

# **Report: National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants (Julie Macfarlane 2013)**



The following is the National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants Final Report Executive Summary -

## **EXECUTIVE SUMMARY**

# **Part 1: The study**

## **1. Methodology**

The goal of this qualitative study was to develop data on the experience of self-represented litigants in three Canadian provinces: Alberta, British Columbia and Ontario. Field sites in each province were used as primary data collection points, but SRL respondents also came via social media and from all over each province. In addition, service providers (court staff, duty counsel, pro bono lawyers, staff in community agencies working with SRL's) were included in the sample. Most respondents (almost 90% of SRL's and 100% of service providers) participated in an in-depth personal interview; the remaining 10% of SRL's participated in a focus group.

## **2. Data sample**

259 SRL's from the three provinces participated in either an in-depth personal interview or a focus group. Including follow-up interviews, a total of 283 interviews were conducted with SRL's. In addition 107 interviews were conducted with service providers (defined above).

## **3. SRL demographics**

The characteristics of the SRL sample are broadly representative of the general Canadian population. 50% were men and 50% were women. 50% had a university degree. 57% reported income of less than \$50,000 a year and 40% (the largest single group) reported incomes of less than \$30,000 a year.

60% of the SRL were family litigants and 31% were litigants in civil court (13% in small claims and 18% in general civil). 4% were appearing in tribunals (the remainder were unassigned). The majority of family SRL's were filed in the divorce court (Supreme Court, Queen's Bench or Superior Court) and a smaller number in provincial family court.

## **Part 2: Decisions over self-representation**

### **4. Motivations**

By far the most consistently cited reason for self-representation was the inability to afford to retain, or to continue to retain, legal counsel.

In addition, some SRL respondents were dissatisfied with the legal services that they had received earlier in this case when they were represented by counsel. Their complaints (in their own words) included: counsel “doing nothing”; counsel not interested in settling the case; difficulty finding counsel to take their case; counsel not listening or explaining; counsel made mistakes/ was not competent.

53% of the sample had been represented by counsel earlier in their action. Three quarters of these had retained a private lawyer, and the remainder had been legally aided, but this was now discontinued. These respondents had exhausted their available resources and were often resentful that despite significant expenditures on private legal services, they were still not at the end of their action. Past experience with legal counsel in an earlier case or legal transaction was not dispositive in their decision to self-represent.

Around one in five SRL respondents expressed a personal determination to take their matter forward themselves, as well as acknowledging financial reasons to self-represent. A small number – around than 10% of the sample - expressed confidence from the outset that they could handle their case themselves and saw retaining legal counsel as a poor use of resources when relatively little money was at stake.

### **5. The expectations / experience disconnect**

Some SRL’s began with a reasonable sense of confidence; others began with trepidation. However within a short time almost all the SRL respondents became disillusioned, frustrated, and in some cases overwhelmed by the complexity of their case and the amount of time it was consuming.

## **Part 3: How SRL’s engage with the justice system**

### **6. SRL’s and court forms**

While on-line court forms appear to offer the prospect of enhanced access to justice, many forms are complex and difficult to complete, and SRL's often find they have made mistakes and omissions. The most common complaints include difficulty knowing which form(s) to use; apparently inconsistent information from court staff/judges; difficulty with the language used on forms; and the consequences of mistakes including adjournments and more wasted time and stress. These widespread difficulties result in frustration for SRL's and additional burdens on court personnel, including registry staff and judges.

There has been some progress made towards developing user-friendly and simplified court forms, but it is far too little. A number of court staff commented that they (and some lawyers) also had difficulty completing complex and lengthy court forms and keeping up with constant changes. In her assignment to apply for a divorce in the three provinces (The Divorce Applications Project), Kyla Fair also found that even with legal training, the forms were confusing, contained terminology she did not understand, and required an enormous amount of work and concentration.

Court guides are an important step towards assisting SRL's complete forms and understand court procedure but these too are often written in a confusing and complex manner. In her "audit" of three sample Court Guides, Cynthia Eagan found problems very similar to those highlighted above by SRL's regarding court forms (see (7) below).

## **7. On-line resources for SRL's**

A large amount of the assistance presently made available to SRL's by the courts (and some service providers) is in the form of on-line information and related technologies (on-line forms, informational websites, and some video material). New initiatives in programming and support for SRL's in both Canada and the United States are largely based on the premise that access to the Internet can promote access to justice for SRL's. While many of these initiatives are in relatively early stages of development, this study suggests there are significant limitations and deficiencies to this material. On-line resources often require some level of understanding and knowledge in order to be able to make best use of them.

