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"I'm Not a Lawyer, Your Honour": Tips for Dealing with the Self-Represented Litigant

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"I'M NOT A LAWYER, YOUR HONOUR": TIPS FOR DEALING WITH THE SELF-REPRESENTED LITIGANT

I. Introduction

More and more, lawyers and the courts must deal with self-represented litigants.

The high cost of retaining and maintaining counsel combined with the perception by many members of the public that they can do just as well as a lawyer (or that the lawyer they have consulted failed to appreciate how strong their case is), leads many people to represent themselves.

A self-represented litigant may mistakenly believe that the court will become its advocate. In *Topgro Greenhouses Ltd. v. Houwelling*, 2006 BCCA 183, the Court of Appeal explained that the courts are not required to advocate for self-represented litigants:

> [51] Mr. Houweling's factum can only be described as incoherent. His oral submissions did little to assist us. We are not obliged to create arguments for an in-person litigant such as Mr. Houweling. As this Court stated in *Newson v. Kexco Publishing Co.*, 1995 CanLII 1182 (BC C.A.), (1995), 17 B.C.L.R. (3d) 176 at para. 19, 111 W.A.C. 297:
>
> > Our obligation, as with all litigants in persons, is to put our deepest understanding to the arguments being made without becoming advocates for the personal litigant or creating new arguments which he has not advanced …

Self-represented litigants do not have "some kind of special status" that allows them to ignore the Supreme Court Civil Rules, although the court is required to ensure that self-represented litigants have a fair opportunity to present their case.

Burnaby (City) v. Oh, 2011 BCCA 222, para 35-36

Self-represented litigants pose a challenge for both the courts and opposing counsel.

This paper suggests strategies and considerations for counsel dealing with self-represented litigants. This paper is designed to address issues that arise during chambers applications, but many of the strategies will also apply to other aspects of the proceedings.

II. Never Forget Your Ethical Obligations

Dealing with self-represented litigants can be extremely frustrating.

Self-represented litigants are not bound by the ethical obligations of the legal profession.

Many self-represented litigants take matters personally. Some may lie or refuse to recognize the truth. Some may be abusive or rude. Some may be polite and respectful, but under a great deal of stress.

Regardless of the behaviour of the self-represented litigant, a lawyer remains bound by the ethical obligations of lawyers and officers of the court.

In general, counsel should always keep all submissions, correspondence and conversations cordial, respectful and polite.

Counsel should ask themselves whether they would be embarrassed if their statements or correspondence were put before the court.

Counsel should also remember their duty to the court not to misstate facts or law and to provide full disclosure of relevant facts and law to the court. Counsel should strive to prevent the frustration of dealing with a difficult self-represented litigant from overwhelming their better judgment.

Self-represented litigants are deserving of the same courtesy as a lawyer.

Counsel's conduct toward a self-represented litigant should be characterized by courtesy and good faith. Counsel should avoid sharp practice or taking paltry advantage on a small technical mistake.

Lawyers should keep their ethical obligations in the front of their mind. Self-represented litigants disappointed with the outcome of a case or application often look to place the blame elsewhere and may complain to the Law Society about the conduct of opposing counsel.

III. Keep the Court's Obligations in Mind

The Canadian Judicial Council has adopted a *Statement of Principles on Self-Represented Litigants and Accused Persons*.

The Statement of Principles encourages the courts (and other participants in the justice system) to "promote opportunities for all persons to understand and meaningfully present their case" and to "promote access to the justice system for all persons on an equal basis."

> Canadian Judicial Council, *Statement of Principles on Self-Represented Litigants and Accused Persons*, September 2006, at 2–5.

The Statement of Principles encourages the courts to:

> (a) inform self-represented parties of the potential consequences and responsibilities of proceeding without a lawyer and to refer self-represented litigants to available sources of representation and information;
>
> (b) do whatever is possible to provide a fair process and prevent unfair disadvantage to a self-represented litigant;
>
> (c) not deny relief to a self-represented litigant on the basis of a minor or easily rectified deficiency;
>
> (d) engage in case management activities when required to provide a fair process; and
>
> (e) engage in courtroom management such as explaining the process and providing information about the law or evidentiary requirements to provide a fair process.
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> Canadian Judicial Council, *Statement of Principles on Self-Represented Litigants and Accused Persons*, September 2006, at 2–5

The Statement of Principles also makes clear that self-represented litigants are expected to familiarize themselves with relevant practices and procedures, to prepare their own case and to be respectful of the court process.

