



Self-Represented Litigants: An Overview

**A paper prepared to accompany the Self-Represented Litigants Webinar
by Judge P.A. Demong and Jane Wootten on November 28, 2013**

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I. INTRODUCTION

Self-represented litigants, (“SRLs”), are not a recent phenomenon – there have always been those who decide, for whatever reason, to represent themselves before a court or an administrative tribunal. However, the number of those choosing to do so has increased significantly in the last several years, with resultant consequences for counsel and for the judiciary.

The challenges posed by the proliferation of self-represented litigants are many and varied. A plethora of studies, papers and projects has been generated to consider this issue. Notable among these are several which are canvassed in this paper. A bibliography will follow to allow you to access them at your leisure. These comprehensive efforts are thoughtful, expansive studies well worth reading and we commend them to you.

The authors of this paper do not purport to illuminate the issue of SRLs in better fashion than those who have written on the subject to date. Rather, through this paper and our presentation we want to share our experiences with you in the hopes that they assist in making interactions more positive for you, your judge in any given matter, and the SRL you may be facing.

To that end, what follows is a brief overview of the place of the SRL in the legal landscape, together with a discussion of the role of counsel and judiciary where an SRL is involved in an action. Our respective experiences are grounded in a civil context and, as such, this paper addresses the issue from that perspective.

II. THE SELF-REPRESENTED LITIGANT

While self-represented litigants are not a new phenomenon, the phrase, “self-represented litigant” itself is a relatively new creation. Reference to Westlawcarswell reflects that usage of the term appears to have begun in the late 1980’s. There are scattered references in cases prior to that time, but the use of the term SRL had not yet become commonplace. Rather, self-represented individuals were variously described as “unrepresented”, “pro se”, “pro per”, “in

¹ “Jane Wootten, Senior Counsel with Saskatchewan Government Insurance, is the author of this paper which is presented in tandem with a webinar on this subject for the Law Society of Saskatchewan . The extensive research that has been undertaken and the careful analysis that is provided are entirely of her own doing. My nominal participation involved proofreading its original draft- which required no work whatsoever- but which provided me with a thoughtful and comprehensive overview of the leading Canadian jurisprudence relating to Self-Represented Litigants, and the utter satisfaction of knowing that my juridical temperament in relation to them is, for the most part, in keeping with the pronouncements of Appellate Courts across Canada. I would urge every Civil Litigator who is opposite a Self-Represented Litigant to keep this paper readily accessible and in their Trial Book.”

person”, “without counsel”, “under-represented”, “litigants in person” or “acting on his or her own behalf”.²

Consistency of descriptor has evolved over time such that in Canada the term SRL is now the commonly accepted appellation. However, it is important to note that this standardization should not be interpreted as suggesting that there are homogeneous reasons for the existence of the SRL. For example, the SRL may choose to represent himself or herself because he feels he can better argue his interests than a lawyer could, there may be limited lawyer availability in certain locales, or there may be an inherent bias against the legal profession. For others, economic imperatives may play a role in the decision, essentially obviating any “decision-making” when it comes to their situation as self-represented individuals.

In 2006, in recognition of the need to address the growing presence of the SRL, the Canadian Judicial Council issued a *Statement of Principles on Self-represented Litigants and Accused Persons*³. The cornerstones of the document were:

- Promotion of rights of access to justice;
- Promotion of equal justice, regardless of representation;
- A recitation of the responsibilities of the participants in the legal system – the judiciary, court administrators, the Bar, the SLR, and others⁴

The document concludes that:

- Statistical information should underpin the adoption of these principles by the judiciary;
- Collaborative efforts amongst stakeholders should form the basis of programs designed to assist SRL’s;
- Court personnel must be educated to understand the difference between the provision of legal information and legal advice;
- The message from the judiciary to the SRL with respect to process, consequences, and evidence should be consistent;
- Assistance for SRL’s may include such items as easily accessible forms, virtual libraries consisting of Rules of Court, law, guidelines, directions to court facilities, summaries of the law etc.;
- Scheduling ought to take into account the unique situation of the SRL.

Since the publication of the *Statement of Principles*, numerous studies, papers and projects have been published with respect to the needs, impact and role of the SRL. Consideration of these documents reflects an evolution of the perception of the SRL in some respects, and in others the material simply serves to echo the findings and recommendations of predecessor documents.

² As noted in *No Lawyer: Institutional Coping with the Self-represented*, D.A. Rollie Thompson, (2001 – 2002) 19 CFLQ 455 and as listed in *Addressing the Needs of Self-Represented Litigants in the Canadian Justice System*, Trevor Farrow, Diana Lowe et al, March 27, 2012

³ See: http://cjc-ccm.gc.ca/cmslib/general/news_pub_other_PrinciplesStatement_2006_en.pdf

⁴ Others in this context are noted as government departments charged with responsibility for court administration, Legal Aid, and providers of judicial education.

A number of jurisdictions have embarked on mapping projects.⁵ The 2007 “*Alberta Self-Represented Litigants Mapping Project*” was undertaken between July and November 2006. The final report was issued in January 2007. The report involved needs assessment mapping of the SRL in Edmonton, Grande Prairie and Region and Red Deer and Region. The project confirmed that the needs of the SRL are not being met and that the SRL views the legal system as confusing, duplicative and contradictory. Information sharing and coordinated assistance for SRLs were advocated.

Like those that came before, and those that followed, the Mapping Project attempted to differentiate amongst those who become SRLs. For its part the Mapping Project identified the following seven groups of SRLs:

- SRLs with an overall lack of social resources;
- Low income SRLs with some social resources;
- SRLs living with additional social barriers
- SRLs unable to find a lawyer;
- SRLs who were previously represented;
- SRLs in cases where representation is supposed to be unnecessary;
- SRLs who could access representation but who prefer to self-represent.

These categories are essentially the same as those found by many other researchers and authors in this area. The document went on to note that the subset of SRLs who choose to self-represent because they feel that they do not require the assistance of able counsel is very small. Rather, economic, social and/or geographic barriers to obtaining counsel are the most common reasons for self-representation.

The Association of Canadian Court Administrators commissioned a white paper in 2011, delivered on March 2, 2012, entitled *Addressing the Needs of Self-Represented Litigants in the Canadian Justice System*, (the “White Paper”), designed to respond to the question:

*How can the Canadian justice system better assist SRLs with their legal needs?*⁶

The methodology included consultation with court administrators and front-line workers, consultation with lawyers, judges, researchers and policy makers, a comprehensive literature review and a survey of 296 Canadian court administrators and front-line workers.

The White Paper yielded the following eight main recommendations⁷, as follows:

⁵ While the Alberta Project is the most recent, Nova Scotia undertook an SLR mapping project in 2004.

⁶ *Addressing the Needs of Self-Represented Litigants in the Canadian Justice System*, Trevor Farrow, Diana Lowe et al, March 27, 2012, at page 8

⁷ *Ibid.*, pages 10 -- 11

- There must be a recommitment by stakeholders to the “core dispute resolution purpose” of the justice system;
- Stakeholder collaboration is necessary to bridge the “need-service gap” that exists for SRLs;
- The justice system must shift its focus from a provider-centred service model to a user-centred service model;
- The “legal information/advice distinction” relied upon by court staff should be rejected in favour of a concept of “meaningful legal assistance”⁸;
- There should be a “multi-option” approach to assistance for SRLs;
- Front-line staff should be identified as functioning in a “triage” capacity;
- The “multi-option” and “triage” models should be supported by continued training of court staff;
- Judicial impartiality, neutrality and fairness may mandate different treatment for both individual SRLs and for SRLs as a group in order to ensure that they are treated as equals.

The White Paper points to a study outlined in the 2010 article entitled, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, to the effect that as much as 70% -- 90% of legal needs in a society go unmet.⁹

The White Paper suggests that:

*Depending on the court, issue and jurisdiction, SRL’s may amount to more than half of the litigants in today’s courtrooms.*¹⁰

They are differentiated into seven basic categories:¹¹

- A primary group of individuals who lack social resources;
- Low income individuals with some social resources;
- Individuals with social barriers that impact their efforts to access justice;
- Individuals unable to find a lawyer;
- Individuals who were at one time represented, but who are no longer represented;
- Individuals in situations where representation is generally considered unnecessary;
- A minority of individuals who could access representation, but are disinclined to do so.

The consistency in the identification of SRLs and their rationale for not retaining counsel has continued from the 2006 Mapping Project through the 2011 White Paper. This continues to be

⁸ Note the subtle shift from the concept of clearly delineating and differentiating these concepts in the 2006 Canadian Judicial Council document, referenced above.

⁹ See: <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2321&context=ulj>

¹⁰ See: White Paper, page 16

¹¹ We would note that in our experience these seven categories are not silos. Very often an SRL may exhibit more than one of these characteristics.

the case with the issuance of the May 2013, final report of the National Self-Represented Litigants Project, (the “Project”).

