

Dealing with Unrepresented Litigants

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1. Practitioners who appear before the Ontario Municipal Board (“OMB”) on land use planning matters are expected to deal with unrepresented litigants on a regular basis. Unlike court proceedings, where notice is generally limited to the parties involved, the principle of public notice is enshrined in the *Planning Act*.³ This principle encourages public participation on planning matters that are decided by municipal committees and councils, and on appeal, by the OMB.
2. The OMB Rules of Practice and Procedure specifically allow for participants.⁴ There are good reasons for this. First, allowing participants to provide evidence at a hearing is consistent with the principle of public notice. Second, the fundamental issue to be determined by the Board on appeal is whether the proposed development or change in land use represents good planning. As such there is a public interest component which mandates fair participation by the public.
3. Given this context, what are counsel’s professional duties and responsibilities when dealing with unrepresented litigants under the Rules of Professional Conduct (“ROPC”)? What do the leading cases recommend, both in the courts and at the OMB, regarding the treatment of unrepresented litigants? What are some common practice tips and principles that counsel should adhere to when dealing with such litigants? This paper attempts to answer these questions.

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³ R.S.O. 1990, c. P. 13, as amended.

⁴ See Ontario Municipal Board, *Rules of Practice and Procedure*, made under section 91 of the *Ontario Municipal Board Act* and section 25.1 of the *Statutory Powers Procedure Act*, issued 11 August 2008, amended 2 November 2009, 3 September 2013 and 1 January 2017, definition of “participant”, rr. 8, 21.02, 70(a), 81(g) and Sample Procedural Order, online: <<http://elto.gov.on.ca/wp-content/uploads/2017/01/OMB-Rules-January-1-2017.pdf>>.

Rules of Professional Conduct

4. The Rules of Professional Conduct⁵ for the Law Society of Upper Canada (soon to be renamed the Law Society of Ontario) set out the key duties and professional responsibilities for lawyers in Ontario. The rules are updated regularly. The latest amendment, as of the date of this paper, was September 28, 2017.

General Rules that Apply when Dealing with Unrepresented Litigants

5. Some general rules that apply when dealing with unrepresented litigants include the following, in no particular order:
 - **Rule 2.1-1 A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.**

The commentary to this rule reminds lawyers that public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct.⁶

- **Rule 5.1-1 When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.**

The commentary clarifies that this rule applies not only to court proceedings but also to appearances and proceedings before boards, administrative tribunals, mediators and others who resolve disputes, regardless of their function or the informality of their procedures.⁷

⁵ *Law Society of Upper Canada, Rules of Professional Conduct*, Adopted by Convocation on June 22, 2000, effective November 1, 2000, amendments based on the *Federation of Law Societies Model Code of Professional Conduct* adopted by Convocation October 24, 2013, effective October 1, 2014; amendments current to 28 September 2017, online: <<https://www.lsuc.on.ca/lawyer-conduct-rules/>> [ROPC].

⁶ *Ibid*, Commentary [2] to Rule 2.1-1.

⁷ *Ibid*, Commentary [2] to Rule 5.1-1.

Lawyers should take particular care in how they act towards the tribunal when facing unrepresented litigants. In adversarial proceedings, even against the unrepresented litigant, a lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question to obtain the best results for his or her client. This duty, however, must be exercised fairly and balanced with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing in the administration of justice.⁸

- **Rule 5.1-5 A lawyer shall be courteous, civil, and act in good faith to the tribunal and with all persons with whom the lawyer has dealings.**

The commentary to this rule clarifies that legal contempt of court and the professional obligation to be courteous, civil, and act in good faith are not the same thing. A consistent pattern of rude, provocative, or disruptive conduct by a lawyer, even though unpunished as contempt, may constitute professional misconduct.⁹

- **Rule 5.6-1 A lawyer shall encourage public respect for and try to improve the administration of justice.**

6. Rule 5.6-1 demands further review as it requires lawyers to “encourage public respect for” and “try to improve” the administration of justice. Given its potential for application, the interpretation of this rule provided by the Law Society in its commentary is particularly pertinent, as summarized below:¹⁰

- The obligation to try to improve the administration of justice implies on a lawyer a basic commitment to the concept of equal justice for all within an open, ordered,

⁸ *Ibid*, Commentary [1] to Rule 5.1-1.

⁹ *Ibid*, Commentary [1] to Rule 5.1-5.

¹⁰ This rule is analogous to Rule XIII of the Canadian Bar Association, *Code of Professional Conduct* (2009), which states “The lawyer should encourage public respect for and try to improve the administration of justice.”, online: <[http://www.cba.org/Publications-Resources/Resources/Ethics-and-Professional-Responsibility/Code-of-Conduct/Code-of-Professional-Conduct-\(2009\)>](http://www.cba.org/Publications-Resources/Resources/Ethics-and-Professional-Responsibility/Code-of-Conduct/Code-of-Professional-Conduct-(2009)>).

and impartial system.¹¹ This is particularly applicable when dealing with unrepresented litigants, as they are starting off at a disadvantage as compared to parties represented by counsel.