> Canadian Judicial Council, *Statement of Principles on Self-Represented Litigants and Accused Persons*, September 2006, at 9

The Court of Appeal has affirmed some of these principles in decisions such as *Burnaby (City) v. Oh*, 2011 BCCA 222 and *Murphy v. Wynne*, 2012 BCCA 113.

The role of a Supreme Court judge in dealing with self-represented litigants is discussed in detail in *Burnaby (City) v. Oh*, but is succinctly described in *Murphy v. Wynne*:

> While it is important unrepresented litigants have a full opportunity to avail themselves of our court processes, all litigants must keep within the bounds of those processes (para. 16)

Counsel should be aware of these principles and should not be discouraged if the courts appear to be overly helpful to self-represented litigants. Sometimes the court will appear to be overly helpful to the self-represented litigant because it is aware the self-represented litigants' argument is doomed to fail and it wants to make sure that the self-represented litigant feels that his or her case has been heard and carefully considered by the court.

Counsel can take advantage of these principles by suggesting case management or court management activities that facilitate the self-represented litigants access to justice and streamline the proceedings to the benefit of the court and counsel.

Counsel can assist the court in meeting the objectives in the Statement of Principles by delivering a letter to the self-represented litigant explaining the process and the applicable rules and urging the self-represented litigant to obtain advice or information from available sources.

By providing this information to the self-represented litigant, counsel not only fulfills his or her ethical obligations and assists the court with its obligations, counsel may also improve his or her chances for success by foreclosing various arguments the self-represented litigant might make about not understanding the process.

IV. Assess the Personality of the Self-Represented Litigant

Assess the personality of a self-represented litigant and the reason that the litigant is self-represented. It is helpful to differentiate between self-represented litigants who choose to represent themselves and unrepresented litigants who cannot afford counsel.

Different personalities may require different approaches. For example, consider whether the self-represented litigant is the type of person who feels aggrieved or wronged. Often their submissions are rambling or disjointed.

When confronted with this type of litigant, the best strategy may be to allow the self-represented litigant to speak as often as possible during the chambers hearing. Their submission may make it plain to the judge that there is little or no merit to their position and may eliminate any sympathy the judge may have otherwise felt for the self-represented litigant.

Different strategies may apply when the self-represented litigant is a defendant. These self-represented litigants may attempt to invoke the pity of the court by telling a sad story about their circumstances and asking for time to find a lawyer to represent them.

The courts are often sympathetic to this type of litigant. Counsel can reduce the sympathy the court may feel by advising the court of the history of the proceedings and the prejudice suffered by their client. Providing a written chronology for the court's benefit can be very helpful in illustrating the delay caused by the self-represented litigant.

Counsel may also reduce the sympathy factor by being reasonable.

For example, if the self-represented litigant is seeking an adjournment to obtain counsel, counsel may consent to an adjournment to a specific date on the condition that it will be peremptory on the self-represented litigant. This way, counsel takes the difficult decision away from the court and maintains control of the proceeding by ensuring that the application is not adjourned indefinitely or endlessly.

V. Delivery of a Chamber's Application and Supporting Material

When delivering a chambers application to a self-represented litigant, counsel must ensure that they have complied with all of the rules relating to the application, and particularly those rules relating to service and notice.

If proper service or proper notice is not given, an adjournment will be the likely result.

Counsel should consider contacting a self-represented litigant to determine their availability before scheduling a heading. Not only will determining a self-represented litigant's availability in advance make it more difficult for them to request an adjournment, but it will make it easier for a lawyer to obtain an adjournment if the self-represented litigant unilaterally schedules a hearing on a date the lawyer is not available.

See also *Delvarani v. Delvarani*, 2012 BCSC 1178, in which the Court commented that it expects self-represented litigants to respect counsel's availability.