The Project considered data relevant to the experience of the self-represented litigant in Alberta, British Columbia and Ontario. The participants were SRLs and service providers. Themes found in previous papers were echoed throughout the document. Specifically, economic imperatives were found to drive the decision of most SRLs not to retain counsel. Other reasons for self-representation included dissatisfaction with previously retained counsel, difficulty finding counsel and concerns that previous counsel had been incompetent and/or had not listened to the SRL as a client. As with previous studies, it was noted that a small group of SRLs chose to represent themselves because they felt confident that they did not require counsel to move a matter forward to a successful resolution.

The Project touched on SRL engagement with the justice system. Complexity of forms, inconsistency of information, and the ramifications, both temporal and otherwise, of mistakes were all cited as frustrating for the SRL. Note was made of the plethora of information available to the SRL on the Internet, together with the attendant difficulties that this information creates through inconsistency, inaccuracy and inapplicability of the information often relied upon by SRLs.

The study also highlighted the difficulty for court staff in differentiating between the provision of legal “guidance” and legal “advice” and the frustration for both court personnel and the SRL where this demarcation limits the ability to assist the SRL.

These studies and others merely serve to accentuate the established place of the SRL in the legal system, the attendant problems and the increasingly urgent need to address the growing trend toward self-representation in our legal system. Clearly, SRLs are here to stay. Their numbers are not decreasing and their involvement with the legal system continues to challenge the traditional operation of the legal system.

However, as uncomfortable as the SRL is with the current state of affairs, the SRL is not alone in his or her discomfort and frustration. For both the judiciary and lawyers, the challenges are equally real, as will be discussed below.

III. THE JUDICIARY

The National Self-Represented Litigants Project cited above also considered the interaction between the judiciary and the SRL. The study highlighted the continuum that marks the varied approaches of individual members of the judiciary to the SRL. On the one hand, some judges were lauded for judicial interventions that included advice with respect to court procedure and presentation as well as assistance with settlement negotiations. Conversely, other members of the judiciary were called out for incivility, rudeness and impatience. Throughout, there is a theme of

discomfort on the part of the judiciary as judges struggle to ensure that the SRL is afforded respect, courtesy and appropriate assistance without importing bias in favour of the SRL.

The judiciary has been making its mark at all levels through statements that are helping to define and shape the role of the SRL and the breadth of accommodation that might be available. As may be anticipated, there is not a uniform approach to the SRL. Rather, two schools of thought seem to have gained favour – those supportive of accommodation for the SRL and those who advocate consistent application of the rules whether the litigant is represented or not.

For her part, in her 1999 paper, “*Self-Represented Litigants in Family and Civil Law Disputes*”¹², Madam Justice Blishen of the Ontario Superior Court of Justice, (Family Division), addressed the related issues of fairness and leniency so often faced by the judiciary where an SRL is involved. As will be addressed later in this paper, her views, even in 1999, are prescient in that they parallel the current Ontario approach to the SRL.

That said, she noted that:

Overall, decisions reflect the view that SRLs should, as a matter of consistent practice, be afforded some accommodations to ensure that they understand the issues in dispute and have an opportunity to address those issues, despite their inexperience or lack of knowledge or skill.

Determining the appropriate standard of fairness should not involve comparing the SRL’s own abilities to those of a lawyer. Rather, it is important for the court to assist SRLs in understanding the legal process and relevant legal issues so that a case may be presented to the best of the litigant’s ability.

And thereafter:

Any leniency must, of course, be balanced against the duty of a trial judge to ensure the overall fairness of any hearing, especially with respect to the opposing party. In other words, leniency and flexibility extended to one party because of a “structural vulnerability”, (i.e. their lack of legal representation) should not translate into a corresponding rigorousness or over-vigilance with respect to the other, “represented” party. Any special treatment must not yield an unfair and unintended advantage to the SRL.

For his part, Professor Rollie Thompson noted in his paper, “*Institutional Coping with the Self-Represented*”¹³, that:

¹² Cited as “*Self-Represented Litigants in Family and Civil Law Disputes* 25 C.F.L.Q. 117 at 121

¹³ Cited as “*Institutional Coping with the Self-Represented*”, 19 CFLQ 455 at 488

Unrepresented and self-represented litigants pose a fundamental policy question for courts. If the courts move too far to accommodate the unrepresented, litigants will be encouraged to proceed on their own in even greater numbers. But, if too little is done to recognize or assist, inefficiencies and costs will plague the system and costs will be imposed upon represented parties. The result has been a delicate, or fearful, compromise: “Prose litigation should not be encouraged but must be accepted”, to quote a Minnesota committee.

Inevitably this compromise must break down.

The “delicate, fearful compromise” is reflected in judicial decisions on this issue to date as courts grapple with finding that elusive balance. However, there is evidence of regional judicial trends within the confines of that exercise.

For its part, the Alberta Court of Appeal is generally in favour of equal application of the rules to the represented and the SRL alike, with limited, appropriate guidance from the Court to assist the SRL in his efforts to stay within the parameters of the rules. . The recent case of *Cold Lake First Nations v. Alberta (Minister of Tourism, Parks & Recreation)*¹⁴ confirms this and delineates the factors to be considered by the judge tasked with this duty to assist, as follows:

24 It is well established that a judge has a special duty to provide limited assistance to unrepresented parties: R. v. Phillips, 2003 ABCA 4 (Alta. C.A.) at para. 2, (2003), 320 A.R. 172 (Alta. C.A.), aff'd 2003 SCC 57, [2003] 2 S.C.R. 623 (S.C.C.) [Phillips]; R. v. McGibbon (1988), 45 C.C.C. (3d) 334 (Ont. C.A.), at 347, (1988), 31 O.A.C. 10 (Ont. C.A.) [McGibbon]; R. v. S. (B.K.) (1998), 170 W.A.C. 149 (B.C. C.A.) at para. 26, (1998), 104 B.C.A.C. 149 (B.C. C.A.); Beaver First Nation Band v. A.T.N. Farms Ltd., 2001 ABQB 748, 356 A.R. 1 (Alta. Q.B.) at para. 62; CT Comm Edmonton Ltd. v. Shaw Communications Inc., 2007 ABQB 473 (Alta. Q.B.) at para. 4, (2007), 423 A.R. 338 (Alta. Q.B.). That special duty applies in cases of contempt: College of Optometrists (Ontario) v. SHS Optical Ltd., 2008 ONCA 685 (Ont. C.A.) at paras. 55-60, (2008), 93 O.R. (3d) 139 (Ont. C.A.).

25 The extent of this duty depends on the totality of the circumstances, including the seriousness of the offence, the defences raised, and the sophistication of the unrepresented party: Phillips at para. 25. The judge's advice must be interactive, appropriate to the unrepresented party and to the surrounding circumstances of the case: Phillips at para. 22. Just how far a judge should go in guiding an unrepresented party is a matter of judicial discretion: Phillips at para. 23, citing McGibbon at 347.

26 Examples of what a judge might be expected to provide guidance about include informing the party of his or her right to be represented by a lawyer, explaining that the assistance of a lawyer may be important to ensure that his or her defence is fully before

¹⁴ Cited as *Cold Lake First Nations v. Alberta (Minister of Tourism, Parks and Recreation)*, 2012 CarswellAlta 179, Alberta Court of Appeal 179, Alberta Court of Appeal 2012

the court, and ascertaining that the party does not wish to be represented by a lawyer: R. v. Hardy (1991), 120 A.R. 151 (Alta. C.A.) at para. 7, (1991), 84 Alta. L.R. (2d) 362 (Alta. C.A.).

This balance of ensuring compliance with the rules through appropriate judicial guidance is also addressed in the case of *Koerner v. Capital Health Authority*¹⁵, as follows:

7 *Secondly, the appellant argues that, as a self-represented litigant, she is entitled to some indulgences when it comes to compliance with legal processes. The Rules of Court make it clear that the same rules apply to all litigants, even if self-represented:*

1.1(2) These rules also govern all persons who come to the Court for resolution of a claim, whether the person is a self-represented litigant or is represented by a lawyer.

The case management judge attempted to assist the appellant, and granted numerous orders in an attempt to move the action along. The appellant's refusal to accept the validity of many of those orders is the source of the problem. As was said in Broda v. Broda, 2001 ABCA 151, 286 A.R. 120 (Alta. C.A.) at para. 4: "Unrepresented litigants are entitled to justice, but they are not entitled to command disproportionate amounts of court resources to remedy their inability or unwillingness to retain counsel". The record does not disclose that the appellant was unfairly dealt with because she is self-represented.

