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Supporting the Unrepresented: Case Management of Self-Represented Litigants

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Case Commented On: *Pintea v Johns*, 2016 ABCA 99 (CanLII)

In *Pintea v Johns*, 2016 ABCA 99 (CanLII), the majority, Justices McDonald and Veldhuis, and dissent, Justice Martin, strongly disagreed on whether to uphold a case management judge's decision to dismiss a self-represented litigant's cause of action. Valentin Pintea brought this case against Dale and Dylan Johns for damages related to a car accident that had left Pintea in a wheelchair. In May 2014, after considerable time in case management, the case management judge directed Pintea to provide a witness list as a means of preparing the case for trial. Pintea did not comply (at para 24).

In July 2014, the appellant moved residences, but did not file a change of address with the court as required by the Alberta *Rules of Court* (at para 25). Following this move, all documents were served on the appellant at his former address and were not forwarded to his new address. Consequently, the appellant failed to respond to or appear at all subsequent applications and case management meetings (at para 25). When the appellant failed to appear for a case management meeting on January 21, 2015, the respondent's counsel requested that the Statement of Claim be struck. The case management judge agreed to strike the claim if the appellant failed to appear for a meeting on January 30, 2015. The case management judge directed the respondent to serve notice of these conditions on the appellant, but dispensed with the requirement for personal service. The respondent left the notice in the mailbox at Pintea's former address, which, again, resulted in it not being brought to his attention (at para 26).

On January 30, 2015, the case management judge found Pintea in contempt of court for having failed to obey earlier court orders and attend as directed. For those reasons, the trial management judge dismissed the case and awarded over $82,000 in costs to the respondent (at paras 27-28). This dismissal and costs award was served at Pintea's former address, but on this occasion, it was also sent to his email. The appellant received the email and began this appeal, which asserted that the application documents regarding the January 30, 2015 case management hearing were improperly served at his former address and, by implication, expressed his wish for the action to be restored (at paras 5-6). In response to the appeal, the respondent applied to adduce fresh evidence to support an assertion that the appellant had engaged in "mischief" after his claim was struck by presenting documents that were falsified to suggest that he had filed a timely change of address with the court.

The Alberta Court of Appeal addressed two issues: whether Pintea had filed the requisite change of address and whether the case management judge's decision to dismiss his claim was reasonable. Applying the *Palmer* test (at para 10, citing *R v Palmer* [1980] 1 SCR 759), the majority allowed the Dales to enter evidence from the Court of Queen's Bench support staff members that, despite Pintea's assertion, they had not received an address change from him (at

para 17). It further found that it was reasonable for the case management judge to deem service at Pintea's claim address to be sufficient and strike the claim for a failure to obey orders and appear. Finally, it noted that notwithstanding the fact that Pintea had no counsel, he was required to follow the *Rules of Court*, including filing the change of address notification (at para 20).

In his dissent, Justice Martin focussed on Pintea's personal circumstances and his self-representation. He did not find Pintea's alleged document falsification relevant and would have referred the matter back to the case management judge to determine whether the mischief had occurred (at para 31). Justice Martin also found that the Statement of Claim was struck solely due to a failure to comply with a procedural matter (at para 32).

Further, Justice Martin concluded that the consequences of dismissing the appeal would be excessively punitive, particularly because the appeal made it clear that the appellant's failure to appear was due to him being unaware of the meetings rather than an act of contempt. According to Justice Martin, a dismissal would result in the Court not reinstating a viable claim that could have resulted in significant damages for the appellant. In Justice Martin's words, "now instead, this disabled, unemployed man is saddled with a cost award of almost $83,000" (at para 34). Due to this disproportionate result for a failure to comply with a procedural order, the dissent would have reinstated the Statement of Claim and set aside the order of costs.

This case likely does not provide strong precedential value, given the evidence that indicated that the appellant attempted to provide evidence that fraudulently gave the impression that he had properly notified the Court of a change of address. This case, however, does present a prime example of the courts grappling with the issue of how to approach decisions that primarily turn on the competency of self-represented litigants to participate in a trial process.