Consider delivering a cover letter, along with the Notice of Application plainly describing:

(a) the substance of the application;

(b) what must be done in order to respond to the application; and

(c) the time limits required for the response.

Sending this type of letter allows counsel to produce the letter in court if the self-represented litigant claims being unaware of the nature of the application or that an affidavit was required.

Consider listing the contact information for free legal clinics that may assist the self-represented litigant or websites which contain helpful information or a copy of the Supreme Court Civil Rules in the cover letter. (The BC Supreme Court website, www.courts.gov.bc.ca, has a section devoted to assisting self-represented litigants.) Encourage the self-represented litigant to obtain legal advice.

If the application concerns a particular rule or statutory provision consider enclosing a copy or providing a website reference.

Often, self-represented litigants do not file an Application Response or responding affidavits.

Send a reminder letter that the deadline for delivering an Application Response has expired and describe the documents the self-represented litigant must provide in response and the consequences of failing to respond.

Even if not required to do so, deliver a courtesy copy of the Application Record Index to the self-represented litigant, along with a reminder of the hearing date.

Counsel should consider delivering a Notice of Application that contains a thorough argument, particularly if the relief sought is important or the legal argument is complicated and providing copies of caselaw and/or statutes well in advance of the hearing which will foreclose many potential arguments about the process or its unfairness.

In certain circumstances providing a self-represented litigant with copies of material not formally required by the rules has been transformed into a legal requirement. In *Cecil v. Holt Renfrew & Co.*, [2001] B.C.J. No. 789 (P.C.), the Small Claims Court held that it would not hear an application to dismiss a claim at a Settlement Conference unless prior to the Settlement Conference counsel had given notice to the self-represented litigant of counsel's argument and any relevant caselaw.

Even if you are not required to deliver a detailed argument or caselaw to a self-represented litigant, it is wise to do so. The self-represented litigant cannot claim to be taken by surprise or make a persuasive argument for an adjournment.

Finally, prepare a chronology of the proceedings to pass to the judge if necessary. In difficult proceedings, a chronology will quickly allow the court to understand the course of the proceedings and any attempts the self-represented litigant has made to avoid dealing with the applications.

VI. Filing of Chambers Material

The filing of chambers material is largely dealt with by the rules. However, if a self-represented litigant is making an application, counsel should consider preparing an additional Application Record for the court in case the self-represented litigant has not filed a proper Application Record.

Consider whether there is additional material that the court will need to render a proper decision, to understand the nature of the proceeding, or to place the application in context. Either file that material or bring it to the hearing.

VII. The Chambers Hearing

When counsel arrives at the chambers hearing, he or she should locate the self-represented litigant and introduce themselves.

Counsel should be polite and professional and should keep in mind that the self-represented litigant may be nervous or stressed.

If the self-represented litigant is not experienced in court proceedings, you should explain the chambers procedure. Explain how consent matters or unopposed matters are heard first and that contested matters are heard in order of increasing time estimate. You may explain that applications may be referred to another judge in another court room.

Counsel should ensure that the matter has been checked-in with the court clerk and that the time estimate is accurate. Consider increasing the time estimate as many self-represented litigants take a longer time to present their argument.

Ask the self-represented litigant if there are any additional materials that they may rely on.

If there are any materials counsel has not already delivered to the self-represented litigant, counsel should deliver them as soon as possible and explain why they were not previously delivered.

Consider asking the self-represented litigant whether some issues can be resolved by consent. Compromise resolutions may be achieved on some issues, streamlining the issues to the benefit of the court and the parties. An imminent hearing may cause a formerly intransigent self-represented litigant to resolve some or all of the issues.

If counsel expects the self-represented litigant to appear but he/she does not, counsel should consider telephoning or emailing the self-represented litigant to ask whether he or she intends to appear. If counsel receives an email from the self-represented litigant on the morning of the hearing claiming that they are unable to attend, counsel should print the email and provide a copy to the court so that there is no risk that counsel will misstate the self-represented litigant's position.

