

# THE FUTURE OF SELF-REPRESENTATION

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## **ABSTRACT**

Canada's access-to-justice crisis has been well researched and documented. The combination of an increase in the amount of self-represented litigants engaging the justice system and the failings of the system to meet their needs has led to frustration and concern that many are choosing not to pursue justice, leaving their disputes unaddressed instead. This paper analyzes the experience of self-representatives and identifies where the traditional justice system is failing them. It addresses both hesitations of others involved in the justice system working with (or against) self-represented parties, as well as concerns that have emerged about the traditional provision of legal services. Cost alone is not the only reason that many are increasingly pursuing justice without the aid of legal help. The challenges of self-representation are explored, along with opportunities to address access-to-justice problems through system design. New, online dispute resolution processes can better support those who are left to navigate their justice seeking experience on their own. Canada's first fully online tribunal, the Condominium Authority Tribunal in Ontario, is discussed and a practical example shared to demonstrate how online dispute resolution can better support self-represented litigants and deliver access-to-justice to them, while also offering new roles and opportunities for legal representatives.



## INTRODUCTION

*It is an unfortunate but now uncontroversial fact that many legal needs in society go unaddressed. Of those who do pursue their legal needs through the justice system, a significant and increasing number are SRLs.<sup>1</sup>*

There are many reasons why one might address their legal issue on their own, becoming another of the growing number of self-represented litigants (“SRLs”) engaging the justice system.<sup>2</sup> “Depending on the court, issue and jurisdiction, SRLs may amount to more than half of the litigants in today’s courtrooms.”<sup>3</sup> While the reality is that many cannot afford the services of a legal advocate, cost is not the only contributing factor to this trend.<sup>4</sup>

The toll that self-representation takes on an individual is significant.<sup>5</sup> Shortcomings of the justice system create challenges that frustrate participants and question the adequacy of existing legal processes to appropriately include, support and accept SRLs’ pursuit of justice. Self-representation, as it has been experienced, creates new access-to-justice obstacles in the course of overcoming others. SRLs are not receiving the support, information or justice-seeking procedural experience that they require; systemic change and modern legal service offerings are needed to deliver the promise of the law. The future of self-representation must include access to information, unbundled legal services and process improvements made possible through technological advancement, in the public interest of improving access-to-justice.

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1. Trevor C.W. Farrow *et al.*, “Addressing The Needs Of Self-Represented Litigants In The Canadian Justice System” (2012) Association of Canadian Court Administrators at 4 [Farrow].
  2. For the purpose of this paper, “justice system” will include a wide range of formal conflict resolution processes, including courts, administrative tribunals, mandatory mediation and arbitration. This paper will indicate when one or more particular processes are specifically addressed.
  3. Farrow, *supra* note 1 at 16.
  4. *Ibid.* at 4.
  5. Noel Semple, “The Cost Of Seeking Civil Justice In Canada” (2016) 93(3) The Canadian Bar Review 639-673 at 642-644, online: <<https://scholar.uwindsor.ca/lawpub/36>> [Semple].

This paper will review the historic negative perception of SRLs and the challenges they face. It will identify systemic issues that create additional obstacles and consider how modern dispute resolution processes can overcome these difficulties to improve the experience of self-representation.

### HISTORIC HESITATIONS ABOUT SRLS

*For a long time, most courts simply took the position that individuals could represent themselves in court if they (foolishly) chose to do so, but courts had no obligation to provide assistance or to modify their policies and procedures to accommodate the needs of these litigants.<sup>6</sup>*

SRLs have historically been viewed as choosing to represent themselves.<sup>7</sup> “[S]uggesting that SRLs are proceeding without counsel as a matter of routine choice (for reasons of empowerment or otherwise) is misleading and, in fact, unhelpful.”<sup>8</sup> This has fostered assumptions surrounding the reasons why one would choose to self-represent, including the sentiment that SRLs have a lack of appreciation for the role and ability of lawyers and feel they are just as or more capable of providing legal advocacy.<sup>9</sup> In fact, “Canadian courts are increasingly populated by SRLs, the vast majority of whom cannot afford legal counsel and are not choosing to be self-represented.”<sup>10</sup>

The notion that self-representation is a choice fuels negative sentiments toward SRLs. “Some believe that many or even most SRLs are mentally unstable, emotional, and obsessive about their cases.”<sup>11</sup> This affects how those who interact with SRLs, including opposing counsel and the judiciary, treat them and introduces access-to-justice hurdles that SRLs would not face if they had legal representation.

Many legal professionals view SRLs as incapable of navigating the legal system on their own, creating inefficiency and placing the opposing lawyer in a difficult position.<sup>12</sup> Concerns amongst legal advocates work-

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6. Ronald W. Staudt & Paula L. Hannaford, “Access to Justice for the Self-Represented Litigant: An Interdisciplinary Investigation by Designers and Lawyers” (2002) 52 Syracuse L. Rev. 1017 at 1018-1019 [Staudt].

7. Julie Macfarlane, *The New Lawyer: How Clients Are Transforming The Practice of Law*, 2nd ed. (Vancouver: UBC Press, 2017) at 94 [Macfarlane].