- This rule is not restricted to the lawyer's professional activities but is a general responsibility resulting from the lawyer's position in the community.¹² Accordingly, even when not acting as a lawyer in the courtroom or tribunal, lawyers should be mindful of their comments to the public.
- Lawyers should refrain from criticizing tribunals on matters that are petty, intemperate or unsupported by a bona fide belief in its real merit. This is particularly important when such criticism is made in front of unrepresented litigants, who may put particular weight on the lawyer's judgments or criticism. Likewise, if the tribunal is the object of unjust criticism, a lawyer as a participant in the administration of justice should be compelled to support the tribunal. Tribunal members often cannot defend themselves (either by law or by custom) and, by defending the tribunal, the lawyer is contributing to greater public understanding of and therefore respect for the legal system.¹³

Specific Rules for Dealing with Unrepresented Litigants

7. In addition to the general rules above, there are specific rules that apply when lawyers are acting on behalf of a client against unrepresented litigants. Most importantly, lawyers must be vigilant in advising unrepresented litigants that their role is limited to acting exclusively in the interest of their clients, and as such, their comments may be influenced by such interests:

- **Rule 7.2-9 When a lawyer deals on a client's behalf with an unrepresented person, the lawyer shall:**

¹¹ ROPC, *supra* note 5, Commentary [2] to Rule 5.6-1.

¹² *Ibid*, Commentary [1] to Rule 5.6-1.

¹³ *Ibid*, Commentary [3] to Rule 5.6-1.

(b) take care to see that the unrepresented person is not proceeding under the impression that their interests will be protected by the lawyer; and

(c) take care to see that the unrepresented person understands that the lawyer is acting exclusively in the interests of the client and accordingly their comments may be partisan.

8. In 2014, the requirement for lawyers to urge unrepresented litigants to seek independent legal advice was removed from Rule 7.2-9 of the ROCP. This requirement is required under the Model Code of Professional Conduct published by the Federation of Law Societies of Canada (“Model Code”).¹⁴ Nonetheless, legal commentators recommend that lawyers refrain from undertaking to advise an unrepresented person and urge the person to obtain independent legal advice.¹⁵ As a matter of good practice, lawyers should consider documenting communications with unrepresented litigants as part of their hearing notes in case there is a dispute as to whether legal advice was given.
9. Finally, since unrepresented litigants do not have the benefit of legal counsel protecting their interests, lawyers should be particularly mindful of what they should not do as an advocate, since such behaviour may not be corrected by the court or tribunal. Rule 5.1-2 sets out a long list of prohibited acts, which include the following:

- **Rule 5.1-2 When acting as an advocate, a lawyer shall not:**

(e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed, or otherwise assisting in any fraud, crime, or illegal conduct,

(f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument, or the provisions of a statute or like authority,

¹⁴ See Federation of Law Societies of Canada, *Model Code of Professional Conduct* (as amended March 14, 2017), 7.2-9(a), online: <<http://flsc.ca/national-initiatives/model-code-of-professional-conduct/federation-model-code-of-professional-conduct/>> [Model Code].

¹⁵ Orkin, Mark M., *Legal Ethics*, 2 ed. (Toronto: Canada Law Book, 2011), at 126.

(g) knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence or as a matter of which notice may be taken by the tribunal,

(i) deliberately refrain from informing the tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by an opponent.

Recent Amendments to the Rules that May Apply to Unrepresented Litigants

10. Recent amendments to the ROPC clarify the scope of the prohibition on threatening to advance penal proceedings to advance a client's case. In our view, these directions are all the more stringent when dealing with unrepresented litigants:

- **Rule 3.2-5 A lawyer shall not, in an attempt to gain a benefit for a client, threaten, or advise a client to threaten, without reasonable and lawful justification:**

(a) to initiate or proceed with a charge for an offence, including an offence under

(i) the Criminal Code or any other statute of Canada;

(ii) a statute of a province or territory of Canada; or

(iii) a municipal by-law; or

(b) to make a complaint to a regulatory authority.

11. Prior to the 2017 amendments to the ROPC, Rule 3.2-5 prohibited the threatening of criminal or quasi-criminal charges and complaints to a regulatory authority.¹⁶ Since

¹⁶ See October 2014 ROPC, *supra* note 5.

