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Self-Represented Litigants & Legal Doctrines of “Vexatiousness” - An Interim Report from The National Self-Represented Litigants Project

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The Self-Represented Litigants Case Law Database
Occasional Research Series
(Paper 6)

**Self-Represented Litigants
& Legal Doctrines of “Vexatiousness”**

**An Interim Report from
The National Self-Represented Litigants Project**

**Canadian family cases 2013 – 2017,
& civil cases 2013 – 2014**

December 2019

Megan Campbell & Julie Macfarlane

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1. Introduction and Background

The Self-Represented Litigants Case Law Database Project (the “CLD” Project) is a research initiative of the National-Self-Represented Litigants Project and as such, an extension of Director Julie Macfarlane’s original 2013 [Study on Self-Represented Litigants](#) (“SRLs”). The CLD tracks emerging jurisprudence across Canada which affects SRLs. The development of the CLD was driven by the fact that no other organization in Canada was systematically tracking and analyzing case decisions on SRLs. To date, NSRLP researchers have identified more than 600 important cases that fall within our parameters (below) and over 360 Canadian decisions have been analyzed and entered into the database. As the database builds, it is possible to see trends emerging from the data.

The CLD Project has established parameters that are used to identify cases eligible for inclusion in the database. These are:

1. Informal descriptions or formal designations of SRLs as “vexatious”;
2. Unusual or atypical costs awards for and against SRLs;
3. Questions of procedural fairness where an SRL does not appear to properly understand the court procedure(s) or their role; and
4. Disability-based and other forms of accommodations for SRLs.

In December of 2017 the first CLD report, [“Introducing the Self-Represented Litigant Case Law Database”](#) (“The Preliminary Report”)¹, was published, outlining our methodology in more detail. It also notes some initial observable trends – for example the wide variation in practice regarding declarations of “vexatiousness”.

While initial data collection focused on family cases, in the summer of 2018 the CLD was expanded to include civil cases. This report is the 6th NSRLP publication based on CLD data.² Compared to our earlier reports, this report on the application of rules, case law, and general jurisdiction on vexatiousness, and how these decisions affect SRLs, draws on a much larger sample of cases (n=357³) than earlier reports, including a more substantial amount of civil cases. It takes a deeper look at the initial trends observed in [the Preliminary Report](#), and notes other patterns emerging from country-wide decisions on vexatiousness.

¹ Sandra Shushani, Lidia Imbrogno & Julie Macfarlane, “Introducing the Self-Represented Litigant Case Law Database” *The National Self-Represented Litigants Project*, December 2017.

² <https://representingyourselfcanada.com/case-law-database/>

³ This report draws on data entered in the database as of November 6th 2019. Approximately sixty-eight percent (68%) of the cases that have been entered into the CLD are family law cases, thirty-four percent (34%) are civil, and the remainder are administrative, constitutional, or criminal. Each week more cases are added to the CLD, with the goal of having a database that holds relevant SRL cases in family and civil law from 2010 to the present.

2. Data Period

Currently, the CLD contains family cases from 2013 to 2017, and civil cases from 2013 to 2014, from across Canada. Note that this interim report on trends regarding vexatious litigants is restricted to analysis of cases within this time period. However, we believe that the trends we are already seeing in the data are important for researchers, SRLs, and lawyers alike. Once the CLD Project is completed, subsequent reporting will bring this tracking and analysis up to the present time.

3. Defining a Vexatious Litigant

When a judge determines that a litigant's behavior has abused the court's processes, the litigant is designated as "vexatious", and consequently barred from accessing the court. Courts are given the authority to designate a litigant as vexatious by using their respective rules of court, legislation, or by common law.⁴ Although not completely uniform, the elements required to find a litigant vexatious are similar across in Canada. The CLD examines those cases in which a vexatious designation has been applied to a litigant who is an SRL, or where there is other discussion of an SRL's behaviour in terms that suggest vexatiousness, but without a formal designation as such (see "vexatiousness lite" below at section 4).

