

Rules of Court Committee
Request for Comments 2018-1
Corporate Self-Representation

The Rules of Court Committee has become aware of recent developments in the ability of corporations to be self-represented in court. This occurs when a corporation engages in litigation unrepresented by a member of the Bar, generally by having one of its officers or directors represent it. After an examination of the applicable statutes, rules and recent case law, the Committee is considering recommending amendments to the applicable rule.

The Rules of Court Committee is now requesting comments on R. 2.23 which deals with representation in court without the assistance of a lawyer. Submissions are requested by November 30, 2018, and should be sent to: RCC@albertacourts.ca, or Barb Turner, Q.C., Secretary, Rules of Court Committee, John E. Brownlee Building, 9th Floor, 10365 – 97 Street, Edmonton, Alberta, T5J 3W7. Comment is invited on any aspect of the rule, although the following discussion document is intended to highlight the issues identified to date.

Background

[1] When a corporation is involved in litigation, the corporation will generally retain a lawyer to represent its interests. From time to time, however, a director or officer of the corporation will appear in court and purport to represent it. This happens relatively frequently on routine matters, such as landlord and tenant disputes, debt collection, foreclosures, etc. There have, however, been instances where corporations have been represented by non-lawyers in lengthy and complex proceedings.¹

[2] The old *Rules of Court* gave the Court a discretion to permit representation by an agent who was not a lawyer:

R. 5.4. With the permission of the Court, a person may be represented before the Court by an agent other than a solicitor.

This discretion could be used to permit officers or directors of corporations to represent the corporation in court. New R. 2.22 allows “individuals” to represent themselves, which necessarily excludes corporations. While new R. 2.23 allows “a person to assist a party before the court”, recent

¹ For example, *Spartek Systems Inc. v Brown*, 2014 ABQB 526 (25 day trial, two of the named corporate defendants were represented by two of the named individual defendants); *Park Avenue Flooring Inc. v EllisDon Construction Services Inc.*, 2015 ABQB 478, (127 day trial, named plaintiff was represented by an individual who was an officer and director of the company) and see *Park Avenue Flooring Inc. v EllisDon Construction Services Inc.*, 2016 ABCA 327 (agent denied standing on appeal).

case law has interpreted the rule as abolishing the discretion to permit a corporation to be represented by a non-lawyer officer.²

[3] The general rule set out in s. 106 of the *Legal Profession Act* is that only members of the Law Society may represent other persons in court:

106(1) No person shall, unless the person is an active member of the Society,

- (a) practice as a barrister or as a solicitor,
- (b) act as a barrister or as a solicitor in any court of civil or criminal jurisdiction,
- (c) commence, carry on or defend any action or proceeding before a court or judge on behalf of any other person, . . .

There are a number of provisos in s. 106(2) about what is excepted from “practicing law”, such as:

- (h) a person who acts on the person’s own behalf in an action, matter or proceeding to which the person is a party;

Since corporations are “persons”, and since they can only act through their human agents, an argument can be made that provisos like the one in s. 106(2)(h) permit a director or officer of the corporation to represent the corporation during litigation. The situation is, however, unclear, because when read in context the word “person” as used in the *Legal Profession Act* may be intended to only refer to “individuals”.

[4] Neither the Court nor the *Rules of Court* can enable a breach of a statute like the *Legal Profession Act*. Any judicial discretion could not extend to allowing anyone to “practice law” unless they were a member of the Law Society. There was always, however, a distinction between representing another person in litigation and thereby “practicing law”, and a mere right of audience in court:

In order to place the issues in perspective it is important to distinguish between the inherent discretion of a superior Court to permit a non-lawyer to appear physically in Court or before a judge as a representative or advocate of another person (the ‘right

² For example, *908077 Alberta Ltd. (Escape & Relax) v 1313608 Alberta Ltd.*, 2015 ABQB 1 affm’d 2015 ABCA 117; *Landmass Dirtworx Ltd. v Prairie Mountain Construction (2010) Inc.*, 2015 ABQB 362; *Park Avenue Flooring Inc v EllisDon Construction Services Inc*, 2016 ABCA 211 leave to appeal refused 2016 ABCA 327; *Oommen v Ramjohn*, 2015 ABCA 34 leave to appeal refused, 2015 ABCA 58; *EXP Mining Equipment Rentals Inc. v Caterpillar Financial Services Ltd.*, 2017 ABCA 364.

of audience’), and the right of an individual to represent another person in respect of legal matters generally, that is, the right to practice law.³

The discretion recognized by old R. 5.4 was a manifestation of this distinction. It allowed a director or officer to appear in court on behalf of the corporation, if the judge permitted that appearance, but it did not allow the director or officer to otherwise “practice law” on behalf of the corporation.

The Competing Arguments

[5] The immediate question is whether the *Rules of Court* should be amended to restore the judicial discretion to allow a non-lawyer agent a right of audience in litigation involving other persons. This would enable a director or officer of a corporation to represent the corporation, and it would also enable, for example, one family member to speak on behalf of another.

