Self-Represented Litigants: A Sea Change in Adjudication

Michelle Flaherty

Abstract

Self-represented litigants make up an increasingly large portion of parties appearing before Canadian courts and tribunals. Where much of the literature looks at the administration of the legal system, including the role of court administrators, the streamlining of procedures, and access to legal aid or duty counsel, I focus on the role of the adjudicator. In particular, rising numbers of self-represented litigants have changed our perception of the role of adjudicators and their obligation to remain impartial. Traditionally, adjudicators understood impartiality to require a strict prohibition on assisting any party, including self-represented litigants. This article charts the evolution in the jurisprudence and shows that decision-makers are now balancing the obligation to remain impartial with a corresponding obligation to ensure a fair process, which often involves assisting self-represented litigants. This article explores the material implications of self-represented litigants for judicial and administrative adjudicators and offers ‘substantive impartiality’ as a new way to conceptualize the spectrum of active adjudicative approaches in cases involving self-represented litigants. The notion of ‘substantive impartiality’, is a timely rethinking of the traditional approaches to adjudicative duties such as impartiality, which has been shown to be ill-equipped to meet the challenges posed by self-represented litigants.

Keywords: self-represented litigants, impartiality, judicial discretion

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I. INTRODUCTION

The self-represented litigant is not a new phenomenon; individuals have been representing themselves for as long as there has been a justice system. Of late however, the numbers of self-represented litigants has risen dramatically and this trend is expected to continue. Self-represented litigants now make up a significant proportion (and sometimes even represent the majority) of parties appearing before certain courts and administrative tribunals.

Indeed, number of self-represented litigants and the challenges they pose are now so significant that they have inspired countless courts, administrative bodies, and academics to study how best to address the implications of rising numbers of self-represented litigants on the justice system. In particular, some administrative bodies are being designed with the understanding that many of the persons appearing before them would


3 Julie Macfarlane, “The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants” (2013) at 8, online: Representing yourself in a Legal Process <http://www.representing-yourself.com>. This recent empirical study describes the characteristics of the self-represented litigants included in the sample as “broadly representative of the general Canadian population.” Fifty percent were men; 50% were women; 50% had a university degree; 57% reported income of less than $50,000 a year and 40% reported incomes of less than $30,000 a year. Sixty percent of the sampled were family litigants; 31% were litigants in civil court, of these 13% were litigants in small claims courts and 18% in general civil matters. According to MacFarlane, judges, especially in family court, now deal with self-represented litigants as often as they deal with counsel representing clients. See also Engler, supra note 2; and John M. Greacen, “Self-Represented litigants: learning from ten years of experience in Family Courts” (2005) 44 Judges’ Journal 24 [“Family Courts”].

4 See e.g. Goldschmidt, “Strategies”, supra note 1.
not be represented.\textsuperscript{5} However, much of the discussion surrounding self-represented litigants has been about the administration of the legal system, including the role of court administrators, the streamlining of procedures, and access to legal aid or duty counsel.\textsuperscript{6}

Although the rise in self-represented litigants has material implications for judicial and administrative decision-makers,\textsuperscript{7} their changing role has not been at the fore of the discussion. Nor has there been much discussion about whether the needs and increasing numbers of self-represented litigants have or should impact the development of legal or procedural rules. This paper argues that, in addition to inspiring a number of administrative changes within the justice system, the volume of self-represented litigants has begun to transform adjudication.

Adjudicators are dealing with growing numbers of litigants who are unfamiliar with legal rules and decision-making. Adjudicators’ responses to the presence and particular needs of self-represented litigants are an important part of the legal system’s reaction to the changing face of litigants.\textsuperscript{8} As we shall see, rising numbers of self-represented litigants put the continued relevance of some of our traditional legal rules and processes into question. They also raise issues about how adjudicators can accommodate self-represented litigants’ needs without departing from their obligation to be neutral and impartial.\textsuperscript{9}

I begin by identifying some of the challenges self-represented litigants present for the justice system as a whole and for the judicial or quasi-judicial decision maker in particular. Next, I discuss adjudicators’ impartiality obligations and whether the traditional approach to adjudication is equipped to meet those challenges given increasing

\textsuperscript{5} For example, the Ontario Human Rights Tribunal, which has developed resources and an adjudicative to accommodate large numbers of self-represented litigants.


\textsuperscript{7} Referred to collectively as “adjudicators” or “decision-makers”.


numbers of self-represented litigants. Finally, I consider adjudicative guidelines and recent case law and look at some of the ways in which decision-makers have adapted to the needs of self-represented litigants, both in terms of procedural requirements and substantive developments in the law.

II. SELF-REPRESENTED LITIGANTS: THE CHANGING FACE OF THE JUSTICE SYSTEM

The past approximately two decades have been marked by a significant rise in the number of self-represented litigants within our justice system.\(^\text{10}\) This phenomenon has been attributed to a number of social and economic factors, including the rising cost of legal services relative to inflation and decreases in public funding for legal services for low-income litigants.\(^\text{11}\) In some fora, particularly in what Russel Engler has referred to as the “poor people’s courts,” notably small claims courts, family courts, bankruptcy courts and administrative tribunals, self-represented litigants now outnumber represented litigants.\(^\text{12}\) This increased presence of self-represented litigants has serious implications for the justice system. As one study explained,

Cases involving self-represented litigants often require significantly more time from judges and court staff; they put judges and court staff in the difficult and sometimes stressful position of trying to deal fairly with self-represented parties without compromising neutrality; they create ethical and practical challenges for counsel in cases where one

\(^{10}\) Macfarlane, supra note 3.
\(^{11}\) Hannaford-Agor & Mott, supra note 6 at 163-4; and Shone, supra note 1 at 8.
\(^{12}\) Macfarlane, supra note 3 at 32 – 34 where Macfarlane looks at self-representation in family court. See also Engler, supra note 2 at 1988 & 2022; Greacen, “Family Courts”, supra note 3 at 25. Indeed, the literature concerning self-represented litigants is particularly rich in the family court context, where courts have long been contending with the needs of self-represented litigants: See e.g Georgina Carson & Michael Stangaron, “Self-Represented Litigants In The Family Courts: Is Self-Representation An Unfair Tactic?” online: MacDonald & Partners LLP <http://www.macdonaldpartners.com>; Macfarlane, supra note 3.; Lorne D Bertrand, Joanne J Paetsch, Nicholas Bala, & Rachel Birnbaum, “Self-Represented Litigants in Family Law Disputes: Views Of Alberta Lawyers” (December 2012), online: Canadian Research Institute for Law and the Family <http://people.ucalgary.ca>. Indeed, as part of issues concerning family law reform, the needs of self-represented litigants are being considered by the Canadian Bar Association’s Action Committee on Access to Justice in Civil and Family Matters. The Committee, chaired by Cromwell J of the Supreme Court of Canada, has four working groups: Court Processes Simplification, Access to Legal Services, Prevention Triage and Referral, and Family Justice. The Action Committee launched the access to justice initiative, “Envisaging Equal Justice” in 2012, and hosted a national summit in April 2013. For more information about this see the Canadian Forum on Civil Justice, online: < http://www.cfcj-fcjc.org/collaborations>.
side is represented and the other is not; and the inability of some self-represented litigants to understand and comply with court rules and procedures may make it impossible for their cases, however worthy, to be decided on the merits.  

