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Creating a System for All Parents: Rethinking Procedural and Evidentiary Rules in Proceedings with Self-Represented Litigants

Cassandra Richards

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Through qualitative interviews undertaken with ten judges at the Superior Court of Québec, this study considers the procedural and evidentiary challenges faced by self-represented litigants in family law matters. Subsequently, this paper offers solutions to the problems identified. The goal of this paper is to provide legal participants with concrete techniques to facilitate proceedings with SRLs that uphold their duty of impartiality and duty of assistance. While this article will likely be useful for judges who engage with SRLs daily, it will also be of interest to those working on issues relating to access to justice, SRLs, as well as procedural and evidentiary law reform. This paper urges its readers to think critically about our legal system. Who has our legal system been created for, yet who must actually use it?

Grâce à des d'entrevues qualitatives menées auprès de dix juges de la Cour supérieure du Québec, nous examinons dans le présent article les défis en matière de procédure et de preuve auxquels font face les justiciables qui ne sont pas représentés par un avocat dans les affaires de droit de la famille. Ensuite, nous proposons des solutions aux problèmes identifiés. L'objectif de cet article est de fournir aux intervenants juridiques des techniques concrètes pour faciliter les procédures avec les justiciables sans avocat tout en respectant leur devoir d'impartialité et leur devoir d'assistance. Bien que cet article soit susceptible d'être utile aux juges qui travaillent quotidiennement avec des justiciables non représentés par un avocat, il intéressera également ceux qui travaillent sur des questions liées à l'accès à la justice, aux justiciables sans avocat, ainsi qu'à la réforme du droit en matière de procédure et de preuve. Dans l'article, nous incitons les lecteurs à réfléchir de manière critique à notre système juridique. Pour qui notre système juridique a-t-il été créé, et qui doit réellement l'utiliser?

* Cassandra Richards is a lawyer in Quebec and Ontario. She is a graduate of McGill University's Faculty of Law, BCL/JD program. She holds an Honours degree in Conflict Studies and Human Rights from the University of Ottawa. She lectures at McGill University on self-represented litigants and researches access to justice. The author would like to thank the very helpful encouragement and feedback from Professor Rosalie Jukier, Professor Stefanie Carsley and the peer reviewers.

Introduction

It is no secret that our justice system is failing many of the people it purports to serve. Former Chief Justice Beverley McLachlin has been regularly cited for asserting that our "legal systems everywhere are experiencing an access to justice crisis that requires innovative solutions."[1] In particular, Self-Represented Litigants (SRLs) in family law matters are among those struggling, as they face significant procedural and evidentiary challenges

1. Chief Justice Beverley McLachlin, "Remarks of the Right Honourable Beverley McLachlin" (Speech delivered at the 2015 Canadian Bar Association Plenary, 14 August 2015) [unpublished].

in getting their cases through our legal system. Student-run legal clinics, pro bono offices, and numerous community programs work tirelessly to help Self Represented Litigants navigate complex legal proceedings. These efforts are extremely important. However, as a public service, it is time the legal system adapts to better reflect and serve its clientele, rather than the other way around.

The access to justice crisis greatly affects Canadian family matters.[2] The traditionally lawyer-dominated courtroom is being replaced by many litigants with little or no legal training. Canada's changing legal landscape requires all actors within the system to rethink their role and adapt, and the judiciary is no exception. In fact, the growing presence of SRLs has made the role of the judge more difficult and important. Judges must uphold impartiality, a fundamental tenet of our judicial system, while simultaneously fulfilling their duty of assistance to SRLs. Although procedural and evidentiary rules serve as a framework for judges, lawyers, and court staff, they often create substantial burdens on SRLs seeking justice.[3]

This article is based on qualitative interviews I conducted with ten judges at the Superior Court of Québec during the Fall of 2018.[4] It builds on previous scholarship that seeks to provide judges with concrete techniques to facilitate proceedings with SRLs while upholding their duty

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2. See generally Christine E Cerniglia, "The Civil Self-Representation Crisis: The Need for More Data and Less Complacency" (2020) 27:3 Geo J on Poverty L & Pol'y 355 at 371; Rachel Birnbaum, Michael Saini & Nicholas Bala, "Growing Concerns About the Impact of Self-Representation in Family Court: Views of Ontario Judges, Children's Lawyers and Clinicians" (2018) 37:2 Can Fam LQ 121 at 127; Rachel Birnbaum, Nicholas Bala, & Lorne Bertrand, "The Rise of Self-Representation in Canada's Family Courts: The Complex Picture Revealed in Surveys of Judges, Lawyers and Litigants" (2013) 91:1 Can Bar Rev 67 at 71.

3. See generally Julie Macfarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants, Final Report" (2013) at 8, online (pdf): *The National Self-Represented Litigants Project* <representingyourselfcanada.com/wp-content/uploads/2015/07/nsrlp-srl-research-study-final-report.pdf> [perma.cc/FLQ4-VB7V]; Joanne J Paetsch, Lorne D Bertrand & John-Paul E Boyd, "An Evaluation of the Cost of Family Law Disputes: Measuring the Cost Implication of Various Dispute Resolution Methods" (2017) at 54-56, online (pdf): *Canadian Forum on Civil Justice* <www.cfcj-fcjc.org/sites/default/files//docs/Cost-Implication-of-Family-Law-Disputes.pdf> [perma.cc/6D6S-4739]; Brandon Fragomeni, Kaila Scarrow & Julie Macfarlane, "Tracking the Trends of the Self-Represented Litigant Phenomenon: Data from the Self-Represented Litigants Project, 2018/2019" (2020), online (pdf): *National Self-Represented Litigants Project* <representingyourselfcanada.com/wp-content/uploads/2020/01/Intake-Report-2019-Final.pdf> [perma.cc/EGR3-MCW7]; *Pintea v Johns*, 2017 SCC 23 [*Pintea*]; *Moore v Apollo & Beauty Care*, 2017 ONCA 383 at para 44; *Catholic Children's Aid Society of Toronto v EB*, 2018 ONCJ 333; *Girao v Cunningham*, 2020 ONCA 260 [*Girao*].

4. This paper uses the spelling "Superior Court of Québec" as used on its official website. See Jacques R Fournier, "Words of welcome" (2020), online: *Superior Court of Québec* <coursuperieureduquebec.ca/en/about/words-of-welcome> [perma.cc/CF69-D8QL].

of impartiality and duty of assistance.[5] While this article will be useful for judges who engage with SRLs daily, it will also be of interest to those working on issues relating to access to justice, SRLs, and procedural and evidentiary law reform. It is organized into four parts. Part I describes the research methodology utilized. Part II provides an overview of self-representation in Canadian family law matters. Part III considers the role of the judge in administering justice in proceedings involving SRLs in family law. It explores how judges balance judicial ethics as well as the duty of assistance in these proceedings. Part IV identifies salient procedural and evidentiary challenges faced by SRLs in family law proceedings. Subsequently, it provides judges with practical solutions to address these problems. The solutions I propose are informed by the interviews I conducted with judges, as well as current literature and jurisprudence. In February 2020, I presented these solutions at a judicial conference to 35 members of the judiciary of the Superior Court of Québec in Montreal.

Since SRLs turn to the judge before them for guidance, how judges conduct proceedings is crucial. The degree of assistance provided by the judge and the manner in which this assistance is delivered can influence the outcome of an SRL's case and, more importantly, their belief in having accessed meaningful justice. Ultimately, promoting access to justice for SRLs will require a momentous cultural shift, for which this paper is but one effort. Roderick A Macdonald insisted that "the law requires citizens to come to it, not the reverse."[6] This paper urges its readers to change the reality described by Macdonald by creating a legal system that works for all, including SRLs in family law matters.

I. *Research Methodology*

The findings of this study are based on data I compiled through qualitative interviews with 10 judges who regularly hear family law cases in the Montreal Division of the Superior Court of Québec.[7] As the court of original general jurisdiction, the Superior Court of Québec has jurisdiction

5. "Statement of Principles on Self-Represented Litigants and Accused Persons" (2006) at 7, online (pdf): Canadian Judicial Council <cjc-ccm.ca/cmslib/general/news_pub_other_PrinciplesStatement_2006_en.pdf> [perma.cc/89DM-2XJF] [CJC, "Statement of Principles"]. Courts have also recognized that judges owe SRLs a duty of assistance. See e.g. *Pintea*, *supra* note 3; *A(JM) v Winnipeg Child & Family Services*, 2004 MBCA 184 at paras 19-20, 32 [*A(JM)*]; *New Brunswick Minister of Health v G(J)*, [1999] 3 SCR 46, 177 DLR (4th) 63 at para 85 [*G(J)*]; *Ménard c Gardner*, 2012 QCCA 1546 [*Ménard*].

6. Roderick A Macdonald, "Access to Justice in Canada Today: Scope, Scale, Ambitions" in Julia Bass, WA Bogart & Frederick H Zemans, eds, *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005) 19 at 27.

7. A research ethics certificate was obtained prior to commencing these interviews.

in family law matters,[8] with the exception of adoption, which is the jurisdiction of the Court of Québec.[9] Unlike in other jurisdictions, Quebec does not have designated family law courts. However, in Montreal and Quebec City, legal matters are divided between internal administrative entities known as chambers, one of these being the Family Chamber.[10] The Family Chamber deals with cases involving applications for divorce, annulment of marriage, separation from bed and board and dissolution of civil unions. It also handles cases related to child support, the exercise of parental authority (custody and access rights), and applications concerning civil status.[11]

The Montréal Division of the Superior Court of Québec is served by 102 regular judges, 89 of which are assigned to the district Montreal.[12] While some judges of the Superior Court in Québec may sit exclusively in the Family Chamber, judges are not officially appointed to specific chambers. In fact, some judges may sit in a variety of chambers and hear different types of legal matters.[13] However, six of the ten judges I interviewed stated that they heard exclusively family law matters.[14]

Participants of this study were recruited through the Associate Chief Justice of the Superior Court of Québec. I contacted the Associate Chief Justice by e-mail explaining the objectives of my research and the interview process I intended to utilize. The Associate Chief Justice shared my research proposal and interview questions by e-mail to judges at the Superior Court of Québec in the Division of Montreal. This Division was chosen because it is the biggest Division in the Superior Court of Québec in terms of number of judges and case load.[15] Participation in this study was voluntary; judges decided themselves whether they would participate. The ten participants ranged in their experience as a judge from one year to 15 years on the bench. Six had worked in family law prior to being

8. Arts 33, 35 CCP (1965).
9. *Ibid*, art 37, see also art 35 and art 37(3) for more exceptions.
10. See Office of the Chief Justice of the Superior Court of Québec, "Superior Court of Québec: 2010-2014 Activity Report" (2015) at 7, online (pdf): *Superior Court of Québec* <coursuperieureduquebec.ca/fileadmin/coursuperieure/Pdf_Word_par_district/en/ActivityReport_July_2015.pdf> [perma.cc/57SJ-2VXH].
11. *Ibid* at 10.
12. See "Jurisdiction" (2020), online: *Superior Court of Québec* <coursuperieureduquebec.ca/en/about/jurisdiction> [perma.cc/W7DL-M5Y6] [Superior Court of Québec, "Jurisdiction"].
13. Interview, Judge 8, 5 November 2018.
14. Interview, Judge 1, 5 November 2018; Interview, Judge 2, 27 November 2018; Interview, Judge 4, 29 November 2018; Interview, Judge 5, 14 November 2018; Interview, Judge 6, 21 November 2018; Interview, Judge 7, 17 December 2018; Interview, Judge 9, 17 December 2018; Interview, Judge 10, 6 November 2018.
15. Superior Court of Québec, "Jurisdiction," *supra* note 13.

appointed a judge. Nine of the participants identified as women and nine identified as white.

