OFFICE OF THE PRESIDENT
CABINET DU PRÉSIDENT

August 23, 2006

Chief Justice Marc M. Monnin
Canadian Judicial Council
Ottawa ON K1A 0W8

Dear Chief Justice,

I am writing on behalf of the Canadian Bar Association (CBA) responding to the request of the Canadian Judicial Council Subcommittee on Self-Represented Litigants for comments about the draft *Statement of Principles on Self-Represented Litigants and Accused Persons* (draft Statement). The CBA is a national association of over 36,000 members, including lawyers, notaries, law students and teachers. Our mandate includes seeking improvements in the law, the administration of justice and advancing access to justice, so we are particularly interested in the draft Statement.

The CBA has urged that legal aid be considered an essential public service, like health care or education, to ensure meaningful access to justice for people with serious legal problems. While we see an adequately funded legal aid system as the real solution, we support the intent of the draft Statement to provide guidance for those involved with the justice system in dealing with the reality of self-represented persons. We recognize that self-represented litigants and accused persons are a huge challenge to our justice system at present, with widespread repercussions not only for those individuals, but also for judges, court administrators and opposing parties and their counsel. Self-represented persons significantly impact the staff and time required to deal with various matters, and often call on judges to simultaneously assist a litigant or accused, while retaining impartiality and neutrality.

When discussing this challenge, the CBA normally distinguishes between those who choose to represent themselves and those who want legal representation, but cannot afford it and have been denied legal aid coverage, using the terms, "self-represented" and "unrepresented" litigants, respectively. We recognize important distinctions between the two groups in terms of their legal needs and the types of challenges they pose to the legal system. However, we adopt the terminology of the draft Statement in our response.

Preamble

The Preamble refers to those "unrepresented by counsel", but then uses "self-represented persons" in the remainder of the draft Statement. The draft Statement should use consistent terminology throughout, unless a distinction between the two categories of litigants is intended.

500 - 865 Carling, Ottawa, Ontario Canada K1S 5S8
Tel/Tél. : (613) 237-2925 Toll free/Sans frais : 1-800-267-8860 Fax/Télécop. : (613) 237-0185
Home Page/Page d'accueil : www.cba.org E-Mail/Courriel : info@cba.org

We note the definition of "self-represented" in the preamble refers to those who "appear without representation". Again, there may be those who are receiving legal advice or have counsel of record, but appear without the benefit of counsel at a particular application or proceeding. This may be done because of cost or as a matter of strategy. It may not be appropriate to include such persons as "self-represented" for all purposes of the draft Statement.

The Preamble states:

> [J]udges, court administrators, members of the Bar, legal aid organizations, and government funding agencies each has a responsibility to ensure that persons have fair access and equal treatment by the court.

Systemic problems of inadequate legal aid funding and increasingly complex legislation have led to the current problems, and we believe that the answer lies in systemic solutions. Certainly, the CBA encourages members of the Bar to donate generously of their time, and will continue to do so. Private practitioners volunteer their services both by taking cases for no payment (***pro bono***) and also when they do legal aid work for less than their hourly rate, and often less than the amount needed to cover their office overhead. However, the voluntary contribution of the private Bar should be a separate discussion from how salaried justice system participants or government/legal aid agencies might best address the problem of self-represented litigants and accused.

Promoting Rights of Access

The terminology of "average citizen" in Commentary 1 on page 4 might be changed, as it seemingly excludes the many people that appear in court who are landed immigrants.

Promoting Equal Justice

We agree that minor or easily rectified deficiencies should not be used to deny relief, and judges should normally provide more assistance and explanation to a self-represented person than they would to a lawyer. We appreciate the commentary's reminder that judges may also treat self-represented persons as vexatious litigants. It does happen, particularly with those who choose to self-represent, that such a party may unnecessarily prolong the process, leading to significant additional costs to the other side, who may well be struggling to afford legal representation. Certainly, litigants should not be encouraged to self-represent because of a perception that they will gain advantage with the court. We also question whether going so far as to suggest referral to agencies may place presiding judges too far into the fray to be consistent with judicial neutrality and impartiality, in spite of B.5.

A difficult issue arises when a judge recognizes that a self-represented accused has grounds to make a ***Charter*** application that could result in a stay of proceedings, or when judges might consider a stay because a fair trial is unlikely without legal representation. The responsibilities of judges outlined on page 8 would suggest that the accused should be advised of that fact, and invited to make such an application, given the heavy imbalance of power between the state and accused persons, especially for those who are self-represented. However, this would seem to present a significant challenge to judicial impartiality, and again underscores the need for an adequately funded legal aid system.