In many ways, swelling numbers of self-represented parties have already begun to change much about how our legal system is administered. Examples of administrative changes they have inspired include rethinking the role of court staff to include assisting self-represented litigants, adopting standardized forms, and developing self-help and educational resources and making them available on the internet. 

It is not surprising that a dramatic increase in self-represented litigants would change not just how courts and tribunals are administered, but also how adjudicators view their role and how they apply and develop the law. Arguably, the rising numbers of self-represented litigants is calling out for a rethinking of some of our key legal rules and processes. Many of these were designed within a traditional legal framework, one in which parties were generally represented by counsel. Traditionally, self-represented litigants were treated like any other litigant, held to the same standards and, like represented parties, not entitled to any assistance from the adjudicator in presenting their case. This often hands off approach to adjudication appears to have been shaped by two key factors: the notion that self-representation was a choice that litigants made, inter alia, to gain an advantage in the legal proceeding and a vision of impartiality obligations that equated to adjudicative passivity. As we shall see, however, the recent influx of self-represented litigants has brought both of these premises into question.

14 Macfarlane, supra note 3 at 13. 
15 For a more detailed discussion of what has been or could be done to better meet the needs of self-represented litigants within the justice system, see e.g.Rose Hough & Zelon, supra note 2; Macfarlane, supra note 3; Shone, supra note 1; and Federal Courts of Canada, supra note 6. 
16 See e.g. the guides prepared by the Human Rights Tribunal of Ontario, online: Human Rights Tribunal of Ontario <http://www.hrto.ca>. 
18 Engler, supra note 2 at 1989 & 2015.
A. SELF-REPRESENTATION: QUESTIONING THE PREMISES

In the past, self-represented litigants were the exception and representation by counsel was the norm. In those matters where litigants did represent themselves, adjudicators often assumed they had made a voluntary and informed choice to do so.19

The premise of self-representation as choice is, however, no longer valid in the current climate. Recent empirical research conducted by Professor MacFarlane in Ontario, Alberta, and British Columbia demonstrates this. The research shows that the vast majority of self-represented litigants in family and civil courts in those jurisdictions represent themselves, not because they wish to engage the legal system on their own or perceive they will obtain a better outcome if they do so. Rather, they do so because (among other reasons) they lack the means to retain counsel.20 The current reality, for most parties, is that self-representation often has little do with choice.21 Professor MacFarlane’s research also suggests that, to the extent they ever did, litigants no longer view self-representation as an advantage and instead are concerned they will be materially disadvantaged by the absence of counsel.22

B. RETHINKING THE PRINCIPLES: SUBSTANTIVE IMPARTIALITY

Until relatively recently, adjudicators understood impartiality to require a strict prohibition on assisting any party, including self-represented litigants.23 This meant that rather than intervene or provide directions, traditional adjudicators remained passive

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19 See e.g. Lieb v Smith (1994), 120 Nfld & PEIR 201 at para 16, 373 APR 201 (NL SC (TD)); White v True North Springs Ltd, 208 Nfld & PEIR 143, 624 APR 143 (NL SC (TD)).
20 Macfarlane, supra note 3; see also Zorza, “An Invitation to Dialogue”, supra note 2 at 521; and Supreme Judicial Court Steering Committee (of Massachusetts), supra note 13.
21 Economic necessity is one of the main reasons for the self-representation phenomenon: over 90% of the litigants who took part in the MacFarlane study referred to financial reasons for representing themselves. However, the issue and its causes are much more complex. As professor MacFarlane points out, parties represent themselves for a series of often overlapping reasons, including dissatisfaction with previous legal services, inability to find counsel to take their case, or a preference for handling the matter themselves, see generally Macfarlane, supra note 3 at pages 38 – 48. See also Bertrand, Paetsch, Bala, & Birnbaum, supra note 12 at 6-7 for a study that looks (among other things) at Alberta family lawyers’ perceptions about why parties self represent.
22 See generally Engler, supra note 2; and Zorza, “An Invitation to Dialogue”, supra note 2. Certainly, based on the findings of MacFarlane, self-represented parties do not perceive self-representation as advantageous; see Macfarlane, supra note 3. But see Carson & Stangaron, supra note 12 at 3 where the authors describe abusive tactics and “legal bullying” by some self-represented family law litigants and discusses the advantages they may derive from these tactics.
23 Engler, supra note 2 at 1989; and Zorza, “An Invitation to Dialogue”, supra note 2 at 529.
throughout the hearing process, even in the face of lay litigants’ confusion. Like the conventional image of judges we see depicted on television, the traditional adjudicative model is characterized “by a responsive and reactive attitude, in which the judge does no more or less than acts as an umpire.” The traditional adjudicative model presumes that litigants play a passive role, they are viewed as the subject matter of the litigation rather than an active participant in the proceedings. As with so many other legal processes and rules however, this model arose out of an outdated framework where both parties were typically represented by counsel.

Fundamentally, ours is an adversarial legal system which relies on each party to present the material evidence, identify the key legal issues, and provide submissions. Underpinning this adversarial system is the assumption that parties understand the complex and nuanced rules governing the presentation of their case. Our adversarial system becomes much less effective where the law, the rules, and the legal processes are unfamiliar (or unintelligible) to one or more of the litigants, where self-representation is the rule rather than the exception. In those circumstances, cases cease to be a dialogue between informed and experienced participants within a framework designed to test evidence and facilitate truth seeking. They can become instead a frustrating exercise in imposing legal norms on parties who do not or cannot grasp their significance, and who sometimes view the legal issues through a fundamentally different paradigm.

Adjudicators in Canada have recognized that the traditional adversarial model is ill-suited to dealing with self-represented litigants. Where they cannot understand and apply legal rules or principles or navigate legal processes, self-represented litigants are at a distinct disadvantage. To put it differently, the notion of a fair trial, fundamental to our legal system, is undermined to the extent that the legal outcome depends on whether the litigants have mastered legal rules and processes rather than whether their case has

24 Zorza, ibid at 529.
merit. Consider circumstances, not uncommon in some courts or administrative
tribunals, where a self-represented litigant attends the hearing without any understanding
that she is expected to make an opening statement summarizing her legal position and the
witnesses’ expected evidence. Further, she may be without relevant documents, and may
not have anticipated the testimony of seemingly key witnesses. Formal impartiality, in
circumstances such as these, would make for a time-consuming proceeding and one that
may not lead to a meaningful adjudication of the merits of the case.