The data collection process consisted of semi-structured interviews conducted from October through December 2018. Each interview was conducted by phone or in-person and lasted between forty minutes and one hour and a half. Interviews were conducted in English or French according to the wishes of the participants. Participants were asked approximately twelve open-ended questions disclosed to them prior to the interview.[16] The first set of questions focused on how judges interact when one or more of the litigants are self-represented. Participants were asked about the degree to which they assist SRLs and the techniques they employ to facilitate proceedings. The second group of questions explored the perceptions of judges regarding the extent to which they believe SRLs access justice, if they had concerns, and what solutions they would suggest. While the interviews were based on the questions I prepared, participants were free to discuss any topic related to SRLs they found relevant or important. With the consent of each participant, each interview was audio-recorded and subsequently transcribed verbatim.

This study is constrained by certain methodological limitations. First, it would have been beneficial to interview a greater number of judges within the chosen population. Unfortunately, this was limited by judges' willingness to participate, as well as my own time and resources.[17] The study's sample size was small and not randomly selected; however, the qualitative interviews palliated the size by providing in-depth and detailed data into the everyday interactions of seasoned judges and SRLs. Further, at around the sixth interview I felt that many of the judges' answers were becoming repetitive. Despite my small sample size, the fact that my final interviews yielded little new information made me more confident in the value and reliability of the data I collected.

Second, the empirical research of this study is limited to the perspectives of judges in Montreal and its surrounding areas. Given that the majority of participants were white women in the judiciary, certain gender, racial and socio-economic biases may have influenced how participants understand the phenomenon of self-representation as well as how they perceive cases involving SRLs and SRLs themselves. While it was beyond the scope of this particular research, the experiences of SRLs are fundamental to efforts

16. See Appendix A.

17. While I anticipated that some judges were not willing to participate in the study, some may have also been worried about judicial impartiality and confidentiality. I make that conclusion based on the fact that eight of the ten judges asked numerous questions prior to the interview commencing about how I planned on keeping their participation and interviews confidential.

seeking to transform the legal process.[18] Future research should consider whether, from the perspectives of SRLs, the solutions offered in this paper do in fact improve access to justice.

II. *Self-representation in Canadian family law cases*

The judges I interviewed were unable to identify a precise number of SRLs that come before the courts. Nonetheless, many estimated that approximately 40 per cent of family law cases involve at least one SRL.[19] This percentage reflects current estimates found in the literature.[20] However, in Ontario, Macfarlane states that this number is likely an underestimation as many commence proceedings with legal representation, yet will discontinue to retain these services due to financial ressources.[21] Despite the lack of accurate data, all judges interviewed affirmed that SRLs are most prevalent in family law cases and their numbers are steadily rising.

This paper will not recap the literature which has extensively documented the demographics of SRLs and their reasons for self-representing.[22] Numerous studies have also identified the challenges faced by SRLs in accessing our legal system and presenting their case

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18. For research on legal needs see Macfarlane, *supra* note 3; Fragomeni, Scarrow & Macfarlane, *supra* note 3; Paula Hannaford-Agor & Nicole Mott, "Research on Self-Represented Litigation: Preliminary Results and Methodological Considerations" (2003) 24:2 Justice System J 163 at 178.

19. Interview, Judge 1, 5 November 2018; Interview, Judge 8, 5 November 2018; Interview, Judge 10, 6 November 2018. Interview, Judge 5, 14 November 2018: emphasized that approximately 1/8 of the cases they hear involve at least one SRL. This judge hears family cases in rural Quebec towns. Judge 5 stated that due to the different socioeconomic class, more litigants may be eligible for legal aid in those regions.

20. Birnbaum, Bala & Bertrand, *supra* note 2 at 71.

21. Macfarlane, *supra* note 3 at 33.

22. See generally Macfarlane, *supra* note 3; Fragomeni, Scarrow & Macfarlane, *supra* note 3; Birnbaum, Bala & Bertrand, *supra* note 2; Hannaford-Agor & Mott, *supra* note 18 at 163-181; Institute for the Advancement of the American Legal System, "Cases Without Counsel: Our Recommendations After Listening to the Litigants" (2016) at 9, 12-20, online (pdf): *Honoring Families Initiative* <iaals.du.edu/sites/default/files/documents/publications/cases_without_counsel_recommendations_report.pdf> [perma.cc/Q3K5-6K8K]; Mary Stratton, "Alberta Legal Services Mapping Project: An Overview of Findings from the Eleven Judicial Districts" (July 2011) at 13-15, 89-91, online (pdf): *Canadian Forum on Civil Justice* <www.cfcj-fcjc.org/sites/default/files/docs/2011/mapping-final-en.pdf> [perma.cc/4MMJ-4CLC]; INFRAS inc, "Rapport: Enquête sur le sentiment daccès et la perception de la justice au Québec" (2016) at 26, online (pdf): *Ministère de la Justice* <cdn-contenu.quebec.ca/cdn-contenu/adm/min/justice/publications-adm/rapports/RA_enquete_perception_2016_MJQ.pdf?1545334585> [perma.cc/3DUM-XF66]; National Self-Represented Litigants Project, "Avoiding Conflation: OPCAs and Self-Represented Litigants" (6 October 2012), online: *NSRLP Blog* <representingyourselfcanada.com/avoiding-conflation-opcas-and-self-represented-litigants/> [perma.cc/63HG-UUGE]; Julie Macfarlane, "Chasing Down the Data: How Doubtful Assertions about SRLs Sometimes Become 'Facts'" (12 March 2015), online (blog): *NSRLP Blog* <representingyourselfcanada.com/chasing-down-the-data-how-doubtful-assertions-about-srls-sometimes-become-facts/> [perma.cc/4V3H-S98Q]; Emmanuelle Bernheim & Richard-Alexandre Laniel, "Le droit à l'avocat, une histoire d'argent" (2015) 93:1 R du B can 251 [Bernheim & Laniel, "histoire d'argent"].

in court.[23] However, one recurring theme throughout these studies is that SRLs struggle to present their case in court due to the complexity and inaccessibility of procedural and evidentiary rules.[24] The National Self-Represented Litigants Project's 2020 study quoted SRLs who describe this struggle.[25] One SRL insisted, "I have not had trouble with legal arguments, I have had problems with process and procedures which are either obscure or informal which has left me at a disadvantage."[26] Another SRL explained, "[D]uring that process, I realized that what was holding me back was knowledge of process. I know my case, but I don't know how to counter the defendant's legal maneuvering in court."[27]

The majority of judges interviewed echoed these concerns, stating that procedural and evidentiary law remain the biggest obstacles for SRLs in family law cases. Generally, family law proceedings involving SRLs are not substantively complex. In referring to the sharing of assets within the family patrimony, one judge stated that SRLs usually grasp the substantive law applicable to their case once it has been explained: "It is rare that unrepresented parties have a lot of property to share. Often, parties with a lot to share can afford legal representation."[28] While substantive law is often inaccessible for those without legal education, one judge emphasized that SRLs are increasingly more knowledgeable about it. The judge indicated that often SRLs will have referred to online resources, such as Éducaloi,[29] prior to their proceedings. Thus, judges interviewed explained that most

23. See Macfarlane, *supra* note 3; INFRAS inc, *supra* note 22; "Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity" (2013) at 13-54, online (pdf): *Law Commission of Ontario* <www.lco-cdo.org/wp-content/uploads/2013/06/family-law-reform-final-report.pdf> [perma.cc/2S6P-X57Y]; Shane Simpson et al, "An Evaluation of Alberta's Family Law Act" (2009) at 95-119, online (pdf): *CanLII* <canlii.ca/t/286c> [perma.cc/N8DN-ETYE]; Jennifer A Leitch, "Lawyers and Self-Represented Litigants: An Ethical Change of Role?" (2017) 95:3 Can Bar Rev 669 [Leitch, "Ethical Change"] at 679-687; Ellen Degnan et al, "Trapped in Marriage" (2018) at 26-43 [unpublished, archived at Social Science Research Network], online (pdf): <papers.ssrn.com/sol3/papers.cfm?abstract_id=3277900> [perma.cc//3RUU-LJXZ].

24. Macfarlane, *supra* note 3 at 54; Fragomeni, Scarrow & Macfarlane, *supra* note 3 at 17-22; Action Committee on Access to Justice in Civil and Family Matters, "Access to Civil and Family Justice: A Roadmap for Change" (2013) at 2, 17-19, online (pdf): *Canadian Forum on Civil Justice* <cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf> [perma.cc/K7U4-6VQ6]; Hannaford-Agor & Mott, *supra* note 18 at 166; Paris R Baldacci, "Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City's Housing Court" (2006) 3:3 Cardozo Public L, Policy, & Ethics J 659.

25. Fragomeni, Scarrow & Macfarlane, *supra* note 3.

26. *Ibid* at 19.

27. *Ibid*.

28. Interview, Judge 3, 16 November 2018. This quotation was translated by the author. The original reads: "C'est rare que les parties non représentées ont beaucoup de biens à partager. Souvent les parties avec beaucoup à partager peuvent se permettre d'être représentées par un avocat."

29. Interview, Judge 5, 14 November 2018. Éducaloi is an online platform that provides legal information to Quebecers about their rights and responsibilities in a vulgarized manner.

court time is dedicated to explaining procedural and evidentiary rules as opposed to substantive law.[30] For SRLs, these rules remain "a sea of legal unknowns."[31]

An ongoing discussion about best practices surrounding judicial engagement is required given the growing number of SRLs in family law proceedings and the issues at the heart of these cases. This discussion must consider dismantling procedural and evidentiary obstacles faced by SRLs to create more accessible courtrooms for all. Hence, this study builds on previous research that seeks to dismantle these barriers.[32] It provides judges with concrete techniques to address procedural and evidentiary issues faced by SRLs in family law proceedings. The solutions I propose are neither exhaustive nor one-size-fits-all. Further research is needed to offer solutions that address systemic barriers faced by various demographics of

30. Interview, Judge 1, 5 November 2018; Interview, Judge 2, 27 November 2018; Interview, Judge 3, 16 November 2018; Interview, Judge 4, 29 November 2018; Interview, Judge 5, 14 November 2018; Interview, Judge 6, 21 November 2018; Interview, Judge 7, 17 December 2018; Interview, Judge 8, 5 November 2018; Interview, Judge 9, 17 December 2018; Interview, Judge 10, 6 November 2018.

31. Interview, Judge 5, 14 November 2018. This quotation was translated by the author. The original reads: "une mer juridique inconnue."

32. See e.g. Emmanuelle Bernheim & Richard-Alexandre Laniel, "Un Grain de Sable Dans l'engrenage Du Système Juridique: Les Justiciables Non Représentés: Problèmes Ou Symptômes?" (2013) 31:1 Windsor YB Access Just 45 [Bernheim & Laniel, "Problèmes Ou Symptômes?"]; Richard Zorza, "The Self-Help Friendly Court: Designed from the Ground Up to Work for People Without Lawyers" (2002) at 17, online(pdf): *The National Center for State Courts* <www.srln.org/system/files/attachments/Zorza%20SRL%20Friendly%20Court.pdf> [perma.cc/VTP5-BWRZ]; The Canadian Association of Provincial Court Judges, "Access to Justice: Self-Represented Litigants" (2009) 32:2 Prov Judges J 22; Michel Robert, "La magistrature a l'ère du jugement sur mesure" (2010), online (pdf): *Colloque Éducaloi* <www.yumpu.com/fr/document/view/27796883/la-magistrature-a-lare-du-jugement-sur-mesure-colloque-aducaloi> [perma.cc/4DDR-Q5J3]; Jona Goldschmidt, "Strategies for Dealing with Self-Represented Litigants" (2008) 30:2 NC Cent L Rev 130 at 139; Rebecca A Albrecht et al, "Judicial Techniques for Cases Involving Self-Represented Litigants" (2003) 42:1 Judges J 16; Birnbaum, Saini & Bala, *supra* note 2; John-Paul E Boyd & Lorne D Bertrand, "Comparing the Views of Judges and Lawyers Practicing in Alberta and in the Rest of Canada on Selected Issues in Family Law: Parenting, Self-Represented Litigants and Mediation" (2016), online (pdf): *CanLII* <canlii.ca/t/2865> [perma.cc/WJ9R-PQHD]; Ministry of Attorney General of British Columbia, "Family Justice Reform Working Group Report: A New Justice System for Families and Children" (2006), online (pdf): *Ministry of Attorney General* <www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/fjr_report_09_06.pdf> [perma.cc/7BMR-BYQS]; Canadian Judicial Council, "Access to Justice: Report on Selected Reform Initiatives in Canada" (2008), online (pdf): *Sub-committee on Access to Justice (Trial Courts) of the Administration of Justice Committee* <cjc-ccm.ca/cmslib/general/2008_SelectedReformInitiatives_Report_final_EN.pdf> [perma.cc/5SJC-YGCT]; Institute for the Advancement of the American Legal System, "Cases Without Counsel: Our Recommendations After Listening to the Litigants" (2016), online (pdf): *Honoring Families Initiative* <iaals.du.edu/sites/default/files/documents/publications/cases_without_counsel_recommendations_report.pdf> [perma.cc/W2QU-J4R5]; Shane Simpson et al, *supra* note 23; Anna E Carpenter, "Active Judging and Access to Justice" (2018) 93:2 Notre Dame L Rev 647; Birnbaum, Bala & Bertrand, *supra* note 2 at 71.

