The Use of Summary Judgment Procedures Against Self-Represented Litigants: Efficient Case Management or Denial of Access to Justice?

Julie Macfarlane, Katrina Trask & Erin Chesney for the National Self-Represented Litigants Project

THE NATIONAL
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Research, Resources, Dialogue & Collaboration

Windsor Law
University of Windsor

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1. Anecdotal Data about the Growing Use of Summary Judgment Procedures

Approximately a year ago, a NSRLP lawyer-volunteer began to regularly observe hearings that included SRLs (self-represented litigants) taking place at a busy Toronto courthouse. She reported that she was seeing a number of procedural motions against SRLs. In these cases, she noted, the SRL was usually bewildered and perplexed by what was happening – they had often come to court expecting to present their case for trial – and instead found that they were suddenly facing the dismissal of their action.

At the NSRLP, we began to hear from SRLs who described efforts to dismiss their cases using a Summary Judgment Procedure or SJP. Sometimes this also resulted in them being designated as vexatious litigants, barring them from future efforts to use the courts.

We were concerned that SRLs often do not understand legal rules and procedures, but were attempting to represent themselves because they could not afford to pay for a lawyer to do so. While their actions and behaviors might have been considered to be vexatious or an abuse of process by system experts, this may have been the consequence of their lack of understanding and general desperation rather than a deliberate effort to disrupt the system. Furthermore, these cases were clearly raising a crisis of confidence in the justice system for these individuals.

In April 2015, our attention was brought to a decision by Saskatchewan Chief Justice Richards in Hope v Pylypow[1]. C.J. Richards was highly critical of an earlier decision to strike the

[1] (2015) SKCA 26

pleadings of a SRL couple. The decision of the Chambers judge - overruled by the Chief Justice - conflated a finding of "no cause of action" with "vexatiousness".

Both our anecdotal data and this judgment led us to speculate whether application for summary judgment could be emerging as an intentional strategy used by represented parties against SRLs, labeling them as vexatious and appealing to the concerns of judicial officers about SRLs "jamming up" the courts.

And if this was becoming a strategy, how successful was it?

We immediately recognized that an increase in SJPs may simply reflect the growing number of self-represented litigants (SRLs) in the courts, and a felt need (seen in legislative and judicial initiatives) to strike actions that do not have merit at an early stage. Growing numbers of SRLs in civil and family courts raise considerable challenges for the efficient use of available justice system resources and this concern must be balanced with a commitment to access to justice, as described by the Supreme Court of Canada in Hryniak v Mauldin[2].

Karakatsanis J., writing for the Court, considered summary judgment as a tool furthering access to justice:

> "Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system."[3]

She continued:

[2] 2014 SCC 7, [2014] 1 S.C.R. 87
[3] Para 2

"However, undue process and protracted trials, with unnecessary expense and delay, can *prevent* the fair and just resolution of disputes."[4]

The question that we wanted to try to answer was whether we are seeing the use of SJPs that Hyrniak anticipated? Were the ways in which SJPs used against SRLs fair and appropriate, in light of the Hryniak principle? We decided that we needed a closer look at the data.

2. A Brief Overview of Summary Judgment Procedures

On a motion for summary judgment, the moving party bringing the motion attempts to persuade the court that there is no genuine issue requiring a trial and that judgment should be granted on a summary basis.

The criteria described in case law include:

- That there are "no genuine issues for trial"
- That there is "no chance of success"
- That it is "plain and obvious that the action cannot succeed" (see Prete v. Ontario (Attorney General (1993), 16 O.R. (3d) 161 (C.A)
- That there is no "triable issue" (Tupperware Canada v 1196815 Ont. Ltd. 2008 OJ 532).

Other rules of civil procedure deal specifically with whether a SRL may be declared a vexatious litigant. However, when a SJP is brought against a SRL there is often a discussion of whether this party is a vexatious litigant, and whether their case is an

[4] Para 24

abuse of the legal process[5]. Indeed in some jurisdictions the rule on summary procedure includes grounds of not only "no reasonable claim or defence" but also that the case is determined to be "unnecessary, scandalous, frivolous or vexatious…(or) otherwise an abuse of the process of the court."[6]

3. Our Research Process

We decided to conduct a survey of reported cases in Can Lll where a SJP was used, and to further analyze those in which a SRL appeared.

Katrina Trask, a volunteer NSRLP researcher who at this time was working as a research lawyer for the Supreme Court of Newfoundland, offered to take up the challenge.

