Summary judgments – the backstory that may shock you

About a year ago, a NSRLP lawyer-volunteer began to regularly observe hearings taking place at a busy Toronto courthouse that included SRLs. She reported that she was seeing a number of procedural motions against SRLs. In these cases 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.

And at the NSRLP, we began to hear from SRLs who described efforts to dismiss their case using a Summary Judgment Procedure or SJP.

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 behavior 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 Chief Justice Richards in Hope v Pylypow (2015 SKCA 26)[1], which I blogged about[2]. Chief Justice Richards was highly critical of an earlier Chambers decision to strike the pleadings of a SRL couple finding "no cause of action" – and further critical of the

[1] www.canlii.org/en/sk/skca/doc/2015/2015skca26/2015skca26.html
[2] http://representingyourselfcanada.com/2015/04/14/not-de-cruz-but-the-srl-case-you-should-have-been-paying-attention-to-this-week/

conflation the Chambers judge seemed to make between a finding of "no cause" and "vexatiousness".

We began to wonder – was an application for summary judgment 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?

Recognizing the context & the variables

We realized that one response might be that an increase in SJPs simply reflects the growing number of self-represented litigants (SRLs) in the courts, and the need to strike actions without merit at an early stage. Growing numbers of SRLs in civil and family courts raise challenges for the efficient use of available justice system resources which must be balanced with a commitment to access to justice, as described by the Supreme Court of Canada in Hryniak v Mauldin[3].

We also recognized that procedural changes that have taken place over the last decade – for example, the change in the cost consequences of a failed application for summary judgment in Ontario following the Osborne Report – might also affect a ten-year review of SJPs.

But we decided that we needed a closer look at the data[4]….and this is what we found (you can read the full report and see all the numbers here URL)

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

[4] This research was conducted by Julie Macfarlane with Katrina Trask and Erin Chesney

A huge rise in the use of summary judgment procedures against SRLs

- The number of SJPs being brought against SRLs rose from 5 in 2004 to 61 in 2014. This is a percentage increase of 1160%.

SJPs brought against SRLs are almost always successful

- In 2014, where SJPs were brought by represented parties against SRLs (almost all the cases), the "success rate" (judgment granted or appeal against summary judgment dismissed), was 96%

Digging deeper

This was shocking, but wait. Perhaps, we wondered, the 2014 cases we had found described intentional vexatiousness and process abuse, and should indeed be removed, in the spirit of Hryniak?

We next reviewed each of the 65 cases we found in 2014, and removed each case that included either a formal declaration that the SRL was a "vexatious litigant", or *any indicia* in the judgment hinting at vexatiousness or "process abuse" (for example, multiple filings in this case, or previous actions on similar points)[5].

This review left us with 45 cases in which there was no reference to vexatious behavior or process abuse - instead the summary judgment decision focused on the merits of the

[5] We could not of course appraise the fairness of such conclusions, and simply accepted them on face value.

arguments, the technical completeness of the pleadings, and the sufficiency of the evidence being presented by the SRL.

- In this "sanitized sample", the increase in summary judgment applications from 2004 to 2014 is still 800%.
- Where SJPs were brought by represented parties against SRLs (almost all the cases), success was still almost universal: 98% of applications in this group succeeded[6].
- Almost half of the decisions as reported – which include appeals against an order of summary judgment – include no or minimal judicial reasoning on the summary judgment issue, making further analysis difficult.

Another check on the data: focus on one jurisdiction

Phew, we thought, it still looks bad. But wait a minute - there are so many different forms of summary procedure across the country. Maybe we should reduce the potential variables and focus on just one set of SJPs and see if the data look any different? We chose Ontario's Rule 20 & 21.

Here's what we found:

- Applications under Rule 20 & 21 by represented parties rose by 93% between 2004 and 2014
- In 2014, where these were contests between *represented parties*, 61% resulted in an order granting summary judgment
- Also in 2014, where motions were brought by represented parties against SRLs, 88% resulted in an order granting summary judgment

[6] We counted partial success as 0.5 in our calculation

What does all this mean?

Broadly speaking, the data confirmed our worst fears. We were concerned at the outset that SJPs might be being used against SRLs in a way that took advantage of their confusion and lack of knowledge and skill.

The results suggest that SJPs are increasingly being used successfully against SRLs. And given the results we see even when we remove cases formally or informally referencing "vexatiousness" or "process abuse", this suggests that many cases are being struck because of technical errors that are unintentional and could be addressed if SRLs had more assistance.

Or – perhaps most worrisome – that the SRL stereotype rather than the reality of "vexatiousness" in a particular case is being used, rather effectively, by counsel to appeal to judges to order summary judgment against a SRL. Without more complete reasoning offered in many of the decisions, this is difficult to assess.

Recommendations

There are four recommendations in the full report (URL). These are for:

- Better monitoring of SJP decisions and outcomes
- Further and better judicial education informed by this data
- Enhanced assistance for SRLs who are presently often "ambushed" and unaware of what is happening in a SJP
- Consideration of whether the strategic use of SJPs against a SRL raises questions of ethical practice for lawyers.

As always, we welcome your comments, suggestions, and reflections. As courts across the country consider modifying existing SJPs or introducing new ones, there is a lot more research that could be done in this area. We offer our new report as a starting point only.