As practicing lawyers, we find that some self-represented persons are quite unclear as to the role of opposing counsel. On page 5, we suggest the draft Statement indicate that judges may explain that the duty of opposing counsel is to advance the interests of their client, in a manner consistent with their duties as an officer of the court and their professional ethics. Opposing counsel cannot and must not assist a self-represented person if doing so may prejudice their client. Similarly, it may be useful to explicitly state under principle 4 that judges may explain the difference between civil and criminal proceedings, the role of an ***amicus curiae*** (if relevant), and the rules against cross-examination of certain complainants by the self-represented person.

We have concerns with respect to point 4, which invites judges to "modify the traditional order of taking evidence", and "question witnesses" in order to accommodate self-represented persons. This principle has the potential to lead to two legal systems: a quasi-inquisitorial system where self-represented persons are involved, and the traditional adversarial system for other cases. We believe that this would not be consistent with the rule of law and the impartial administration of justice.

Rules of evidence and trial procedures have been developed over time to ensure fairness at trial. Even considered at the individual level, such a change in procedure could be unfair to a represented party or result in an apprehension of bias, even if the judge explains the purpose for taking such steps. Any duties the courts have to self-represented litigants do not extend to prejudicing represented parties. This could also have the unintended effect of potentially encouraging self-representation. We suggest that principle 5 be revised to state that if any steps are taken in accordance with principle 4, a judge must ensure that they do not result in any prejudice to represented parties or a reasonable apprehension of bias.

Responsibilities of the Participants in the Justice System

We are concerned that the draft Statement relating to members of the Bar (point 1, page 11) seems focused on eliminating self-represented litigants and accused persons, rather than providing guidance on how lawyers can accommodate them. The only actual suggestion made to lawyers for dealing with the self-represented is that they avoid unnecessarily complex legal language. The CBA suggests that the draft Statement give more guidance as to how lawyers should interact with self-represented persons, and how courts can facilitate appropriate interactions between self-represented persons, opposing parties, and opposing party's counsel. The CBA's new ***Code of Professional Conduct***, in particular Guiding Principle XIX(8), might be of assistance.

Specifically, more detail is needed on how judges and lawyers should deal with vexatious behaviour on the part of a self-represented litigant. Page 7 of the draft Statement indicates, "Judges and court administrators have no obligation to assist a self-represented person who is disrespectful, frivolous, unreasonable, vexatious, or making no reasonable effort to prepare his or her own case". The draft Statement might go further to state that courts have the duty to prevent self-represented persons from continuing behaviour that is disrespectful to any participant in the justice system, frivolous, unreasonable, or vexatious.

On page 10, the duties of self-represented persons should include their obligation not to engage in this behaviour, referred to in explicit and clear language in the "information packet" provided to self-represented persons. Some examples of behaviour that will not be tolerated (for example, use of profanity or interrupting the judge/opposing counsel in court) would be helpful.

It would also assist if the draft Statement on page 11 were to refer to the fact that lawyers are not obliged to deal directly with self-represented persons who are "disrespectful, frivolous, unreasonable, or vexatious", may limit their communications in writing, and need not respond to repeated communications that qualify as harassment. This would address in part the difficulty many lawyers find themselves in of being ethically bound to respond to communication by a self-represented party, but being subject to abusive behaviour as a result.

On page 8, the judiciary is asked to ensure that procedural and evidentiary rules are not used to unjustly hinder the legal interests of self-represented persons. While we agree that such rules should not be needlessly applied to deny remedies to self-represented persons, we again question whether this recommendation goes so far as to ask judges to apply the law differently than they would for represented persons. We would support explicitly requiring judges to explain proceedings (especially criminal proceedings) to self-represented persons in plain language.

We support the proposal for education of court personnel on page 9. Court personnel such as those in the registry are really on the front line, and are frequently in very difficult situations as to how much guidance they can offer self-represented persons without providing "legal advice". However, asking court administrators to "ensure" that self-represented persons get the assistance necessary may be too strong.

Conclusion

The draft Statement is a careful attempt to provide much needed written guidance to justice system participants as to how to deal with self-represented persons. While we know that most judges already try to achieve a balance when faced with self-represented persons, these principles provide a good synthesis and compilation of the existing jurisprudence dealing with judges' obligations toward self-represented litigants. We trust that our comments will be helpful, and we would be pleased to review any subsequent drafts, and the proposed Bench Book, at the appropriate time.

Yours truly,

(original signed by J. Parker MacCarthy)

J. Parker MacCarthy, Q.C.