Arguably, the solution to the challenge posed by self-represented litigants is not
neutrality as formal impartiality or passivity, but neutrality as what I will term
“substantive impartiality.” This notion of “substantive impartiality” borrows from the
concept of “substantive equality”, a longstanding principle developed under s. 15 of the
Canadian Charter of Rights and Freedoms. The Supreme Court, referring to substantive
equality, has explained that identical treatment is not necessarily appropriate or
conducive to equality. This is because to treat people the same without regard to their
needs and circumstances can undermine, rather than advance Charter values. In this
way, the s. 15 approach to substantive equality may require that parties be treated
differently, according to their needs and circumstances.

Similarly, taking a substantive approach to impartiality means that not all parties
are treated with the same detached passivity, but instead receive the treatment and
assistance they need in order to have an opportunity at a fair hearing. In other words,
substantive impartiality (like substantive equality) is not necessarily about treating parties
the same, but rather about treating them fairly, or in this context, providing self-
represented litigants with meaningful legal assistance so they can navigate and function
within our legal system.

27 Hannaford-Agor & Mott, supra note 5; and supra note 3. See also Engler, supra note 2.
28 While a more detailed discussion of the notion of substantive impartiality extends beyond the scope of
this chapter, I intend to explore the idea further in a future piece.
29 Trevor C W Farrow, Diana Lowe, QC, Bradley Albrecht, Heather Manweiller, Martha E Simmons,
“Addressing The Needs Of Self-Represented Litigants In The Canadian Justice System” (Paper delivered at
the Association of Canadian Court Administrators, Toronto & Edmonton, 27 March 2012) at 47, online:
Indeed, Russel Engler argues that neutrality or impartiality is only truly achieved with what I call substantive impartiality, when adjudicators intervene to ensure that both parties are fully informed of their rights, their procedural options, and the benefits and detriments arising from exercising them. Arguably, adjudicative passivity is not impartial in that it favours the represented litigant, and does little to even the playing field or ensure that the self-represented party has an opportunity at a fair hearing. In this regard, Engler distinguishes between judicial neutrality and judicial passivity and argues that the principle of impartiality does not mandate passivity, but rather:

In the pro se context, the appearance of neutrality and true neutrality are often very different, and true neutrality often requires a form of engagement that may seem inconsistent with traditional expectations for the appearance of neutrality.

Scholars and adjudicators who have espoused this line of thinking raise questions as to whether an impusive adjudicative approach continues to be appropriate in a justice system increasingly characterized by self-represented litigants who most often represent themselves out of economic necessity rather than by choice. They argue that, absent revised rules that not only permit, but require adjudicators to help unrepresented litigants, these parties will not have an opportunity at a fair trial.

Russel Engler took a close look at cases in the United States and remarked on what appear to be two contrasting approaches to self-represented litigants. Some American courts take the position that unrepresented litigants generally must play by the same rules as represented litigants and can expect no special treatment. Another strand of cases suggests that judges do need to provide a measure of assistance to the unrepresented litigant and ensure they have a fair opportunity to present their case. According to Engler, the court’s approach is critical to the outcome of the legal proceeding: he posits that the outcome in cases involving self-represented parties may be

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30 Engler, supra note 2 at 2023-2024.
31 Zorza, “Disconnect Between the Requirements” supra note 25 at 426 – 428.
32 Engler, supra note 2 at 1991; and Farrow, Lowe, Albrecht, Manweiller, & Simmons, supra note 29 at 47.
driven as much by a given judge's approach and the level of assistance he or she provides to the self-represented litigant as by the particular facts of the case.\footnote{Engler, \textit{supra} note 2 at 2014.}

Of course, no amount of adjudicative assistance will place a self-represented litigant on the same footing as a party represented by capable and experienced counsel. Importantly, substantive impartiality does not contemplate perfect parity; nor does it suggest that adjudicators should take on the role of representative of one or both of the parties.\footnote{John M Greacen, "Legal Information vs. Legal Advice: Developments During the Last Five Years,"(2001) 84 \textit{Judicature} 198 ["Information vs. Advice"] and Greacen, “Family Courts”, \textit{supra} note 3 at 25. See also \textit{Mercedes-Benz Financial (DCFS Canada Corp) v Kovacevic} (2009), 308 DLR (4th) 562, 74 CPC (6th) 326 (ON Sup Ct) [\textit{Kovacevic}].} Rather, as the Ontario Court of Appeal explained in its oft-cited decision \textit{Davids v. Davids}:

\begin{quote}
Fairness does not demand that the unrepresented litigant be able to present his case as effectively as a competent lawyer. Rather, it demands that he have a fair opportunity to present his case to the best of his ability. Nor does fairness dictate that the unrepresented litigant have a lawyer’s familiarity with procedures and forensic tactics. It does require that the trial judge treat the litigant fairly and attempt to accommodate unrepresented litigants’ unfamiliarity with the process so as to permit them to present their case. In doing so, the trial judge must, of course, respect the rights of the other party.\footnote{\textit{Davids v Davids} (1999), 125 OAC 375 at para 36, 92 ACWS (3d) 87 [\textit{Davids}]. See also \textit{Baziuk v BDO Dunwoodo Ward Mallette} (1997), 13 CPC (4th) 156 at para 18, 72 ACWS (3d) 76 (OntGen Div) [\textit{Baziuk}]; \textit{Barrett v Layton} (2004), 69 OR (3d) 384 (Ont Sup Ct), ; \textit{Director of Child and Family Services (Man) v JA}, 2006 MBCA 44, 205 Man R (2d) 50; \textit{R v Rice}, 2011 ONSC 5532, 97 WCB (2d) 338; \textit{R v McGibbon} (1988), 45 CCC (3d) 334, 31 OAC 38 (Ont CA) [\textit{McGibbon}].}
\end{quote}

