The National Self-Represented Litigants Project presents:

The Self-Represented Litigants Case Law Database
Occasional Research Series
(Paper 3)

Substantial & Punitive Costs Awards Against Self-Represented Litigants

July 2018

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Introduction: The Self-Represented Litigants Case Law Database

The Self-Represented Litigants Case Law Database (CLD) is a research initiative that tracks emerging jurisprudence across Canada affecting case outcomes for self-represented litigants (SRLs). To date, we have entered over 200 Canadian decisions into the CLD. Approximately 82% of the cases that have been entered so far are family law cases; the remainder are civil, constitutional, or criminal.

The CLD focuses on four issues: (1) descriptions or designations of SRLs as "vexatious"; (2) unusual or atypical costs awards both for and against SRLs; (3) questions of procedural fairness where an SRL does not appear to properly understand the court procedure, or their role; and (4) disability-based and other forms of accommodations for SRLs. For a case to be eligible for the CLD, one or both parties must be self-represented, and the case must raise at least one of the abovementioned issues. These parameters were chosen because they appear to be the most frequently occurring issues noted in the growing body of jurisprudence involving SRLs. While each issue is distinct, we have begun to see an interesting interplay between them, which we explore in this report.

For a more detailed description of our methodology, and the boundaries of each of our four parameters, please see the CLD Preliminary Report, published in December 2017.[1]

Our Report on Costs Awards for Successful SRLs

In April 2018, the NSRLP's Lidia Imbrogno and Professor Julie Macfarlane published a report (Costs Awards for Self-Represented Litigants) examining how courts determine costs awards for *successful SRLs*. The case law presented in that report showed that while the ultimate goal of awarding costs is to indemnify the successful party, the additional goals of encouraging settlement, prevention of vexatious litigation, streamlining proceedings, and ensuring Access to Justice are more frequently being given greater weight.[2]

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

[2] Lidia Imbrogno & Julie Macfarlane "Costs Awards for Self-Represented Litigants" *The National Self-Represented Litigants Project*, April 2018, at 3.

Today's Report: Costs Awards Against Losing SRLs

This report focuses on decisions that award costs *against SRLs*: that is, when they are on the losing side. We are interested in whether there is any difference in the way a losing party is treated, and how costs against them are assessed when they are self-representing, as opposed to when they are represented by a lawyer.

At NSRLP our attention was first drawn to this issue as a result of our intervention in *Pintea v Johns*,[3] where an SRL who failed to attend two case management conferences was held in contempt and ordered to pay $83,000 in costs (this order was later set aside by the Supreme Court of Canada).[4]

We have also noticed other judicial comments that suggest that substantial or punitive costs may be seen as 'warning off' those who are considering attending court without a lawyer. For example, such costs may be awarded against an SRL as a "sign to others who contemplate using the Court room as a personal soap box, that there will be a price to pay for doing so."[5] Another judge indicated that demonstrating disregard for the rules of the court "is simply intolerable and must be sanctioned by the court to protect the integrity of the court process and as a warning to the mother [the SRL] and other litigants that this kind of behaviour will have significant consequences."[6]

While the rationale for awarding substantial or punitive costs (see below) is about deterring and/or punishing bad behaviour, SRLs are relatively new to judicial decision-making, and we wanted to begin to interrogate how their behavior in litigation was being evaluated and (in some cases) 'punished'.

Costs Payable by Losing Parties

When one party loses a law suit, they may be ordered to pay costs to the successful party in a number of ways. Typically, costs awards are made on a *partial indemnity* basis. Partial indemnity – otherwise known as a regular 'loser-pays' award – usually entitles the successful party to approximately 60%

[3] *Pintea v Johns,* 2016 ABCA 99.
[4] *Pintea v Johns,* 2017 SCC 23.
[5] *Darlington v Moore*, 2016 NSSC 84 at para 37.
[6] *Delichte v Rogers*, 2013 MBQB 93 at para 36.

of their legal fees. Partial indemnity is also referred to as "party and party costs"[7]

The amount of costs ordered under partial indemnity varies between provinces, due to the different methods used to calculate costs. The method of calculation is usually found in the Rules of Civil Procedure in each province. For further information please see the Costs Awards for Self-Represented Litigants Report.[8]

Substantial indemnity awards a successful party one and a half times more than their partial indemnity costs.[9] Substantial indemnity is also known as "solicitor and client costs".[10] Finally, in relatively unusual circumstances, *punitive* costs may be awarded.