8 *The obligation to comply with court orders is one that is imposed on all persons, whether they are self-represented or not. The importance of ensuring compliance with court orders is an aspect of the Rule of Law, which is one of the fundamental principles of Canadian law recognized in the Charter of Rights.*

The earlier case of *K. (P.E.) v. K. (B.W.)*¹⁶ is reflective of the need to ensure that the rules are applicable to represented party and SRL alike, in any event, as reflected in the following passage from that decision:

7 *First, the mother urges us to take into consideration that she was self-represented when this matter was heard before the chambers judge. While we are sympathetic to her position, there are not two sets of procedures, that is, one for lawyers and one for self-represented parties. In the absence of special provisions, our courts will apply the same legal principles, rules of evidence and standards of procedure regardless of whether litigants are represented by counsel or are self-represented.*

A similar approach to the obligations of the SRL was taken by the Federal Court of Appeal in the case of *Palonek v. Minister of National Revenue*¹⁷ where the Court considered the expectations of the SRL, as follows:

¹⁵ Cited as *Koerner v. Capital Health Authority*¹⁵ 2011 CarswellAlta 2079, Alberta Court of Appeal, 2011

¹⁶ Cited as *K. (P.E.) v. K. (B.W.)*, 2003 CarswellAlta 1936, Alberta Court of Appeal, 2003

¹⁷ Cited as: *Palonek v. Minister of National Revenue*, 2007 CarswellNat 2887, Federal Court of Appeal, 2007

16 Counsel for the appellant drew our attention to selected excerpts of this Court's decision in *Wagg v. R.*, 2003 FCA 303, [2003] G.S.T.C. 120 (F.C.A.), page 206 where Pelletier J.A., properly so, reasserted the need to maintain fairness in the proceedings when a person is self-represented. However, he also sounded the following warning at paragraphs 23, 24 and 25 of his reasons for judgment:

[23] Litigants represent themselves for a variety of reasons. If they come to realize before the commencement of trial that they have underestimated the complexity of the task before them, it is in their interest and the Court's to allow them to obtain representation. But once a trial is underway, I do not think it unfair to hold appellants to their choice to represent themselves, and to be guided by their own judgment.

[24] The decision to represent oneself is not irrevocable, nor is it trivial. Persons who undertake to represent themselves in matters of the complexity of the Income Tax Act [R.S.C., 1985 (5th Supp.), c. 1] or the Excise Tax Act must assume the responsibility of being ready to proceed when their appeal is called. If they embark upon the hearing of their appeal, they are representing to the Court that they understand the subject matter sufficiently to be able to proceed. ...

[25] Putting the matter another way, litigants who choose to represent themselves must accept the consequences of their choice (*Lieb v. Smith et al.* (1994), 120 Nfld. & P.E.I.R. 201 (S.C.T.D.), at paragraph 16):

Thus, while the court will take into account the lack of experience and training of the litigant, that litigant must also realize that, implicit in the decision to act as his or her own counsel is the willingness to accept the consequences that may flow from such lack of experience or training.

[Emphasis added]

For its part, the Manitoba Court of Appeal has weighed in in similar fashion as is evident in the case of *Fegol v. National Post Co.*¹⁸, where the Court held that:

27 I am left with the sense that the fact that the plaintiff is self-represented was an overriding consideration that led the judge to disregard the plaintiff's failure to serve the statement of claim in accordance with the Rules. She did so even though he had been advised on several occasions of the requirement to do so. To validate the plaintiff's actions as service in these circumstances would send the wrong message that the Rules can be ignored by self-represented litigants. The essential element of fairness that guides all proceedings does not demand that the Rules be ignored when one of the parties is self-represented. Fairness must be demonstrated to the self-represented litigant, but also to the other party who is represented by counsel. See *Coleman v. Pateman Farms Ltd.*, 2001 MBCA 75, 156 Man. R. (2d) 144 (Man. C.A. [In Chambers]), and *C.F.S. v. J.A.* As stated in *K. (P.E.) v. K. (B.W.)* (2003), 2004 ABCA 135, 348 A.R. 77 (Alta. C.A.): "[t]here are not two sets of procedures, that is, one for lawyers and one for self-represented parties"

¹⁸ Cited as: *Fegol v. National Post Co.*, 2007 CarswellMan 64, Manitoba Court of Appeal, 2007

(at para. 7) (quoted with approval in *C.F.S. v. J.A.*. Simply put, self-represented litigants do not "have some kind of special status" (at para. 12 in *Ridout v. Ridout*, 2006 MBCA 59, 205 Man. R. (2d) 146 (Man. C.A.)).

The Fegol case follows on the heels of the oft-cited case of *Ridout v. Ridout*¹⁹ where the Manitoba Court of Appeal spoke at length about the concerns raised by the proliferation of SRLs and that Court's perspective on the latitude to be accorded to them:

12 As everyone who is involved in court matters knows, more and more litigants, especially in family proceedings, are self-represented. This often creates difficulties not only for them but for court staff and judges. Notwithstanding, it is not accurate to say, as counsel for the wife seemed to be suggesting, that self-represented litigants (SRLs) have some kind of special status. The fact that the wife, during her extensive cross-examination of her former counsel, did not "get anywhere" with her is not a reason to order a new trial. The recent decision of this court in *A. (J.M.) v. Winnipeg Child & Family Services* (2004), 190 Man. R. (2d) 298, 2004 MBCA 184 (Man. C.A.) ([hereinafter] *J.A. No. 1*), makes it clear that while the court should provide assistance to SRLs, this must be done in such a way as to maintain judicial impartiality. Thus in *J.A. No. 1*, the SRL's contention that the trial judge had a duty to assist her to do a better job in developing her case was rejected. As the Ontario Court of Appeal noted in *Dauids v. Dauids*, [1999] O.J. No. 3930 (Ont. C.A.) (at para. 36):

... Fairness does not demand that the unrepresented litigant be able to present his case as effectively as a competent lawyer. Rather, it demands that he have a fair opportunity to present his case to the best of his ability. ...

13 The result in *J.A. No. 1* can be contrasted to that in *Manitoba (Director of Child & Family Services) v. A. (J.)*, [2006] M.J. No. 171, 2006 MBCA 44 (Man. C.A.) ([hereinafter] *J.A. No. 2*), an appeal by coincidence involving the same SRL as in *J.A. No. 1*. In this instance, the court concluded that the SRL had not received a fair hearing because the judge refused to permit her to argue her motion to disqualify him on the basis of judicial bias because, it would appear, he considered the argument to be devoid of merit. As explained by Hamilton J.A., writing for the court (at para. 32):

... the trial judge cannot become the advocate for the unrepresented litigant, nor can the judge provide legal advice. However, the judge's challenge is to take pains to ensure that a party's lack of legal training does not unduly prejudice his or her ability to participate meaningfully in the proceeding.²⁰

14 It is clear that the motions court judge in this instance was alive to the fact that the wife was self-represented and took pains to ensure that she was not prejudiced. She received a fair and impartial hearing.

¹⁹ Cited as: *Ridout v. Ridout*, 2006 CarswellMan 186, Manitoba Court of Appeal, 2006

²⁰ Cited with approval in *Turton v. Garrett*, 2012 CarswellSask 675, Saskatchewan Court of Queen's Bench, 2012 and in *Brickner v. Brickner*, 2010 CarswellSask 749, Saskatchewan Court of Queen's Bench, 2010

For its part, the Ontario Court of Appeal may be inclined to advocate a more SRL-friendly approach to litigation, as seen in the following excerpts from the case of *Toronto Dominion Bank v. Hylton*:²¹

39 *Once again, the fact that a party is self-represented is a relevant factor. That is not to say that a self-represented party is entitled to a "pass". However, as part of the court's obligation to ensure that all litigants have a fair opportunity to advance their positions, the court must assist self-represented parties so they can present their cases to the best of their abilities. Linhares de Sousa J. provided a helpful list of ways to assist self-represented litigants in Kainz v. Potter (2006), 33 R.F.L. (6th) 62 (Ont. S.C.J.), at para. 65:*

[N]umerous Court decisions have reiterated the principle again and again, that self-represented parties are entitled to receive assistance from an adjudicator to permit them to fairly present their case on the issues in question. This may include directions on procedure, the nature of the evidence that can be presented, the calling of witnesses, the form of questioning, requests for adjournments and even the raising of substantive and evidentiary issues.

