Labour Boards and Self-Represented Litigants

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I. Introduction[1,2]

What are tribunals' and lawyers' obligations for improving access to justice for the self-represented litigant (SRL)?

Improving equitable access to justice continues to dominate the legal headlines. In *Hryniak* v. *Mauldin*, 2014 SCC 7 (*Hryniak*), the Supreme Court of Canada (SCC) recently commented on the impact that access to justice has on the rule of law:

> [1] **Ensuring access to justice is the greatest challenge to the rule of law in Canada today**. Trials have become increasingly expensive and protracted. **Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.**
>
> [2] Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. **The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.**
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> [3] Summary judgment motions provide one such opportunity. Following the *Civil Justice Reform Project: Summary of Findings and Recommendations* (2007) (the Osborne Report), Ontario amended the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (*Ontario Rules* or Rules) to increase access to justice. This appeal, and its companion, *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, address the proper interpretation of the amended Rule 20 (summary judgment motion).
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> (emphasis added)

The challenge for tribunals is to ensure their processes do not exclude SRLs[3], a goal which may include providing appropriate procedural instructions. Concurrently, however, tribunals must ensure that they do not become an advocate for any party.

[1] The comments in this paper are of a summary nature only and do not bind the CIRB or any of its members.
[2] The author thanks CIRB lawyers Ms. Lori Straznicky and Ms. Sara Bennett, as well as Ms. Stéphanie Paquette, for providing helpful background material used during the drafting of this paper.
[3] This paper does not deal with the equally important issue of querulous SRLs and the challenges they pose both to tribunals and legal counsel. For a more thorough review, see *Meads* v. *Meads*, 2012 ABQB 571. The panel discussion at the conference will include this topic.

This paper will first review the obligations tribunals and legal counsel have when dealing with SRLs. It will then describe some of the tools the Canada Industrial Relations Board (CIRB) has adopted to decide cases, often without elaborate oral hearings, while also helping all parties, including SRLs, understand its various processes.

II. Access to Justice Obligations

Access to justice does not simply mean providing a SRL with a date and time to plead his/her case. A tribunal cannot simply sit back and expect an SRL to present the case. In order to promote access to justice, a tribunal, as well as legal counsel, have certain obligations.

In September, 2006, the Canadian Judicial Council (CJC) adopted an advisory "Statement of Principles on Self-represented Litigants and Accused Persons" which commented on the obligations owed to SRLs. The Preamble to the Statement described those obligations:

> **Therefore**, judges, court administrators, members of the Bar, legal aid organizations, and government funding agencies each have responsibility to ensure that self-represented persons are provided with fair access and equal treatment by the court.

The CJC issued this Statement about Promoting Rights of Access:

> Judges, the courts and other participants in the justice system have a responsibility to promote opportunities for all persons to understand and meaningfully present their case, regardless of representation.

Principle #3 in support of this Statement holds that useful information should be made available to SRLs:

> 3. Information, assistance and self-help support required by self-represented persons should be made available through the various means by which self-represented persons normally seek information, including for example: pamphlets, telephone inquiries, courthouse inquiries, legal clinics, and internet searches and inquiries.

In support of promoting equal justice, the CJC issued this Principle for a tribunal adjudicating a case involving SRLs:

> 4. When one or both parties are proceeding without representation, non-prejudicial and engaged case and courtroom management may be needed to protect the litigants' equal

> right to be heard. Depending on the circumstances and nature of the case, the presiding judge may:
>
> (a) explain the process;
> (b) inquire whether both parties understand the process and the procedure;
> (c) make referrals to agencies able to assist the litigant in the preparation of the case;
> (d) provide information about the law and evidentiary requirements;
> (e) modify the traditional order of taking evidence; and
> (f) question witnesses.