Factors in Awarding Substantial or Punitive Costs

Punitive costs are used to address the behavior of a particular party during litigation. Similarly, substantial indemnity costs can be awarded if a party acted unreasonably or in bad faith, was negligent, filed separate claims that should have been filed in one action, refused to admit or denied anything that should have been admitted, or if a party unnecessarily delayed the proceedings.[11] In addition, if one party refuses a reasonable offer to settle from the other side, and the party making the reasonable offer is then successful at trial, costs on a substantial basis can be awarded against the unsuccessful litigant from the date that the offer to settle was served.[12] Further, the British Columbia *Supreme Court Civil Rules* indicate that if the costs that would normally be awarded would be "grossly inadequate or unjust", substantial costs may be awarded. [13]

In the case of *Young v Young*, Justice McLachlin, indicated that punitive costs are awarded "only where there has been reprehensible, scandalous or outrageous

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[7] *Rules of Civil Procedure*, RRO 1990, Reg 194, section 1.04(4).
[8] "Costs Awards for Self-Represented Litigants" *supra* note 2.
[9] *Supreme Court Rules*, BC Reg 221/90, Appendix B s 2(4.1); *Rules of Civil Procedure*, *supra* note 7, s 1.04(5).
[10] *Rules of Civil Procedure*, *supra* note 7, s 1.04(5).
[11] *Ibid*, s 57.01(1), s 20.06; *Alberta Rules of Court*, Alta Reg 124/2010, s 10.33(2).
[12] *Rules of Civil Procedure*, *supra* note 7, s 49.10(1).
[13] *Supreme Court Civil Rules*, BC Reg 168/2009, Appendix B, s 2(1).

conduct on the part of one of the parties."[14] She also indicated that applications that are without merit do not automatically attract punitive costs awards.[15]

There is a similarity and sometimes an ambiguity between when costs awards are properly characterized as 'substantial' vs 'punitive'. Moreover, both approaches are deviations from the norm, which is partial indemnity or regular 60% loser-pays awards. For this reason, the data and analysis that follows is based on cases in the *SRL Case Law Database* that show losing SRLs being ordered to pay costs on *either* a substantial indemnity or a punitive basis.

Of the 216 cases entered in the CLD as of this writing, approximately 36% (n = 78) involve costs being awarded against an SRL as the losing party. Of these 78 cases, 51% (n = 40) of SRLs were ordered to pay regular "loser-pays" costs. In the remainder, 49% (n = 38) of SRLs were ordered to pay costs awards that were substantial or punitive in nature. These 38 cases are analyzed further below.

Substantial / Punitive Costs and Gender

Based on the cases entered into the CLD to-date, there is a noticeable disproportionality in how often substantial or punitive costs are ordered against men versus women. In 67% (n = 29) of cases involving punitive costs, the SRL identified as male. However, in only 33% (n = 14) of cases involving punitive costs, the SRL identified as female.[16]

This is significant considering the overall gender distribution of the CLD: 53% (n = 131) of the cases entered so far involve a male-identified SRL, while 39% (n = 97) of cases involve a female-identified SRL.[17] This suggests that male SRLs are overrepresented in cases that involve substantial or punitive costs awards.

[14] *Young v Young,* [1993] 4 SCR 3, 1993 CarswellBC 1269 at para 260.
[15] *Ibid*.
[16] In five cases both parties involved in the litigation were SRLs. For the purposes of determining gender distribution we have considered each litigant in those cases separately.
[17] Within the overall database there were 32 cases where both litigants were SRLs. In the remaining 8% (n = 20) of cases, the gender of the SRL was not identified.

Procedural Fairness and Costs

We examined cases that had been entered into the CLD in which substantial or punitive costs awards had been made, and which were also identified by our research team as raising issues of procedural fairness. Procedural fairness issues include cases in which questions are raised and arguments are made regarding, for example, the scope of judicial assistance for an SRL, and the ability of an SRL to understand and fully participate in the proceedings. Procedural fairness issues stem from an SRL's mistakes or misunderstandings around court procedure, and may relate to tasks such as filing and serving documents, or how to properly present admissible evidence to the court.

In *Pintea v Johns,* the Supreme Court of Canada determined that there is a judicial responsibility to recognize that SRLs are not in the same position as lawyers when it comes to understanding the relevant law and procedure, and that steps need to be taken to assist them (sometimes described in the emerging literature as "active adjudication").[18] In other words, the presiding judge should ensure that the SRL understands the rules and procedures of the court, and is not unfairly discriminated against for their lack of legal knowledge.

