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### Introducing the Self-Represented Litigant Case Law Database

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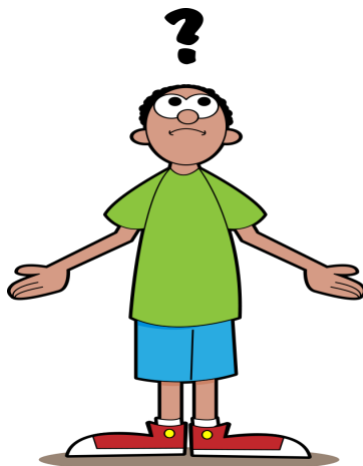
**The National Self-Represented Litigants Project**

# **Introducing the Self-Represented Litigant Case Law Database**

**December 2017**

**Sandra Shushani, Lidia Imbrogno & Julie Macfarlane**

# Have you ever wondered....



- ✓ How do self-represented litigants (SRLs) fare when they are up against a lawyer?
- ✓ What standards of procedural fairness<sup>1</sup> for SRLs do judges set across Canada?
- ✓ What does “vexatiousness” mean, and how might it result in an SRL being barred from the courts?
- ✓ Are there any other consequences of being characterized as badly behaved by a judge? For example, might someone be ordered to pay more in costs?
- ✓ Do different provinces adopt different approaches when people come unrepresented to court?
- ✓ Are there other ways in which SRLs are differentiated – for example are men and women treated differently, or people in blue-collar versus white-collar occupations?
- ✓ How do judges deal with accommodation requests from SRLs who have recognized disabilities or other demonstrable disadvantages?

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<sup>1</sup> “Procedural fairness” refers to whether the SRL has sufficient sense of the legal procedure to be able to participate meaningfully and effectively. See *Pintea v Johns* 2017 SCC 23 (and the NSRLP summary)

**The *Self-Represented Litigant (SRL) Case Law Database Project* began in January of 2017 and is the newest work-in-progress of the National Self-Represented Litigants Project. Our goal is to track the developing jurisprudence across Canada in cases that relate to and affect the positions of individuals appearing unrepresented.**

### **Why an *SRL Case Law Database*?**

The purpose of the *SRL Case Law Database* is to highlight patterns and themes relevant to SRLs, as evidenced by decisions reported by Canadian courts.

- ❖ Judges are now routinely being asked to consider issues that relate directly to the Access to Justice challenges of self-represented litigants. Judicial decision-making in cases involving SRLs is a new area of law, and one which presents many challenges for a traditional “strict-neutrality” model of judging<sup>2</sup>.
- ❖ We hear frequently from both SRLs who contact us to share their particular case outcomes, and legal professionals (lawyers, court clerks) who send us particular decisions, in anticipation of our interest.

We believe that the *Database* will be of interest and practical use to lawyers, judges, SRLs, and the public. In 2018, we will begin to publish detailed research reports on how these cases are being decided across the country and in individual provinces. Once we have populated the *Database* with both family and civil cases back to 2010, we shall publish the complete *SRL Case Law Database* on the NSRLP website, where it will be searchable, downloadable and free.

We have received grant funding for this project to date from the Foundation for Legal Research, and the Law Foundation of Ontario, and we are grateful for these resources which have allowed us to recruit and train a team of law student case law readers (with the assistance of WestLawCanada).

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<sup>2</sup> See for example Flaherty, Michelle. “Self-Represented Litigants, Active Adjudication and the Perception of Bias: Issues in Administrative Law” (2015) 38 *Dalhousie Law Journal* 119.

## Our Research Method

### 1. *Identifying the issues*

Because of the enormous numbers of SRLs now appearing in family and civil cases across Canada, we began by developing some key variables or measurement parameters for identifying which of these reported cases should be included in the *Database*.