February 2017, the scope of the prohibition has been further clarified to include offences under municipal by-laws.¹⁷

12. It is also not unusual for counsel dealing with unrepresented litigants to receive a request from such litigants to represent their interests in an unrelated proceeding. In these circumstances, counsel are directed to pay attention to the following rules in the ROPC:

- **Rule 3.4-1 A lawyer shall not act or continue to act for a client where there is a conflict of interest, except as permitted under the rules in this Section.**
- **Rule 3.4-2 A lawyer shall not represent a client in a matter when there is a conflict of interest unless there is consent, which must be fully informed and voluntary after disclosure, from all affected clients and the lawyer reasonably believes that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client. (Emphasis added to highlight changes from February 2016)**

13. Rule 3.4-2 and the commentary in rules 3.4-1 and 3.4-2 were amended by the Law Society in February 2016 in response to the Supreme Court of Canada's decision in *Canadian National Railway Co. v. McKercher LLP*.¹⁸ In *McKercher*, the Supreme Court held that a lawyer cannot act for a client whose immediate legal interests are adverse to those of another existing client, without consent from each of the clients (also referred to in the ROPC as the "bright line rule"). The commentary notes that the bright line rule applies even if the work done for the two clients is completely unrelated, but does not apply in circumstances where it is unreasonable for a client to expect that the client's law firm will not act against the client in unrelated matters.¹⁹

14. The above summary is not an exhaustive review of all of the professional duties and responsibilities of lawyers when dealing with unrepresented litigants. Counsel are urged

¹⁷ Law Society of Upper Canada, *Rules of Professional Conduct*, "Amendment History", online: <<https://www.lsuc.on.ca/with.aspx?id=672>>, see February 23, 2017 Amendment.

¹⁸ 2013 SCC 39, 360 DLR (4th) 389 (CanLII).

¹⁹ ROPC, *supra* note 5, Commentary [7] to Rule 3.4-1 and Commentary [6] to Rule 3.4-2.

to review the ROPC as they apply to the circumstances before them, particularly where interaction with unrepresented litigants is expected to continue well into the proceedings.

Recent Case Law and the Unrepresented Litigant

15. It is primarily the role of the adjudicator to assist unrepresented parties in matters of procedure and in presenting their positions before the court.²⁰ In some cases, courts have held that judges must “do whatever is possible” to provide a fair and impartial process and prevent an unfair disadvantage to unrepresented persons.²¹ Likewise, as tribunals are created to facilitate access to justice, this duty extends to tribunal members and chairs. A tribunal should provide reasonable assistance to an unrepresented person to allow the person a fair opportunity to present the case to the best of his or her ability.²²
16. Although the case law is primarily directed towards the behaviour of the adjudicator or tribunal towards the unrepresented litigant, counsel also have a role to play to ensure that the administration of justice is not only upheld, but is seen to be upheld.

Statement of Principles on Self-represented Litigants and Accused Persons

17. In September 2006, in response to the dramatically increasing trend of unrepresented litigants in the courtroom, the Canadian Judicial Council endorsed the “Statement of Principles on Self-represented Litigants and Accused Persons” (the “Statement”).²³
18. The Statement recognizes that unrepresented litigants face and present special challenges with respect to the court system. Due to the unique challenges presented by such litigants, this document provides certain statements, principles and commentary on how various participants in the justice system should treat such litigants.

²⁰ *Earthcraft Landscape Ltd. v. Clayton*, 2002 NSSC 259, 210 NSR (2d) 101 (CanLII), at paras. 14 and 28.

²¹ *Seminatore v. Banks*, 2006 NBCA 110, 306 N.B.R. (2d) 195, at paras. 8-9.

²² *Kelly v. Nova Scotia Police Commission*, 2006 NSCA 27, 241 NSR (2d) 300 (CanLII) at para. 77; *Dauids v. Davids*, 1999 CanLII 9289, 125 OAC 375 (ON CA) at para. 36.

²³ Canadian Judicial Council, *Statement of Principles on Self-Represented Litigants and Accused Persons* (September 2006) [CJC Statement].

19. The Statement specifically recognizes that it is not a code of conduct but an “advisory statement” aimed at providing guidance to participants in the administration of justice. Prior court decisions have generally confirmed this interpretation.²⁴ However, the Statement has been recently cited in numerous cases at both the trial and appellate level (and most recently by the Supreme Court of Canada) when assessing whether procedural fairness has been met with respect to the court’s conduct towards unrepresented litigants.
20. Although the Statement is primarily directed at the judiciary and court administrators, the Statement provides the following guidance to members of the bar:

STATEMENT:

All participants are accountable for understanding and fulfilling their roles in achieving the goals of equal access to justice, including procedural fairness.

PRINCIPLES

For the Bar

1. Members of the Bar are expected to participate in designing and delivering legal aid and pro bono representation to persons who would otherwise be self-represented, as well as other programs for short-term, partial and unbundled legal advice and assistance as may be deemed useful for the self-represented persons in the courts of which they are officers.

