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Costs Awards for Self-Represented Litigants

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**The National
Self-Represented Litigants Project
presents:**

**The Self-Represented
Litigants Case Law Database
Occasional Research Series
*(Paper 1)***

**Costs Awards for
Self-Represented Litigants**

April 2018

Lidia Imbrogno & Julie Macfarlane

An Introduction to the Self-Represented Litigants Case Law Database

Over 200 Canadian decisions have now been read, analyzed, and added to the Self-Represented Litigants Case Law Database (CLD) by researchers at the National Self-Represented Litigants Project ([NSRLP](#)).

The purpose of this database is to track the emerging jurisprudence at all levels of courts across Canada, as it relates to self-representation, and to present findings that highlight patterns and themes evident within decisions reported by Canadian courts from coast to coast.

Self-represented litigants, or SRLs, face unique obstacles and challenges throughout trial proceedings. Cases included within the CLD focus on four issues that the NSRLP has noticed are raised with increasing regularity where one or both parties are self-represented: (1) the description of SRLs as vexatious litigants or as engaging in “vexatious behaviour”; (2) requested accommodations being either declined or accepted; (3) questions about procedural fairness and judicial assistance; and (4) the nature of costs being awarded for or against the SRL.

For a more detailed description of our methodology and the focus of case parameters, please see the [Preliminary Report](#) published in December 2017. This paper highlights leading cases where costs awards have been ordered for self-represented parties, and analyzes how these principles have developed in family law cases.

Canadian Principles for Awarding Costs

Whether or not a litigant is entitled to costs, and for what amount, is within the judge's discretion, subject always to a determination of reasonableness. The first goal of costs awards is indemnity. Over time, three other goals for awards have been introduced: the encouragement of settlement, the prevention of frivolous or vexatious litigation, and the discouragement of unnecessary steps in proceedings.

More recently, an additional factor in determining costs awards has become the consideration of how such awards can promote Access to Justice. This approach was first seen in decisions regarding costs awards in favour of *pro bono* counsel.¹ The rationale is to reduce the financial burden associated with taking on *pro bono* work and perhaps increase the number of lawyers willing and able to accept *pro bono* cases.

This reasoning now supports awards in favour of parties who would previously not have been entitled to costs, such as parties represented *pro bono* and self-represented litigants.²

Factors in Awarding Costs

There are some established factors that courts will consider in determining whether costs will be awarded, and the amount of costs awarded to a successful litigant. Courts will assess whether reasonable offers to settle were made before the trial, the importance and complexity of the proceedings, and the general conduct of the parties, before making a decision around costs.

Once costs are deemed appropriate, in most provinces the Rules of Civil Procedure dictate how those costs will be calculated³. For example, British Columbia uses a

¹ 1465778 *Ontario Inc. v 1122077 Ontario Ltd.*, 2006 ONCA 35819 (CanLII); Doucet and Dauphinee v. Spielo Manufacturing Incorporated and Manship, 2011 NBCA 44 (CanLII); 232 Kennedy Street Ltd. v. King Insurance Brokers (2002) Ltd., 2009 MBCA 22 (CanLII); ALGO Enterprises and NBP Enterprises v. REPAP New Brunswick Inc., 2013 NBQB 176 (CanLII)

² Jonathan de Vries "The Law of Costs – A Brief Overview" Shillingtons LLP at 5.

³ The Queen's Bench Act, 1998, SS 1998, c Q-1.01,

<<http://www.publications.gov.sk.ca/freelaw/documents/English/QBRules/23Tariff.pdf>> retrieved on 2018-04-03; Code of Civil Procedure, CQLR c C-25, <

<http://legisquebec.gouv.qc.ca/en/ShowDoc/cr/T-16,%20r.%2010>> retrieved on 2018-04-03; *Rules of Supreme Court*, 1986, S.N.L. 1986, c. 42 Sch. D <

http://assembly.nl.ca/legislation/sr/regulations/RulesSC/Rc86ru55.htm#55_01>; Supreme Court Civil Rules, BC Reg 168/2009, <

three-part scale based on complexity, while in Alberta costs are calculated as fees for specific services performed in a legal action. Ontario Rules, however, employ no numeric guidelines or breakdowns for fixing costs.⁴ The fixing of costs in Ontario is governed by the overarching principle of “reasonableness”.⁵

“Reasonableness” mandates that the cost award reflects what the court views as a fair and reasonable amount, as opposed to any exact measure of the actual costs borne by the successful litigant.⁶ “Reasonableness” has had the effect of devaluing the importance of what the successful party actually spent on litigation in favour of the proportionate⁷ and reasonable expectations that either side would expect to pay should they lose.⁸

Cost Awards for SRLs

The growing presence of SRLs in Canadian courts has raised new questions about how the principles for awarding costs should be applied to those who come to court as their own representative, rather than using a lawyer as their professional agent.