The Quebec Court of Appeal in *Ménard* v. *Gardner*, 2012 QCCA 1546 gave practical guidance to the judiciary on the need to provide assistance to SRLs, but without becoming their protector:

> 58 …Yet, as indicated by our court in *Deschênes c. Valeurs mobilières Banque Laurentienne* and *Azar c. Concordia University* and by the Federal Court of Appeal in *Bérubé*, *supra*, **those who choose to represent themselves must assume the drawbacks of doing so and cannot usually complain about the consequences of their ignorance of the law, including the rules of evidence and rules of procedure, at least when they have received the assistance that the court or tribunal has a duty to provide**.
>
> 59 **Because, in fact, the principle of the responsibility of self-represented parties is tempered by the duty incumbent on the court or tribunal before which they appear to provide them with assistance. Indeed, in such cases, the court or tribunal is required to assist the parties by providing certain explanations concerning the process and how things are done.** Needless to say, the court or tribunal is not required to play the role that counsel would play with those parties; it does not advise them and cannot show them favouritism; it cannot lighten their burden of proof, relieve them of their obligations, or do the work for them; nor is it required to give them a course in substantive law or procedure. **It merely instructs self-represented parties on the basics and guides them generally, as needed (the extent of this duty to assist may therefore vary, as not all parties are equally disadvantaged before the courts and pretending otherwise would be an insult to their intelligence).**
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> 60 That said—and this actually goes without saying—in discharging this limited duty of assistance, the court or tribunal must of course be careful not to mislead the parties. W**ithout acting as the protector of self-represented parties, the court or tribunal must, insofar as possible, ensure that opposing parties, assuming that they are represented by counsel, do not benefit unduly from that advantage.**
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> (unofficial translation; emphasis added)

Ontario's Court of Appeal (OCA) has also commented on judicial intervention in trials involving SRLs. Evidently, a passive decision-maker who never intervenes may avoid allegations of bias. But a timid, hands-off approach, which encourages prolonged hearings and higher costs, does little to improve access to justice.

In *Chippewas of Mnjikaning First Nation* v. *Chiefs of Ontario*, 2010 ONCA 47, the OCA provided guidance on proper judicial intervention:

> [233] The reasons a trial judge may properly intervene include the need to focus the evidence on the matters in issue, to clarify evidence, to avoid irrelevant or repetitive evidence, to dispense with proof of obvious or agreed matters and to ensure that the way a witness is answering or not answering questions does not unduly hamper the progress of the trial.

In *Martin* v. *Sansome*, 2014 ONCA 14, the OCA examined a judge's interventions and clear expressions of frustration with an SRL. Despite inappropriate comments being made, the OCA dismissed the allegation that the judge was biased:

> [35] **This trial required a more proactive approach than is customary. I have reviewed those instances in which the trial judge intervened in the examination of witnesses. In most cases, they were motivated by an effort to focus the evidence on the matters in issue, clarify evidence and move a difficult trial along. In a few instances, the trial judge's questions were inappropriate, his language was ill-advised, or he transmitted his reaction to the distressing evidence that he heard.**
>
> [36] Some of the trial judge's conduct reflected his impatience and annoyance. The trial judge acknowledged this. In his orally delivered reasons, he apologized to the parties for his impatience at times. He explained: "I heard far too much evidence about things that were irrelevant, most of which Mr. Martin insisted upon presenting, despite my frequent entreaties to focus on the main issue".
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> …
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> [38] As the respondent argues, **the trial judge made clear efforts to assist the appellant. For example, he provided instructions on how to call and subpoena witnesses, gave the appellant an extension of time to provide a list of witnesses, and attempted to help the appellant to focus his evidence and structure his questions.** He also interrupted the evidence to ensure that the appellant understood the main issues in the proceedings and the implications of the proceedings.
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> [39] **I have also considered those instances in which the trial judge's comments or questions were inappropriate.** If taken alone, these statements could create the impression that he favoured the respondent's case over the appellant's. **However, I am not satisfied that when considered in the context of the trial, as a whole, a reasonable person would have the impression that the trial judge was predisposed to decide the issues before him in favour of the respondent.**
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> (emphasis added)

Just as tribunals have certain obligations in cases involving SRLs, so do opposing legal counsel.

The Law Society of Upper Canada (LSUC) in its Rules of Professional Conduct has dealt explicitly with a lawyer's initial obligation toward SRLs:

> 2.04 (14) When a lawyer is dealing on a client's behalf with an unrepresented person, the lawyer shall
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> (a) urge the unrepresented person to obtain independent legal representation,
>
> (b) take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer, and
>
> (c) make clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client and accordingly his or her comments may be partisan.