2. **Members of the Bar are expected to be respectful of self-represented persons and to adjust their behaviour accordingly when dealing with self-represented persons**, in accordance with their professional ethical obligations. For example, members of the Bar should, to the extent possible, avoid the use of complex legal language. Members

²⁴ *Dew Point Insulation Systems Incorporated v. JV Mechanical Limited*, 2009 CanLII 71721, 259 OAC 179 (ON SCDC) at para. 29.

of the Bar may be guided by the Canadian Bar Association’s Code of Professional Conduct and the codes of each jurisdiction (see Guiding Principle XIX (8)) and references therein. (Emphasis added)²⁵

21. The principles directed at the bar are consistent with counsel’s general duties under the ROPC: to ensure that unrepresented litigants are treated fairly and with respect, and that access to justice is not denied simply because of a lack of legal representation. In particular, the Statement places a positive obligation on counsel to “adjust their behaviour accordingly” when dealing with unrepresented litigants.

Statement of Principles Endorsed by the Supreme Court of Canada

22. The Supreme Court of Canada recently endorsed the Statement in *Pintea v. Johns*.²⁶ This case involved an unrepresented litigant in Alberta being found in contempt of court by a case management judge for, among other things, disobeying court orders directing court attendance. The unrepresented party claimed that he did not receive the court orders due to a change in address for service of which the court and opposing parties were not notified.
23. The Court of Appeal of Alberta upheld the decision of the case management judge, but the finding was unanimously overturned by the Supreme Court. Although it was not necessary for Justice Karakatsanis to do so (as the Supreme Court found that the grounds for contempt were not met on the facts and the Statement was not raised by the dissenting judge on appeal), she specifically endorsed the Statement in her decision.²⁷
24. Since the *Pintea* decision, a number of other courts in Ontario have relied on the Statement. A summary of these decisions is provided below:
 - In *PohQuong v. Marks*, the Court allowed an unrepresented father in a family law dispute to call additional evidence on rental expenses. In exercising its discretion

²⁵ CJC Statement, at 9.

²⁶ 2017 SCC 23, [2017] 1 S.C.R. 470 [*Pintea*].

²⁷ *Ibid*, at para. 4.

to allow the evidence, the Court made reference to the Statement and the *Family Law Rules*, O. Reg. 114/99, and noted that the principles in these documents required the Court, among other things, to ensure that the father was not denied relief based on an easily rectified deficiency in his case.²⁸

- In *Gray v. Gray*, the Court set aside an order granting judgment against the appellant on the basis that he did not attend the trial. The appellant had unfortunately relied on advice from a paralegal to send an agent in his place to request an adjournment in order to attend his first day at a new job. In setting aside the order, the Court reviewed the principles in the *Family Law Rules*, O. Reg. 114/99, as well as the Statement and held that to decline to set aside the order would be particularly unfair and prejudicial to the appellant whereas any prejudice to the applicant can be addressed relatively easily through an award of costs. In making its decision the Court also considered the risk of a multiplicity of proceedings and use of court resources if the order was not set aside, and held that the issue in dispute was sufficiently important and complex to warrant hearing evidence from both parties.²⁹
- In *R. v. Tossounian*, the Court of Appeal noted that the trial judge had failed to provide the requisite assistance to the unrepresented appellant and ordered a new trial. The Court held that as soon as a problem of disclosure arose, the trial judge had a duty to ensure that the accused received full disclosure and that she fully understood her rights to disclosure and the available remedies for infringement of those rights. In holding that the trial judge failed to discharge that duty, the Court of Appeal referred to specific principles in the Statement addressed to the judiciary, including the following:

Judges have a responsibility to inquire whether self-represented persons are aware of their procedural options, and to direct them to available information if they are not. Depending on the

²⁸ *PohQuong v. Marks*, 2017 ONCJ 706, 2017 CarswellOnt 16582 (Ont. C.J.) (24 Oct 2017), at paras. 28-29.