Our research shows that over the last two decades, Canadian courts have gradually shifted towards treating SRLs as representatives for the purposes of calculating cost awards, beyond the reimbursement of expenses alone.

First Wave: SRLs Should Receive Costs

http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/168_2009_05> retrieved on 2018-04-03; Nova Scotia Civil Procedure Rules, Nova Scotia Civil Procedure Rules, Royal Gaz Nov 19, 2008, <

http://www.courts.ns.ca/Civil_Procedure_Rules/cpr_docs/civil_procedure_rules_june_08_complete.pdf> retrieved on 2018-04-03; Alberta Rules of Court, Alta Reg 124/2010, <

http://www.qp.alberta.ca/documents/rules2010/Rules_vol_1.pdf> retrieved on 2018-04-03

⁴ While Ontario Rules employed a costs grid in the Rules in 2002, costs remained mainly discretionary, as it was never judicially adopted. Jonathan de Vries “The Law of Costs – A Brief Overview” Shillingtons LLP at 8.

⁵ *Zesta Engineering Ltd. v Cloutier*, 2002 ONCA 25577 (CanLII).

⁶ *Zesta Engineering Ltd. v Cloutier*, 2002 ONCA 25577 (CanLII).

⁷ Jonathan de Vries “The Law of Costs – A Brief Overview” Shillingtons LLP at 8.

⁸ Jonathan de Vries “The Law of Costs – A Brief Overview” Shillingtons LLP at 8.

The first wave in this trend saw widespread⁹ Canada-wide recognition that SRLs are entitled to some types of costs aside from disbursement expenses, including loss of time spent while away from their usual remunerative activity. In a 1995 decision, the British Columbia Court of Appeal¹⁰ overturned earlier decisions and found that successful SRLs are entitled to be compensated for their time in the same way that a lawyer would be. This decision was followed by *Fong v Chan*¹¹ (*Fong*), which further developed a process for SRL costs awards. *Fong* recognized that lawyers as professional agents should not be the only parties entitled to costs, as SRLs also devote their own time away from paid activity to pursue a legal claim.¹² These costs were not to include the time that a represented party would ordinarily spend on their case as a “client”, for example attending a hearing or preparing for the trial with their lawyer.

“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.”¹³

Fong utilized the principles of indemnification, encouragement of settlement, and discouragement of bad litigation behaviour and unnecessary steps to justify awarding costs to SRLs.¹⁴ The judgement also stipulated costs remain discretionary and that successful SRLs are not entitled to costs automatically¹⁵, and that SRLs are not to be awarded costs for the time that they spend with their “client hat” on, since all parties with or without representation expend time on their case.

In light of *Fong*, the courts would now look at the overall effort and time that the SRL devoted to the case, and whether or not this caused them to forego remunerative activity such as taking time off of work. After *Fong*, and using the same reasoning,

⁹ *Skidmore v. Blackmore*, 1995 CanLII 1537 (BC CA); *Sherman v. M.N.R.*, [2003] 4 FC 865, 2003 FCA 202 (CanLII); *Huet v. Lynch*, 2001 ABCA 37 (CanLII); *Kuny v. Beamish*, 2003 MBQB 47 (CanLII)

¹⁰ *Skidmore v. Blackmore*, 1995 CanLII 1537 (BC CA)

¹¹ *Fong v Chan*, 1999 ONCA 3955 (CanLII).

¹² *Fong v Chan*, 1999 ONCA 3955 (CanLII).

¹³ *Fong v Chan*, 1999 ONCA 3955 (CanLII) at para 23.

¹⁴ *Fong v Chan*, 1999 ONCA 3955 (CanLII) at para 24.

¹⁵ *Fong v Chan*, 1999 ONCA 3955 (CanLII) at para 25.

costs would also be awarded to counsel acting *pro bono* in Charter or public interest.¹⁶

Second Wave: Beyond Loss of Remunerative Activity

The second wave of decisions reject the view that *only* those who can confirm a loss of remunerative activity may be granted counsel fees and instead adopt the notion that SRLs should be compensated for more than their lost opportunity cost, and should be compensated for their actual work. For example, in *Bishop v Purdy*, Justice MacAdam endorsed the idea that “foregoing remunerative activity”, should not exclude an award where the self-represented litigants were not otherwise engaged in paid activity. MacAdam outlined that allowing costs for only those missing out on paid work would exclude persons who were not otherwise financially gainfully employed, including students, unemployed people, homemakers and retirees.¹⁷

These decisions reject the view that *only* those who can confirm a loss of remunerative activity or lost opportunity to earn may be granted counsel fees, and adopts the notion that SRLs should be compensated for their actual work. But the question remained: at what rate should they be compensated?