Notably, some provincial legislation states that a vexatious litigant designation cannot be applied to a member of the Law Society of that jurisdiction when the individual is acting as legal counsel for another person.⁵ These provisions are clearly intended to be applied to those coming to court without counsel.

In *Hawkins v. Schlosser*⁶, Justice Ellies of the Ontario Superior Court extracted seven principles (see below) from the jurisprudence to define the meaning of the term "vexatious", quoting from the leading case for Ontario courts, *Re Lang Michener and Fabian* [1987] OJ No 355. Apart from section (e), these provisions are matched by legislation in Alberta.⁷ These parameters are also echoed in case law in jurisdictions where there are no specific vexatious litigant provisions in Judicature Acts, such as Newfoundland and Labrador⁸, and Quebec.⁹ All cases in the CLD that contain formal vexatious designations fall into one or more of these seven categories:

⁴ Legislation: *Judicature Act*, RSA 2000, c J-2, s 23.1 [Alberta Judicature Act]; *Supreme Court Act*, RSBC 1996, c 443, s 18; *The Court of Queen's Bench Act*, CCSM c C280, s 73; *Judicature Act*, RSNB 1973, c J-2, s 73(1)(l); *Judicature Act*, RSNS 1989, c 240, s 45B; *Judicature Act (Nunavut)*, SNWT (NU) 1998, c 34, s1(51)(2)(1); *Courts of Justice Act*, RSO 1990, c C43, s 140; *Judicature Act*, RSPEI 1988, c J-2.1, s 65; *The Queen's Bench Rules*, Sask 2013, pt 11, s 11-21; *Supreme Court Act*, RSY 2002, c 211, s 7.1; *Federal Courts Act*, RSC 1985, c f-7, s.40.

Common law: Newfoundland and Labrador: as seen in *M (JM) v M (KAA)*, 2009 NLUFC 3 at para 17. Quebec: the designation of a vexatious label is apart of the inscribed in Quebec law, as stated in *Mazhero c CBC Radio-Canada*, 2013 QCCS 4682 at para 46.

⁵ *Alberta Judicature Act*, *supra* s 23.1(5).

⁶ *Hawkins v Schlosser*, 2013 ONSC 2120 at para 64.

⁷ *Alberta Judicature Act*, *supra* s 23(2).

⁸ *M (JM) v M (KAA)*, 2009 NLUFC 3 at para 17.

⁹ *Mazhero v CBC Radio-Canada*, 2013 QCCS 4682 at para 46.

- 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 purposes 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; and
- g) The respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings.¹⁰

More recently, and outside the data period of this interim report, there has been the development in Alberta of the theory that the judge's "inherent jurisdiction" to control their court room and award court restrictions does not require the authority of legislation.¹¹ This issue of inherent jurisdiction and applying court restrictions has also been seen in Federal Court.¹² This report draws on civil cases entered into the CLD up to 2014, and hence does not examine the development of this jurisprudence in detail, but it is important to observe that this has given rise to a new line of case law in Alberta which is currently under appeal in *Jonsson v Lymer*.¹³

4. Defining "Vexatious Lite"

The [Preliminary Report](#) described a set of cases where SRLs were deemed to be acting inappropriately by a judge – as described in judicial commentary in the judgment – and where it appeared that their case reasoning and outcome was impacted by this evaluation. Many of the described inappropriate behaviours are similar, if not the same, to indicia of a formal vexatious designation. However, these SRLs were not formally designated as vexatious litigants, and thus did not receive court restrictions.

¹⁰ *Hawkins v Schlosser*, *supra* note 8.

¹¹ *Hok v Alberta*, 2016 ABQB 651

¹² *Canada v Olumide*, 2017 FCA 42.

¹³ *Jonsson v Lymer* 2019 ABCA 113.