We have noted a relationship in some cases in which there is reference to the difficulty an SRL is experiencing navigating legal procedure and effectively representing themselves, and in which substantial/punitive costs are then awarded against this SRL. Of the 38 cases we have analyzed involving substantial or punitive costs awarded against SRLs, 42% also raise issues of procedural fairness (n = 16). The justification for the substantial or punitive costs often centres on concerns about delays caused by the SRL's mistakes or omissions. While delays certainly raise Access to Justice issues, we note that this may be in some tension with ensuring that SRLs are not penalized for their lack of procedural knowledge.

For instance, in the case of *JJR v JFM,* a New Brunswick custody and access case, costs of $3,500 were awarded against the SRL, despite the court recognizing that costs in custody and access cases should be awarded only in exceptional circumstances.[19] Justice Baird held that the SRL was not "fully prepared" as he required an additional court appearance to bring forward further evidence

[18] *Pintea v Johns, supra* note 4.
[19] *JJR v JFM,* 2013 NBQB 253 at para 238.

from a representative from the Department of Social Development regarding his income, and delayed the court proceedings [20]; and that the SRL failed to file a post hearing brief.[21] The court noted that, "not to award her [the represented party] costs would be tantamount to rewarding Mr. R [SRL] for his unsuccessful attempt to change two previous orders, and would economically penalize Ms. M".[22]

Concerns about delay led to a much higher costs award in the case of *Ottewell v Ottewell.*[23] The losing SRL was required to pay a full indemnity, including fees and disbursements, plus the SRL's share of the parenting coordinator for a total of $120,256.76.[24] The court stated:

> "During the hearing itself, the RM [respondent mother] 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 another litigant"[25]

Ottewell v Ottewell is a parental alienation case and is there is no doubt that the court saw the SRL mother as highly culpable in her handling of the dispute between the parties. Nonetheless, we note that she was also described as "…unfailingly polite to the court" and Justice McCarthy said that she "…attempted, as best she could, to follow my instructions as they pertained to procedure and rules of evidence."[26] It is complex to untangle overall "reasonableness" in relation to both the issues in dispute and the use of the legal process where a party is unfamiliar with court procedure.

Another narrative used to justify orders for substantial or punitive costs against SRLs is a belief that they are deliberately using a lack of procedural knowledge to attempt to manipulate the court. In *MacNeil v Hedmann,* the court indicated:

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[20] *Ibid* at para 233.
[21] *JJR v JFM, supra* note 19 at para 234.
[22] *Ibid* at para 237.
[23] *Ottewell v Ottewell*, 2013 ONSC 721.
[24] *Ibid* at para 15.
[25] *Ibid* at para 6.
[26] *Ottewell v Ottewell,* 2012 ONSC 5201 at para 30.

> "I was not impressed by what I ultimately regarded as thin or feeble efforts on your [the SRL's] part to actually engage a lawyer for the trial of this proceeding, and you will have discerned from my reasons that I was also critical of what I referred to as an element of gamesmanship in the process."[27]

This concern was also apparent in *Dorey v Dorey,* when the court indicated concern that, "The applicant mother states that her ability to pay is limited. Her actions speak otherwise. Her failure to make any Offer to Settle, the extensive materials filed and her aggressive cross motion paint a picture of a party who has no concern for the costs of the litigation."[28]

We have also noted that representing oneself admirably in court does not necessarily protect an SRL from the potential issuance of a substantial or punitive cost award. An SRL who does an effective job may in fact open themselves up to a greater degree of scrutiny for procedural proficiency.

For example, in *Reyes v Scott,* it was suggested by the defendant that the SRL was an "experienced litigator" and therefore should have known the potential financial consequences of an unsuccessful action.[29] Similarly, in *Patrich v Patrich,* the SRL indicated that he did not include child support in his offer to settle because, "he had no idea how to deal with it."[30] However, the court found this was inconsistent with the "astute and capable advocate" he had proven himself to be, and punitive costs were awarded on a substantial indemnity basis.[31] Further, in *Droit de la famille – 162645,* the SRL was noted as being a "sophisticated, self-represented litigant", and was found by the judge to be uncooperative by not providing the requisite financial information.[32] The SRL's perceived lack of cooperation was considered when the cost award was made.[33]