What is the Appropriate Rate of Compensation for an SRL’s Time?

Calculating the rate for a SRL’s time is especially problematic in Ontario where, unlike other provinces, the Rules do not set out cost guidelines for steps in litigation. Some cases¹⁸ focus on calculating the SRL’s time based on their current salary. Some simply reject the SRL’s requested hourly rate and assign another amount. Most recently, judicial approaches focus on the quality of work of the SRL and seek to compensate them based on their actual work on their case.

*“The true point is that a self-represented litigant can only expect to recover costs if he or she does work that a lawyer would do. Put somewhat differently, if the self-represented litigant demonstrates that he or she did the work ordinarily done by a lawyer, then they will have justified receiving an award of costs.”*¹⁹

¹⁶ *Ontario (Human Rights Commission) v Brockie*, 2004 (CanLII).

¹⁷ *Bishop v. Purdy*, 2015 NSSC 365 (CanLII) at para 5.

¹⁸ *Baetens v Arthurs*, 2013 ONSC 2147(CanLII).

¹⁹ *Huard v Hydro One Networks ITTc.*, 2002 OJ 4547 (CanLII) at para 14.

In one case²⁰, the successful SRL asked for \$150 per hour, which would be “a good fee for a well-experienced and well-qualified law clerk”. The judge assigned a figure of \$30 per hour with no justification for the number other than that the SRL’s adequacy at representing herself was not up to the level of a well-qualified law clerk. In short, the rate for SRLs varies widely from \$20.00²¹ an hour to \$200.00²² an hour in some cases.

In Ontario, Justice Price has addressed the ability of SRLs to claim costs awards expansively, specifically in *Jahn-Cartwright v Cartwright* and *Cassidy v Cassidy*.²³ Both cases argued that requiring that a SRL prove lost opportunities for remuneration serves to “disqualify litigants who are homemakers, retirees, students, unemployed, unemployable, and disabled but not a party under a disability”²⁴. *Jahn-Cartwright v Cartwright* and *Cassidy v Cassidy* maintain that even if no income was lost, the self-represented party’s allocation of time spent working on the case may still represent value.

In *Jahn-Carwright v Cartwright* Justice Price rejected the represented husband’s submission that the successful SRL (Ms. Cartwright, wife) should receive only the value of her lost remunerative activity totalling \$500.00. Justice Price stated²⁵:

“The insufficiency of this amount shows how essential it is to use an appropriate methodology to quantify costs, one which takes account of all the objectives which costs orders should serve and all the factors to be considered in order to attain those objectives. If such a methodology is not adopted, the resulting amount can render the entitlement to costs illusory and undermine access to justice by self-represented litigants.”

Ms. Cartwright’s success in the proceeding, her time spent doing work ordinarily done by a lawyer, and her unaccepted offer to settle made under rule 49.10 to which she later received a more favourable outcome at trial, were all factors in Justice Price’s decision to award her costs for her time, fixed at \$9,038, plus HST, and disbursements of \$616.56.

²⁰ *Warsh v Warsh*, 2013 ONSC 1886 (CanLII)

²¹ *McMurter v McMurter*, 2017 ONSC 725 (CanLII) at para 8.

²² *Jahn-Cartwright v Cartwright*, 2010 ONSC 2263 (CanLII) at para 117.

²³ *Jahn-Cartwright v Cartwright*, 2010 ONSC 2263 (CanLII); *Cassidy v Cassidy*, 2011 ONSC 791 (CanLII).

²⁴ *Mustang Investigations v Ironside*, 2010 ONSC 3444 (CanLII) at para 13.

²⁵ *Jahn-Cartwright v Cartwright*, 2010 ONSC 2263 (CanLII) at para 20.

A New Ontario Wave? From Quantifying Time to Quantifying Work

Our work on the SRL Case Law Database reveals that recently there has been a shift towards compensating SRLs by assessing the work that they have completed, rather than by assessing how much the SRL's time is worth based on subjective factors such as their hourly work wage. This emerging trend seeks to counter the inconsistencies that result from Ontario's discretionary costs calculation. However, this case law is still emerging and is not always consistent.

