Background Information: Self-represented, the role of judges and active adjudication models

The Traditional Approach of the Judiciary in Adversarial Proceedings

Hadi v A-Z Law Solicitors [2012] EWCA Civ 1431 (09 November 2012), http://www.bailii.org/ew/cases/EWCA/Civ/2012/1431.html

21. In support of his case … Mr Chowdhary relies upon the classic judgment of Denning LJ giving the judgment of the court (Denning, Romer and Parker LJJ) in *Jones v National Coal Board* [1957] 2 QB 55.

22. Ordinary civil proceedings in this country – it is well recognised that family proceedings are very different – are adversarial not inquisitorial. The duty of the judge is to hear and determine the issues raised by the parties as set out in the pleadings. But, as Denning LJ observed (page 63), the judge

> "is not a mere umpire to answer the question "How's that?" His object, above all, is to find out the truth, and to do justice according to law".

23. In pursuit of that fundamental objective the judge is not required to sit silent as the sphinx. Appropriate intervention while a witness is giving evidence, even while the witness is being cross-examined, is not merely permissible but may be vital. As Denning LJ put it (page 63):

> "No one can doubt that the judge, in intervening as he did, was actuated by the best motives. He was anxious to understand the details of this complicated case, and asked questions to get them clear in his mind. He was anxious that the witnesses should not be harassed unduly in cross-examination, and intervened to protect them when he thought necessary. He was anxious to investigate all the various criticisms that had been made against the board, and to see whether they were well founded or not. Hence, he took them up himself with the witnesses from time to time. He was anxious that the case should not be dragged on too long, and intimated clearly when he thought that a point had been sufficiently explored. All those are worthy motives on which judges daily intervene in the conduct of cases, and have done for centuries."

He continued (page 64):

> "The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point

> that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate".

24. So there is nothing objectionable, for example, in a judge intervening from time to time to make sure that he has understood what the witness is saying, to clear up points that have been left obscure, to make sure that he has correctly understood the technical detail, to see that the advocates behave themselves, to protect a witness from misleading or harassing questions, or to move the trial along at an appropriate pace by excluding irrelevancies and discouraging repetition. Indeed, it is, as Denning LJ recognised (page 65) his duty to do so.

25. But there is, of course, a difficult and delicate balance to be held. The judge must not, as it is often put, descend into the arena. Denning LJ referred (page 63) to Lord Greene MR, who in *Yuill v Yuill* [1945] P 15, 20, had:

> "explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations? If a judge, said Lord Greene, should himself conduct the examination of witnesses, "he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict".

Denning LJ continued (page 64) that it is for the advocate to make his case;

> "as fairly and strongly as he can, without undue interruption, lest the sequence of his argument be lost."

26. The dangers of inappropriate intervention are particularly acute during cross-examination. As Denning LJ explained (page 65):

> "Now, it cannot, of course, be doubted that a judge is not only entitled but is, indeed, bound to intervene at any stage of a witness's evidence if he feels that, by reason of the technical nature of the evidence or otherwise, it is only by putting questions of his own that he can properly follow and appreciate what the witness is saying. Nevertheless, it is obvious for more than one reason that *such interventions should be as infrequent as possible when the witness is under cross-examination*. It is only by cross-examination that a witness's evidence can be properly tested, and it loses much of its effectiveness in counsel's hands if the witness is given time to

> think out the answer to awkward questions; the very gist of cross-examination lies in the unbroken sequence of question and answer. Further than this, cross-examining counsel is at a grave disadvantage if he is prevented from following a preconceived line of inquiry which is, in his view, most likely to elicit admissions from the witness or qualifications of the evidence which he has given in chief. Excessive judicial interruption inevitably weakens the effectiveness of cross-examination in relation to both the aspects which we have mentioned, for at one and the same time it gives a witness valuable time for thought before answering a difficult question, and diverts cross-examining counsel from the course which he had intended to pursue, and to which it is by no means easy sometimes to return (emphasis added)."

27. *Jones* was a case involving a fatal accident in a coal mine where the plaintiff was represented by Mr Mars-Jones, as he then was, and the defendant by Mr Edmund Davies QC, as he then was. The judge intervened far too much, indeed, so much that each party complained that they had not been able to put their case properly. For example (page 62), in the case of one witness the judge:

> "took the examination of the witness out of the hands of leading counsel for the rest of that day and of his junior counsel next morning. Mr Mars-Jones then cross-examined the witness; but during the cross-examination the judge intervened on several occasions to protect the witness from what he thought was a misleading question, and to bring out points in favour of the witness's point of view."

And again (page 63):

> "the judge took the examination-in-chief largely out of the hands of Mr Edmund Davies … Mr Mars-Jones cross-examined the witness, but after a while the judge disclosed much impatience with him and he brought it to a close."

A retrial was ordered, Denning LJ having commented (page 65) that "It seems to us that the case was conducted by counsel on both sides with complete propriety."

28. At the end of the day, the question for us comes down to this. Adopting what Denning LJ said in *Jones* (page 61): Was justice done between these parties? Were the facts properly found by the judge on a fair trial between the parties? As he added (page 67):

"There is one thing to which everyone in this country is entitled, and that is a fair trial at which he can put his case properly before the judge."