²⁹ *Gray v. Gray*, 2017 ONSC 5028, 2017 CarswellOnt 13050 (24 Aug 2017) at paras. 31, 33, 65-67.

circumstances and nature of the case, judges may explain the relevant law in the case and its implications, before the self-represented person makes critical choices. (Emphasis in original)³⁰

- In *Moore v. Apollo Health & Beauty Care*, the Court of Appeal held that the trial judge had erred in dismissing the appellant’s claim for unpaid wages, statutory holidays and sick days based on a misapprehension of evidence. Making reference to the principles set out in the Statement (similar to those in *R. v. Tossounian*), the Court held that judges have a responsibility to meet the need of unrepresented persons for “simplicity” and to provide “non-prejudicial and engaged case and courtroom management” to protect the equal rights of unrepresented persons to be heard. In this case, the Court held that the trial judge did not ask clear, unambiguous, and comprehensive inquiries as to whether the issue of unpaid wages still formed part of the appellant’s claim when he determined that the claim had been abandoned.³¹
25. The above cases demonstrate that courts since *Pintea* have arguably interpreted the Statement as imposing positive obligations on judges beyond a simple “advisory statement”. In this new era of unrepresented litigants, judges may, in appropriate cases, be required to ensure that legal technicalities do not preclude an unrepresented litigant from advancing their case, to explain legal concepts and ramifications of such concepts to unrepresented litigants (particularly when critical choices are being made, such as obtaining disclosure and abandonment of a claim) and to provide non-prejudicial case and courtroom management to meet the need of unrepresented litigants.
26. At the same time, it is important to recognize that the Statement also imposes reciprocal obligations on unrepresented litigants. These obligations include familiarizing themselves with the relevant legal practices and procedures, preparing their own case and respecting the court process. The vexatious litigant will not be excused just because he or

³⁰ *R. v. Tossounian*, 2017 ONCA 618, 2017 CarswellOnt 1123 (25 July 2017) at paras. 32-37.

³¹ *Moore v. Apollo Health & Beauty Care*, 2017 ONCA 383, 2017 CarswellOnt 674 (11 May 2017) at paras. 44-45, 47, 49.

she is unrepresented; the Statement is not a licence for unrepresented persons to engage the courts as an exception to the rules.³²

The OMB and the Unrepresented Litigant

27. The issue of unrepresented litigants frequently arises at the OMB. While it was noted earlier that the trend towards an increasing amount of unrepresented parties has been observed in other forums, the OMB has always encountered a significant amount of self-represented citizens participating in its hearings. The reason for this can at least in part be attributed to the very subject matter that the tribunal deals with, namely land use planning applications and municipal approvals, which by their nature are public processes. Coupled with a relatively inexpensive cost to appeal, unrepresented litigants often appear before the OMB as applicants, appellants, or objectors to development proposals.
28. In addition to the general principles practitioners should always follow when dealing with unrepresented parties in all legal forums, the information below examines the specific treatment of unrepresented litigants in decisions by the OMB. It also looks at how the recent provincially mandated OMB review and Bill 139³³ draft legislation address the issue of citizen participation at the tribunal.

OMB Review and Bill 139

29. The province undertook a review of the powers and processes of the OMB in June 2016. The result of that review is Bill 139, which proposes a number of changes to the form and substance of the tribunal. As of the date of this paper, Bill 139 is before the legislature for third reading.

³² *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 530, 2017 CarswellAlta 1569 at paras. 46-47. Also see *Nowoselsky v. Canada (Treasury Board)*, 2004 FCA 418, 329 NR 238 (CanLII).

³³ Province of Ontario, Bill 139, *An Act to enact the Local Planning Appeal Tribunal Act, 2017 and the Local Planning Appeal Support Centre Act, 2017 and to amend the Planning Act, the Conservation Authorities Act and various other Acts*, 2nd Sess, 41st Legislature, Ontario, 66 Elizabeth II, 2017 [Bill 139].

30. As part of the OMB review, the province issued a Public Consultation Document³⁴ setting out the context and direction of the review and soliciting public feedback from the public. Theme 2 of the Public Consultation Document pertained to "Citizen Participation and Local Perspective". In that section, the province noted the emphasis placed on encouraging unrepresented individuals to take part in OMB hearings, stating that "[t]he government wants to ensure that individuals and parties without legal representation are able to get and stay involved in local land use planning, including appeals."³⁵
31. Previously, the province established the Citizen Liaison Office (the "CLO") at the OMB in 2016 as a resource for unrepresented members of the public with an interest in land use planning disputes.³⁶ The CLO is available to the public by phone, email, or in person to help unrepresented individuals understand the OMB appeals process and provide information about participating in hearing events.³⁷ In addition, the CLO can also be requested to attend community meetings for the purpose of answer questions related to the OMB process.³⁸
32. Based on the feedback obtained during the OMB review, Bill 139 now proposes the creation of a new Local Planning Appeal Support Centre (the "Support Centre") with expanded capacity to assist unrepresented parties during land use appeals. Pursuant to the new *Local Planning Appeal Support Centre Act, 2017*, the Support Centre would be a non-Crown Agency corporation that offers services to qualified persons. Qualified individuals will be determined on the basis of financial resources.³⁹ The draft legislation outlines the purpose of the Support Centre as follows:

4. The Centre shall provide the following support services in order to achieve its objects:

³⁴ Government of Ontario, *Review of the Ontario Municipal Board: Public Consultation Document*, October 2016, online: <<http://www.mah.gov.on.ca/AssetFactory.aspx?did=15814>> [Public Consultation Document].