In this case, the majority was not willing to give any leniency to Pintea for being a self-represented litigant. Instead, the majority expected every party to follow the *Rules of Court*, regardless of whether the person was self-represented. With all due respect to these justices, I believe that it is unreasonable to expect self-represented litigants to know, understand, and comply with every procedural requirement, particularly as lawyers go through years of training to be able to find and understand all of the legal requirements applicable to a given case.

In the face of longer and more expensive legal proceedings, self-representation has increasingly become the most viable option for people who cannot afford to retain legal counsel for the amount of time required to conclude a case (An Overview of Self-Represented Litigation Innovation, Its Impact, and an Approach for the Future: An Invitation to Dialogue, at p 521). This results in an increasing number of people who are untrained and largely inexperienced with the legal system trying to navigate court processes. Disregarding the special circumstances of these individuals attempting to participate in a trial process that is inherently complicated and includes many diverse procedural requirements would likely result in a trial that is skewed in favour of a party that is able to retain counsel.

Although I disagree with the majority's conclusion that all litigants should be equally expected to comply with the *Rules of Court*, I also cannot agree with Justice Martin's reasoning for reinstating the case. I find that Justice Martin overstepped the boundaries of impartial decision-making by exercising broad discretion when interpreting the case management judge's written decision and applying retroactive reasoning, all seemingly to avoid saddling this disabled, unemployed man with a cost award of almost $83,000 (at para 34).

Justice Martin interpreted the case management judge's decision as primarily being based on the appellant's failure to appear, saying "I cannot think his failure to file a witness list or take such other procedural steps as required would have made a significant contribution to the decision to strike the statement of claim" (at para 32). The case management judge's written decision, however, contains no suggestions that the judge elevated the failure to appear over the failure to comply with previous orders as a basis for striking the claim. The judge simply states, "I do find him to be in contempt of court for having failed to obey my earlier court orders and failing to attend as directed" (at para 27).

Beyond interpreting where the emphasis lay in the previous decision, Justice Martin also found the knowledge that the Court gained through the appeal to be quite persuasive. Although he noted that it was understandable that the case management judge would conclude that Pintea's failure to appear indicated his abandonment of the case, Justice Martin determined that Pintea would have continued to attend case management meetings if he had received notice (at paras 32-33). This conclusion seemed to be based solely on the information that the Court gained through this appeal – that Pintea had not received notice and was not acting in contempt of court. Justice Martin's conclusion ignored the fact that the case management judge was not aware of those circumstances and did not address whether the decision was reasonable in light of information that was available to the case management judge at the time of the dismissal.

Overall, I believe that this liberal interpretation of the case management judge's reason for striking the claim and attention to details that only became clear through the appeal process demonstrates that Justice Martin exercised outcome-oriented decision-making. It seems that Justice Martin focussed on these aspects of the case in order to avoid dismissing this self-represented litigant's appeal due to a failure to comply with a procedural requirement.

After careful consideration of the judgements in this case, I find that I am at the mid-point along a spectrum that is bounded by the decisions of the majority and dissent. Along the lines of Justice Martin, it seems prudent to create a mechanism for accommodating the special circumstances and often pressing cases of self-represented litigants in order to face the reality that self-representation is becoming increasingly prevalent. However, the appropriate time for accommodating these special circumstances must be carefully evaluated.

The Alberta Court of Appeal addressed the need for balance between supporting self-represented litigants and maintaining a fair trial in *Malton v Attia*, 2016 ABCA 130 (CanLII), while deciding an appeal regarding procedural fairness and reasonable apprehension of bias by a trial judge. The Court noted that judges have a responsibility to ensure that self-represented individuals are given fair access to and equal treatment by the court, which may include judges providing information regarding the law and evidentiary requirements. It is clear that this responsibility does not relieve self-represented litigants from the obligation to prepare their own case and familiarize themselves with court procedures (at para 31). Ultimately, the Court made the following statement about the balance between supporting self-represented litigants and maintaining a fair trial:

> While a trial judge may, therefore, allow some leeway to the self-represented litigant and provide some assistance, particularly in procedural matters, he or she must not become an advocate for the litigant. Nor can a trial judge allow assistance to a self-represented litigant to override the right of a represented litigant to a fair trial (at para 34).