8. Farrow, *supra* note 1 at 14.

9. Macfarlane, *supra* note 7 at 94-95.

10. Farrow, *supra* note 1 at 23.

11. Macfarlane, *supra* note 7 at 94.

12. *Ibid.* at 94-95.

ing with SRLs include the management of client perceptions concerning justice and effective advocacy, especially if the legal representative aids an unrepresented party in navigating the system. “[M]any lawyers are concerned about the possibility of a complaint from their own client if they appear to be too attentive to the SRL on the other side.”<sup>13</sup>

This breeds resentment, a feeling that SRLs receive an unfair advantage or pose the threat of increased liability to the legal representative working opposite them. Rule 7.2-9 of the Law Society of Ontario’s Rules of Professional Conduct speaks specifically to a lawyer working with an unrepresented person, imposing additional obligations that do not apply when other parties have legal counsel.

Such obligations seek to ensure that lawyers actively prevent SRLs from forming the impression that opposing lawyers will protect their interests or act in a non-partisan manner.<sup>14</sup> “[I]t is vital to ensure that the SRL is not “under the impression that their interests will be protected by the lawyer,” and ... understands that they are acting exclusively in the interests of their own client.”<sup>15</sup> However, few additional details are offered surrounding lawyers’ interactions with SRLs, doing little to guide how they should be treated. “The absence of more comprehensive professional guidelines regarding self-represented litigants is in serious need of correction.”<sup>16</sup>

There are also concerns that the mediator, arbitrator, adjudicator or judge may relax certain procedures or otherwise take steps to assist SRLs to overcome their lack of legal expertise or process familiarity, which would not be offered to someone with legal representation. “[S]ome lawyers point out that some judges will take more time and are more patient with SRLs and may even “bend the rules” for them – the opposite of what most SRLs believe.”<sup>17</sup>

Against this perception of legal representatives, most SRLs view the justice system as designed to work against them; they struggle with

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13. *Ibid.* at 214.

14. Law Society of Ontario, *Rules of Professional Conduct*, Toronto: Law Society of Ontario, 2018, online: <<https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct>> [LSO Rules].

15. Macfarlane, *supra* note 7 at 215.

16. Diana Lowe, “A Changing Role for Lawyers in the Age of Self-Represented Litigants”, online (blog): *Canadian Forum on Civil Justice* <<http://cfcj-fcjc.farendesign.com/a2jblog/a-changing-role-for-lawyers-in-the-age-of-self-represented-litigants/>> [perma.cc/73NC-JNZM] [Lowe].

17. Macfarlane, *supra* note 7 at 214.

such things as the navigation of procedural protocols, the application of the law, preparing pleadings and making submissions.<sup>18</sup> SRLs can feel bullied or intimidated by the lawyer advocating for the opposing position.<sup>19</sup> Historically, little guidance – particularly in plain language<sup>20</sup> – has been offered to assist SRLs with these complexities.<sup>21</sup> While some suggest that SRLs become more capable in the course of repeat engagements,<sup>22</sup> working through the legal process remains a struggle for them.

Recognizing the increase of SRLs and appreciating the reasons why they self-represent can allow for enhanced integration of SRLs into the justice system. Rather than looking at SRLs as the problem, it is time for a wider, systematic perspective. “There is a service gap that exists in the Canadian justice system between what SRLs need and what is currently being provided.”<sup>23</sup>

### ISSUES WITH TRADITIONAL LEGAL SERVICES

*A consistent critique is emerging among those who are now self-representing of how they were served by the lawyers whom they had previously retained, identifying poor listening skills and insufficient consultation and transparency over fees and costs. Both developments suggest a widening gap between what the public wants and can afford and what lawyers continue to offer.*<sup>24</sup>

Many SRLs worked with a legal representative before proceeding on a self-represented basis. “[I]t is not uncommon for a person to spend tens of thousands of dollars on legal fees, without actually resolving his or her legal need.”<sup>25</sup> SRLs report having concerns about both the cost of involving a legal representative and the way in which a legal advocate would represent them. This encourages self-representation in a justice system that has been ill-equipped to support SRLs.

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18. Farrow, *supra* note 1 at 65.

19. Macfarlane, *supra* note 7 at 213-215.

20. Julie Macfarlane, “The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants: Final Report” (2013) National Self-Represented Litigants Project, online: <<https://representingyourselfcanada.files.wordpress.com/2014/02/reportm15-2.pdf>> at 57-59 [Final Report].

21. *Ibid.* at 59-61.

22. Staudt, *supra* note 6 at 1025.

23. Farrow, *supra* note 1 at 4.

24. Macfarlane, *supra* note 7 at 19.

25. Semple, *supra* note 5 at 657.

### Complicating Matters and Imbalanced Approaches to Negotiation

“The most obvious effect of using agents – an effect that must be kept in mind in any analysis of representative negotiation – is the complication of a transaction.”<sup>26</sup> More people become involved in a dispute and their various roles, motives and priorities introduce complexities. There is a risk that the conflict could escalate: “[L]awyers may get too caught up in the adversary game and lose sight of the underlying problem that is dividing the principals.”<sup>27</sup>

“Differing goals and standards of agent and principal may create conflicting pulls.”<sup>28</sup> Competing interests can emerge surrounding approach, which includes the potential of the conflict escalating despite desires by the client to resolve the matter and maintain good relations with others involved. “In reality, many disputes that are brought to lawyers do not require, and may even be unsuited to, a rights-based solution.”<sup>29</sup>

Negotiation between lawyer and client can be imbalanced. If the lawyer is involved because of their expertise and familiarity with the law, there may be little the client feels that they can contribute to strategizing around how to approach the situation. “The client is left with the impression that the legal system is so high-context that she can do no more than go along with her lawyer’s suggestions.”<sup>30</sup> “This interaction of information and choice goes to the heart of the adjustment that is taking place in the lawyer/client relationship.”<sup>31</sup> The relationship needs to shift to become more of a partnership for many to become comfortable with involving legal representation.<sup>32</sup>

### Agent Self-Interest and the Role of Emotions

Self-interest of the legal representative is also seen as a complicating factor that encourages self-representation.<sup>33</sup> “[T]he goals and

26. Jeffrey Z. Rubin and Frank E.A. Sander, “When Should We Use Agents? Direct vs. Representative Negotiation” (1988) 4 *Negotiation Journal* 395 at 395 [Rubin].

