provide more direction to lower courts regarding self-represented litigants but failed to take it.

Perhaps the Court did not want to articulate a protocol because it believes there should be no unique treatment for self-represented litigants in a trial process. In the case of *K(P.E.) v K(B.W.)*, 2004 ABCA 135, Wittman J.A. (as he then was) expressed the Court's view on a separate set of procedures for self-represented litigants (at para 7):

> First, the mother urges us to take into consideration that she was self-represented when this matter was heard before the chambers judge. While we are sympathetic to her position, there are not two sets of procedures, that is, one for lawyers and one for self-represented parties. In the absence of special provisions, our courts will apply the same legal principles, rules of evidence, and standards of procedure regardless of whether litigants are represented by counsel or are self-represented.

Similarly, Rule 1.1(2) of the *Alberta Rules of Court* does not allow for lenience to a self-represented litigant, as it states:

> These rules also 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.

In 2006, the Canadian Judicial Council adopted a Statement of Principles on Self-represented Litigants and Accused Persons. The Statement is advisory in nature and not intended to be a code of conduct. Higher courts from provinces across the country have adopted the advice from the Statement in part or in whole (see e.g. *Cole v British Columbia Nurses' Union*, 2014 BCCA 2 at para 36; *Cicciarella v Cicciarella,* 2009 CanLII 34988 (ON SCDC) at para 45; *Deschênes c. Valeurs mobilieres Banque Laurentienne,* 2010 QCCA 2137 at para 37), yet Alberta has not explicitly done so. The Statement outlines principles for those who are participants in litigation with a self-represented litigant, including the judiciary. Of particular importance are principles 3 and 4 under the heading "Promoting Equal Justice":

3. Where appropriate, a judge should consider engaging in such case management activities as are required to protect the right and interests of self-represented persons. Such case management should begin as early in the court process as possible.

4. When one or both the 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. Depending on the circumstances and nature of the case, the presiding judge may:

(a) explain the process;
(b) inquire whether both parties understand the process and the procedure;
(c) make referrals to agencies able to assist the litigant in the preparation of the case;
(d) provide information about the law and evidentiary requirement;
(e) modify the traditional order of taking evidence; and`
(f) question witnesses.

Lord Chancellor Francis Bacon (1561-1626) in *Essays, Civil and Moral*, observed that "Patience and gravity of hearing, is an essential part of justice; and an overspeaking judge is no well-tuned cymbal." The phrase is most applicable to situations when both parties are represented by counsel. Yet often there are times, such as when one party is self-represented, that a judge needs to over speak, for the purposes of promoting equal justice and access to justice.