As we shall see, adjudicators and policy-makers in Canada have at least begun to adopt the substantive impartiality model.\footnote{See e.g. \textit{Baziuk},\textit{supra} note 35, referred to with approval in \textit{Smith v Heron}, 2003 NSCA 113, 218 NSR (2d) 250.; \textit{Ayangma v Prince Edward Island}, 2000 PESCAD 20, 189 Nfld & PEIR 286;\textit{Kemp v Wittenberg}, 2001 BCSC 273, [2001] BCJ No 296 (QL);\textit{Toronto-Dominion Bank v Saville}, [2000] O.J. No. 806 (QL) at para 18, 95 ACWS (3d) 440 (Ont Sup Ct); \textit{McGibbon, supra} note 35.} For the most part, adjudicators no longer view self-representation as tactical choice. Most agree that the right to a fair trial sometimes means that decision-makers must intervene to give self-represented litigants not only additional latitude, but also assistance and information.\footnote{See e.g. Canadian Judicial Council, “Statement of Principles”, \textit{supra} note 1..}
The debate does not end here, however. Substantive impartiality is a principle that is much easier to articulate than it is to apply. While there is now little dispute that some level of adjudicative assistance may be appropriate, the questions become what type and level of assistance is needed and can be provided without running afoul of the adjudicator’s impartiality obligations. This trend away from the traditional hands-off adjudicative model forces adjudicators to deal with competing issues. Impartiality and the right to an opportunity at a fair trial are the bright lines that must define any adjudicative approach. Yet, in matters involving self-represented litigants, the space between those bright lines can be ill-defined and adjudicators may struggle to both assist self-represented litigants and remain impartial.

Having considered the principles of impartiality, the right to a fair trial, and how adjudicators’ perception of these has shifted with the rise in numbers of self-represented litigants, we turn now to consider some of the policy-making and jurisprudence in the area. In the next section, we look at how policy-makers, courts, and administrative decision-makers have navigated within the zone between fairness and impartiality and how they have balanced these principles in their dealings with self-represented litigants.

III. STRIKING A BALANCE: TALES FROM THE JURISPRUDENCE

In a substantive impartiality model, determining the appropriate type and level of adjudicative assistance involves assessing the needs of the litigants within the boundaries of fairness and impartiality. Adjudicators, particularly those on the front lines of the legal system, face a number of important challenges as they attempt to put these notions into practice and strike the appropriate balance. Maintaining impartiality while ensuring that all litigants have an opportunity at a fair trial involves a careful exercise of adjudicative discretion; it is a balancing exercise that must be done on a case-by-case basis.

38 Jona Goldschmidt, “The Pro Se Litigant’s Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance,” (2002) 40 Fam Ct Rev 36 [“Access to Justice”]; Hannaford-Agor & Mott, supra note 5 at 165. See also Cicciarella v Cicciarella (2009), 252 OAC 156 (Ont Sup Ct Div Ct) [Cicciarella].

39 Hannaford-Agor & Mott, ibid at 165.

40 Goldschmidt, “Access to Justice”, supra note 38. See also R v Darlyn (1946), 88 CCC 269, [1947] 3 DLR 480 (BCCA) at 482 [Darlyn].
basis and, because of its very nature, cannot be achieved through the strict application of formula or codes of conduct.

In many jurisdictions, there are no formal guidelines to assist adjudicators in balancing these principles. Guidelines that do exist are suggestive (rather than prescriptive) and speak in broad terms. They identify a range of possible measures that might assist self-represented litigants, but they provide little help for adjudicators who, for any particular case, must choose from within the range of possible measures. Moreover, written decisions contain little discussion about what type and level of adjudicative assistance is appropriate. While adjudicators often deal with self-represented litigants and regularly provide them with some form of assistance, they often do so orally. Only rarely do written decisions discuss the level and type of assistance that was given to a self-represented litigant. In the main, the jurisprudential discussion of adjudicative assistance occurs in the limited number of decisions that are appealed or judicially reviewed. Thus, while adjudicators dealing with self-represented litigants are regularly called upon to balance impartiality with fairness, they often do so orally in response to specific issues or questions that arise during the hearing. The frequency with which it is conducted and the full extent of this balancing exercise are not necessarily apparent from written decisions.

The type of assistance adjudicators provide seems to fall within two general categories. Some of the assistance is procedural in nature: this can include helping self-represented litigants to understand the steps in the litigation and their procedural obligations. It may also involve relaxing the rules of procedure so that the self-

41 To the extent that they provide specific guidance, this often relates to legal process and the adjudicator’s role in communicating information to litigants. Many guidelines encourage adjudicative practices such as explaining all aspects of the legal process to the self-represented party, using plain English, alerting self-represented parties to their right to counsel and to the availability of resources. See Judicial Institute “Judicial Guidelines For Civil Hearings Involving Self-Represented Litigants,” (April 2006), online: Massachusetts Court System <http://www.mass.gov>. See also Delaware’s Supreme Court, “Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants” (May 2011), online: Delaware State Courts <http://courts.delaware.gov>. See also Canadian Judicial Council, “Statement of Principles”, supra note 1.
represented litigant is not denied the opportunity of presenting his or her case by a strict application of the rules and has more meaningful access to a fair hearing.\textsuperscript{42}

Second, adjudicators may provide assistance that is more substantive in nature. This ranges from explaining the applicable law and the rules of evidence to questioning witnesses, soliciting evidence or submissions, and otherwise ensuring a full record is before the adjudicator.\textsuperscript{43} Importantly, however, there is not always a clear demarcation between procedural and substantive assistance. For instance, relaxing the rules of procedure could be construed as assistance with the legal process or procedure. However, to the extent that it may allow a self-represented litigant to present evidence or advance a legal argument that would not have been available but for the relaxed rules, it may also amount to substantive assistance with the presentation of the case.

The distinction between procedural and substantive assistance, while not always apparent, may be material to the balancing exercise and the relative weight given to fairness and impartiality within that exercise. For instance, helping a litigant understand the mechanics of legal procedures may not be particularly controversial and unlikely to trigger concerns about partiality: arguably, transmitting information does not influence the direction of the self-represented litigant’s case, but simply explains to litigants how to achieve what they have already decided to do.\textsuperscript{44} Nevertheless, this type of adjudicative assistance has been described as a key component of access to justice: where parties who do not understand the rules and procedures they must abide by, they may not be able to

\textsuperscript{42}Engler, \textit{supra} note 2 at 2018. See also \textit{Coleman v Pateman Farms Ltd, et al} 2001 MBCA 75 at paras 15-16, 156 Man R (2d) 144 \textit{(Coleman)}; and \textit{Manitoba (Director of Child and Family Services) v A(J)}, 2004 MBCA 184 at para 21, 190 Man R (2d) 298 \textit{(Manitoba v A(J))}.

\textsuperscript{43}See e.g. Judicial Institute, \textit{supra} note 41. See alsoEngler, \textit{supra} note 2 at 2018, in circumstances where courts deal with many self-represented litigants, some of processes developed in Florida small claims cases include:

"[i]n an effort to secure substantial justice, the court shall assist any party not represented by an attorney on: (1) procedure to be followed; (2) presentation of material evidence; and (3) questions of law."