27. *Ibid.* at 397.

28. *Ibid.* at 400.

29. Macfarlane, *supra* note 7 at 54.

30. Colleen M. Hanycz, Trevor C.W. Farrow and Frederick H. Zemans, *The Theory and Practice of Representative Negotiation*, 1st ed. (Toronto: Emond Montgomery Publications Limited, 2008) at 143 [Hanycz].

31. Macfarlane, *supra* note 7 at 146.

32. *Ibid.* at 143.

33. Trevor C.W. Farrow, “The Negotiator as Professional: Understanding the Competing Interests of a Representative Negotiator” (2007) *Comparative Research in Law &*

interests of the agent may be different from those of the principal, and this difference will have some effect on how an agent communicates on behalf of the principal.”<sup>34</sup> Consider that a confidential mediated settlement may not advance the reputation of a lawyer in the same manner as a publicly reported decision.

While legal representatives have ethical and other obligations to take instructions from their clients and may not be consciously driven by the personal or professional benefits they can derive beyond them, the traditional “lawyer-in-charge” model – where the lawyer makes all decisions about how a dispute will be addressed – comes at the cost of client autonomy.<sup>35</sup> While the monetary cost of this model is unaffordable for many, there is also the loss of control for the client.<sup>36</sup>

“The importance of staying in charge of one’s own case is genuinely important to many SRLs.”<sup>37</sup> This includes control over the consideration of non-adversarial dispute resolution processes. Many SRLs report that mediation was not offered to them or considered seriously by the legal counsel involved in their case; there is a sentiment that lawyers are not interested in good faith settlement negotiations to resolve disputes, despite such being of interest to many SRLs.<sup>38</sup> Rule 3.2-4 of the *Professional Rules of Conduct* offered by the Law Society of Ontario only require lawyers to review Alternative Dispute Resolution options with their clients when “appropriate” – failing to offer sufficient direction on when lawyers should do so and maintaining a loophole to permit lawyers who are not interested in good faith settlement agreements to bypass working toward them.<sup>39</sup>

Even if the underlying driver for the lawyer-in-charge approach is reliance on the expertise and emotional detachment of the lawyer from the situation, parties engaged in conflict today expect to be involved in decision-making.<sup>40</sup> The way that legal services are offered therefore needs to be reconsidered in light of this changing client expectation. For example, the emotions of the party directly involved in a dispute should play a role in decision-making. As no one can truly detach emotion from

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Political Economy. Research Paper No. 3/2007, online: <<http://digitalcommons.osgoode.yorku.ca/clpe/224>> at 7.

34. Hanycz, *supra* note 30 at 256-257.

35. Macfarlane, *supra* note 7 at 67-68.

36. Semple, *supra* note 5 at 671.

37. Final Report, *supra* note 20 at 49.

38. *Ibid.* at 45, 73-75 and 118.

39. LSO Rules, *supra* note 14.

40. Macfarlane, *supra* note 7 at 68.

their involvement in a conflict,<sup>41</sup> it is better to acknowledge and work with emotions. Yet, the traditional approach risks decisions being made by the lawyer without consideration of the client's emotional needs, which could reveal priorities beyond rights-based deliberation of what constitutes a just outcome.

### **Do-It-Yourself Expertise**

What Dr. Julie Macfarlane refers to as the “democratization of knowledge”<sup>42</sup> considers that technological advancements have made information more widely accessible. Macfarlane refers to resources available online as equipping lay individuals with (actual or perceived) knowledge and understanding.<sup>43</sup> “Access to information on the Web is also driving a self-help culture that routinely questions and even second-guesses the advice of experts.”<sup>44</sup>

This devalues legal services. The “Google is my lawyer”<sup>45</sup> culture suggests that information available online can offer guidance in place of professional legal services, at significantly lower cost. “A very large number of middle-income litigants are self-representing because they feel that legal representation is too expensive, represents poor value for money, and does not give them enough personal agency.”<sup>46</sup> Traditional ways that legal services have been provided – and billed – discourage their use and warrants reconsideration. “There is growing public criticism of archaic legal processes and procedures that protract disputes and drive costs up.”<sup>47</sup>

## **THE CHALLENGE OF SELF-REPRESENTATION**

*Self-represented litigants have no current access to the guidance, training, knowledge or experience of their own lawyer – the professional guide that the legal system has been designed to expect.*<sup>48</sup>

Without legal counsel, SRLs are left to their own devices to navigate the justice system. Technological advancements may offer easy

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41. Roger Fisher and Daniel Shapiro, *Beyond Reason: Using Emotions as You Negotiate*, 1st ed. (New York: Penguin Books, 2005) at 5.

42. Macfarlane, *supra* note 7 at 239.

43. *Ibid.* at 135.

44. *Ibid.* at 136.