In this report we will describe this phenomenon as “vexatious lite”. In these cases we observe judicial language that describes “process abuse”, SRL “failures”, and limits on the court accommodating such failures. Relying on the language in the decision, we have done our best to tease out the relationship between these criticisms and observations of SRL behaviour, and final judgments in these cases. Case-specific examples of “vexatious lite” are described in section 7 below, which examines the extent to which such comments appear to be linked to case outcomes and costs awards, and how often it appears in cases which raise questions of procedural fairness and (denied) requests for accommodations. We are also concerned that in cases where an SRL is described with language that amounts to “vexatious lite”, these remarks can be used in future proceedings as justification for formal vexatious litigant labels, and thus court restrictions.

5. Formal Vexatiousness and Vexatiousness Lite: Provincial Applications

Figure 1 below shows the numbers of cases by province currently in the CLD, the number of cases in which there has been a formal designation of vexatiousness, and the number of cases we have classified as examples of “vexatiousness lite”.

	All Data	Vexatious	“Vexatious Lite”
Province	#	#	#
Alberta	52	12	8
BC	63	7	12
Manitoba	17	0	5
NB	11	0	0
NFL	10	1	4
NWT	9	0	2
NS	48	2	13
Nunavut	3	0	0
ONT	109	6	22
PEI	6	0	0
Quebec	8	1	3
Sask	9	0	3
Yukon	9	0	2
Fed	4	1	0
	358	30	74

Figure 1: Provincial applications

6. Formal Vexatiousness and the “Last Resort” Approach

Most courts appear to adopt an approach of restraint, explaining their reasoning in detail and adopting a “last resort” approach during the time period for which we have analyzed the data.

Some examples – taken from cases across Canada – that illustrate this “last resort” approach and emphasize thoroughness and explanation include:

- Many judges speak at length about the SRL’s behaviour, and conclude by saying, “I am therefore satisfied” to give a formal vexatious designation.¹⁴
- There is an effort to characterise formal vexatiousness as apparently extreme types of behaviours by SRLs: “It is clear that [the SRL] has no respect for the courts, other litigants, counsel or the judges in the various courts. Yet he uses the court system as an instrument of torture, with impunity... When confronted or challenged in any way he is prepared to make offensive, and meritless accusations that call into question the integrity and character of all justice participants including not just the litigants but litigants’ counsel and members of the judiciary”¹⁵. And in another case: “the time has now come to emphatically state the obvious: [the SRL] is indeed an imaginative conspiracy theorist bent on spreading scandalous allegations against judges and members of the Bar involved in his action for defamation.”¹⁶
- There is a reference to prior history and observable patterns, as understood by the judge: “I am satisfied that if [formal vexatious designation is not declared] [the SRL] will continue to pursue proceedings in this jurisdiction against many of the same defendants, by relying on many of the same allegations which he persists in pleading in a manner inconsistent with the rules relating to pleadings in this province.”¹⁷
- There is an effort to characterise formal vexatiousness as behaviour causing significant damage: “costs related to the contempt and vexatious litigant conduct must bring home to [the SRL] the seriousness of her actions and the responsibility she must bear of the damage she has caused.”¹⁸

Some decisions do not reflect the same depth of analysis, and a more assumptive and less nuanced approach to restricting court access¹⁹. We expect to see this develop further as a result of Alberta’s evolving “inherent jurisdiction” approach.

7. Relationship Between Formal Designation as a Vexatious Litigant and Procedural Fairness

Despite the general effort to use formal vexatiousness as a last resort, we are concerned about the possible conflation between behaviours deemed to be vexatious and behaviours that suggest confusion and unintended errors. Our CLD method identifies cases raising issues of “procedural

¹⁴ For example: *Ahmed v Assu*, 2014 BCSC 1768, *M. (M.) v Sullivan*, 2014 BCSC 1217, *De Silva v Fraser Health Authority*, 2013 BCSC 659

¹⁵ *Tupper v Nova Scotia (Attorney General)*, 2014 NSCA 60 at para 23.