The Court went on to reaffirm the importance of judicial impartiality. It determined that a judge must be free from actual bias, as well as seen as being free from bias in order to avoid a reasonable apprehension of bias (at para 81).

Similar to the majority in *Pintea*, I am of the opinion that the decision-making process undertaken by judges during a hearing is not the appropriate time to accommodate the special considerations of self-represented litigants. A judge providing the assistance that generally would be required for a self-represented person to effectively participate in a trial would likely fall short of the dual mandate in *Malton*, which is providing self-represented litigants with enough support to meaningfully access the court system and ensuring that represented litigants receive a fair, impartial trial.

Self-represented litigants often need extensive pre-trial support, as was seen in *Pintea*. In an already heavily loaded court system, judges are not well positioned to provide this type of extensive pre-trial support. On the other hand, during a trial, a judge would need to be cognizant of the personal characteristics and needs of a self-represented litigant in order to provide appropriate assistance and information on legal and evidentiary requirements. This sort of focus on the self-represented litigant's situation may lead to outcome-oriented decision-making as a means of compensating for the self-represented person's circumstances, a method which Justice Martin seemed to follow in *Pintea*. This focus would likely go beyond giving self-represented individuals meaningful access to the courts. Instead, it would infringe on a represented party's right to a fair trial that is based on the merits of the case. As a result, a judge providing assistance and information to a self-represented litigant during a trial would likely be seen as favouring that party and lead to a finding of reasonable apprehension of bias.

Given the need to assist self-represented litigants and to avoid potential judicial bias, I am of the opinion that the appropriate time to accommodate the special considerations of self-represented litigants is during pre-trial case management. In particular, an expansion of the Case Management Counsel program to help facilitate civil cases that involve at least one self-represented individual would likely go a long way toward supporting their participation in the legal system, while ensuring that courts do not become unnecessarily encumbered with litigants who cannot effectively navigate procedural requirements.

Case Management Counsel (CMC) began as a two-year pilot project at the Alberta Court of Queen's Bench in Edmonton and Calgary in 2011 (The Advisory, p 14). The purpose of CMC was to "assist in the orderly, proportionate, focused and expeditious handling of civil files (including family) streamed into case management" (Court of Queen's Bench of Alberta Notice to the Profession, p 1). The responsibilities of CMC included "assisting to narrow [and/or] resolve issues, assisting with scheduling and the development of litigation plans, providing guidance to parties… vetting applications to ensure parties are in a position to proceed, [and] monitoring and assisting in the management of litigation" (Court of Queen's Bench of Alberta Notice to the Profession, p 1).

Following the pilot project, CMC was established as a permanent program at the Court of Queen's Bench in Edmonton and Calgary. Currently, CMC may only oversee cases that have been formally assigned into case management (Case Management Counsel in the Court of Queen's Bench). In addition, only family law cases that are high conflict and involve at least one

self-represented person are eligible for CMC in Calgary. In Edmonton, however, any civil law case, regardless of whether there is a self-represented litigant, may be managed by CMC (Case Management Counsel in the Court of Queen's Bench). These cases may be referred to CMC either by the Calgary Chief Justice or the Edmonton Associate Chief Justice after the case has been sent to case management and prior to the case being heard by a case management judge, or by a case management judge during case management (Case Management Counsel in the Court of Queen's Bench).

Case Management Counsel could be used to provide self-represented litigants with the support and knowledge needed to comply with complex procedural requirements and appropriately complete all applications and orders in a timely manner. In this way, CMC could take much of the guesswork out of court processes for self-represented individuals, while ensuring that cases efficiently move forward. Utilized in this manner, CMC appears to be an ideal mechanism for accommodating the inexperience and lack of training of self-represented litigants without jeopardizing the position of either party at trial. Accordingly, the CMC program should be expanded to more court centres and civil cases with at least one self-represented individual should generally be referred to CMC as a means of enabling self-represented litigants to more easily and effectively participate in the legal system.