In *Izyuk v Bilousov*²⁶, Justice Pazaratz found that a rate of \$100.00 per hour was reasonable for a well-prepared self-represented litigant. Similarly, in *Burns v. Krebs*²⁷, Justice O'Connell agreed with Justice Pazaratz and fixed the rate of \$100.00 per hour as being appropriate for a self-represented litigant who was well-organized and well-prepared. The rate used in *Witter v Gong*²⁸ was \$150.00 per hour. In effect, these cases bring SRLs closer to obtaining comparable counsel fees, while still excluding the time that they would have ordinarily spent preparing for trial as a represented party. *Bergen v Sharpe*, another decision by Justice Price, concluded that it is ultimately the value of the services that the SRL performs on their own behalf that determines the costs being allowed.²⁹

The highly-publicized decision in *McMurter v McMurter*³⁰ marked a significant shift in SRL costs awards in Ontario. In *McMurter v McMurter*, the SRL was successful in a 15-day trial. She requested costs of just over \$18,000, which included a \$35 an hour rate for her time. The husband argued that her costs should be reimbursed at just \$18.32 per hour, which was what she would otherwise have earned at her regular job.

Justice MacLeod-Beliveau disagreed. She pointed out that the SRL was fully successful in the motion, the case was complex, and that the SRL was exceptionally well-organized and presented her position well. "She did the work of a lawyer in addition to the work expected of her as a litigant."³¹ The court held that the work done by the SRL in this case could be likened to that of a junior lawyer or to an

²⁶ *Izyuk v Bilousov*, 2011 ONSC 7476 (CanLII)

²⁷ *Burns v Krebs*, 2013 ONSC 1991 (CanLII)

²⁸ *Witter v Gong*, 2016 ONSC 6333 (CanLII)

²⁹ *Bergen v Sharpe*, 2013 ONSC 74188 (CanLII) at para 97.

³⁰ *McMurter v McMurter*, 2017 ONSC 725 (CanLII)

³¹ *McMurter v McMurter*, 2017 ONSC 725 (CanLII) at para 13.

experienced law clerk.³² Accordingly, the SRL was awarded costs of \$100 an hour, for a total of \$30,000.

In *Jordan v Stewart*³³, Justice Czutrin highlighted that the difficulty of calculating, in any objective way, the difference between the time a represented party would spend on litigation and the time that a SRL puts into a file is particularly problematic. Justice Czutrin made the reasonable point that it is nearly impossible to come up with an objective way of fixing a SRL's hourly rate or the amount of time they have spent doing what we might otherwise consider lawyers' work, stating: "We have yet to require in-person parties to somehow docket their time and provide satisfactory and reliable evidence as to what work they did equivalent to counsel work."³⁴

The shift towards awarding costs in favour of SRLs by assessing the *value* of the work done involves assessing not only the value of the time spent, but also the usefulness of the work to the court. Costs must compensate the successful party while recognizing that all litigation behaviour (represented or not) must reflect an attempt to solve matters efficiently and in a reasonable time frame. Assessing the value of the work done provides for a more objective approach, which seeks to balance the recognition of the SRL's work with the necessity to protect judicial time and resources.

Conclusion

Judicial decisions across Canada have widened the ability of SRLs to obtain costs. In Ontario, where the *Rules* lack guidance around the fixing of costs, costs amounts remain inconsistent for SRLs. Courts are moving towards focusing on the SRL's work quality, rather than a quantification of how much their time is worth.

SRLs (similarly *pro bono* counsel) seeking a favourable costs outcome are advised to keep a detailed list of the work that they've done at each step in the litigation. This will help in determining what might be considered counsel fees, versus time that would be spent by any litigant as a client. SRLs should also [understand the rules of settlement](#) in their jurisdiction, as offers to settle can greatly impact a SRL's ability to obtain costs.

³² *McMurter v McMurter*, 2017 ONSC 725 (CanLII) at para 19.

³³ *Jordan v Stewart*, 2013 ONSC 5037 (CanLII) at para 16.

³⁴ *Jordan v Stewart*, 2013 ONSC 5037 (CanLII) at para 16.

Lawyers should also be aware that litigation against a SRL can have serious costs consequences, as the law continues to move towards treating SRLs more fairly in cases where they are successful.

Justice MacLeod-Beliveau summarised the current state of the law in *Murter v McMurter, 2017*.³⁵

“Litigants cannot and should not assume that if a party is self-represented that they will not bear the consequences of a significant cost award in the litigation in the appropriate circumstances if they are unsuccessful.”

³⁵ *McMurter v McMurter, 2017 ONSC 725 (CanLII)* at para 26.