The research methodology that we developed was as follows:

i. We undertook an initial search in Can Lll of 2004 and 2014 for reported decisions of motions involving SJPs and SRLs

ii. We further reviewed the 2014 data as follows:

   a. We separated out cases where a SRL was described as "vexatious" (or in which there were clear indicia that suggested that they were "vexatious"). We did this in order to focus our analysis on cases in which summary judgment was sought in the absence of

[5] Leading cases include *Re Lang Michener and Fabian* (1987), 50 O.R. (2d) 353 *Gao v. Ontario WSIB*, 2014 ONSC 6497 and *Meads v. Meads*, 2012 ABQB 571
[6] *Supreme Court Civil Rules*, BC Reg 168/2009, rule 9-5(1)(a)-(b), (d).

any claim or evidence of "vexatiousness"; or "abuse of process";

b. We reviewed the reasons given for summary judgment in the remaining cases (a subset of our initial group);

c. We distinguished between cases in this group brought by represented parties against SRLs, and those initiated by SRLs;

d. We calculated the success rates[7] of summary judgment motions brought by represented parties against SRLs, and those of motions brought by SRLs

iii. In order to eliminate some procedural variables across the country, we repeated this analysis with cases brought under Ontario Rules 20 & 21, and new Rule 2.1 (implemented during the last 6 months of 2014).

4. Our Findings

i. Initial review of Can Lll cases

- Can Lll reports 5 SJP cases involving a SRL in 2004[8]
- Can Lll reports 61 SJP cases involving a SRL in 2014[9]

We hoped to use 2004 as a rudimentary control group, and the findings below relate the 2004 figures to 2014 at each step.

[7] We used a simple formula to calculate this, assigning plus 1 to a case in which the motion was granted in full, 0.5 where it was granted in part

[8] Repeat motions by the same moving party were eliminated

[9] We removed repeat cases (note (8)), and those which were leaves for appeal or related to costs only

We recognize that there are some important intervening variables that may diminish the usefulness of this group as a direct comparator to the SJP landscape in 2014[10].

In addition, we recognize that there has been a sharp rise in the number of SRLs in the courts during this same ten-year period[11]. The number of summary judgments granted should be expected to increase as the number of SRLs increase, in line with Hryniak.

Nonetheless, the number of reported cases has risen very sharply from 2004 to 2014. In summary:

- The percentage increase of SJPs from 2004 to 2014 is 1160%.

- There were 61 applications for a SJP in cases involving a SRL in 2014. All but 4 cases were brought by represented parties against a SRL (n=57 or 93%).

- Almost all the SJP applications brought by represented parties against SRLs in 2014 were fully successful. Of the 57 cases, summary judgment was granted (or upheld on appeal) in 55 cases.

- This is a success rate of 96%.

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[10] For example, after revisions to Ontario's Rule 20 in 2010 following the recommendations of the Osborne Report, the rule that an unsuccessful party to a SJP would be subject to substantial indemnity costs was revised to make this costs order possible after a failed SJP, but far from standard. This may have removed an important disincentive to use a SJP. See Osborne Report 2007, para. 17 of the Summary of Findings and Recommendations, p. vii, discussed further at pages 36-7

[11] For example, the Queen's Bench of Alberta reports a 96% increase in SRLs from 2006 to 2014.

The number of summary judgment applications in cases involving SRLs rose by more than 1000% between 2004 and 2014

In SJPs involving SRLs, 93% were brought by represented parties against SRLs

96% of these applications were successful

ii. Digging deeper into the 2014 data

Next, we *removed* from our full case set of 2014 cases (n=61) those in which there was a finding of "vexatiousness" or indicia that pointed to vexatiousness.

In 4 cases, a SRL was formally declared "vexatious".

In a further 12 cases, summary judgment was ordered or actions were dismissed for being vexatious or an abuse of process.

This left 45 cases in which a SJP was used where the decision on summary judgment does not reference vexatiousness or abuse of process.

- After removing these 16 cases, the increase in summary judgment applications from 2004 to 2014 is from 5 to 45. The rate of increase is 800%.

- The SJP applications brought by represented parties against SRLs in this subset (n=43 or 96%) were successful in all but two cases, where the motion was only partially successful, and another in which the motion was adjourned.

- This is a success rate of 95%.

- Almost half of these decisions as reported – which include appeals against an order of summary judgment – include little or no judicial reasoning on the summary judgment issue, making further analysis (for example, whether the decision strikes an appropriate balance under the Hyrniak principle) difficult.