45. Final Report, *supra* note 20 at 35.

46. Macfarlane, *supra* note 7 at 19.

47. *Ibid.* at 140.

48. Staudt, *supra* note 6 at 1026.

access to information, yet self-representation still comes with many challenges. These challenges extend beyond the financial considerations that give many SRLs no choice but to represent themselves and prevent SRLs from truly attaining access-to-justice.

### Capable Self-Advocacy

Amongst the stereotypes SRLs face is the sentiment that they are not capable advocates. From reports of SRLs struggling to correctly complete standardized forms to claims that they are extremely emotional about their cases,<sup>49</sup> the feeling is that SRLs do the justice system a disservice by failing to present a proper case, even with help from opposing counsel, court staff or their adjudicator. SRLs can themselves contribute to the protraction of disputes due to their lack of experience and/or ability.<sup>50</sup>

The case of *Jahn-Cartwright v. Cartwright*, [2010] O.J. No. 3307, includes cost award considerations pertaining to a successful self-represented party. The court found that “generous enough” costs should be attributed to the work of SRLs to preserve their access-to-justice<sup>51</sup> and was impressed by the work of the self-represented party involved in the case. In the decision, the court stated that Ms. Cartwright’s documents were similar in quality to what would have been expected from a lawyer.<sup>52</sup> While the capabilities of Ms. Cartwright are not necessarily indicative of the abilities of all SRLs,<sup>53</sup> they can help dispel stereotypes about SRLs’ capabilities – particularly as the court considered Ms. Cartwright to be self-represented “*by necessity*”, for affordability reasons.<sup>54</sup>

In the case, the Ontario Superior Court of Justice acknowledged that self-representation is inefficient,<sup>55</sup> requiring more time to participate in the justice system than would be needed if legal representation was involved. “[F]or self-represented litigants, the time cost of pursuing civil justice is often high enough to impose significant opportunity costs – especially in terms of foregone employment opportunities.”<sup>56</sup>

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49. Farrow, *supra* note 1 at 65-70.

50. Staudt, *supra* note 6 at 1018.

51. *Jahn-Cartwright v. Cartwright*, [2010] O.J. No. 3307 at para. 22 [*Jahn-Cartwright*].

52. *Ibid.* at para. 79.

53. Capable advocacy is subjective. While the “success rate” of SRLs might offer some insight, statistical data is imperfect. A capable legal advocate can lose a case.

54. *Jahn-Cartwright*, *supra* note 51 at para. 81 [emphasis added].

55. *Ibid.* at para. 22.

56. Semple, *supra* note 5 at 673.

### Non-Financial Costs

SRLs avoid the out-of-pocket cost of legal representation.<sup>57</sup> While staying in control can also be appealing, the problem is that self-representation comes at significant other costs. “Pursuing civil justice without professional help often exposes an individual to very substantial temporal and psychological costs.”<sup>58</sup> The time, work and sacrifices required for SRLs to participate in the justice system are tremendous.<sup>59</sup> “Many must undertake this navigation challenge while simultaneously dealing with stress arising from the underlying source of the legal need.”<sup>60</sup>

### Perceptions of Procedural Injustice

SRLs’ experience with the justice system has a negative impact upon them beyond the internal cost of time and sacrifice. “The justice-seekers’ interactions with their adversaries, with lawyers representing adversaries, and with judges all created psychological costs.”<sup>61</sup> SRLs report feelings of stress, frustration, fear, humiliation and intimidation related to their experience.<sup>62</sup> A study of SRLs indicated that almost 80% classified their experience with the legal system as negative (reduced to 66% in an administrative tribunal context).<sup>63</sup>

“[T]he experience of *how* a result is reached is often as, or even more, important than the substantive “rightness” of the outcome itself in fostering a sense of fairness or justice amongst participants.”<sup>64</sup> The poor experience reported by SRLs suggests that self-representation is not an appealing alternative to legal representation. As it has been experienced, self-representation merely replaces one access-to-justice hurdle (cost of legal representation) with others that have a profound negative impact on SRLs nonetheless.<sup>65</sup>

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57. Marg. Bruineman, “The Right Price: Our 2018 Legal Fees Survey”, *Canadian Lawyer* (April 2018) online: <<https://www.canadianlawyermag.com/author/marg-bruineman/the-right-price-our-2018-legal-fees-survey-15525/>>.

58. Semple, *supra* note 5 at 671.

59. *Ibid.* at 660-662.

60. *Ibid.* at 665.

61. *Ibid.* at 666.

62. *Ibid.*

63. *Ibid.* at 667.

64. Macfarlane, *supra* note 7 at 60 [emphasis in original].

65. Any debate as to the scope of the impact of negative psychological or temporal experiences on self-represented individuals is beyond the scope of this paper. It has been assumed that the strong negative experiences reported by SRLs indicates that there are problems with the system from which they seek justice.

## The Law's Broken Promise of Justice

While the Internet offers SRLs guidance and resources, it also enhances expectations surrounding what the justice system is intended to deliver. "In this age of widespread legal consciousness and encyclopaedic online information, people are more aware than ever before of the promise the law has made to them."<sup>66</sup> When that promise is broken, public perception is that the system has failed to deliver justice in a timely manner, if at all.<sup>67</sup> The law is failing to keep its promise and "most people do not actually obtain the law's help in dealing with their justiciable needs and problems"<sup>68</sup> as a result. Changes need to be made with consideration given to rectifying these issues.