This jurisprudence suggests that SRLs may be facing a contradictory challenge. If an SRL does not represent themselves well enough, they may be punished for delaying proceedings, or attempting to 'game' the system. Alternatively, if they

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[27] *MacNeil v Hedmann*, 2013 YKSC 81 at para 27.
[28] *Dorey v Dorey,* 2016 ONSC 2746 at para 20.
[29] *Reyes v Scott,* 2017 ONSC 2296 at para 3.
[30] *Patrich v Patrich,* 2015 BCSC 1557.
[31] *Ibid* at para 26.
[32] *Droit de la famille - 162645,* 2016 QCCS 5216 at para 59.
[33] *Ibid* at para 68.

represent themselves exceptionally well, then any degree of procedural ineptitude may not be forgiven.

Vexatiousness and Costs

The term "vexatious" is used to describe behavior that is harassing, annoying, malicious, or conducted on the basis of an improper motive. When an individual is officially designated a "vexatious litigant", they are thereafter prohibited from continuing with their proceeding, or from starting any new proceedings without the express permission of the court.[34]

Alternatively, the court may describe individuals as exhibiting 'vexatious-style' behavior without formally designating them as a vexatious litigant. This can include remarks about the litigant's presentation to the court, their ability to follow instructions, or their acting in a manner that is aggressive, obstructionist, manipulative, or deceitful.[35] Based on our preliminarily findings, it appears that vexatious-style behavior may impact overall case outcomes and the subsequent costs awards issued against unsuccessful SRLs.[36]

Since the rationale for imposing substantial or (especially) punitive costs is often related to inappropriate behaviour by the losing party, we are not surprised to find a correlation between an award of substantial or punitive costs and vexatiousness. In 58% (n = 22) of the cases involving substantial or punitive costs that we have analyzed, the SRL was either officially designated as a vexatious litigant (n = 3) or, much more often, accused of 'vexatious-style' behavior (n = 19). Vexatious behavior is sometimes equated with acting

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[34] The Ontario *Rules of Civil Procedure, supra* note 7, section 2.1.01(1) indicates, "the court may, on its own initiative, stay or dismiss a proceeding if the proceeding appears on its face to be frivolous or vexatious or otherwise an abuse of the process of the court." Under section 2.1.01(3) of the same Act, the court may also make a further order which prohibits an individual from making further motions without leave of the court. Similar provisions can be found in the *Supreme Court Civil Rules*, *supra* note 13, rule 9-5(1) "Striking Pleadings, Scandalous, frivolous or vexatious matters"; *Alberta Rules of Court*, *supra* note 11, section 14.74(c) "Application to dismiss an appeal, the appeal is frivolous, vexatious, without merit or improper"; and section 14.5(1)(j) of the same Act, "appeals only with permission, any appeal by a person who has been declared a vexatious litigant in the court appealed from".

[35] "Introducing the Self-Represented Litigant Case Law Database" *supra* note 1 at page 8.

[36] *Ibid* at page 9.

'unreasonably',[37] or in a disrespectful or disruptive manner.[38] Also described as vexatious behaviour are "verbal wanderings",[39] or failure to comply with court orders.[40]

The relationship between the imposition of substantial or punitive costs and perceived vexatious behavior by SRLs is made clear in some judicial dicta. For example, in *Reilly v. Johnson and Junger Law Firm,* opposing counsel claimed that the SRL's behavior was an, "egregious abuse of the court's process that warrants judicial reprimand."[41] Substantial or punitive costs are also being used to discourage SRLs described as vexatious from taking future legal action. In the recent case of *NK v BH,* the judge found "without doubt" that the SRL was a vexatious litigant.[42] The judge noted, "Because this is the second application made by Mr. K for the same relief, based upon false allegations, I am satisfied that costs in the amount of $3,000.00 should be ordered".[43] The SRL was also prohibited by the court from filing any further applications for leave concerning JN, whom he alleged to be his child, for a period of five years.[44] It appears that this costs award was issued not only in response to the SRL's perceived vexatious behavior, but to prevent any future legal action on the behalf of the SRL. Similarly, in the case of *Droit de la famille – 16152,* the court awarded costs of $8,000 against the SRL, which were intended in part to act as "a deterrent for future and frivolous litigation."[45]

While it is consistent to find formal designation as a vexatious litigant associated with increased costs, it is more concerning to see a similar correlation between increased cost and the 'vexatious-style behaviour' labelling of an SRL that stops short of formal designation. We have already observed significant variations in the interpretation of SRL behaviour (as intentionally obstructive, or just the result of mistakes or misunderstandings). These cases will be the subject of a future report in this series.