The Ontario Court of Appeal also had occasion to comment upon the unique situation of the SRL who chooses to act for himself or herself. In the case of *College of Optometrists (Ontario) v. SHS Optical Ltd.*²² the Court differentiated this SRL from the others who come within the SRL rubric. Specifically, the Court noted that:

(iv) Discussion

56 *This is a case of self-representation by choice, not by press of circumstances. Bruce Bergez represented himself because that is what he wanted to do. He wanted to plead his own case, to make his own submissions, to do battle with the prosecutor. Not once did he seek representation. And not once, when he asked for help, did he not receive it.*

57 *This ground reduces to a complaint that the failure of Crane J. to provide assistance to the self-represented appellant rendered the proceedings unfair. In circumstances like these, it is helpful to recall what this Court said several years ago about the standard by which we should determine whether proceedings involving the self-represented were unfair. In Davids v. Davids, [1999] O.J. No. 3930 (Ont. C.A.), this Court said at para. 36:*

[36] ... The fairness of this trial is not measured by comparing the appellant's conduct of his own case with the conduct of that case by a competent lawyer. If that were the measure of fairness, trial judges could only require persons to proceed to trial without counsel in those rare cases where an unrepresented person could present his or her case

²¹ Cited as: *Toronto Dominion Bank v. Hylton* 2010 CarswellOnt 8371, Ontario Court of Appeal, 2010

²² Cited as: *College of Optometrists (Ontario) v. SHS Optical Ltd.*, 2008 CarswellOnt 6073, Ontario Court of Appeal, 2008

as effectively as counsel. Fairness does not demand that the unrepresented litigant be able to present his case as effectively as a competent lawyer. Rather, it demands that he have a fair opportunity to present his case to the best of his ability. Nor does fairness dictate that the unrepresented litigant have a lawyer's familiarity with procedures and forensic tactics. It does require that the trial judge treat the litigant fairly and attempt to accommodate unrepresented litigants' unfamiliarity with the process so as to permit them to present their case. In doing so, the trial judge must, of course, respect the rights of the other party.

58 *The presiding judge must not appear to assume (or in fact assume) the role of counsel for the self-represented litigant. A. (J.M.) v. Winnipeg Child & Family Services, [2004] M.J. No. 451 (Man. C.A.) at paras. 38-40.*

59 *In many, if not most cases in which a similar argument is advanced, it can be said that the presiding judge could have done more to assist the self-represented litigant. So too here. But that is not the test. At bottom, what falls to be decided is whether the proceedings were fairly conducted. Did the self-represented litigant get a fair hearing? Bruce Bergez got a fair hearing, as was his right.*

60 *I would not give effect to this ground of appeal.*

In Saskatchewan, the recent decision in *Bird v. Bird*²³ would seem to suggest an awareness of the impossible balancing act faced by the judiciary and the need to ensure that rules are followed even as there is cognizance of the often difficult situation of the SRL. The *Bird* decision canvasses the commonly cited *Ridout* as well as a number of Ontario authorities in concluding that, at the end of the day, maintenance of judicial neutrality is paramount. While the following excerpt is lengthy, it is worthy of repeat, given that it nicely summarizes the state of the law in Saskatchewan today with respect to the conduct of an action involving an SRL:

44 *Aleta is an attractive, intelligent and well-spoken individual. The level of her intelligence was obvious in her conduct and presentation before this Court and from the evidence which indicates she excelled in her post-secondary endeavours. Aleta chose to represent herself in these proceedings. Whether that choice was made freely or was foisted upon her as a result of financial limitations is a subject of hot debate. Whatever the reason, in assuming the role of representing herself, Aleta assumed the responsibility for preparing and presenting her case which includes following the Rules. While great latitude is given self-represented litigants, in the final analysis a judge must maintain their neutrality. They cannot enter the fray. They can canvass the issues, explain procedure and in a general way describe what evidence may be required but they cannot tell a self-represented litigant what evidence they must call or what they need to do.*

45 *The Nova Scotia Court of Appeal in Family & Children's Services of Cumberland (County) v. M. (D.M.), supra, at para. 25, stated the following with respect*

²³ Cited as: *Bird v. Bird*, 2013 CarswellSask 277, Saskatchewan Court of Queen's Bench, 2013

to the assistance to be offered self-represented parties:

[25] When self-represented parties are before the court the trial judge is expected to offer them some assistance if needed, especially in family matters. In Murphy v. Wulkowicz, 2005 NSCA 147, [2005] N.S.J. No. 474, a family matter where both parties were unrepresented at trial, one of them complained on appeal that the trial judge helped the other one too much. MacDonald, C.J.N.S. stated:

[37] Ms. Murphy asserts that the judge offered too much assistance to Mr. Wulkowicz as a self-represented litigant. I disagree. It is difficult for a judge to conduct a trial when one of the parties is self-represented. Two competing interests must be balanced. First the judge obviously cannot be an advocate for a party. At the same time the trial must be run as efficiently and fairly as possible. This may require the judge to offer guidance to a self-represented party. The appropriate balance falls within the judge's discretion. See R. v. McGibbon (1988), 45 C.C.C. (3d) 334 (Ont. C.A.). In this context I conclude that the judge in guiding Mr. Wulkowicz did no more than was necessary to ensure that the trial proceeded fairly and efficiently. The judge did not act as Mr. Wulkowicz's advocate.

46 *The Court went on to quote the guidelines established in F., Re. [2001] FamCA 348 (Australia Fam. Ct.), the Full Court of the Family Court of Australia, as follows:*

- 1. A judge should ensure as far as is possible that procedural fairness is afforded to all parties whether represented or appearing in person in order to ensure a fair trial;*
- 2. A judge should inform the litigant in person of the manner in which the trial is to proceed, the order of calling witnesses and the right which he or she has to cross examine the witnesses;*
- 3. A judge should explain to the litigant in person any procedures relevant to the litigation;*
- 4. A judge should generally assist the litigant in person by taking basic information from witnesses called, such as name, address and occupation;*
- 5. If a change in the normal procedure is requested by the other parties such as the calling of witnesses out of turn the judge may, if he/she considers that there is any serious possibility of such a change causing any injustice to a litigant in person, explain to the unrepresented party the effect and perhaps the undesirability of the interposition of witnesses and his or her right to object to that course;*
- 6. A judge may provide general advice to a litigant in person that he or she has the right to object to inadmissible evidence, and to inquire whether he or she so*

objects. A judge is not obliged to provide advice on each occasion that particular questions or documents arise;

7. If a question is asked, or evidence is sought to be tendered in respect of which the litigant in person has a possible claim of privilege, to inform the litigant of his or her rights;

8. A judge should attempt to clarify the substance of the submissions of the litigant in person, especially in cases where, because of garrulous or misconceived advocacy, the substantive issues are either ignored, given little attention or obfuscated. (Neil v. Nott (1994) 121 ALR 148 at 150);

9. Where the interests of justice and the circumstances of the case require it, a judge may:

- draw attention to the law applied by the Court in determining issues before it;*
- question witnesses;*
- identify applications or submissions which ought to be put to the Court;*
- suggest procedural steps that may be taken by a party;*
- clarify the particulars of the orders sought by a litigant in person or the bases for such orders.*

The above list is not intended to be exhaustive and there may well be other interventions that a judge may properly make without giving rise to an apprehension of bias.

47 When one litigant is represented by legal counsel and the other is self-represented, maintaining the appearance of neutrality is crucial. It is also extremely difficult as self-represented litigants generally struggle with procedural issues and how evidence must be presented. As such, judges find themselves constantly trying to balance "fairness" to the litigant who is represented by legal counsel and has played by the rules with "fairness" to the self-represented party who is struggling to present their case.

48 The dilemma was canvassed by the Manitoba Court of Appeal in Ridout v. Ridout, 2006 MBCA 59, 27 R.F.L. (6th) 237(Man. C.A.). This was an appeal by the wife of a decision that denied her application to rescind a consent judgment. The wife represented herself at the application. On appeal, she alleged she had not received a fair hearing because she was a self-represented litigant who was not emotionally capable of representing herself in the circumstances. Scott C.J.M. at para. 12 stated the following:

[12] As everyone who is involved in court matters knows, more and more litigants, especially in family proceedings, are self-represented. This often creates difficulties not only for them but for court staff and judges. Notwithstanding, it is not accurate to say, as counsel for the wife seemed to be suggesting, that self-represented litigants (SRLs) have some kind of special status. The fact that the wife, during her extensive cross-examination of her former counsel, did not "get anywhere" with her is not a reason to order a new trial. The recent decision of this court in Director of Child and Family Services (Man.) v. J.A. et al. (2004), 190 Man. R. (2d) 298, 2004 MBCA 184 (J.A. No. 1), makes it clear

that while the court should provide assistance to SRLs, this must be done in such a way as to maintain judicial impartiality. Thus in J.A. No. 1, the SRL's contention that the trial judge had a duty to assist her to do a better job in developing her case was rejected. As the Ontario Court of Appeal noted in Davids v. Davids, [1999] O.J. No. 3930(at para. 36): ... Fairness does not demand that the unrepresented litigant be able to present his case as effectively as a competent lawyer. Rather, it demands that he have a fair opportunity to present his case to the best of his ability....