In Illinois, [i]n any small claims case, the court may, on its own motion or on motion of any party, adjudicate the dispute at an informal hearing. At the informal hearing, all relevant evidence shall be admissible and the court may relax the rules of procedure and the rules of evidence. The court may call any person present at the hearing to testify and may conduct or participate in direct and cross-examination.

\textsuperscript{44}Zorza, “An Invitation to Dialogue”, \textit{supra} note 2 at 521.
present their case in a way that it can be fairly assessed on the merits. Moreover, some research has suggested that litigants’ perception of the fairness of the outcome of their legal proceeding is affected more by the fairness of the process than it is by the actual outcome. Thus, adjudicative assistance in explaining legal process may not only enhance self-represented litigants’ access to a fair hearing, it seems to affect their perception and confidence in both the administration of justice and the outcome of the proceeding.

In 2006, the Canadian Judicial Counsel introduced a “Statement of Principles on Self-represented Litigants and Accused Persons”. This statement is notable in that it goes beyond suggesting better communication between the bench and self-represented litigants and encourages judges to provide substantive assistance to unrepresented parties. For example, the statement suggests that it may be appropriate for judges to help self-represented litigants by: (a) explaining not just the applicable procedures, but also the relevant law and its implications; (b) providing self-represented litigants with information to assist them in asserting their rights and raising arguments before the court; and (c) ensuring that procedural and evidentiary rules are not used to unjustly hinder the legal interests of self-represented parties.

Issues surrounding the application of procedural and evidentiary rules, in particular, can be challenging. Adjudicators are expected to accommodate the needs of self-represented litigants within existing rules, all the while maintaining their impartiality. Some

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45 The Supreme Judicial Court Steering Committee (of Massachusetts) on Self-Represented Litigants, supra note 13.
46 Hannaford-Agor & Mott, supra note 5 at 179.
47 This “Statement of Principles” is meant to be advisory in nature. It is not a code of conduct.
48 This approach stands in contrast to guidelines that exist in for example, the Massachusetts principles states at principle 1.4 “Judges shall apply the law without regard to the litigant's status as a self-represented party and shall neither favor nor penalize the litigant because that litigant is self-represented.” See Judicial Institute, supra note 41. But see also Delaware’s Supreme Court, supra note 41, where the guidelines also require that the law be applied equally to all parties, without regard for representation, but (with regards to evidentiary issues) also encourage judges to:
   “use their discretion, when permissible, to provide self-represented litigants the opportunity to meaningfully present their cases. Judges may ask questions to elicit general information and to obtain clarification. Judges should explain why the questions are being asked and that they should not be taken as any indication of the judge’s opinion of the case” (at 4.3).
guidelines, including the Canadian Judicial Council statement, suggest that this can be accomplished through a more active role for judges, which could include questioning witnesses and determining the order evidence, where this is appropriate to give self-represented parties an opportunity to meaningfully present their case within those applicable rules.\(^{50}\) It may also mean that adjudicators raise legal issues that would not have been put forward by the parties.\(^{51}\) These examples of substantive assistance, while aimed at ensuring that self-represented parties have an opportunity at a fair hearing, put the adjudicator in a position to influence the direction of the hearing, the nature of the evidence, and the types of submissions that will be presented. A more active role for adjudicators can lead to a more fragile relationship between fairness and impartiality. For these reasons, substantive adjudicative assistance has often been more controversial than when adjudicators simply help litigants with procedural issues.

The Canadian Judicial Council statement is notable in that it encourages adjudicators to consider substantive assistance. It recognizes that self-represented litigants are increasingly important players within the legal system and it acknowledges that fairness requires steps to ensure their specific needs are addressed. Arguably, although not reflected to any large degree in written decisions, some adjudicators had been doing what the statement proposes well before it was introduced.\(^{52}\) It may be that the statement is most significant because it takes some of these measures out of the obscurity of oral rulings and puts them squarely on the table, in policies and in the jurisprudence. As we have seen, some of the measures the Statement proposes, including the more active role for adjudicators, engage thornier issues in the balance between fairness and impartiality. The challenge for adjudicators becomes how to reconcile these competing issues outside the traditional model of adjudication.

In this regard, one of the trends that has emerged most clearly from the case law is a tendency to apply both the rules of procedure and the rules of evidence with more flexibility where parties are self-represented. A statement of principle developed in


\(^{51}\) *Kainz*, *supra* note 50; and *Toronto-Dominion Bank v Hylton*, 2010 ONCA 752, 270 OAC 98 [*Hylton*].

\(^{52}\) See e.g. *McGibbon*, *supra* note 35, and *Darlyn*, *supra* note 40 at 482.
Massachusetts and which has served as a model for other American jurisdictions, states that although the law should be applied equally and without regard to representation, self-represented litigants should be afforded additional leeway in the application of legal rules. Although this approach is not spelled out so clearly in the Canadian Judicial Council Statement, it is consistent with the approach taken by Canadian decision-makers.

A number of Canadian adjudicators have explicitly adopted a more lenient or permissive approach when dealing with self-represented litigants. For example, some adjudicators have said that, where pleadings have been drafted by self-represented litigants, it is incumbent upon adjudicators to construe the allegations as liberally as possible in favour of the self-represented litigant and to “search the pleadings for any statement that could constitute a meritorious claim or defense.” Self-represented litigants also tend to have more leeway in amending pleadings at a late stage of the proceedings, introducing previously undisclosed evidence during the hearing, obtaining adjournments, introducing evidence of limited or questionable probative value according to the standard rules of evidence, and make additional submissions.

They are often given more “second chances”, including extensions of time or additional warnings before the consequences of their non-compliance with a substantive or procedural rule are imposed.

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53 See, Judicial Institute, supra note 41 at 3.2, where it states: “Judges shall adhere to the applicable rules of evidence, but may use their discretion, when permissible, to provide self-represented litigants the opportunity to meaningfully present their cases. Judges may ask questions to elicit general information and to obtain clarification. Judges should explain why the questions are being asked and that they should not be taken as any indication of the judge's opinion of the case.” Also see Delaware’s Guidelines, supra note 41 at 3.2

54 Cicciarella, supra note 38; Manitoba v A(J), supra note 42 at para32; and Fleming v North Bay (City), 2011 HRTO 140 (CanLII) [Fleming]. See also Carson & Stangaron, supra note 12 at 8 – 11.