29. I have dealt with *Jones* at some length because it remains the classic statement of principle, because it is an illuminating illustration of where the line is properly to be drawn between appropriate and inappropriate intervention and, not least, because it stands in striking contrast to what the transcripts reveal in the case before us.

Self-represented

"A judge's view on one of the biggest problems facing the justice system
Charlie Gillis talks to Justice David Price about more people representing themselves in court", Maclean's February 3, 2013, http://www2.macleans.ca/2013/02/04/a-judges-view-on-one-of-the-biggest-problems-facing-the-justice-system/

…

A: Higher costs of legal representation, economic hardship, and greater public access to legal data bases will continue to lead to greater numbers of litigants who choose to represent themselves in court. The court must respond effectively to the growing numbers of self-represented litigants, and governments must recognize the demographic changes among those using the courts. It must provide the court with adequate resources to continue serving the public effectively with the same high quality of justice it has delivered in the past. This is essential if the public's access to justice is to be preserved.

Q: Even when self-represented litigants have no mental issues, do judges have to have to take steps to ensure they get a fair shake?

A: A judge may try to empower self-represented litigants by explaining how the court system is designed to facilitate their negotiation of a settlement of their own dispute, and the advantages that they derive from resolving the issues in that way. I personally refer self-represented litigants, especially in family law cases, to books they can access to improve their ability to communicate with each other in a conflict, and to improve their understanding of the challenges they face in separation and divorce, and as parents when creating two households for their children following separation.

Q: Are there other resources available to them?

A: I inform litigants of the resources that are available to them on the internet, such as on the Ministry of the Attorney General website, and the CanLII legal database, containing information, such as the Federal Child Support Guidelines,

and Advisory Spousal Support Guidelines, that the court will likely apply in their case. I advise them of the public mediation service that is available at the courthouse, and of resources such as the Office of the Children's Lawyer, Supervised Access Centres, Drug and Alcohol Assessment and Treatment facilities, and certified valuators of property, businesses, and income, that may help them resolve the issues in dispute between them. My colleagues and I also provide, at trial management conferences, a memo to self-represented litigants describing what will be expected of them at their forthcoming trial.

Q: How in your experience are so-called "self-reps" treated by others in the legal profession?

A: Both the Ministry of the Attorney General and the Courts have created web-sites that are increasingly "user-friendly" to empower self-represented litigants to make effective use of the legal system to resolve their disputes. The Divorce Act imposes a legal obligation on lawyers to inform clients of the resources that are available to them in the community to help them explore the possibility of reconciliation. Whether the goal is to enhance their ability to do that, or simply to help them separate more fairly and amicably, lawyers need better information about the resources that are available in the community. Governments could provide a more useful service as a conduit for such information.

See also, Charlie Gillis, "Why people representing themselves in court are clogging the justice system: Do-it-yourselfers flood a system set up for lawyers and judges", Maclean's, February 4, 2013, http://www2.macleans.ca/2013/02/04/courting-a-crisis/

New approaches of Canadian Courts

Canadian Bar Association, *Underexplored Alternatives for the Middle Class*, February 2013
At pages 11-12

Current proposals for court reform generally involve consideration of proportionality, diversion and streaming, simplification, case management, better use of technology, or some combination of these strategies. Raising the financial limits for small claims courts, where lawyers will often not be involved, can bring more matters within the jurisdiction of those courts. Fast tracks, simplified procedures, and expedited trials are ways of dealing with cases outside the financial limits for small claims courts, but where the issues at stake are at the lower end of civil cases. Simplified rules of court make the process easier to access for the public, especially for unrepresented litigants.

Case management and technology are also being used to lower litigation costs and reduce delays, and set timelines and goals for the progress of a case. Case management guidelines can also mean earlier judicial involvement and consideration of options like dispute resolution, as well as prompt rulings on motions. Technology has already had a significant impact on filing documents,

communications and document exchange with opposing parties in the litigation process, and more. Specialized courts are also being considered. For example, Unified Family Courts have the potential to address demanding family law cases in an integrated way, providing several resources for separating couples under one roof and specialized professionals and judges to assist.

The Limits to assistance in an adversarial model: Canadian experience

See Freya Krystjanson, Freya and Naipaul, Sharon, “Active Adjudication or Entering the Arena: How much is too much?”, 2011 24 CJAP 201 at page 223-224