VIII. Submissions at the Hearing

The most important task in any application is to make it as easy as possible for the court to make the order counsel seeks. This is particularly important when a self-represented litigant is involved.

Remain calm throughout the hearing. Be concise in submissions.

Avoid objecting during the submissions of a self-represented litigant unless the self-represented litigant is misleading the court on a point of substance. Be prepared, for the court may interrupt the self-represented litigant and ask for some guidance from counsel, in which case be brief and scrupulously fair.

If the self-represented litigant has misrepresented the facts of the case, counsel should illustrate the examples concisely in reply.

Draw to the court's attention those portions of the self-represented litigant's argument that are not supported by admissible affidavit evidence, particularly when those portions are contradicted by documentary evidence.

Be fair and accurate when describing the facts or law to the court, particularly when answering a question posed by the court.

Be prepared to deal with complaints by self-represented litigants about the process and perceived past injustices. A chronology and history of the proceedings will blunt these complaints.

Do not be afraid to ask questions of the court to clarify the terms of the order.

Consult with the court clerk to ensure that the clerk's notes are accurate and that counsel has accurately recorded the court's order. This will prevent the Registry from rejecting an order that does not comply with the clerk's notes.

It is good practice to ask the court for a direction under Rule 13-1(1) that the order be drafted by counsel and filed without the endorsement of the self-represented litigant. Self-represented litigants will sometimes refuse to endorse an order with which they disagree, even if it is properly drafted.

It is even better practice to take a draft order to chambers so that it can be signed by the court at the hearing. The order must be vetted by the Registry before presenting the order to the court, otherwise the court will generally not sign the order. Taking a draft order to the court avoids any difficulties with obtaining the endorsement of the self-represented litigant.

IX. After the Hearing

After the hearing, counsel should consider speaking to the self-represented litigant to ensure that the self-represented litigant understands the order made by the court and the consequences of not complying with the order.

Deliver a letter to the self-represented litigant confirming the order made by the court. Explain in clear terms any actions the self-represented litigant must take and the time limits for those actions. Explain that the order takes effect immediately even if it has not yet been entered. Explain the ramifications of failing to comply with the court's order.

If counsel has obtained leave of the court to file the order without the endorsement of the self-represented litigant, deliver a copy of the order to the self-represented litigant. Deliver an entered copy of the order to the self-represented litigant promptly after it's entered.

If it is likely that the self-represented litigant will not comply with the terms of the order, counsel should consider writing a letter to the Registry asking the Registry to process the order on a priority basis so that counsel can have a copy of the entered order for any subsequent applications.

X. Special Topics

A. Dealing with Adjournment Applications

Self-represented litigants will often seek an adjournment of a hearing, often with an argument that they are in the process of hiring a lawyer or with a story designed to elicit sympathy from the court.

Counsel can make it more difficult for a self-represented litigant to obtain an adjournment by taking the steps discussed in this paper.

Counsel should emphasize the history of the proceeding (if there is a history of adjournments or non-compliance with the Civil Rules), the merits of the application (particularly if the application is straightforward and the self-represented litigant has no real response) and the prejudice the client will suffer if the application is adjourned.

If it becomes clear that an adjournment will be granted, counsel should request terms that will force the matter to be heard, such as an early hearing date, dates for the delivery of application materials or a peremptory date.

If a self-represented litigant has convinced the court to reluctantly adjourn a hearing, counsel should seek costs and emphasize that his or her client should not have to bear the costs incurred in preparing for and attending at the hearing and that the adjournment is not due to the actions of counsel or his or her client.

B. Dealing with "Temporary" Counsel

One of the common difficulties experienced by counsel when dealing with self-represented litigants is "temporary" counsel. Often, the self-represented litigants will temporarily obtain a lawyer who will contact opposing counsel to discuss the matter. Sometimes these lawyers will not get on the record, or will get off the record shortly after being retained.

Occasionally, a litigant will claim to be self-represented when the court's sympathy is required (for example, when he or she wants an adjournment), but have counsel appear whenever the court is poised to make an important decision.