By Spring 2017, we had identified four major issues that were emerging from the jurisprudence. We decided that the *SRL Case Law Database* should search for and analyze reported cases with one or more SRL parties that raise at least one of the following four issues:

1. Cases that discuss questions of ***procedural fairness*** for SRLs, for example raising arguments about the scope of judicial assistance for an SRL.
2. Cases that discuss “***vexatious behaviour***” or “***process abuse***” by a SRL. This might be a vexatious litigant *designation* in that jurisdiction, but also includes cases in which judges describe “process abuse” and “vexatious behaviour” but stop short of giving a formal designation.
3. Cases involving out-of-the-ordinary ***cost awards*** where either costs are awarded to an SRL for their time and work, or (more commonly) against an SRL with an accompanying judicial rationale relating to “vexatious behaviour” or “process abuse”.
4. Cases that concern ***accommodation requests*** by an SRL within a spectrum of disability access and/or specific accommodations (e.g. a request for language services, for a delay/adjournment to enable an SRL more time to respond, or for permission to use a McKenzie Friend).

### Our Research Team

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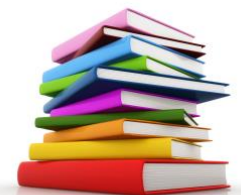
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## 2. Search strategy

A search strategy (developed with WestLaw Canada) identifies cases raising one or more of the four issues described above. Research team members are assigned a region and/or timeframe to search for (first family, later civil) cases falling within these parameters.

## 3. Case analysis

Once a case has been identified, a different team member is assigned to analyze the case using a series of standard questions (see below and Appendix). This peer-review system ensures that each case is read by at least two different members of the research team. If there is a disagreement over either qualification or analysis, the case is read by a third team member.

Lead Research Assistant Lidia Imbrogno has created a spreadsheet for case analysis, which was piloted and modified in the Spring of 2017. As well as noting which of the four case types (procedural fairness, vexatiousness, costs, or accommodations) are implicated by the decision, each case is analyzed using more than twenty further case “factors” or questions that we have decided are important to track. These include area of law, facts, legal reasoning, outcome, province and court level, judge, and other information about the SRL (plaintiff/defendant, gender)<sup>3</sup>.

Once the factors and questions for analysis were finalized, Survey Monkey was used to create a survey<sup>4</sup> to record the details for each case that had been identified as falling within our parameters. The Survey Monkey data is then regularly transferred to a spread sheet to allow us to not only track raw

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<sup>3</sup> See the complete list at Appendix A. We appreciate that there may be additional factors that emerge that we wish to track in our case analysis, and we have had some interesting discussions about this amongst the NSRLP team (including with our colleague Cindy Freitag at an earlier stage in the project). Our decision to focus on the above factors reflects our wish to make the analysis as thorough as possible based on what we already know about SRL case law, while making the analysis manageable for our research team and for potential users.

<sup>4</sup> *Survey Monkey* is widely used for quantitative analysis and for entering text based data for future analysis.

numeric data but also to filter and correlate several questions or factors for a deeper analysis. A few examples,

- How many vexatious litigants has each province formally designated (in any particular court, or timeframe)?
- Where accommodations were requested and permitted (Canada-wide, or in any particular court or province or timeframe), what is the gender breakdown of the SRLs?
- How frequently and how were SRLs awarded costs for the time they spent working on their case (by court, by province)?
- How do the reported decisions (on any of the four issues) of the last twelve months (by province, by court, Canada-wide) compare to the same period five years ago (e.g. raw numbers, outcomes for SRLs)?

Family and civil cases can also be analyzed separately or in aggregate.

### **Our Goals – And How Far Along We Are**

Having worked through the small pool of cases that had already been sent to us, data entry continued in early 2017 by adding Ontario family law cases reported in 2016-2017. By the middle of May 2017, the research team was searching and entering family law cases from 2016-2017 for all of Canada, assigning RAs to specific regions. This was expanded to 2014-2015 Canada-wide family cases in July, and 2013 cases in December. The research team will begin 2012 Canada-wide family case searches in January 2018.

Our immediate goal is to go back as far as January 2010 for both family and civil cases, before working forward and updating.