¹⁶ *Mazhero v CBC/Radio-Canada*, 2014 QCCA 107 at para 25.

¹⁷ *Ibid.* at para 34.

¹⁸ *McDonald Estate, Re*, *supra* note 20 at para 55.

¹⁹ For example, *Chutskoff Estate v Bonora*, 2014 ABQB 389, and more recently, *Templanza v Ford*, 2018 ABQB 168.

fairness”, where an SRL does not appear to properly understand the court procedure(s) or their role.

Just under half of the formally designated vexatious litigant cases, thirteen (13) cases out of thirty (30), were also identified as falling within our “procedural fairness” parameter. Cases falling within the procedural fairness category of the CLD are those in which there are signs in the written decision that the SRL has a less than full understanding of legal and court procedures, and as a consequence, makes errors.

Many of the hallmarks of formal vexatiousness described above have the potential to be reframed as issues of procedural fairness. In these cases, the intentions of the SRL – that is, whether they have done their best and are simply overwhelmed by the procedural complexity of the system, or whether they are deliberately causing trouble – become critical. For example:

- “Irregular”²⁰ written pleadings;²¹
- Repetitive and lengthy documents;²²
- “Misguided” claims, or claims in the wrong jurisdiction;²³
- Having “no understanding of the court”;²⁴
- “Ignoring” the rules of the court by failing to take court advice;²⁵
- Failing to comply with basic case management orders;²⁶
- Being absent from trial with no description of what unforeseeable event necessitated the SRL being away;²⁷ and/or
- “Inappropriately” bringing applications to seek the judge’s advice on how an SRL should bring forward litigation, and asking for explanations about why certain court procedures are in place.²⁸

Decisions over formal vexatiousness do not generally discuss procedural fairness for SRLs, or interrogate intentionality or motive on the part of the SRL. Instead they are focused on mistakes and misunderstandings that are part of the SRL’s litigation history. The question of vexatiousness is often determined by evidence of repeated errors, or the likelihood of repeated mistakes that would result in an abuse of the court. We note that this appears to blur the line between vexatiousness and unintended errors which may have the same effect. For example in *De Silva*, Justice Mahoney said:

²⁰ Examples of this particular SRL’s irregular pleadings are several unauthorized lengthy letters sent to judges, including Chief Justice McLachlin. The Appeal Court of Quebec noted, in reference to this behaviour, that “there are no limits to [the SRL’s] non-observance of this basic rule in the conduct of appellate litigation.” *Mazhero, supra* note 12.

²¹ *Ibid.*

²² *Mazhero c CBC Radio-Canada, supra* note 12, *Gondal v Teck Resources Ltd.*, 2013 BCSC 1676.

²³ *De Silva v Fraser Health Authority*, 2013 BCSC 659.

²⁴ *Mazhero c CBC Radio-Canada, supra* note 12.

²⁵ *Gondal v Teck Resources Ltd.*, 2013 BCSC 1676.

²⁶ *McDonald Estate, Re*, 2013 ABQB 602.

²⁷ *Ibid.*

²⁸ *Boyd v Shaw*, 2015 ABQB 780.

“The self-represented litigants face many challenges in preparing and presenting their cases properly before the court, particularly in complex areas of the law... Although a self-represented litigant faces these challenges, it remains the responsibility of that litigant to follow the applicable rules of procedure. These rules are intended to ensure a level of fairness in how the litigation is started and conducted. In large part, these rules allow the matter to proceed to a hearing on the merits on a proper basis. Following the rules therefore ensures that the proper material is before the court in a timely matter, all of which assists in resolving the issues at hand in a timely and fair manner.”²⁹

8. Formal Vexatiousness and Costs

Currently there are six (6) cases (of 30) where an SRL has been formally designated as vexatious and is awarded punitive and/or substantial costs against them. These are not enough cases to draw any substantial conclusions at this time. We will continue to track this issue as the database expands.

