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Pintea v Johns: An Updated Commentary

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The National Self-Represented Litigants Project

Pintea v Johns:
An Updated Commentary

The Self-Represented Litigants Case Law Database
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THE FOUNDATION FOR LEGAL RESEARCH



LA FONDATION POUR LA RECHERCHE JURIDIQUE

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A. Introduction

Almost 4 years have passed since the Supreme Court of Canada rendered its judgment in *Pintea v. Johns*.¹ The National Self-Represented Litigants Project (NSRLP) published a report in October 2018 which examined the first 18 months of caselaw following this landmark decision. The 2018 report examined the courts' application of *Pintea*, cases that distinguished *Pintea*, and the limitations on the *Pintea* decisions.²

Since 2018, the Westlaw database shows that there have been an additional 65 cases citing *Pintea*. This updated report aims to clarify the limitations on *Pintea*, and will also examine broad trends in how the courts have both applied and distinguished *Pintea* since October 2018.

B. The application of *Pintea* to assist self-represented litigants

A notable trend has emerged in some cases since October 2018, where courts have reinforced the *Canadian Judicial Council (CJC) Principles* endorsed by the Supreme Court in *Pintea*.

In *Ó Murchú v. Yukon (Government of)*, the defendant sought to have the self-represented plaintiff's statement of claim struck on the basis of no reasonable cause of action due to the court's lack of jurisdiction in a matter relating to probationary employees in a unionized workplace.³ The plaintiff, Mr. Ó Murchú, conceded that his pleading did not conform to the *Rules of Court* and understood the issues concerning parts of his claim.⁴ The Court referenced the Supreme Court's endorsement of the *Principles* in *Pintea*, noting that "judges should ensure that procedural and evidentiary rules are not used to unjustly hinder the legal interests of self-represented persons," and that "self-represented persons should not be denied relief on the basis of a minor or

¹ *Pintea v. Johns*, 2017 SCC 23 [*Pintea*].

² Kaila Scarrow and Julie Macfarlane, "Pintea v. Johns: 18 Months Later" (2018), online (pdf): *National Self-Represented Litigants Project* <<https://representingyourselfcanada.com/wp-content/uploads/2018/10/Pintea-Report-FINAL-1-1.pdf>>.

³ *Ó Murchú v. Yukon (Government of)*, 2020 YKSC 21 [*Ó Murchú*] at para 1.

⁴ *Ibid* at para 58.

easily rectified deficiency in their case.”⁵ In *Ó Murchú*, the Court applied *Pintea* and granted leave to the plaintiff so that he could amend his statement of claim to address concerns of the defendant, ultimately promoting the plaintiff’s access to justice.⁶

In *Girao v. Cunningham*, the appellant was an SRL who struggled to understand the English language and relied on an interpreter.⁷ The respondent’s counsel made a complaint regarding the SRL’s irregular form of appeal, however the Court of Appeals acknowledged the appellant’s SRL status and struggle to understand English, and made an allowance where they deemed that the appeal was properly brought forth to the court.⁸ The Court referenced *Pintea*, and noted that the *Principles* are meant to assist the judiciary in allowing an SRL to meaningfully present their case.⁹

The Court in *Girao* noted that the defence advanced problematic evidentiary positions on legally complex topics, and therefore they should have assisted the trial judge with the legal issues embedded in their position to allow the judge to actively assist the SRL.¹⁰ After reviewing the trial record, the court held that the trial judge was led by the trial counsel’s arguments instead of asking for further assistance from opposing counsel to assist in understanding the legal complexity of the issues, and that the self-represented plaintiff was subjected to an unfair trial.¹¹ A new trial was subsequently ordered.¹²

Another example where a court applied *Pintea* to assist an SRL is in *Durmuller v. Canada (Attorney General)*. In this case, the appellant sought to appeal an order that confirmed a prior decision to refuse his application for a firearms licence.¹³ The appellant claimed that his reference hearing was unfair, and contended that the reference judge failed to comply with the fundamental

⁵ *Ibid* at para 59.

⁶ *Ibid* at para 60.

⁷ *Girao v. Cunningham*, 2020 ONCA 260 [*Girao*] at para 8.

⁸ *Ibid* at para 6.

⁹ *Ibid* at para 149. Also note: Kelsey Buchmayer, “*The Court of Appeal Emphasizes the Vital Role Judges and Counsel Play in Ensuring Trial Fairness toward Self-Represented Litigants*” (2020), online (pdf): *CanLii Connects*

<https://www.canliiconnects.org/en/commentaries/70639>

¹⁰ *Ibid* at para 154.

¹¹ *Ibid* at para 156.

¹² *Ibid* at para 177.