## Systemic Failure

There is "a growing gap between what most SRLs need and the services that are available at courts."<sup>69</sup> Judges and court staff have encountered a substantial increase in the number of SRLs engaging the justice system, which is changing how they work.<sup>70</sup> Currently, across Canada, at least half of those involved in family court proceedings are self-represented and this increases to nearly 80% in Toronto.<sup>71</sup> Unfortunately, this trend has yet to result in sufficient delivery of the services that SRLs need; they often report becoming "disillusioned, frustrated, and in some cases overwhelmed by the complexity of their case and the amount of time it was consuming."<sup>72</sup> "Judges and court staff also perceive that litigants' requests for personalized assistance jeopardize their ability to adhere to ethical requirements of neutrality and objectivity."<sup>73</sup>

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66. Semple, *supra* note 5 at 640.

67. While extensive analysis is beyond the scope of this paper, the success of the "Me Too" movement is an example of public reactions to perceptions of the system failing to deliver justice. The public, through the Internet, took delivery of justice into its own hands in response.

68. Semple, *supra* note 5 at 641.

69. Farrow, *supra* note 1 at 5.

70. Macfarlane, *supra* note 7 at 227; Final Report, *supra* note 20 at 68-73.

71. "More Canadians are acting as their own lawyer because they don't have a choice." (25 March 2018) at 00h:02m:57s, online (podcast): *CBC Radio, The Sunday Edition* <<https://www.cbc.ca/radio/thesundayedition/the-sunday-edition-march-25-2018-1.4589621/more-canadians-are-acting-as-their-own-lawyer-because-they-don-t-have-a-choice-1.4589633>> [perma.cc/R9M4-TUZN].

72. Final Report, *supra* note 20 at 9.

73. Staudt, *supra* note 6 at 1018.

Key needs of SRLs range from a basic overview of the justice system (physical location of hearing room, timelines and steps involved in the case's progression) to case presentation assistance (form completion, file organization, strategizing and preparing appropriate submissions) and ultimately closure (including understanding enforcement and appeal rights).<sup>74</sup> The general consensus is that the courts have not historically been user-friendly, particularly to non-lawyers.<sup>75</sup>

The role of court staff in offering support is often at odds with expectations of SRLs, adding further frustration through the disconnect between the support SRLs seek and the type of support court staff offer.<sup>76</sup> Almost 70% of SRLs feel that they receive inadequate support from the justice system, while court staff consider much of the support expected to be beyond what they should be providing.<sup>77</sup> The lack of resources, training and understanding is emphasized through inconsistent services between – and also within – jurisdictions across Canada.<sup>78</sup> “The most common complaints of SRLs is that every person they talk to gives them a different answer.”<sup>79</sup> Opportunities to better assist are available, particularly as we are now aware of and can anticipate what kind of support SRLs need.<sup>80</sup>

Finding solutions to the struggles SRLs have encountered requires reconsideration of the support offered, to make engaging the legal system simpler and easier.<sup>81</sup> Caution must be exercised to avoid court staff or other administrators being perceived to give legal advice<sup>82</sup>; however, the concept of “meaningful legal assistance”<sup>83</sup> has been introduced as a way to consider the actual value of support from the perspective of the recipients of it.

“[B]y and large, SRLs are in an unequal position compared to other litigants.”<sup>84</sup> Their needs are both practical and technical in nature, and often involve a relational component.<sup>85</sup> In consideration of the variant

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74. Farrow, *supra* note 1 at 18-19; Staudt, *supra* note 6 at 1040.

75. *Ibid.* at 1030.

76. Farrow, *supra* note 1 at 21.

77. *Ibid.* at 20-22; Final Report, *supra* note 20 at 68-72.

78. Farrow, *supra* note 1 at 21; Final Report, *supra* note 20 at 106-107.

79. Farrow, *supra* note 1 at 21.

80. *Ibid.* at 23, 55-64.

81. *Ibid.* at 5.

82. Final Report, *supra* note 20 at 117.

83. Farrow, *supra* note 1 at 6.

84. *Ibid.* at 47.

85. *Ibid.* at 19.

support desires of SRLs and parties with legal representation, differential treatment by the judiciary and court staff is justified and can help preserve fairness, neutrality and impartiality.<sup>86</sup> After all, “it is clear that treating all persons alike does not necessarily result in equal justice.”<sup>87</sup> “Given that SRLs are typically disadvantaged in the system, providing them with adequate assistance... does not provide them with an unfair advantage.”<sup>88</sup>

### SOLUTIONS THROUGH SYSTEM DESIGN

*What therefore needs to happen is for the system and its stakeholders to recommit themselves to the core dispute resolution purpose for which the system was designed: to provide a meaningful, fair and accessible venue for citizens – represented or not – to resolve their disputes.*<sup>89</sup>

Opportunities to enhance the self-represented experience are available through online dispute resolution (“ODR”) processes. The use of technology has been widely cited as an effective way that courts, administrative boards, tribunals and others can better meet the justice needs of people today.<sup>90</sup> The Condominium Authority Tribunal of Ontario (the “Tribunal”) launched on November 1, 2017, offering Canada’s first entirely ODR process. It includes online negotiation, mediation and adjudication; the Tribunal focuses on specific types of condominium disputes.<sup>91</sup>

Niche focuses, such as the Tribunal’s, allow for specialized sources of information to become available. This helps overcome traditional access-to-justice hurdles surrounding cost, access, scheduling, distance and subject matter expertise<sup>92</sup> through a narrowly focused, online platform. SRLs can more easily gain access to information to learn about and address their disputes.