Having removed cases involving formal declarations of vexatiousness or indicia of same, summary judgment applications in cases involving SRLs still rose by 800% between 2004 and 2014

96% of these summary judgment applications were brought by represented parties against SRLs

95% of these applications were successful

Almost 50% of these reported decisions included minimal reasons for the SJ decision

iii. Focusing on Ontario Rules 20 & 21

We decided next to refocus our analysis on cases brought under Rules 20 & 21 of the Ontario Rules of Civil Procedure[12]. The reason for this is that summary judgment procedures vary considerably across the country, and we wanted to reduce some of the potential dependent variables that might affect outcome.

With the assistance of Research Assistant Erin Chesney at the NSRLP, we went back to Can Lll, and this time pulled the cases in 2004 and 2014 that used Ontario's Rules 20 or 21. We looked at both cases involving SRLs and those with represented parties on both sides.

In 2004, Can Lll reports:

- 33 applications were brought under Rule 20 or 21 by represented parties against other represented parties.
- 69% were successful
- 4 motions brought under Rule 20 or 21 in cases involving SRLs. One (unsuccessful) application was initiated by a SRL.The other 3 motions brought by represented parties were successful.

[12] *Ontario Rules of Civil Procedure*, RRO 1990, Reg 194, Rules 20-21. Rule 20 provides that a judge has the power to order a summary judgment dismissing all or part of a plaintiff or defendant's claim if the court is satisfied that there is no genuine issue for trial or both parties agree that summary judgment is the appropriate order. Rule 21 provides that the court has the power to determine a question of law before trial or strike out a pleading on the ground that it discloses no reasonable cause of action or defence.

In 2014:

- 61 applications were brought under Rule 20 or 21 with represented parties on both sides, an increase of 93%

- 61% of these applications were successful

- 13 motions were brought under Rule 20 or 21 in cases involving SRLs; one was initiated by a SRL. This is an increase of 225% since 2004

- 81% of these applications for summary judgment were successful, 88% if the single case brought by a SRL is removed

Finally, Can Lll reports 4 cases in 2014 heard under Ontario's new Rule 2.1[13]. Rule 2.1 came into effect in July 2014, and allows for an application for summary judgment in writing and without a hearing.

All 4 motions under Rule 2.1 were brought by represented parties against SRLs, and each was successful (a success rate of 100%)

[13] *Ontario Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 2.1

Applications under Ontario's Rule 20 & 21 between represented parties rose by 93% from 2004 to 2014

In 2014, 61% of applications between represented parties were successful

Applications under Ontario's Rule 20 & 21 involving SRLs rose by 225% from 2004 to 2014

In 2014, 88% of Rule 20 & 21 applications where represented parties moved against SRLs were successful

5. SRLS & SJPs: the Problems

While SJPs offer an opportunity to deal efficiently with cases that are without merit, it is equally important to consider their unintended consequences. This is especially critical at a time of great change due to the influx of large numbers of SRLs. SRLs who face the end of their claim as a result of a summary judgment often feel that they have been denied access to justice and unfairly treated by our legal system.

SJP cases illustrate the dilemma of how to fairly and appropriately hold a SRL to account when their case is unlikely to succeed (the premise of SJPs). Hyrniak speaks to the need to ensure that "undue expense and delay" do not prejudice access to justice.

However, this perfectly reasonable and logical principle may assume a different character and consequence when applied to SRLs, instead of (as historically been the case), to expert agents and their clients.

i. Attributed motivation

It is possible that judges sometimes attribute a motivation to a SRL – to intentionally disrupt or thwart the legal process – that misinterprets their genuine confusion, stress, and difficulty in navigating a complex and unfamiliar process[14].

ii. Conflation among criteria

We saw that discussion about "merits" was often joined with discussion about "vexatiousness" and "abuse" in some of the cases. This reinforces the problem of assumed motives described above, and takes it one step further. While these may be useful "catch-all" expressions, they further reinforce the chances of conflating SRLs = vexatious = lack of merit.

iii. Applying the same criteria to SRLs and to lawyers

This is a further problem. For example:

- Where a case is attacked for being improperly pleaded - should SRLs be given assistance to plead properly?

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[14] *Hope v Pylypow* serves as an excellent illustration of this (above note (1)). Some judges are clearly aware of this danger. See for example *International Longshore & Warehouse Union Local 502 v. Ford*, 2014 BCSC 65, Affleck J; *CAS v. T.*, 2014 ONSC 916, Maranger J.

Should there be a chance to amend? (seen in a small number of cases).

- Where a case is attacked because it lacks proper evidence – should SRLs be guided on what types of evidence will be needed to make their claim?
- Where a case is attacked because it has "no reasonable chance of success" – would this be different if the case were being argued by a lawyer? Is the standard different for a case brought by a SRL?