Counsel will generally prefer dealing with another lawyer and may give that lawyer indulgences or courtesies that they may not give self-represented litigants, particularly if that lawyer provides assurances that the proceedings will move more smoothly. Problems occur when that lawyer gets off the record after committing to certain actions or providing certain assurances. Opposing counsel is then left with a self-represented litigant who does not consider themselves bound by the commitments of their former lawyer.

In dealing with a self-represented litigant with a pattern of retaining "temporary" counsel, counsel should deliver a letter to the self-represented litigant's new lawyer setting out the background of the case and the temporary nature of the self-represented litigant's previous lawyer.

Counsel may want to insist that the self-represented litigant's new lawyer file a Notice of Change of Lawyer or confirm their retainer or instructions on an issue in writing before taking any further steps in the proceeding. In return for the indulgences sought by the new lawyer, counsel may insist on a consent order detailing the steps necessary to bring the matter to court.

If the self-represented litigant chronically hires and then fires a lawyer to obtain adjournments or avoid hearings, counsel should send a letter to the new lawyer (or the self-represented litigant if counsel is certain that the self-represented litigant has recently fired his/her lawyer) stating that counsel will not consent to any adjournments.

If the self-represented litigant persists in hiring and firing counsel to obtain adjournments, counsel should be prepared to deal with this argument at the chambers hearing by explaining to the court the history of the proceeding, including the various lawyers the self-represented litigant has retained and the various adjournments the self-represented litigant has obtained. If the court appears inclined to grant an adjournment, counsel should attempt to put terms on the adjournment so that the matter is not adjourned endlessly or indefinitely.

C. Settlement Discussions

Counsel may enter into discussions with a self-represented litigant at the chambers hearing to resolve the issue. If the parties reach an agreement, counsel should speak to the agreement with the self-represented litigant present so that the terms of the agreement are recorded in court. This way, there can be no dispute about the terms of the agreement.

If counsel and a self-represented litigant are able to reach an agreement before the hearing date, prepare a letter setting out the terms of the agreement or a draft order reflecting the terms of the agreement. Deliver it to the self-represented litigant. Insist that the self-represented litigant endorse and return the agreement or order before adjourning the hearing. This will prevent a self-represented litigant from resiling from the agreement.

D. Obtaining an Address for Delivery

Rule 4-1 of the Supreme Court Civil Rules sets out types of addresses for delivery parties are required to provide.

Often, a self-represented litigant will not provide an "accessible" address which is mandatory under Rule 4-1(1)(b).

Counsel should write to the self-represented litigant setting out the rules relating to addresses for delivery, enclosing a copy of Rule 4-1. Counsel should insist that the self-represented litigant file a proper address for delivery with the court and should encourage the self-represented litigant to provide an email address for delivery as is permitted by Rule 4-1. Counsel should consider enclosing a copy of the form a self-represented litigant will have to file with the court (i.e., a Notice of Change of Address for Delivery).

If the self-represented litigant refuses to provide a proper address for delivery, counsel should consider applying for an order requiring the self-represented litigant to provide a proper address for delivery. Counsel may also consider applying for an order permitting the service or delivery of documents by email or ask that the terms relating to service or delivery of documents be included as a term of an adjournment order.

Counsel may combine this application with another application to save time and expenses.

E. Application for Summary Dismissal

When defending a unmeritorious claim by a self-represented litigant, consider making an application to dismiss the claim on a summary basis:

(i) under Rule 22-7(5) if the self-represented litigant has not complied with the Rules of Court;

(ii) under Rule 9-5(1) if the claim does not disclose a reasonable cause of action against one or more of the defendants; or

(iii) under Rule 9-6 or Rule 9-7 if the claim lacks merit.

A Rule 9-7 application has a greater chance of success as the court is generally more comfortable dismissing a claim on its merits, rather than on a technical point.

F. Application for Security for Costs

When defending an action brought by a self-represented litigant, consider bringing an application for security for costs.

If the plaintiff is a corporation, applications for security for costs are generally brought under s. 236 of the *Business Corporations Act*.

When the plaintiff is an individual, applications for security for costs are brought under the court's inherent jurisdiction.

The court may make an order for security for costs against an individual plaintiff, even one who resides in BC, but the test is very onerous. The court will exercise its jurisdiction to order security for costs cautiously and sparingly.

