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Marika: The Adventures of a Young Lawyer Like No Other!

Marika and the Unrepresented Party

On a beautiful afternoon in June, Marika finalizes sending some emails before meeting her friend Alice for their outdoor yoga class. That's when her phone rings. It's her aunt France who explains that her colleague Maryse recently bought a motor home from a private individual in order to take full advantage of the summer season. To inaugurate the season, Maryse had decided to rent a parcel of land in Baie-Saint-Paul. Unfortunately, the vehicle did not survive the mountainous terrain of the area because it came to a stop and would not restart when climbing one of the many slopes leading to the campsite. The mechanical examination revealed several problems and having the vehicle repaired would require several thousand dollars.

At the time of the sale, the seller had not reported any problems with the vehicle and a short test drive had not revealed any apparent problems. Maryse is therefore very disappointed since the purchase of a motor home has always been her retirement dream. Indeed, she had planned to use this vehicle to travel around the United States with her husband. But there's more! She is now very anxious and no longer trusts the vehicle. Maryse therefore contacted the seller, asking him to cancel the sale, but the seller refused. In view of the foregoing, France asks Marika if Maryse could meet with her quickly to assess her recourses. Marika schedules an appointment for the next day and, as planned, meets with Maryse.

After having read the garage's estimate and having discussed the matter with Maryse, Marika concludes that the cancellation of the sale is appropriate given the latent nature of the defects and the amount of the repair work. She is therefore given the mandate to send a formal notice to the seller and, failing a positive outcome, to file an *Application to cancel the sale* of the vehicle. Marika prepares the formal notice and sends it to the seller. The answer is not long in coming. The seller categorically denies that his former motor home is affected by latent defects and refuses to take it back. The action to cancel the sale of the vehicle is therefore instituted.

A few days later, Marika receives the *Answer* from the seller who is representing himself. She therefore prepares a draft *Case protocol* which she sends to the seller by email, explaining that it is a document setting out the stages of the case.

A week later, she receives an email from the seller with the *Case protocol* attached; the *Case protocol* is marked up with several annotations in red. In particular, he has struck out the step providing for his examination. In his email, he explains that he does not need to be examined since the case is simple and he is ready to defend himself against the lies alleged in the *Application to cancel the sale*. In an email, Marika explains to the seller that the *Code of Civil Procedure* authorizes her to examine him given the amounts involved. This is followed by numerous email exchanges culminating in a *Case management notice*

During the presentation of the *Case management notice*, the judge explains to the seller the purpose of the *Case protocol* and confirms Marika's right to examine him. After several minutes spent in a cubicle explaining the normal course of a case to the seller, Marika finally agrees with the seller on the content of the *Case protocol*. The judge confirms it.

A few weeks later, Marika examines the seller and asks him, as undertakings, to provide several documents, having made sure to explain what they are about beforehand. Following receipt of the stenographer's notes of the examination, she emails the seller a list of the undertakings. Radio silence! She follows up several times, but hears nothing from the seller. She therefore resigns herself to notifying a new *Case management notice* in order to have the undertakings respected.

On the day of presentation of her *Case management notice*, the seller presents himself in court and explains that he was unable to prepare the requested documents because he was taking care of his sick mother. After hearing the representations of both parties, the judge sets a deadline for the seller to communicate the documents agreed upon in the undertakings.

One week before the deadline set by the judge, Marika reminds the seller by email of the time limit for communicating the documents agreed upon in the undertakings. Within minutes of that email, she receives an email from the seller explaining that the volume of documents required is large and therefore asking her to pay the printing costs. Marika contacts the seller in writing to explain that the costs of printing the documents are at the seller's expense. He then replies that she will not get any documents from him. In spite of Marika's reminders, the seller refuses to communicate the documents agreed upon in the undertakings. She therefore notifies a third *Case management notice* requiring the communication of the documents agreed upon in the undertakings.