SRLs.[33] Nonetheless, these solutions are promising contributions which can make our courtrooms more accessible for many.

III. *The role of the judge*

This section begins by discussing judicial ethics, notably impartiality, fairness, and equality. Next, it considers the duty of assistance. Throughout, the views of judges interviewed are considered alongside current literature. I conclude this section by advocating for a shift in how the legal community has traditionally understood balancing the duty of impartiality and assistance to SRLs. I call for a modification of procedural and evidentiary rules in family law proceedings with SRLs when appropriate.

1. *Impartiality, equality, and fairness*

The Canadian judiciary is guided by the 2004 *Ethical Principles for Judges*.[34] These principles were recently revised in June 2021 and will be referred to throughout this paper.[35]

The *Ethical Principles* include the principles of impartiality, equality, and fairness.[36] The importance of these principles cannot be overstated; they are vital to the proper functioning of our courts and to ensuring that those who utilize them, regardless of who they are, will be able to access the legal system and feel heard. Despite their important presence in the legal system, SRLs were not mentioned once within the 2004 *Ethical Principles*. The 2004 *Ethical Principles* seemed to presume that all cases involve clients represented by legal counsel.[37] I found this particularly

33. Studies have shown that various social structures, such as an individual's gender, ethnicity, race, immigration status, Indigeneity, education, language, disability, age, and location, compound to mold the experiences of SRLs. See e.g. Fragomeni, Scarrow & Macfarlane, *supra* note 3; Sara Sternberg Greene, "Race, Class, and Access to Civil Justice" (2016) 101:4 Iowa L Rev 1263; Rebecca L Sandefur, "Access to Civil Justice and Race, Class, and Gender Inequality" (2008) 34 Annual Rev Sociology 339; Julie Macfarlane & Sandra Shushani, "When Judges See SRLs, Do They See Gender? Observations on Gendered Characterizations in Judgments" (2018), online (pdf): *University of Windsor, Faculty of Law* <scholar.uwindsor.ca/cgi/viewcontent.cgi?article=1082&context=lawpub> [perma.cc/6CJ5-S69H].

34. "Ethical Principles for Judges" (2004), online (pdf): *Canadian Judicial Council* <cjc-ccm.ca/sites/default/files/documents/2019/news_pub_judicialconduct_Principles_en.pdf> [perma.cc/5ZE3-8NR7].

35. "Ethical Principles for Judges" (2021), online (pdf): *Canadian Judicial Council* <cjc-ccm.ca/sites/default/files/documents/2021/CJC_20-301_Ethical-Principles_Bilingual%20FINAL.pdf> [perma.cc/8B7D-V8ZV] [CJC, "Ethical Principles 2021"].

36. *Ibid*. Impartiality is a fundamental precept guaranteeing the legitimacy of our legal system. Judges are not only required to be impartial, but equally emanate the appearance of impartiality. Furthermore, judges must ensure that proceedings are conducted in a manner that upholds equality according to the law. Finally, notions of impartiality and equality are deeply intertwined in a judge's responsibility to assure fair proceedings for all parties. The judge must not only act fairly, but appear to be acting fairly.

37. *Ibid.*

concerning given that principles of impartiality and fairness should be at the forefront of the minds of the judiciary when they are faced with cases involving SRLs. Judges interviewed explained that legal representation is an additional safeguard of judicial impartiality, as the judge can rely on counsel to assist their client. However, judges explained that impartiality becomes more vulnerable to erosion when a judge is tasked with assisting a SRL.[38] Thankfully, as will be later discussed, the revised 2021 *Ethical Principles* now make reference to SRLs.

The situation in Quebec mirrors that of other Canadian jurisdictions: judges worry about maintaining impartiality during proceedings for both SRLs and opposing represented parties.[39] Judges interviewed admitted heightened concerns when one party is represented and the other is not.[40] One judge stated, "there is a risk of being told that we lack impartiality when we have a self-represented party before us. We receive many complaints. Either we helped too much or not enough. It is very difficult."[41] However, interviews showed that maintaining impartiality during a proceeding is easier when both parties are self-represented. Two SRLs are perceived by judges as generally being on equal playing fields. However, judges explained that a case involving two SRLs requires much more time and work on behalf of the judge; one judge stated, "It's like preparing two files, it's too much work. At least when I have a lawyer, he manages his client."[42]

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38. Interview, Judge 1, 5 November 2018; Interview, Judge 2, 27 November 2018; Interview, Judge 3, 16 November 2018; Interview, Judge 4, 29 November 2018; Interview, Judge 5, 14 November 2018; Interview, Judge 6, 21 November 2018; Interview, Judge 7, 17 December 2018; Interview, Judge 8, 5 November 2018; Interview, Judge 9, 17 December 2018; Interview, Judge 10, 6 November 2018.

39. See generally Bernheim & Laniel 2013, *supra* note 32; Anne-Marie Langan, "Threatening the Balance of the Scales of Justice: Unrepresented Litigants in the Family Courts of Ontario" (2005) 30:2 Queen's LJ 825-862; Jona Goldschmidt, "The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance" (2002) 40:1 Family Court Rev 36-62; Jona Goldschmidt, "Judicial Assistance to Self-Represented Litigants: Lessons from the Canadian Experience" (2008) 17:3 Mich State U College LJ Intl L 601-656; Cynthia Gray, "Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants" (2007) 27:1 J National Assoc Administrative L Judiciary 97-168; Micah Rankin, "Access to Justice and the Institutional Limits of Independent Courts" (2012) 30:1 Windsor YB Access to Justice 101-138; Richard Zorza, "The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear Pro Se: Causes, Solutions, Recommendations and Implications" (2004) 17:3 Geo J Leg Ethics 423-454; Michelle Flaherty, "Self-Represented Litigants, Active Adjudication and the Perception of Bias: Issues in Administrative Law" (2015) 38:1 Dalhousie LJ 119 at 128.

40. *Ibid*.

41. Interview, Judge 10, 6 November 2018. This quotation was translated by the author. The original reads: "Il y a un risque de se faire dire que nous manquons d'impartialité lorsque nous avons une partie non représentée devant nous. Nous recevons beaucoup de plaintes. Soit nous avons trop assisté ou pas assez. C'est très difficile."

42. Interview, Judge 6, 21 November 2018. This quotation was translated by the author. The original reads*: "C'est comme préparer deux dossiers, c'est beaucoup trop lourd. Au moins quand j'ai un*

These findings suggest that dynamics and communications between the judiciary and litigants may differ based on the number of SRLs involved in the proceeding. Specifically, judges interviewed were more concerned about adequately balancing their duty of impartiality and assistance in proceedings involving one SRL and one person represented by counsel.

2. *The duty of assistance*

Jurisprudence has increasingly recognized that judges "should provide some assistance" to SRLs to ensure fair and equal proceedings.[43] In 2006, the Canadian Judicial Council (CJC) issued the *Statement of Principles on Self-Represented Litigants and Accused Persons* (*Principles on SRLs*). The *Principles on SRLs* highlight the "special challenges" faced by SRLs and list obligations of all actors within the legal system to ensure access to justice and equal treatment of all litigants.[44] Judges may modify or supplement court procedures when necessary, as "procedural and evidentiary rules [should not be] used to unjustly hinder the legal interests of self-represented persons."[45]

Over ten years later, the Supreme Court of Canada (SCC) endorsed the *Principles on SRLs* in *Pintea v Johns*.[46] Mr. Pintea had commenced an action to recover damages from a motor vehicle accident. He later became an SRL and failed to notify the court and the defendants of his change of address. Consequently, he did not attend case management meetings as he had never received the notices. The trial judge found Mr. Pintea in contempt of court, struck his claim, and awarded the defendants over $80,000 in costs. The Court of Appeal upheld the lower court decision, which was later appealed to the SCC.[47] In a mere five paragraphs, the SCC found that Mr. Pintea could not be held in contempt of court as he was unaware of the court orders. The SCC reinstated his action, removed the cost award, and endorsed the *Principles on SRLs.*[48] The SCC's endorsement of the *Principles on SRLs* is a significant milestone. However, a report released by the NSRLP has found that while lower courts are increasingly

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avocat il gère son client."

43. *A(JM)*, *supra* note 5 at para 32. See generally *G(J)*, *supra* note 5 at para 85; *Ménard*, *supra* note 5; *Morwald-Benevides v Benevides*, 2019 ONCA 1023 at para 34; *Dewing v Kostiuk*, 2017 MBCA 22 at paras 17-20; *Davids v Davids* (1999), 92 ACWS (3d) 87 at para 36, 125 OAC 375 (Ont CA); *Janes v Deer Lake (Town)* (1993), 110 Nfld & PEIR 202 at paras 35-40, 42 ACWS (3d) 510 (Nfld CA).

44. CJC, "Statement of Principles," *supra* note 5 at 1.

45. *Ibid* at 7.

46. *Supra* note 3. The trial judge found Mr. Pintea in contempt of court, struck his claim and awarded the defendants over $80,000 in costs.

47. *Pintea v Johns,* 2016 ABCA 99 at para 20.

48. *Pintea*, *supra* note 3 at paras 1-5.

referencing the *Principles on SRLs*, there continues to be much variation in how judges fulfill their duty of assistance.[49]

Similar trends were observed during my interviews. All judges interviewed acknowledged their duty to assist SRLs. One judge insisted, "I owe a different duty to an unrepresented party, a duty which is minute when a person is represented by a lawyer. However, I'm not their lawyer."[50] While judges recognized their duty to assist SRLs, how they translated this assistance in the courtroom varied. Some judges took a broader approach to assisting SRLs and were able to identify specific techniques they use to facilitate courtroom interactions.[51] Others were unable to provide specific practices they employ, but insisted they take a different approach to dealing with SRLs.[52] Some insisted that nothing changes with respect to their interactions in the courtroom.[53]

In fact, the degree to which procedural and evidentiary rules are enforced in proceedings involving SRLs provides a useful example to demonstrate the differing degrees to which judges assist SRLs.[54] Generally, the level of enforcement can be categorized into two views. The first view is premised on a fairly strict application of procedure. Accordingly, these judges believed, "the procedure is what it is; it applies to everyone."[55]

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49. Kaila Scarrow & Julie Macfarlane, "Pintea v Johns: 18 Months Later" (2018) at 12, online (pdf): University of Windsor, Faculty of Law <scholar.uwindsor.ca/cgi/viewcontent.cgi?article=1085&context=lawpub> [perma.cc/T4F9-2BTU]; Jennifer Leitch, "Lawyers and Self-Represented Litigants: Taking Pintea More Seriously" (31 July 2020), online: *Slaw* <www.slaw.ca/2020/07/31/lawyers-and-self-represented-litigants-taking-pintea-more-seriously/#_ftn2> [perma.cc/CZ6D-8YT3] [Leitch, "Taking Pintea More Seriously"]; Sean Sutherland & Cassie Richards, "Supreme Court of Canada Endorses A New Approach to Self-Represented Litigants" (1 November 2017), online: *LawNow* <www.lawnow.org/supreme-court-of-canada-endorses-a-new-approach-to-self-represented-litigants/> [perma.cc/TE4B-PGVV]; *Cabana v Newfoundland and Labrador*, 2018 NLCA 52 at paras 53-63 [*Cabana*]; *R v Tossounian*, 2017 ONCA 618 at paras 37-39; *Cole v British Columbia Nurses' Union*, 2014 BCCA 2 at para 38.