The search strategy has been fine-tuned as the team has gone deeper into the case law. For example, the team decided to define “accommodation” as including any request by an SRL that might affect their case management – including, for example, additional time to prepare, or permission to bring a McKenzie Friend to court – as well as more formal disability and access related accommodations such as audio aids, ASL signing, or an interpreter.

To date, the NSRLP team has entered 125 cases in to the *Database*. 98 (79%) of these are family law cases, and the remainder civil.

## What are We Seeing?

We will report in more detail on the patterns emerging from our research as the total number of cases in the *SRL Case Law Database* grows, but we want to provide some preliminary observations about what we are seeing.

**The question of vexatiousness and the behaviour of the SRL is a dominant issue in the emerging SRL jurisprudence.**

The largest single group of cases (n=50 or a little over 40% in the *SRL Case Law Database* are those that refer to “vexatiousness” or similar behaviours.

**There is significant judicial discussion of “vexatiousness” that stops short of formal designation.**

In a sub-set of these cases (n=13, or just over one quarter of the total) the result was a formal designation of the SRL as vexatious<sup>5</sup>. In the other 37 cases (including 3 cases where both sides were SRLs), the judge(s) described an SRL as “vexatious”, accusing them of “abusing” the process, or engaging in similar “bad” behaviour – but did not formally designate him/her as vexatious.

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<sup>5</sup>Some examples: Under Ontario legislation, if a party is deemed to be frivolous or vexatious, a court may stay or dismiss a proceeding or a motion and may further strike out or expunge all or part of a pleading or other document. The court may also prohibit a party who is deemed to be vexatious from making any further motions in the proceeding without leave. When determining costs, the court may consider whether any part of the proceeding was improper, vexatious or unnecessary.

*Courts of Justice Act*, RRO 1990, c. C-43, Reg. 194, ss.2.1, 25, 37.16, 57.01(f)(i).

Under Alberta legislation, if the court finds that an individual’s application or motion is instituting a vexatious proceeding, a court may order that the person is no longer able to institute a further proceeding or that the proceeding instituted may not be continued unless they have the permission of the court.

*Judicature Act*, R.S.A. 2000, c. J-2, s. 23.1.



The consequence of being designated a vexatious litigant is clear: this individual cannot start or continue any proceeding without the court's permission. The consequences of a judge describing a litigant as "vexatious", but without formally designating them as a vexatious litigant are less clear; these are discussed below.

**Vexatious litigant designation is used more frequently  
in certain provinces.**

We have noticed that the level at which litigants are formally designated as vexatious seems to vary widely among the provinces. Currently, the top designator is Alberta – so far 6 of the 13 cases Canada-wide (46%) in which an SRL was formally designated as a vexatious litigant are Alberta decisions.

**Courts vary greatly in how they characterize "vexatiousness".**

- ❖ There are some signs of distinctive provincial approaches to what is characterized as vexatious behavior. For example, courts in British Columbia often focus on the litigant's presentation to the court<sup>6</sup>, while courts in Nova Scotia seem more concerned with the litigant's ability to properly follow instructions<sup>7</sup>. There is some evidence of gendered characterizations, with male SRLs likely to be described as behaving in an aggressive or obstructionist way<sup>8</sup>, and female SRLs more likely to be described as manipulative or deceitful<sup>9</sup>.
- ❖ Some decisions suggest judicial expectations of competence that relate to social class and occupation<sup>10</sup>.

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<sup>6</sup> For example, *Lalli v Grewal*, 2017 BCSC 983

<sup>7</sup> For example, *Marshall v Robbins*, 2016 NSCA 51

<sup>8</sup> For example, *Weidenfeld v Parikh-Shah et al*, 2017 ONSC 1275

<sup>9</sup> For example, *Morwald-Benavides v. Benavides*, 2015 ONCJ 532

<sup>10</sup> For example, *Droit de la famille - 162645*, 2016 QCCS 5216

- ❖ In a small but nonetheless troubling number of cases, mental health issues are put forward as an explanation for SRL behavior, but the judge still describes the litigant as vexatious<sup>11</sup>.