It is difficult to obtain an order for security for costs against a personal litigant unless the claim clearly has no merit or the self-represented litigant is flaunting the fact that he/she is creditor-proof.

Counsel should consider whether it is more appropriate to make an application for summary dismissal rather than an application for security for costs. If the claim is weak, it may be better to simply apply to have the claim dismissed rather than apply for an order for security for costs.

Alternatively, counsel should strongly consider combining an application for summary dismissal with an alternative application for security for costs. This way, if the court finds that the plaintiff's claim is

very weak, but worthy of a trial, the court may order security for costs, essentially testing the plaintiff's belief in the merits of their case.

Cases involving applications for security for costs against personal plaintiffs include: *Tordoff v. Can Life Assur. Co.* (1985), 64 B.C.L.R. 46 (S.C.); *Fraser v. Houston* (1997), 36 B.C.L.R. (3d) 118 (S.C.); *J.D.L. v. C.L.L.*, [1999] B.C.J. No. 803 (S.C.); and *Lawrence v. Sandilands*, [2003] B.C.J. No. 343, 2003 BCSC 211.

The leading case on applications for security for costs against corporations is *Kropp v. Canadian Resort Development Corp.* (1997), 29 B.C.L.R. (3d) 252 (C.A.).

G. Application for a Stay Pending Payment of Past Cost Orders

If counsel obtains an order for costs against a self-represented litigant that is payable forthwith, counsel may apply for a stay of proceedings until these orders are paid.

The court has the jurisdiction to make this type of order pursuant to its inherent jurisdiction and pursuant to s. 8 of the *Law and Equity Act*. Cases involving this type of order include: *World Wide Treasure Adventure Inc. v. Trivia Games Inc.* (1994), 56 C.P.R. (3d) 1, [1994] B.C.J. No. 1375 (S.C.), leave to appeal on this issue dismissed (1994), 57 C.P.R. (3d) 365 (B.C.C.A.); and *Ross v. Canada* (2003), 244 F.T.R. 265, [2003] F.C.J. No. 1168, 2003 F.C. 902.

H. Costs

Costs are on tool by which the court can sanction inappropriate behaviour.

If the court has expressed its disapproval to the self-represented litigant, counsel may encourage the court to award costs as a means of deterring the self-represented litigant from "re-offending."

Self-represented litigants may argue that they should not have to pay costs because they "misunderstood" the rules or process.

The Honourable Mr. Justice Voith addressed this agreement in *LeClair v. Mibrella Inc.*, 2011 BCSC 533, stating:

> Second, the *Rules of Court* and the rules of evidence apply equally to both parties who are represented by counsel and those who are self-represented. Self-represented litigants are not insulated from these requirements or the obligations they create. Nevertheless, depending on the nature of the concern expressed, some greater flexibility or tolerance may be accorded a self-represented litigant. For some issues, the need for honesty being the clearest example, no different standard can or does apply to a lay litigant. The requirement that parties be forthright is readily understood by all and is inflexible. (para. 12)

Counsel should make sensible submissions on costs and should not seek an award of special costs unless it is clearly warranted.

Counsel should, whenever possible, ask for an order that costs be payable on a lump sum basis, forthwith. Few things improve the conduct of a self-represented litigant more effectively then writing a cheque to his or her opponent.

I. Cleaning Up "the Mess"

Counsel may be engaged to make an application in a proceeding which both parties have been self-represented.

Counsel should consider whether to obtain reasons for judgment or transcripts of prior proceedings so that he or she can obtain an accurate picture of the history of the proceeding.

Counsel should prepare new affidavits in compliance with the rules of evidence rather than relying on previously filed affidavits which contain irrelevant or inadmissible evidence. The new affidavit may incorporate facts contained in previous affidavits in a more organized and concise form.

J. Bankruptcy Issues

Two brief points will be made here.