The LSUC has further published a Practice Management article[4] reminding lawyers of their obligations when dealing with SRLs. Among those obligations, the LSUC highlighted:

> i) the need to declare bias to your client's interests and urge the SRL to obtain representation (rule 2.02(14));
>
> ii) the obligation to provide information about procedural errors and actions to take, but without giving legal advice or opinions;
>
> iii) the need to maintain professional communications and be courteous, civil and acting in good faith;
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> iv) the requirement to act reasonably for requests such as adjournments, setting trial dates and waiving procedural formalities if such do not prejudice the client; and
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> v) the caution to avoid becoming a witness, since a lawyer cannot be both advocate and witness in his/her client's matter.

The Barreau du Québec provides comparable advice in its article « Le citoyen-plaideur sans avocat »[5].

The Fondation du barreau du Québec has published a book entitled "Seul devant la cour en matières civiles »[6] to assist SRLs with civil actions in the courts.

[4] http://www.lsuc.on.ca/UnrepresentedOrSelfRepresentedParties/
[5] http://www.barreau.qc.ca/pdf/journal/vol37/no5/citoyen.html
[6] http://www.fondationdubarreau.qc.ca/pdf/publication/seul-devant-la-cour-civiles-fr.pdf

Section 3.02.01(i) of Quebec's Code of Ethics of Advocates, CQLR c B-1, r 3, expressly prohibits lawyers from taking advantage of an unrepresented party:

> 3.02.01. The following acts, among others, are a breach of the obligation to act with integrity:
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> ...
>
> *(i)* acting in such a manner as to lead into error the opposite party who is not represented by an advocate, or abusing his good faith;

In short, in order to encourage proper access to justice, tribunals, including their staff, and legal counsel, have certain obligations when dealing with SRLs. The ability for decision-makers to meet these obligations will depend to a large extent on their own practical experience with tribunals.

Ironically, perhaps, a few tribunal decisions have led to an SRL suing both opposing counsel as well as the decision-maker.

Decision-makers who are sued find themselves in good company given that one SRL sued, albeit unsuccessfully, a number of judges in their personal capacity, including those on the SCC[7]:

> 38. The immunity of the superior court judges in Canada was described by the Supreme Court in *Morier,* above, at paragraphs 85 and following. The issue in that case was whether members of the Commission de police du Québec enjoyed the same immunity as superior court judges. They did, as stated by Mr. Justice Chouinard at paragraph 110:
>
> > Indeed, there is no question in the case at bar that appellants, members of the Commission de police, had the necessary jurisdiction to conduct an inquiry and to submit a report. It is possible that they exceeded their jurisdiction by doing or failing to do the acts mentioned in the statement of claim. It is possible that they contravened the rules of natural justice, that they did not inform respondent of the facts alleged against him or that they did not give him an opportunity to be heard. It is possible that they contravened the *Charter of human rights and freedoms*. All of these are allegations which may be used to support the respondent's other action to quash the report of the Commission de police and the evidence obtained. This action continues to be before the Superior Court, and of course I shall make no ruling upon it: but in my opinion these are not allegations which may be used as the basis for an action in damages.

[7] *Crowe* v. *Canada (Supreme Court, Judge),* 2007 FC 1209

In *Rainbow Concrete*[8], the Ontario Superior Court of Justice expressed in *obiter* its preference for giving administrative decision-makers judicial immunity:

> **6**. Both parties made extensive submissions on judicial immunity and whether Mr. Anderson is protected since he acted in his ad judicature capacity. While I do not propose to decide this motion on that basis, I find the Defendant's arguments about the status of the law and the rational for extending this immunity to MRA for more compelling than the Plaintiff's, on the basis of the principals set out in *Sirros* v. *Moore*, [1974] 3 All E.R. 776 (Eng. C.A.) and *Montgomery* v. *Zeus Developments Ltd.*, [1989] B.C.J. No. 255 (B.C. S.C.). I am also more persuaded by the Defendant's submissions with respect to the exception to immunity for allegations of bad faith (see *Tsai* v. *Klug*, [2005] O.J. No. 2277 (Ont. S.C.J.) aff [2006] O.J. No. 665 (Ont C.A.)) and the absolute nature of such immunity.
>
> [*sic*]