Cue the dramatic music: The day before the presentation of the *Case management notice*, the seller comes to Marika's office with a box of documents and says that all the documents agreed upon in the undertakings are there. Marika therefore agrees to postpone the presentation of the *Case management notice* by two weeks in order to review the documents and ensure that they satisfy the agreed upon undertakings. When she sits down to go through the documents, Marika quickly realizes that the seller has not identified the undertakings, not to mention the fact that the box contains documents unrelated to the dispute. Marika informs the seller in writing that she considers that he has not fulfilled the undertakings and that she will have no choice but to present her *Case management notice*.

Two days later, the seller notifies a procedure to Marika entitled *Application to dismiss the Case management notice and Declaring an abuse of process*. Not only

does the procedure state that the request for undertakings is abusive, but it contains numerous insults against Marika and allegations of bias against the judges who heard the previous *Case management notices*. Marika is discouraged and decides to seek advice from M^e Pagé, the firm's senior lawyer. M^e Pagé provides the young lawyer with a lot of useful advice.

What you should remember: No doubt about it, dealing with an unrepresented party is a challenge for any lawyer. There are a number of reasons why a case with an unrepresented party is more complex:¹

- Ignorance of the laws and the judicial process;
- Unrealistic expectations of the unrepresented party;
- The emotional aspect of the dispute;
- Confusion about the roles of the various persons involved in the judicial process;
- Difficulties in understanding the pleadings notified to them and in drafting their own pleadings in accordance with the *Code of Civil Procedure*.

Here are a few suggestions to help you better manage your cases involving an unrepresented party:

- First, inform your client about the peculiarities of facing an unrepresented opposing party. In other words, manage your client's expectations so that they don't perceive your approach to the other party as a lack of loyalty to them. More specifically, explain that such a situation is likely to prolong the file and requires additional steps (e.g., preparing more documents, communications or case management notices, etc.); consequently, additional fees are to be expected. Also, tell your client that you will have to communicate procedural information to the opposing party in order to move the case forward in your client's best interests. Finally, reassure your client that no legal opinion or advice will be given to the opposing party. Include a clause to that effect in your engagement letter;
- Communicate in a courteous and respectful manner;
- Use a professional tone. An overly familiar tone could lead the unrepresented party to believe that you are being disrespectful to them or that you are protecting their interests;
- Inform the unrepresented party that you prefer to communicate in writing during normal business hours (by mail or email). Keep in mind that some unrepresented persons record telephone conversations;
- Be sure to keep a record of all your communications with the unrepresented opposing party;
- Write your communications in plain language, i.e. without legal jargon or Latin expressions;

¹ The Honourable Daniel W. Payette, *Les personnes non représentées devant les tribunaux : Défis et opportunités*, Text of a conference presented before the Canadian Bar Association-Health Law Section, December 1, 2016.

- Encourage the unrepresented party (always in writing) to seek advice from a lawyer. You can also refer them to organizations such as Éducaloi, legal aid clinics, community justice centres or the guide prepared by the Fondation du Barreau du Québec entitled *Representing Yourself in Court*;
- Make it clear in every communication that you are not protecting their interests and that you are representing the interests of your client only;
- If you have to meet with the unrepresented party, including at the courthouse, have someone (an articling student or other person) accompany you;
- Provide written confirmation of the important points of the discussions;
- Provide all procedural information in order to move the case forward. Do not give legal advice under any circumstances;
- In closing, choose your battles and do not escalate the dispute. In particular, avoid unnecessary *Case management notices* on points that have no bearing on the merits of the dispute. At the trial, reserve your objections for fundamental elements of the case. Your moderation will be appreciated by the judges who will see it as a collaborative effort to move the case forward more quickly.

There is no question that dealing with an unrepresented party is likely to bring its share of unpredictability. Nevertheless, by behaving in a calm and collaborative manner, this is an opportunity to demonstrate your professionalism to your client.