We have larger numbers suggesting a correlation between vexatious lite and punitive or substantial costs awards (see section 11 (b) below).

9. Formal Vexatiousness and Persons with Disabilities

One of the parameters we track in the CLD is whether an SRL identifies as having a disability and asks for accommodation. In these cases, the CLD records whether the disability is confirmed by the court (meaning that the judge has recognized the disability in delivering the judgment), or alternatively, if the SRL identifies as having a disability but this is neither confirmed nor denied in the judgment, meaning that no account is taken of this for any requested accommodation.

Of the SRLs formally designated as vexatious, there are a total of seven (7) cases (of 30) in the CLD that involve an SRL with a disability (two of these cases have the same SRL party). In three (3) cases the SRL has a disability that is confirmed by the court. There are four (4) cases where an SRL self-identified as having a disability, but the disability is not affirmed by the court.

Five (5) of these same seven (7) cases involve the SRL identifying personal mental health issues, and two (2) are cases in which that disability is recognized by the court. In *Meadus v Meadus*, the judge denotes that “it has been long apparent to me that [the SRL] suffers from a form of mental illness that lies at the root of his failure to take responsibility for his actions... [The SRL] is ill and his illness manifests itself in ways that cause him to improperly and groundlessly challenge, ignore, and/or defy provisions of court orders.”³⁰

²⁹ *De Silva*, *supra* note 17 at paras 69-70.

³⁰ *Meadus v Meadus*, 2013 NLTD(F) 37 at para 2840.

It is difficult to assess from written decisions whether or not a litigant's mental illness contributed to the behaviour that resulted in them being designated as vexatious. In *M. (MA) v M (DJ)*³¹, the SRL was identified as having a mental disability by the court.³² The SRL stated that she suffered from mental health issues and this contributed to her, "difficulties including making false, distorted and scandalous statements."³³ The judge was not swayed by the suggestion that the SRL's mental health challenges may have led to these difficulties, commenting: "In fact, [the SRL] comported herself quite appropriately during this hearing and provided medical letters purporting to support her level of stability."³⁴ However, the judge went on to state that, "the conduct of [the SRL] throughout this process contributed significantly to the numerous court applications, consents, variations and disputes over the years she accessed this Court."³⁵ The SRL was designated as a vexatious litigant.³⁶

The [2013 SRL Study](#) notes that there is a relationship between mental health and legal issues.³⁷ While these are as yet very small numbers, we are concerned that to date the CLD data indicates that 20% of those who are given a vexatious label are accepted by the court as suffering from mental illness. We will continue to track this figure as the CLD expands.

10. Formal Vexatiousness and Gender

Of the thirty (30) cases with a formal vexatious designation, approximately half (n=12) designate female SRLs as vexatious and the other half (n=14) have male SRL parties. Of the outstanding four (4) cases, two (2) were cases where both parties were SRLs, where one side was male and the other female; the other two (2) cases had SRL parties consisting of multiple members.

What is noticeable is the gendered way in which vexatious behaviour is often characterized. An earlier CLD [report on SRLs and gender](#)³⁸ touched on initial observations on the use of language suggesting gender stereotypes in decisions that involve a female SRL. For example, female SRLs have been described as schemers, dramatic, attention-seeking, and emotional.³⁹ There does seem to be some gendered language in some vexatious cases, such as acknowledging male SRLs' combativeness and abusive behaviour. Examples include: a male SRL being "obsessed with overturning a judgement",⁴⁰ "persist[ing] in pleading in a manner inconsistent with the rules

³¹ *M (MA) v M (DJ)*, 2014 ABPC 52.

³² Noted that the SRL suffers from bipolar disorder, *ibid* at para 50.

³³ *ibid* at para 28.

³⁴ *ibid*.

³⁵ *ibid* at para 33.

³⁶ *ibid* at para 38.