¹³ *Durmuller v. Canada (Attorney General)*, 2020 BCSC 660 at para 1.

principles of procedural fairness.¹⁴ The Court allowed the appellant’s appeal, stating that the reference judge did not accord the appellant with an opportunity to meaningfully and fully present his case.¹⁵ Based on the transcript of the prior hearing, the Court concluded that the reference judge expressed his conclusions on the merits of the case very early in the hearing, and did so in a “colourful and definitive fashion.”¹⁶

The Court in *Durmuller* further clarifies their decision through reference to *Pintea*, emphasizing that the *Principles* advocate for “engaged courtroom management” where SRLs are concerned.¹⁷ The Court held that the reference judge in the appellant’s case was obligated to listen to the case as framed by the SRL and consider the case with an open mind.¹⁸

The cases above highlight how *Pintea*’s application can guide judges in their active courtroom management where an SRL is involved, which ultimately promotes access to justice and the right to a fair trial.

C. Cases that distinguished *Pintea*

In *Toronto Community Culture Centre and Municipal Property Assessment Corp., Region 09, Re (TCCC)*, there was an issue about whether the Assessment Review Board (Board) failed to ensure that procedural and evidentiary rules weren’t used to unjustly hinder the legal interests of the self-represented person (Appellant).¹⁹ The Appellant cited *Pintea* in their argument that SRLs “need to be aware of procedural options and be given information to assist them in understanding and asserting their rights before a court.”²⁰

The Court held that the *TCCC* case could be distinguished from *Pintea*.²¹ The main reason was that the Appellant, despite admitting that they did not understand the legal process, failed to seek procedural assistance from the

¹⁴ *Ibid* at para 3.

¹⁵ *Ibid* at para 29.

¹⁶ *Ibid* at para 30.

¹⁷ *Ibid* at para 17.

¹⁸ *Ibid*.

¹⁹ *Toronto Community Culture Centre and Municipal Property Assessment Corp., Region 09, Re, 2020 CarswellOnt 11808, [TCCC]* at para 13.

²⁰ *Ibid* at para 16.

²¹ *Ibid*.

Board despite having numerous opportunities to do so.²² With respect to this issue, the Court held that it was inappropriate for the Appellant to wait until the day of the hearing to request procedural assistance, and the Board did not use procedural and evidentiary rules to unjustly hinder the legal interests of the SRL.²³

D. Further limitations on *Pintea*

In our 2018 report, two main limitations were identified towards the application of *Pintea* at that point in time.²⁴ These were:

- i) judicial assistance under *Pintea* may be “forfeit” for previous bad behaviour, and
- ii) judicial assistance may be withheld from “sophisticated” SRLs.²⁵

Since 2018, there have been additional cases where courts continue to develop each of these limitations in their decisions.

In *Ubah v. Canadian Natural Resources Limited*, the court had imposed sanctions on the plaintiff, who was labelled as a vexatious litigant and whose behaviour was deemed to be “problematic.”²⁶ The problematic behaviour was described as filing 3 leave to file applications (none of which met the low threshold for a possibly valid action), advancing trivial complaints, and repeated attempts to re-open litigation that had concluded.²⁷

The Court in *Ubah* cited the *Pintea* decision as they noted a court’s duty to provide assistance to SRLs to facilitate their access to legal processes and remedies.²⁸ The plaintiff was deemed to be a “very experienced SRL” because of his previous litigation misconduct in other courts, and was ultimately subject to court access restrictions.²⁹

²² *Ibid* at paras 18-19.

²³ *Ibid* at para 19.

²⁴ *Supra* at note 2 at para 5.

²⁵ *Ibid*.

²⁶ *Ubah v. Canadian Natural Resources Limited*, 2020 ABQB 554 [*Ubah*].

²⁷ *Ibid* at para 26.

²⁸ *Ibid* at para 27.

²⁹ *Ibid* at para 28. *Lymer (Re)* 2018 ABQB 859 [*Lymer*] has now removed this procedure for restricting court access for SRLs.

In *AE v. Alberta (Child Welfare)*, Alberta's Queen Bench explicitly referenced the plaintiff's intelligence level in holding that the plaintiff did not move with reasonable promptness to rectify defects in their application and restore their appeal.³⁰ The fact that the plaintiff held both a bachelor's and a master's degree in engineering was used by the Court to support their statement that the plaintiff was capable of advancing their arguments on a rule 4.33 motion, however failed to do so with reasonable promptness.³¹

In *Ubah*, the Court seemingly attempts to draw a correlation between the number of times that a plaintiff has previously appeared in other courts and their level of experience as an SRL. While it may be possible that a few SRLs might become somewhat more familiar with legal processes if they appear in court more frequently, it is unfair to merely assume that an SRL is well-versed with complex court procedures because of a few prior appearances in other courts. Similarly, referencing an SRL's academic achievements, as done by the Court in *AE*, suggests that a person's academic skill in an area unrelated to legal processes is somehow a factual indicator of their competency in navigating complex legal processes. Regardless of the frequency that an SRL appears in other courts, or of the education level of an SRL, there remains a great possibility that an SRL will struggle in some capacity to understand complex court procedures and legal processes.