[Emphasis added]

The case of *Planchot v. Planchot*²⁴ evidences a slightly more sympathetic, interventionist approach to the SRL where both parties are SRLs. Of course, where both parties are SRLs, we find a leveling of the playing field, less cause for concern about perceptions of bias or judicial favour and, in all likelihood, greater need for assistance from the Bench, generally. To this end, we see that the Court noted that:

27 *Both parties were self-represented. They had obviously spent a great deal of time and effort organizing their cases as best they could but, even so, the best prepared self-represented litigant will usually have at least some difficulty understanding not only the legal issues that are at the fore, but the nature of evidence and how to adduce that evidence to satisfy the legal tests that will govern the Court's considerations. Self-represented parties are entitled to some assistance, especially in family matters. They cannot be left to simply muddle about to the prejudice of their cases. (see: Family & Children's Services of Cumberland (County) v. M. (D.M.), 2006 NSCA 75, 29 R.F.L. (6th) 268 (N.S. C.A.)).*

On a related note, the Saskatchewan Court of Queen's Bench has also taken the opportunity to address the unique situation of the Small Claims judge, particularly in light of the fact that often both litigants are SRLs. Specifically, in *Hancock v. Richardson*,²⁵ Justice Gabrielson noted that:

24 *It must be remembered that this was a small claims proceeding and that Hancock was self-represented. The somewhat unique nature of small claims proceedings where often one or both of the parties are self-represented, was aptly described by Preston J. in the case of Garry v. Pohlmann, 2001 BCSC 1234, 12 C.P.C. (5th) 107 (B.C. S.C.) at para. 52:*

52 *The frequency of the trial judge's interventions and the tone that he adopted in some of his statements lead to some concern. However, the proper test is whether his conduct denied the defendant a fair trial or gave rise to a reasonable apprehension of bias as that term is defined at law. Those questions must be answered in the context of the facts of the particular case. In small claims cases when litigants are unrepresented some will require more direction than others; sometimes that direction will have to be more forceful than at others; some*

²⁴ Cited as: *Planchot v. Planchot*, 2009 CarswellSask 662, Saskatchewan Court of Queen's Bench, 2009

²⁵ Cited as: *Hancock v. Richardson* 2013 CarswellSask 195, Saskatchewan Court of Queen's Bench, 2013

litigants will require more assistance than others. The decisions concerning the manner in which individual proceedings are conducted are best left to the trial judge. The questions for a court on an appeal of this nature are questions of trial fairness and the reasonable apprehension of fair-minded persons concerning the impartiality of the tribunal. These questions are to be answered upon an examination of the proceedings as a whole.

25 *In my opinion the trial judge's comments and interventions did not go beyond the nature of a legitimate attempt to ensure that all of the evidence regarding the matters at issue was before the court and was of sufficient clarity so that the trial judge could understand it. As Hancock was self-represented, more questions of him were required than may have been appropriate or necessary in a traditional civil trial. However, in my opinion, the Richardsons have not met the high onus of establishing that a reasonably informed person would have an apprehension of bias on the part of the trial judge or a reasonable belief that they received an unfair trial, I would therefore dismiss this ground of appeal.*

The British Columbia Court of Appeal recently addressed the role of the trial judge in the context of an appeal couched in terms of breach of a judge's duty to assist an SRL. In that case, *R. v. Endeavour Developments*,²⁶ the Court held that:

Insufficient Assistance

55 *A trial judge has a duty to assist the self-represented appellants. However, the failure to assist a self-represented litigant is not a stand-alone ground of appeal. As the Nova Scotia Court of Appeal stated in R. v. West, 2010 NSCA 16 (N.S. C.A.) at para. 72:*

The failure of a trial judge to appropriately assist a self-represented accused is not a free-standing ground of appeal. The question is whether the failure to assist rendered the trial of the accused unfair pursuant to s. 686(1)(a)(iii) of the Criminal Code. A judge who prevents an accused from fully presenting his or her defence, or who makes tactical decisions for the accused, will fall into error, but in every case, it must be asked whether the error rendered the trial of the accused unfair.

The foregoing are but a few of the many, many recent examples of judicial pronouncement on the status of the SRL and the role of the court in providing guidance to the SRL. Clearly, the theme that repeats is one of judicial impartiality co-existent with a responsibility to ensure that the SRL is heard and that appropriate guidance is provided. Where the court is able to navigate this difficult task, counsel *contra* as well as their client also benefit via increased efficiencies throughout the trial²⁷

- **Pleadings**

²⁶ *R. v. Endeavour Developments Ltd.* [Schiel], 2012 CarswellBC 3444, British Columbia Court of Appeal, 2012

²⁷ The case of *Slipetz v. Trudeau*, 2013 CarswellMan 241, Manitoba Court of Queen's Bench 2013, also offers a very helpful overview of the recent law in this area.

In the case of *Beveridge Holdings Ltd. v. Ascent Financial Services Ltd.*²⁸, the Saskatchewan Court of Queen's Bench reiterated the advice given in the earlier Court of Queen's Bench case with respect to the flexibility that may be accorded to SRLs with respect to written documentation generally, and pleadings specifically, as follows:

24 *In the case of a self-represented litigant, the court should be reluctant to deprive that person of an opportunity to have his day in court and may be lenient with respect to pleadings where they are not irreparably defective (Canada (Attorney General) v. Griffiths, 2005 SKQB 170, [2005] S.J. No. 300 (Sask. Q.B.)).*

- **The Troublesome Litigant**

One area that has been singled out for special comment by several courts is that of the vexatious litigant. Mr. Justice Saunders, of the Nova Scotia Court of Appeal, in Chambers, addressed the place of this unique litigant in the context of the SRL generally, as follows:

44 *In light of Justice Coady's findings in the court below and from what I have seen on this and other matters on our Court's docket, it seems to me that litigants such as Mr. Doncaster appear to fall into a camp of persons who claim an unconditional, and unassailable "right to appeal" every step, in every case. Persons who hold such a view are seriously misguided or ill-informed. No right is absolute. In our free and democratic society every right, privilege or interest is balanced and held in check by other rights, privileges and interests. The opportunity to appeal is regulated by long held practices and rules, by which deadlines, substance, style and content are strictly enforced. Those unwilling or unprepared to follow those strictures do so at their peril.*

45 *Litigants, self-represented or not, with legitimate interests at stake will be treated with respect and will quickly come to realize that judges, lawyers and court staff are prepared to bend over backwards to accommodate their needs, to explain procedures that may seem foreign, and to ensure that the merits of their disputes will be heard. They and their cases will be seen as the raison d'être for access to justice.*

46 *Litigants, self-represented or not, with a different agenda designed to wreak havoc on the system by a succession of endless, mindless or mind-numbing paper or electronic filings, or meant to drive a spouse or opposite party to distraction or despair or financial ruin will quickly come to realize that the Court's patience, tolerance and largesse have worn thin. They and their cases will be seen as an affront to justice and summarily shown the door.*

47 *More often than not, the individuals in this latter group whom I would dub "self-serving litigants" leave a trail of unpaid judgments and costs orders in their wake. Judges will not sit idly by as the finite resources of their courts are hijacked by people with computer skills or unlimited time on their hands; at the expense of worthy matters,*

²⁸ *Beveridge Holdings Ltd. v. Ascent Financial Services Ltd.*, 2010 CarswellSask 645, Saskatchewan Court of Queen's Bench, 2010

waiting patiently in the queue for a hearing. Faux litigants will be exposed, soon earning the tag "vexatious litigant" or "paper terrorist" whose offerings deserve a sharp rebuff and rebuke.

48 *Over the past two months I have encountered several such cases. Their number is mounting. I find that troubling. The Bench, the practicing Bar and the public should be concerned. This trespass upon legitimate advocacy is not in the public interest. In the short term it frustrates the efficient passage and completion of litigation. In the long term it erodes and denigrates confidence in and respect for the administration of justice. It defeats a system of dispute resolution managed and overseen by people who are doing the best they can to serve the public in a way that respects and follows the law, and produces a result that satisfies the primary object of the Rules which is to provide "for the just, speedy and inexpensive determination of every proceeding".²⁹*

The Doncaster case was relied upon by the Nova Scotia Court of Appeal in the subsequent case of Leigh v. Belfast Mini-Mills Ltd.³⁰, where the Court recited paragraphs 447 through 46 of the Doncaster decision and then noted that:

23 I would place the appellants in this case in that category of litigant. Being self-represented does not inoculate the appellants from the courts' processes. The appellants have no respect for court orders, have thumbed their noses at the request by the respondents to pay costs, failed to attend at a discovery and, in general, have conducted this litigation in a frivolous and vexatious manner. I pause here to comment that on my review of the record and the submissions of the parties there is absolutely no merit to the allegations of improper conduct on the part of Mr. Dickson in any of the proceedings. The appellants continued assertions that Mr. Dickson is acting inappropriately further highlights their lack of respect and understanding of the court's processes.