86. *Ibid.* at 6.

87. Canadian Judicial Council, “Statement of Principles on Self-represented Litigants and Accused Persons” (2006) Canadian Judicial Council at 5, online: <[http://www.cjc-ccm.gc.ca/cmslib/general/news\\_pub\\_other\\_PrinciplesStatement\\_2006\\_en.pdf](http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_other_PrinciplesStatement_2006_en.pdf)>.

88. Farrow, *supra* note 1 at 47.

89. *Ibid.* at 25.

90. Lisa Moore, *et al.*, “Canadian Access To Justice Initiatives: Justice Development Goal Status Report” (2017) Action Committee on Access to Justice in Civil and Family Matters at 27 [Moore].

91. Condominium Authority of Ontario, “The Condominium Authority Tribunal”, online: <<https://www.condoauthorityontario.ca/en-US/tribunal/>>.

92. Semple, *supra* note 5 at 672.

## Self-Help

The Condominium Authority of Ontario (“CAO”) offers self-help resources designed to provide an individual facing a dispute with consistent, accurate and easy-to-access information. The *Issues and Solutions* section of the CAO’s website is known as “*Guided Steps*” and helps site visitors address common issues impacting Ontario’s condominium communities.<sup>93</sup> This free web service offers an overview of each issue identified, to explain (generally) how the law applies, set out what legal considerations may be important and offer suggestions as to how related conflict might be addressed.<sup>94</sup>

Template letters and emails are available to assist with communications and to encourage proactive resolution attempts before formally engaging the Tribunal.<sup>95</sup> This can save time and cost by promoting early action to address emerging conflict. The availability of practical information from a single authority that is consistent and current has been identified as what SRLs want from online resources.<sup>96</sup> Basic information of this nature can help SRLs determine if a matter is worth pursuing,<sup>97</sup> thereby avoiding frivolous or unnecessary claims backlogging formal dispute resolution processes and negatively impacting the access-to-justice experience.

## Early Resolution

“The availability and distribution of legal information and resources in efficient, effective and innovative ways at the earliest points of a legal problem increase the opportunity for such problems to be resolved quickly and with less cost.”<sup>98</sup> Key elements include assisting with the identification of the legal problem, offering how such can be addressed and pointing to services, resources and information available to help.<sup>99</sup>

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93. Condominium Authority of Ontario, “Guided Steps to Common Issues”, online: <<https://www.condoauthorityontario.ca/en-US/issues-and-solutions/common-issues/>> [CAO].

94. Macfarlane, *supra* note 7 at 236. This process is similar to the “guided pathways” approach utilized in British Columbia.

95. CAO, *supra* note 93.

96. Final Report, *supra* note 20 at 64.

97. Coulter A. Osborne, “Civil Justice Reform Project: Unrepresented Litigants” (Ministry of the Attorney General of Ontario, 2007), online: <[http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/080\\_unrepresented.asp](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/080_unrepresented.asp)>.

98. Moore, *supra* note 90 at 14.

99. *Ibid.* at 16.

Accessing information of this nature is key to improving public education.<sup>100</sup> “Early resolution outside of Canada’s courts and tribunals, where appropriate, can offer a cost-effective and timely path to problem resolution.”<sup>101</sup> Early resolution measures of this nature were demonstrated through the Tribunal’s *Guided Steps* process.

From September 1, 2017<sup>102</sup> to September 5, 2018, *Guided Steps* received 11, 298 engagements.<sup>103</sup> Of these engagements, only 99 cases were ultimately submitted to the Tribunal,<sup>104</sup> suggesting that the information offered helped to educate, potentially resolved issues, and prevented the pursuit of unnecessary claims. While such self-help tools are not necessarily intended to replace legal analysis, they offer a consistent and accurate source of information that has not been generally available to SRLs. The ability of technology to deliver assistance tailored to the individual encountering the issue is significant.<sup>105</sup>

While the development of recent ODR offerings warrant their review, prior criticism suggested that “on-line resources are insufficient to meet SRL needs for face-to-face orientation, education and other support.”<sup>106</sup> The *Guided Steps* process can assist in establishing basic understanding and narrowing the focus of support needed, thereby making it easier and more affordable for SRLs to obtain additional help. Canadians have been increasing the amount of time that they spend online, reducing traditionally perceived needs for in-person support interactions.<sup>107</sup> While Canadians averaged 45 hours a month online in 2013,<sup>108</sup> 74% of them spent *at least* 3-4 hours a day online in 2018.<sup>109</sup> As more people spend significant amounts of their time online attending

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100. *Ibid.* at 17.

101. *Ibid.* at 25.

102. The *Guided Steps* process was available online prior to the Tribunal being operational.

103. Robin Dafoe and Keegan Ferreira, “Update from the Condominium Authority of Ontario” (delivered at the London Conference of Association of Condominium Managers of Ontario, London, September 7, 2018) [unpublished].

104. *Ibid.*

105. Farrow, *supra* note 1 at 42.

106. Final Report, *supra* note 20 at 115.

107. It has been assumed that the concept that one will become more comfortable receiving support online as they spend more time online is generally accepted. Further analysis is beyond the scope of this paper.

108. Canadian Internet Registration Authority, “Canada’s Internet Factbook 2013”, online: <<https://cira.ca/factbook/2013/canada-online.html>>.