(1) First, if when defending an action brought by a self-represented litigant, there is reason to believe that party may be insolvent, counsel should inquire as to whether the self-represented litigant is or has recently been formally bankrupt. This can be important. Generally, choses in action belonging to a bankrupt at the date of bankruptcy vest in the trustee pursuant to ss. 67 and 71(2) of the *Bankruptcy and Insolvency Act*. This means that the self-represented litigant may be incapable of commencing or continuing proceedings in respect of those choses in action. A plaintiff's bankruptcy can be a simple, relatively inexpensive defence to an action.

    Not all choses in action belonging to a bankrupt at the time of bankruptcy vest in the trustee. Causes of action which are "personal" to the bankrupt, such as personal injury or defamation, do not pass to the trustee (*Wilson v. United Counties Bank*, [1920] 1 A.C. 102; *Re Holley* (1986), 59 C.B.R. (N.S.) 17 (Ont. C.A.)). A bankruptcy defence will not be available in actions such as malicious prosecution or defamation (*Egan v. Grayson* (1956), 8 D.L.R. (2d) 125 (Alta. S.C.); *Cherry v. Ivey et al.* (1982), 37 O.R. (2d) 361 (H.C.J.)).

(2) Second, the stay of proceedings against a bankrupt imposed on creditors by ss. 69 to 69.3 of the *Bankruptcy and Insolvency Act* does not prevent a successful defendant from having its costs assessed as against an unsuccessful, bankrupt plaintiff (*Neudorf v. Nettwerk Productions Ltd.*, [2000], 48 C.P.C. (4th) 140, [2000] B.C.J. No. 1705, 2000 BCSC 1257; *Fairview Electronics Ltd. v. De Boer International Ltd.* (1983), 48 C.B.R. (N.S.) 102 (Ont. S.C.)).

K. Vexatious Litigant Proceedings

The Supreme Court may order that a legal proceeding must not be instituted by a person without leave of the court. The jurisdiction to do so is contained in s. 18 of the *Supreme Court Act*. To exercise this jurisdiction, the court must be satisfied the person has habitually, persistently and without reasonable grounds, instituted vexatious legal proceedings in the Supreme Court or in the Provincial Court against the applicant or different persons.

This statutory provision is both broad (restricting access to any court) and narrow (it only restricts the launching of *new* proceedings).

A Justice of the Court of Appeal has a similar statutory power under s. 29 of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77. That section is limited to proceedings in the Court of Appeal.

These statutory provisions are supplementary to similar powers residing in the court's inherent jurisdiction. Under this jurisdiction, the court may bar prosecution of proceedings already commenced (*Household Trust Co. v. Golden Horse Farms Inc.* (1992), 65 B.C.L.R. (2d) 355, [1992] B.C.J. No. 652 (C.A.)). It may prevent a party from launching or being heard on his or her interlocutory application except by counsel (*Household Trust Co., supra*).

A vexatious litigant application may be made by interlocutory application notwithstanding Rule 2-1 (*Nelson Family Home Inc. v. Springer Dev. Corp.* (1982), 31 C.P.C. 66 (B.C.C.A.)).

The seminal authority on vexatious litigants is *Lang Michener et al. and Fabian et al.* (1987), 59 O.R. (2d) 353, 37 D.L.R. (4th) 685 (H.C.J.). *Lang Michener* has been applied in several BC cases. The applicable principles are these:

(a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding;

(b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;

(c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purpose other than the assertion of legitimate rights;

(d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;

(e) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action;

(f) the failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious;

(g) the respondent's conduct in persistently taking unsuccessful appeal from judicial decisions can be considered vexatious conduct of legal proceedings.

A vexatious litigant declaration will sometimes be accompanied by an order for special costs: see, e.g., *Anani v. Ismail*, 2004 BCCA 370, where Chief Justice Finch considered that "[t]his litigation must be brought to an end." There is no doubt this is the underlying message counsel should convey to the court on a vexatious litigant application.

XI. Conclusion

Dealing with self-represented litigants may test counsel's patience.

Counsel should remain courteous patient and fair throughout proceedings with self-represented litigants.

Although dealing with self-represented litigants may involve substantially more work than dealing with counsel, the additional work will foreclose many of the common tactics used by self-represented litigants, resulting in more efficient proceedings and better service to counsel's client.