[6] The general argument in favour of corporate self-representation is that “access to justice” requires that corporations be allowed to appear in court on some occasions without counsel, as otherwise the whole exercise becomes uneconomic. In effect, the corporation must unreasonably retain a lawyer, or surrender its legal rights. Specific examples of this general argument are given:

1. Defence of a claim brought against a corporation (say, a foreclosure), where the corporation does not have sufficient funds to retain counsel to defend, and its long-term viability is in jeopardy.
2. Small debt collection, where a judgment is obtained in Provincial Court, but enforcement requires registration of the judgment with the Court of Queen’s Bench. If the corporate plaintiff has to appear in court, for any reason, to enforce or collect on the judgment, it has to hire a lawyer, which makes the operation uneconomic.
3. Landlord and tenant matters, where the corporate landlord is brought into court by the tenant (usually self-represented) on appeal from the Residential Tenancies Dispute Resolution Service. Having to retain a lawyer to appear on these applications, which are generally pleas for more time to vacate, or other non-conventional relief, is an unreasonable burden.

Some of these activities (to the extent they involve preparing and filing documentation) may step over the line into impermissible representation, unless they fall within s. 106(2)(h). The primary issue is how judges and Masters should deal with officers or directors who show up in court wanting to represent corporations on such routine matters.

[7] The provisions of the *Legal Profession Act* are directed at the danger of allowing unqualified persons to give legal advice to, and to represent members of the public. Those policy concerns are

³ See *Professional Sign Crafters (1988) Ltd. v Wedekind* (1994), 19 Alta LR (3d) 53 and *Pacer Enterprises Ltd. v Cummings*, 2004 ABCA 28.

diminished when a closely held corporation willingly allows a non-trained director or officer to represent it. It is anomalous that a proprietorship can represent itself, but as soon as the proprietorship is incorporated it must retain a lawyer, even though the underlying business and legal interests are unchanged. There are, however, broader policy considerations, including the interests of other participants in the litigation (such as witnesses and the other parties), as well as the interests of the judicial system. Untrained officers or directors of corporations may consume additional court resources because of a lack of knowledge of procedures, and by raising arguments that are legally unsustainable.

[8] The arguments against corporate self-representation include that corporations provide valuable liability and tax advantages. Those who choose the corporate vehicle should not be allowed to enjoy those advantages, without bearing the parallel burdens. One of those burdens is the need to be represented by a lawyer. Further, “access to justice” is a two-way street. Having to deal with a self-represented litigant throws an additional burden on the other litigant and its lawyer. Persons who deal with a corporation should be entitled to expect professional representation if a dispute arises.

Options for Reform

[9] As noted, neither the Court nor the *Rules* should permit anything that is contrary to the *Legal Profession Act*. Any representation of a corporation by a non-lawyer agent for a fee would be presumptively unlawful as amounting to the “practice of law”.

[10] Providing a general exemption for “small” or “closely held” corporations would be problematic, if only because of the problems of defining that group. Further, that is the only category of corporations that presents a problem, because the issue does not generally arise with larger and widely owned corporations.

[11] An available option, however, would be to restore the historic judicial discretion to permit audiences in the Court by non-lawyer agents. This could be accomplished by adding a new R. 2.23(4), and by expanding on the existing *Information note* found after that rule, to outline some of the factors to be considered in exercising the discretion.⁴ For reference, the existing rule and *Information note* read as follows:

Self-represented litigants

2.22 Individuals may represent themselves in an action unless these rules otherwise provide.

Assistance before the Court

2.23(1) The Court may permit a person to assist a party before the Court in any manner and on any terms and conditions the Court considers appropriate.

⁴ See for example *Pacer Enterprises; Ayangma v Charlottetown (City)*, 2017 PECA 15 at para. 70, 415 DLR (4th) 708.

- (2) Without limiting subrule (1), assistance may take the form of
 - (a) quiet suggestions,
 - (b) note-taking,
 - (c) support, or
 - (d) addressing the particular needs of a party.
- (3) Despite subrule (1), no assistance may be permitted
 - (a) that would contravene section 106(1) of the *Legal Profession Act*,
 - (b) if the assistance would or might be disruptive, or
 - (c) if the assistance would not meet the purpose and intention of these rules.

Information note

Under section 106(1) of the *Legal Profession Act* assistance permitted by this rule must fall short of “acting as a barrister or solicitor” or “commencing, carrying on or defending an action or proceeding before a court or judge on behalf of another person”.

[12] The proposed new R. 2.23(4) could read:

- (4) Subject to any enactment, this rule does not affect the discretion of the Court to permit a person to be represented before the Court by an agent other than a solicitor.

The *Information note* could then be expanded as follows:

Information note

Under section 106(1) of the *Legal Profession Act* assistance permitted by this rule must fall short of “acting as a barrister or solicitor” or “commencing, carrying on or defending an action or proceeding before a court or judge on behalf of another person”.

In exercising its discretion under rule 2.23(4) to permit an agent other than a solicitor to appear in court, the Court can consider any relevant factor, including:

- the nature and complexity of the litigation;
- the identity, competence and ability of the agent;
- the relationship between the agent and the party to the litigation;

- the extent to which, and conditions and circumstances under which the agent proposes to represent the party to the litigation;
- the effect that the participation of an agent who is not a lawyer will have on the other parties to the litigation;
- the effect that the participation of an agent who is not a lawyer will have on the Court, the use of court resources, and the integrity of the proceedings;
- the effect that denial of the participation of an agent who is not a lawyer will have on the applicant;
- any conditions that should be imposed on the agent or the party.

[13] The Rules of Court Committee invites comments and input from the public on the proposed amendments, and the issue of corporate self-representation generally.