The Human Rights Tribunal of Ontario (HRTO) in *Taucar* v. *University of Western Ontario*, 2013 HRTO 597 (*Taucar*) extensively reviewed the concept of adjudicative immunity for decision-makers. It found the concept applied not only to adjudicators, but also to an arbitrator/mediator who had been retained to investigate alleged harassment:

> **45**. Whether explicitly or implicitly, **the Tribunal has relied upon two interrelated rationales for applying the doctrine of judicial immunity to quasi-judicial decision-makers**. Both rationales are consistent with the reasons of the Divisional Court in *Agnew*, above. **First, the Tribunal has accepted that quasi-judicial decision-makers are functionally comparable to judges**. These decision-makers play a critical role in the administrative justice system. They are called upon to adjudicate the fundamental rights of citizens. Therefore, impartiality and independence of thought and decision-making is no less important for quasi-judicial decision-makers than for judges. See for example: *Hazel, above* at para. 86; *Cartier, above* at para. 20.
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> **46**. **The second rationale the Tribunal has relied upon for extending the doctrine of judicial immunity to quasi-judicial decision-makers is to prevent collateral attacks on their decisions. The application of the doctrine of adjudicative immunity ensures that adjudicative decisions are reviewed through the proper channels of judicial review and appeal instead of by undertaking a legal proceeding against the adjudicator himself or herself.** If parties are dissatisfied with the decisions of quasi-judicial decision makers, they may appeal these decisions or seek judicial review where available, but they are prevented from pursuing litigation against them before the Tribunal. See for example, *Hazel* at para. 98 and *Bin Slama* at para. 14.
>
> …
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> **63**. **The applicant's counsel argues that, even if the doctrine of adjudicative immunity may apply to some quasi-judicial decision-makers, it does not apply to the Swan respondents. He argues that the doctrine is inapplicable to the Swan respondents because, in his view, Mr. Swan was not an arbitrator under the collective agreement**. Therefore, according to the applicant's counsel, he

[8] *Rainbow Concrete Industries Ltd.* v. *Anderson*, [2011] O.J. No. 3763 (*Rainbow Concrete*)

> was not governed by the *Labour Relations Act*, 1995, S.O. 1995, c. 1, Sched. A. Both before me and before the Divisional Court, the applicant's counsel argued that Mr. Swan was a private arbitrator covered by the *Arbitrations Act.* I note that the Divisional Court rejected this argument in its decision on a preliminary motion relating to the applicant's judicial review application: *Taucar v. University of Western Ontario*, 2011 ONSC 1535. The Divisional Court treated Mr. Swan as an arbitrator or quasi-judicial decision-maker subject to the ***Judicial Review Procedure Act,* R.S.O. 1990, c. J.1**, by applying the test for the admissibility of affidavits in judicial review proceedings developed by the Court of Appeal for Ontario in *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* **1980 CanLII 1877 (ON CA)**, (1980), 29 O.R. (2d) 513 (C.A.). **In any event, whether Mr. Swan was governed by the *Arbitrations Act* or the *Labour Relations Act* is immaterial as the Tribunal has held that the doctrine of adjudicative immunity applies to both.**
>
> **64**. **I find that the Swan respondents are covered by the doctrine of adjudicative immunity.** In making this determination I have taken into account the particular circumstances surrounding Mr. Swan's role in this case. I have carefully reviewed the Memorandum of Agreement under which Mr. Swan was appointed against the context of the dispute-resolution process for discrimination and harassment complaints set out in the collective agreement. **Based on this review, I find that Mr. Swan's role was to be a neutral and impartial fact-finder who carried out functions that were integral to the alternate dispute resolution process agreed to by the parties to the Memorandum of Agreement**. As Mr. Swan noted in his report, although he was assigned a fact-finding role, this role necessarily required him to engage in an interpretation of what constitutes discrimination and harassment in order to decide which facts were pertinent and to place the facts in context. Moreover, it is clear from the materials filed by the parties that Mr. Swan was to exercise his jurisdiction as a substitute for the Panel of Inquiry which itself is an alternative to the collective agreement's grievance arbitration procedure to deal specifically with discrimination and harassment complaints filed under the collective agreement. For all these reasons, I find that Mr. Swan was the kind of neutral or impartial third party deciding disputes between others to which the doctrine of adjudicative immunity applies.