SRL's who anticipated that the proliferation of on-line resources would enable them to represent themselves successfully became disillusioned and disappointed once they began to try to work with what is presently available on-line. In particular, they identified the following weaknesses: an emphasis on substantive legal information and an absence of information on practical tasks like filing or serving, advice on negotiation or a strategy for talking to the other side, presentation techniques, or even legal procedure; often directed them to other sites (sometimes with broken links) with inconsistent information; and multiplicity of sites with no means of differentiating which is the most "legitimate". Cynthia Eagan found many of the same problems when she audited a selection of on-line Court Guides (The Court Guides Assessment project). Cynthia also highlighted the reading levels of some of this material (as high as 13.5), and the heavy use of jargon and unexplained legal terms.

The study data also shows that no matter how complete, comprehensive and user-friendly (standards we are still far from meeting), on-line resources are insufficient to meet SRL needs for face-to-face orientation, education and other support. Enhanced on-line technologies can be an important component of SRL programming - for example the development of sites developed specifically for SRL's making use of interactive technology - but cannot provide a complete service.

## **8. Legal information for SRL's**

It is clear that many SRL's are eager to access further and better sources of legal information. SRL's in the study frequently described themselves as seeking "guidance" rather than "direction". This suggests that the expansion of legal information services (along with the clarification of the legal information/ legal advice distinction, below) has the potential to relieve pressure on more costly public legal services such as duty counsel.

The most common source of legal information for SRL's are court staff, primarily those working at the registry counters but also staff working in court programs such as Pro Bono Ontario, FLIC & LinC in Alberta, and the Justice Access Centres in British Columbia. These excellent services are not always clearly "signposted" in the courthouse or on the courthouse website; as a consequence some SRL's appeared to have missed the opportunity to use these programs (this was also a problem for

mediation services; see below at (9)). SRL's consistently described staff working in these locations as the "most helpful" person they encountered during their SRL experience. However they also complained about the restrictions on the time and scope of information that these staff can offer, because of the limitation on their providing "legal advice" (which results in substantial personal discretion, which some SRL's are better at exploiting than others) or because of the sheer volume of people they are dealing with.

The distinction between legal information/ legal advice which lies at the heart of the job descriptions of staff working on the court counters and in information services is consistently complained about by both SRL's and staff, as at best unclear and at worst practically unworkable. The present situation places an unfair burden on court staff who are required to make constant determinations of how much information they can provide to frustrated SRL's. This leads to inconsistent applications and creates a barrier between SRL's and certain basic information that may be construed as "legal advice".

Court and agency staff providing legal information to SRL's described an almost identical set of frustrations and challenges to SRL respondents. They also accurately identified the primary frustrations and challenges of the SRL's. Court and agency staff are working under enormous pressure in dealing with the growing SRL population and constantly changing court forms and procedures. These are very stressful jobs, for which they are often poorly trained and remunerated.

## **9. Other support & resources for SRL's**

Service providers universally recognized the frustrations of SRL's as a source of pressure on the justice system in general, and on court staff and judicial officers in particular. Improving the experience for SRL's by developing low cost support services for them has the potential to both improve the efficiency and enhance the morale of the entire justice system. SRL's talked about a variety of "non-legal" services that they needed but either were not currently available to them, or did not meet their needs.

SRL's particularly identified the need for orientation and education (aside from legal training) to enable them to better anticipate and plan for what is involved in self-representation. While this study did not evaluate the effectiveness of existing

mandatory education programs (eg Parenting After Separation, MIPS), it is clear that many SRL's are looking for different forms of educational workshops to prepare them for the SRL experience. In particular, they are asking for practical tools and skills that they can apply in practice.

SRL's also described a need for one-on-one assistance in the form of "coaching" (eg document review, answering questions) which support them in handling their own case but also provide checks, as well as moral support. For many SRL's who wish to remain in control of their own case, coaching would be an important resource.

A significant number of SRL's say that they were never offered mediation, and/or do not know what it is. This is a clear gap that needs to be urgently addressed (for example in educational workshops and better publicity). Some SRL's were nervous about participating in mediation, and especially where there was a lawyer representing the other side. Some SRL's who were eager to resolve their case expressed frustration that the Bench did not exercise greater pressure on a recalcitrant opposing side to come to mediation.

At present many SRL's bring friends and/or family members with them to the courthouse for moral support, especially on appearance days. There is a great deal of confusion and inconsistency surrounding the role of friends or supporters of SRL's, as well as the potential for an unrepresented person to being a McKenzie friend into the courtroom. This lack of clarity and the wide exercise of discretion by some judges is creating resentment and confusion

Finally, many SRL's do not have access to the types of office facilities that they require in order to represent themselves, including printing services, photocopying facilities and even computers. Some services are presently provided by counter staff (informally) or overburdened court-based programming.