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[37] *Ascani v Robert,* 2013 ONSC 2579 at para 11; *NK v BH*, 2017 ABPC 100 at para 20.
[38] *Bouchard v Bouchard,* 2017 MBQB 42 at para 4; *NK v BH*, 2017 ABPC 100 at para 17.
[39] *Darlington v Moore,* 2012 NSSC 84 at para 36.
[40] *Lalli v Grewal,* 2017 BCSC 983 at para 26, 29; *V (EL) v V(RL),* 2016 YKSC 9 at para 37.
[41] *Reilly v. Johnson and Junger Law Firm*, 2016 ONSC 8188 at para 25. The court found that the SRL's action was frivolous and an abuse of process. The court ultimately awarded full indemnity costs against the SRL.
[42] *NK v BH, supra* note 37 at para 39.
[43] *Ibid.*
[44] *Ibid* at para 40.
[45] *Droit de la famille – 16152,* 2016 QCCS 257 at para 58.

Provincial Use of Substantial and Punitive Costs

The use of substantial or punitive costs against SRLs appears to be more common in certain provinces and levels of court. While the largest number of substantial or punitive awards against SRLs that we have identified to-date have been made by either the Ontario Superior Court or the British Columbia Supreme Court, this is reflective of the overall numbers of decisions from these two courts that are included in the CLD.

On the other hand, cases involving the award of substantial or punitive costs comprise 5 out of the total 14 Nova Scotia Supreme Court decisions in the CLD (approximately 36% of the total). Similarly, substantial or punitive costs were ordered in 3 of the total 5 cases from the Yukon Supreme Court presently in the CLD. Conversely, some provinces appear to have low levels of substantial or punitive costs awards relative to the total number of cases appearing in the CLD. Most noticeable is the province of Alberta, where only 2 of the 29 cases in the CLD from the Alberta Court of the Queen's Bench, Alberta Court of Appeal, and Alberta Privy Council involved an award of substantial or punitive costs. This is particularly interesting given that in 8 Alberta cases the SRL was either officially labelled a vexatious litigant, or was accused of vexatious behavior. While this finding is not necessarily statistically significant, it could indicate a pattern of restraint among the Alberta judiciary in using costs as a punitive tool.

In Conclusion

1. It is difficult to determine why certain provinces appear to award substantial or punitive costs more frequently than others. From the data currently available to us, it appears that SRLs are less likely to be the subject of substantial or punitive costs awards in Alberta, and more likely in Nova Scotia and the Yukon. However, a larger sample and further analysis is needed to draw more definitive conclusions.

2. Substantial or punitive costs awards against SRLs appear to be closely linked to judicial discussion of vexatious behaviour (what we describe here as 'vexatious-style' labelling), as well as formal designation as a vexatious litigant. While this is less surprising where there is a formal designation of an SRL as vexatious, it does raise a question about the consistency and fairness with which SRL behaviour is informally

characterized as intentionally vexatious. We shall be addressing this issue further in our upcoming detailed research report on vexatiousness.

3. There appears to be a correlation between cases that raise questions and arguments about procedural fairness – including SRLs who cause delay to court proceedings, bring forward what are determined to be frivolous claims, or conduct themselves in a manner that the court considers inappropriate – and increased awards of costs against them. This concerns us, because it is not always clear whether these are intentionally obstructive behaviours, or simply the result of a lack of understanding of the court procedure, as the Supreme Court of Canada decided in *Pintea*. In the alternative, SRLs who prove themselves to be effective advocates do not seem to fare any better – we note that small missteps in procedure may then be interpreted as deliberate actions, rather than as a result of a lack of formal legal education.

4. There is some evidence in the jurisprudence to suggest that substantial or punitive costs may be being used as a measure to warn or deter SRLs from pursuing future legal action. Increased costs are an important tool to compensate a wronged party for clear and deliberate misbehavior on the part of the opposing party, and this is sometimes framed as an Access to Justice issue. However, we do not believe that this is generally a fair or effective way to reduce the growing number of people who are forced to attend court without legal representation, many of whom do so because they cannot afford legal representation. We conclude that the Access to Justice goals implicit in an award of higher-than-usual costs to a successful party may be in some tension with this reality.

As always, we welcome questions and comments on this report, and hope that it will encourage discussion of these important issues as our courts try to adjust to the increasing number of self-represented litigants.