Further to the extension of these court-developed limitations referenced in the 2018 report, we have now identified two additional avenues of judicial reasoning that suggest further limitations on the application of *Pintea*.

i) The CJC Principles in *Pintea* do not confer a special status on SRLs

A recurring notion expressed by some courts citing *Pintea* since 2018 is that the *CJC Principles (Principles)* recognized by the Supreme Court in *Pintea* do not confer a special status to SRLs.

In *Lymer (Re)*, the court turned their attention to the plaintiff's status as an SRL, citing the Supreme Court's endorsement of the *Principles* in *Pintea*.³²

³⁰ *AE v. Alberta (Child Welfare)* 2019 ABQB 401 [*AE*] at para 30.

³¹ *Ibid.*

³² *Lymer* at para 117.

While the Court acknowledged the special needs that SRLs have when they appear in court, the Court went on to state that these principles of fairness cannot be used as a “sword” by SRLs.³³ This commentary was made by the Court in response to the plaintiff’s action of placing blame for deficiencies in his pleadings on others.³⁴ The Alberta Court of Appeals proceeded to reverse the decision in *Lymer (Re)*, stating that an SRL is not “vexatious” if they are merely confused about the procedures surrounding their case, or passionate about the merit of their cause.³⁵ While *Lymer* focuses on striking down the procedure formerly adopted in Alberta imposing court restriction orders, rather than the application of *Pintea*, it makes some clarifications around what behaviour can be considered “vexatious” that are useful for future applications of *Pintea*. The Court also notes, however, that being an SRL does not excuse abuse of court procedures.³⁶

In *C.A.T. v. S.T.B.*, the Court further expanded on the notion that the *Principles* do not confer a special status on SRLs.³⁷ The Court referenced the fact that the *Principles* were adopted with the intent of promoting equal access to justice in Canada, aiming to “provide practical guidance to judges and others to ensure fairness to self-represented litigants.”³⁸ However, the Court also stressed that fairness is a “two-way street.”³⁹ An SRL is expected to take reasonable measures to familiarize themselves with the legal procedures relevant to their case, and to respect court processes. The Court in *C.A.T.* concluded that a judge has no obligation to assist an SRL who makes no reasonable effort to prepare for their case, who does not respect court processes, or who is abusive.⁴⁰

Although *Pintea* established that judges have a duty to follow the *Principles* to assist an SRL in receiving a fair opportunity to present their case, neither the *Principles* nor the Supreme Court’s decision in *Pintea* suggests that SRLs are exempt from trying their best to adhere to court procedures (the “two-way street”).

³³ *Ibid.*

³⁴ *Ibid* at para 114.

³⁵ *Jonsson v. Lymer* 2020 ABCA 167 [*Lymer* appeal] at paras 8, 14.

³⁶ *Ibid* at para 15.

³⁷ *C.A.T. v. S.T.B.* 2020 BCSC 593 [*C.A.T.*].

³⁸ *Ibid* at para 41.

³⁹ *Ibid* at para 48.

⁴⁰ *Ibid.*

ii) There is no duty on opposing counsel to assist SRLs

Another line of judicial reasoning that has surfaced in a few cases that cite *Pintea* is that there is no duty on opposing counsel to assist SRLs.

In *Gadsby v. British Columbia (Attorney General)*, the plaintiff relied on the *Principles* in *Pintea* to submit that the opposing counsel owed her a duty of care to ensure that she had a fair hearing.⁴¹ The Court in *Gadsby* accepted opposing counsel’s argument that *Pintea* does not create a duty on lawyers with respect to how they interact with SRLs on the opposing party.⁴² This reasoning provides clarification that other legal actors in the courtroom, including opposing counsel, do not hold the same duty that court administrators or judges have to assist SRLs.⁴³

Similarly in *Girao v. Cunningham*, discussed above, while the Court applied the *Pintea* principles, it also recognized that these did not extend to a duty on opposing counsel.⁴⁴ Instead the Court said that the duty of opposing counsel is limited to the relevant professional regulation, here sections 7.2-7.9 in the Law Society of Ontario’s *Rules of Professional Conduct*.⁴⁵

E. “Striking the Balance”—a two-way street

The Supreme Court in *Pintea* explicitly endorsed the *Principles* that were established by the Canadian Judicial Council with respect to SRLs. Since then, cases involving SRLs have referenced *Pintea* and the concept of “striking a balance” between the duty of an SRL to meaningfully prepare their argument, and a judge’s duty to assist an SRL.