50. Judge 8. This quotation was translated by the author. The original reads: "J'ai un devoir différent envers une partie non représentée et ce devoir est beaucoup moindre quand une personne se fait représenter par avocat. Mais je ne suis pas son avocat."

51. Interview, Judge 4, 29 November 2018; Interview, Judge 6, 21 November 2018; Interview, Judge 7, 17 December 2018; Interview, Judge 10, 6 November 2018.

52. Interview, Judge 2, 27 November 2018; Interview, Judge 5, 14 November 2018; Interview, Judge 9, 17 December 2018.

53. Interview, Judge 1, 5 November 2018; Interview, Judge 3, 16 November 2018; Interview, Judge 8, 5 November 2018.

54. A study completed in Jackson, Missouri demonstrated that 59 per cent of judges assist SRLs "always" or "frequently," 36 per cent "sometimes" or "infrequently," and 18 per cent "never": See Cynthia Cook, "Self-Represented Litigants in Family Cases in Jackson County, Missouri" (2007) at 56, online (pdf): *Institute for Court Management* <srln.org/system/files/attachments/Cook_SelfRepresentedLitigants%20Ct%20Exec%20Devel%20Project%20MO%202007.pdf> [perma.cc/N8PN-VFPN]. See also Birnbaum, Bala & Bertrand, *supra* note 2 at 81.

55. Interview, Judge 1, 5 November 2018. This quotation was translated by the author. The original reads: "la procédure est telle quelle. La procédure s'applique à tous. Rien ne change dans la procédure."

This approach suggests a mechanical, copy-and-paste application of procedure across all cases regardless of the needs of the person before the court. Article 23 of the *Code of Civil Procedure* (CCP) equally seems to support a strict application of procedure to all persons: "Natural persons may self-represent before the courts, but must comply with the procedure established by this Code and the regulations under this Code."[56] In fact, one judge emphasized that they read and reiterate this article to all SRLs that come before them that choose to proceed without a lawyer.[57]

The alternative view held by other interviewees was that procedure should be adaptable. These judges emphasized the need to simplify procedure and make accommodations based on the needs of the parties. One judge stated it is their duty to make proceedings as simple as possible, which often involves curtailing procedure. The adaptation of procedure was intimately linked to their understanding of their role as a judge and more importantly as a "public servant."[58] This camp of judges emphasized their duty to assist SRLs by modifying procedural and evidentiary rules when required. They also believed that procedural and evidentiary rules serve as frameworks, allowing all parties to a proceeding to understand their rights and obligations therein. However, they cannot be so heavily enforced that they impede a party from having their case heard. The CCP also attempts to create this balance. While article 23 CCP posits that procedure applies to everyone, it must be balanced by article 25 CCP, which states, "The rules of this Code are designed to facilitate the resolution of disputes and to bring out the substantive law and ensure that it is carried out."[59]

Throughout the interviews, it became apparent that not all judges share the same vision of how the duty of assistance should be carried out in the courtroom. Some believed assisting SRLs requires changing their usual mode of operation, others did not. Cynthia Gray has noted that "[t]rial courts possess 'a discretionary range of control over parties and proceedings' that allows reasonable accommodations to self-represented litigants."[60] The key point is that this control is *discretionary*, implying that the judiciary is not obliged to use it. In fact, my research has shown that a lack of concrete guidelines for the duty of assistance can lead to inconsistent assistance among judges and throughout cases. According to Nicholas Bala, balancing the rights of SRLs and judicial ethics "is one of

56. CCP, *supra* note 8, art 23.
57. Interview, Judge 10, 6 November 2018.
58. Interview, Judge 8, 5 November 2018.
59. CCP, *supra* note 8, arts 23, 25.
60. *Gray, supra* note 39 at 102.

the hardest things that we now expect judges to do."[61] However, SRLs have repeatedly voiced that our current way of operating disadvantages them in court.[62] As the legal landscape changes, how judges interact with SRLs needs to be re-examined. These traditional passive notions of impartiality create barriers to justice for SRLs and call for more active approaches.

3. *A way forward: rethinking judicial ethics and the needs of SRLs*

Within the adversarial system, maintaining impartiality while simultaneously assisting SRLs is a challenging task the judiciary must grapple with. When asked if they believe SRLs are disadvantaged in the courtroom, some judges replied that one's status as an SRL does not impact the outcome of the case: "In judging the merits of disputes, we make decisions based on the facts and the law. The main issue remains the same."[63] And yet, these same judges hesitated when providing a response and many others admitted it was a difficult question to answer.

While the substantive law applicable to one's case does not change based on legal representation or lack thereof, in many cases "an imbalance exists between the parties, and judges do not have a magic wand."[64] According to one judge, "though we can provide some information on how this works, we cannot make objections or present evidence for them. Of course, in some cases, self-represented parties would have benefited from legal advice."[65] Another judge acknowledged: "It's very possible. There are numerous subtle factors that can impact a case. It can simply come down to how SRLs present themselves. Lawyers often polish their clients, and you have to appreciate that many of these self-represented litigants have not been polished."[66] While some judges interviewed may not believe that a litigant's status as an SRL impacts their final decision, Macfarlane suggests that many SRLs do not share these sentiments.[67]

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61. Aidan Macnab, "Balancing rights of self-reps and neutrality of the court" (28 November 2018), online: *Canadian Lawyer* <www.canadianlawyermag.com/legalfeeds/author/aidan-macnab/balancing-rights-of-self-reps-and-neutrality-of-the-court-16551/> [perma.cc/HB9P-G8DV].
62. Macfarlane, *supra* note 3.
63. Interview, Judge 2, 27 November 2018. This quotation was translated by the author. The original reads: "Sur le fond du litige, le juge prend la décision en fonction des faits et du droit. La question principale demeure la même."
64. Interview, Judge 10, 6 November 2018. This quotation was translated by the author. The original reads: "un déséquilibre existe entre les parties, et les juges n'ont pas de baguette magique."
65. Interview, Judge 9, 17 December 2018. This quotation was translated by the author. The original reads: "bien qu'on puisse leur donner certaines informations sur le fonctionnement, on ne peut pas faire les objections ni présenter la preuve pour eux. C'est sûr que dans certains cas, les parties non représentées auraient eu intérêt à avoir des conseils juridiques."
66. Interview, Judge 7, 17 December 2018.
67. Macfarlane, *supra* note 3 at 95-110.

The duty of assistance to SRLs seems often limited by judicial impartiality. For some judges, balancing these objectives is perceived as a constant contention between "competing imperatives."[68] However, I argue that these important objectives do not need to be perceived as zero-sum; it is possible to safeguard the fundamental ethical pillars of our judicial system while ensuring that SRLs are not disadvantaged by their lack of legal representation.[69] Michelle Flaherty explains that our understanding of impartiality is firmly rooted in a time and courtroom where most benefited from legal representation and passive adjudication was the norm:

> However, as self-representation becomes the new norm, the ongoing validity of this approach is called into question. To put it differently: if it is unfair to expect self-represented litigants to navigate the hearing process without adjudicative assistance and direction, it is also unfair to insist on a vision of impartiality that prevents adjudicators from intervening with direction or assistance.[70]

It is time to divorce our understanding of impartiality from passivity and encourage judges to undertake more active adjudication which modifies rules of procedure and evidence when appropriate.[71] Gray argues that active adjudication remains consistent with the role of the judge:

> The adversary system is not ensconced in the code of judicial conduct, nor is the primary purpose of the code to protect the formalities of the adversary system. While judges may be more comfortable in the role reflected in the rare situation in which all parties are represented by competent, diligent counsel, their discomfort in a more involved role does not necessarily suggest the role reflects partiality, and the traditional role of the judge is in fact as a guiding force at a trial, not just a ceremonial presence or silent monitor presiding over rituals understandable only by the initiated.[72]

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68. *A(JM)*, *supra* note 5 at para 32.
69. Flaherty, *supra* note 39 at 128; Leitch, "Ethical Change," *supra* note 23 at 690-694; Jennifer Leitch, "Coming off the Bench: Self-Represented Litigants, Judges and the Adversarial Process" (2017) 47:3 Adv Q 309 at 319 [Leitch, "Coming off the Bench"]; Leitch, "Taking Pintea More Seriously," *supra* note 49; Anna E Carpenter, "Active Judging and Access to Justice" (2018) 93:2 Notre Dame L Rev 647 at 661-662; Rosemary Hunter, "Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law" (2003) 30:1 JL & Soc'y 156 at 170.
70. Flaherty, *supra* note 39 at 137.
71. See Leitch, "Coming off the Bench," *supra* note 69 at 315; Russell G Pearce, "Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help" (2004) 73:3 Fordham L Rev 969 at 970; Richard Moorhead, "The Passive Arbiter: Litigants in Person and the Challenge To Neutrality" (2007) 16:3 Soc & Leg Stud 405 at 406; Russell Engler, "Ethic in Transition: Unrepresented Litigants and the Changing Judicial Role" (2008) 22:2 Notre Dame JL Ethics & Pub Pol'y 367 at 385; Leitch, "Taking Pintea More Seriously," *supra* note 49; *Girao*, *supra* note 3 at para 76; *Dewing v Kostiuk*, 2017 MBCA 22 at para 17; *Cabana*, *supra* note 49 at para 46.
72. *Gray, supra* note 39 at 160.

The solutions I propose in this article align with the role of the judge and uphold important ethical principles, notably impartiality. They encourage judges to modify some of their in-court practices to address the real and diverse challenges faced by so many accessing our family court system. Flaherty explains, the judicial "model has begun to shift from a more traditional, passive approach to one in which decision-makers more actively adjudicate cases and direct the course of proceedings."[73] The revised 2021 *Ethical Principles* are an example of this.[74] As previously mentioned, the 2004 *Ethical Principles* made no reference to SRLs. Thankfully, in 2019 the CJC recognized this blind spot and asked the Judicial Independence Committee to begin consultations to update the *Ethical Principles*.[75] The new principles were released in June 2021 and now make reference to SRLs a handful of times, a welcome change from the previous edition. More importantly, the new principles call on the judiciary to re-evaluate their ethical duties: "Today, judges' work includes case management, settlement conferences, judicial mediation and frequent interaction with self-represented litigants. These responsibilities invite further consideration with respect to ethical guidance."[76]

One further addition to the revised *Ethical Principles* deserves consideration. Principle 2 on Integrity and Respect now includes a comment section entitled "Access to Justice and Self-Represented Litigants." Comment 2.D.2 reads:

> Passive neutrality and treating everyone in the same manner may not always be appropriate. Parties often appear before the court as self-represented litigants. Judges should provide information and reasonable assistance, proactively where appropriate, on procedural and evidentiary rules, while being alert not to compromise judicial impartiality and the fairness of the proceeding.[77]

The CJC's assertion that treating everyone equally does not necessarily lead to a fair hearing is a transformative remark. In fact, the CJC seems to be encouraging judges to assist SRLs by modifying procedural and evidentiary rules when necessary.[78] It is not possible to treat every litigant

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73. Flaherty, *supra* note 39 at 121-122.
74. CJC, "Ethical Principles 2021," *supra* note 35.
75. *Ibid*. See the consultation report: "Consultation on Ethical Principles for Judges" (2019), online (pdf): *Canadian Judicial Council* <cjc-ccm.ca/sites/default/files/documents/2019/Ethical%20Principles%20for%20Judges%20Consultation%20V5%20-%20EN.pdf> [perma.cc/Z36C-Z7MT].
76. CJC, "Ethical Principles 2021," *supra* note 35 at 11. See also CJC, "Statement of Principles," *supra* note 5 at 5.
77. CJC, "Ethical Principles 2021," *supra* note 35 at 24.
78. CJC, "Statement of Principles," *supra* note 5 at 7.

absolutely the same, nor is it equal to uphold a passive principle of impartiality; doing so may actually undermine a fair hearing.[79]

The solutions I propose in the next part are consistent with the CJC's discourse. Truly advancing access to justice requires giving litigants what they need to present their case. Reasonably modifying in-court practices so that all individuals can be heard does not erode impartiality—rather it allows for a fair process. The following part will delve into the challenges faced by SRLs and propose techniques to judges in efforts to facilitate cases with SRLs.