(emphasis added)

Ontario's Divisional Court agreed with the HRTO's comments about adjudicative immunity[9]:

> 20. If we are incorrect in our exercise of discretion, we find that the analysis undertaken by the Vice-chair was correct with respect to both the issue of "reasonable prospect" as well as adjudicative immunity.
>
> …
>
> 23. Finally, the Vice-chair's analysis with respect to adjudicative immunity was thorough, comprehensive and is correct. It need not be repeated here.

If the courts continue to support the concept of adjudicative immunity for decision-makers, then tribunals should not hesitate to intervene, when necessary, to give appropriate information in order to provide SRLs with a reasonable opportunity to present their cases.

[9] *Taucar* v. *Human Rights Tribunal of Ontario*, 2014 ONSC 1818 (Divisional Court)

Tribunals, as the HRTO decision noted, must also be aware that their processes may be used, if not abused, to attack legal counsel who represented a party. The courts, administrative tribunals, as well as the self-regulating provincial bars, need to ensure their processes are not used inappropriately to harass legal counsel who simply acted as an advocate[10].

In the next section, this paper will describe the processes and the current resources the CIRB provides to all parties in order to improve access to justice.

III. CIRB processes and resources for all parties, including SRLs

All tribunals discuss internally various ways to improve access to justice. This is particularly the case at the CIRB which is not required under the *Canada Labour Code* (*Code*) to hold an oral hearing in all cases:

> 16.1 The Board may decide any matter before it without holding an oral hearing.

The written pleadings take on an increased significance given that the Board may not hold an oral hearing.

The CIRB assists SRLs, and indeed all parties, in numerous ways.

Its Industrial Relations Officers (IRO), besides being heavily involved in settling disputes, process new applications/complaints. They may provide general information about the Board's processes.

The *Canada Industrial Relations Board Regulations, 2012* (*Regulations*) have recently been reorganized and written in plainer language in order to describe the pleading requirements for applications, complaints, responses and replies. The *Regulations* also deal with other procedural issues, such as document disclosure, adjournments and the need for will-say statements.

[10] For an example of how the CIRB dealt with a duty of fair representation complaint contesting how legal counsel had pleaded a case at arbitration, see *Browne*, 2012 CIRB 648 at paragraphs 51-64. The CIRB may decide this type of case based solely on the written pleadings, *infra*.

The CIRB has drafted a series of Information Circulars (ICs) designed to demystify the adjudication process, as well as provide guidance about certain specific applications. Current IC topics include: i) The role of an IRO; ii) CIRB hearings; iii) Duty of fair representation complaints and iv) Certification/revocation applications.

While section 5 of *Regulations* notes that the use of the standard forms is not essential, the CIRB has designed these forms to focus the parties on the essential elements they need to plead. For example, the detailed duty of fair representation (DFR) form helps complainants understand the scope of a trade union's duty under the *Code*. It further focuses complainants to help them provide the material facts in support of their complaint.

What might occur if a layperson had difficulty pleading a case like a DFR?

In *Reid*, 2013 CIRB 693 (*Reid 693*), the complainant filed a 356-page DFR complaint, inclusive of extensive documentation. The Board commented explicitly on the situation of an SRL:

> [13] What should the Board do when faced with this type of initial pleading?
>
> [14] The *Canada Industrial Relations Board Regulations, 2012* (*Regulations*) establish the essential content of a complaint. For example, section 40 of the *Regulations* requires a complainant filing an unfair practice complaint (of which a DFR complaint is just one type) to provide proper particulars:
>
> > 40.(1) A complaint must include
> >
> > …
> >
> > (*d*) full particulars of the facts, relevant dates and grounds for the complaint;
> >
> > …
>
> [15] **The Board is not alone among administrative tribunals in attempting to demystify its adjudicative process for lay people.** No labour tribunal expects lay people to be as familiar with legal concepts as are experienced labour lawyers or labour relations experts.
>
> [16] **Indeed, the Board has created public "Information Circulars" (ICs), available on its website, in order to assist all parties, whether lay people or not, with Board proceedings.** One IC entitled "Duty of Fair Representation" helps lay people understand the scope of a trade union's duty under section 37 of the *Code*.
>
> [17] That IC indicates that the Board, when reviewing a DFR complaint, examines a trade union's process in order to see if it meets the high threshold of being arbitrary, discriminatory or in bad faith.