Within this sub-category of SRL, there is a further niche SRL – variously, the “Freeman” or the “Detaxer”. The Alberta Court of Queen’s Bench recently addressed this issue in the case of Meads v. Meads³¹, wherein he styled them as OPCA, (Organized Pseudolegal Commercial Argument) litigants. Justice Rooke analyzes the strategies and perceptions of this very unique litigant at great length and noted that the duty a judge owes the SRL to ensure a fair proceeding is tempered by context, as follows:

629... In OPCA litigation, that duty occurs in the face of vexatious litigation and procedural strategies that are designed to disrupt court operation and impede the exercise of legal rights. OPCA litigants have chosen to implement strategies that they have been told will, at a minimum, paralyze court operation, if not break it. That means OPCA litigants have, first and foremost, decided to adopt vexatious litigation strategies. These OPCA litigants claim (wrongly) to be outside court jurisdiction — the rules do not

²⁹ Cited as: *Doncaster v. Chignecto-Central Regional School Board*, 2013 NSCA 59 (N.S. C.A.)

³⁰ Cited as *Leigh v. Belfast Mini-Mills Ltd*, 2013 CarswellNS 499, Nova Scotia Court of Appeal, 2013

³¹ Cited as *Meads v. Meads*, 2012 CarswellAlta 1607, Alberta Court of Queen’s Bench, 2012

apply to them.

The Nova Scotia Court of Appeal also singled out this niche SRL in the case of *MacDonald v. First National Financial GP Corp.*³², and noted that the plaintiff had, “*done his best to flout, defeat, thwart or ignore this Court's rules of procedure at practically every turn.*” And, as such, he had, “*no hesitation in concluding that these violations constitute a pattern of flagrant disregard for the Rules.*”

- **Costs**

Costs and the SRL are another area that has received specific attention from the judiciary. Recently, the Alberta Court of Appeal weighed in on the issue in the case of *Hogarth v. Rocky Mountain Slate Inc.*³³. The Court confirmed the dual purpose of costs – as an indemnification toll and also as a mechanism to deter frivolous legal activity. Costs may serve these purposes for the represented and the SRL equally, albeit via the application of different considerations, as will be discussed below:

8... The primary purpose of a costs award is to partly indemnify the successful party for the costs of the litigation: British Columbia (Minister of Forests) v. Okanagan Indian Band, 2003 SCC 71 (S.C.C.) at paras. 21, 26, [2003] 3 S.C.R. 371 (S.C.C.). Since a self-represented litigant does not incur any legal fees, the ordinary objective of indemnification is not achieved. Costs awards do, however, achieve other purposes: they can be used to encourage settlement, or to prevent frivolous, vexatious or harassing litigation, and they can also be used to encourage economy and efficiency during litigation. Rule 10.31(5) ensures that those purposes of a costs award can be achieved even where a party is self represented.

9 Previous decisions have observed that awarding costs to self-represented litigants raises difficult policy issues. The expectation that costs might be received can actually invert the usual objectives of costs, by encouraging litigation and discouraging settlement "because of an anticipated windfall to the unrepresented litigant that could result from a costs award": Dechant v. Stevens, 2001 ABCA 81 (Alta. C.A.) at para. 15, (2001), 89 Alta. L.R. (3d) 289, 277 A.R. 333 (Alta. C.A.). As Dechant observed at paras. 16-7, self-represented litigants do not necessarily bear a greater personal burden:

16 It is true that unrepresented litigants expend time and effort presenting their law suits. Represented litigants, however, also sacrifice a considerable amount of their own time and effort for which no compensation is paid. Any award of costs is merely a partial reimbursement for their lawyer's fees. As noted, an award of costs to represented litigants should never be higher than their solicitor-client fees, which are only awarded

³² Cited as *MacDonald v. First National Financial GP Corp.*, 2013 CarswellNS 290, Nova Scotia Court of Appeal, 2013

³³ Cited as: *Hogarth v. Rocky Mountain Slate Inc.*, 2013 CarswellAlta 835, Alberta Court of Appeal, 2013

in exceptional circumstances. Thus, applying an identical costs schedule to both represented and unrepresented litigants will work an inequity against the represented litigant who, even with an award of costs, will be left with some legal fees to pay and no compensation for a personal investment of time. What the Rules do provide is that both kinds of litigants are to be paid for their out-of-pocket expenses.

17... Applying an identical costs schedule to the unrepresented litigants, who have no out-of-pocket expenses for the legal fee portion of the suit, effectively awards fees for their own time and work. In short, self-litigation could become an occupation.

For these reasons, a self-represented litigant should generally not receive costs unless that would serve one of the policy reasons for which costs awards are made.

10 The appellant Simonson suggests he should receive two-thirds of the assessable costs during the time he was self-represented. Such an award, however, would still represent an indemnity for expenses that were never incurred. While it is undoubtedly true that Simonson took time away from his business affairs to attend the trial, that is true of most litigants, whether they are self-represented or not. There is no evidence on this record that Simonson exercised any special skill during the trial (such as briefing the law, or arguing complex issues), nor that he was burdened more than the average litigant. In the circumstances, it is appropriate that for the portion of the trial when he was self-represented he only receive assessable disbursements.

Before *Hogarth*, there was *Fong v. Chan*³⁴, generally regarded as the leading case on costs and the SRL. In *Fong*, the Ontario Court of Appeal considered earlier cases that advocated in favour of costs for SRLs as well as cases that found that the SRL bears no entitlement to costs. The analysis yielded the following conclusions:

*21 It is apparent from this review of the case law that the preponderance of modern authority supports the contention that both self-represented lawyers and self-represented lay litigants may be awarded costs and that such costs may include allowances for counsel fees. Since the *Chorley* decision in 1884, it seems not to have been doubted that self-represented solicitors could recover costs for solicitor's fees. The respondents did not take issue with that proposition on this appeal. *Johnson v. Ryckman*, supra stands for the proposition that a self-represented solicitor could not recover anything for counsel fee, but as I have already noted, it was acknowledged in that case that there seemed to be no rationale for the rule. I am not persuaded by the respondent's submission that this 1903 case, which rests on such a shaky foundation, should continue to govern us today. *Johnson v. Ryckman* has been superceded by more recent cases that have quite properly ignored the untenable distinction between solicitor's fees and counsel fees. I can see no reason for maintaining the distinction between solicitor's fees and counsel fees that was already outmoded almost one hundred years ago. The legislature's decision to allow parties to recover costs in relation to the work of salaried employees provides added impetus to reject the view that self-represented solicitors should be precluded from*

³⁴ *Fong v. Chan*, 1999 CarswellOnt 3955, Ontario Court of Appeal 1999

recovering costs. Two provincial appellate courts have held that lay litigants may recover costs, including counsel fees. The clear trend of both the common law and the statutory law is to allow for recovery of costs by self-represented litigants.

*22 Quite apart from authority and as a matter of principle, it seems to me to be difficult to justify a categorical rule denying recovery of costs by self-represented litigants. As noted in the *Fellowes McNeil*, *supra* and in *Skidmore*, *supra*, modern cost rules are designed to foster three fundamental purposes: (1) to indemnify successful litigants for the cost of litigation; (2) to encourage settlements; and (3) to discourage and sanction inappropriate behaviour by litigants. It seems to me that all three purposes are fostered by allowing the trial judge a discretion to award costs to self-represented litigants.*

*23 Since the *Chorley* case over one hundred years ago, it had been accepted that self-represented lawyers are entitled to indemnity on the "time is money" or opportunity cost rationale. It is difficult to see why the opportunity cost rationale should not be more generally applicable to self-represented litigants. The self-represented lawyer possesses legal skills, but lacks professional detachment when acting in his or her own cause. If the law is prepared to compensate lawyers for this loss of time when devoting their efforts to their own cause, I fail to see any basis for denying the same entitlement to self-represented lay litigants who are able to demonstrate the same loss.*

24 A rule precluding recovery of costs, in whole or in part, by self-represented litigants would deprive the court of a potentially useful tool to encourage settlements and to discourage or sanction inappropriate behaviour. For example, an opposite party should not be able to ignore the reasonable settlement offer of a self-represented litigant with impunity from the usual costs consequences. Nor, in my view, is it desirable to immunize such a party from costs awards designed to sanction inappropriate behaviour simply because the other party is a self-represented litigant.