In *Grover v. CUPE Local 211 (Saanich) and another*, the Court acknowledged the duty of the British Columbia Human Rights Tribunal to ensure that SRLs are provided with fair access to justice and equal treatment, as per the *Principles*.⁴⁶ In this case, however, the plaintiff displayed behaviour on various occasions that pointed towards a lack of preparedness. Some examples of this

⁴¹ *Gadsby v. British Columbia (Attorney General)* 2019 BCSC 1596 [*Gadsby*] at para 87.

⁴² *Ibid* at para 88.

⁴³ Cite CJC Principles, principle 4

⁴⁴ *Girao v. Cunningham*, 2020 ONCA 260 at para 152 [*Girao*].

⁴⁵ *Ibid* at para 152.

⁴⁶ *Grover v. CUPE Local 211 (Saanich) and another* 2020 BCHRT 205 [*Grover*] at para 49.

included missing five out of six filing deadlines, failure to respond to requests for providing further documentation, and failing to procure necessary information despite being granted multiple extensions of time.⁴⁷ The Court concluded that the Tribunal was not obligated to assist an SRL who made no reasonable effort to prepare their own case.⁴⁸

Similar sentiments were conveyed by the Court in *C.A.T. v. S.T.B.*,⁴⁹ discussed above. A fair process, the Court said, is a “two-way street” because there are limits to the extent that a judge or administrator can assist an SRL.⁵⁰ Similarly to *Grover*, the Court in *C.A.T.* stated that judges do not have an obligation to assist an SRL who makes no reasonable effort to prepare their case, or to assist in situations where an SRL was disrespectful or abusive.⁵¹ Furthermore, an SRL is expected to familiarize themselves with relevant procedures and practices as they apply to their case.⁵²

F. Conclusions

Since the release of our last report in October 2018,⁵³ there have been some important developments in the application of the *Pintea* doctrine. Courts have applied *Pintea* to actively assist SRLs in certain cases, and have generally acknowledged the role of the *Principles* in guiding judges and court administrators to assist SRLs to the extent that it affords them a fair trial.

However, the most notable developments are the two additional court-developed limitations on *Pintea*, namely that there is no duty on opposing counsel to assist SRLs, and that the *Principles* do not confer a special status on SRLs.

These additional court-developed limitations appear to fall in the same vein as the prior two limitations relating to withholding judicial assistance for SRLs who appear to be “experienced” or “well-educated.”⁵⁴ References have been

⁴⁷ *Ibid* at paras 50-52.

⁴⁸ *Ibid* at para 68.

⁴⁹ *C.A.T. v. S.T.B.* 2020 BCSC 593 [*C.A.T.*].

⁵⁰ *Ibid* at para 48.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Supra* at note 2.

⁵⁴ *Ibid* at pages 5-8.

made by some courts to the notion that SRLs may use *Pintea* as a sword, rather than a shield, to advance their case.⁵⁵ Such statements may reflect subjective perceptions of an SRL's "best efforts," and may undermine the true utility of *Pintea* as an endorsement of the use of the *Principles* to guide judges in their assistance to SRLs to ensure fair trials.

The direction and tone of this case law raises some concerns. One is that the use of the expression "special status" evokes the idea that SRLs (like "special interest groups") are trying to get an unfair advantage by exploiting their position. Similar language is common in political debates over the extension of "levelling treatment" to marginalized groups.

Second, the case law is developing a highly subjective standard for evaluating an SRL's "best effort." The court process is complex, and SRLs face many difficulties in navigating the process. While it is important for judges to continue to assist SRLs to the greatest extent possible, it is equally important to underscore the importance of SRLs taking reasonable steps to ensure that they are familiar with the relevant procedures, rules, and practices with respect to their case. This "reasonable" expectation should not simply be an extension or reflection of a judge's personal feelings about managing SRLs in their court.

Finally, it is noticeable how much of the jurisprudence restricting or limiting the application of *Pintea* continues to come from Alberta. A regional difference this marked is a matter of some concern.

Furthermore, inconsistencies in this standard may emerge where an SRL is perceived to be experienced or well-educated by the court.⁵⁶ This presumptive line of reasoning may endanger the principles of fairness and justice where SRLs are concerned, and courts should exercise caution to avoid employing a subjective standard that undermines access to justice for SRLs. Our concern moving forward is over how this "reasonable" expectation can be measured so that it is consistent, and not subjective.

In light of adjustments to court procedures due to COVID-19 restrictions, SRLs now face even more (frequently changing) procedural rules to follow in

⁵⁵ *Supra* at note 24. (*Lymer (Re)* 2018 ABQB 859 at para 117.)

⁵⁶ *Biley v. Sherwood Ford Sales Limited* 2019 ABQB 95 at para 108.

bringing their cases forward. As acknowledged by the Supreme Court's endorsement of the *Principles* in *Pintea*, it is imperative for judges and court administrators to assist SRLs in accordance with the *Principles* to ensure that the interests of fairness and equal access to justice are upheld.