109. Canadian Internet Registration Authority, “Canada’s Internet Factbook 2018”, online: <<https://cira.ca/factbook/canada%E2%80%99s-internet-factbook-2018>> [emphasis added].

to an increasing variety of activities, they are likely to become more comfortable accessing online resources, including those that SRLs need to improve their justice-seeking experience. “On-line information and resources for SRL’s clearly have great potential as a means of delivering information.”<sup>110</sup>

“Technological developments and intense competition (including from non-lawyer do-it-yourself services) may actually have reduced the cost of such legal services in recent years.”<sup>111</sup> Thus, it may also be the case that self-help resources contribute to reducing the cost of legal services to further support enhancing access-to-justice for SRLs and others.

### Unbundled Legal Services

*While a lawyer is an expert on the terrain and routes of the legal system, even a first-time traveller in this area will want to make choices about where to stop, how fast he or she is comfortable moving, and whether to take the most direct or subsidiary road.*<sup>112</sup>

There is an opportunity to grow the use of modern legal services and delivery methods, such as those offered by way of unbundled legal services and alternative fee arrangements.<sup>113</sup> In offering a primarily text-based, asynchronous dispute resolution process, the Tribunal provides a platform that supports the use of unbundled services.<sup>114</sup>

Contemporary service offerings provide legal representatives with new professional opportunities “at a time when North American lawyers face a challenging job market.”<sup>115</sup> This improves access-to-justice and supports the legal profession simultaneously. “Understanding the private costs encountered by individuals with different types of legal problems can help legal professionals and entrepreneurs create affordable, accessible alternatives to the traditional full-scope retainer.”<sup>116</sup> Unbundled legal services can be offered in a variety of ways, including

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110. Final Report, *supra* note 20 at 67.

111. Semple, *supra* note 5 at 655. Analysis of the decrease in cost of these legal services is beyond the scope of this paper.

112. Hanycz, *supra* note 30 at 151.

113. Moore, *supra* note 90 at 20.

114. While beyond the scope of this paper, the Tribunal’s process also addresses a participation hurdle cited by SRLs surrounding anxiety presenting oral arguments to a judge. Final Report, *supra* note 20 at 95.

115. Semple, *supra* note 5 at 672.

116. *Ibid.* at 671.

“legal coaching”,<sup>117</sup> where a legal representative supports a client in the course of their own self-representation.

“Clients who contract for specific unbundled services – for example, assistance that is limited to document review, or preparation for a specific event – may reach a point at which they wish to extend the services provided by the lawyer.”<sup>118</sup> Both lawyer and client can benefit from a structure that allows SRLs to leverage legal guidance in an affordable manner and preserve their freedom to participate and make decisions as they wish. “The traditional assumptions regarding an open-ended retainer agreement are challenged by clients seeking value for money and questioning whether they need or can afford a full-representation model.”<sup>119</sup>

While some lawyers have expressed hesitations about unbundled services, concerned that they might make them more open to liability if a client misunderstands the extent of the lawyer’s involvement in a matter,<sup>120</sup> such services could help to better manage a lawyer’s liability risk exposure by narrowing and clearly defining the responsibilities of the lawyer. “Law societies across Canada permit limited-scope retainers, and the legal insurers indemnify lawyers offering such services.”<sup>121</sup>

### Case Study

As an original member of the Tribunal, I was involved as a mediator in an early case that demonstrates an advantage of access to unbundled legal services in the course of participating in an asynchronous, online process. The “Applicant User”<sup>122</sup> was self-represented, and indicated that they could not afford legal representation in the proceeding. However, when a specific legal question arose that was central to how the dispute would be addressed, the individual was able to coordinate a meeting with a lawyer.

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117. National Self-Represented Litigants Project, “Providing Legal Services in a Coaching Model: the What, Why, and How” (December 13, 2013), online (blog): *National Self-Represented Litigants Project* <<https://representingyourselfcanada.com/providing-legal-services-in-a-coaching-model-the-what-why-and-how/>> [perma.cc/ZD85-QJ55].

118. Macfarlane, *supra* note 7 at 210.

119. *Ibid.* at 147.

120. *Ibid.*

121. *Ibid.* at 147-148.

122. Those who formally engage the Tribunal are referred to as “Users”. The “Applicant User” submits a claim while the “Respondent User” defends such in the online negotiation, mediation and adjudication processes that the Tribunal offers.

As the legal question was relatively straight forward, particularly for a lawyer who had subject matter expertise, the meeting was only one hour long. Upon receiving legal advice, the Applicant User accepted settlement terms offered with comfort that the outcome was just. In this case, the Applicant User was able to utilize unbundled legal services to gain understanding. Full representation throughout the entire online mediation was not an option truly available, in view of cost considerations, yet the individual was able to utilize unbundled legal services and enhance their access-to-justice experience.

This demonstrates how ODR processes can be designed to better support SRLs. While just one example, it is indicative of my experience in several cases at the Tribunal – both as a mediator and as an adjudicator. The asynchronous aspect of the Tribunal’s process introduces participation convenience and offers opportunities for SRLs to obtain legal advice, opinions and/or coaching between process events, promoting procedural fairness.