³⁷ Pleasance P and Balmer NJ "Mental Health and the Experience of Social Problems Involving Rights" 16(1) *Psychiatry, Psychology and Law* (2009). The same article points out the causal connection between experiences in the courts and legal issues and deteriorating mental health.

³⁸ Sandra Sushani & Julie Macfarlane, "When Judges See SRLs Do They See Gender? Observations on Gendered Characterizations in Judgements" *The National Self-Represented Litigants Project*, May 2018.

³⁹ *ibid* at page 3 and 4.

⁴⁰ *Mazhero c CBC Radio-Canada*, *supra* note 12 at para 40.

relating to pleadings in [the] province”,⁴¹ a “scorched earth [style of] litigation”,⁴² and a refusal to accept the outcome of his case.⁴³ Words such as unreasonable, misleading, and uncooperative are consistently used with both female and male SRLs.

11. Relationship Between “Vexatious Lite” and the Other CLD Parameters

Out of the three hundred and fifty-seven (357) cases in the CLD, seventy-four (74) cases involve an SRL being described in a way that falls within our definition (above) of vexatious lite.

(a) *Vexatious Lite and “Procedural Fairness”*

Just over half of these cases, forty (40) out of the seventy-four (74), also deal with issues of procedural fairness. Examples of the problems cited by judges in these cases include:

- Failure to attend hearings;⁴⁴
- Failure to meet deadlines;⁴⁵
- Failure to file court documents or file them on time;⁴⁶
- Being “ill-prepared”;⁴⁷ and
- Providing facts not supported by affidavits.⁴⁸

This suggests a correlation between an SRL’s difficulty with court procedures, and behavior described as “vexatious lite”, stopping short of a formal designation as a vexatious litigant but nonetheless referred to, sometimes extensively, in judicial reasoning regarding outcomes. For example, as Justice Martin noted in *Slipetz v Trudeau*: “(I)t is unfortunately not unusual with self-represented litigants, the absence of competent plaintiff’s counsel needlessly complicated this case through a lack of objectivity, focus, appropriate legal analysis and interpretation, and properly drafted pleadings.”⁴⁹

The data further suggests a tension between accommodating SRLs and reprimanding behaviour that the judge sees as inappropriate. While the Supreme Court of Canada case of *Pintea v Johns*,⁵⁰ and more recently *Wouters v Wouters*⁵¹ in the Ontario Court of Appeal, held that SRLs should not be expected to have the same level of procedural competence as a lawyer, in some cases judicial comments on an SRL’s lack of knowledge appear pejorative. For example:

⁴¹ *Gondal v Teck Resources Ltd*, *supra* note 19 at para 34.

⁴² *Hokhold v Gerbrandt*, 2017 BCSC 1249 at para 30.

⁴³ *Meadus v Meadus*, *supra* note 26 at para 41.

⁴⁴ *Weidenfeld v Parikh-Shah et al*, 2017 ONSC 1275; *0927613 B.C. Ltd. v 0941187 BC Ltd.*, 2015 BCCA 457

⁴⁵ *Slater v Slater*, 2013 NSSC 17.

⁴⁶ *Jovanovic v Jovanovic*, 2013 ONSC 7132.

⁴⁷ *Ottewell v Ottewell*, 2013 ONSC 721.

⁴⁸ *1269016 Ontario Ltd. v Ellis*, 2013 ONSC 2185.

⁴⁹ *Slipetz v Trudeau et al*, 2013 MBQB 111 para 3.

⁵⁰ *Pintea v Johns*, 2017 SCC 23.

⁵¹ *Wouters v Wouters*, 2018 ONCA 26.