## **Part 4: SRL's, Lawyers and Judges**

### **10. Delivering legal services to SRL's**

This study shows clearly (and consistent with other recent studies) that the primary reason for self-representation is financial. Many SRL's find that the legal services that they can realistically afford to pay for, and/ or prioritize as an area in which they

want assistance, are simply not available to them other than in a traditional legal services model. Financial retainers and services billed at a rate of \$350-400 an hour are beyond the means of many Canadians. 53% of the SRL sample who were willing to pay for counsel at first later ran out of funds and/or exhausted their willingness to continue to pay for legal services.

86% of the SRL sample sought legal counsel, either in the form of private legal services or legally aided/ pro bono assistance. SRL's are not saying that they do not want lawyers to help them - but that the way in which lawyers are currently offering their services does not fit within their budget. Some are also saying that they prefer to have more control over the progression of their case and resist the traditional assumption of professional control by their lawyer.

Other complaints made consistently by some SRL's who had previously been represented in this action included: counsel "doing nothing", and no progress being made; counsel being disinterested in settlement possibilities and processes (including mediation); counsel not listening to them or consulting them in decision-making; and a sense that their lawyer was insufficiently familiar in the relevant area of law to be effective as counsel. A further complaint was that lawyers were not truly accountable to the public, and that efforts to question their competence were often not taken seriously by the courts or the regulators.

When asked in interviews what they would ask a lawyer to do for them now, assuming that they could be provided with an affordable and competent counsel, some SRL's said that they were no longer interested in working with a lawyer. This was usually the result of a negative experience with a legal representative earlier in this action, and their determination now to manage their case themselves. Many more SRL's responded that they would prefer to have legal counsel, if this was affordable, offered them tangible value-for-money as they understood this (ie expertise they lacked and the prospect of a better outcome), and would allow them to remain in control of major decisions about the direction and conclusion of their case.

While many SRL's appreciated the assistance they received from duty counsel or other pro bono legal services, the study also found dissatisfaction with the most common model of delivery ie the summary legal advice model. While this model works well for some SRL's, others find a time limited opportunity to speak with legal

counsel leaves them more confused, and even panicked, than before. At the same time, court duty counsel models are in serious overload. For both reasons, there is a need for reassessment of how to offer the maximum value to the maximum number of SRL's via the summary advice model.

Respondents frequently questioned the limitations placed on the provision of assistance by para-legals, especially in relation to family matters.

Finally, many SRL's sought some type of "unbundled" legal services from legal counsel; for example, assistance with document review, writing a letter, or appearing in court. Relatively few were successful in accessing legal services on this basis despite a sustained effort. This was perplexing to many respondents, who could not afford to pay a traditional retainer and envisaged that they could undertake some parts of the necessary work themselves, with assistance.

## **11. Court appearances and interactions with judges**

The influx of SRL's into the family and civil courts has dramatically altered the judicial role. Judges, especially in family court, now find themselves dealing with SRL's as often as with lawyers representing clients. This is a huge sea change that some members of the judiciary are clearly adjusting to better than others. The study data is replete with SRL descriptions of negative experiences with judges, some of which suggest basic incivility and rudeness. There are also some examples of judicial interventions such as providing advice regarding court procedure, coaching on presentation, and progress towards settlement, which attract positive comments from SRL's. Other studies show that judges are concerned about showing "favour" towards SRL's and find themselves in a difficult position when one side is represented by counsel, and the other is not.

Most SRL's saw numerous judges during the progress of their case, and many complained that this created inconsistencies and required them to re-establish their credibility at each appearance. Very few SRL's experienced single judge case management but those who did were far more satisfied with their overall experience.

There was a very widespread sentiment among SRL's that judges are not truly accountable and that the current mechanism for bringing forward a complaint

against a judge is highly protective of the judiciary.

## **12. Social impact and consequences**

The study data illustrates a range of negative consequences experienced by SRL's as a result of representing themselves. These include depletion of personal funds and savings for other purposes; instability or loss of employment caused by the amount of time required to manage their legal case; social and emotional isolation from friends and family as the case becomes increasingly complex and overwhelming; and a myriad of health issues both physical and emotionally.

The scale and frequency of these individually experienced consequences represent a social problem on a scale that requires our recognition and attention. The costs are as yet unknown.

Preliminary Recommendations based on these findings are included at the end of this Report.

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