55 See e.g. Manitoba v A(J), supra note 42 at para 31; Kovacevic, supra note 34.

56 Simmons v Trillium Health Centre, 2009 HRTO 1469 at para 8.


58 Audmax, ibid; Kainz, supra note 50; and Hylton, supra note 51.

59 Audmax, ibid at paras 10, 14-15.

60 Manitoba v A(J), supra note 42 at para 21, and McGibbon, supra note 35.
This more flexible approach to procedural and evidentiary rules is not, however, without limits. Adjudicators have implicitly found that fairness dictates a more flexible approach to self-represented litigants, but they do not go so far as to exempt these parties from substantive or procedural rules and the consequences of not complying with them.\textsuperscript{61} There remains some ambiguity here: adjudicators have struggled to articulate what it means to apply rules flexibly but fairly, in a way that does not amount to a double standard. Indeed, decision-makers have repeatedly stated that there are not two sets of rules, one set for self-represented litigants and another for parties that are represented.\textsuperscript{62} It is perhaps more accurate to state that while there may nominally be one standard, it can interpreted quite differently for different parties. Indeed, it seems quite clear from our jurisprudence that a party’s representation status is material and will affect how procedural and substantive standards are applied.

In \textit{Coleman v Photeman Farms Ltd}, the Manitoba Court of Appeal attempted to explain some of these nuances, as it contended with the difference between flexibility and arbitrariness.\textsuperscript{63} In that case, the issue before the court was whether the appellant, a self-represented litigant, was excused from complying with the requirement to perfect an appeal within a specified time period. The Court of Appeal first explained the need for some flexibility in the application of the rule. In this regard, Philip J.A. wrote:

\begin{quote}
In my view, a \textit{pro se} litigant should not be denied the opportunity of presenting his or her case to the court by a strict application of the Rules. The touchstone is fairness and that involves the balancing of the \textit{pro se} litigant’s imperfect knowledge of rules and procedures with the right of the other party to know the legal and factual issues that he or she must meet.\textsuperscript{64}
\end{quote}

In applying these principles to the facts of the case, however, Philip J.A. found that the lay litigant was not excused from the obligation to perfect the appeal. The obligation to perfection “is an issue that governs all litigants who are faced with the consequences of

\textsuperscript{61} Albrecht, Greacen, Rose Hough, & Zorza, \textit{supra} note 9 at 20.
\textsuperscript{62} \textit{PEK v BWK} 2004 ABCA 135, 348 AR 77 at para 7, “there are not two sets of procedures, that is, one for lawyers and one for self-represented parties”. See also \textit{Fleming, supra} note 54.
\textsuperscript{63} \textit{Coleman, supra} note 42.
\textsuperscript{64} \textit{Ibid} at paras 15 – 16.
their delay. The pro se status of the appellant does not excuse him from addressing that fundamental requirement.” 65

Others have found that, without more, the fact that a party is self-represented is not an extenuating circumstance that extends limitation periods. 66 Similarly, while a party’s self-represented status will attract additional latitude, it does not mean that it will be permitted to make unlimited or very late-stage amendments to the pleadings, 67 lead evidence that is entirely without probative value 68 or that he or she will be granted an unlimited number of adjournments. 69 As always, the challenge for adjudicators is to find the appropriate middle ground between fairness and impartiality.

Although there remains considerable ambiguity, there has been some notable jurisprudence regarding adjudicators’ role in helping self-represented litigants raise arguments or assert rights. Some courts have held that adjudicators have a positive obligation to alert self-represented parties to substantive and procedural arguments they might not otherwise have raised. These can include statutory defenses, limitation periods, jurisdictional issues, constitutional arguments, and requests for adjournments. 70 In some cases, a failure to provide this assistance has been held to be a reversible error or grounds for review. 71

An obligation to assist self-represented litigants by providing guidance and raising substantive legal issues has existed for some time in the criminal context. For example,

65 Ibid at para 16.
66 Bailey v Servos, 2007 CanLII 33116, 159 ACWS (3d) 605 (Ont Sup Ct); R v Basaraba; Basaraba v Rutley, 2006 MBCA 27 at paras 28 – 29, 201 Man R (2d) 302. See also Ibrahim v Hilton Toronto, 2012 HRTO 740 (CanLII); Panditaratne v TransLink and Lownsbring, 2009 BCHRT 172 (CanLII); Godfrey v Co-operators Group, 2011 HRTO 187 (CanLII).
67 See e.g. Bernard v Lakehead University, 2012 HRTO 370 (CanLII).
68 Washington v Toronto Police Services Board, 2009 HRTO 217 (CanLII); XY v Housing Connections, 2012 HRTO 1147 (CanLII). See also Gerrard v Canada (Attorney General), 2010 FC 1152 (CanLII); Hughes v Canada (Attorney General), 2010 FC 963 (CanLII), 375 FTR 1; See also Canada (Attorney General) v Mossop, 1993 SCR 554, 100 DLR (4th) 658.
69 Manitoba v A(J), supra note 42.
70 Julie M Bradlow, “Procedural Due Process Rights of Pro Se Civil Litigants,” (1988) 55 U Chicago L Rev 659; see Hylton, supra note 51; Kainz, supra note 51; R v Laycock (1996), 19 OTC 302, 32 WCB (2d) 427 (Ont Gen Div) [Laycock]; McGibbon, supra note 35 and Darlyn, supra note 40 at 482.
71 In Family and Children’s Services of Cumberland County v DMM, 2006 NSCA 75, 247 NSR (2d) 43 [DMM]; See also Audmax, supra note 57; and Griffin v O’Brien (2006), 263 DLR (4th) 412, 206 OAC 121 (Ont CA) [Griffin v O’Brien].
criminal courts are obliged to inquire into any possible infringement of a defendant’s Charter rights, even where these are not raised by the defendant. They must also aid unrepresented accused persons so that their defence is “brought out with its full force and effect.”

This type of obligation has expanded into civil cases as well. In some civil cases, courts have found that adjudicators have a positive obligation to provide procedural assistance to self-represented litigants. In Toronto Dominion Bank v Hylton the Ontario Court of Appeal ordered a new hearing based on the judge’s failure to grant a self-represented litigant’s request for adjournment. The Court of Appeal found that in order for the court to fulfill its obligation to assist the unrepresented litigant and ensure that he could present his case to the best of his abilities, the judge ought to have granted a request for adjournment.