³⁵ *Ibid*, at 22.

³⁶ *Ibid*, at 21.

³⁷ Environmental Land Tribunals Ontario, "Citizen Liaison Office", 2017, online: <<http://elto.gov.on.ca/contact/citizen-liaison-office/>>.

³⁸ Public Consultation Document, *supra* note 34, at 21.

³⁹ Bill 139, *supra* note 33, Sch. 2, ss.2-3.

1. Information on land use planning.
2. Guidance on Tribunal procedures.
3. Advice or representation.
4. Any other services prescribed by the regulations.⁴⁰

The most significant change effected by the Support Centre would be the provision of advice or representation to unrepresented members of the public. It is anticipated that this would likely be in the form of duty counsel and planning experts who could offer services beyond simply providing factual information to qualified parties who have not otherwise retained a lawyer or experts.

33. If enacted, Bill 139 and the Support Centre may shift the landscape of unrepresented parties currently encountered at the OMB. While a lawyer's professional duties and responsibilities towards unrepresented litigants encountered during hearings will not change, the availability of duty counsel at the tribunal may alter the dynamic of land use planning appeals.

OMB Case Law on Unrepresented Parties

34. As noted above, the presence of unrepresented parties is common at OMB hearings. The OMB has expressly addressed issues surrounding unrepresented individuals in previous decisions, in particular in matters arising out of motions for cost against such litigants. While the cases generally address the role, rights, and responsibilities of unrepresented litigants appearing before the tribunal – rather than the conduct of lawyers towards such parties – these cases are informative in providing a better picture of how the OMB views the unique position of unrepresented persons during contested hearings.
35. One of the most frequent questions that arise with respect to unrepresented litigants is to what extent the Board Member and counsel present should assist in their understanding

⁴⁰ *Ibid*, Sch. 2, s. 4.

of the matters before the tribunal and the case to be met. In the case of *Graham v. Leeds and Grenville (United Counties) Land Division Committee*,⁴¹ the applicants Gerald and Roberta Graham appealed the refusal of a consent by the local Land Division Committee to the OMB. Ms. Graham attended the hearing on her and her husband's behalf, providing evidence in support of the proposal through her own testimony and by calling her contractor as a witness. The OMB ultimately refused the consent and noted that the Ms. Graham called no evidence on the Township's Official Plan. Acknowledging the lack of planning evidence provided, the Board Member stated the following:

Unfortunately, this is one of those not infrequent cases in which unrepresented parties really do not know what is expected of them at a Board hearing, and are consequently not prepared to present a sufficient case. The Board has some sympathy for those who find themselves in that position. However, it is ultimately the responsibility of any party to a Board hearing, represented or not, to find out what is expected and prepare accordingly. The Board can (and in this case did) assist unrepresented parties by telling them the standard which their case must meet and by outlining the requirements of the Act. It cannot, however, go so far as to run their case or fill in gaping holes in it (like the lack of any evidence in this case respecting conformity with the Plan).⁴² (Emphasis added)

The OMB's decision clarifies that while assistance to an unrepresented party can be offered by explaining to them the statutory tests that need to be met in order for an application to succeed, the tribunal cannot take it upon itself to direct their case or consider necessary evidence that was not presented at the hearing.

36. Unrepresented parties are often unfamiliar with the formalities of the tribunal, in terms of process and conduct, as well as the legal requirements that need to be met with respect to a certain application. In the case of *Ringas v. Hamilton (Township)*,⁴³ the OMB considered a motion for costs brought by the municipality and a neighbouring landowner

⁴¹ [1994] O.M.B.D. No. 1247 [*Graham*].

⁴² *Ibid*, at 4.

⁴³ [2008] O.M.B.D. No. 10 [*Ringas*].

against unrepresented applicants. The applicants had applied for amendments to the Township's official plan and zoning by-law to permit a residential subdivision on their lands. Although they called a qualified land use planner at the hearing, the unrepresented applicants and their witness continued to change their position on key issues and failed to sufficiently prepare for the hearing. At the earlier hearing on the merits, the OMB refused the applicant's appeal.⁴⁴ In reaching a decision on the motion for costs, the tribunal considered the applicants' status as an unrepresented litigant against the rights of other represented parties to the hearing:

Ringas [the applicant] was self-represented at the hearing of the merits and in this motion. The Board often accords unrepresented parties some latitude in presenting their case and dealing with procedural matters. And the Board did so in this case. Latitude that is given, however, cannot stray into a condition of prejudice to other parties nor veer from the requirement that there must be a full and fair hearing where all parties know the case to be met. (Emphasis added)⁴⁵