IV. *Solutions for facilitating proceedings with SRLs*

This part outlines procedural and evidentiary problems that arise in family law proceedings involving SRLs as identified by judges I interviewed. Subsequently, I propose solutions to those problems that are informed by these interviews, as well as current literature, jurisprudence, and legislative interpretation. The solutions I propose are useful and promising, given that they are informed by judges for judges. The problems and accompanying solutions are in the following categories: (1) Visualizing the legal process; (2) Determining the legal issues; (3) Modifying examination & cross-examination; (4) Dealing with a lack of objections; and (5) Failure to ask for certain claims.[80] Facilitating proceedings with SRLs can be a difficult task, generally requiring greater work on the part of the judiciary within an already overburdened legal system. Therefore, these solutions not only seek to better the experiences of SRLs, but also those of the judiciary, opposing counsel, and the general administration of justice.

1. *Visualizing the legal process*

a. *Problem*

The interviews revealed that SRLs often do not understand the different steps involved in family law cases or the components of an actual trial. For example, judges explained that SRLs are usually unaware that family law cases involve a mandatory mediation information session, proceedings dealing with interim orders, and the trial. Further, SRLs do not typically

79. *Ibid*. See also *Cabana*, *supra* note 49 at paras 43-50; *Cabana v Newfoundland and Labrador*, 2020 NLCA 44 at para 127: "Delivering trial fairness requires an individualized approach in every case. What is said to a self-represented litigant must not become formalistic exercise. There is no standardized "script." It must be tailored to the circumstances of each case."

80. This paper presumes that the SRL is often the vulnerable party. This is not always the case. In fact, a growing phenomenon is that SRLs in family law cases choose to be self-represented in order to personally be able to examine the opposing party and control the case. This is often seen in the context of abusive relationships and most often the SRL is a man (as explained by Interview, Judge 8, 5 November 2018). Further research will need to address this issue.

know that the trial is organized into opening statements, the introduction of evidence, examinations, and closing statements.[81] One judge explained that SRLs may get assistance from legal clinics prior to coming to court. However, legal clinics focus on educating SRLs on the substantive law applicable to the case, rather than procedural and evidentiary rules.[82] Hence, processes inside the courtroom remain largely unknown to and complex for SRLs.

Some of the judges interviewed explained that they provide a general roadmap or framework to explain how the proceeding will unfold: "I explain the steps in the procedure and what the [CCP] requires. I tell them that I understand that it is impossible to remember everything now, but that I will tell them where we are at each stage."[83] Other judges seemed to go the extra mile, as one described that they not only explain the procedure to the SRL, they subsequently ask the SRL to identify what they understood from this explanation to identify any gaps in the SRL's understanding.[84] While judges explained that this is helpful, they admitted that many SRLs often forget what they have been told.[85] Other judges stated that these types of explanations are not part of their practice,[86] or they cannot undertake this due to a lack of time.[87]

b. *Solution*

SRLs must receive information regarding the different proceedings involved in the legal process as well as the different steps of a trial. The solution I propose is to provide SRLs with a visual representation of each of these processes once they come before a judge (See Graphic 1 and Graphic 2 as examples below).[88] Currently, the CJC asks judges to "refer

81. Interview, Judge 1, 5 November 2018; Interview, Judge 2, 27 November 2018; Interview, Judge 3, 16 November 2018; Interview, Judge 4, 29 November 2018; Interview, Judge 5, 14 November 2018; Interview, Judge 6, 21 November 2018; Interview, Judge 7, 17 December 2018; Interview, Judge 8, 5 November 2018; Interview, Judge 9, 17 December 2018; Interview, Judge 10, 6 November 2018.

82. Interview, Judge 6, 21 November 2018. See Bernheim & Laniel, "histoire d'argent," *supra* note 22 at 125.

83. Interview, Judge 9, 17 December 2018. This quotation was translated by the author. The original reads: "Je leur explique les étapes de la procédure et ce que le [CCP] exige. Je leur dis que je comprends qu'il est impossible de tout retenir maintenant, mais que je vais leur dire à quelle étape on est rendu à chaque fois."

84. Interview, Judge 8, 5 November 2018.

85. Interview, Judge 8, 5 November 2018; Interview, Judge 9, 17 December 2018.

86. Interview, Judge 1, 5 November 2018; Interview, Judge 3, 16 November 2018; Interview, Judge 5, 14 November 2018.

87. Interview, Judge 2, 27 November 2018; Interview, Judge 10, 6 November 2018.

88. These draft graphics were created by the author and inspired by other visual aids in Ontario and Quebec. They were presented at a judicial conference to judges at the Superior Court of Québec in Montreal. Judges expressed positive feedback regarding both their content and the proposed solution of having them available with court clerks. See e.g. Community Legal Education Ontario, "What

self-represented persons to other appropriate sources of information, education, advice and assistance."[89] What I propose goes one step further. Instead of referring an SRL to the pamphlets outside the courtroom, judges can use these pamphlets during their in-court explanations of legal processes to an SRL.

An abundance of public legal education resources have been created by courts and community organizations.[90] However, these are rarely used inside a courtroom.[91] I argue this information must become part of the regular court process undertaken by a judge assisting an SRL in the courtroom.[92] These visual aids could be held by court clerks and given to the SRL prior to commencing the proceeding. At this time, a judge can use the visual aid to explain the different steps involved in a family law case and/or trial. While a judge may explain this information orally, many SRLs would benefit from visual reminders given the stress of self-representing and SRLs' limited legal education.[93] Further, these aids can be used throughout the proceeding, as judges can refer to the graphic once they go from, for example, examination to cross-examination (Graphic 2).

The legalese in the graphics should be made into plain language to ensure they are understood by all.[94] They should also be offered in Braille

happens at a family law trial" (1 September 2021), online: *Steps to Justice: Your guide to law in Ontario* <stepstojustice.ca/questions/family-law/what-happens-family-law-trial/> [perma.cc/73XV-8ELW]. See also "Divorce: Main Steps in the Court Process" (last modified 30 March 2020), online: *Educaloi* <www.educaloi.qc.ca/en/capsules/divorce-main-steps-court-process> [perma.cc/43L5-GLZF]; Legal Info Nova Scotia, "Representing Yourself" (last modified 2017), online: *Legal Info* <www.legalinfo.org/representing-yourself/representing-yourself-intro> [perma.cc/D2GH-XDJJ]; Courthouse Libraries BC, "Teaching Materials" (last visited 24 February 2022), online: *Clicklaw* <www.clicklaw.bc.ca/learnteach/search?f=teaching+materials> [perma.cc/D2GH-XDJJ]; "Representing Yourself in Family Court" (last modified 2021), online (pdf): *Centre for Public Legal Education Alberta* <www.cplea.ca/wp-content/uploads/RepresentingYourselfinFamilyCourt.pdf> [perma.cc/P5D8-KJUT].

89. CJC, "Statement of Principles," *supra* note 5 at 2.

90. See e.g. "A propos d'Éducaloi" (last visited 24 February 2022), online: Éducaloi <educaloi.qc.ca/a-propos/> [perma.cc/X36X-Q48A]; "Organismes" (last visited 24 February 2022), online: *Centres de justice de proximité* <www.justicedeproximite.qc.ca/a-propos/organismes/> [perma.cc/5FXP-2FXM]; "Service d'information juridique a la Cour municipale de Montréal" (last visited 24 February 2022), online: *Jeune Barreau de Montréal* <ajbm.qc.ca/services-au-public/service-dinformation-juridique/> [perma.cc/DJ6M-FC4F].

91. Interview, Judge 8, 5 November 2018.

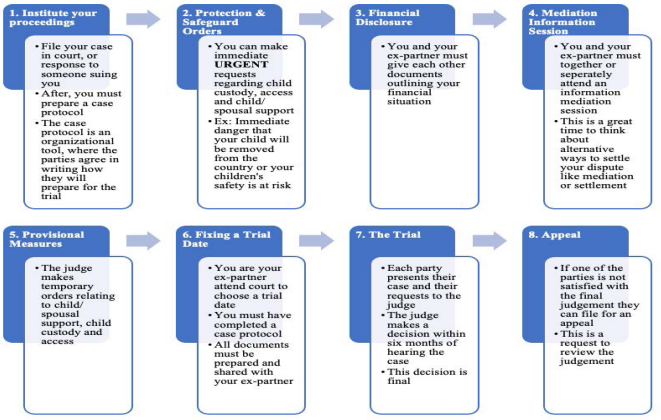
92. This suggestion aligns with numerous principles within the Statement of Principles on SRLs: CJC, "Statement of Principles," *supra* note 5 at 6-7: "Judges and court administrators should meet the needs of self-represented persons for information, referral, simplicity, and assistance. Judges and court administrators should develop forms, rules and procedures, which are understandable to and easily accessed by self-represented person […] In appropriate circumstances, judges should consider providing self-represented persons with information to assist them in understanding and asserting their rights, or to raise arguments before the court."

93. Fragomeni, Scarrow & Macfarlane, *supra* note 3 at 17-19.

94. This solution would not address the difficulties faced by SRLs who are illiterate. A solution to address this would be to transform the graphic into a video that could be watched prior to entering the

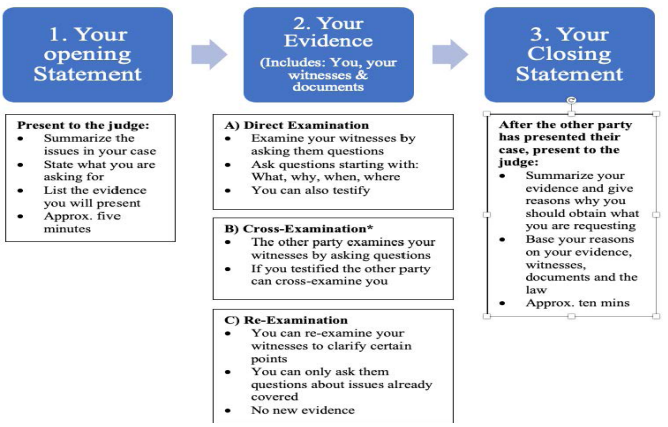
and translated into multiple languages to ensure that SRLs whose first language is neither French nor English can understand the process.[95] Ultimately, incorporating these visual aids into judges' routine explanations to SRLs would allow for greater understanding of the legal process.

Graphic 1: THE STEPS OF A FAMILY LAW FILE



Graph description: This graph provides an outline of the life of a family law file, including but not limited to the following steps: (1) Institute your proceedings; (2) Protection & safeguard orders; (3) Financial disclosure; (4) Mediation and information session; (5) Provisional measures; (6) Fixing a trial date; (7) The trial; (8) Appeal.

Graphic 2: THE TRIAL PROCESS



Graph description: This is a graph that provides a general overview of a trial. The graph outlines three different steps. (1) Your opening statement; (2) Your evidence; (3) Your closing statement.

courtroom.