Similarly, in Griffin v O’Brien, a majority of the Court of Appeal overturned a decision and found that the self-represented litigant was denied the opportunity to fairly present his case. The case involved a series of family law matters in which Dr. Griffin repeatedly sought to rescind arrears of spousal and child support, arguing that his annual income was approximately $16,500 not $115,000, as a court had earlier concluded. One of the key issues in determining Dr. Griffin’s income was the evidence of a third party: Dr. Griffin stated that he had received sums from the third party as a loan and not as income. In an earlier proceeding, the court commented that the material Dr. Griffin relied upon concerning the third party was not appropriate because it was not in “affidavit form sworn under oath”. The next time he sought to have the issue of his income

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72 R v Tran (2001), 55 OR (3d) 161, 156 CCC (3d) 1 (Ont CA) and R v 1275729 Ontario Inc (2005), 203 CCC (3d) 501, 205 OAC 359 (Ont CA) [1275729 Ontario Inc].
73 McGibbon, supra note 35; See also R v Sullivan, 2013 BCCA 32, 333 BCAC 196, where a majority of the British Court of Appeal overturned a decision because the judge in first instance had directed the self-represented accused’s questioning of a witness. The Court of Appeal concluded that because of the judge’s directions, the accused had been unable to question a witness in a manner and about issues that could have bolstered her defense.
74 See Hylton, supra note 51 at paras 25 – 26, where the Ontario Court of Appeal cites the criminal case, 1275729 Ontario Inc, supra note 72, for the proposition that, “[s]elf representation could in some circumstances diminish the impact of the failure to exercise due diligence on the admissibility of the evidence.” The Court of Appeal explains that while this notion arises out of a criminal matter, it sees no reason why a similar “contextual approach” should not be taken in civil matters.
75 Hylton, supra note 51; and Griffin v O’Brien, supra note 71.
76 Griffin v O’Brien, ibid
determined by the court, Dr. Griffin sought to rely on a notarized letter from the third party to establish that he had received a loan, not income. The trial judge refused to admit the document and advised Dr. Griffin that he must call the author of the letter as a witness. She denied Dr. Griffin’s request for an adjournment and drew an adverse inference from the fact that the third party did not testify.

The dynamic between Dr. Griffin and the trial judge is interesting in this case, particularly given the Court of Appeal’s decision to order a new trial. Arguably, Dr. Griffin is an example of an abusive self-represented litigant. Both the Court of Appeal and the lower court were critical of his behaviour during the proceedings. As the Court of Appeal noted, the trial judge had done a great deal to assist Dr. Griffin in the presentation of his case, including explaining to him how he should proceed.

However, rather than be influenced by the fact that Dr. Griffin was an abusive self-represented litigant with very limited chances of success, the Court of Appeal appropriately looked past Dr. Griffin’s behaviour and the merits of his case and assessed the fairness of the proceeding. The Court of Appeal found that the judge had failed in her duty to assist the self-represented litigant when she refused his request for an adjournment and drew an adverse inference from his failure to present a witness. According to the Court of Appeal, Dr. Griffin thought he was responding to the criticism of the judge in the prior proceeding who had criticized him for failing to produce information in affidavit form. The Court of Appeal held that just because Dr. Griffin was an experienced self-represented litigant did not mean that he understood what was required of him to secure the admission of his proposed evidence at trial.

Courts have also held that, even when a self-represented party does not explicitly request an adjournment, fairness requires that the adjudicator propose one. For example, in

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77 According to the Court of Appeal, “much in Griffin’s overly aggressive conduct of his litigation against his former wife that invites justifiable criticism.” One of the lower courts found Dr. Griffin’s behaviour to be an abuse of process. By the time his matter was before the Court of Appeal, Dr. Griffin had failed to produce documents when directed to do so, failed to produce documents under subpoena, persistently sought to re-litigate issues that had already been addressed by the courts; and delayed complying with multiple cost orders. See Griffin v O’Brien, *ibid* at para 8.


Audmax Inc v Ontario Human Rights Tribunal the Divisional Court overturned a decision of the Ontario Human Rights Tribunal because the adjudicator had failed to consider options (including a possible adjournment) for obtaining the evidence of a key witness for the self-represented respondent. In that case, the respondent gave the adjudicator a sealed envelope containing a letter from a key witness, explaining why he was unable to attend the hearing, and setting out the substance of his proposed evidence. The adjudicator did not read the letter and refused to accept it into evidence.

The Divisional Court held the Tribunal to a standard of correctness on this issue of procedural fairness. It concluded that it was apparent from the self-represented respondent’s witness list and her attempts to introduce the witness’s evidence in writing that she wished to rely on this evidence in her defense. According to the Court, because the respondent was self-represented and not fully aware of her rights, it was incumbent on the adjudicator to consider the implications of refusing to admit the letter and to inform the self-represented of the options available to her.

Importantly, however, the Divisional Court did not conclude that an adjournment should necessarily have been granted. Rather, it held that the adjudicator had an obligation to consider the available options and that his failure to do so compromised the overall fairness of the hearing. This unfairness was further compounded when the adjudicator drew an adverse inference from the key witness’ failure to testify.

This line of cases has not, however, translated into an automatic right to an adjournment for self-represented parties: for example, courts have held that it is appropriate to refuse multiple adjournments where the self-represented party has made no effort to comply with the reason for the original adjournment or where a further adjournment would unfairly compromise the interests of the opposing party.

In some circumstances, adjudicators also have a positive obligation to provide substantive assistance to self-represented parties. For example, the fact that administrative and

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80 See e.g. Audmax, supra note 57.
81 Ibid at para 33. Thus, fairness issues arising in administrative proceedings (including those involving self-represented litigants) are generally reviewed on the same standard as fairness issues arising in court proceedings.
82 See e.g. Manitoba v A(J), supra note 42.
possibly other decisions must be consistent with the *Charter* may mean that in some instances adjudicators must raise constitutional issues even though they may not have been advanced by the parties.\(^{83}\) Similarly, adjudicators may need to raise jurisdictional issues that have not been advanced by the parties. Some cases suggest that in matters involving self-represented parties, it is appropriate (and perhaps even required) that courts and tribunals raise objections to proposed evidence.\(^{84}\) For example, the Nova Scotia Court of Appeal found that where the self-represented litigant might claim privilege over proposed evidence, the judge should intervene to inform the litigant of his or her rights.\(^{85}\)

Again, however, there are limits on the substantive help that an adjudicator can appropriately provide. For example, *R v Laycock*, the Ontario Divisional Court acknowledged that fairness considerations require a more active role for courts, including raising procedural and substantive matters that the self-represented party had not advanced. However, the court explained:

> A trial judge should not be required to instruct a litigant on the nuances and subtleties of an extremely complicated body of knowledge. Nor should the trial judge be suggesting theories or weaknesses that ought to be pursued. That would be patently unfair to the opposing party and so onerous a duty as to be impossible.\(^{86}\)

This is echoed by the Manitoba Court of Appeal, in *Child and Family Services of Winnipeg v JA et al*, which involved an appeal from an order of permanent guardianship of a child. The child’s mother was self-represented appellant and the main issue before the court was whether her mental disorder meant that the child would be at serious and substantial risk if left in her care. The trial judge encouraged the mother to obtain legal

\(^{83}\) *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 at paras 2-8. It is unclear whether judicial decisions may also be subject to *Charter* scrutiny. See *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. For a detailed discussion of this, see 626381 Ontario Ltd v Kagan, Shastri, 2013 ONSC 4114 (CanLII).