> The IC emphasizes that the Board does not sit in appeal of a trade union's decisions. A trade union has a large discretion when representing the members of its bargaining unit.
>
> [18] **The Board has further created a non-obligatory DFR Complaint Form which is designed to focus complainants on the need to describe how their trade union allegedly acted in an arbitrary, discriminatory or bad faith manner with regard to their rights under the collective agreement.** Ms. Reid put some of her comments on that form, but her complaint did not seem to focus on the actual questions the Board had set out.
>
> [19] **While the Board has attempted to assist lay people to focus on the essential elements of a DFR complaint, it is ultimately up to each complainant to submit a proper pleading.** Neither the Board, nor the opposing parties, are required to sift through reams of material in an attempt to analyze whether they contain sufficient elements to make out a cause of action.
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> (emphasis added)

The Board in *Reid 693*, *supra*, described the *prima facie* case test it applies to all DFR complaints before it requests a response from the trade union. This *prima facie* case test, while helping the Board manage its limited resources, is equally relevant to the issue of the querulous SRL, both from the trade union's and its legal counsel's perspective[11]. The Board decided in *Reid 693* to allow the complainant to provide further particulars:

> [32] As mentioned above, **the Board is fully aware that Ms. Reid, like many unrepresented litigants, may not be familiar with the *Code*.** But a complainant still has the ultimate obligation of going through his/her own material, including allegedly relevant documents, and drafting a complaint in accordance with the *Regulations*. That obligation is not satisfied by filing hundreds of pages of documents and implicitly asking the Board to go through it and decide what, if anything, should form part of a complaint.
>
> [33] **It would be unfair in a DFR case for the Board to forego the essential *prima facie* case screening analysis of an unwieldy pleading and instead ask the respondents to provide their submissions. One of the goals of the *prima facie* process is to avoid the waste of resources which occurred in the past when respondents had to respond to every DFR complaint, no matter how deficient.**
>
> [34] **The *quid pro quo* is that respondents must now take the time necessary to respond properly in those cases where the Board requests submissions after finding that a prima facie case exists.**
>
> [35] **In this case, the Board is not prepared to dismiss Ms. Reid's complaint outright, though that is an available option in the right circumstances.** While the complaint is unfocussed, Ms. Reid initially attempted to set out her concerns with regard to CUPW's alleged actions.
>
> [36] However, it will be up to Ms. Reid to provide a proper and focussed pleading.

[11] *Browne* 648, *supra*.

> [37] **The Board orders Ms. Reid to do the following for her DFR complaint:**
>
> - **Ms. Reid will set out specifically how CUPW allegedly acted in an arbitrary, discriminatory and/or bad faith manner with regard to her rights under the collective agreement;**
> - **Ms. Reid will attach to her complaint only relevant documents, together with an explanation of their relevance;**
> - **The Board refers Ms. Reid to its recent decision in *Browne*, 2012 CIRB 648, which reviewed certain key DFR principles.**
>
> [38] Once Ms. Reid has provided this particularized pleading, the Board will then examine the complaint anew. The respondents are not required to take any further steps at this point.
>
> (emphasis added)

While the Board will attempt to balance the parties' interests, this does not mean that SRLs obtain more leeway than represented parties. For example, the *Code* imposes time limits for the filing of complaints. All parties, including SRLs, have an equal responsibility to meet them, subject to the Board exercising its discretion to extend the time limits[12]:

> [21] In this matter, the exceptional reason given by the complainant as to why he filed the complaint in an untimely manner was because he "was not aware of time limit."
>
> [22] **The Board does not consider lack of knowledge of the provisions of the *Code* to be "compelling" circumstances beyond the complainant's control.** As explained in *Galarneau*, 2003 CIRB 239, oversight or negligence on the part of the complainant is not considered to be a reason beyond the complainant's control:
>
> > [29] Generally, the Board will only extend time limits where the delay was beyond a complainant's control. This might include, for example, a situation where a complainant was ill to such a degree that he was prevented from filing the complaint on time. Oversight or negligence on the part of a complainant will not be regarded as beyond his control (see *Gary T. Sayle*, July 4, 2002 (CIRB LD 674)); neither will seeking an alternative avenue of redress.
>
> [23] **Moreover, the fact that the complainant may be considered as a layperson who is self-represented before the Board is also not sufficient to warrant an extension. The time limits apply equally to all parties.** This was expressed in *Torres*, supra, as follows:
>
> > [20] **While it may appear unfair that laypeople need to act quickly in bringing labour relations complaints forward, section 97(2) applies equally to trade unions and employers.**

[12] *Dunne*, 2013 CIRB 705.