95. These are equally beneficial for SRLs who are hearing impaired.

2. *Determining the legal issues*

a. *Problem*

Judges highlighted that a major obstacle in cases involving SRLs is that they have not identified the precise legal issue to be resolved that day. One judge explained, "it's difficult to get the right information from the parties, to really know what the parties want and why they are in court that day."[96] SRLs often believe that all issues will be resolved in one proceeding.[97] However, family law matters involve numerous stages; some issues are resolved at an interim stage (such as child support and custody leading up to the trial), while others are resolved at a final stage (such as the division of family property). Moreover, SRLs struggle to parse relevant and irrelevant information based on the legal issue at hand. SRLs who lack legal advice and are unfamiliar with procedural law submit an abundance of irrelevant information: "Since they don't know what is important and relevant in a given situation, they respond to us with a very, very wide range of information; we end up having a lot of sorting to do."[98] Interviewees indicated that proceedings with SRLs are more prone to disorganization, particularly when both parties are self-represented.

b. *Solution*

I propose two ways to identify the legal issue(s) which must be resolved during the proceeding in question and ensure SRLs are aware of and understand them. One option is for the judge to summarize to the parties what they, as the judge, have understood as the main legal issues to be resolved that day. After reading the file, one judge explained that they list to the parties what they have understood as the main issues in dispute, then they ask the parties if any issues have been overlooked.[99]

Alternatively, the judge may ask each of the parties to briefly outline the main legal questions to be resolved. The judge then summarizes back to the parties what the judge has understood from both sides. In both scenarios, the judge should ask the SRL(s) if they have understood the

96. Interview, Judge 2, 27 November 2018. This quotation was translated by the author. The original reads: "c'est difficile d'obtenir la bonne information en provenance des parties, savoir véritablement ce que les parties veulent et pourquoi elles sont à la cour aujourd'hui."

97. Interview, Judge 1, 5 November 2018; Interview, Judge 2, 27 November 2018; Interview, Judge 3, 16 November 2018; Interview, Judge 4, 29 November 2018; Interview, Judge 5, 14 November 2018; Interview, Judge 6, 21 November 2018; Interview, Judge 7, 17 December 2018; Interview, Judge 8, 5 November 2018; Interview, Judge 9, 17 December 2018; Interview, Judge 10, 6 November 2018.

98. Interview, Judge 2, 27 November 2018. This quotation was translated by the author. The original reads: "Vu qu'ils ne connaissent pas ce qui est important et pertinent comme information pour la situation donnée, ils nous répondent avec un éventail très, très large et nous avons beaucoup de triage d'information à faire."

99. Interview, Judge 6, 21 November 2018.

requests made from the opposing party. If they have not, the judge should reiterate these requests in a simplified manner.[100]

These proposed solutions are in line with the CJC's *Principles on SRLs* that suggests when one or more SRLs are present, a judge may "inquire whether both parties understand the process and the procedure."[101] However, these solutions go a bit further by suggesting concrete ways a judge can inquire into an SRL's understanding of the legal process and the legal issues relevant to their case on that day. The second proposed solution, in particular, requires a judge to be satisfied that an SRL understands the current legal issue based on the explanation the SRL will provide. The SRL cannot simply acquiesce to understanding.

These solutions are evidently more time consuming in the short-term, specifically at the beginning of the proceeding. Whereas identifying the legal issues may take five seconds to two minutes with a lawyer, it often takes ten to thirty minutes with SRLs.[102] However, judges explained this technique will likely save time in the long term.[103] Furthermore, it also requires more pre-court preparation time, as judges must take more time to read the file. One judge explained that they will suspend court for ten to fifteen minutes when they realize one or more SRLs are involved in the case: "I suspend and reread the entire file."[104] Nonetheless, this solution ensures organization of the proceeding, which benefits the judge and the parties. It also allows SRLs to focus on the information that is relevant to the specific proceeding. Finally, this technique is especially useful when there is a lack of communication between the two parties. By putting both parties on the same page at the beginning of the proceeding, the judge effectively builds a bridge between them.[105] While the practices explained above may seem rudimentary, determining and/or clarifying the legal issues is crucial to helping SRLs have their voices heard and ensuring they understand the content of proceedings.

100. Interview, Judge 8, 5 November 2018. This interview suggested that this judge takes a very active approach with regard to their duty of assistance, as they explained this is a technique they regularly use. This quotation was translated by the author. The original reads: "je vais demander à chaque partie ce qu'elle veut aujourd'hui."
101. See "Promoting Equal Justice. B. (4)(a)(b)" in CJC, "Statement of Principles," *supra* note 5 at 4.
102. Interview, Judge 5, 14 November 2018.
103. Interview, Judge 2, 27 November 2018; Interview, Judge 7, 17 December 2018; Interview, Judge 8, 5 November 2018.
104. Interview, Judge 8, 5 November 2018. This quotation was translated by the author. The original reads: "Je me retire et je relis le dossier en totalité."
105. Interview, Judge 8, 5 November 2018.

3. *Modifying examination and cross-examination*

a. *Problem*

Every judge I interviewed emphasized that SRLs struggle to understand and differentiate between pleadings, examination, and cross-examination. One judge stated, "instead of questioning the witness during examination, unrepresented parties often start talking to me and tell me their claims."[106] Another judge explained, "often, in cross-examination, the party does not even ask questions. Rather, they criticize the interrogation of the first party by saying *none of that is true*!"[107] This issue must be addressed to save time and simplify proceedings for both SRLs and judges.

b. *Solution*

I propose two solutions to address this challenge. First, judges can attempt to explain what each of these examinations consist of—using Graphic 2 proposed above would provide an extra tool to assist in these explanations. Second, if after doing so, the SRL is unable to properly grasp and follow the different stages of the trial, an effective solution is to modify the examination and cross-examination. Accordingly, the judge can modify the order of the proceeding by suspending the cross-examination and allowing the SRL to testify.[108] One judge explained how they utilize this technique:

> This is how I explain it to the unrepresented person: What I sense is that you can't wait to tell me your version. So, what I propose is that you suspend your cross-examination and testify. I am not cancelling your cross-examination. After your testimony, if you have any questions for the lady, we will resume your cross-examination.[109]

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106. Interview, Judge 4, 29 November 2018. This quotation was translated by the author. The original reads: "Au lieu de poser des questions au témoin pendant l'interrogatoire principal, la partie non représentée va commencer à me parler et essentiellement me dire leurs réclamations."

107. Interview, Judge 2, 27 November 2018. This quotation was translated by the author. The original reads: "Souvent lors de le contre-interrogatoire, la partie ne pose même pas de questions. Plutôt, elle critique l'interrogatoire de la première partie en disant ce n'est pas vrai tout ça!"

108. Interview, Judge 4, 29 November 2018; Interview, Judge 6, 21 November 2018; Interview, Judge 10, 6 November 2018. See Principle on "Promoting Equal Justice. B. (4)(e)" in CJC, "Statement of Principles," *supra* note 5 at 4, which suggests to sometimes "modify the traditional order of taking evidence." See also "Informal Domestic Relations Trial" (last visited 24 February 2022), online: *Oregon Judicial Branch* <www.courts.oregon.gov/programs/family/forms/Pages/Informal-Domestic-Relations-Trial.aspx> [perma.cc/SUL2-9HMU].

109. Interview, Judge 6, 21 November 2018. This quotation was translated by the author. The original reads: "C'est comme ça que je l'explique à la personne non représentée : Ce que je sens c'est que vous avez hâte de me donner votre version. Alors ce que je vous propose c'est de suspendre votre contre-interrogatoire et de témoigner. Je n'annule pas votre contre-interrogatoire. Après votre témoignage, si vous avez des questions à poser à madame on va reprendre votre contre-interrogatoire."

Generally, SRLs simply want to voice their side of the story to the judge and do not have questions to ask the opposing party.[110] By suspending the cross-examination instead of cancelling it, this ensures that the litigant's procedural rights are still protected if they ever wish to come back to the cross-examination. Suspending the cross-examination is in line with the principle of proportionality[111]: modifying procedural rules to the capacities of the litigant before the court will "facilitate the resolution of disputes and bring out the substantive law and ensure that it is carried out."[112] Furthermore, the technique helps save time, as allowing an SRL to improperly continue with a cross-examination leads to repeated objections by the opposing lawyer.[113] In the case of two SRLs, one judge explained this technique brings about the contentious issues immediately: "Then, I have both versions and can guide the trial more efficiently."[114]

Judges utilizing this technique concluded that it greatly simplified proceedings and therefore rendered them more accessible to SRLs: "it works nine out of ten times."[115] Despite the purported efficacy of this approach, only three judges interviewed reported using this technique.[116] There is reason to be optimistic about this technique being adopted by judges, as it received a great deal of positive feedback during the February 2020 judicial conference. Therefore, it seems the issue with this solution is not its effectiveness, but rather judges' awareness of it and whether they utilize it in the courtroom. Ultimately, suspending the cross-examination is a valuable technique advantageous to both SRLs and judges. Judges can better manage proceedings and save time, while SRLs can voice their concerns promptly and therefore feel heard.

110. *Ibid*.
111. CCP, *supra* note 8, art 18.
112. *Ibid*, art 25.
113. *Ibid*.
114. Interview, Judge 4, 29 November 2018. This quotation was translated by the author. The original reads: "Parce que là j'ai les deux versions et je peux diriger le procès plus efficacement."
115. Interview, Judge 4, 29 November 2018. This quotation was translated by the author. The original reads: "et cela marche 9/10." See also *CAT v STB*, 2020 BCSC 593, where the trial judge modified the usual trial process (examination and cross-examination) to assist the SRL.
116. Interview, Judge 4, 29 November 2018; Interview, Judge 6, 21 November 2018; Interview, Judge 10, 6 November 2018.

4. *Dealing with a lack of objections*

a. *Problem*

A preeminent advantage of legal representation is that a lawyer will ensure their client's rights are respected: "The lawyers are the watchdogs."[117] However, without legal representation, SRLs are often unaware of the possibility of raising objections when procedural and evidentiary rules are not being followed. For example, judges explained that SRLs often do not raise objections to improper leading questions being asked by opposing counsel or to the admission of evidence via hearsay.[118] Another judge described a situation where the opposing lawyer was attempting to admit documents that had not been disclosed to the SRL prior to trial.[119] Judges interviewed highlighted the difficult and delicate position in which they are placed when these situations arise. While judges cannot become an advocate for the SRL and raise the objection,[120] they must ensure procedural fairness and that "the rights of all parties are not infringed."[121]

Some judges stated they steer clear from these potentially conflictual situations, insisting, "I cannot object on behalf of the litigant."[122] Others stated they creatively attempt to mitigate the imbalance between an SRL and a lawyer.[123] Interviews demonstrated that judges are more concerned about a lack of objections by an SRL when the proceeding involves one SRL and a represented party, rather than when a proceeding involves two SRLs. In the latter case, a lack of objections on the part of either or both SRLs is generally not as problematic, as they are operating on a relatively equal playing field. Accordingly, judges explained that in such a situation they may reasonably loosen the rules of evidence, allowing both parties to have their case heard without being unnecessarily impeded by procedural or evidentiary requirements.[124] For example, certain judges explained that often both parties will admit evidence via hearsay. When deliberating, the judge will determine the weight they should assign to

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117. Interview, Judge 2, 27 November 2018. This quotation was translated by the author. The original reads: "Les avocats sont les chiens de garde."
118. Interview, Judge 10, 6 November 2018.
119. Interview, Judge 4, 29 November 2018.
120. Art 2859 CCQ: "The court may not of its own motion raise a ground of inadmissibility […] where a party who is present or represented has failed to raise it."
121. Interview, Judge 5, 14 November 2018. This quotation was translated by the author. The original reads: "les droits de toutes les parties ne sont pas brimés."
122. Interview, Judge 9, 17 December 2018. This quotation was translated by the author. The original reads: "je ne peux pas faire les objections pour la personne."
123. Interview, Judge 7, 17 December 2018; Interview, Judge 8, 5 November 2018.
124. Interview, Judge 2, 27 November 2018; Interview, Judge 7, 17 December 2018; Interview, Judge 8, 5 November 2018.

this evidence according to the rest of the case presented by each litigant.[125] Some judges allow SRLs to present proof of employment or earnings via copies or letters, rather than originals or authentic acts.[126] Thus, in cases with two SRLs, judges often deal with a lack of objections by both sides by loosening evidentiary rules. This is in line with the principle of proportionality[127] and the objective of bringing out the substantive law to allow the case to be heard and resolved.[128]

While a lack of objections may not be problematic in proceedings involving two SRLs, SRLs may still be prejudiced by their lack of knowledge regarding how and when to object, specifically when opposed by a represented party. This must be addressed to facilitate fair proceedings for all litigants.

b. *Solution*

In cases where one party is self-represented and the other is represented by counsel, I propose that a judge can intervene when they believe that a lack of an objection would infringe the principles of natural justice, procedural equity, or the best interests of the child. To be clear, the judge would not be making the objection for the SRL. Rather, in these circumstances, the judge would remind the opposing lawyer of their obligation to respect the rules of procedure and evidence required by the court. Article 19 CCP states the following: "the parties control the course of their case insofar as they comply with the principles, objectives and rules of procedure and the prescribed time limits."[129] In addition to lawyers being bound by the rules of procedure and evidence, both parties must "refrain from acting with the intent to cause prejudice to another person or behaving in an excessive or unreasonable manner, contrary to the requirements of good faith."[130] Further, the CCP reminds lawyers that they cannot knowingly prejudice another party to advance their case. Indeed, lawyers know they cannot admit evidence via hearsay or rely on suggestive questions except in limited circumstances. Consequently, in cases where a judge feels an objection should have been made by the SRL and a lack thereof is likely to prejudice them, a judge can remind opposing counsel of their obligation to respect the rules of the court.