*25 I would add that nothing in these reasons is meant to suggest that a self-represented litigant has an automatic right to recover costs. The matter remains fully within the discretion of the trial judge, and as *Ellen Macdonald J.* observed in *Fellowes, McNeil v. Kansa*, *supra*, there are undoubtedly cases where it is inappropriate for a lawyer to appear in person, and there will be cases where the self-represented litigant's conduct of the proceedings is inappropriate. The trial judge maintains a discretion to make the appropriate costs award, including denial of costs.*

*26 I would also add that self-represented litigants, be they legally trained or not, are not entitled to costs calculated on the same basis as those of the litigant who retains counsel. As the *Chorley* case, *supra*, recognized, all litigants suffer a loss of time through their involvement in the legal process. The self-represented litigant should not recover costs for the time and effort that any litigant would have to devote to the case. Costs should only be awarded to those lay litigants who can demonstrate that they devoted time and effort to do the work ordinarily done by a lawyer retained to conduct the litigation, and that as a result, they incurred an opportunity cost by foregoing remunerative activity. As the early Chancery rule recognized, a self-represented lay litigant should receive only a*

"moderate" or "reasonable" allowance for the loss of time devoted to preparing and presenting the case. This excludes routine awards on a per diem basis to litigants who would ordinarily be in attendance at court in any event. The trial judge is particularly well-placed to assess the appropriate allowance, if any, for a self-represented litigant, and accordingly, the trial judge should either fix the costs when making such an award or provide clear guidelines to the Assessment Officer as to the manner in which the costs are to be assessed.

Fong has been cited in virtually every decision that follows with respect to costs and the SRL. Among these, the case of *Mustang Investigations Inc. v. Ironside*³⁵ bears mention for its overview of this area of costs in the aftermath of *Fong*. In *Ironside*, we find the following excerpts that serve to confirm that, as noted in *Fong*, while costs are available to the SRL, they are available to address the opportunity costs occasioned by the SRL where he or she performs the work of a lawyer, not because that SRL attended court or performed duties that would be the responsibility of any litigant whether represented or not:

21 *Recently, in Henderson v. Pearlman, 2010 CarswellOnt 75 (Ont. S.C.J.) Hennessy J. after alluding to the Fong principles, agreed with the reasoning of Newbould J. in White v. Ritchie and without making any reference to whether or not lost opportunity costs had been established, awarded the unrepresented litigant 120 hours of time spent at \$20 per hour.*

22 *Returning to the case before us, I agree with the conclusions of Karakatsanis J. (as she then was) in paragraph 8 of her reasons for granting leave:*

The motions judge interpreted the second principle [in Fong] as requiring a self-represented litigant to demonstrate only that he or she did the work ordinarily done by a lawyer in order to justify a costs award. However, the effect of such an interpretation is to treat the first and second requirement as two different ways of expressing the same principle. Furthermore it gives no effect to the concluding requirement "that as a result, they incurred an opportunity cost by foregoing remunerative activity".

23 *In my opinion, the language used by Sharpe J.A. is clear. First, to receive costs a lay litigant must demonstrate that he or she devoted time and effort to do the work ordinarily done by a lawyer and that as a result he or she incurred an opportunity cost by foregoing remunerative activity. Second, if an opportunity cost is proved a self-represented litigant should only receive a moderate or reasonable allowance for the loss of time devoted to preparing and presenting the case.*

³⁵ *Mustang Investigations Inc. v. Ironside*, 2010 CarswellOnt 5398, Ontario Superior Court of Justice (Divisional Court), 2010

And thereafter:

27 As I have said, Master Dash, and several trial judges, seem to have interpreted Fong as saying that even in the absence of proof of an opportunity cost, one may assume that because the lay person was involved in the litigation preparing material that might otherwise be prepared by a lawyer, he or she should nevertheless be entitled to nominal costs. With great respect to the Master and those judges, I'm unable to find that the language in Fong permits an award to be made without the self-represented litigant demonstrating that, as a result of the lawyer-like work put in on the file, remunerative activity was foregone. Simply stated, no proof of opportunity cost, no nominal costs available.

Finally, we refer you to the case of *232 Kennedy Street Ltd. v. King Insurance Brokers (2002) Ltd.*³⁶, which confirms the primacy of the modern approach to costs for the SRL as embodied in the Fong decision, while also confirming that costs are a tool which may be used as a disincentive to the vexatious SRL. In this regard, reference is made to the following passages from that decision:

25 The decision of Beard J. in Kuny provides the most extensive analysis to date in Manitoba on the issue of costs for a self-represented litigant. It departs from the traditional approach, which is premised only on indemnification and, therefore, denies party and party costs to self-represented litigants because the purpose of indemnity for legal costs incurred is absent.

26 The British Columbia Court of Appeal's seminal decision in Skidmore is often regarded as the start of the movement to award costs to self-represented litigants. The five-person court, which unanimously overruled its decision in Kendall v. Hunt (No. 2) (1979), 16 B.C.L.R. 295 (B.C. C.A.), identified three other purposes for an award of party and party costs in addition to the purpose of partial indemnification (at para. 37):

.... [Costs] partially indemnify the successful litigant, deter frivolous actions and defences, encourage both parties to deliver reasonable offers to settle, and discourage improper or unnecessary steps in the litigation.

27 In Fong, Sharpe J.A., for a unanimous court, expanded on the reasoning in Skidmore, especially with respect to the purpose of indemnification in the context of self-represented litigants. After reviewing the history of the traditional approach, he noted that, as a result of authority and principle, "[t]he clear trend of both the common law and the statutory law is to allow for recovery of costs by self-represented litigants" (at para. 21). He cautioned that self-represented litigants do not have an automatic right to recover costs, nor are they "entitled to costs calculated on the same basis as those of

³⁶ Cited as *232 Kennedy Street Ltd. v. King Insurance Brokers (2002) Ltd.*, 2009 CarswellMan 63, Manitoba Court of Appeal, 2009

the litigant who retains counsel" (at para. 26).

28 *As for the purpose of indemnification, he endorsed the historical concept of lost opportunity applicable to self-represented lawyers as a relevant factor when considering an award of costs in favour of a self-represented litigant (at para. 23):*

Since ... over 100 years ago, it had been accepted that self-represented lawyers are entitled to indemnity on the "time is money" or opportunity cost rationale. It is difficult to see why the opportunity cost rationale should not be more generally applicable to self-represented litigants. The self-represented lawyer possesses legal skills, but lacks professional detachment when acting in his or her own cause. If the law is prepared to compensate lawyers for this loss of time when devoting their efforts to their own cause, I fail to see any basis for denying the same entitlement to self-represented lay litigants who are able to demonstrate the same loss.

[emphasis added]

29 *Having said that, Sharpe J.A. was of the view that the opportunity cost rationale should not entitle a self-represented litigant to "recover costs for the time and effort that any litigant would have to devote to the case" (at para. 26). He was also of the view that self-represented litigants are not entitled to costs without demonstrating that they incurred "an opportunity cost by forgoing remunerative activity" (ibid.):*

.... Costs should only be awarded to those lay litigants who can demonstrate that they devoted time and effort to do the work ordinarily done by a lawyer retained to conduct the litigation and that, as a result, they incurred an opportunity cost by forgoing remunerative activity.

[emphasis added]

30 *In Kuny, Beard J. generally endorsed the approach set out in Fong, but rejected the reasoning set out in the foregoing quote. She preferred the approach of the Alberta Court of Appeal in Dechant, which viewed the issue of the loss of remunerative activity by a self-represented litigant to be a factor to be considered, not a "condition precedent" to an award of costs (Kuny, at para. 14).*

31 *The Ontario Court of Appeal recently identified access to justice as another purpose of awarding costs. In 1465778 Ontario Inc. v. 1122077 Ontario Ltd. (2006), 82 O.R. (3d) 757 (Ont. C.A.), Feldman J.A. concluded that parties represented by pro bono counsel should not be denied an award of costs (at para. 45):*

I agree with the submission of [Pro Bono Law Ontario] that the list of the purposes of costs awards should now include access to justice as a fifth consideration. It is clear that the profession sees the availability of costs orders in favour of pro bono counsel as a tool to potentially reduce the necessary financial sacrifice associated with taking on pro bono work and to thereby increase the number of counsel who may be willing and able to accept pro bono cases. This will facilitate access to justice.

32 *The development of the modern approach to costs has been endorsed in other appellate decisions. See, for example, Turner v. R., 2003 FCA 173, [2003] 3 C.T.C. 250 (Fed. C.A.), McNichol v. Co-operators General Insurance Co., 2006 NBCA 54, 37 C.C.L.I. (4th) 1 (N.B. C.A.), and Kilrich Industries Ltd. v. Halotier, 2008 YKCA 4, 56 C.P.C. (6th) 214 (Y.T. C.A.). It has also been endorsed by the Supreme Court of Canada, albeit not in the context of awarding costs to a self-represented litigant, but in the context of addressing the issue of interim orders for costs in cases of public importance. In British Columbia (Minister of Forests) v. Okanagan Indian Band, 2003 SCC 71, [2003] 3 S.C.R. 371 (S.C.C.), the majority favourably cited Skidmore when explaining that the purpose of an order of costs extends beyond the indemnity rule. LeBel J., for the majority, wrote (at paras. 25-26):*

As the Fellowes [(1997), 37 O.R. (3d) 464 (Gen. Div.)] and Skidmore cases illustrate, modern costs rules accomplish various purposes in addition to the traditional objective of indemnification. An order as to costs may be designed to penalize a party who has refused a reasonable settlement offer; this policy has been codified in the rules of court of many provinces (see, e.g., Supreme Court of British Columbia Rules of Court, Rules 37(23) to 37(26); Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 49.10; Manitoba Queen's Bench Rules, Man. Reg. 553/88, Rule 49.10). 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.

