

Family

Cost sanctions against self-represented litigants for incivility

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(May 13, 2021, 1:52 PM EDT) -- One of the stresses for counsel acting opposite a self-represented litigant (SRL), which seems to be accentuated in family law litigation, particularly high-conflict litigation, is the frequent "incivility" of the SRL to opposing counsel. This incivility can often extend to the lawyer's client and may extend to court staff as well. If the SRL were represented by counsel, that lawyer would be governed by the law society's *Code of Conduct* to regulate his or her behaviour, especially written communications. An SRL's conduct is not similarly proscribed.

What can be done to curb the abusive behaviour of an SRL?

There is case law making it clear that civil behaviour is required of SRLs in the judicial system, and that, like lawyers, the SRL can be sanctioned for incivility by a cost award, usually in the amount of a "substantial indemnity."

The basic question is, what amounts to "incivil" behaviour?

The Supreme Court of Canada has opined on this in the leading case of *Groia v. Law Society of Upper Canada* 2018 SCC 27, which arose in the context of incivil behaviour in the courtroom. Justice Michael J. Moldaver, writing for the majority, characterized incivil behaviour as that which challenges opposing counsel's integrity, is not made in good faith and is without a reasonable basis, amongst other things.

In an earlier Supreme Court of Canada case, *Doré v. Barreau du Québec* 2012 SCC 12, the court defined incivil behaviour as "potential displays of disrespect for the participants in the justice system, beyond rudeness or discourtesy" (para. 61).

There are a handful of cases that impose a cost sanction against an SRL for incivility. The seminal Canadian case is *Stacey v. Barrie Yacht Club* [2003] O.J. No. 2673, a decision of Justice Margaret Eberhard of the Ontario Superior Court of Justice. This decision involved the consideration of what costs should be awarded in a case-managed matter. The SRL failed to comply with the rules and caused enormous complexity to be introduced into procedural disputes that were capable of a straightforward resolution.

The judge found that the plaintiff had used his status as an SRL as "an additional arrow in his quiver of vexatious weaponry in the battle that he wages against the Respondent/Defendant." The complication and delay in the proceeding was entirely due to the approach the SRL took to the litigation. It had become unfair to the represented opposing party, who had been required, at their own cost, "continually to appear, to prepare written response to the unreasonable and irrelevant positions put forward and to react to the unprecedented, incessant and capricious arguments that arise as quickly as the last one can be quelled, all in the simple effort to receive materials that will comply with the Rules of Practice and, more important, render the dispute capable of adjudication" (para. 14).

The SRL was found to have proceeded with arrogance. Although he was not impolite to the judge, the

SRL was "resoundingly impolite" to the opposing party and court staff. He had exposed that it was his strategy "to wear down the opponent with incivility, irrelevant skirmishes, delay and expense" (para. 20).

Justice Eberhard noted that costs may be awarded on two scales — the partial indemnity and substantial indemnity scale. The defendant claimed \$12,928.03 for costs on a substantial indemnity basis. The judge fixed costs against the SRL and ordered \$10,000 payable forthwith.

Justice Eberhard relied on the 2003 decision of *Baksh v. Sun Media* 63 OR (3d) 51, a decision of master Dash, as authority that an SRL was to be held to the same standards of civility expected of lawyers and a proper reprimand for failure to do so was an award of costs on substantial indemnity basis. In this case, the plaintiff lawyer represented himself in a defamation action against the defendants.

The defamation action was based on an article published in the *Toronto Sun* newspaper respecting criminal charges against the plaintiff, who himself was a lawyer practising primarily criminal law. The plaintiff failed to pay four orders for costs regarding interlocutory applications, failed to comply with orders to answer questions in examination for discovery and failed to comply with an order for payment of security for costs. An application to dismiss the action was granted.

The master further granted an award of costs on a substantial indemnity scale in light of the plaintiff's derogatory remarks made about defence counsel. The master described some of the egregious communications, including the plaintiff's comments about the motives of the defendant newspaper in defaming and "preying" upon members of minority communities and then using procedural steps to derail determination on the merits.