Put simply: is it fair and reasonable – or even possible, in a climate that often suspects their motives - to hold SRLs to the same standards as expert agents?

iv. Efficiency versus a chance to be heard

Ontario introduced a new paper-only SJP (Rule 2.1) in July 2014[15]. While undoubtedly more efficient, the risks and dangers set out at (i) above may be even more formidable in this context. SRLs are likely to find it even more difficult to convince a judge or master of the merits of their case as they struggle to master another written procedure. Some may feel that the dismissal of their matter without an opportunity to speak to the court is an additional unfairness.[16]

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[15] *Ontario Rules of Civil Procedure*, RRO 1990, Reg 194, rule 2.1; and see Julius Melnitzer, "Courts 'taking a harder line' on vexatious lawsuits", *Law Times* (9 November 2015), online: <www.lawtimes.com>.

[16] Our research shows that in the small number of cases reported in 2014 on the use of Rule 2.1, represented parties have a 100% success rate against SRLs.

6. Some Ways Forward

i. Monitoring of SJP decisions/ outcomes

As more and more courts introduce SJPs in an effort to case manage the increasing number of matters that are being handled by SRLs, it is crucial to ensure monitoring to allow for the evaluation of the risks and dangers outlined at (i) above.

At present, a large number of reported decisions include minimal reasoning in relation to the summary judgment decision. This makes it difficult to know not only how the decision was reached – for example whether it is consistent with the criteria of the particular SJP as well as the spirit of Hyrniak - but whether any of the risks outlined above have been recognized and taken into account.

There is a striking difference in the success rate of SJPs brought against SRLs (almost always successful), SJPs brought by SRLs (nil successes) and those brought between represented parties (in Ontario in 2014, 61%, and with a smaller sample in 2004 70%). While one might expect a higher rate of success against a SRL by a represented party, when numbers reach the high 90 percentiles there is at minimum a public perception of unfairness, unfortunately reinforcing a frequent complaint voiced by SRLs that "the deck is stacked" against them. In contrast, the rate of success in motions involving lawyers on both sides reflects a more even contest.

ii. Judicial training and education

Judges face a heavy burden in adapting and adjusting to the influx of SRLs. Some clearly recognize the difficulty of treating

SRLs in the same way as expert agents when it comes to SJPs. Others may feel that SJPs afford them an opportunity to reduce the number of cases involving SRLs and remove troublesome cases from the docket.

Judges need to be supported by judicial training that presents empirical data on the use of SJPs, and allows them to collectively develop best practices. Training can also be an opportunity to develop more nuanced and sophisticated rules that achieve the goals of SJPs without risking basic access to justice.

iii. Assistance for SRLs

There is a clear need for enhanced information and education for SRLs on the purpose of a SJP, and how to effectively participate in these processes. At present there appears to be a default "ambush" of SRLs who are often unaware of what is happening in a SJP.

This implies more assistance for SRLs not only in responding to an application for summary judgment against them, but also in the original preparation of their materials, and in understanding the requirements of evidence and what to provide in this respect, and so on.

iv. Ethical issues for lawyers

If the use of SJPs against SRLs is becoming, as we speculate, an increasingly frequent and perhaps intentional litigation strategy, there is a need to consider whether this is compatible with the Rules of Professional Conduct.

Presently, professional conduct rules in Canada require that members of Bar are professional in their dealings with one another, prohibiting "sharp practice"[17]. If there were evidence of SRPs being used as a "blanket" strategy by counsel wherever they faced a SRL, would this count as a "sharp practice"? Or is this behavior that could bring the profession into disrepute[18]?

Professional conduct rules in all the provinces require that members of the profession deal in good faith with members of the public, treating them with courtesy and respect[19]. Is there a need to go further? Are specific new rules necessary to monitor the dealings between lawyers and SRLs[20]?

7. Comments and Further Research

As with all NSRLP research reports, we welcome comments on our work and our conclusions from those both inside and outside the legal community.

We are also aware of the need for further data collection in this area, and hope that our initial work will provide impetus for that.

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[17] Law Society of Upper Canada, *Rules of Professional Conduct,* rule 6.03(3)
[18] Law Society of Upper Canada, *Rules of Professional Conduct*, rules 7.2-2, 4.1-2(e).
[19] For example, Law Society of Upper Canada, *Rules of Professional Conduct*, rule 6.03(1).
[20] See for example the new guidelines of the Law Society of England and Wales at http://www.cilex.org.uk/pdf/Litigants%20in%20person%20guidelines%20for%20lawyers%20-%201%20June%202015.pdf