Indeed, the traditional approach to costs can also be viewed as being animated by the broad concern to ensure that the justice system works fairly and efficiently. Because costs awards transfer some of the winner's litigation expenses to the loser rather than leaving each party's expenses where they fall (as is done in jurisdictions without costs rules), they act as a disincentive to those who might be tempted to harass others with meritless claims. And because they offset to some extent the outlays incurred by the winner, they make the legal system more accessible to litigants who seek to vindicate a legally sound position. These effects of the traditional rules can be connected to the court's concern with overseeing its own process and ensuring that litigation is conducted in an efficient and just manner. In this sense it is a natural evolution in the law to recognize the related policy objectives that are served by the modern approach to costs.

[emphasis added]

It is clear, then, that the judiciary has defined for itself a responsibility to advise and assist the SRL, tempered by the over-reaching imperative to ensure that all interaction is fair and impartial. The inherent difficulty of balancing these two goals is readily apparent. No two SRLs are the same, nor are the issues that their court appearances will bring to bear. It goes without saying that the law in this area is most certainly in a nascent phase. We may anticipate further refinement of the law over time, of course, as the common law, rules of court, codes of conduct, and perhaps even legislation, evolve to address the role of the SRL in the litigation process.

IV. LEGAL COUNSEL

Representing a client in any action where the party *contra* is self-represented invariably presents many and varied challenges in all but the most exceptional of circumstances. That said, there are strategies and suggestions that will render the process less difficult for all involved. As counsel for the represented party you, of course, owe a duty to your client. You also owe a duty as an officer of the Court. The SRL does not. Your client management is facilitated when you ensure that your client fully understands that the fact that the other party is an SRL may well mean that:

- The proceeding may well be longer than it would be were both sides represented;
- Costs may escalate as a result of the SRL *contra*;
- The Court may appear at times to be lenient and/or to favour the SRL. Fairness may mandate that the judge approach the matter in a fashion that may appear, at times, to be unduly interventionist;
- You may appear at times to be helpful or overly patient with the SRL, but, your professionalism is intended to assist with timeliness and cost-effectiveness as well as to ensure that your conduct is in accordance with the Code and with your role as an officer of the Court.

But, of course, your client is not the only party that must be educated on your role and upon reasonable expectations. The SRL may well look to you to assist. Reference to the Code of Conduct reflects the following specific guidance with respect to interactions with SRLs:

6.02 (9)

When a lawyer deals on a client's behalf with an unrepresented person, the lawyer must:

- (a) urge the unrepresented person to obtain independent legal representation;*
- (b) take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer; and*
- (c) make it clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client.*

Commentary

If an unrepresented person requests the lawyer to advise or act in the matter, the lawyer should be governed by the considerations outlined in this rule about joint retainers.

Certainly, we must also heed the Code's admonition to the effect that:

6.02 (1)

A lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.

However, as counsel for the represented party, unlike judges, we encounter difficulties and concerns that arise aside and apart from courtroom interaction. Specifically, those if us who

encounter SRLs in our practices will find ourselves negotiating with SRLs. This exercise is fraught with difficulties and often results in misunderstandings on the part of the SRL as to your role and attendant concerns on your part as you strive to balance advocating for your client's interests and ensuring that you are neither taking advantage, nor perceived to be taking advantage, of the SRL.

In her article, "Self-Represented Litigants in Family Disputes" cited above, Madam Justice Blishen suggests that lawyers be careful in any considerations involving negotiation with an SRL. She adds that any verbal negotiation be followed by written documentation of the negotiations. On this point, it will benefit you to ensure that all matters reduced to writing are written simply, clearly and unambiguously.

Madam Justice Blishen also suggests that the presence of a third party is often helpful, particularly given the common SRL predilection to raise negotiation discussions during court proceedings, notwithstanding your best efforts to object to this behavior.³⁷

The presence of a third party and employment of written documentation of verbal discussions may also prove helpful in the unhappy event that the SRL reports you to the Law Society on the basis of some sort of misapprehension of your role, notwithstanding your efforts at clarifying same.

You may also find that, even as you are not required to elucidate the process for the SRL, it may be beneficial to your client in the long run to do so, both from a cost perspective and in furtherance of timely progress of the action. Correspondence that clearly sets out the next steps in the process and how they are facilitated both may serve to engender a measure of civility on the part of the SRL, and may also assist him or her with a more efficient approach to the court action.

The accommodations you may choose to make when acting for a party against an SRL continue throughout the life of your action, from the outset, through negotiation and into the court room if matters do not settle. These accommodations, we would suggest, are not solely comprised of practical matters related to the actual furtherance of the action. The vast majority of SRLs in a civil context have few interactions with the legal system. They are neither well-versed in court room decorum, nor do they have an understanding of the relationships that counsel have with each other and the court. This means that your standard behaviours and the habits that collegiality bring to the court room may appear suspect to the SRL, or your client for that matter, if neither tempered nor explained.

Accordingly, in our experiences, it serves you well to ensure that communications amongst counsel in multi-party actions where an SRL is involved are seen to be professional. This applies equally to any communication between counsel and the Bench. We know that many of us are

³⁷³⁷ Op. Cit. page 127.

acquainted and that this does not impact upon our duty to the court and our client. But, to an SRL, any interaction that appears unduly friendly may be seen as indicative of relationships that may impact on the impartiality of the court or relationships amongst counsel that may impact negotiations and/or the manner in which a case is put to the court.

As well, of course, you will find it virtually impossible not to make accommodations of a more practical bent when dealing with an SRL. As noted by Professor Thompson, in his article, *A Practising Lawyers' Field Guide to the Self-Represented*,³⁸ you simply will be required to do more in court when faced with an SRL. The ambit of responsibility you choose to assume in this regard is essentially a measure of your own willingness to shoulder the SRLs responsibilities in order to smooth the process.

You may find on the one hand that these responsibilities may include such things as drafting consent orders and preparing joint exhibit books so as to streamline process. On the other, you may simply find that your own responsibilities are complicated as you work through SRL materials that cite inapplicable legislation, case law and rules and/or you find yourself on the receiving end of incomprehensible pleadings, unnecessary or inappropriate applications and/or irrelevant arguments.

However, your best efforts and the best efforts of the court aside, it is commonplace in my experience to encounter SRLs who will fail to disclose documents, who will attend court unprepared and/or will conclude that the “rules” do not apply to him or her. Your best tactic is to be professional, be patient and remember your role as your client’s advocate in the context of a situation that is challenging, at best.

In these circumstances your best friend is the court. In my experience, where the court or tribunal sees that you are making efforts to manage the situation, the court will generally bring to bear its best efforts to ensure that the SRL is aware of his or her obligations and is not permitted to use his or her status as an SRL to perpetuate unhelpful habits and tactics in furtherance of his or her case.

Your next best friend may be the lawyer who has offered the SRL assistance via an unbundling of legal services. Throughout the literature related to the needs of the SRL we see repeated reference to the concept of unbundled legal services. The SRL wants to be able to avail himself or herself of legal services in this fashion and you should want this to be available to the SRL *contra*. In our experiences, the SRL who appears with solid pleadings and even a rudimentary concept of procedure due to the purchase of limited legal services is far and away a more welcome adversary than the SRL who has had no access to legal advice.

V. SUMMARY

³⁸ Cited as “A Practising Lawyers’ Field Guide to the Self-Represented”, D.A. Rollie Thompson, Lynn Reiersen, 19 C.F.L.Q. 529.

The SRL has become a well-established addition to the legal system in Canada. The demographic of the SRL has been thoroughly explored, as have their needs, frustrations and expectations. Undoubtedly, there is much that has yet to be done to smooth the involvement of the SRL in the legal system. However, you do have tools to ensure that your experience with the SRL is as uncomplicated and stress-free as can reasonably be expected.

The courts are very aware of their responsibility to both the SRL and to you and your client to ensure fairness. Court staff are doing their level best to assist within the ambit of their authority to do so. For your part, patience, understanding as to the difficult position that the court is in and some assistance to the SRL, as well as awareness of the potential pitfalls associated with SRL litigation will be helpful in making your encounters with the SRL more positive than they otherwise might be.