The SRL also made personal attacks against opposing counsel, including: "I find their failure to consent to an adjournment in the above circumstances to be bordering on sharp, high-handed practice;" the motion to dismiss was characterized as "strong-handed legal tactics of 'litigation freeze' to defeat legitimate claims;" and "It is unfortunate that he seems to want to bring clout as a Goodman's Law Partner into the fray [sic] of these proceedings like some Goliath trying to lampoon a less fortunate person" (para. 20).

The master concluded that SRLs appearing before courts in Ontario were expected to comply with the *Rules of Professional Conduct* and the *Principles of Civility and Professionalism for Advocates* published by The Advocates' Society in Ontario, or risk sanctions by the court. He awarded substantial indemnity costs of \$4,858.18.

Another leading case is *Jahn-Cartwright v. Cartwright* 2010 ONSC 2263, a decision of Justice David G. Price of the Ontario Superior Court of Justice. This was a matrimonial matter, and does not involve incivil communications *per se*. Justice Price simply states:

[W]here either a litigant or his or her lawyer acts unreasonably, by incivility or otherwise, it is a factor that may result in discounting the costs that should otherwise be awarded. This is because such conduct diminishes the value of the work in the resolution of the conflict and increases the costs that must be incurred by the other litigant. This discounting is a necessary part of quantifying costs and is consistent with the overall purpose of costs awards in improving the efficiency of the administration of justice. [Para 83]

In *Cook v. Cook* 2012 ONSC 1141, a decision of Justice John P.L. McDermot of the Ontario Superior Court of Justice, a husband and wife were in matrimonial litigation and the self-represented wife was incivil to the counsel for the husband. The husband claimed substantial indemnity costs as against the wife and was successful.

Justice McDermot flagged some of the incivil communications as the wife stating in correspondence to the opposing lawyer to "cut the crap," "quit the nonsense" and "chalk (sic) one up for your math." When the lawyer asked for disclosure the SRL told him not to "waste my time" (para. 27). Justice McDermot concluded that the SRL had taken advantage of her unrepresented status and characterized her treatment of opposing counsel as rude and cavalier (para. 36). The judge awarded costs on a substantial indemnity basis in the amount of \$36,852.23.

The American case of *Polejewski v. Metzger* 2011 MT 252N, a decision of the Supreme Court of Montana per Michael E. Wheat, offers an even more egregious example of abuse by the SRLs. The plaintiffs sued the defendant in defamation as he had criticized their treatment of their animals.

[W]hen Polejewski was deposed, she and Hanson exhibited the following behavior: telling Metzger's attorney to "blow it out his ass," calling Metzger's attorneys "disgusting" and "sick," saying Metzger's attorneys are "probably going to chase down our witnesses and kill them or whatever," calling Metzger a "thing," and accusing the attorneys of buying off judges. [Para 22].

The judge held that: "Even though Polejewski and Hanson are self-represented litigants, they must still adhere to procedural rules, . . . and basic rules of civility. Abuse of the kind exhibited in this case will not be tolerated." The money sanction imposed in the amount of \$9,828.18 by the lower court was upheld.

With the increase in self-represented parties, who, contrary to popular belief do not always self-represent because of impecuniosity, there is a viable remedy recognized in some jurisdictions that is available to counsel suffering rude and insulting abuse from an SRL, in the form of a substantial indemnity cost award.

Of significant concern in high-conflict family matters is that the egregious behaviour of a self-represented party towards opposite counsel is a continuation of a pattern of abuse focused on the estranged spouse or partner and results in higher legal fees as the opposing lawyer attempts to quell the conduct.

Although not physically assaultive behaviour, the continuing attempts by an SRL to threaten, humiliate and intimidate through use of language and words in the litigation process is intolerable. Civil behaviour should be expected and incivil behaviour sanctioned.

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