On the basis of the prejudice that the Ringas' conduct at the hearing and the prejudice resulting to the other parties, the OMB granted the award for costs against the unrepresented applicants.⁴⁶

37. The OMB further opined on the standard of conduct expected of unrepresented parties in another cost motion decision in *Richmond Hill (Town) Official Plan West Gormley Secondary Plan Amendment, Re.*⁴⁷ In that case, an unrepresented party was the only objector to a new secondary plan that was supported by a number of landowners in Richmond Hill. Despite filing an issues list, the unrepresented party did not follow those issues and introduced new matters throughout the proceedings. During the course of the hearing on the merits, the unrepresented objector failed to clarify her issues with the secondary plan and the exact nature of the relief she sought.⁴⁸ In reviewing the conduct

⁴⁴ *Ibid*, at paras. 1-2, 13, 14-16, 20.

⁴⁵ *Ibid*, at para. 21.

⁴⁶ *Ibid*, at para. 24-26.

⁴⁷ [2006] O.M.B.D. No. 931 [*Richmond Hill*].

⁴⁸ *Ibid*, at paras. 18-20.

of the unrepresented litigant, the Board found no issue with the fact that she did not call any evidence in support of her case:

In the case before the Board, the Board finds no fault in the conduct of Ms Hoffelner in failing to call evidence or in relying on her cross-examination of witnesses in support of her case. There is no absolute requirement to call evidence, if a party believes that it can prove its case through the cross-examination of other witnesses that are called to testify. Furthermore, all parties were aware of the fact that Ms Hoffelner was not going to call any evidence well in advance of the hearing [...].⁴⁹

The Board ultimately dismissed the motion for costs, noting that an unrepresented person is afforded a lower standard of conduct than more sophisticated parties:

However, the Board is very aware that Ms Hoffelner is not a sophisticated participant. Although she has had experience at the Board, she is neither a planner, nor a lawyer. The standard of conduct demanded of an unsophisticated party is lower than is demanded of a party who can hire professionals to advise it. While some of Ms Hoffelner's conduct was insufficient to meet the exact standard of responsible participation, the lapses can properly be explained by her lack of understanding or misunderstanding or lack of sophistication in the process.⁵⁰ (Emphasis added)

38. In another cost motion decision, the OMB also considered when the conduct of an unrepresented party can be considered unreasonable and merit an award against it. In the earlier decision of *Pauze v. Midland (Town)*,⁵¹ the OMB allowed a cost award against an unrepresented party who appealed and objected to a zoning by-law in the Town of Midland. The OMB found that the unrepresented litigant put no effort into his appeal apart from filing the matter and attending mediation and the hearing.⁵² In arriving at its

⁴⁹ *Ibid*, at para. 17.

⁵⁰ *Ibid*, at para. 21.

⁵¹ [1995] O.M.B.D. No. 3 [*Pauze*].

⁵² *Ibid*, at 2.

decision, the Board Member quoted a number of precedent decisions emphasising the tribunal's role in encouraging citizens to attend the OMB and express their views without being deterred by a fear of adverse cost awards.⁵³ The Board Member went on to explain the tribunal's extensive experience with unrepresented litigants:

The Ontario Municipal Board has long experience with unrepresented groups and individuals. They range from those who do absolutely no preparation for their hearings to those who turn their participation into a full-time job. They also represent the full spectrum of knowledge, ability and experience; from the egregiously (and sometimes deliberately) uninformed to "amateur experts" who in virtue of sheer intelligence and hard work make crucial contributions to the hearing process. And finally, they run the gamut from the well-meaning, public-spirited citizen to the manipulative or obstructionist interloper.⁵⁴

In determining whether the conduct of an unrepresented party merits an award of cost, the OMB outlined three standards against which a party's contribution to the hearing should be assessed:

The point here is that any party's contribution to a hearing can and should be assessed with reference to at least three, relatively independent, standards: the amount of preparation undertaken, the knowledge and experience offered, and the purity of motive for participating. In this Member's view, it is therefore not sufficient to plead good intentions when the real issue is lack of preparation or absence of a meaningful contribution of knowledge or experience to the hearing.⁵⁵ (Emphasis added)

⁵³ *Ibid*, at 3-4.

⁵⁴ *Ibid*, at 5-6.

⁵⁵ *Ibid*, at 6.