During the hearing itself, the [SRL] unnecessarily lengthened the duration of the hearing by being ill-prepared and unfamiliar with the procedures and rules of the court. The court acknowledges that self-represented litigants often face special challenges; however, the costs associated with the delays engendered by these challenges should not be visited upon [the opposing party], especially when that litigant is entirely successful in the result and reasonable in his conduct.⁵²

It is challenging to distinguish judicial comments about inappropriate and even vexatious behaviour from comments that seem to arise from the unique barriers SRLs face because they are without representation. For example, in *Littler v Howie*⁵³, the SRL was not formally designated as vexatious, but their behaviour was described in terms that suggest “vexatious lite”. The court stated:

Unfortunately, what courts are facing today is a cluster of cases in which the self-represented litigant is generally unwilling and, at times, hostile to the prospect of taking instruction from the court, particularly as to what can be argued. This is the litigant who is under the mistaken impression they have an unfettered right to pursue their self-interests without regard to the rights of the opposing party under the rules of evidence and the Rules of Court... Fortunately, most cases and most self-represented litigants do not fall within these descriptions... Regrettably, it only takes a few to grind down the pace at which justice is delivered.⁵⁴

When does an SRL cross over from making reasonable mistakes, as in *Wouters v Wouters*, to being viewed as intentionally “grinding down” the pace of justice? How often might accusations of “vexatiousness lite” be avoided if SRLs were given more assistance with legal procedure? Our analysis of the jurisprudence in this data period suggests that these are questions which are not yet clearly answered.

(b) Vexatious Lite and Punitive/Substantial Costs

An earlier NSRLP report, [“Costs Awards against SRLs”](#)⁵⁵, noted a correlation between an award of substantial or punitive costs against SRLs and informal vexatiousness.⁵⁶ Of the seventy-four (74) cases in which we have seen a description of the SRL amounting to vexatious lite, twenty-seven (27) had punitive and/or substantial costs awarded against them, suggesting a correlation between perceived bad behaviour and heavier-than-usual costs awards. Substantial or punitive costs require a finding of “bad faith” and punitive costs can only be awarded where there has been, “reprehensible, scandalous or outrageous conduct on the part of one of the parties.”⁵⁷

⁵² *Ottewell*, *supra* note 41 at para 6.

⁵³ *Littler v Howie*, 2013 NSSC 84.

⁵⁴ *Littler v Howie*, *supra* note 48 at para 10.

⁵⁵ <https://representingyourselfcanada.com/costs-awards-against-srls/> (Ashley Haines and Julie Macfarlane)

⁵⁶ Ashley Haines & Julie Macfarlane, “Substantial & Punitive Costs Awards Against Self-Represented Litigants” *The National Self-Represented Litigants Project*, July 2018.

⁵⁷ *Young v Young*, [1993] 4 SCR 3, 1993 CarswellBC 1269 at para 260.

It is a matter of judicial discretion whether or not an SRL's behaviour is deemed vexatious enough to deserve punitive and/or substantial costs, but not sufficiently egregious for the SRL to be formally designated as a vexatious litigant. As Justice Pearlman noted in *Leger v Metro Vancouver YWCA*⁵⁸, "The plaintiff meets many of the hallmarks of a vexatious litigant. However, matters have not yet reached the stage where I am satisfied that the plaintiff has habitually brought vexatious litigation."⁵⁹ However, that same behaviour was deemed inappropriate enough to have special costs awarded against the SRL, because the SRL's actions were, "deserving of the court's rebuke".⁶⁰

In *House of Sga'nisim v. Canada*, the court held that increased costs could be used as a punishment for bad behavior. On an appeal from an SRL of an order requiring them to pay two thirds of the opposing party's costs, the British Columbia Court of Appeal upheld the decision, referencing "conduct that can fairly be described as abusive or vexatious"⁶¹ by the plaintiff and going on to state, "...costs can also be used to sanction behaviour that increases the duration and expense of litigation, or is otherwise unreasonable or vexatious. In short, it has become a routine matter for courts to employ the power to order costs as a tool in the furtherance of the efficient and orderly administration of justice."⁶²

(c) Vexatious Lite Cases Involving Both Punitive/Substantial Costs and Procedural Fairness

Thirteen (13) of these twenty-seven (27) cases where punitive or substantial costs were awarded against SRLs who were described in a vexatious lite manner *also* contain issues of procedural fairness, i.e. where SRLs made procedural errors that appear to stem from confusion or lack of knowledge.