125. *Ibid*.
126. Interview, Judge 2, 27 November 2018; Interview, Judge 6, 21 November 2018; Interview, Judge 7, 17 December 2018; Interview, Judge 8, 5 November 2018. Judges clarified that in cases where the earnings of one or both litigants were contested, this would not be accepted.
127. CCP, *supra* note 8, art 18.
128. *Ibid*, art 25.
129. *Ibid*, art 19. See CCQ, *supra* note 120, art 2811.
130. CCP, *supra* note 8, art 19(2).

In the event of suggestive questions raised by the opposing lawyer, one judge explained that they intervened by remarking, "counsel, the court is aware that the other party is self-represented; your question could be worded differently."[131] In addition to these interventions, judges emphasized the role of body language. In particular, one judge highlighted its importance in dissuading lawyers from undertaking oppressive acts: "Non-verbal communication can say a lot. My non-verbal will indicate, *What is that question? Where are you going with this?* Professional lawyers will know their judges, they will know how to read them and maintain eye contact."[132] Coupling verbal interventions with appropriate body language is helpful when the SRL has failed to raise an objection which may prejudice them. Ultimately, these types of interventions are in line with Comment 2.D.2 of the *Ethical Principles*.[133] They maintain the impartiality of the judge while upholding the procedural rights of all parties to the proceeding and ensuring an equitable process.[134]

Importantly, judges may intervene to prevent certain evidence from being admitted when a lawyer's failure to comply with procedural or evidentiary rules would violate public order or the rights of a child.[135] For example, one judge explained that if a lawyer attempts to admit psycho-social reports of an adolescent to corroborate their position, the judge would intervene even without the objection of the SRL and disallow the party from admitting the evidence. The judge would ask how the document was received and request proof of the adolescent's consent for its use in court.[136] This scenario is in line with article 2848 *Civil Code of Québec* (CCQ) which permits the court "even of its own motion, [to] reject any evidence obtained under such circumstances that fundamental

131. Interview, Judge 4, 29 November 2018. This quotation was translated by the author. The original reads: "Vous savez Maître, le tribunal est conscient que l'autre partie n'est pas représentée et que votre question pourrait être formulée différemment."

132. Interview, Judge 7, 17 December 17 2018. This quotation was translated by the author. The original reads: "Le non verbal peut en dire beaucoup. Mon non verbal va indiquer c'est quoi cette question-là? Où allez-vous avec ça? Un avocat qui est professionnel va connaitre son juge, va savoir le lire et maintenir un contact visuel."

133. CJC, "Ethical Principles 2021," *supra* note 35 at 24. Comment 2.D.2 of the revised Ethical Principles states the following: "Passive neutrality and treating everyone in the same manner may not always be appropriate. Parties often appear before the court as self-represented litigants. Judges should provide information and reasonable assistance, proactively where appropriate, on procedural and evidentiary rules, while being alert not to compromise judicial impartiality and the fairness of the proceeding."

134. See *Watterson v Canadian EMU*, 2016 ONSC 6744 (where the court found the trial judge should have explained to the SRL that they could have objected to the calling of a witness without notice by opposing party and should have explained that they could have requested adjournment to prepare for the cross-examination of the witness).

135. CCQ, *supra* note 120, art 2848.

136. Interview, Judge 2, 27 November 2018.

rights and freedoms are violated and whose use would tend to bring the administration of justice into disrepute."[137] Hence, when the rights of a child are being violated by a party and the opposing party has not made an objection, the judge may intervene on their own initiative.

5. *Addressing a failure to ask for claims*

a. *Problem*

Judges interviewed noted that SRLs regularly neglect to ask for certain claims, notably a provision for costs or child-related claims. For example, SRLs may not be aware of their duty to provide reciprocal information and their right to obtain that information from the other party. At times, they may fail to disclose their income or to ask the other party to do so.[138] Further, an SRL may not know that a provision for costs exists or that they could ask for it if their situation warrants it.[139] This is an unfortunate predicament given that most SRLs find themselves self-represented due to their precarious financial situation.[140] An SRL may fail to ask for support for certain child-related expenses, such as retroactive child support,[141] medical or dental insurance,[142] or certain special and extraordinary expenses.[143]

Judges admitted that their duty of assistance is limited in these situations, as such interactions can rapidly become legal advice. When asked if they employ any techniques to mitigate these, most judges answered that they didn't and that they were unaware of what could be done.[144] While some judges stated that it was up to the SRL to get a lawyer,[145] others affirmed that these situations need to be addressed, as they illustrate clear instances where an SRL is disadvantaged.[146] One judge explained, "obviously, the person will suffer a harm, but we can't prepare the case for them."[147] Another

137. CCQ, *supra* note 120, art 2848.
138. *Ibid*, art 596.1.
139. CCP, *supra* note 8, art 416; CCQ, *supra* note 120, art 588(2); Interview, Judge 1, 5 November 2018.
140. Action Committee, *supra* note 24 at 4.
141. CCQ, *supra* note 120, art 595.
142. *Federal Child Support Guidelines*, SOR/97-175, s 6 [*FCSG*].
143. *Ibid*, s 7(1).
144. Interview, Judge 2, 27 November 2018; Interview, Judge 4, 29 November 2018; Interview, Judge 5, 14 November 2018; Interview, Judge 6, 21 November 2018; Interview, Judge 9, 17 December 2018; Interview, Judge 10, 6 November 2018.
145. Interview, Judge 1, 5 November 2018; Interview, Judge 3, 16 November 2018.
146. Interview, Judge 4, 29 November 2018; Interview, Judge 7, 17 December 2018; Interview, Judge 8, 5 November 2018.
147. Interview, Judge 7, 17 December 2018. This quotation was translated by the author. The original reads: "évidemment une personne va subir un préjudice, mais on ne peut pas préparer le dossier pour

judge noted that in these scenarios they will make general comments about the benefits of receiving legal advice to the SRL: "Without naming things precisely, I will say that because of the claims made in your file, it would be in your best interest to consult a lawyer."[148] However, this same judge said that these measures were insufficient, as the parties regularly proceed without legal representation despite the advice and will not know the gaps in their file. These challenges need to be addressed, especially for SRLs of lower socio-economic status and women. For example, a failure to request certain child-related expenses or costs can have far-reaching consequences on the SRL and the children associated with the file.

b. *Solution*

The following provides two potential solutions to address the two challenges elucidated above: the failure of an SRL to 1) ask for a provision for costs; and 2) ask for child-related claims. Unlike the other solutions proposed in previous sections, judges I interviewed had little or nothing to suggest in terms of how to rectify situations when SRLs fail to ask for certain claims. In fact, during many interviews, they would turn the question around on me, asking what I would suggest in these situations.[149] After the interviews, I began thinking about how these problems could be addressed. I developed the following proposed solutions based on recent literature, jurisprudence, and legislative interpretation. Subsequently, I discussed these possibilities during the judicial conference I facilitated in February 2020. The feedback received during the judicial conference helped modify and strengthen the proposed solutions.[150]

Provision for Costs

A provision for costs is an order by the court which requires one party to pay for part of the legal costs of the opposing party associated with a family law file. A judge may order a provision for costs when one party, as a result of their financial situation, would be otherwise unable to effectively present their case.[151] The underlying goal of a provision for

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eux."

148. Interview, Judge 2, 27 November 2018. This quotation was translated by the author. The original reads: "Sans nommer précisément les choses, je vais dire que par rapport à l'ensemble des réclamations faites dans votre dossier, ce serait dans votre intérêt de consulter un avocat."

149. Interview, Judge 1, 5 November 2018; Interview, Judge 4, 29 November 2018; Interview, Judge 7, 17 December 2018; Interview, Judge 8, 5 November 2018; Interview, Judge 10, 6 November 2018.

150. These solutions were presented at a judicial conference in February 2020. They generally received positive feedback from many of the attendees. The feedback was not collected using any distinct method, rather it was received in a conversation style format.

151. CCP, *supra* note 8, art 416. See also CCQ, *supra* note 120, art 588(2). See *Droit de la famille-191999*, 2019 QCCS 4145 at para 52 which explains the differences between the articles: "Contrary to article 588 [CCQ] which authorizes the court to grant a provision for costs only in

costs is to attempt to place both parties on an equal playing field in cases where the financial resources of one party are incommensurate with those of the other. The provision for costs seeks to facilitate a fair and equitable trial.[152] When an SRL has not asked for a provision for costs, yet a judge believes it is appropriate in the circumstances,[153] I propose that a judge can, on their own initiative, order it. I argue that a judge has authority to do so for two reasons.

First, the criteria that must be met for a provision for costs to be granted do not require that the party obtaining it raise the request themselves. The Quebec Court of Appeal has outlined principles that a judge should consider when ordering a provision for costs. The judge must consider the financial means of the party claiming the provision for costs and the resources of the debtor party. When doing so, six criteria should be considered: (1) the nature and importance of the dispute; (2) the means of the parties; (3) the respective behaviour of each party; (4) the amount of child support; (5) the protection of the children associated to the dispute.[154] Nowhere in the criteria listed by the Quebec Court of Appeal is the party receiving the provision for costs required to raise this issue on their own initiative. While the judge must be convinced that each criterion has been met, this does not include the party actually raising the issue in the first place.[155] For this reason, I argue that when a judge hears a case involving a self-represented party who's financial situation is impeding their ability to present their case, they may bring the provision for costs to the attention of the parties. If the receiving party meets the necessary criteria, a judge can order the provision for costs.

Second, the provision for costs is a discretionary measure.[156] The underlying objective of the provision for costs is to allow eligible parties to obtain the services of a lawyer. In *Droit de la famille-16940*, the court stated the provision for costs "is intended to allow the economically disadvantaged party to assert its rights, with a view to a fair and equitable resolution to the dispute, but should not encourage and fuel unnecessary

favour of the alimentary creditor, articles 409 and 416 [CCP], allows the court to order a party to pay a provision for costs to the other party when the hearing deals with an application under book two of the [CCQ]."

152. *Droit de la famille-2013*, 2020 QCCA 19 at para 18 [*DF-2013*]; *Droit de la famille-19982*, 2019 QCCA 930 at para 37 [*DF-19982*]; *Droit de la famille-18949*, 2018 QCCA 711 at paras 34-35 [*DF-18949*].

153. See *Droit de la famille-172765*, 2017 QCCA 1844 for the criteria that need to be met.

154. *DF-2013*, *supra* note 152 at para 18; *DF-19982*, *supra* note 152 at para 37; *DF-18949*, *supra* note 152 at paras 34-35.

155. *Ibid*.