In concluding that an award of costs against the unrepresented party was merited in this case, the Board found that the party made no effort to find out and address the substantive issues of the appeal and as a result the conduct of that party was unreasonable.⁵⁶

39. Finally, in addition to unrepresented litigants, the OMB has also addressed the unique circumstance of lay representatives (or agents) for parties to a hearing. At OMB hearings the case occasionally arises where a party seeks to be represented by an agent who is not a lawyer and who are themselves another resident or ratepayer without specialized knowledge of planning matters or the tribunal. In the cases of such lay representatives, similar considerations as those for dealing with unrepresented parties apply. The case of *Dell v. Mississauga (City)*⁵⁷ is one such instance. In that case, Gregory Dell brought forward a number of appeals on behalf of various parties to Mississauga Official Plan Amendment 25 ("OPA 25"). The City of Mississauga brought a motion to disqualify Dell from acting as agent for various other appellants on the grounds that he was not a lawyer or paralegal and his acting as agent would constitute providing unauthorized legal services in contravention of the *Law Society Act*.⁵⁸ The Board Member ultimately refused the City's motion and concluded that the OMB is granted the power under the *Statutory Powers Procedure Act* to allow competent lay representatives to appear before it.⁵⁹ In arriving at its decision, the tribunal made some important observations about the role played by lay representatives and unrepresented parties at the OMB:

Lay representations before the Board is a feature of life that has been flourishing since its inception. The instances where difficulties arise are few and far between. For this Board, it is not a problem and certainly not a problem in need of a solution. Whether representatives are legal, lay or combined, the Board has always been able to conduct our hearings in a manner befitting a tribunal functioning under the *Statutory Powers Procedure Act* and complying with the rules of natural justice. These include cases where there are multi-parties with

⁵⁶ *Ibid*, at 8.

⁵⁷ [2008] O.M.B.D. No. 177 [*Dell*].

⁵⁸ *Ibid*, at paras. 6-8.

⁵⁹ *Ibid*, at paras. 18-23.

multifarious concerns and poly-technical issues. The Municipal Bar, to its credit, has never taken on an officious air or elitist stance towards unrepresented parties or lay representatives. Over the decades, our adjudication has evolved to a stage where coexistence with lay representatives or unrepresented parties is a norm rather than an exception. To upset this delicate but seamlessly workable balance, the Board would require far more persuasive arguments than what have been presented by [counsel for the City].⁶⁰

40. As the above cases demonstrate, the presence of unrepresented litigants is a significant feature of OMB appeals and hearings. While certain leeway and accommodations are afforded to unrepresented litigants, the extent of such exceptions cannot result in prejudice to any other party. The OMB has stated that while it can provide information about procedure and the standard of approval to unrepresented proponents, it cannot run their case or fill gaps in their evidence. Finally, although a lower standard of conduct has been applied to unrepresented parties, like all parties, they must still conduct themselves in a reasonable and appropriate manner and demonstrate that they have sufficiently prepared and participated in a hearing.

Practice Tips and Key Conclusions

41. We provide below a list of non-exhaustive practice tips for counsel facing unrepresented litigants before the OMB:
- Ensure that unrepresented litigants understand that your duty is first and foremost to your client.
 - Your duty to your client must be balanced with your duty to treat the OMB with candour, fairness, courtesy and respect to promote the parties' rights to a fair hearing.

⁶⁰ *Ibid*, at paras. 17.

- Confirm communications with unrepresented litigants in writing, particularly where there is any advice on legal process.
 - Urge unrepresented litigants to obtain independent legal counsel and record this in writing.
 - Commence procedural and case management matters early (e.g. establishment of a Procedural Order) to ensure that the unrepresented litigant is aware of key deadlines and the implications of not meeting these deadlines.
 - Avoid any conduct that may suggest that counsel is exploiting or taking advantage of unrepresented litigants. Make efforts to ensure that such litigants are well apprised of the OMB process (e.g. remind the unrepresented litigant of the deadline to respond to motions) and well informed over the course of the proceedings.
 - Agree to reasonable adjournment requests, particularly if any prejudice to your client can be mitigated by costs, but recognizing that the imposition of costs is the exception and not the rule in most OMB matters.
 - Do not take on a retainer for unrepresented litigants that may be adverse to your client's interests, without written consent from both the unrepresented litigant and your current client.
42. In return, however, unrepresented litigants also have a duty to treat courts and tribunals with respect. This includes:
- Preparing for the evidence to be led in the case and not expect the judge or tribunal member to help fill in gaps in their evidence;
 - Making an effort to familiarize themselves with the relevant legal practices and procedures pertaining to their case (although the standard of conduct demanded may be lower); and

- Conducting themselves in a reasonable manner that respects the court or tribunal process, including identifying and addressing substantial issues on appeal and participating in a hearing.
43. In conclusion, counsel before OMB proceedings should adapt and adjust their behaviour accordingly when dealing with unrepresented litigants. By ensuring that unrepresented litigants are better informed of the OMB process, treating such litigants with appropriate sensitivity, and communicating your professional duties as counsel clearly and without ambiguity, counsel will be better prepared to respond to challenges that their professional responsibilities have not been properly discharged.