> Both courts and tribunals struggle with the balance between appropriate control of proceedings and descending into the arena. The adjudicator's conduct will generally be determined on the traditional reasonable apprehension of bias test, specifically whether a decision maker appears to have either taken sides or prejudged facts, evidence or credibility. The focus is generally on interactions with witnesses and interference with the ability of parties to fairly state their case. Interventions must be evaluated contextually, taking into account the statutory framework and rules that may provide a particular framework for adjudicative engagement. Moreover, an adjudicator's conduct will be evaluated on the totality of the record. The form of an adjudicator's participation is important, and the purpose underlying her interventions. Where a reasonable apprehension of bias or other failure of procedural fairness is identified, the matter will generally be remitted back to a different adjudicator or differently constituted panel.
>
> Particular challenges arise in the administrative context where parties are un-represented. **Administrative justice is meant to be accessible. Adjudicators should help ensure accessibility by providing unrepresented parties with information about the hearing process, and their obligations in meeting the case. However, adjudicators cannot offer assistance that crosses the line — that appears one-sided, or disadvantages the represented party.** Where the unrepresented party persistently fails to comply with the tribunal's rules or rulings, persists in pursuing irrelevant questions, or attempts to introduce evidence improperly, the adjudicator must strive to maintain a calm demeanour and a careful hand over the proceedings
> .
> In the end, the concern in administrative hearings is the fairness of the proceeding. In the administrative realm, where efficient and accessible justice is a goal, there may be a particular temptation to take control — to ensure that relevant matters are pursued with expeditiousness. However, all adjudicators must avoid descending into the arena.

Active Adjudication Models

Human Rights Code, RSO 1990, c H.19

> 43.(1) The Tribunal may make rules governing the practice and procedure before it.
>
> (2) The rules shall ensure that the following requirements are met with respect to any proceeding before the Tribunal:
>
> > 1. An application that is within the jurisdiction of the Tribunal shall not be finally disposed of without affording the parties an opportunity to make oral submissions in accordance with the rules.
> > 2. An application may not be finally disposed of without written reasons.
>
> (3) Without limiting the generality of subsection (1), the Tribunal rules may,
>
> (a) provide for and require the use of hearings or of practices and procedures that are provided for under the *Statutory Powers Procedure Act* **or that are alternatives to traditional adjudicative or adversarial procedures**;
>
> (b) authorize the Tribunal to,
>
> (i) **define or narrow the issues** required to dispose of an application and **limit the evidence and submissions** of the parties on such issues, and
>
> (ii) **determine the order** in which the issues and evidence in a proceeding will be presented;
>
> (c) authorize the Tribunal to **conduct examinations in chief or cross-examinations** of a witness;
>
> (d) **prescribe the stages of its processes at which preliminary, procedural or interlocutory matters will be determined**;
>
> (e) authorize the Tribunal to make or cause to be made such examinations of records and such other inquiries as it considers necessary in the circumstances;
>
> (f) authorize the Tribunal to require a party to a proceeding or another person to,
>
> (i) produce any document, information or thing and provide such assistance as is reasonably necessary, including using any data

storage, processing or retrieval device or system, to produce the information in any form,

(ii) provide a statement or oral or affidavit evidence, or

(iii) in the case of a party to the proceeding, adduce evidence or produce witnesses who are reasonably within the party's control; and

(g) govern any matter prescribed by the regulations.

(4) The rules may be of general or particular application.

….

(8) Failure on the part of the Tribunal to comply with the practices and procedures required by the rules or the exercise of a discretion under the rules by the Tribunal in a particular manner is not a ground for setting aside a decision of the Tribunal on an application for judicial review or any other form of relief, unless the failure or the exercise of a discretion caused a substantial wrong which affected the final disposition of the matter.

HRTO Rules of Procedure

1.1. The Tribunal will determine how a matter will be dealt with and **may use procedures other than traditional adjudicative or adversarial procedures**.

1.2. In order to provide for the **fair, just and expeditious resolution** of any matter before it the Tribunal may:

a) lengthen or shorten any time limit in these Rules;

b) add or remove a party;

c) allow any filing to be amended;

d) consolidate or hear Applications together;

e) direct that Applications be heard separately;

f) direct that notice of a proceeding be given to any person or organization, including the Commission;

g) **determine and direct the order in which issues in a proceeding, including issues considered by a party or the parties to be preliminary, will be considered and determined**;

h) **define and narrow the issues in order to decide an Application**;

i) make or cause to be made an examination of records or other inquiries, as it considers necessary;

j) **determine and direct the order in which evidence will be presented**;

k) on the request of a party, direct another party to adduce evidence or produce a witness when that person is reasonably within that party's control;

l) permit a party to give a narrative before questioning commences;

m) **question a witness**;

n) **limit the evidence or submissions on any issue**;

o) **advise when additional evidence or witnesses may assist the Tribunal**;

p) require a party or other person to produce any document, information or thing and to provide such assistance as is reasonably necessary, including using any data storage, processing or retrieval device or system, to produce the information in any form;

q) on the request of a party, require another party or other person to provide a report, statement, or oral or affidavit evidence;

r) direct that the deponent of an affidavit be cross-examined before the Tribunal or an official examiner;

s) make such further orders as are necessary to give effect to an order or direction under these Rules;

t) attach terms or conditions to any order or direction;

u) **consider public interest remedies**, at the request of a party or **on its own initiative**, after providing the parties an opportunity to make submissions;

v) notify parties of policies approved by the Commission under s. 30 of the *Code*, and receive submissions on the policies;

v.1) make such orders or give such directions as are necessary to prevent abuse of its processes and ensure that the conduct of participants in Tribunal proceedings is courteous and respectful of the Tribunal and other participants; and

w) take any other action that the Tribunal determines is appropriate.