156. *DF-18949*, *supra* note 152 at para 57.

proceedings."[157] Further, in *Droit de la famille-18230*, the court insisted a provision for costs seeks to promote access to justice and fairness, allowing both parties to oppose each other on equal footing.[158] Therefore, courts have recognized that a provision for costs is a tool that should be used to promote a fair and equitable proceeding. The discretionary nature of this provision allows judges to order it on their own initiative in order to fulfill its underlying objectives when the party meets the corresponding criteria.

Practically, in a case where the judge believes the SRL is economically weaker than the other party, which undermines the SRL's ability to assert their rights, the judge may ask the SRL if they are making a request for a provision for costs. The judge may then direct the SRL to article 416 CCP or 588(2) CCP, and, if necessary, explain the general criteria that must be met for the provision to be granted. Such direction from the judge does not amount to becoming the SRL's advocate, as it remains the latter's responsibility to ensure that the evidence before the court is sufficient to meet the criteria. If such evidence is before the court, the judge may grant the order.

The provision for costs is not automatically granted simply because one is self-represented.[159] Judges must carefully consider whether the circumstances justify the order. However, if an SRL meets the criteria, judges should ensure the litigant does not fail to benefit from the provision for costs simply because they were unaware of its existence. Indeed, judges confirmed that a provision for costs is most useful when one party is represented and the other is not.[160] It is also relevant when there exists a significant power imbalance between the two parties as a result of the litigants' financial situations or domestic violence history.[161] Ultimately, the provision for costs is a discretionary measure that ensures an equitable and just process for the most vulnerable litigants.[162] To give full effect to the underlying objectives of the provision for costs, I argue that a judge can grant this when the criteria are met, even when the receiving party does not raise the request on their own initiative.

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157. *Droit de la famille-16940*, 2016 QCCS 1892 at para 39 [*DF-16940*]. This quotation was translated by the author. The original reads : "[…] vise à permettre à une partie économiquement plus faible à faire valoir ses droits, en vue d'une solution juste et équitable du litige, mais ne devrait pas encourager et alimenter des procédures inutiles."

158. *Droit de la famille-18230*, 2018 QCCS 421 at para 31. *See also Droit de la famille-172327*, 2017 QCCS 4849 at para 176.

159. *Droit de la famille-16836*, 2016 QCCS 1617 at para 100.

160. Interview, Judge 1, 5 November 2018; Interview, Judge 4, 29 November 2018; Interview, Judge 7, 17 December 2018; Interview, Judge 8, 5 November 2018; Interview, Judge 10, 6 November 2018.

161. Interview, Judge 4, 29 November 2018; Interview, Judge 10, 6 November 2018;

162. *DF-16940*, *supra* note 157 at para 39.

Child-Related Claims

SRLs often omit to ask for certain child-related expenses.[163] In these circumstances, I suggest that a judge may raise this omission to the parties. Take, for example, where an SRL pays for the entire cost of their child's braces and fails to ask for the associated special and extraordinary expenses. After considering the evidence before them, a judge may ask the SRL if they plan on making a request related to special and extraordinary expenses by directing the SRL to the appropriate section in the *Federal Child Support Guidelines*.[164] Despite the SRL not having made the initial request, if the evidence before the judge demonstrates that special and extraordinary expenses should be ordered, then the judge may grant them. While this solution requires the judge to raise the omission to the parties, it does not consist of the judge providing the evidence nor the arguments to justify granting the order. The SRL must present this evidence to the court, which the judge then weighs. Once again, the judge does not become the SRL's advocate, but rather ensures that all evidence is before them to make an informed child support order in the best interests of the child.

This intervention can be justified pursuant to two duties imposed by the CCQ in family law cases. First, adjudicating courts must make all decisions relating to children in the best interests of the children.[165] Second, a judge rendering a decision relating to child support has a duty to ensure the respect of child support which is of public order.[166] In other words, a judge must make a decision regarding child support that reflects the best interests of the child. If an SRL's failure to request extraordinary expenses undermines this principle, I argue a judge may intervene to raise the omission. In this same vein, a judge would also be able to intervene to raise omissions on the part of a lawyer if failing to do so would jeopardize the best interests of the child.

Support for this solution can be found in article 268 CCP (previously article 292 CCP), which allows the court to "draw the parties' attention to any deficiency in the proof or procedure and authorize the parties to remedy it, subject to the conditions it determines."[167] This provision is analyzed in depth in *Droit de la famille-16436*.[168] The court explained that the provision gives the trial judge discretion to bring a perceived injustice

163. An SRL may fail to ask for support for certain child-related expenses, such as retroactive child support, medical or dental insurance, or certain special and extraordinary expenses.
164. *Supra* note 142, s 7(1).
165. CCQ, *supra* note 120, art 33.
166. *Ibid*, art 586ff.
167. CCP, *supra* note 8, art 268.
168. *Droit de la famille-16436*, 2016 QCCA 376 at paras 21-22.

to the parties' attention. However, the judge is not permitted to intervene substantially or to drive the presentation of the proof. These deficiencies must also be significant enough as to fundamentally affect the outcome of the case should they go entirely unaddressed.[169]

Article 268 CCP gives judges the discretion to raise a deficiency in evidence or procedure.[170] If a judge allowed child support to be granted without addressing the failure of the SRL to speak to the issue of special or extraordinary expenses that are otherwise relevant, this would constitute a deficiency in the evidence and undermine the fundamental principle of rendering decisions in the best interest of the child. Therefore, intervening per the solution I propose ensures that a decision is rendered in a just manner all while maintaining the judge's impartiality.

There are other instances in the CCP where the legislator has given judges the tools to highlight omissions on behalf of the parties. For example, article 49 CCP gives judges "all the powers necessary to exercise their jurisdiction. […They] may make such orders as are appropriate to deal with situations for which no solution is provided by law."[171] Similarly, article 446 CCP authorizes a judge to supplement missing information, such as parent's income.[172] These are but two examples that demonstrate how the legislator empowers judges to undertake active adjudication, particularly in situations where an injustice would result from their inaction.[173]

The solution I propose above is in line with these provisions of the CCP, as well as the duty to render decisions in the best interests of the child and uphold the public order of child support. Accordingly, raising omissions by SRLs related to certain child-related claims ensures an equitable resolution of the file, where the judge retains their impartiality to render a judgement on the totality of the evidence.

6. *Implementing systemic and consistent change*

Part IV of this paper has considered prominent procedural and evidentiary obstacles faced by SRLs in family law proceedings and provided solutions

169. *Ibid*.
170. *Ibid*; CCP, *supra* note 8, art 268.
171. CCP, *supra* note 8, art 49.
172. CCP, *supra* note 8, art 446.
173. See Rosalie Jukier, "The Impact of Legal Traditions on Quebec Procedural Law: Lessons From Quebec's New Code of Civil Procedure" (2015) 93:1 Can Bar Rev 211 at 232, 235-237. See also "Le Rapport d'évaluation de la Loi portant réforme du Code de procédure civile" (March 2006), online (pdf): *Ministère de la Justice du Québec* <collections.banq.qc.ca/ark:/52327/bs58721> [perma.cc/6F7E-DM3U]; Jean-Guy Belley, "Une justice de la seconde modernité : proposition de principes généraux pour le prochain Code de procédure civile" (2001) 46:2 RD McGill 317 at 371; JA Jolowicz, "Adversarial and Inquisitorial Models of Civil Procedure" (2003) 52:2 ICLQ 281 at 294-295.

for judges to mitigate these obstacles. The success of these solutions depends on their adequate implementation. Interviews demonstrated that while some judges consistently assist SRLs and routinely employ many of the techniques discussed above, others do not. Truly promoting access to justice for all litigants requires that the duty of assistance given to SRLs be systemic and consistent. For example, we cannot have some judges modifying examination and cross-examination in proceedings with SRLs while others do not. The degree to which an SRL is assisted and is able to access justice should not depend on the judge before them. As a legal community we must want to foster active adjudication by spreading the word through systemic and mandatory continued judicial education. As the number of SRLs continue to rise, all judges need to be adequately trained to respond to the needs of those before them.[174] Greater judicial education would allow all judges to become aware of these techniques and apply them consistently when needed.[175]

Through qualitative interviews undertaken with ten judges at the Superior Court of Québec, this study considered procedural and evidentiary challenges faced by SRLs in family law matters. Based on these interviews, recent literature, and jurisprudence, it provided solutions to the problems identified. These solutions seek to improve access to justice for SRLs within a framework that upholds judges' duties of impartiality and assistance to create a fair process for all.

Although a separate set of rules for SRLs and lawyers is not the answer, rules must be conceptualized and tailored to those who must abide by them. Are SRLs able to tell their story? Do they leave the courtroom feeling heard and understood? The legal system exists to serve the public. Therefore, whether justice has been achieved must also be considered from the perspectives of SRLs. SRLs comprise a vast segment of those using Canadian courts, particularly in family law: "[SRLs] are not, as they are too often seen, an inconvenience; they are why the system exists."[176] Unfortunately, our legal system has been designed with a different, legally-trained clientele in mind. It is time that we "put the public first"[177] and create systems responsive to the realities of everyday people who must

174. This also requires judicial education focused on the lived experiences of diverse litigants that come before the courts.
175. While judicial education is and continues to focus on SRLs, this is not mandatory for all judges. Moreover, the public has no ability to know what training judges have taken in a certain area of law, nor the amount. Further, the content of many judicial trainings is not publicly available. For example, the National Judicial Institute does not often make the subject or content of their continuing judicial education publicly available..
176. Action Committee, *supra* note 24 at 7.
177. *Ibid*.

engage in them. Former Supreme Court Justice Rosalie Abella has long called for change in this direction: "[we must redesign] a whole new way to deliver justice to ordinary people with ordinary disputes and ordinary bank accounts. That's what real access to justice needs and that's what the public is entitled to get."[178] Truly promoting access to justice requires a change in how we operate and a readiness to explore innovative solutions.

178. Rosalie Abella, "Our civil justice system needs to be brought into the 21st century," *The Globe and Mail* (24 April 2020), online: <www.theglobeandmail.com/opinion/article-our-civil-justice-system-needs-to-be-brought-into-the-21st-century/> [perma.cc/8R68-RDN7].

Appendix A

Interview Questions

The data collection process will consist of semi-structured interviews lasting approximately 60 minutes each, with 10 judges. The interviews will be conducted in English or French, based on the wishes of participants. All questions relate to family law cases.

(1) What did you do before being appointed as a judge?
(2) Do you find you are increasingly seeing self-represented litigants in family law cases?
    a. What is the approximate percentage of family law cases you hear in which at least one party is a self-represented litigant?
    b. Is that percentage higher in family law than other areas of law?
(3) Are there things you do differently with a self-represented litigant in a family law case than another case?
(4) Do you deal differently when one party is a self-represented litigant vs. when both are?
(5) Do you think a judge should assist self-represented litigants? For example, explaining procedure, clarifying the position and legal issues through questioning, etc.?
    a. To what extent do you assist self-represented litigants during trials? Can you think of examples where you have assisted self-represented litigants?
    b. What are some of the techniques you use when interacting with self-represented litigants?
    c. How successful do you find these techniques in simplifying and expediting procedures?
(6) Do you think there are potential concerns regarding judges' increased interactions or involvement with self-represented litigants?
(7) What solutions would you propose to facilitate your interactions with self-represented litigants?
(8) Under the new CCP, judges have been given greater case management powers. Do you think this has had an impact on facilitating interactions with self-represented litigants?
(9) The literature often insists that self-represented litigants fare worse than those with legal representation. Do you believe that self-represented litigants are disadvantaged by their lack of legal representation? Does this have an impact on the outcome of the case?

(10) Do you believe it would be beneficial to have all family law cases dealt with in accordance with special case management (ie: dealt with by one judge throughout)?
(11) Do you think Quebec, like Ontario, should impose mandatory mediation for family law cases?
(12) Do you believe Quebec would benefit from a separate family law court, such as a unified family court in Ontario?
(13) Do you think a solution to tackling the challenges associated with self-represented litigants is increased legal aid?