> [21] The Board will not exercise its discretion under section 16(*m*.1) so as to render illusory the Legislator's intent to oblige parties to file their labour relations complaints expeditiously.
>
> [24] In the present matter, the Board finds that the complainant has not presented any compelling reasons to explain the untimely filing of his complaint that would convince the Board to exercise its discretion to extend the time limit pursuant to section 16(*m*.1) of the *Code*.
>
> (emphasis added)

A diligent party, including an SRL, may convince the Board in a special situation to extend the 90-day time limit, as recently occurred in *Perron-Martin*, 2014 CIRB 719:

> [24] Notwithstanding the general principle described in *Kerr 631*, *supra*, the Board finds that Ms. Perron-Martin's complaint constitutes an exceptional case which warrants an extension of the 90-day limit. A number of factors support this conclusion.
>
> [25] First of all, Ms. Perron-Martin acted diligently following her dismissal. She filed several complaints at the provincial and federal levels. This is not a case where a complainant did nothing for 90 days. Ms. Perron-Martin always wanted to contest her dismissal.
>
> [26] Secondly, constitutional law is complicated; the Supreme Court of Canada is not always unanimous in its constitutional law decisions. The fact that a diligent complainant failed to file a complaint in the proper jurisdiction can be a relevant factor when the Board is considering whether it should exercise its discretion. However, this does not mean that filing a complaint in the wrong jurisdiction automatically gives a right to an extension of the *Code*'s time limits.
>
> [27] Third, and this is perhaps the most important factor in this case, the number of days exceeding the 90-day time limit is relatively low. When one compares the 24-day delay (24 days over and above the 90-day limit) in this case with the six-month delay in *Kerr 631*, *supra*, the Board's exercise of its discretion under the *Code* becomes appropriate.

IV. Conclusion

A negotiated settlement does not necessarily mean a party received equitable access to justice. An SRL may accept a settlement only after being overwhelmed by a strange and unfriendly adjudicative process. Similarly, a represented party may settle after being terrified by the escalating costs of its representative in a proceeding.

Only a settlement that actually addresses and settles the underlying legal issue(s) may meet the goal of promoting equitable access to justice.

Similar considerations exist when a tribunal examines its processes for resolving disputes. When an SRL appears before it, any tribunal might ask itself if it has provided sufficient information

about the process and the legal issues, but without becoming a representative or protector for one side.

Without attempting to create an exhaustive list, a tribunal might ask itself some of the following questions when dealing with SRLs:

1. How much advice may IROs provide to parties, including SRLs?

2. Can staff or the Board mention to a party, including SRLs, the existence of other potentially relevant *Code* sections which they may have overlooked in their pleadings?

3. When do a panel's comments change from merely being informational and move into the realm of providing legal advice to an SRL?

4. Can a panel member's questions go beyond seeking clarification about the evidence as adduced and explore new and untouched factual areas?

5. Can a panel explain the meaning of one of its interim written decisions, or must the decision always speak for itself?

6. Should a decision-maker in cases involving SRLs be more or less open to separating the parties and mediating? Will a reviewing court fully understand this labour law practice, which is widespread in some jurisdictions[13]?

8. Should a decision-maker ever give an opinion on the merits of a proposed settlement?

[13] Section 15.1(1) of the *Code* states: "The Board, or any member or employee of the Board designated by the Board, may, if the parties agree, assist the parties in resolving any issues in dispute at any stage of a proceeding and by any means that the Board considers appropriate, without prejudice to the Board's power to determine issues that have not been settled".

The SCC in *Hryniak* clearly promoted the concept of summary judgment as a way to improve access to justice. Some administrative tribunals have long applied a similar concept to decide cases expeditiously. But the challenge still remains between balancing access to justice with the time-tested methods used in the hearing process to determine the facts and apply the applicable law to them.

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