### **Enhanced Support of SRLs**

*An asynchronous process enables SRLs to edit their submissions until they are satisfied with the outcome, thus preventing their “silencing,” and potentially improving the effectiveness of their participation... by its very nature, asynchronous communication structurally prevents speakers from being interrupted, thereby guaranteeing SRLs an opportunity to present their arguments.<sup>123</sup>*

SRLs can be informed and better positioned to decide their best course of action; accessing information, resources and assistance in a manner that is not possible in many traditional justice system processes.<sup>124</sup>

The online aspects of the Tribunal’s process also allow SRLs to overcome many of the access-to-justice challenges that traditional processes introduce. For example, beyond the cost of legal representation,

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123. Ayet Sela, “Streamlining Justice: How Online Courts Can Resolve the Challenges of Pro Se Litigation” (2016) 26 Cornell J.L. & Pub. Pol’y 331 at 11-12.

124. While a self-represented party can obtain legal coaching ahead of in-person participation at a mediation or hearing, traditional dispute resolution processes do not typically provide opportunities to obtain legal guidance during the process – where information or options may arise, which could not have been anticipated and which may impact the legal advice they receive – unless a legal representative directly participates therein.

transportation costs are considered the second most frequent type of expense people incur in trying to address their legal problems.<sup>125</sup> The online platform can alleviate this expense altogether, introducing affordability.<sup>126</sup> Saving travel time and expense also makes participating more convenient, furthering access-to-justice.

An additional convenience offered through an online process is the disposal of traditional operating hours. The Tribunal is available 24 hours a day, 7 days a week, avoiding the obstacle that many encounters in needing to accommodate a court or tribunal's schedule to pursue justice. Users of the Tribunal can participate at their leisure, within the timelines established for doing so. In fact, the Tribunal has found peak usage extends outside of traditional business hours.<sup>127</sup> This pattern highlights how online processes provide a convenience and flexibility that has not historically been offered.

### Staying Current

"The Internet's intangible and borderless nature is a factor that both fuels and complicates ODR's development."<sup>128</sup> While the jurisdiction of the Tribunal's ODR platform assists in managing the borderless aspect of addressing conflict online by creating limitations, the rapidly changing nature of technological advancements and use creates new challenges. A March 2017 Justice Development Goals Status Report found that: "Only 13% of court, tribunal and administrative board respondents indicated that they provide information and resources via mobile applications."<sup>129</sup>

In contrast, an online dispute resolution platform offered in Bay County, Michigan (which addresses small claims concerning past due accounts, traffic violations and warrants) found that 65.8% of its users accessed their online system by way of mobile device – rather than desk-

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125. Trevor C.W. Farrow *et al.*, "Everyday Legal Problems and the Cost of Justice in Canada: Overview Report" (2016) Canadian Forum on Civil Justice at 14.

126. Condominium Authority of Ontario, "Fees", online: <<https://www.condoauthorityontario.ca/en-US/about-cao/fees/>>. An Applicant User pays a total of \$200 for a hearing. Beyond saved travel expenses, the CAT's engagement cost is low, in part, due to the online platform utilized.

127. Dafoe and Ferreira, *supra* note 103.

128. John C. Kleefeld *et al.*, ed., *Dispute Resolution: Readings and Case Studies*, 4th ed. (Toronto: Emond Montgomery Publications Limited, 2016) at 665.

129. Moore, *supra* note 90 at 28.

top computer – from January to November 2018.<sup>130</sup> Should this trend extend to other jurisdictions, it will become important for ODR platforms to adapt for increased mobile application access. System design should be approached as an ongoing challenge that requires staying attuned to the preferences and use patterns of the public. Failing this, there is risk that past access-to-justice challenges concerning accessibility, convenience and simplicity of use will re-surface.

## CONCLUSION

There has been an increase in SRLs because legal representation is unaffordable and becoming less appealing. However, self-representation, as it has been experienced, fails to enhance access-to-justice. SRLs avoid the cost of legal representation, yet they are incurring other costs resulting in negative experiences. This impacts perceptions of procedural justice and leaves many needs of SRLs unmet. The result is a justice system that is failing to deliver justice.

We must develop new ways to meet the needs of SRLs, overcoming non-financial deterrents from involving legal representation as well as financial ones. Contemporary legal service offerings can provide lower cost options and client autonomy, while at the same time creating new business opportunities for lawyers. Rather than continuing to embrace the mindset that legal representation is required to gain access-to-justice,<sup>131</sup> we must recognize that SRLs are engaging the justice system and enhance their experience by addressing their support gaps sustainably.

Asynchronous ODR processes can be designed to support the provision of unbundled legal services, as demonstrated by the Tribunal. Modern technology makes it easier to provide information that can assist in the early stages, avoiding the unnecessary escalation of disputes “by creating novel infrastructures for convenient, inexpensive and speedy dispute resolution and prevention processes.”<sup>132</sup> The future of self-representation includes improved access-to-justice through the use of

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130. Magistrate Janice Doner, *Webinar: Overcoming Distance with ODR – a Rural Perspective* (Matterhorn, 74th District Court, Bay County, Michigan, November 7, 2018) at Slide 15, online: <<https://getmatterhorn.com/webinar-overcoming-distance-with-odr-a-rural-perspective>>.

131. Lowe, *supra* note 16.

132. Orna Rabinovich-Einy and Ethan Katsh, “A New Relationship between Public and Private Dispute Resolution: Lessons from Online Dispute Resolution” (2017) 32(4) *Ohio State Journal on Dispute Resolution*, Vik, 695 at 708.

technology and offering SRLs support in a way that is affordable and keeps them in control. Self-representation can then become “supported self-representation”, as modern legal processes will no longer consider legal representation an all-or-nothing consideration.