**Judicial discussion of an SRL behaving in a “vexatious” manner may affect case outcome (costs, result).**

- Costs

In the 37 cases across Canada that described an SRL as vexatious in some way (but did *not* formally designate them as a vexatious litigant), 8 (22%) ended with costs awarded against them that appeared to be significantly higher than usual, and were justified by the litigant’s behaviour. We noticed that 6 of these 8 cases involved male SRLs. In just 3 of these 37 cases there was an SRL on both sides – in the remainder (92%), an SRL described as vexatious faced a represented party.

- Result

Analyzing the same 37 cases for results, 29 out of 37 have negative outcomes for the SRL described as vexatious (about 78%). This may have been because there was no merit in the SRL’s case (we do not make this assessment), or because the way in which the SRL presented the case detracted from its merit. While we cannot make this judgment, we do note that this number is significantly higher than the negative result rate (35%) for the remaining 72 cases in the database that did not describe any vexatiousness on the part of an SRL.

There are two concerns here – one is that SRLs are being inappropriately labeled as vexatious and this is being used against them, and the other is that even if SRLs are fairly described as vexatious, that does not mean that their case has no merit.

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<sup>11</sup> For example, *M. (M.A.) v. M. (D.J.)* 2013 ABPC 101

While numbers are still small, cases that identify vexatious behaviour and that resulted in a negative outcome for the SRL involved significantly more men (71%) than women.

### **Want to Stay in the Know?**

The NSRLP will produce a series of research reports using data from our constantly expanding *SRL Case Law Database* in 2018. We are planning regional reports, reports on our four key issues (see above), and reports on special themes relating to litigants, judges and area of law. If you would like to be sure of getting the reports as they come out, please email [representingyourself@gmail.com](mailto:representingyourself@gmail.com) and ask to be added to our mailing list.

Our ultimate goal is to publish the searchable *SRL Case Law Database* on the NSRLP website for free access by SRLs, justice system professionals, and anyone with an interest in Access to Justice issues in Canada.



## Appendix

### Case Questions / Factors for analysis

<b>1.</b>	<b>Province</b>
<b>2.</b>	<b>Case citation</b>
<b>3.</b>	<b>Area of law (i.e. Family or Civil)</b>
<b>4.</b>	<b>Court level</b>
<b>5.</b>	<b>Date</b>
<b>6.</b>	<b>Judge</b>
<b>7.</b>	<b>Brief facts</b>
<b>8.</b>	<b>Issues in the case</b>
<b>9.</b>	<b>Reasoning of the court</b>
<b>10.</b>	<b>Holding</b>
<b>11.</b>	<b>Who is the SRL in the case (i.e. plaintiff, defendant, appellant, respondent)?</b>
<b>12.</b>	<b>What is the gender of the SRL/each SRL?</b>
<b>13.</b>	<b>Was the SRL/either SRL a person with a disability?</b>
<b>14.</b>	<b>Was an accommodation requested by the SRL (e.g. an interpreter)?</b>
<b>15.</b>	<b>How was accommodation addressed?</b>
<b>16.</b>	<b>Was vexatiousness addressed in the case?</b>

<b>17.</b>	<b>How was vexatiousness addressed in the case? (vexatious behavior or vexatious designation)</b>
<b>18.</b>	<b>Does the case involve procedural fairness in relation to the SRL's ability to adequately represent him/herself?</b>
<b>19.</b>	<b>How is procedural fairness relevant to this case?</b>
<b>20.</b>	<b>Were costs ordered in favour of an SRL?</b>
<b>21.</b>	<b>If yes to (20) how were costs calculated for the SRL in this case (hourly rate, number of hours, etc.)</b>
<b>22.</b>	<b>If costs were awarded against an SRL, were these punitive/excessive?</b>
<b>23.</b>	<b>If yes to (22), what was the punitive nature of the costs?</b>
<b>24.</b>	<b>What was the outcome of the case for the SRL (or if both sides are unrepresented, each side)?</b>
<b>25.</b>	<b>Was the outcome of the case generally positive for those coming self-represented?</b>
<b>26.</b>	<b>If yes to (25), explain briefly</b>