In two (2) cases, behaviour resulting from procedural mistakes appears to have been punished with punitive costs even when there was no evident bad faith. In *Ottewell v Ottewell*⁶³ the SRL's behaviour in the litigation was deemed, "intransigent" and, "unreasonable",⁶⁴ yet Justice McCarthy also described the SRL as having, "a misplaced belief that she was acting in the best interests of the children".⁶⁵ Finding that there was no evidence that a punitive costs award would render the SRL parent unable to support her children, the court ordered that she pay full costs to the other parent.

The wide range of judicial discretion we are seeing in these cases raises concerns that SRLs may sometimes be unfairly penalized with costs for unintentional procedural errors, lack of understanding of the "offer to settle" system, or other procedural issues. There may be some

⁵⁸ *Leger v Metro Vancouver YWCA* 2013 BCSC 2021.

⁵⁹ *Ibid* at para 66.

⁶⁰ *Ibid* at para 76.

⁶¹ *House of Sga'nisim v Canada (Attorney General)*, 2013 BCCA 301 at para 111.

⁶² *Ibid* at para 15.

⁶³ *Ottewell v. Ottewell*, *supra* note 41.

⁶⁴ *Ibid* at para 8.

⁶⁵ *Ibid* at para 7.

sense that this will act as a deterrent to coming to court without a lawyer, but we respectfully disagree.

(d) Vexatious Lite and Persons with Disabilities

Among the seventy-four (74) vexatiousness lite cases, nine (9) involved SRLs asking for accommodations for disabilities. Four (4) had their disability confirmed by the court, and five (5) identified as having a disability that was not recognized by the court. These cases illustrate a range of disabilities, including being on disability pay, injured from a motor accident, mental illness, and/or using the vague label of “health issues”.

(e) Vexatious Lite and Gender

In contrast to cases in which an SRL is formally designated as vexatious, there are significantly more male SRLs described in a vexatious lite manner than female SRLs. Of the seventy-four (74) cases where an SRL is described in a vexatious lite way; fifteen (15) involve female SRLs, whereas forty-four (44), almost 60%, are male. We are not sure what conclusions to draw from this trend at this stage, which we shall continue to track. The outstanding fifteen (15) cases either have both parties as SRLs (one male, one female), or the SRL party consists of multiple members.

12. Conclusions

The vexatious litigant designation, when used appropriately, can be an effective tool to enable court resources to be used efficiently.⁶⁶ However, some of our data suggests that behavior formally labelled as vexatious, and especially behaviour we identify as “vexatiousness lite” may be the result of unintentional frustrations or obstacles SRLs are faced with as they navigate the courts. There clearly seems to be a correlation between an SRL’s lack of understanding of the courts’ procedures, and how SRLs are regarded and subjectively evaluated in terms of vexatiousness. This may lead to conflation of genuinely vexatious and abusive litigants, and those SRLs who are simply confused and overwhelmed.

Recent developments in Alberta regarding an “inherent jurisdiction” for making vexatious litigant orders suggest that this jurisprudence is still evolving in a significant way. Within the data period of this report – up to 2017 for family cases and 2014 for civil – we have already seen variations across the country in the application of similar legislative rules on vexatiousness, and the impact of “vexatiousness lite” on outcomes and costs. There is a broad scope of judicial discretion and subjective evaluation of SRL motives and intentions in the case law.

We shall continue to input more recent cases (2017-present family cases, 2014-present civil cases) into the CLD. This interim report offers a baseline for our next evaluation.

⁶⁶ *Hyrniak v Mauldin*, 2014 SCC 7.