\(^{84}\) See Rose Hough & Zelon, supra note 2 at 31. The authors write that because self-represented litigants tend not to object to the introduction of evidence and adjudicators, adjudicators should be “mindful” as to whether the evidence being proffered is appropriate.

\(^{85}\) See *DMM*, supra note 71 at para 26.

\(^{86}\) *Laycock*, supra note 70 at para 22. See also *Davids*, supra note 35 at paragraph 22; and *Baziuk*, supra note 35 at para 18.
aid counsel and repeatedly adjourned the proceeding so that she could do so. When it became apparent that the mother had taken no steps to obtain counsel, the judge found that it was in the best interest of the child for the matter to proceed. As the Court of Appeal explained, it was a difficult trial for both parties and for the judge himself. The mother was angry and hostile towards all but one of the witnesses and on occasion she behaved aggressively towards the trial judge himself. In the end, the trial judge found that it was also in the best interest of the child to grant the order for permanent guardianship and allow him to be adopted by his grandparents.

The self-represented litigant appealed the decision because she said the judge “might have reminded her” of elements of her case that she had omitted and that he had failed to give her guidance and advice on the best course for her to follow. According to the Court of Appeal, the mother’s appeal was not about any alleged failure of the trial judge to assist her in an understanding and even-handed way, but rather his failure to provide with substantive legal advice and guidance to advance her position. The Court dismissed the appeal, holding “no judge can assist an unrepresented litigant in this way and at the same time maintain the essential appearance and reality of impartiality that is a core precept of the judicial function.”

These examples help illustrate what is expected of an adjudicator in matters involving self-represented litigants. They also show how reviewing or appellate courts distinguish between procedural and substantive assistance. As we have seen, adjudicators have a positive obligation to assist self-represented litigants with procedural matters and the failure to do so may result in the decisions being reversed or quashed on fairness grounds. While appellate jurisprudence and guidelines such as the Canadian Judicial Council statement state that it is also appropriate for adjudicators to assist self-represented litigants with substantive legal matters, the jurisprudence has not treated substantive assistance as an obligation. In other words, while adjudicators are told that they should give substantive help to self-represented litigants, the case law tells us that there is no positive obligation to do so. Other than in the criminal context, the

87 Manitoba v A(J), supra note 42, at para 13.
88 See e.g. Manitoba v A(J), supra note 42 at para 40.
89 See e.g. Kainz, supra note 50; Hylton, supra note 51; and Audmax, supra note 57.
90 Manitoba v A(J), supra note 42. See also Canadian Judicial Council, “Statement of Principles” supra note 1.
application of the constitution, or matters relating to jurisdiction, raising substantive 
issues appears to be more of an advisable option for adjudicators than a positive 
obligation. Thus, while adjudicators may not typically be faulted for alerting a self-
represented party to a substantive legal issue, their decisions will not generally be 
reviewable on the sole grounds that they failed to shepherd a self-represented litigant 
through the subtleties and nuances of complex legal issues.

IV. CONCLUSION

Many of our traditional rules and processes were not developed for and are ill-
suited to self-represented litigants. While the needs of self-represented litigants have for 
some time informed how the legal system is administered, we have been slower to 
consider whether the needs of the self-represented litigant should also shape adjudicative 
approaches and procedural rules. While these latter issues may not yet be at the fore of 
academic or jurisprudential discussion, policy developments as well as some of the case 
law we have considered shows that subtle changes are taking place.

The presence of self-represented litigants within our legal system has encouraged 
a move towards adjudicative involvement that goes beyond seeking clarification and 
actually elicits evidence or raises legal and procedural issues. In Canada, there is 
growing recognition that this level of involvement is a necessary and appropriate 
response to the changing face of litigants. It is contemplated in both the Canadian 
Judicial Council statement and reflected in Canadian jurisprudence. Increasingly, 
adjudicative approaches seem to be characterized by what I have termed substantive 
impartiality.

This is not to suggest, however, that Canadian decision-makers are universally 
embracing substantive impartiality or that they are always striking the appropriate 
balance between impartiality and fairness. Some continue to refer to self-represented 
litigants as “burdens”, “problems” and “scourges”. For some adjudicators, self-

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91 See e.g. McLachlin, supra note 1; Carson & Stangaron, supra note 12; and Cardwell, supra note 2.
represented litigants are a nuisance, which they deal with expeditiously, with impatience, and with little thought for accommodating litigants’ particular needs.\(^{92}\)

Still, as we have seen, substantive impartiality is emerging in the jurisprudence not only as a general trend, but as an obligation. However, the measures and levels of adjudicative assistance vary significantly from case to case. In other words, even when an adjudicator is held to the standard of substantive impartiality, there may be a spectrum of appropriate assistive measures that do not offend either the principle of impartiality or of fairness.

My objective in writing this paper has been to call attention to the range of adjudicative responses to self-represented litigants and highlight some of the jurisprudential discussion about the evolving role of decision-makers. Whether an adjudicator adopts an approach of substantive impartiality and where an adjudicator falls along the spectrum of levels of assistance can have real implications for the parties, the outcome of the proceeding, and the administration of justice. In light of this, it is troubling that adjudicative approaches can be so wide-ranging and that although substantive impartiality has generally become the baseline, there remains considerable ambiguity as to its application.

The Supreme Court of Canada may soon have an opportunity provide some direction on this issue. It is scheduled to hear \textit{Bernard v PIPSC},\(^{93}\) a labour relations matter in which a self-represented litigant is seeking to raise a constitutional issue that was not before the original decision-maker. In deciding this matter, the Supreme Court may need to reflect on whether the applicant’s self-represented status should lead it to relax the legal principle that prevents new arguments being raised on appeal.

To allow any litigant to do so would be a marked departure from long-standing principles grounded in the notion that legal issues ought not to be decided in a factual vacuum and that parties must have an opportunity to lead evidence in support of their legal position. The \textit{Bernard} case involved many different steps and levels of proceeding. Such complex matters can be daunting for self-represented litigants and can leave questioning the fairness of a legal system that they feel limits their ability to raise

\(^{92}\) See e.g. Cicciarella, \textit{supra} note 38.

\(^{93}\) Elizabeth Bernard v Attorney General of Canada and Professional Institute of the Public Service of Canada, 2012 FCA 92, 431 NR 317.
constitutional arguments. However, real fairness issues also arise for opposing parties if they are called upon to address a new issue on appeal without an opportunity to present evidence to support their legal position. As we have seen, adjudicators have been struggling on a case-by-case basis to give additional leeway to self-represented litigants without appearing to apply a different set of rules to them. *Bernard* may be an opportunity for the Supreme Court to provide some guidance on these difficult and important issues.